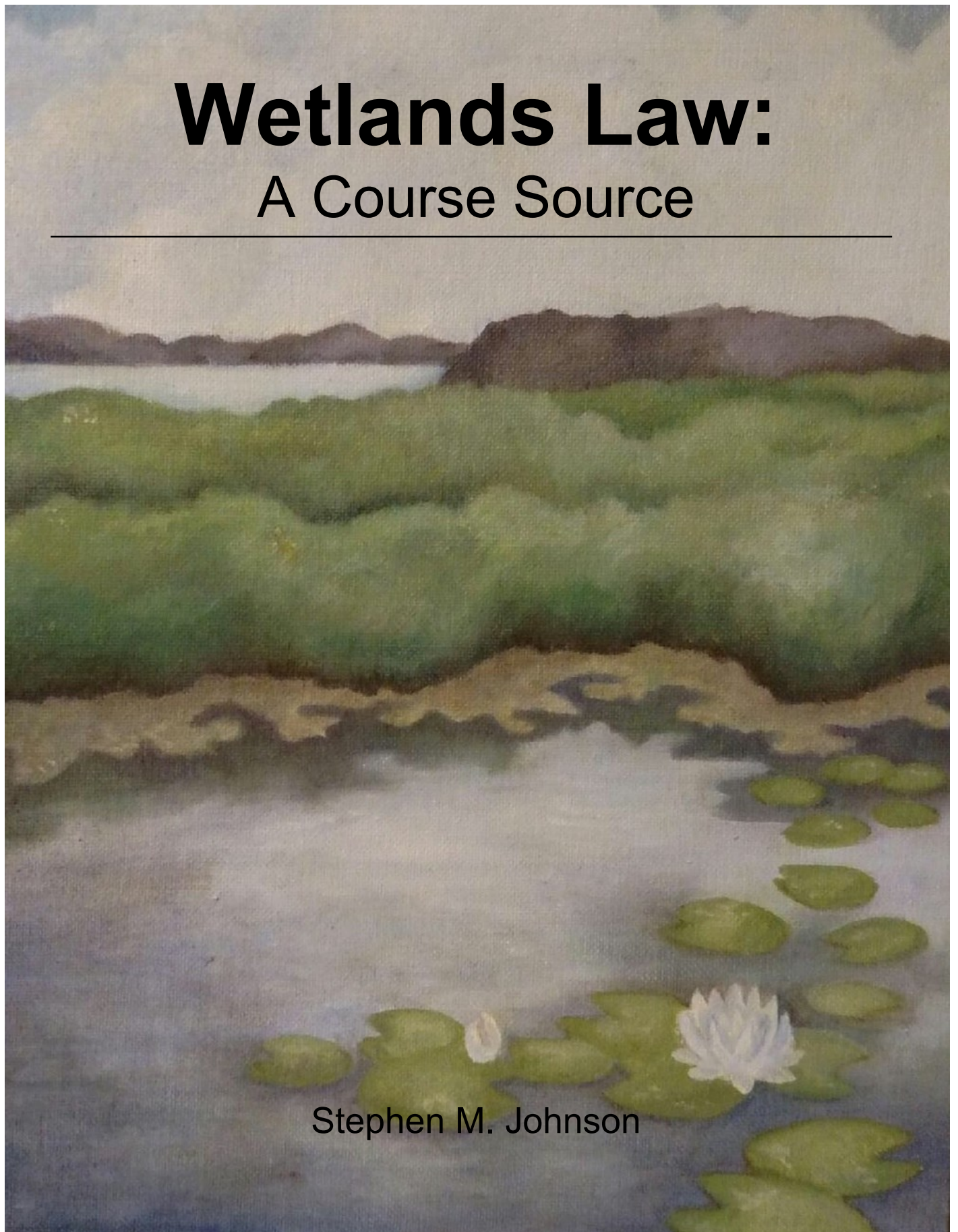


# **Wetlands Law:**

## A Course Source

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# Wetlands Law: A Course Source

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CALI eLangdell Press 2015

# Notices

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# Acknowledgments

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I would like to thank my wife, Anne, and my children, Lyndsey, Keith and Caroline, for their support and for all of the time that we spent walking, hiking, running, climbing, paddling and otherwise enjoying the outdoors over the years, which provided the inspiration for this project. I would also like to thank Mercer Law School for providing me with a sabbatical and financial support for this project. I owe special thanks to the colleagues who agreed to be interviewed for this project or hosted those interviews and to everyone who provided suggestions and comments on drafts of the work. Finally, I would like to dedicate this project to everyone at CALI and in academia that are working to create the next generation of e-books.

# About the Author

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Stephen M. Johnson is the W.F.G. Professor of Law at Mercer University Law School in Macon, Georgia. He received his J.D. from Villanova University School of Law and an LL.M. in environmental law from the George Washington University Law School. Prior to teaching, he served as an attorney for the Bureau of Regulatory Counsel in the Pennsylvania Department of Environmental Resources (now DEP) and as a trial attorney for the U.S. Department of Justice, Environment and Natural Resources Division, Environmental Defense Section, where he worked on wetlands litigation and other environmental litigation.

He joined the Mercer faculty in 1993 and served as the Associate Dean for Academic Affairs from 2002-2012. He specializes in Environmental Law, but has also taught Torts, Statutory Law, Administrative Law, and Dispute Resolution. His scholarship focuses on wetlands, environmental justice, economics and the environment, technology and the law, and administrative law. In addition to authoring numerous articles on those topics, he has edited an American Bar Association book on Wetlands law and has authored a book on economic approaches to environmental protection. He has also authored several CALI exercises on wetlands and environmental law and has served on the Board of Directors of CALI for more than a decade.

While teaching at Mercer, he has been fortunate to teach or visit at Notre Dame Law School, the University of London and Strathclyde University. In 2004, he taught at the University of Tokyo and at Waseda University (Tokyo) on a Fulbright grant.

# Preface

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## ***Course Source: The Casebook Evolved***

You'll notice that these materials are entitled, **Wetlands Law: A Course Source**. I chose the term "course source," as opposed to casebook or coursebook, to indicate that the format of these materials is qualitatively different from traditional law school textbooks.

### ***I. Traditional casebooks and the evolution of casebooks***

The law school casebooks that were created in the late 1800's to implement Christopher Columbus Langdell's case method of teaching consisted primarily of edited versions of cases and perhaps a few questions and comments. Casebooks have evolved slowly over the years. Over time, it became popular to incorporate excerpts from law review articles, statutes and regulations into the texts in addition to the cases, questions and comments.

Little changed for decades until problem-based books came along, incorporating a wealth of hypotheticals and problems that allowed students to apply the law that they were learning from the cases, statutes, and regulations included in the book. Those books could more precisely be referred to as "coursebooks" than "casebooks," because they incorporated more than cases, questions and comments.

After the MacCrate report in the 1990s and the 2007 Carnegie Foundation report, faculty and book publishers began publishing separate books focusing on skills development that could be used to supplement traditional casebooks and coursebooks. In a few cases, books that were not marketed as "skills" books incorporated some skills exercises as well. Publishers also began marketing "law stories" books that provided a wealth of background information about a few cases to help bring those cases to life. Those were positive developments in the evolution of law school teaching materials.

### ***II. The "Course Source": The technological evolution of the casebook***

Technology can help casebooks and coursebooks evolve into a new format. Several years ago, publishers began marketing e-books for the law school market. So far, e-books for law school have not taken full advantage of the medium. A few of the early books were simply electronic versions of traditional casebooks or coursebooks. Others added a few hyperlinks to a traditional casebook or coursebook. For the most part, though, the changes in the format of casebooks and coursebooks in the e-book era have been modest. Much more is possible. Technology can foster the transformation of the casebook and the coursebook into the "course source" - a one-stop shop for all of a faculty member's teaching resource needs.

The Carnegie Foundation Report, *Educating Lawyers: Preparation for the Profession of Law*, stressed the importance of three apprenticeships in the formation of a lawyer - the cognitive apprenticeship, the apprenticeship in the forms of expert practice shared by practitioners, and the apprenticeship of identity and purposes (professionalism). In short, the report stressed that law schools should be training students in the **knowledge, skills,** and **values** necessary to the legal profession. A “course source,” the next generation of law teaching materials, can utilize technology to provide resources for training students in all three apprenticeships. A “course source” recognizes that the three apprenticeships are interconnected and that a faculty member needs the tools to train students in all three apprenticeships, rather than assuming that a separate course in legal professionalism or research and writing will develop the student’s skills and values.

In addition, legal educators have increasingly recognized the importance of formative and summative assessment, and the American Bar Association’s Standards for Approval of Law Schools require schools to use both formative and summative assessment in their curriculum “to measure and improve student learning and to provide meaningful feedback to students.” A “course source” provides a variety of tools for formative and summative assessment.

A “course source” also takes advantage of the wealth of materials available online and in a variety of media formats to incorporate links to content that puts the cases, materials and disputes in the book in context, to provide a fuller and richer understanding of the materials.

Further, a “course source” is portable and customizable, since it is distributed through a Creative Commons license as open source materials. Thus, faculty can pick and choose the portions of the materials that they find most useful and relevant for their teaching and distribute those materials to students for free.

A “course source” is available in a variety of formats as an e-book, but most of the content and links in the book will also be re-purposed as a web-based library of teaching resources related to the topic of the book.

### **III. Wetlands Law: A Course Source**

This “course source” on wetlands law implements the vision outlined in the preceding section. The Wetlands Law Course Source includes resources to train students in all three apprenticeships. To address the **knowledge** apprenticeship, the “course source” includes all of the traditional elements of a casebook or coursebook (cases, commentary, notes and questions) and includes several hypotheticals and problem exercises that focus on reinforcing wetlands law. In addition, as one of the many forms of summative and formative assessment included in the book, every chapter includes one or more CALI exercise as a



“quiz” to reinforce the material covered in the chapter. The course source also includes links to other CALI exercises on topics related to the material covered in the book.

To address the **skills** apprenticeship, the “course source” includes sixteen separate legal research exercises, several drafting exercises (including exercises that focus on drafting a FOIA request, drafting comments on a proposed regulation, and drafting a citizen suit complaint and 60 day notice letter), a negotiation exercise, and an interviewing and counseling exercise.

To address the **values** apprenticeship, the “course source” includes several professionalism scenarios, with questions related to the scenarios.

As noted above, the “course source” also incorporates a wealth of audio/video materials and external links to bring the cases, disputes and materials in the book to life. For instance, links are provided to the audio for the oral arguments in most of the principal cases excerpted in the book. A Google map is included in the book, identifying the location of the properties involved in all of the principal cases excerpted in the book, so that students can see the wetlands that were preserved in the cases or the development that replaced the wetlands. For most of the principal cases that are excerpted in the book, there are links to decision documents, administrative orders, property maps, pictures, local media coverage or other background materials. While the principal cases have been edited, the book includes links to the full unedited versions of all of the principal cases in the book. Throughout each chapter, there are several “Resource” sections that identify reports, databases, audio or video materials, government documents, and other materials that are relevant to the topics covered in the chapter.

The book also links to (1) a series of videos prepared by the Army Corps of Engineers that describe the wetland delineation process, wetland mitigation, the wetland permitting process and many other wetland-related issues; (2) videos demonstrating mountaintop removal mining; and (3) videos outlining the values and functions of wetlands. In addition, the book contains links to interviews that I conducted regarding a variety of different wetland issues with attorneys who work with local communities and with the Department of Justice, the National Wildlife Federation, and the Environmental Council of the States. Those interviews are posted on YouTube.

Since the “course source” is distributed under a Creative Commons license, it was also possible to include several pictures of wetlands and activities that take place in wetlands in the book, as the pictures are available through the Wikimedia Commons for materials that are distributed under the Creative Commons license. Most of the cases that are cited in the book, other than cases that are only cited in the excerpts of the principal cases, are linked to full, unedited opinions that are available online for free through Justia.com. Further, almost all of the statutes, regulations, reports, databases, and government documents in the book are hyperlinked to external sources. The 400 page book includes almost 1000

links. I hope you will find this “course source” to be a useful and engaging teaching and learning tool.

The links in the book have also been re-purposed as a web-based library of wetlands teaching resources, which is accessible at:

<http://www.envirolawteachers.com/wetlands-law-a-course-source.html>

# Table of Cases

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All of the opinion links below, and throughout the book, are links to Justia.com, unless noted below. The principal cases that are excerpted in the book are indicated in bold text.

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| <a href="#"><u>Fund for Animals v. Rice, 85 F.3d 535, 541-542 (11<sup>th</sup> Cir. 1996)</u></a>                                | 6    |
| <a href="#"><u>Golden Gate Audubon Society v. U.S. Army Corps of Engineers, 717 F. Supp. 1417 (N.D. Cal. 1988)</u></a>           | 10   |
| <a href="#"><u>Greater Yellowstone Coalition v. Flowers, 359 F.3d 1257 (10<sup>th</sup> Cir. 2004)</u></a>                       | 6    |
| <a href="#"><u>Grutter v. Bollinger, 539 U.S. 306 (2003)</u></a>   | 4    |
| <a href="#"><u>Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, 484 U.S. 49 (1987)</u></a>                             | 10   |
| <a href="#"><u>Hadacheck v. Sebastian, 239 U.S. 394 (1915)</u></a>   | 11   |
| <a href="#"><u>Hallstrom v. Tillamook County, 493 U.S. 20 (1989)</u></a>   | 10   |
| <a href="#"><u>Hawkes Co., Inc. v. U.S. Army Corps of Engineers, 782 F.3d 994 (8<sup>th</sup> Cir. 2015)</u></a>                 | 10   |
| <a href="#"><u>Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9<sup>th</sup> Cir. 2001)</u></a>                      | 4    |
| <a href="#"><u>Heckler v. Chaney, 470 U.S. 821 (1985)</u></a>  | 10   |
| <a href="#"><u><b>Hobbs v. United States, 947 F.2d 941 (4<sup>th</sup> Cir. 1991), cert. denied 504 U.S. 940 (1992)</b></u></a>  | 4    |
| <a href="#"><u>Hoffman Group, Inc. V. EPA, 902 F.2d 567 (7<sup>th</sup> Cir. 1990)</u></a>                                       | 4    |
| <a href="#"><u>Hoffman Homes, Inc. v. Administrator, United States EPA 975 F.2d 1554 (7<sup>th</sup> Cir. 1992)</u></a>          | 4    |
| <a href="#"><u>Hoffman Homes, Inc. v. Administrator, United States EPA, 961 F.2d 1310 (7<sup>th</sup> Cir. 1992)</u></a>         | 4    |
| <a href="#"><u>In re Needham, 354 F.3d 340 (5<sup>th</sup> Cir. 2003)</u></a>  | 4    |
| <a href="#"><u>James City County v. Environmental Protection Agency, 12 F.3d 1330 (4<sup>th</sup> Cir. 1993)</u></a>             | 8    |
| <a href="#"><u>James City County v. U.S. Environmental Protection Agency, 955 F.2d</u></a>                                       | 6,8  |

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| <a href="#"><u>254 (4<sup>th</sup> Cir. 1992)</u></a>  |    |
| <i>Jentgen v. United States</i> , 657 F.2d 1210 (Cl. Ct. 1981), <i>cert. denied</i> , 455 U.S. 1017 (1982)                                       | 11 |
| <i>Just v. Marinette County</i> , 201 N.W.2d. 761 (Wis. 1972)  | 11 |
| <a href="#"><u><i>J.W. Hampton, Jr. &amp; Co. v. United States</i>, 276 U.S. 394 (1928)</u></a>  | 3  |
| <a href="#"><u><i>Kelly v. United States</i>, 203 F.3d 519 (7<sup>th</sup> Cir. 2000)</u></a>  | 10 |
| <a href="#"><u><i>Kentuckians for the Commonwealth v. Rivenburgh</i>, 317 F.3d 425 (4<sup>th</sup> Cir. 2003)</u></a>                            | 5  |
| <a href="#"><u><i>Kentucky Riverkeeper, Inc. v. Rowelette</i>, 714 F.3d 402 (6<sup>th</sup> Cir. 2013)</u></a><br>(From the court's website)     | 6  |
| <a href="#"><u><b><i>Koontz v. Saint John's River Water Management District</i>, 133 S. Ct. 2586 (2013)</b></u></a>                              | 11 |
| <a href="#"><u><i>Leovy v. United States</i>, 177 U.S. 621 (1900)</u></a>  | 2  |
| <a href="#"><u><i>Leslie Salt v. United States</i>, 896 F.2d 354 (9<sup>th</sup> Cir. 1990), <i>cert. denied</i>, 486 U.S. 1126 (1991)</u></a>   | 4  |
| <a href="#"><u><i>Lexmark International, Inc. v. Static Control Components, Inc.</i>, 134 S. Ct. 1377, 1387 (2014)</u></a>                       | 10 |
| <a href="#"><u><i>Lingle v. Chevron, U.S.A.</i>, 544 U.S. 528 (2005)</u></a> (Link to Cornell's LII)   | 11 |
| <a href="#"><u><b><i>Lost Tree Village Corporation v. United States</i>, 43 E.L.R. 20012 (Fed. Cir. 2013)</b></u></a> (From the court's website) | 11 |
| <i>Lost Tree Village Corp. v. United States</i> , No. 08-117L (Fed. Cl. 03/14/2014)  | 11 |
| <a href="#"><u><b><i>Louisiana Wildlife Federation, Inc. v. York</i>, 761 F.2d 1044 (5<sup>th</sup> Cir. 1985)</b></u></a>                       | 6  |
| <a href="#"><u><i>Loveladies Harbor, Inc. v. United States</i>, 28 F.3d 1171 (Fed. Cir. 1994)</u></a>  | 11 |
| <i>Loveladies Harbor v. United States</i> , 21 Cl. Ct. 153 (1990)  | 11 |
| <a href="#"><u><b><i>Lucas v. South Carolina Coastal Council</i>, 505 U.S. 1003 (1992)</b></u></a>   | 11 |
| <a href="#"><u><i>Lucas v. South Carolina Coastal Council</i>, 424 S.E.2d 424, 23 E.L.R. 20297 (S.C. 1992)</u></a> (From Duke Law School)        | 11 |
| <a href="#"><u><i>Marks v. United States</i>, 430 U.S. 188 (1977)</u></a>  | 4  |

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| <a href="#"><u>McDonald et al v. County of Yolo, 477 U.S. 340 (1986)</u></a>   | 11 |
| <a href="#"><u>McQueen v. South Carolina Coastal Council, 580 S.E.2d 116 (S.C. 2003)</u></a>   | 11 |
| <a href="#"><u>Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S.1 (1981)</u></a>  | 10 |
| <a href="#"><b><u>Mingo Logan Coal Company v. U.S. Environmental Protection Agency, 714 F.3d 608 (D.C. Cir. 2013)</u></b></a> (From the court's website) | 8  |
| <a href="#"><u>Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983)</u></a>                                   | 3  |
| <a href="#"><u>Municipality of Anchorage v. United States, 21 ELR 20119 (D. Alaska 1990), aff'd 980 F.2d 1320 (9th Cir. 1992)</u></a>                    | 7  |
| <a href="#"><u>National Broadcasting Co. v. United States, 319 U.S. 190 (1943)</u></a>   | 3  |
| <a href="#"><u>National Cable &amp; Telecommunications Association v. Brand X Internet Services, 545 U.S. 967 (2005)</u></a>                             | 4  |
| <a href="#"><u>National Mining Association v. McCarthy, No. 12-5310 (D.C. Cir. July 11, 2014).</u></a>   | 5  |
| <a href="#"><b><u>National Mining Association v. U.S. Army Corps of Engineers, 145 F.3d 1399 (D.C. Cir. 1998)</u></b></a>                                | 5  |
| <a href="#"><u>National Wildlife Federation v. Whistler, 27 F.3d 1341 (8th Cir. 1994)</u></a> (Link to OpenJurist)                                       | 6  |
| <a href="#"><u>Natural Resources Defense Council, Inc. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975)</u></a>   | 4  |
| <a href="#"><u>Natural Resources Defense Council v. California Department of Transportation, 96 F.3d 420 (9th Cir. 1996)</u></a>                         | 10 |
| <a href="#"><u>Nollan v. California Coastal Commission, 483 U.S. 825 (1987)</u></a>  | 11 |
| <a href="#"><u>Northern California River Watch v. Wilcox, 633 F.3d 766 (9th Cir. 2011)</u></a> (From the court's website)                                | 4  |
| <a href="#"><u>Office of Personnel Management v. Richmond, 496 U.S. 414 (1990)</u></a>   | 4  |
| <a href="#"><u>Ohio Valley Environmental Coalition v. Aracoma Coal Company, 556 F.3d 1777 (4th Cir. 2009)</u></a> (From EPA's website)                   | 5  |
| <a href="#"><b><u>Ohio Valley Environmental Coalition v. Bulen, 429 F.3d 493 (4th Cir. 2005)</u></b></a>   | 6  |

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| <a href="#"><u>Orleans Audubon Society v. Lee, 742 F.2d 901 (5<sup>th</sup> Cir. 1984)</u></a>  | 10          |
| <a href="#"><u>Palazzolo v. Rhode Island, 533 U.S. 606, 620 (2001)</u></a>  | 11          |
| <a href="#"><u>Penn Central Transportation Company v. New York City, 438 U.S. 104 (1978)</u></a>  | 11          |
| <a href="#"><u>Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922)</u></a>  | 11          |
| <b><a href="#"><u>Permit Elevation, Plantation Landing Resort</u></a></b> (From EPA’s website)<br>(Administrative decision)                       | <b>6</b>    |
| <a href="#"><u>Precon Development Corp. v. Corps, 633 F.3d 278 (4<sup>th</sup> Cir. 2011)</u></a>   | 4           |
| <a href="#"><u>Preserve Endangered Areas of Cobb’s History, Inc. v. U.S. Army Corps of Engineers, 87 F.3d 1242 (11<sup>th</sup> Cr. 1996)</u></a> | 8,10        |
| <a href="#"><u>Public Interest Research Group of New Jersey, Inc. v. Windall, 51 F.3d 1179 (3d Cir. 1995)</u></a>                                 | 10          |
| <a href="#"><u>PUD No. 1 of Jefferson County v. Washington Department of Environmental Quality, 511 U.S. 700 (1994)</u></a>                       | 9           |
| <b><a href="#"><u>Rapanos v. United States, 547 U.S. 715 (2006)</u></a></b> (Link to Mercer Law)  | <b>4</b>    |
| <a href="#"><u>Resource Investments, Inc. v. United States, 85 Fed. Cl. 447 (2009)</u></a> (Link to Findlaw)                                      | 11          |
| <b><a href="#"><u>Sackett v. EPA, 132 S. Ct. 1367 (2012)</u></a></b>  | <b>4,10</b> |
| <a href="#"><u>Sasser v. Administrator, 990 F.2d 127 (4<sup>th</sup> Cir. 1993)</u></a>   | 10          |
| <a href="#"><u>Save Our Community v. EPA, 971 F.2d 1155 (5<sup>th</sup> Cir. 1992)</u></a> (Link to the court’s website)                          | 5           |
| <a href="#"><u>Save Ourselves v. U.S. Army Corps of Engineers, 958 F.2d 659 (5<sup>th</sup> Cir. 1992)</u></a>                                    | 10          |
| <a href="#"><u>Save Our Wetlands v. Sands, 711 F.2d 634 (5<sup>th</sup> Cir. 1983)</u></a>  | 5           |
| <a href="#"><u>Securities and Exchange Commission v. Chenery, 332 U.S. 194 (1947)</u></a>   | 3           |
| <a href="#"><u>Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80 (1943)</u></a>  | 3,10        |
| <a href="#"><u>Seminole Tribe v. Florida, 517 U.S. 44 (1996)</u></a>  | 10          |
| <a href="#"><u>Sierra Club v. U.S. Environmental Protection Agency, 268 F.3d 898 (9<sup>th</sup> Cir. 2001)</u></a>                               | 10          |



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| <a href="#"><u>Sierra Club v. U.S. Army Corps of Engineers, 508 F.3d 1332 (11<sup>th</sup> Cir. 2007)</u></a> (Link to Findlaw)   | 6  |
| <a href="#"><u>Shoreline Associates v. Marsh, 555 F. Supp. 169 (D. Md. 1983)</u></a> , <i>aff'd</i> 725 F.2d 677 (4 <sup>th</sup> Cir. 1984) (Link to Google Scholar)                 | 6  |
| <a href="#"><u>Skidmore v. Swift, 323 U.S. 134 (1944)</u></a>   | 3  |
| <a href="#"><b><u>Solid Waste Agency of Northern Cook County, v. United States Army Corps of Engineers, et al., 531 U.S. 159 (2001)</u></b></a> (Link to Mercer Law)                  | 4  |
| <a href="#"><u>Southern Pines Associates v. United States, 912 F.2d 713 (4<sup>th</sup> Cir. 1990)</u></a>  | 4  |
| <a href="#"><u>Stoddard v. Western Carolina Regional Sewer Authority, 784 F.2d 1200 (4<sup>th</sup> Cir. 1986)</u></a>  | 10 |
| <a href="#"><u>Sylvester v. U.S. Army Corps of Engineers, 871 F.2d 817 (9<sup>th</sup> Cir. 1989)</u></a> , revised at <a href="#"><u>884 F.2d 394 (9<sup>th</sup> Cir. 1989)</u></a> | 6  |
| <a href="#"><u>Tabb Lakes, Ltd. v. United States, 10 F.3d 796 (Fed. Cir. 1993)</u></a>  | 11 |
| <a href="#"><u>Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002)</u></a> (Link to Legal Information Institute)                                 | 11 |
| <a href="#"><u>Texas Mun. Power Agency v. EPA, 836 F.2d 1482 (5<sup>th</sup> Cir. 1988)</u></a>   | 4  |
| <a href="#"><u>Tull v. United States, 481 U.S. 412 (1987)</u></a>   | 10 |
| <a href="#"><u>The Daniel Ball, 77 U.S. 557 (1870)</u></a>  | 4  |
| <a href="#"><u>United States v. Bailey, 571 F.3d 791 (8<sup>th</sup> Cir. 2009)</u></a> (Link to Google Scholar)  | 4  |
| <a href="#"><u>United States v. Banks, 115 F.3d 916 (11<sup>th</sup> Cir. 1997)</u></a>   | 10 |
| <a href="#"><u>United States v. Cundiff, 555 F.3d 200 (6<sup>th</sup> Cir. 2009)</u></a> (Link to Google Scholar)   | 4  |
| <a href="#"><b><u>United States v. Deaton, 209 F.3d 331 (4<sup>th</sup> Cir. 2000)</u></b></a>  | 5  |
| <a href="#"><u>United States v. Deaton, 332 F.3d 698 (4<sup>th</sup> Cir. 2003)</u></a>   | 5  |
| <a href="#"><u>United States v. Donovan, 661 F.3d 174 (3d Cir. 2011)</u></a>  | 4  |

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| <a href="#"><u><i>United States v. Gerke Excavating, Inc.</i>, 464 F.3d 723 (7<sup>th</sup> Cir. 2006)</u></a>                  | 4             |
| <a href="#"><u><i>United States v. Hopkins</i>, 53 F.3d 533 (2d Cir. 1995)</u></a>  | 10            |
| <a href="#"><u><b><i>United States v. Huebner</i>, 752 F.2d 1235 (7<sup>th</sup> Cir. 1985)</b></u></a>                         | <b>6</b>      |
| <a href="#"><u><i>United States v. Johnson</i>, 467 F.3d 56 (1<sup>st</sup> Cir. 2006) (Link to Google Scholar)</u></a>         | 4             |
| <a href="#"><u><i>United States v. Lucas</i>, 516 F.3d 316 (5<sup>th</sup> Cir. 2008) (Link to the court's website)</u></a>     | 4             |
| <a href="#"><u><i>United States v. Mead Corp.</i>, 533 U.S. 218 (2001)</u></a>  | 3,5           |
| <a href="#"><u><i>United States v. Nova Scotia Food Products Corp.</i>, 568 F.2d 240 (2d Cir. 1977)</u></a>                     | 3             |
| <a href="#"><u><b><i>United States v. Riverside Bayview Homes</i>, 474 U.S. 121 (1985)</b></u></a>                              | 1,4,10,11     |
| <a href="#"><u><i>United States v. Robison</i>, 505 F.3d 1208 (11<sup>th</sup> Cir. 2007) (Link to the court's website)</u></a> | 4             |
| <a href="#"><u><i>United States v. Rueth Development Co.</i>, 335 F.3d 598 (7<sup>th</sup> Cir. 2003)</u></a>                   | 4             |
| <a href="#"><u><i>United States v. Weitzenhoff</i>, 35 F.3d 1275 (9<sup>th</sup> Cir. 1994)</u></a>                             | 10            |
| <a href="#"><u><b><i>United States v. Wilson</i>, 133 F.3d 251 (4<sup>th</sup> Cir. 1997)</b></u></a>                           | <b>4,5,10</b> |
| <a href="#"><u><i>Vieux Carre Property Owners v. Brown</i>, 948 F.2d 1436 (5<sup>th</sup> Cir. 1991)</u></a>                    | 10            |
| <a href="#"><u><i>Whitman v. American Trucking Assns., Inc.</i>, 531 U.S. 457 (2001)</u></a>                                    | 3             |
| <a href="#"><u><i>Williamson County Regional Planning v. Hamilton Bank</i>, 473 U.S. 172 (1985)</u></a>                         | 11            |

[Yakus v. United States, 321 U.S. 414 \(1944\)](#) 3

[Zabel v. Tabb, 430 F.2d 199 \(5th Cir. 1970\), cert. denied 401 U.S. 910 \(1971\)](#) 2

# Audio/Video Materials

Interviews: Alexandra Dapolito Dunn, Director and General Counsel, Environmental Council of the States

Chapter 7: discusses State wetland mitigation programs, in contrast to the federal program

Chapter 9: discusses regional and other variations in the attitudes that States take toward wetlands regulation;

discusses whether many States operate their own State wetland permitting programs and generally describes the State programs;

discusses the most effective tools that States are using to protect wetlands;

discusses the greatest impediments to wetland protection in the States;

discusses the Association of Wetlands Managers and the role they play in wetland protection; impediments to assumption by States of the 404 permitting program; and

discusses the way in which States use the 401 certification process to protect wetlands.

Jan Goldman Carter, Senior Manager and Counsel, National Wildlife Federation Wetlands and Water Resources Program:

Chapter 1: discusses the value of a scientific background for a career in environmental law;

discusses the judicial and legislative understanding of, and receptivity to, scientific issues involving wetlands.

Chapter 4: discusses the importance of the Clean Water Act's "waters of the United States" language as a foundation

for wetlands protection.

Chapter 5: discusses the Tulloch litigation (in which she was involved) and the aftermath of the litigation.

Chapter 9: discusses the variety of State wetland protection programs and the political pressure on State programs.

Chapter 10: discusses the mission and structure of the National Wildlife Federation, and work that the organization does to protect wetlands; and

discusses the role that litigation plays in protecting wetlands, and the manner in which the National Wildlife Federation chooses litigation priorities.

Patrick McGinley, Charles H. Haden Professor of Law, West Virginia University College of Law

Chapter 5: discusses the history of mountaintop removal mining;  
discusses valley fills and their environmental impacts;  
discusses other impacts of mountaintop mining;  
discusses benefits to communities from mountaintop mining;  
discusses the environmental justice impacts of mountaintop removal mining; and  
discusses representing communities affected by mountaintop mining

Stephen Samuels, U.S. Department of Justice, Environment and Natural Resources Division, Environmental Defense Section

Chapter 1: discusses the challenge of influencing courts and legislatures with scientific information on the values and functions of wetlands.

Chapter 2: discusses the division of responsibility for wetlands litigation within the Environment and Natural Resources

Division;

discusses how the Environmental Defense Section represents multiple federal agencies that may take conflicting positions on issues in litigation; and

discusses the role that DOJ's Environment and Natural Resources Division plays in developing regulations and legislation, focusing specifically on legislative and regulatory initiatives to clarify the scope of the "waters of the U.S."

Chapter 4: discusses the Supreme Court cases interpreting the breadth of the Clean Water Act jurisdiction over "waters of the United States", the interpretive difficulties the decisions have created, and the legislative and regulatory efforts to clarify the breadth of jurisdiction.

Chapter 10: explains how federal wetland enforcement priorities are set.

Map: [Google Map](#) identifying the location of the properties at issue in all of the cases excerpted in the course source - Chapters 3, 4, 5, 6, 8, 10, and 11.

Oral

Arguments: [Borden Ranch Partnership v. United States Army Corps of Engineers](#) (link to the Oyez Project) - Chapter 5

[Chevron v. NRDC](#) (link to the Oyez Project) - Chapter 3

[Coeur Alaska v. S.E. Alaska Conservation Council](#) (link to the Oyez Project) - Chapter 5

[Koontz v. St. John's River Water Management](#) (link to the Oyez Project) - Chapter 11

[Lost Tree Village Corp. v. United States](#) (link to the court's website) - Chapter 11

[Lucas v. South Carolina Coastal Council](#) (link to the Oyez Project) - Chapter 11

[Mingo Logan Coal Company v. U.S. Environmental Protection Agency](#) Oral Argument (link to the court's website) - Chapter 8

[Rapanos v. United States](#) (link to the Oyez Project) - Chapter 4

[Sackett v. EPA](#) (link to the Oyez Project) - Chapter 10

[Solid Waste Agency of Northern Cook County v. Corps](#) (link to the Oyez Project) - Chapter 4

[U.S. v. Riverside Bayview Homes](#) (link to the Oyez Project) - Chapter 4

Videos: Corps of Engineers videos on [Delineating Wetlands](#) (Chapter 1); [404 permitting](#) (Chapter 6); [404\(b\)\(1\) Guidelines](#) (Chapter 6); [Alternatives Analysis](#) (Chapter 6); [Mitigation](#) (Chapter 8); [Administrative Appeals](#) (Chapter 10)

Deep Ripping Videos on [Facebook](#) and [YouTube](#) - Chapter 5

EPA Video - [Wetlands and Wonders - Reconnecting Children with Nearby Nature](#) - Chapter 1

[Liquidity: The Value of Wetlands](#) - Chapter 1

Mountaintop removal mining videos from [Appalachian Voices](#), [Discovery](#), and [Smithsonian](#) - Chapter 5

[USDA Video](#) regarding the history of the Conservation Reserve Program - Chapter 2

Wetlands Values and Functions Videos from [Conservation Media](#), [GreenTreks Network](#) (Pennsylvania's wetlands), [Delaware DNREC](#), and [Oklahoma Gardening](#) - Chapter 1

# Problems and Exercises

## Chapter 1

Research Problem: Finding agency reports online; Finding agency guidance documents online

CALI Chapter Quiz

## Chapter 2

Research Problem: Finding international materials online

Research Problem: Finding agency contacts - offices and phone numbers

Professionalism Hypothetical: Model Rule 1.1

CALI Chapter Quiz

## Chapter 3

Research Problem: Finding rules using Regulations.gov; Finding information in the rulemaking dockets on Regulations.gov

Drafting Exercise: Drafting a comment on a proposed rulemaking

Hypothetical: Rulemaking v. adjudication; Formal v. informal procedures

Hypothetical: Standards of review for agency decision-making (*Chevron*, *Skidmore*, etc.)

CALI Chapter Quiz

## Chapter 4

Research Problem: Finding jurisdictional determinations online

Professionalism Hypothetical: Model Rule 4.2

Hypothetical: Waters of the United States

CALI Section Quiz

CALI Chapter Quiz

## Chapter 5

Professionalism Hypothetical: Model Rule 1.6

Hypothetical: Regulated Activities

CALI Chapter Quiz



## **Chapter 6**

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|---|--|
| Research Problem:                                       | Finding and interpreting nationwide and regional general permits |
| Research Problem:                                       | Finding individual permits and pending individual permits        |
| Hypothetical:<br>CALI Section Quiz<br>CALI Chapter Quiz | Alternatives Analysis  |

## **Chapter 7**

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| Research Problem:                                  | Finding mitigation banking data in RIBITS |
| Professionalism Hypothetical:<br>CALI Chapter Quiz | Model Rules 1.16 and 2.1                  |

## **Chapter 8**

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|---|--|
| Research Problem:                       | Finding and interpreting EPA elevation decisions |
| Research Problem:                       | Finding and interpreting EPA veto documents      |
| Drafting Exercise:<br>CALI Chapter Quiz | Drafting a FOIA request                          |

## **Chapter 9**

|                   |  |
|-------------------|--|
| Research Problem: | Finding and interpreting state laws limiting authority over wetlands     |
| Research Problem: | Finding and interpreting state laws regarding jurisdiction over wetlands |
| Research Problem: | Finding and interpreting state programmatic general permits              |
| Research Problem: | Finding and interpreting state laws regarding water quality standards    |
| CALI Chapter Quiz |  |

## **Chapter 10**

|                   |   |
|-------------------|---|
| Hypothetical:     | Administrative Appeals                    |
| Research Problem: | Finding administrative appeals            |
| Hypothetical:     | Judicial Review of Administrative Actions |
| Research Problem: | Finding and interpreting consent decrees  |

Hypothetical: Criminal Enforcement  
Hypothetical: Choice of Enforcement Tool  
Hypothetical: Citizen Suits  
Drafting Exercise: Drafting a Complaint and 60 day notice in a Citizen Suit  
  
CALI Chapter Quiz

## **Chapter 11**

Hypothetical: Timing of Takings Claims  
Hypothetical: Takings Analysis  
Interviewing & Drafting Exercise: Draft questions to evaluate the strength of a client's takings claim  
  
CALI Chapter Quiz

# Chapter 1

## The Science

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### I. Wetland Values and Functions

This is a book about wetlands, and the laws that protect wetlands. It seems only natural, therefore, to begin the book by looking at the reasons that there are laws to protect wetlands. This first chapter begins with a focus on the values and functions of wetlands.

In the 19<sup>th</sup> century, wetlands were considered “a menace, the cause of malaria, and a hindrance to land development.” See [U.S. Congress, Office of Technology Assessment, OTA-O-206, \*Wetlands: Their Use and Regulation\* 37 \(Mar. 1984\)](#). Attitudes towards wetlands have changed greatly since then as scientists and the public have discovered the societal benefits and important ecological functions of wetlands. The United Nations Millennium Ecosystem Assessment determined that the ecosystem services provided globally by wetlands in 1997 were worth 15 trillion dollars. See [Ramsar Convention on Wetlands, Ramsar Convention Secretariat, \*Wetland Ecosystem Services - An Introduction\*](#). Consequently, wetlands frequently provide far greater economic benefits as part of healthy functioning ecosystems than they would provide after being converted to other uses. *Id.* The “ecosystem services” and other values and functions provided by wetlands include:

- ***Provision of Habitat / Protection of Species and Biodiversity***
- ***Flood Control***
- ***Erosion Prevention and Shoreline Stabilization / Protection***
- ***Water Quality Protection*** (removal of sediments, nutrients and toxics)
- ***Groundwater Replenishment***
- ***Climate Regulation***
- ***Wetland Products*** (timber, food products, etc.)
- ***Recreation, Aesthetics, and Education***
- ***Protection of Cultural Values***

Not every wetland provides all of the functions outlined above. The services that each wetland provides will vary based on the type of wetland, its size and location. See [Ramsar Convention on Wetlands, Ramsar Convention Secretariat, \*Wetland Ecosystem Services - An Introduction\*](#). However, the services that each wetland provides generally benefit much broader segments of the public than would be benefitted by the conversion of the wetlands to unsustainable uses. *Id.* It is not always easy to get that message across, though, as, in the past, there has frequently been a lack of concrete economic data available to demonstrate the monetary value of preserving wetlands in their natural state. *Id.* In addition, some of the values provided by wetlands, such as recreation, aesthetics, education, research and protection of cultural values, are difficult to quantify in dollar figures. Nevertheless, methods for assessing the value of ecosystem services are maturing and a recent study demonstrated that coastal wetlands in the United States provide storm protection worth over 23 billion dollars per year, so that the conversion of one hectare (about 2 ½ acres) of coastal wetlands would eliminate about 33,000 dollars worth of storm protection per year. *Id.*; see also [Institute for European Environmental Policy, \*The Economics of Ecosystems and Biodiversity for Water and Wetlands 19-33 \(2013\)\*](#).

Many of the values and functions provided by wetlands, such as water quality protection, flood control, shoreline stabilization, atmospheric maintenance, and groundwater replenishment, are tied to the integral role of wetlands within the hydrologic cycle. Wetlands receive, store and release water physically through ground water and surface water, and biologically through transpiration by vegetation. See [U.S. Environmental Protection Agency, Watershed Academy Web, \*Distance Learning Modules on Watershed Management, Wetland Functions and Values 5\*](#) [hereinafter “Watershed Academy Web”]; see also [Institute for European Environmental Policy, \*The Economics of Ecosystems and Biodiversity for Water and Wetlands 5-6 \(2013\)\*](#). Wetlands are frequently referred to as “nature’s kidneys.” See [Association of State Wetlands Managers, \*The Compleat Wetlander: Wetlands - Nature’s Kidneys and Other Specialized Services \(Feb. 23, 2010\)\*](#). The United States Supreme Court recognized the central role that wetlands play in the hydrologic cycle and discussed the importance of protecting wetlands in order to protect ecosystems in [United States v. Riverside Bayview Homes, 474 U.S. 121, 132-133 \(1985\)](#). The diverse values and functions that wetlands provide are discussed in more detail in the following sections.

#### **A. Provision of Habitat / Protection of Species and Biodiversity**

Wetlands are sometimes referred to as “nurseries of life” because they provide the essential elements of habitat - food, water, and shelter - for thousands of species of aquatic and terrestrial plants and animals. See [U.S. Environmental Protection Agency, \*Wetlands Overview\*](#).



Photo 1 By Muffet  
[http://commons.wikimedia.org/wiki/File:Blue\\_heron.jpg](http://commons.wikimedia.org/wiki/File:Blue_heron.jpg) [CC-BY-2.0 ]

Almost 50% of endangered animal species in the United States depend on wetlands for survival and viability, even though wetlands only occupy about 3.5% of the land area in the U.S. See William J. Mitsch, James G. Gosselink, *Wetlands* 344 (4<sup>th</sup> ed. John Wiley & Sons, 2007). More generally, according to Fish and Wildlife Service estimates, 43% of all of the federally listed endangered or threatened species rely on wetlands either directly or indirectly. See [Watershed Academy Web](#) at 7. Not surprisingly, therefore, the Secretariat for the Ramsar Convention on Wetlands has referred to wetlands as “reservoirs of biodiversity.” See [Ramsar Convention on Wetlands, Ramsar Convention Secretariat, Wetland Ecosystem Services - An Introduction](#). Globally, coastal wetlands “contain some of the most biologically diverse and productive communities in the world.” *Id.*

Wetlands are not just habitat for *endangered or threatened species*, though. About 80% of the breeding bird population in the United States rely on wetlands for their primary habitat. See Mitsch & Gosselink, *supra* at 336. Between 1950 and 1994, for instance, the coastal wetlands in the Chesapeake Bay Region supported an annual average of 79,000 black ducks and 14,000 pintails on their southerly migration. See [Watershed Academy Web](#) at 7. Two thirds of the 10-12 million migratory waterfowl in the continental United States reproduce in the prairie pothole wetlands of the Midwest. See [U.S. Environmental Protection Agency, Wetlands Overview](#). Many animals, including beavers and wood ducks, and plants, including wild rice and cattails, rely almost exclusively on wetlands. *Id.* at 6.



Photo 2  
[https://commons.wikimedia.org/wiki/File:Cattails\\_in\\_the\\_Everglades.jpg](https://commons.wikimedia.org/wiki/File:Cattails_in_the_Everglades.jpg)  
[Public Domain]

Wetlands provide rich habitats for several reasons. In many wetlands, the shallow water, high levels of inorganic nutrients, and high rates of productivity of new plant biomass combine to provide ideal conditions for the development of organisms at the bottom of the food chain. See [U.S. Environmental Protection Agency, America’s Wetlands: Our Vital Link Between Land and Water 6-7 \(2003\) \[hereinafter “America’s Wetlands”\]](#). In addition, the plant biomass in the wetlands is increasingly enriched as it breaks down due to bacterial, fungal and protozoan activity. *Id.* at 6. The biomass provides food for small invertebrates and fish, which, in turn, provide food for larger amphibians, reptiles, fish, birds and mammals. *Id.* The high levels of biomass and invertebrate life make wetlands an important nursery area for many fish and shellfish. See [Watershed Academy Web](#) at 7. Further, many species of fish rely on wetlands because they require areas of shallow water for breeding and feeding, or for some other portion of their life cycle.

*Id.* at 4; see also William A. Niering, *Wetlands* 32 (Chanticleer Press, 1985).

## B. Flood Control

Wetlands help prevent or minimize flooding and flood damage by storing and slowing water. See [America's Wetlands](#), at 8. Like sponges, wetlands absorb and slowly release rain, snow melt, groundwater and surface water, including flood waters. *Id.* By doing so, they reduce the speed and volume of runoff entering streams and rivers. See [Ramsar Convention on Wetlands, Ramsar Convention Secretariat, Wetland Ecosystem Services - Flood Control \[hereinafter "Ramsar - Flood Control"\]](#) The trees and vegetation in wetlands can also slow the speed of flood waters and distribute them over the floodplain. See [America's Wetlands](#), at 8. By storing and slowing water, wetlands can reduce flood heights and reduce erosion downstream. See [Watershed Academy Web](#), at 9. The flood control benefits provided by wetlands can be particularly important near urban areas where there are significant volumes of runoff from pavement and buildings. *Id.* Regardless of where the wetlands are located, though, by reducing flooding and flood damages, wetlands provide economic benefits, by reducing property damages, and protect health, safety and welfare. *Id.* at 10.



Photo 3 By LSUSoccerbum  
[http://commons.wikipedia.org/wiki/File:Clearview\\_Metairie\\_08\\_30\\_2005.jpg](http://commons.wikipedia.org/wiki/File:Clearview_Metairie_08_30_2005.jpg) [Public Domain]

When wetlands within a floodplain are converted to other uses, peak river discharges following snowmelt or heavy rains that used to dissipate broadly across the floodplain are concentrated in a smaller area, leading to deeper and more damaging floods. See [Ramsar - Flood Control](#). Prior to significant filling and draining, the bottomland hardwood riparian wetlands of the Mississippi River used to store almost 60 days of floodwater. See [America's Wetlands](#), at 8-9. Now, they only store about 12 days of floodwater. *Id.* Engineered flood control measures, such as dredging or the construction of levees, are significantly more expensive than preserving or restoring wetlands. *Id.* A study in Minnesota determined that it would cost 1.5 million dollars per year to replace the flood control provided by 5000 acres of drained wetlands. See [Watershed Academy Web](#), at 10.

Coastal wetlands can play a significant role in protecting communities from storm surges and conversion of those wetlands reduces those natural defenses. See [Ramsar - Flood Control](#). When Hurricane Katrina inundated 80% of the City of New Orleans in 2005, many experts suggested that the destruction of significant amounts of coastal wetlands in the decades prior to the storm, and the artificial constriction of the Mississippi River's floodplains contributed to the magnitude of the flooding. *Id.* Protection of coastal wetlands is particularly important in light of the fact that 39% of the U.S. population lived in coastal

shoreline counties in 2010, even though those counties represented less than 10% of the land area of the United States (excluding Alaska). See [U.S. Department of Commerce, National Oceanic and Atmospheric Administration, NOAA's State of the Coast](#). In addition, the population in those counties increased 39% between 1970 and 2010. *Id.*

### C. Erosion Prevention and Shoreline Protection/Stabilization



Photo 4 USFWS  
[http://commons.wikimedia.org/wiki/File:Coastal\\_wetlands.jpg](http://commons.wikimedia.org/wiki/File:Coastal_wetlands.jpg)

Just as wetlands prevent or reduce flooding by storing and slowing water flows, they also protect shorelines and stream banks from erosion. See [America's Wetlands](#), at 9. The roots of wetland plants stabilize the soil and the plants absorb wave energy and break up currents. *Id.* Erosion prevention can provide significant benefits, as coastal erosion causes 500 million dollars in coastal property loss each year, including damage to structures and conversion of land to aquatic areas. See [U.S. Department of Commerce, National Oceanic and Atmospheric Administration, Coastal Hazards](#). A study by the Heinz

Center in 2000 estimated that erosion may destroy one quarter of the houses located within 500 feet of the shoreline by the middle of this century. *Id.* The federal government spends about 150 million dollars each year on erosion control measures. *Id.* In recognition of the erosion prevention benefits of wetlands, some states are restoring coastal wetlands to provide buffers from storm surges. See [America's Wetlands](#), at 9.

### D. Water Quality Protection

Wetlands play a vital role in protecting and improving water quality by removing sediments, organic and sometimes toxic pollutants, and excess nutrients from water and storing and/or processing those materials. See [America's Wetlands](#), at 8. Wetland soils and vegetation capture and retain nutrients in water that might otherwise cause dangerous levels of nutrients in groundwater that serves as a drinking water source or cause eutrophication of downstream water bodies.

See [Ramsar Convention on Wetlands, Ramsar Convention Secretariat, Wetland](#)



Photo 5 USDA/ NRCS Photo – Martin Pena  
[http://commons.wikimedia.org/wiki/File:NRCSID89001\\_-\\_Idaho\\_\(4105\)\(NRCS\\_Photo\\_Gallery\).jpg](http://commons.wikimedia.org/wiki/File:NRCSID89001_-_Idaho_(4105)(NRCS_Photo_Gallery).jpg)

[Ecosystem Services - Water Purification \[hereinafter "Ramsar - Water Purification"\]](#). Eutrophication of water bodies causes massive growth in algae, which depletes oxygen in the water and blocks sunlight which is essential for many of the plants and animals in the water. *Id.*

Just as wetlands remove and store nutrients, wetland plants trap suspended sediments that could otherwise smother downstream spawning areas, insects and plants. See [America's Wetlands](#), at 8. In addition, increased turbidity in streams caused by excess sediments can lead to increased water temperatures, reduced light penetration and plant growth, and reduced visibility in the stream, making it more difficult for fish to find prey. See [North Carolina State University, Department of Biological and Agricultural Engineering, Soil in Our Streams, Stream Notes, Vol. 1, No. 1](#). Some wetland animals, such as oysters in the Chesapeake Bay, can even help to filter out nutrients and sediments from water that flows through wetlands. See [Ramsar - Water Purification](#).

Wetland plants also protect water quality by removing and storing organic wastes. See [America's Wetlands](#), at 8. There are clear economic benefits associated with this filtering function, as a 1990 study determined that the Congaree Swamp in South Carolina removes as much pollution from the water as would be removed by a 5 million dollar wastewater treatment plant. *Id.* Similarly, in 1997, the city of New York determined that it could spend less than half as much to protect the city's water quality by purchasing and protecting wetlands than it would spend if it constructed new wastewater treatment plants. See [Ramsar - Water Purification](#). Governments and developers are even constructing wetlands to remove nutrients or waste from contaminated water. *Id.*

Some wetland plants can even remove heavy metals and other toxic substances from the water that flows through wetlands. *Id.* As a result, wetlands are being constructed to treat wastewater from mining and other activities, as well as to treat sewage effluent. See [Ramsar Convention on Wetlands, Ramsar Convention Secretariat, Wetland Ecosystem Services - Sediment and Nutrient Retention and Export](#).

Although wetlands can provide these water quality protection features, excessive levels of nutrients, sediments, or pollutants in wetlands can degrade the wetlands and reduce or eliminate many of the values that they would otherwise provide. See [Watershed Academy Web](#), at 9.

## **E. Groundwater Replenishment**

Depending on their location and type, wetlands may maintain stream flow during dry periods and may replenish groundwater. See [America's Wetlands](#), at 8. Although some wetlands have no connection to groundwater, others are located on permeable soils overlaying aquifers. See [Ramsar Convention on Wetlands, Ramsar Convention Secretariat, Wetland Ecosystem Services - Groundwater Replenishment](#). In those wetlands, water can



percolate through the soil into the aquifer to recharge the aquifer when the water table is low. *Id.* Conversely, when the water table is high, the wetland can serve as a groundwater discharge zone. *Id.* Globally, almost 95% of available fresh water is contained in groundwater aquifers, and one third of the world's population relies on groundwater for drinking water. *Id.* One of the most productive groundwater sources in the United States is the Floridan aquifer system, which stretches throughout Florida, southern Georgia, and portions of South Carolina and Alabama. See [Watershed Academy Web](#), at 9. Wetlands in Florida play an important role in recharging that aquifer, as a study found that groundwater in a particular area of the aquifer would be reduced by 45% if 80% of a 5 acre Florida cypress swamp in the area was drained. *Id.*

## F. Climate Regulation

While many of the values and functions of wetlands are tied to water and water quality, wetlands can also provide climatic benefits. Some wetlands, especially peat bogs, store large amounts of carbon, functioning as “carbon sinks.” See [Ramsar Convention on Wetlands, Ramsar Convention Secretariat, Wetland Ecosystem Services - Climate Change Mitigation & Adaptation](#). By doing so, they help slow the rate of greenhouse gas emissions that contribute to global climate change. *Id.* However, when wetlands are converted for development, trees and vegetation are removed and sometimes burned, releasing the carbon that was stored in the wetlands into the atmosphere. *Id.* Those releases may be significant. A recent study indicated that damage to peatlands caused greenhouse gas emissions equal to 1/10 of the emissions from the worldwide use of fossil fuels. *Id.*

Wetlands will be impacted by, and impact society's response to climate change in several ways. First, to the extent that climate change results in the predicted sea level rise and extreme weather events, wetlands will play an important role in adaptation due to the flood control, erosion prevention, groundwater replenishment, habitat protection, and water quality protection functions that they can serve. *Id.* They can only provide those benefits, though, if they survive. Unfortunately, the United Nations Intergovernmental Panel on Climate Change (IPCC) cautions that wetlands are among the ecosystems “most vulnerable to climate change.” *Id.*



## G. Wetland Products

Wetlands may also provide more tangible economic benefits in the form of products that can be harvested from them. Cranberries, blueberries, rice and many other plants are produced in wetlands. See [America's Wetlands](#), at 10. Various medicines can also be extracted from wetland plants and soils. *Id.*

Timber is frequently harvested from wetlands, and there are 55 million acres of wetlands supporting timber harvesting in the United States. See [U.S. Environmental Protection Agency, EPA-841-R-02-001, National Water Quality Inventory, 2000 Report 45 \(2002\) \[hereinafter "2000 National Water Quality Inventory"\]](#). Fish and shellfish are another wetland "product." In the southeastern United States, about 96% of the fish and shellfish that are harvested commercially, and 50% of the fish that are caught by recreational fishers, rely on estuarine or coastal wetlands. See [Watershed Academy Web](#), at 11. Nationally, about 75% of the fish and shellfish that are harvested commercially depend on wetlands for food or habitat. *Id.* More than 2 billion dollars worth of fish and shellfish are harvested commercially in the United States every year. *Id.*

Wetlands provide essential habitat for several other animals that are trapped and sold commercially, including muskrat, beaver, otter, mink and alligators. *Id.* at 12. In 2000, EPA estimated that more than 70 million dollars worth of muskrat pelts were harvested every year. See [2000 National Water Quality Inventory](#), at 45.

## **H. Recreation, Aesthetics, Education and Research**

In addition to the values outlined above, wetlands often provide opportunities for recreation, education and research. EPA estimates that more than half of the adult population in the United States hunts, fishes, engages in bird-watching or photographs wildlife, and that they spend about 59.5 billion dollars per year on those activities. See [America's Wetlands](#), at 10. A 2011 survey conducted by the Fish and Wildlife Service found that the annual expenditures had increased to 144.5 billion. See [U.S. Department of the Interior, U.S. Fish and Wildlife Service, and U.S. Department of Commerce, 2011 National Survey of Fishing, Hunting, and Wildlife Associated Recreation 4 \(2011\)](#). A significant amount of that hunting, fishing, or wildlife watching takes place in wetlands, as the natural beauty and diversity of animal and plant life in many wetlands promotes recreational tourism. See [Ramsar Convention on Wetlands, Ramsar Convention Secretariat, Wetland Ecosystem Services - Recreation & Tourism \[hereinafter "Ramsar - Recreation and Tourism"\]](#). In EPA's National Water Quality Inventory report to Congress in 2000, the agency indicated that "[a]t least \$18 billion in economic activity is generated annually from recreational fishing in coastal wetlands by 17 million Americans." See [2000 National Water Quality Inventory](#), at 45.

While hunting, fishing and bird-watching attract many people to wetlands, others visit to hike, boat, paint, photograph, record, or otherwise appreciate the beauty and aesthetics of the wetland ecosystems. See [America's Wetlands](#), at 10. Many of those wetland values are difficult to capture in purely economic terms.

Wetlands provide rich educational opportunities for students of all ages, ranging from grammar schools through adult continuing education programs and programs at nature centers. See [Watershed Academy Web](#), at 13. As EPA notes, wetlands are excellent sites "to learn about vegetative structure ... and ecological functions ..., natural ecological

processes ..., biodiversity, and plant-animal interactions.” *Id.*

While wetlands can provide significant recreational and educational opportunities, some recreational or tourism uses of wetlands could harm wetlands, so wetland managers frequently must limit recreational and educational uses to specific areas to protect the wetlands. See [Ramsar - Recreation & Tourism](#).

## I. Protection of Cultural Values

In some cases, wetlands can also be closely tied to the cultural heritage of the surrounding communities. The songs, music, dance, art, literature, stories and rituals of an area may be deeply influenced by the wetland ecosystem in which it is located. [See Ramsar Convention on Wetlands, Ramsar Convention Secretariat, \*The Cultural Heritage of Wetlands: Wetlands, An Inspiration in Art, Literature, Music and Folklore\*](#). Like the aesthetics of wetlands, these values are difficult to measure in purely economic terms, but are vital to the communities. [See Ramsar Convention on Wetlands, Ramsar Convention Secretariat, \*Wetland Ecosystem Services: Cultural Values\*](#). As the wetlands disappear, the ties to the land and many of the stories, rituals and traditions of the communities could disappear as well.

## Questions and Comments

1. If the services that each wetland provides will vary based on the type of wetland and its size and location, should all wetlands be provided the same level of protection? Are they provided the same level of protection? Think about those questions as you read about the standards that the government uses to determine whether to issue a permit to authorize development in wetlands, the process that the government uses to determine appropriate mitigation for destruction of wetlands, the manner in which the government structures its enforcement programs, the analysis that is used to determine whether government restrictions on wetlands development constitute a taking, and

## RESOURCES

EPA Video - [Wetlands and Wonders - Reconnecting Children with Nearby Nature](#)  
[EPA's Watershed Academy - Wetland Values and Functions](#)  
[EPA - America's Wetlands](#)  
[Ramsar Convention Ecosystem Services Website](#)  
[Wetlands: Their Use and Regulation \(1984 OTA report\)](#)  
[EPA Watershed Academy Webinars \(including wetlands\)](#)  
Videos on wetland values and functions from [Conservation Media](#), [GreenTreks Network \(Pennsylvania's wetlands\)](#), [Delaware DNREC](#), [Oklahoma Gardening](#)  
[Liquidity: The Value of Wetlands - independently produced video](#)  
[EPA's Connectivity Study](#) - Connectivity of Wetlands and Streams to Downstream Waters

other issues throughout this book.

## II. Definition and Types of Wetlands

### A. Definitions

In general terms, wetlands are “lands where saturation with water is the dominant factor determining the nature of soil development and the types of plant and animal communities living in the soil and on its surface.” See [U.S. Environmental Protection Agency, \*Wetland Definitions\*](#). That description, which appears on the web site of the Environmental Protection Agency (EPA), is adapted from a more elaborate definition adopted by the United States Fish and Wildlife Service, which administers a [National Wetlands Inventory](#), as part of its “Cowardin” classification system (named for the scientist who developed it). The Fish and Wildlife Service definition for wetlands is:

lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For purposes of this classification, wetlands must have one or more of the following three attributes: (1) at least periodically, the land supports predominantly hydrophytes, (2) the substrate is predominantly undrained hydric soil, and (3) the substrate is nonsoil and is saturated with water or covered by shallow water at some time during the growing season of each year.

See L. Cowardin, et al., U.S. Department of the Interior, Fish and Wildlife Service, [Classification of Wetlands and Deep-Water Habitats of the United States \(1979\)](#).

EPA and the Army Corps of Engineers have adopted the following conceptually, though not linguistically, similar definition of wetlands for their regulatory programs:

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

See [33 C.F.R. § 328.3 \(b\)](#) (Corps’ regulations); [40 C.F.R. § 230.3\(t\)](#) (EPA’s regulations).

Although the Fish and Wildlife Service has developed maps of wetlands as part of its [National Wetlands Inventory](#), the maps are not designed or intended to be used for legal or regulatory purposes to identify the existence of, or boundaries of, wetlands. See [U.S. Fish](#)

[and Wildlife Service, National Wetlands Inventory: Frequently Asked Questions](#). Instead, as outlined in Part IV of this chapter, both the classification of a specific piece of property as a wetland and the boundaries of the wetland are determined through a process known as delineation. The delineation process focuses on whether the property has the **soils**, **vegetation**, and **hydrology** that are typically found in wetlands.

## B. Types of Wetlands

There are many different ways to categorize or classify wetlands. This section begins by examining the Cowardin classification system developed by the Fish and Wildlife Service, takes a closer look at four common types of wetlands, and then focuses on the Hydrogeomorphic (HGM) classification system that categorizes wetlands based on the values and functions that they provide.

### 1. Cowardin classification

Using the Cowardin classification system mentioned above, the Fish and Wildlife Service identifies the following five types of wetland and deepwater habitat systems:

- **Marine**
- **Estuarine**
- **Lacustrine**
- **Riverine**
- **Palustrine**

**Marine** systems encompass the open ocean and coastlines, and include coastal lagoons, rocky shores and coral reefs. See L. Cowardin, et al., U.S. Department of the Interior, Fish and Wildlife Service, [Classification of Wetlands and Deep-Water Habitats of the United States 4 \(1979\)](#).

**Estuarine** systems encompass deepwater habitats “that are usually semi-enclosed by land but have ... access to the open ocean, and in which ocean water is at least occasionally diluted by freshwater runoff from the land.” *Id.* at 4. Estuarine systems include areas such as deltas, tidal marshes, coastal brackish areas, and mangrove swamps. The marine and estuarine systems are generally salt water habitats. The other systems are generally fresh water habitats, although there are some tidal riverine systems.

For wetlands, **lacustrine** systems generally refer to wetlands associated with lakes and

reservoirs. *Id.* at 9-10. Similarly, the wetlands included within **riverine** systems are generally wetlands associated with rivers and streams. *Id.* at 7-8. However, whether wetlands in or near rivers, lakes or streams fit within the lacustrine or palustrine categories, or another category, will depend on the amount of “trees, shrubs, persistent emergents, emergent mosses or lichens” in the wetlands. Riverine systems do not include wetlands dominated by those features, and lacustrine systems do not include wetlands where those features cover more than 30% of the wetlands. *Id.* at 7-10. Wetlands associated with rivers and lakes that do not fit within the lacustrine or riverine systems are included with the much broader final category of wetlands, the palustrine system.

The **palustrine** system includes “all non-tidal wetlands dominated by trees, shrubs, persistent emergents, emergent mosses or lichens” and similar wetlands in some tidal areas. *Id.* at 10. The system includes marshes, swamps, bogs, fens, and prairies. *Id.* Most of the wetland acreage in the United States is within this category. According to a recent Fish and Wildlife Service report, in 2009, 88% of the wetlands in the conterminous United States were in the palustrine system. See [Stedman, S. & T.E. Dahl, National Oceanic and Atmospheric Administration, National Marine Fisheries Service and U.S. Department of the Interior, Fish and Wildlife Service, \*Status and Trends of Wetlands in the Coastal Watersheds of the Conterminous United States: 2004 to 2009\* 38 \(2013\).](#)

## 2. Marshes, Swamps, Bogs, and Fens

Within the various wetland and deepwater habitat systems identified above, the most prevalent types of wetlands are marshes, swamps, bogs, and fens. The differences between those types of wetlands are described in the following sections.

### Marshes

Marshes are wetlands that are characterized by soft stemmed herbaceous plants, such as cattails and pickerelweed, see Niering, *supra*, at 21, and are frequently or continually inundated with water. See [U.S. Environmental Protection Agency, \*Marshes\*](#). While some



marshes may be fed by groundwater, marshes usually receive most of their water from surface water. *Id.*

**Tidal marshes** are most prevalent on the east coast of the United States and along the Gulf of Mexico. *Id.* **Non-tidal marshes** are “the most prevalent and widely distributed wetlands in North America.” *Id.* Non-tidal marshes are often found in poorly drained depressions along streams and in the shallow water along lakes, rivers, and ponds. *Id.*

Photo 7 Photo By Jpaw1991 (Own work)  
<http://commons.wikimedia.org/wiki/File:Cattails.jpg> [CC-BY-SA-3.0]

Included within the category of **non-tidal marshes** are *freshwater marshes*, [wet meadows](#), [wet prairies](#), [prairie potholes](#), [vernal pools](#) and [playa lakes](#). **Wet meadows** commonly occur in poorly drained areas, resemble grasslands, and are generally drier than other marshes except during seasonal high water periods. See [U.S. Environmental Protection Agency, Wet Meadows](#). They frequently are found in agricultural areas. *Id.* **Wet prairies** are similar to wet meadows, but are wet for longer periods of time. See [U.S. Environmental Protection Agency, EPA-843-F-01-002b, Types of Wetlands \(Sept. 2001\)](#). **Prairie potholes** are depressional wetlands that are found most frequently in the upper midwest. See [U.S. Environmental Protection Agency, Prairie Potholes](#). Many species of migratory waterfowl rely on these wetlands for breeding and feeding. *Id.* **Vernal pools** are seasonal depressional wetlands found primarily on the west coast and in the glaciated areas of the northeast and midwest. See [U.S. Environmental Protection Agency, Vernal Pools](#). They are covered by shallow water during periods of the winter and spring, but may be dry for the summer and fall. *Id.* They are usually found in gently sloping grassland plains and usually overlay bedrock or a layer of hard clay. *Id.* **Playa lakes** are round hollows usually found in the southern high plains and are only present for short periods during the year. See [U.S. Environmental Protection Agency, Playa Lakes](#). They are vital because they store water in a region of the country that receives very little rain and has no permanent rivers or streams. *Id.*

## Swamps



Photo 8 NPS Photo  
[http://commons.wikimedia.org/wiki/File:Big\\_thicket.jpg](http://commons.wikimedia.org/wiki/File:Big_thicket.jpg)

Swamps are wetlands dominated by woody plants, such as trees and shrubs. See Niering, *supra*, at 22. The soils are saturated during the growing season and standing water is not uncommon during certain times of the year. See [U.S. Environmental Protection Agency, Swamps](#). Swamps are generally divided into two types, **forested swamps** and **shrub swamps**, depending on the vegetation present. *Id.*

Forested swamps are found throughout the United States and are frequently inundated with surface water from rivers and streams. *Id.* While they vary by geographic region, trees typically found in forested wetlands include red maple, white oak and bald cypress. See [U.S. Environmental Protection Agency, EPA-843-F-01-002b, Types of Wetlands \(Sept. 2001\)](#). Forested swamps in the south central United States are generally referred to as **bottomland hardwood swamps**.

**Shrub swamps** are similar to forested swamps and sometime found adjacent to them, but are dominated by shrub vegetation. See [U.S. Environmental Protection Agency, Swamps](#).

They are often found along streams and in floodplains, although there are also tidal shrub swamps, including **mangrove swamps**. *Id.*

### **Bogs and Fens**

**Bogs** are acidic peatlands, often covered by a blanket of sphagnum moss. See [U.S. Environmental Protection Agency, \*Bogs\*](#). They are mostly found in the northeast and the Great Lakes region (**northern bogs**), although they can also be found in the southeast (**pocosins**) and receive most of their water from precipitation, as opposed to runoff, groundwater or streams. *Id.* Large amounts of carbon are stored in the peat deposits in bogs, so these wetlands play an important role in minimizing and adapting to climate change. *Id.*

**Fens** also are peatlands, but receive water from groundwater as well as precipitation. See [U.S. Environmental Protection Agency, \*Fens\*](#). Consequently, they are less acidic and have higher nutrient levels than bogs and can support a greater diversity of plants and animals. *Id.*

### **3. Hydrogeomorphic (HGM) Classification**

The hydrogeomorphic (HGM) classification system is a system developed by the U.S. Army Corps of Engineers to classify wetlands and other aquatic systems based on their ability to perform various functions. The HGM system was originally developed in 1993 as a tool to classify wetlands based on their **location within a landscape** (“geomorphic setting” - i.e., location on a hillside, in a valley, adjacent to rivers) and their **hydrology** (based on the source of the water in the wetland, such as runoff, groundwater or precipitation; the flow rate of water; and the duration of water in the wetland). See [Mark M. Brinson, U.S. Army Corps of Engineers, \*Technical Report WRP-DE-4, A Hydrogeomorphic Classification for Wetlands\* \(Aug. 1993\)](#). It was expanded a few years later to focus on assessing the **functions** of wetlands, based on the original HGM classifications. See [R. Daniel Smith, U.S. Army Corps of Engineers, \*Technical Report WRP-DE-9, An Approach for Assessing Wetland Functions Using Hydrogeomorphic Classification, Reference Wetlands, and Functional Indices\* \(Oct. 1995\)](#). The HGM system was originally designed for use in the Clean Water Act section 404 permit program that the Corps administers, see Chapter 2 of this book, but, in 1997, most federal agencies that had jurisdiction over wetlands under various laws agreed to use the HGM system to assess wetland functions. See [U.S. Army Corps of Engineers, \*The National Action Plan to Implement the Hydrogeomorphic Approach to Assessing Wetland Functions\*, 62 Fed. Reg. 33607 \(June 20, 1997\)](#). Pursuant to that 1997 “National Action Plan,” the Corps of Engineers has developed a series of regional guidebooks to explain the process for applying the system to various HGM classes across the United States. See [U.S. Army Corps of Engineers, \*Guidebooks\*](#).

The HGM classification system divides wetlands into the following seven classes:



- Depressional
- Riverine
- Mineral Flats (Flats)
- Organic Flats (Extensive peatlands)
- Tidal Fringe
- Lacustrine Fringe
- Slopes

See [U.S. Army Corps of Engineers, Hydrogeomorphic Approach for Assessing Wetlands Functions, Wetland Classifications.](#)

Some of the characteristics of the various types of systems and some of the types of wetlands included in each system, are identified in the following chart:

| <b>HGM Type</b>     | <b>Characteristics</b>  | <b>Typical Wetlands</b>                         |
|---------------------|---|---|
| Depressional        | Located in topographic depressions; Fed by precipitation, surface water, groundwater; Water flows toward the center of the depression; Duration of wetness varies from ephemeral to perennial.  | Prairie potholes, playa lakes, and vernal pools |
| Riverine            | Located in floodplains and riparian corridors associated with stream channels; Water source is primarily overbank flow, with some groundwater and other connections; Water flows out to the channels during rainfall events and after flooding. | Bottomland hardwoods                            |
| Mineral Flats       | Located on slight slopes; Water source is primarily precipitation; Water moves slowly out of these wetlands.  | Pine flatwoods                                  |
| Extensive peatlands | Located on flat interfluves or in locations where depressions have filled with peat; water source is primarily precipitation; Water flows out through overland flow and seepage to groundwater.   | Northern peatlands                              |

|                   |  |  |
|-------------------|--|--|
| Tidal Fringe      | Located along the coast and in estuaries; Tidal currents are the predominant water source, although groundwater and precipitation may be additional sources; Bi-directional flow of water between the wetlands and tides; These wetlands are seldom dry. | Salt marsh                                     |
| Lacustrine Fringe | Usually located adjacent to lakes where the water table of the lake maintains the wetland's water table; Water sources include the lake, precipitation and groundwater discharge; Surface water flow is bi-directional.                                  | Un-impounded marshes bordering the Great Lakes |
| Slopes            | Usually located on slight to steep sloping land; Predominant water source is groundwater and some precipitation; Surface water generally flows quickly downgradient and out of the wetland.  | Fens   |

See [U.S. Army Corps of Engineers, \*Hydrogeomorphic Approach for Assessing Wetlands Functions, Wetland Classifications\*](#).

Since wetlands in the same HGM category have similar geomorphology (location within a landscape) and similar hydrology, they will generally perform similar functions. See Dennis W. Magee, *A Primer on Wetland Ecology, Wetlands Law and Policy: Understanding Section 404* 43-49 (Section of Environment, Energy and Resources, American Bar Association, 2005). For instance, because depressional wetlands trap more water than some other categories of wetlands, they may provide groundwater recharge functions that wetlands in other HGM categories, like slope wetlands, may not. *Id.* at 43-44. Similarly, because of their hydrology and geomorphology, lacustrine fringe wetlands serve a very important floodwater storage function, among other functions. *Id.* at 45-46. Tidal fringe wetlands can perform significant water quality functions, among other functions. *Id.* at 48-49. Since the wetlands within similar categories perform similar functions, the HGM classification system tailors assessment tools within each category to determine how well a specific wetland can perform the functions assessed for that category. *Id.* at 52-53.

## RESOURCES

### [Cowardin Classification](#)

FWS Fact Sheets on Wetland and Deepwater Habitat Systems - [Marine](#),  
[Estuarine](#), [Riverine](#), [Lacustrine](#), [Palustrine](#)  
[Corps of Engineers HGM web page](#)  
[EPA Wetland Types web page](#)

### III. Status and Trends

At the end of the eighteenth century, it is estimated that there were approximately 392 million acres of wetlands in the United States, with 221 million acres in the lower 48 states. See [Dahl, T.E., U.S. Department of Interior, U.S. Fish and Wildlife Service, \*Wetlands Losses in the United States: 1780s to 1980s\* 1 \(1990\)](#). By 1980, the Fish and Wildlife Service concluded that, after a “200 year history of wetland conversion”, wetland acreage in the lower 48 states had declined by 53% to about 104 million acres. *Id.* Over that time period, therefore, about 585,000 acres of wetlands were lost every year. During that time period, California lost 90% of its wetlands, 10 states (Arkansas, California, Connecticut, Illinois, Indiana, Iowa, Kentucky, Maryland, Missouri, and Ohio) lost 70% or more of their wetlands, and 22 states lost at least 50% of their wetlands. *Id.* at 3-5. Except for Alaska, Hawaii, and New Hampshire, every other state lost at least 20% of their wetlands during that time period. *Id.* An overwhelming percentage of those losses occurred before the 1950s, as a 1983 Fish and Wildlife Service report found that there were 108.1 million acres of wetlands in the lower 48 states in the 1950s. See [U.S. Department of Interior, U.S. Fish and Wildlife Service, \*Status and Trends of Wetlands and Deepwater Habitats in the Conterminous United States: 1950s to 1970s\* 3 \(Apr. 1983\)](#). That report also determined that the rate of wetland losses between the 1950s and 1970s was 458,000 acres per year. *Id.* In a follow-up survey, the Fish and Wildlife Service determined that the rate of wetland loss has decreased, between the mid-1980s through mid-1990s, to 290,000 acres per year. [Dahl, T.E. & C.E. Johnson, U.S. Department of the Interior, U.S. Fish and Wildlife Service, \*Status and Trends of Wetlands in the Conterminous United States: Mid-1970s to Mid-1980s\* 3 \(1991\)](#).

The Fish and Wildlife Service has continued to conduct periodic surveys of the status of wetland acreage in the United States and, in a report issued in 2000, concluded that the rate of wetland loss declined, during the period from 1986-1997, to 58,500 acres per year, and that 105.5 million acres of wetlands remained in the conterminous United States in 1997. See [Dahl, T.E., U.S. Department of the Interior, U.S. Fish and Wildlife Service, \*Status and Trends of Wetlands in the Conterminous United States: 1986 to 1997\* 9 \(2000\)](#). Ninety-five percent of the remaining wetlands, at that time, were inland freshwater wetlands, while five percent were estuarine and saltwater wetlands. *Id.* at 10. Ninety-eight percent of the wetland losses during the study period were losses to freshwater wetlands.

*Id.* The study suggested that the overall decline in the rate of wetland losses was due to “implementation and enforcement of wetland protection measures and elimination of some incentives for wetland drainage,” among other factors. *Id.* For the first time, that study also attempted to identify the types of activities that contributed to the wetland losses. Thirty percent of the wetland losses during the study period were attributed to urban development, twenty-six percent were attributed to agriculture, twenty three percent to silviculture, and 21 percent to rural development. *Id.* at 11. Road construction is a major factor in wetland conversion, as it often entails the placement of fill material in wetlands **and** it opens up previously inaccessible areas, wetland and otherwise, to development. See Royal C. Gardner, *Lawyers, Swamps, and Money* 95 (Island Press 2011). To serve a growing population, energy exploration, including offshore exploration and mountaintop removal mining, has also grown as a source of wetland destruction. *Id.* at 96.

In 2005, the Fish and Wildlife Service released a report that found, for the first time, that wetland acreage in the conterminous United States was increasing. [Dahl, T.E., U.S. Department of the Interior, U.S. Fish and Wildlife Service, \*Status and Trends of Wetlands in the Conterminous United States: 1998 to 2004\* \(2005\)](#). The study found that there were 107.7 million acres of wetlands in the conterminous United States in 2004, and that wetland acreage increased by 32,000 acres per year between 1998 and 2004. *Id.* at 16. The report suggested that the net gains in wetland acreage were due to “wetlands created, enhanced or restored through regulatory and nonregulatory restoration programs.” *Id.* at 16. More specifically, though, the report indicated that most of the gains during the study period were due to the restoration and creation of freshwater ponds through agricultural conservation programs, and that the ponds “would not be expected to provide the same range of wetland values and functions as a vegetated freshwater wetland.” *Id.* The authors of the study indicated, at the outset of the report, that “[o]n Earth Day 2004, President Bush announced a wetlands initiative that established a federal policy beyond “no net loss” of wetlands, [which] ... seeks to attain an overall increase in the quality and quantity of wetlands [and that] ... [t]he President set a goal of restoring, improving and protecting more than 3 million acres ... in five years.” *Id.* at 15. The authors indicated that the report provided some data regarding the progress being made to meet the goals regarding the increase in quantity of wetlands, but that the report did “not assess the quality or condition of the nation’s wetlands.” *Id.* Indeed, none of the previous reports assessed the quality or condition of the wetlands either. All of the reports focused simply on the quantity of wetland acreage lost.

In the most recent study of wetland status and trends, the Fish and Wildlife Service found that there was a small, but statistically insignificant, difference between wetland acreage in the conterminous United States between 2004 and 2009, with overall acreage declining by 62,300 acres (or 13,800 acres per year over the 4.5 year study period).” [Dahl, T.E., U.S. Department of the Interior, U.S. Fish and Wildlife Service, \*Status and Trends of Wetlands in the Conterminous United States: 2004 to 2009\* 15-16 \(2011\)](#). As in several previous studies, ninety-five percent of the wetlands identified were freshwater wetlands and five percent were marine or estuarine wetlands. *Id.* at 16. Freshwater pond acreage continued

to grow, although more slowly than in the prior report, and forested wetlands “sustained their largest losses since the 1974 to 1985 time period.” *Id.* at 16. While the authors indicated that the report did not draw conclusions regarding trends in the quality or condition of wetlands, they wrote, “The cumulative effects of losses in the freshwater system have had consequences for hydrologic and ecosystem connectivity. In certain regions, profound reductions in wetland extent have resulted in habitat loss, fragmentation, and limited opportunities for reestablishment and watershed rehabilitation.” *Id.*

Although the rate of wetland loss in the conterminous United States may have leveled off, in some regions, the rate of wetland loss continues to increase. In addition to the reports that focus on wetland acreage in the conterminous United States, the Fish and Wildlife Service has partnered with the National Oceanic and Atmospheric Administration to examine wetland trends in coastal watersheds. Significantly, the agencies found that, during the 1998-2004 time period, the coastal watersheds of the eastern United States lost about 59,000 acres of wetlands each year, at a time when the Fish and Wildlife Service study above was indicating that there was an overall net increase of 32,000 acres of wetlands per year. See [Stedman, S. & T.E. Dahl, National Oceanic and Atmospheric Administration, National Marine Fisheries Service and U.S. Department of the Interior, Fish and Wildlife Service, \*Status and Trends of Wetlands in the Coastal Watersheds of the Eastern United States: 1998 to 2004\* 5 \(2008\)](#). In a more recent report, the agencies concluded that wetland acreage in the coastal watersheds of the United States declined by 360,720 acres between 2004 and 2009, for an average loss of 80,160 acres per year. See [Stedman, S. & T.E. Dahl, National Oceanic and Atmospheric Administration, National Marine Fisheries Service and U.S. Department of the Interior, Fish and Wildlife Service, \*Status and Trends of Wetlands in the Coastal Watersheds of the Conterminous United States: 2004 to 2009\* 2 \(2013\)](#). That represented a 25% increase in the rate of wetland loss when compared to data for the region between 1998 and 2004. *Id.* The greatest losses in acreage are occurring in the Gulf of Mexico and Atlantic regions, with smaller losses along the Pacific coast and net gains in the Great Lakes region. *Id.* at 20. The authors of the report noted that “wetland reestablishment in coastal watersheds has lagged behind reestablishment rates observed nationally [and that] ... [a] strategy of achieving “no net loss” by offsetting wetland acreage losses with wetland creation or reestablishment does not appear to be effective in the coastal watersheds as wetland losses have increased in some coastal regions.” *Id.* at 3.

### Questions and Comments

1. **No net loss ...:** In 1987, the Conservation Foundation convened a National Wetlands Policy Forum, which developed a set of consensus recommendations on protecting and managing wetlands. One of the recommendations was that the national policy be guided by a goal of “no overall net loss” of the nation’s wetlands and a long-term goal to increase the quantity and quality of the nation’s wetlands. See [Julie M. Sibbing, National Wildlife Federation, \*Nowhere Near No Net Loss\*](#).

President George H.W. Bush endorsed the policy of “no net loss” of wetlands in 1989 and Presidents Clinton and George W. Bush endorsed the policy and expanded it in their administrations to achieve increases in wetland acreage. Note, though, that “no net loss” focuses not just on loss of acreage of wetlands, but on loss of the quality of wetlands - the values and functions. Why have most of the federal government studies focused solely on wetland acreage? EPA and the Fish and Wildlife Service are in the process of conducting a National Wetland Condition Assessment to determine the quality of our nation’s wetlands. See [U.S. Environmental Protection Agency, National Wetland Condition Assessment](#). Will this tool help the agencies determine whether the quality of the nation’s wetlands has degraded in the last 50-100 years? The next 50-100 years?

2. The 2005 Fish and Wildlife report indicated that net wetland acreage in the United States had increased between 1998 and 2004. Much of the net growth was attributable to projects to create or restore ponds and other wetlands on agricultural lands. Should the increase in acreage be viewed as a success? When compared to the values and functions provided by the wetlands lost? When compared to the losses of other types of wetlands, such as coastal wetlands, where restoration projects did not outpace conversion projects?
3. ***Mission Accomplished?*** In 2008, President George W. Bush released a report indicating that more than 3.6 million acres of wetlands had been restored, protected or preserved as part of an initiative that he announced in 2004 to create, improve or protect at least 3 million acres of wetlands by 2009. See [Office of the President, Council on Environmental Quality, Conserving America’s Wetlands 2008: Four Years of Progress Implementing the President’s Goal \(April 2008\)](#). Environmental groups criticized the report because it did not quantify wetland losses during the corresponding period, or indicate whether the actions resulted in any net gain of acreage, let alone values or functions.
4. The Natural Resources Conservation Service (NRCS), within the U.S. Department of Agriculture, also collects and analyzes data relating to wetland acreage as part of its National Resources Inventory. See [U.S. Department of Agriculture, Natural Resources Conservation Service, National Resources Inventory](#). It relies on the same classification system for wetlands as the Fish and Wildlife Service, but the study only examines resources on non-federal land in the conterminous United States. See [U.S. Department of Agriculture, Natural Resources Conservation Service, 2007 Natural Resources Inventory: Wetlands 1 \(2013\)](#). In addition, the study periods are different from the study periods used by the Fish and Wildlife Service. *Id.* Consequently, it is difficult to compare the data from the NRCS and FWS studies. NRCS did, however, find net increases in wetland acreage between 1997 and 2002, and between 2002 and 2007. *Id.* at 5.

5. It is estimated that 75% of the remaining wetlands in the lower 48 states are on private lands. See [U.S. Environmental Protection Agency, Wetlands Protection: Partnering with Land Trusts](#). What impacts might that have for regulatory and legislative policy-making?

#### **IV. Wetland Delineation**

While Part II of this chapter focused on the classification systems that are used to categorize wetlands, this part examines the “delineation” process that is used to determine whether property is a wetland and to determine the physical boundaries of wetlands. With the exception of the Natural Resources Conservation Service, the federal agencies that regulate wetlands follow procedures in a 1987 technical manual developed by the Army Corps of Engineers to delineate wetlands. See [U.S. Army Corps of Engineers, Wetlands Research Technical Report Y-87-1, Corps of Engineers Wetlands Delineation Manual \(1987\) \[hereinafter “1987 Corps Delineation Manual”\]](#).

The agencies focus on three characteristics of wetlands to determine whether property is a wetland - **vegetation**, **soils** and **hydrology**. *Id.* ¶ 26(b). Except when an area has been altered or in a few other unusual circumstances, positive indicators of all three characteristics must be present for an area to be delineated as a wetland. *Id.* ¶ 26(c). Thus, an area that has wetland vegetation and wetland hydrology, but not wetland soils, will normally not be a wetland. Since vegetation, soils and hydrology differ throughout the country, the Corps has also developed supplements to the 1987 delineation manual that provide guidance on delineating wetlands in 10 different geographic regions. See [U.S. Army Corps of Engineers, Regional Supplements to the Corps Delineation Manual](#).

#### **Vegetation**

Wetlands are areas where the prevalent vegetation is hydrophytic vegetation (species that have the ability to grow, effectively compete, reproduce and/or persist in anaerobic soil conditions). See [1987 Corps Delineation Manual ¶¶ 26\(b\)\(1\)](#). The Fish and Wildlife Service publishes a list of hydrophytic vegetation that is used in making this determination. See [U.S. Department of the Interior, U.S. Fish and Wildlife Service, 2014 National Wetland Plant List](#). Generally, this criterion is met if more than 50% of the dominant plant species in the area are hydrophytic (categorized as obligate wetland plants, facultative wetland plants or facultative plants on the National Wetland Plant list). See [1987 Corps Delineation Manual ¶¶ 35\(a\)](#). In addition, identification of trees with shallow root systems, swollen trunks or roots growing from the plant stem or trunk above the soil surface may sometimes indicate that the vegetation criterion is satisfied. See [U.S. Army Corps of Engineers, Recognizing Wetlands](#).



Photo 9 NRCS Photo By Bob Nichols  
[http://commons.wikimedia.org/wiki/File:NRCSNE00023\\_-\\_Nebraska\\_\(5167\)\(NRCS\\_Photo\\_Gallery\).jpg](http://commons.wikimedia.org/wiki/File:NRCSNE00023_-_Nebraska_(5167)(NRCS_Photo_Gallery).jpg)

## Soils

Areas meet the criterion for wetland soils if the soils in the area are hydric soils (*i.e.*, “have characteristics that indicate that they were developed in conditions where soil oxygen is limited by the presence of saturated soil for long periods during the growing season.”) See [U.S. Army Corps of Engineers, \*Recognizing Wetlands\*](#). The Natural Resources Conservation Service maintains a list of hydric soils, see [U.S. Department of Agriculture, Natural Resources Conservation Service, \*Soil Taxonomy \(2d ed. 1999\)\*](#), and soil types can usually be identified by comparing soil colors at various depths to soil charts. See [Munsell Color,](#)

[Munsell Soil Color Charts](#). Since hydric soils can remain in an area even after the area no longer exhibits wetland hydrology or vegetation, though, soils are considered less reliable

indicators than the other two criterion. See Mark A. Chertok & Kate Sinding, *Federal Jurisdiction over Wetlands: “Waters of the United States”*, in *Wetlands Law and Policy* 87 (Section of Environment, Energy and Resources, American Bar Association, 2005).

## Hydrology

Areas meet the criterion for hydrology if they “are periodically inundated or have soils saturated to the surface at some time during the growing season.” See [1987 Corps Delineation Manual ¶¶ 46](#). The Corps provides the following helpful definition in an information pamphlet on recognizing wetlands, “wetland hydrology refers to the presence of water at or above the soil surface for a sufficient period of the year to significantly influence the plant types and soils that occur in the area.” See [U.S. Army Corps of Engineers, \*Recognizing Wetlands\*](#). Normally, areas must be inundated for at least a week during the growing season to meet the hydrology criterion. See Chertok & Sinding, *supra*, at 87. Inundation or saturation can be demonstrated by visual observation or recorded data, such as stream gage data, lake gage data, flood predictions and historical data. See [1987 Corps Delineation Manual ¶¶ 49](#). In addition to those methods, the hydrology criterion may be satisfied through observation of drift lines, sediment deposits, drainage patterns, or watermarks on vegetation. *Id.* Many of those indicators, though, do not reveal the frequency, timing or duration of flooding or the soil saturation. See [U.S. Army Corps of Engineers, \*Recognizing Wetlands\*](#). While hydrology “is often the least exact” of the criterion, “it is essential to establish that a wetland area is periodically inundated or has saturated soils during the growing season.” See [1987 Corps Delineation Manual ¶¶ 46](#).



## Interviews



Jan Goldman Carter, Senior Manager and Counsel for the National Wildlife Federation's Wetlands and Water Resources Program, discusses:

1. The value of a scientific background for a career in environmental law. ([YouTube](#))
2. The judicial and legislative understanding of, and receptivity to, scientific issues involving wetlands. ([YouTube](#))



Stephen Samuels, an Assistant Section Chief in the Environmental Defense Section of the Environment and Natural Resources Division of the U.S. Department of Justice, discusses the challenge of influencing courts and legislatures with scientific information on the values and functions of wetlands. ([YouTube](#))

## RESOURCES

[Corps of Engineers Video on Delineating Wetlands](#)

[DNREC \(Delaware\) Video on Wetlands and Identifying Wetlands](#)

[1987 Corps Delineation Manual & Regional Supplements \(Map of regions for suppl.\)](#)

[Field Evaluation Questionnaire used by Corps in delineating wetlands](#)

[National Food Security Act Manual \(includes NRCS delineation procedures\)](#)

[National Wetlands Inventory](#) by Fish and Wildlife Service

National Wetlands Inventory - [Mapping Utility](#) (Search for Wetlands)

## Research Problems

**1. Agency Reports:** While federal law requires agencies to publish rules and various adjudicative decisions and guidance documents in the Federal Register, *see* Chapter 3, *infra*, agencies are generally not required to publish reports that they produce in any specific format. However, most agencies make significant reports that they produce available on the agency's website. See if you can locate a report issued by the United States Fish and Wildlife Service entitled "Status and Trends of Wetlands in the Coastal Watersheds of the Conterminous United States 2004 to 2009". According to the report, in 2009, there were an estimated 41.1 million acres of wetlands in the coastal watersheds of the United States.

- a. What percentage of those wetlands were freshwater wetlands?
- b. What percentage of those wetlands were saltwater wetlands?
- c. Which coastal region experienced a new gain in wetland acreage between 2004 and 2009?

**2. Guidance documents:** Although a few agency guidance documents are published in the Federal Register, most are not. However, agencies publish frequently requested guidance documents on their websites. If guidance documents are not available on the agency's website, interested persons normally have to contact the agency to request a copy of the guidance document (if they know that the guidance document exists). See if you can locate the Regional Supplement to the Corps of Engineers Wetland Delineation Manual that would apply to property located in New York State. Which section of the Corps' 1987 Delineation Manual is replaced, for that Region, by Chapter 2 of the Regional Supplement?

## Chapter Quiz

Now that you've finished Chapter 1, why not try a CALI lesson on the material at: <http://cca.li/PQ>. It should only take about fifteen minutes.

# Chapter 2

## The History of Regulation

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### I. Early Development Laws

Sentiments toward wetlands have evolved significantly over the history of our nation, and wetlands laws have evolved significantly as well. For much of the eighteenth and nineteenth centuries, public sentiment and legislation favored the draining and conversion of wetlands. They were long considered “insect-ridden, unattractive, and dangerous” places. See William A. Niering, *Wetlands* 19 (Chanticleer Press, 1985). In 1732, William Byrd II, the founder of Richmond, Virginia, described the [Great Dismal Swamp](#) (now a national wildlife refuge) as “a vast body of mire and nastiness.” See [U.S. Department of Interior, U.S. Fish and Wildlife Service, \*The Great Dismal Swamp and the Underground Railroad\*](#). Thirty years later, George Washington joined several partners to form “Adventurers for Draining the Dismal Swamp” and the Virginia General Assembly authorized their company to harvest the timber and drain much of the swamp, which extended over 2,000 square miles at the time. See [The Diaries of George Washington, Vol. 1: 11 March 1748–13 November 1765, at 319-320](#) (ed. Donald Jackson. Charlottesville: University Press of Virginia, 1976).

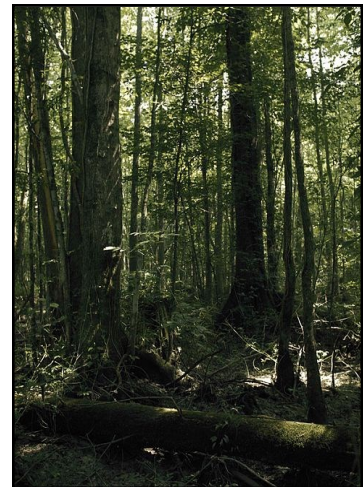


Photo 10 USFWS Photo by S. Bournique  
[http://commons.wikimedia.org/wiki/File:Great\\_dismal\\_swamp.jpg](http://commons.wikimedia.org/wiki/File:Great_dismal_swamp.jpg)

To the extent that Congress legislated in the area of natural resources in the eighteenth and nineteenth centuries, laws such as the Homestead Act of 1862, Act of May 20, 1862, Pub. L. 37-62, 12 Stat. 392 (which required the “improvement” of homesteads), and the General Mining Act of 1872, [30 U.S.C. §§ 22-47](#), focused on encouraging the settlement of the country and the exploitation of natural resources, as opposed to protecting and conserving resources. Federal laws regarding wetlands at the time were no different. **The Swamp Wetland Act of 1849**, 9 Stat. 352 (1849), granted to Louisiana all of the swamp lands in the State that were not suitable for cultivation, so that the State could build levees and drains to “reclaim” the wetlands. See [Shaw, Samuel P. and C. Gordon Fredine, U.S. Department of the Interior, Circular 39 \*Wetlands of the United States - Their Extent and Their Value to Waterfowl and Other Wildlife\* \(1956\) \[hereinafter “USGS, \*Wetlands of the United States\*”\]](#). **The Swamp Wetland Act of 1850**, 9 Stat. 519 (1850), granted the swamp lands in 12 other states (Alabama, Arkansas, California, Florida, Illinois, Indiana, Iowa,

Michigan, Mississippi, Missouri, Ohio, and Wisconsin) to those states for similar purposes. See [USGS, \*Wetlands of the United States\*](#). In 1860, Congress extended the provisions of those laws to cover the wetlands in Minnesota and Oregon. *Id.* Through those laws, almost 65 million acres of wetlands were given to the States. *Id.* The States sold or gave away most of those wetlands to local governments or developers, and now most are in private hands. *Id.* Most of the wetlands that were destroyed over the first two centuries of our nation were converted to agricultural lands, usually by private landowners. See [National Research Council. \*Wetlands: Characteristics and Boundaries 17\* \(Washington, DC: The National Academies Press, 1995\)](#).

At the end of the nineteenth century, Congress passed the **Rivers and Harbors Appropriations Act of 1899**, see [33 U.S.C. § 401, et. seq.](#), a law that would eventually play a role in limiting the destruction and conversion of wetlands. See Chapters 4 and 6, *infra*. However, the primary focus of that law is on protecting the navigability of the nation's waters and protecting interstate commerce, which is often accomplished through dredging or the construction of channels. While the law includes provisions that limit obstructions in navigable waters, see [33 U.S.C. § 403](#), and prohibits the deposit of refuse in navigable waters, see [33 U.S.C. § 407](#), it was almost three quarters of a century after the law was enacted before courts upheld the government's authority to prohibit obstruction activities in wetlands for environmental reasons under the law. See [Zabel v. Tabb, 430 F.2d 199 \(5<sup>th</sup> Cir. 1970\)](#). Thus, at the time, enactment of the law did not signal a significant shift in the congressional policy or attitude toward wetlands.

The prevailing sentiment towards wetlands at the turn of the twentieth century was probably expressed most clearly in the Supreme Court's 1900 decision in [Leovy v. United States](#), when Justice Shiras, for the Court, wrote:

If there is any fact which may be supposed to be known by everybody, and therefore by courts, it is that swamps and stagnant waters are the cause of malarial and malignant fevers, and that the police power is never more legitimately exercised than in removing such nuisances.

177 U.S. 621, 636 (1900). The Court also noted that converting the wetlands in the case to agricultural use increased the value of the land from \$5,000 to \$100,000 and could possibly increase the value to \$300,000. *Id.* at 627.

## II. A Slow Shift to Conservation

Although large segments of the public and policymakers adopted views similar to those expressed by the Court, the turn of the twentieth century also witnessed the birth of a national conservation movement. In 1903, by Executive Order, President Theodore Roosevelt established the country's first National Wildlife Refuge, [Pelican Island National](#)

[Wildlife Refuge](#), in south Florida. See [U.S. Department of the Interior, U.S. Fish and Wildlife Service, \*Short History of the Refuge System: The Early Years \(1864-1920\)\*](#). While the Pelican Island Refuge was the first National Wildlife Refuge, federal and state governments and private organizations had already begun to acquire wetlands to establish wildlife sanctuaries in the late nineteenth century. See [National Research Council. \*Wetlands: Characteristics and Boundaries 45\* \(Washington, DC: The National Academies Press, 1995\)](#). In the six years after he established the Pelican Island National Wildlife Refuge, President Roosevelt issued 51 additional Executive Orders that established wildlife reservations in 17 States. *Id.* As it approached its centennial, the National Wildlife Refuge System included more than 520 units in all 50 states, covering 93 million acres of wildlife habitat. See [U.S. Department of the Interior, U.S. Fish and Wildlife Service, \*Short History of the Refuge System: Approaching the Centennial \(1997 and On\)\*](#). For an in-depth history of the National Wildlife Refuge System, see Robert L. Fischman, [The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation](#), 29 *Ecology L. Quarterly* 457 (2002).

A few years after President Roosevelt left office, in 1913, Congress enacted the **Weeks-McLean Act**, Ch. 145, 37 Stat. 828, 847 (1913), to prohibit the commercial hunting and shipment of migratory birds across state lines. The law, which was enacted as a rider to appropriations legislation, was held unconstitutional as violating the Tenth Amendment, but was replaced a few years later by the **Migratory Bird Treaty Act of 1918**, [16 U.S.C. § 703, et seq.](#), which prohibits hunting, capturing, possessing, selling and many other activities with regard to migratory birds that are protected by an international migratory bird treaty. Although those laws were not enacted to provide protection to wetlands, they demonstrated Congress' concern with protecting migratory birds, and that concern would eventually lead to further legislation to protect the habitat, including wetlands habitat, of those birds.



Photo 11 Public Domain Photo  
[http://commons.wikimedia.org/wiki/File:Duck\\_stamp.jpg](http://commons.wikimedia.org/wiki/File:Duck_stamp.jpg)

were originally created as federal licenses to hunt migratory waterfowl. *Id.* Today, Duck Stamps also serve as entry passes to National Wildlife Refuges and many people buy Duck

Two of the earliest federal wetland conservation laws were the **Migratory Bird Conservation Act of 1929**, [16 U.S.C. §§ 715-715d, 715e, 715f-715r](#), which authorized, but did not permanently fund, the acquisition and preservation of wetlands as habitat for waterfowl, and the **Migratory Bird Hunting Stamp Act of 1934**, [16 U.S.C. §§ 718 - 718j](#) (generally referred to as “The Duck Stamp Act”), which created a funding source for the wetlands conservation authorized by the 1929 law. See [U.S. Department of the Interior, U.S. Fish and Wildlife Service, Federal Duck Stamp Office, \*What Are Duck Stamps?\*](#) Duck Stamps are pictorial stamps that are produced by the Fish and Wildlife Service which

Stamps simply to promote wetland conservation, as ninety-eight cents out of every dollar from the sale of Duck stamps is used to purchase or lease wetland habitat for National Wildlife Refuges. *Id.* Since 1934, the Fish and Wildlife Service has raised more than 800 million dollars from the sale of Duck Stamps and has purchased or leased more than 6 million acres of wetlands with those proceeds. *Id.*

Although Congress created the Duck Stamp program in 1934 to fund federal *acquisition and protection* of wetlands, between 1940 and 1977, the U.S. Department of Agriculture provided technical information and cost-sharing, through its Agricultural Conservation Program, to assist landowners in *draining* wetlands. See [U.S. Congress, Office of Technology Assessment, OTA-O-206, \*Wetlands: Their Use and Regulation\* 77 \(Mar. 1984\).](#)

### III. Towards Comprehensive Federal Regulation

As was the case with most environmental issues, though, federal regulatory involvement in wetlands protection grew during the end of the 1960s and throughout the 1970s. At first, Congress and the Corps strengthened the wetland protections in the **Rivers and Harbors Act**. In 1965, Congress amended the [Fish and Wildlife Coordination Act](#) to require agencies to consider opportunities for fish and wildlife enhancement when planning any navigation, flood control, reclamation, hydroelectric or multipurpose water resource project. See Pub. L. 89-72, 79 Stat. 213 (1965). After that, the Corps entered into an agreement with the Fish and Wildlife Service to consult on projects that the Corps would review for authorization under the Rivers and Harbors Act. See [Memorandum of Understanding Between the Secretary of the Interior and the Secretary of the Army \(July 13, 1967\)](#). Around the same time, the Corps adopted regulations to incorporate a “public interest” review, including a focus on environmental factors, into the Rivers and Harbors Act permitting program. See [33 Fed. Reg. 18670 \(Dec. 18, 1968\)](#). While these changes provided some additional protection for wetlands, the Rivers and Harbors Act only regulates activities in waters that are, were historically, or could potentially be, navigable, see Chapter 4, *infra*, so the Corps’ jurisdiction over wetlands under the Act is fairly narrow.

Instead, most federal regulation of wetlands derives from the **Federal Water Pollution Control Act Amendments of 1972**, Pub. L. 92-500, 86 Stat. 816 (1972), which, after subsequent amendments, is commonly known as the [Clean Water Act](#). The statute prohibits the addition of pollutants into navigable waters, a term that has been interpreted by the government and courts to include wetlands. See Chapter 4, *infra*. However, Section 404 of the statute authorizes the Corps of Engineers to issue permits to authorize the discharge of dredged or fill material into navigable waters. See [33 U.S.C. § 1344](#). While the [Endangered Species Act](#) and the [National Environmental Policy Act](#) play a role in protecting wetlands, as discussed later, the Clean Water Act Section 404 permitting program is the primary federal tool for regulating and protecting wetlands and most of this book focuses on that program. Although the statute authorizes the Corps to issue the permits, Congress gave EPA the authority, with the Corps, to develop the guidelines that

the Corps uses to determine whether to issue the permits. See [33 U.S.C. § 1344\(b\)\(1\)](#). The statute also authorizes EPA and the Fish and Wildlife Service to comment on permit applications, and authorizes EPA to veto Section 404 permits. See [33 U.S.C. § 1344\(c\)](#). The division of authority between EPA and the Corps has created some tension over the years.

In the first few years after Congress created the Section 404 permit program, the Corps of Engineers interpreted the Clean Water Act narrowly to provide limited jurisdiction over wetlands. See Chapter 4, *infra*. By 1975, however, the Corps had adopted a more expansive reading of the statute. *Id.* Since those early years of the Section 404 program, several Presidents have issued Executive Orders, adopted action plans or announced policies to expand protection of wetlands.

In 1977, President Carter issued **Executive Order 11990**, which required federal agencies to “take action to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands.” See [Executive Order 11990, Protection of Wetlands § 1 \(May 24, 1977\)](#). Significantly, the order also required agencies to “avoid undertaking or providing assistance for new construction located in wetlands unless the ... agency finds (1) that there is no practicable alternative to such construction, and (2) that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use.” *Id.* § 2. A little over a decade later, in 1988, President George H.W. Bush endorsed a policy, which was developed by a National Wetlands Policy Forum, of “no net loss” of wetlands. See [Julie M. Sibbing, National Wildlife Federation, Nowhere Near No Net Loss](#). After President Clinton took office, through a **1993 Interagency Wetlands Plan**, he reaffirmed the “no net loss” policy as an interim goal and called for an increase in the quality and quantity of the nation’s wetlands as a long term goal. See [White House Office on Environmental Policy, Protecting America’s Wetlands: A Fair, Flexible, and Effective Approach \(Aug. 24, 1993\)](#). A decade after that, on Earth Day, 2004, President George W. Bush announced a **Strategy to Increase Wetland Acres and Quality**, which focused on moving from a “no net loss” policy to an increase in wetland acres and quality. See [The White House, Office of the Press Secretary, Wetlands Initiative Announced on Earth Day \(April 22, 2004\)](#).

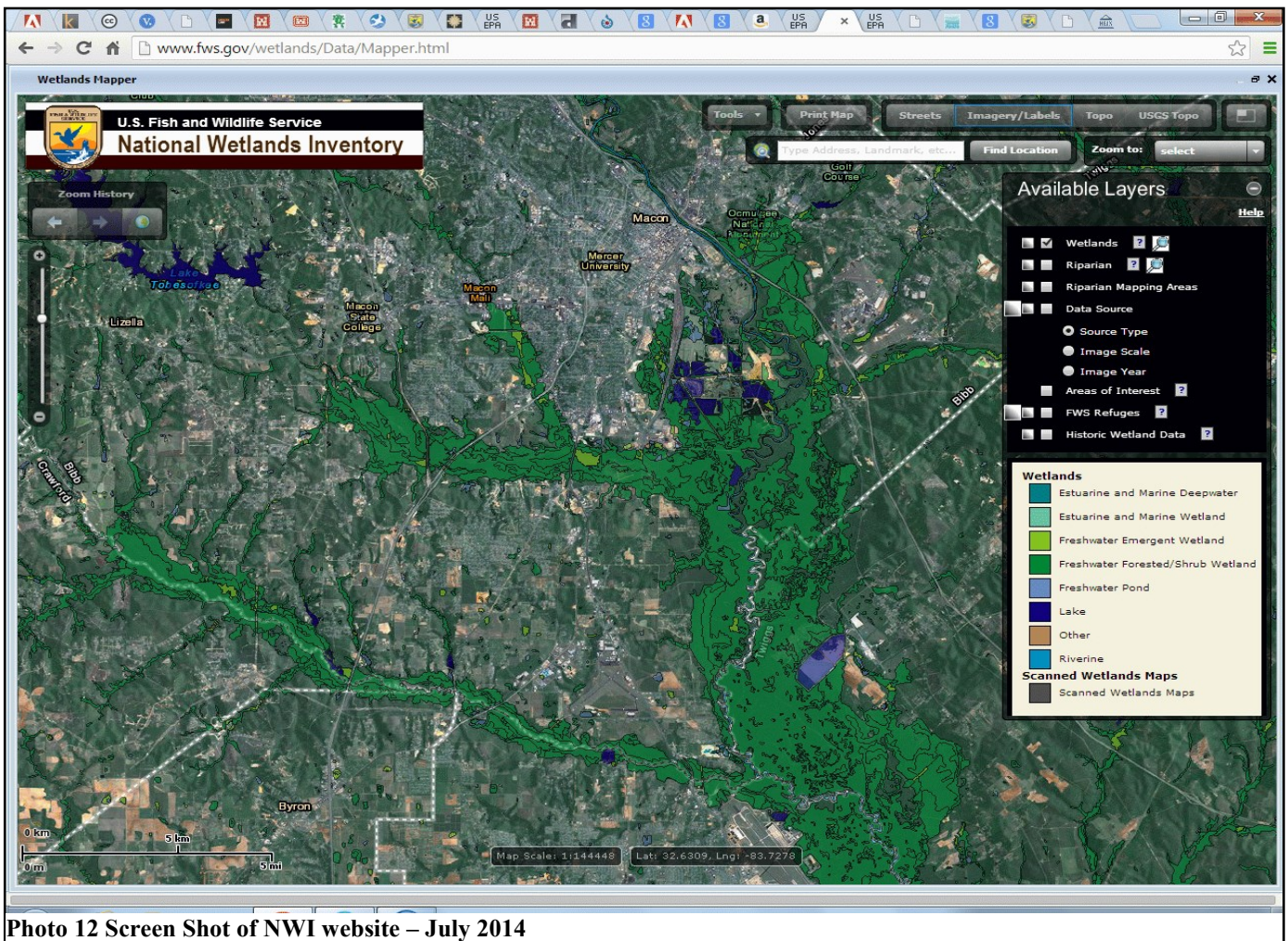


Photo 12 Screen Shot of NWI website – July 2014

For several decades, the [National Wetlands Inventory](#) has played an important role in providing information about whether the “no net loss” goal is being met, at least with regard to wetland **acreage**. The Fish and Wildlife Service began work on the national inventory of wetlands in 1974 “to provide biologists and others with information on the distribution and type of wetlands and to aid in conservation efforts.” See [U.S. Department of the Interior, U.S. Fish and Wildlife Service, NWI Overview](#). The agency developed the Cowardin wetland classification system described in Chapter 1, *supra*, to classify wetlands for the inventory. *Id.* While wetlands in the National Wetlands Inventory were originally plotted on paper maps, the wetlands data in the inventory is now accessible and searchable online in digital maps. *Id.* The data are also used to prepare the Service’s periodic reports on wetland status and trends discussed in Chapter 1. *Id.* Congress required the agency to prepare those periodic reports as part of the **Emergency Wetlands Resources Act of 1986**, [16 U.S.C. §§ 3901-3932](#).

#### IV. Conservation Programs and Agricultural Programs

While the Clean Water Act Section 404 program ushered in an era of comprehensive federal regulation, the federal government also provides protection for wetlands through a



variety of economic incentive programs. Some of the programs have been in place for several decades. For instance, in 1965, Congress passed the **Land and Water Conservation Fund Act of 1965**, creating a Land and Water Conservation Fund, which provides money to federal, state and local governments to purchase property, including wetlands, for conservation and to fund conservation projects. See [16 U.S.C. §§ 4601-4 - 4601-11](#). Through 2014, the Fund provided \$4 billion in grants to States to fund more than 42,000 conservation projects. See [Land and Water Conservation Fund Coalition, 50 Years of Conserving America the Beautiful 6 \(2014\)](#).

In 1970, Congress passed the **Water Bank Act**, which authorizes the Departments of Agriculture and Interior to enter into 10 year contracts with landowners to preserve wetlands on their land and protect wildlife habitat. See [16 U.S.C. §§ 1301-1311](#). In return, the landowners receive annual payments over the contract period. *Id.* In Fiscal Year 2012, Congress appropriated \$7.5 million to fund the Water Bank Program. See [U.S. Department of Agriculture, Natural Resources Conservation Service, Water Bank Program](#).

From those modest beginnings, Congress greatly expanded the number and scope of federal programs that provide economic incentives for wetland protection shortly after the release of a report by the Congressional Office of Technology Assessment (“OTA”) that identified several federal laws and programs that impeded wetlands protection. See [U.S. Congress, Office of Technology Assessment, OTA-O-206, Wetlands: Their Use and Regulation 78 \(Mar. 1984\)](#). The report noted that the Federal tax code provided numerous deductions that gave farmers incentives to clear and drain wetlands for agricultural use. *Id.* The report also concluded that several other federal programs, including cost sharing and technical assistance in the U.S. Department of Agriculture’s Agricultural Conservation Program, Farmers Home Administration Loans, Federal disaster payments and crop insurance, and commodity programs provided incentives to farmers to clear and drain wetlands. *Id.* at 78-81.

In 1985, the year after the OTA report, Congress included several important provisions in the Food Security Act of 1985 (also known as the 1985 Farm Bill) to protect wetlands. See [Pub. L. 99-198, 99 Stat. 1509 \(1985\)](#). The law created a **Conservation Reserve Program**, which provides yearly rental payments to farmers (owners of highly erodible cropland) who agree to remove their land from agricultural production for 10 - 15 years and to plant vegetation that will improve the environmental health and quality of their land. *Id.* § 1231. The program is administered by the Farm Service Agency within the U.S. Department of Agriculture. See [U.S. Department of Agriculture, Farm Service Agency, Conservation Programs: Conservation Reserve Program](#). Since 1988, restoration of cropped wetlands is one of the activities that is eligible for program participation. Although the original law authorized enrollment of up to 45 million acres of highly erodible land in the reserve, that limit was reduced to 39 million acres in the 2002 Farm Bill and 32 million acres in the 2008 Farm Bill. The program provides about \$2 billion to farmers each year and, as of 2012, the program restored over 2 million acres of wetlands and reduced soil erosion by more than

300 million tons per year. See [U.S. Department of Agriculture, Farm Service Agency, \*The Conservation Reserve Program: 45<sup>th</sup> Signup Results\* \(Sept. 2013\)](#).

Perhaps the more significant provisions in the 1985 Farm Bill, though, were the **Swampbuster** provisions. Congress included provisions in the law that disqualified farmers from receiving all or a portion of Federal farm program benefits, including loans, subsidies, crop insurance, and price supports, if they produced agricultural commodities on converted wetlands. See [16 U.S.C. § 3821](#). The Swampbuster provisions were strengthened in the Food Agriculture, Conservation and Trade Act of 1990 (also known as the 1990 Farm Bill), which disqualifies farmers from receiving those benefits if they convert wetlands for the purpose of, or with the effect of, making production of agricultural commodities on them possible. See [16 U.S.C. § 3821\(c\)](#). As noted in Chapters 1, *supra*, and 4, *infra*, the Natural Resources Conservation Service delineates wetlands for purposes of the Swampbuster provisions, see [28 U.S.C. § 3822](#), and uses a different delineation manual than the manual used by the Corps of Engineers, EPA and the Department of Interior. While the Natural Resources Conservation Service and the Farm Service Agency administer the Swampbuster provisions, the Fish and Wildlife Service, within the Department of Interior, provides technical assistance to those agencies, and their relationship in administering the law is outlined in a 2002 Memorandum of Understanding. See [U.S. Department of Agriculture and U.S. Department of Interior, \*Memorandum of Understanding Regarding Implementation of the 2002 Farm Bill Conservation Provisions\* \(Aug. 6, 2002\)](#).

Subsequent farm bills created additional wetland conservation programs. For instance, the 1990 Farm Bill created the **Wetlands Reserve Program**, which provided money and technical assistance to farmers and other landowners to protect, enhance and restore wetlands on their property. See [16 U.S.C. §§ 3837 - 3837f](#). Landowners could enroll in the program by placing a permanent conservation easement or a 30 year conservation easement on their property, in which case they were fully or partially (for the 30 year easement) compensated for the value of the easement and received funding to cover the restoration costs. *Id.* [§ 3837a](#). If the landowners did not prefer to place a conservation easement on their property, they could still enroll their land in the program, but they only received funding to cover the restoration costs. *Id.* In the first twenty years of the program, which was administered by the Natural Resources Conservation Service (NRCS), more than 11,000 landowners participated, enrolling more than 2.3 million acres of wetlands. See [U.S. Department of Agriculture, Natural Resources Conservation Service, \*Restoring America's Wetlands: A Private Lands Conservation Success Story\*](#). The program was replaced, in the 2014 Farm Bill, by an **Agricultural Conservation Easement Program**, also administered by NRCS, which includes a Wetland Reserve Easement program and an Agricultural Land Easement program. In the Wetland Reserve Easement program, landowners place permanent easements, 30 year easements, or shorter term easements on wetlands in exchange for compensation for the easement and funding to cover wetland restoration costs. *Id.*

The Federal Agricultural Improvement and Reform Act of 1996 (the 1996 Farm Bill or Freedom to Farm Act) created the **Wildlife Habitat Incentive Program (WHIP)** and the **Environmental Quality Incentive Program (EQIP)**, both of which are administered by the Natural Resources Conservation Service. See [Pub. L. 104-127, 100 Stat. 888 \(1996\)](#). The Wildlife Habitat Incentive Program provided funding and technical assistance to landowners to develop wildlife habitat on private agricultural land, nonindustrial private forest land, and tribal lands, see [16 U.S.C. 3839bb-1](#), but was not re-authorized when Congress enacted the 2014 Farm Bill. The Environmental Quality Incentives Program provides financial and technical assistance to agricultural producers to plan and implement conservation practices and related projects. See [16 U.S.C. §§ 3839aa - 3839aa-9](#). Landowners sign contracts for a term between one and ten years. [Id. § 3839aa-2](#).

Congress has also created other wetland conservation programs independent of farm bills. For instance, the **North American Wetlands Conservation Act of 1989** created a program to provide matching grants to organizations and individuals who are partnering to carry out wetlands conservation projects in the U.S., Mexico, or Canada. See [16 U.S.C. §§ 4401 - 4414](#). Between 1990 and September, 2013, the program provided about \$1.8 billion to more than 5,000 partners, who contributed about \$2.68 billion in matching funds, affecting more than 27.5 million acres of habitat. See [U.S. Department of the Interior, U.S. Fish and Wildlife Service, Division of Bird Habitat Conservation, North American Wetlands Conservation Act](#). Congress created another wetlands conservation grant program in the Coastal Wetlands Planning, Protection, and Restoration Act of 1990. The **National Coastal Wetlands Conservation Grant Program** is administered by the Fish and Wildlife Service and provides grants to States and Territories to protect, restore, and enhance coastal habitats. See [16 U.S.C. §§ 3951 - 3956](#). From the time the program was created through early 2013, about \$183 million in grants were awarded to 25 States and one U.S. territory to acquire, restore or protect 250,000 acres of coastal wetland ecosystems. See [U.S. Department of the Interior, U.S. Fish and Wildlife Service, National Coastal Wetlands Conservation Grant Program](#). Finally, in 2006, Congress passed the **Partners for Fish and Wildlife Act**, which creates a program to provide financial and technical assistance to landowners and Tribes for projects in a variety of habitats to conserve or restore vegetation, hydrology and soils associated with imperiled ecosystems, including bottomland hardwoods, marshes, rivers, streams and a variety of other habitats, including ecosystems that provide habitat for a rare, declining or protected species. See [U.S. Department of the Interior, U.S. Fish and Wildlife Service, Partners for Fish and Wildlife Program](#). Between 1987 and 2010, the program restored and enhanced over 1 million acres of wetlands. See [U.S. Department of the Interior, U.S. Fish and Wildlife Service, Partners for Fish and Wildlife Program: Regional Showcase Accomplishments: Fiscal Year 2010 at 2](#).

The following chart summarizes the variety of economic incentive programs for wetlands conservation:

| <b>Program</b>  | <b>Agency</b>               | <b>Recipients</b>   | <b>Type of Assistance</b>          | <b>Requirements</b>   |
|---|-----------------------------|---|------------------------------------|---|
| <a href="#">Conservation Reserve Program</a>                    | USDA - Farm Service Agency  | Farmers   | Rental payments for 10-15 years    | Remove land from agricultural production and vegetate to improve the environmental health and quality of the land |
| <a href="#">EQIP</a>  | USDA – NRCS                 | Agricultural Producers  | \$\$\$ and Technical Assistance    | Plan and implement conservation projects and related projects   |
| <a href="#">Land and Water Conservation Fund</a>                | DOI - National Park Service | Federal, State and Local Governments                              | \$\$\$                             | Conservation projects, including purchase of land for conservation  |
| <a href="#">National Coastal Wetlands Conservation Grants</a>   | DOI - FWS                   | States and Territories  | Grants                             | Protect, restore or enhance coastal habitats  |
| <a href="#">North American Wetlands Conservation Act Grants</a> | DOI - FWS                   | Organizations and Individuals                                     | Grants                             | Wetlands conservation projects in the U.S., Mexico or Canada  |
| <a href="#">Partners for Fish and Wildlife</a>                  | DOI - FWS                   | Landowners and Tribes   | \$\$\$ and Technical Assistance    | Conservation or restoration of wetlands and other habitats  |
| <a href="#">Water Bank Act</a>                                  | USDA / DOI                  | Landowners  | Annual payments for a 10 year term | Preserve wetlands and protect wildlife habitat  |
| <a href="#">WHIP</a><br>(Eliminated in 2014 Farm Bill)          | USDA – NRCS                 | Landowners: Private agricultural; Private forestland; Tribal land | \$\$\$ and Technical Assistance    | Develop wildlife habitat on the land  |
| <a href="#">Agricultural Conservation Easement Program</a>      | USDA – NRCS                 | Landowners and Tribes   | \$\$\$ and Technical Assistance    | Protect, enhance, or restore wetlands and place a conservation easement on the land                               |

## Additional Resources

[USDA Farm Service Agency Reports and Statistics](#)  
[USDA NRCS Conservation Programs website](#)  
[USDA NRCS Data and Reports](#) and [Data Mapper](#)  
[USDA Video re: the History of the Conservation Reserve Program](#)  
[USDA NRCS report re: WRP Successes](#)  
[USDA NRCS Photo Gallery of WRP Restoration Projects](#)  
[Land and Water Conservation Fund - Find Grants in Your Community](#)

## Questions and Comments

1. **Multiple agencies:** Why do you think that Congress divided responsibility for administration of the Section 404 permit program between the Corps of Engineers and EPA in the manner that it did? What expertise and historical regulatory authority did each have with regard to wetlands and water pollution? Does having regulation divided between the Corps and the EPA make effective regulation more difficult? Should only one agency have authority over regulation? Which one? See [\*Alyson C. Flournoy, Section 404 at Thirty-Something: A Program in Search of a Policy\*, 55 Ala. L. Rev. 607 \(2004\)](#); [\*Sam Kalen, Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction Over Wetlands\*, 69 N.D. L. Rev. 873 \(1994\)](#); [\*Michael C. Blumm and D. Bernard Zaleha, Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform\*, 60 U. Colo. L. Rev. 695 \(1989\)](#). This division has created some tension, as will be explored in the chapters in this book that address jurisdiction over waters of the United States, delineation, mitigation, and the EPA veto process, among others.
2. **Access to information:** The Department of Interior and the Department of Agriculture provide Internet access to significant amounts of data regarding their wetlands programs. For instance, the Department of Interior provides a user-friendly mapping interface for its National Wetlands Inventory and convenient access to information about grants provided through the Land and Water Conservation Fund. Who are some of the audiences that might use that information and how could it be used? To familiarize yourself with the tools, (a) find the wetlands that are located near you and identify the type of wetlands; (b) find the most recent grant awarded by the Land and Water Conservation Fund to a project in your community.
3. **Swampbuster exemptions:** Although the Food Security Act disqualifies farmers from receiving various federal farm benefits or participating in various federal farm programs if they produce agricultural commodities on converted wetlands, the statute includes a grandfather provision that allows farming on wetlands that were

converted (or the conversion was commenced) to cropland prior to December 23, 1985 (the date of enactment of the law) as long as the wetlands did not exhibit wetlands characteristics after the conversion. [16 U.S.C. § 3822\(b\)\(1\)\(A\)](#). The exemption applies even if the converted cropland once again exhibits wetland characteristics due to various reasons outlined in the statute. [Id. § 3822\(b\)\(1\)\(G\)](#). The statute or agency regulations also exempt farmers from disqualification for farming artificial wetlands, farming that does not destroy natural wetland characteristics or that has a minimal effect on wetland functions and values in the area, or farming where the farmer has acted in good faith and without intent to violate the law. [Id. § 3822](#).

4. **Voluntary programs:** What are some of the limitations to the effectiveness of voluntary economic incentive programs as a tool to conserve and protect wetlands? Is there a national plan or are there regional plans that identify the ecosystems and resources to protect under the voluntary programs? Who determines which wetlands and resources should be protected, and on what criteria? How much wetland acreage can be protected under the programs? What factors limit the amount of acreage? Where does the money to protect the wetlands come from? Are there advantages to conservation easements over rental payments and cost sharing? Advantages to loans versus grants? Is there strong federal oversight of the projects? Several years ago, EPA's National Center for Environmental Economics prepared a comprehensive report on various environmental economic incentive programs. See [U.S. Environmental Protection Agency, EPA-240-R-01-001, \*The United States Experience with Economic Incentives for Protecting the Environment\* \(Jan. 2001\)](#).
5. The Clean Water Act Section 404 program is unusual in the sense that federal environmental laws tend to avoid imposing mandates or restrictions on individual behavior, although many environmental problems, such as climate change, are caused primarily by individual lifestyle choices. See [Stephen M. Johnson, \*Is Religion the Environment's Last Best Hope?: Targeting Change in Individual Behavior Through Personal Norm Activation\*, 24 J. Env'tl. L. & Litig. 119 \(2009\)](#); [Michael P. Vandenberg, \*From Smokestack to SUV: The Individual as Regulated Entity in the New Era of Environmental Law\*, 57 Vand. L. Rev. 515 \(2004\)](#). One of the reasons that direct regulation of individual behavior frequently generates public opposition is that direct regulation makes the costs of the regulation more transparent than indirect regulation. See [Katrina Fischer Kuh, \*When Government Intrudes: Regulating Individual Behaviors That Harm the Environment\*, 61 Duke L. J. 1111 \(2012\)](#). While Professor Kuh reports that customer service surveys of Section 404 permit applicants do not generally reveal animosity or opposition to the program, she acknowledges that the permitting requirement can generate opposition in specific cases because (1) it imposes burdens on the applicant that create benefits for the public; and (2) it involves federal regulation of land use, a traditionally local activity. *Id.* at 1142-1143.

6. **A program in flux:** As you read this book, focusing on issues such as the delineation of wetlands, federal jurisdiction over waters of the United States, the divided responsibility of the Corps and EPA, and the implementation of compensatory mitigation requirements, consider the following quote by Professor Alyson Flournoy: “A review of the section 404 program’s evolution ... reveals a program (and agency) perpetually in flux with a poorly defined goal.” See [Alyson C. Flournoy, Section 404 at Thirty-Something: A Program in Search of a Policy, 55 Ala. L. Rev. 607, 608 \(2004\)](#). Is there a need for a different federal law to protect wetlands? What might be done differently?

## V. International Wetlands Protection - U.S. Role

In 1971, 18 nations reached agreement on the terms of a treaty that committed the nations to identify and protect “Wetlands of International Importance” and to plan for the “wise use” (sustainable use) of all their wetlands. See [Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Feb. 2, 1971, T.I.A.S. No. 1084, 996 U.N.T.S. 245 \(amended 1982 & 1987\)](#). The Ramsar Convention, named for the city in Iran that hosted the negotiations, came into force in 1975. See [The Ramsar Convention on Wetlands, A Brief History of the Ramsar Convention](#). As of October, 2014, 168 nations signed on to the Convention. See [The Ramsar Convention on Wetlands, Country Profiles](#). The United States joined in 1987. *Id.* Two years later, Congress passed the North American Wetlands Conservation Act of 1989, mentioned in the last section, to partially implement the convention in the United States. Pursuant to the terms of the Ramsar Convention, the Fish and Wildlife Service adopted a “Policy on Wetlands of International Importance” in 1990. See [55 Fed. Reg. 13856 \(Apr. 12, 1990\)](#). As of February, 2014, 36 sites in the United States were designated as wetlands of international importance. See [The Ramsar Convention on Wetlands, The Annotated Ramsar List: United States](#).

### Research Problems

**International Materials:** International materials can be very difficult to locate, but the Ramsar Convention website includes the governing documents and many other useful wetlands resources, including a [site database](#). See if you can answer the following questions after browsing through their website: (1) Which wetlands were the first wetlands in the United States to be included on the Ramsar List of Wetlands of International Importance? (2) In what year were they added to the list? (3) Which wetlands on the List of Wetlands of International Importance are located closest to your home? Sounds like a good field trip opportunity. February 2 is [World Wetlands Day](#).

## VI. The Agencies That Regulate Wetlands

Although there are hundreds of agencies at the federal, state and local level that play some role in the regulation or protection of wetlands, the four primary **federal** agencies that are involved in wetlands protection are the U.S. Army Corps of Engineers (within the U.S. Department of Defense), the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service (within the U.S. Department of Interior) and the Natural Resources Conservation Agency (within the U.S. Department of Agriculture).

### A. Corps of Engineers

The [Corps of Engineers](#) is part of the Department of the Army, within the Department of Defense. The Corps' military leader, the Chief of Engineers, a three star general, reports directly to the Assistant Secretary of the Army for Civil Works. See [Melissa Samet, American Rivers & National Wildlife Federation, A Citizens Guide to the Corps of Engineers 10 \(2009\)](#). The Corps has primary authority for issuing Section 404 permits, including both individual permits and general permits, and is responsible for the day to day administration of the permit program. The Corps also administers the Section 10 Rivers and Harbors Act permitting program. Both permitting programs are part of the [Department of the Army Regulatory Program](#).

The Corps' headquarters is located in Washington, D.C., and the agency is divided regionally into 9 Divisions, each of which is commanded by a Division Engineer. There are 43 Districts within the 9 Divisions, each of which is commanded by a District Engineer. Although regulations and general program policies are developed at the headquarters level, other aspects of the Corps' regulatory program are very decentralized, with most permitting and enforcement decisions being made on a regional level. For instance, final agency decisions on most administrative appeals are made by the Division Engineers. See [33 C.F.R. § 331](#). General permits may also be issued on a regional basis, as well as national basis. See Chapter 6, *infra*.

A map of the Corps' [Divisions and Districts](#) is included below:





Photo 13 Corps of Engineers Map from <http://www.usace.army.mil/Locations.aspx>

For more information about the Corps, [American Rivers](#) and the [National Wildlife Federation](#) have prepared a useful guide to the history and structure of the agency and its programs. See [Melissa Samet, American Rivers & National Wildlife Federation, A Citizens Guide to the Corps of Engineers 10 \(2009\)](#).

B.

## Environmental Protection Agency

The [Environmental Protection Agency](#) is an independent agency within the Executive Branch and it administers most of the nation's environmental laws. For wetlands, EPA developed the guidelines that are used to evaluate Section 404 permits, the agency reviews and comments on the permits, and it can veto permits. See [33 U.S.C. § 1344\(c\)](#). EPA also shares wetlands enforcement authority with the Corps. See Chapter 10, *infra*.

EPA is headed by an Administrator and has its headquarters in Washington, D.C. See [U.S. Environmental Protection Agency, About EPA](#). The agency is divided into [ten regions](#), each

of which is headed by a Regional Administrator. Development of regulations and national policies on wetlands takes place in the [Office of Water](#), within EPA's headquarters in Washington. However, daily administration of the agency's responsibilities related to permitting and enforcement under the 404 program takes place in the regions, in coordination with headquarters. Unlike the Corps, though, EPA's administrative appeals are handled by an [Environmental Appeals Board](#), headquartered in Washington. In the event that there are disputes between EPA and the Corps regarding individual permits, EPA's Assistant Administrator for Water (head of the Office of Water), makes final decisions regarding permit vetoes. A map of EPA's regional office structure is included below:

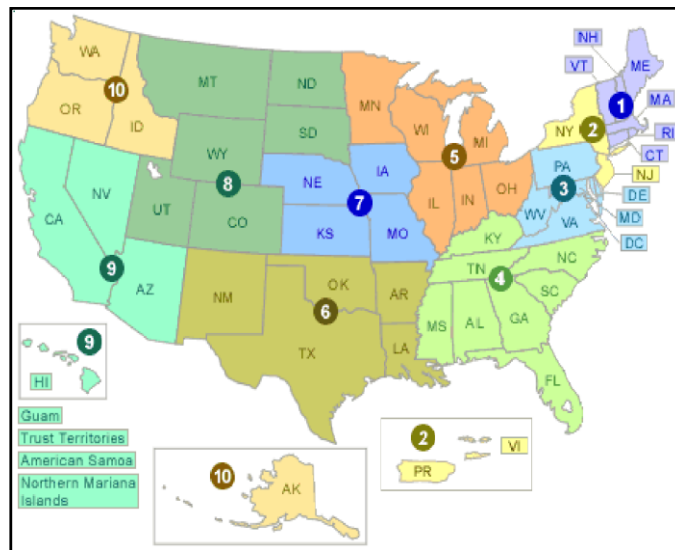


Photo 14 EPA Map from <http://www2.epa.gov/aboutepa/visiting-regional-office>

### C. U.S. Fish and Wildlife Service

The [U.S. Fish and Wildlife Service](#) is an agency within the Department of the Interior (DOI). The agency is headed by a Director, who reports to the Assistant Secretary for Fish, Wildlife and Parks in DOI, and it is divided into 8 regions. See [U.S. Department of the Interior, U.S. Fish and Wildlife Service, Our Regions](#). The agency reviews and comments on Section 404 permits and Rivers and Harbors Act permits based on authority in the Fish and Wildlife Coordination Act and the Clean Water Act. The agency also administers the National Wetlands Inventory.

### D. Natural Resources Conservation Service

The [Natural Resources Conservation Service](#) is an agency within the Department of Agriculture (USDA). It is headed by a Chief, who reports to the Under Secretary for Natural Resources and the Environment in USDA, and it is divided into 4 regions, which are headed by Regional Conservationists. See [U.S. Department of Agriculture, Natural](#)

[Resources Conservation Service, National Headquarters Directory](#). The agency administers the Swampbuster provisions of the Food Security Act and administers several economic incentive programs for protection of wetlands on agricultural lands. See *supra*.

**E. U.S. Department of Justice, Environment and Natural Resources Division**

While many disputes involving wetlands are resolved administratively, without going to court, wetland litigation for the Corps, EPA and other federal agencies is handled by the [Environment and Natural Resources Division](#) of the United States Department of Justice. Within the Division, the [Environmental Defense Section](#) handles wetlands enforcement as well as defense of most lawsuits against the Corps and EPA involving actions relating to the Section 404 permitting program. For a history of the Division, see [Richard J. Lazarus, One Hundred Years of the Environment and Natural Resources Division, 41 ELR 10985 \(Nov. 2011\)](#); [U.S. Department of Justice, ENRD: Public Lands and National Treasures: The First 100 Years of the Environment and Natural Resources Division \(2009\)](#).

## Interview



Stephen Samuels, an Assistant Section Chief in the Environmental Defense Section of the Environment and Natural Resources Division of the U.S. Department of Justice, discusses:

- The division of responsibility for wetlands litigation within the Environment and Natural Resources Division ([YouTube](#)).
- How the Environmental Defense Section represents multiple federal agencies that may take conflicting positions on issues in litigation ([YouTube](#)).
- The role that DOJ's Environment and Natural Resources Division plays in developing regulations and legislation, focusing specifically on legislative and regulatory initiatives to clarify the scope of the "waters of the U.S." ([YouTube](#)).

## Research Problems

**Agency Contacts:** You represent a landowner in Charleston, South Carolina, who is interested in obtaining a wetlands permit from the Corps. You understand that the Regulatory Section of the Corps issues those permits at the District level. What telephone number would you call for more information about the permitting process? If you ultimately needed to appeal a decision of the District Office, to what Divisional Office would you appeal?

Assume that your client lives in Langhorne, Pennsylvania, instead of Charleston, and that your client is a neighbor of a developer who is filling wetlands without a permit. Your client wants to speak to someone at EPA about the violation in their office, rather than on the phone. Where is the closest Regional Office located?

## Hypothetical

Environmental law can be a complex area of practice. It often involves an intricate web of federal, state and local laws, regulations and policies, and the disputes may focus on complicated scientific principles. Consider that as you read the following dialogue between a lawyer and a client regarding a wetlands matter. The lawyer has practiced family law for twenty-five years and specializes in divorce cases. The client has retained the lawyer to finalize the terms of the client's third divorce.

**Scene:** Lawyer's office in Whitefish, Montana

**Client:** Well, three times was not the charm. I guess I keep you pretty busy, don't I?

**Lawyer:** I'm sure that you'll find true love one of these days. But until you do, I'm happy to help you move on with your life.

**Client:** Thanks. You do a great job and I'm very happy with your work, but I would like it if I didn't need to keep seeing you like this every few years. While I'm here, though, I had a question about a different issue. Do you do any environmental law?

**Lawyer:** If someone's got an environmental law question, it usually has some science in it. I usually try to stay as far away from those as I can.

**Client:** I don't think this one is that tough. Here's the thing. You know that my daughter just graduated from college with an environmental science degree.

**Lawyer:** That's great. Congratulations.

**Client:** Thanks. Well, she's visiting a few weeks ago and she tells me that she thinks that this little ditch in my backyard is a wetland. I told her that I was going to be filling it in to build a garage back there and she told me that I might need to get a permit to do that. She said something about a Clean Water Act. Does the city require permits for things like that? I know that I had to get a permit from P&Z when I re-built my deck, but I didn't know that they made you get permits to fill ditches.

**Lawyer:** Like I said. I really have never handled any environmental cases, so I'm not sure about whether the city or anyone else would require a permit for that. My sister is a lawyer, too, and she deals with a lot of environmental matters in her real estate practice. I'd give her a call, but we're not really talking right now. I've got a friend in town who does hazardous waste law. He might know something about wetlands and I could probably call him, but he's on vacation until next week.

**Client:** Next week would be o.k. I'm not planning to do anything about the garage for a while, but I just wanted to know if I would need to get a permit **before** I did anything.

**Lawyer:** I'll do a little research on it, then, and get back to you. But you know, I really don't feel right about charging you for that, since I don't really do environmental law. This one will be on the house.

**Client:** Well, that's nice of you, but I really would feel better if I paid you for it.

**Lawyer:** I insist. No charge on this one. I'll look into it and get back to you as soon as I can. And I should have those papers for the divorce ready for you to sign tomorrow.

**Client:** Thanks. So I'll stop back tomorrow, then.

*(Client leaves)*

**Lawyer:** Sam, could you call Paul's office and see if he has some time to talk about a wetlands issue?

**Sam (Lawyer's assistant):** I would, but he's on vacation for the next month.

**Lawyer:** A month? I thought that he was getting back next week.

**Sam:** No. It's a month. He rented an RV and took the family to see all of the national parks in California.

**Lawyer:** Oh, well. I guess he won't be any help, then. Pat, I've got some research for you to do.

**Pat (Lawyer's paralegal):** O.K. What do you need?

**Lawyer:** I need you to find out whether someone needs to get a permit to fill a ditch to build a garage. Our client says that his daughter thinks that the ditch is a wetland and that the Clean Water Act might require him to get a permit to fill the ditch.

**Pat:** I'll get right on it.

*(Pat does some research and returns)*

**Pat:** Good news. I searched through the whole Clean Water Act online and it only mentions wetlands a few times, but doesn't say anything about requiring a permit to fill wetlands. It does have a few different permit programs, but they are only triggered if there is an addition of a pollutant to a navigable water. You said that the client was asking about a ditch, right?

**Lawyer:** Yeah. The client said a ditch. The client's daughter said a wetland. Neither of them said anything about a navigable water. I would imagine that a navigable water is something that you can navigate, right?

**Pat:** Well, I checked the regulations, and it's actually a little broader than that. It turns out that it's the federal government - EPA and the Army - that administer the Clean Water Act. It's not a local government thing. They've adopted regulations to define navigable waters. I didn't see anything in the regulations about ditches, though, so I think that our client can go ahead and fill the ditch without worrying about getting a permit.

**Lawyer:** That's great. Thanks for finding that so quickly. I guess this environmental law isn't that tough, after all. I'm sure our client will be happy to hear that they can go ahead and fill the ditch. I'll call the client right now and fill them in on the good news.

**Lawyer** (on the phone): Jordan, good news. I did some research on your wetlands issue and it looks like you won't need a permit. You can go ahead and get started on your garage whenever you like....

### Question

Were you troubled, in any way, by the lawyer's representation of the client on the wetlands issue in the scenario above? Is it relevant that the lawyer was not paid for the advice? What should the lawyer have done differently? See [American Bar Association, Model Rule of Professional Conduct 1.1 \(and accompanying comments\)](#).

## Chapter Quiz

Now that you've finished Chapter 2, why not try a CALI lesson on the material at: <http://cca.li/PR>. It should only take about fifteen minutes.

# Chapter 3

## Administrative Law

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The laws that protect wetlands in the United States are administered by [the United States Environmental Protection Agency \(EPA\)](#), the [United States Army Corps of Engineers \(the Corps\)](#), and a variety of other federal, state and local agencies. It is important, therefore, to understand the basic principles of administrative law in order to comprehend the nuances of federal and state wetlands protection laws. This Chapter provides a general introduction to administrative agencies and administrative law. Although the Chapter focuses primarily on federal agencies, state and local agencies are often governed by state laws that closely resemble the federal laws.

### I. Nature of Administrative Agencies

Administrative agencies are ubiquitous. Think, for a moment, about your typical day. Your alarm clock wakes you to the sounds of your favorite radio station. That station is licensed and regulated by the [Federal Communications Commission](#), a federal administrative agency. As you jump into the shower, the water may be delivered to your home by a [municipal or regional water authority](#), a public utility, which is usually regulated by a [state utility commission](#). The water quality is regulated by [federal](#) and [state](#) environmental or health agencies.

When you go to the kitchen for breakfast and pour yourself a bowl of cereal, you'll notice that the cereal package includes nutritional labels required by the [Food and Drug Administration](#). In addition, the production of the ingredients in the cereal, and in most of the other foods that you put on your breakfast table, is likely regulated by [federal](#), [state](#) and maybe [local](#) agricultural and environmental agencies. Those products were produced by businesses that were required to adhere to fair labor standards and workplace safety standards set by [federal](#) and [state](#) labor departments. The electricity in your home is most likely provided by a utility that is regulated by [federal](#) and [state](#) energy, environmental and labor agencies, as well as [state utility commissions](#).

If you drive to work, the car that you are driving was also likely produced in a factory that was subject to fair labor and workplace safety standards. In addition, the car was built to

#### Resources

List of Federal Agencies from [USA.gov](#) and the [Federal Register](#)  
[Administrative Conference of the U.S.](#) (ACUS)  
[Office of Management and Budget](#) (White House)  
[Sourcebook of U.S. Executive Agencies](#) (ACUS)



comply with safety and environmental standards set by [federal](#) and [state](#) transportation and environmental agencies. Indeed, it is hard to identify events in your daily routine that are not touched, in some way, by administrative agency regulation.

Administrative agencies exist at the federal, state and local levels and are often referred to as the “**fourth branch**” of government. As is obvious from the discussion above, agencies exert broad authorities over public and private activities. Moreover, agencies can take a variety of types of actions. First, agencies often create standards, limits or other requirements that apply to the communities that they regulate (**rulemaking**). For instance, an environmental agency may set limits on the amount of lead that can be emitted into the air by a factory or a car. As another example, in the context of wetlands regulation, the EPA and Corps establish rules that outline the requirements for obtaining a permit to fill wetlands under the Clean Water Act. See Chapter 6, *infra*.

In addition to setting standards and making rules, agencies apply the law and the rules that they make to specific factual situations on a case-by-case basis (**adjudication**). In the wetlands context, for instance, the Corps decides whether to issue or deny a wetlands permit, and what conditions to include in the permit, by applying the Clean Water Act and its regulations to the developer’s proposed activity. See Chapter 6, *infra*. Similarly, the Corps or EPA can bring an administrative or judicial enforcement action against a person when the agency determines that the person’s activities violate the Clean Water Act and/or the agency’s regulations. See Chapter 10, *infra*.

In order to create rules and to make decisions on a case-by-case basis, agencies also collect information from the regulated community and other sources. They maintain that information, make much of it available to the public and often create reports based on the information.

Consequently, administrative agencies engage in activities that can be characterized as **legislative** (setting standards and establishing other rules), **judicial** (applying the law to facts on a case-by-case basis) and **executive** (implementing and administering the law). This **combination of functions** in federal administrative agencies creates some tensions, because the United States Constitution exclusively assigns these functions to other branches of government. Article I of the Constitution creates the Legislative Branch, and provides that “[a]ll legislative powers herein granted shall be vested in a Congress of the United States.” [U.S. Const., Art. I](#). Similarly, Article III creates the Judicial Branch, and provides that “[t]he judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.” [U.S. Const., Art. III](#). Finally, Article II of the Constitution provides that “[t]he executive power shall be vested in a President of the United States.” [U.S. Const., Art. II](#). In contrast to those direct statements, there is no provision in the Constitution that explicitly creates or authorizes the creation of administrative agencies or authorizes them to carry out the powers delegated to the legislative, judicial or executive branches of government.

Similar separation-of-powers concerns can arise under state constitutions, which also do not explicitly provide for state administrative agencies.

Nevertheless, agencies have flourished throughout the twentieth and twenty-first centuries and courts have generally upheld most delegations of authority to agencies against constitutional challenges, as discussed further below.

## II. Limits on Agency Authority

### A. Statutory Limits

Agencies are created by statutes. The composition of agencies, their authorities, and any limits on their authorities are set forth in legislation. Congress or a state legislature often initially creates an agency through an “**organic statute**,” but the legislature frequently expands or limits the agency’s powers through other statutes that target the specific agency or statutes that apply generically to a group of agencies or to all agencies. For example, EPA was initially created by a Presidential Reorganization Plan that reassigned responsibilities of other federal administrative agencies to EPA, see [Office of the President, Reorganization Plan No. 3 of 1970 \(July 9, 1970\)](#), but Congress subsequently passed dozens of laws that expanded or limited EPA’s authority to regulate various activities. As noted throughout this book, the Clean Water Act, [33 U.S.C. §§ 1251, et seq.](#), establishes most of the authorities and limits on authority for wetlands regulation by EPA and the Army Corps.

As noted above, Congress frequently authorizes, and sometimes requires, agencies to set standards or to promulgate rules that apply generally to persons or entities regulated by the statute. There are several reasons why Congress gives this power, which seems like law-making authority, to agencies. In some cases, the legislature simply does not have the **time** to set standards at the level of detail that is necessary to implement the law. For instance, the Clean Water Act imposes limits on hundreds of different types of industries regarding the amount of potentially hundreds of different types of pollutants that they might discharge based on technologies that those industries can use to reduce or eliminate those pollutants. See [U.S. Environmental Protection Agency, Water: Industry Effluent Guidelines](#). When Congress created the program limiting those pollutants, it delegated to the EPA the authority to establish specific numerical limits on the industries through a rulemaking process, rather than trying to establish those thousands of numerical limits in the statute itself. See [33 U.S.C. § 1311](#).

In addition to not having the time to enact detailed standards, Congress also may not have the **expertise** to determine what specific numerical standards may be appropriate for specific industries. Although the legislature will likely have some experts on staff, they will not have the resources that are available to an administrative agency, which will also have the experience of implementing the law on a day-to-day basis. Continuing with the Clean

Water Act example, because an agency may be better equipped to determine the specific numerical pollutant limits, Congress will often give the agency general directions regarding how to set those numerical limits but allow the agency to establish the limits through a rulemaking process.

There are a few other reasons why Congress frequently delegates authority to agencies to make rules. To the extent that regulatory restrictions in a law are based on specific technological, economic, or other assumptions that are in existence at the time the restrictions are put in place, those restrictions may no longer be appropriate when the technological, economic or other circumstances change. If Congress were to have set the regulatory restrictions by statute, Congress could only change the restrictions by enacting another statute. When Congress delegates the authority to an agency to set the restrictions through rulemaking, however, the agency can **respond to changing circumstances** by changing the requirements through rulemaking, as opposed to waiting for legislative consensus. In theory, the rulemaking process should be faster than the legislative process. In practice, that is not always true.

A final reason why Congress may delegate authority to an agency to make rules, rather than setting the standards directly through legislation, is that Congress may **lack the political will** to set the standards itself. Delegating to an agency the authority to set specific standards gives Congress political cover from difficult political issues in implementation of the legislation.

## B. Constitutional Limits

While agencies are created by statute, Congress cannot amend the Constitution simply by enacting a statute. Consequently, at the dawn of the era of administrative law, opponents of agency rulemaking frequently asserted that the delegation of rulemaking authority to an agency violated constitutional **separation of powers principles**, on the basis that Article I vests legislative powers exclusively in Congress. The United States Supreme Court outlined the limits of Congress' authority to delegate rulemaking authority to agencies in [J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 \(1928\)](#), when the Court held that Congress could constitutionally delegate rulemaking authority as long as it set forth "by legislative act an **intelligible principle** to which the person or body authorized to fix rates is directed to conform." Thus, as long as Congress provides a very general standard for the agency to use to set more specific standards, courts will uphold the statutory delegation of rulemaking authority against a Constitutional challenge. The Supreme Court has not struck down a federal statute on the grounds that it constituted an excessive delegation of legislative authority since 1935, when it invalidated codes of fair competition established under the National Industrial Recovery

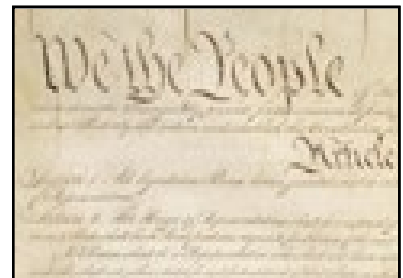


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Act in [\*A.L.A. Schechter Poultry Corp. v. United States\*, 295 U.S. 495 \(1935\)](#). Since that time, the Court has upheld broad delegations of authority, including the authority to set “just and reasonable rates”, see [\*FPC v. Hope Natural Gas Co.\*, 320 U.S. 591 \(1944\)](#), to set prices that are “fair and equitable”, see [\*Yakus v. United States\*, 321 U.S. 414 \(1944\)](#), and to regulate licensing “as public interest, convenience, or necessity require.” See [\*National Broadcasting Co. v. United States\*, 319 U.S. 190 \(1943\)](#). In a more recent decision in the environmental arena, the Supreme Court upheld the Clean Air Act delegation of authority to EPA to set “ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health.” See [\*Whitman v. American Trucking Assns., Inc.\*, 531 U.S. 457 \(2001\)](#).

The delegation of **adjudicative authority** to agencies has *also* been challenged as a violation of **separation of powers** principles. Because Article III vests all judicial power in the Article III courts, critics have argued that the delegation of authority to agencies to apply the law to facts on a case-by-case basis to issue or deny permits, to impose penalties, or to take other adjudicative actions violates the Constitution. A discussion of the case law interpreting the constitutional limits on the delegation of adjudicative authority to agencies is beyond the scope of this book. In the wetlands context, however, most final administrative adjudications can be challenged at some point in an Article III court, so the separation of powers issue has not proven problematic in the context of federal wetland regulation.

### C. Limits Imposed by Other Branches

Although agencies are referred to as the “fourth branch” of government, the other branches can influence agencies actions in a variety of ways. Because the source and limits of agencies’ powers are set by statute, **Congress** can exert significant influence over agencies by passing laws that reduce or eliminate agencies’ powers if Congress opposes actions taken by agencies. Similarly, agencies rely on annual appropriations legislation from Congress to fund their activities, so Congress can exert influence over agencies by decreasing, or threatening to decrease, an agency’s budget. In the wetlands context, Congress has frequently attached riders to appropriations legislation that limit the authority of the Corps to implement policies with which Congress disagrees. See Chapter 4, *infra*. In addition to those powers, the Senate has the power to approve the appointment of “officers,” which can include high ranking agency officials. See [\*U.S. Const., Art. II, § 2\*](#). The Senate may block or delay appointments of those officials if the Senate opposes the potential candidate or, sometimes, if the Senate opposes the policies that have been adopted by the agency. Even when Congress does not actually exercise any of these powers, it can exert control over agencies by threatening to exercise them. Congress frequently holds oversight hearings, calling agency leaders to testify regarding actions taken by the agency or to testify regarding proposed legislative changes.

The **President** also exerts control and influence over agencies, including the Corps and

EPA. The White House has ultimate control over the budget, legislative proposals, and litigation positions taken by Executive Branch agencies. Although the agencies can develop budget requests, the requests are coordinated through the White House [Office of Management and Budget](#) (OMB) and the White House makes the ultimate decision regarding the amount of funds to request for each agency. Similarly, agencies cannot work with legislators independently to advance legislative proposals to expand their authorities or eliminate responsibilities. Legislative proposals, like budget requests, must be coordinated through the OMB. OMB also reviews major regulations developed by agencies, as well as regulatory agendas and various guidance documents prepared by agencies. For litigation, Executive Branch agencies are generally represented by the Department of Justice, so the White House also can exert some control over the positions taken in litigation by agencies. The President also has the power to appoint and remove officers of the United States, which includes high ranking agency officials. See [U.S. Const., Art. II, § 2](#).

One of the more formal ways that the President controls Executive Branch agencies is through the issuance of [Executive Orders](#). Executive Orders are not laws; instead, they direct agencies, where agencies have discretion, to implement policies, take actions, or follow procedures outlined in the order. Because an Executive Order is not a law, it cannot change existing law, but it can influence the manner in which agencies exercise discretion afforded to them under existing laws. Executive Orders cannot be challenged in court, but some orders have been held to be enforceable in administrative proceedings. Over the years, Presidents have issued several Executive Orders that apply to the development of wetlands regulations and other regulations, including an Executive Order that requires agencies to weigh the costs and benefits of major rules, see [Executive Order 12866, 58 Fed. Reg. 51735 \(Oct. 4, 1993\)](#), and an Executive Order that requires agencies to consider whether their actions may unconstitutionally “take” property. See [Executive Order 12630, 53 Fed. Reg. 8859 \(Mar. 15, 1988\)](#).



The judicial branch also exerts control. Because the courts have the ultimate authority to adjudicate disputes involving the Clean Water Act and other wetlands protection laws, the judicial branch can limit agencies by invalidating their actions if they misinterpret the law, fail to follow procedures required by statutes, regulations, or the Constitution, or make decisions that are unreasonable. Those limits are explored more fully in the judicial review section of this Chapter.

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### III. Procedural Requirements for Agency Action

Although agencies engage in a variety of different activities, most agency actions can be categorized as either **rulemaking** or **adjudication**. As noted above, adjudication involves the application of law to a specific set of facts, while rulemaking involves establishing a general standard or obligation that applies broadly and prospectively. The Administrative Procedures Act (APA), the federal statute that establishes the procedures that all agencies must follow and that outlines the manner in which agency actions can be challenged in court, defines a “**rule**” as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency ...” [5 U.S.C. § 551\(4\)](#). The Act defines “**adjudication**”, as “agency process for formulation of an order”, [5 U.S.C. § 551\(7\)](#), and defines “**order**” as “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.” [5 U.S.C. § 551\(6\)](#). Although rulemaking and adjudication are distinct categories of agency actions, an agency can generally interpret and clarify ambiguous provisions of a statute **either** through rulemaking or in an adjudication, if Congress has given the agency both powers and has not required the agency to use a specific procedure to interpret the statute. See [Securities and Exchange Commission v. Chenery, 332 U.S. 194 \(1947\)](#).

Within the broad category of **rulemaking**, an agency’s rules can be divided into **legislative rules** (sometimes called “*substantive rules*”) and **non-legislative rules**. When Congress, in a statute, authorizes an agency to make rules that have the force of law and the agency adopts rules pursuant to that statutory authority, following the required administrative procedures (generally known as “notice and comment” rulemaking), the rules are **legislative rules**. For example, the Clean Water Act authorizes EPA to issue any regulations that are necessary to carry out the agency’s functions under the Act, see [33 U.S.C. § 1361\(a\)](#), and authorizes the Corps to adopt regulations to implement the Section 404 permit program. See [33 U.S.C. § 1344](#). Thus, when EPA adopts rules to clarify the meaning of the statutory term “waters of the United States,” which is not defined in the Clean Water Act, EPA’s rules are **legislative rules**. Similarly, the Corps’ section 404 permitting regulations, the 404(b)(1) Guidelines adopted by EPA, with the Corps, and the compensatory mitigation regulations adopted by EPA and the Corps are **legislative rules**.

While agencies with legislative rulemaking authority can adopt legislative rules, there are times when an agency does not have legislative rulemaking authority or when an agency has that authority but prefers not to exercise it. In those situations, agencies can still interpret a statute through a **non-legislative rule**. Agencies may choose to interpret statutes through non-legislative rules for a variety of reasons. First, as will be discussed below, agencies must follow certain procedures when adopting legislative rules, but are subject to very few procedural requirements when adopting non-legislative rules. Because the legislative rulemaking procedures may be time consuming, an agency may decide to

issue a non-legislative rule in order to announce its interpretation of the law more quickly. An agency might also decide to use a non-legislative rule because the agency is still uncertain about its interpretation of the statute and would like to retain the flexibility to change that interpretation without going through a legislative rulemaking process, which it would be required to do if it wanted to change a legislative rule. In addition, because a non-legislative rule is often not a “final agency action,” an agency can also generally avoid legal challenges to the rule in court.

**Non-legislative rules** are issued in a variety of forms, *including interpretative rules, policy statements, guidance documents, and enforcement manuals*, among others. In the wetlands context, the Corps issues many legal and policy interpretations in the form of [Regulatory Guidance Letters](#). The delineation manual discussed in Chapter 1 is another example of a non-legislative rule. In addition, important wetlands legal and policy directives of EPA, the Corps, and other federal agencies are included in Memoranda of Agreement and Memoranda of Understanding discussed throughout this book. Federal administrative agencies, across the board, have increasingly interpreted statutes through guidance documents and other non-legislative rules because of the advantages outlined above.

While an agency can save time, avoid litigation, and retain flexibility by interpreting a statute through a non-legislative rule, legislative rules have **two distinct advantages** over non-legislative rules. First, legislative rules have the **force of law** and agencies do not have to independently justify the basis for the rule when applying it to a specific factual setting. Non-legislative rules, on the other hand, are not binding on the agency or the regulated community. An agency must justify the basis for the legal or policy interpretation adopted in the non-legislative rule when applying it to a specific factual setting. The second important advantage that legislative rules have is that courts will accord an agency more **deference** when reviewing the statutory interpretation adopted by the agency in a legislative rule than in a non-legislative rule. The different standards of judicial review that apply to legislative and non-legislative rules are discussed in the judicial review section of this Chapter.

| Advantages of Legislative v. Non-Legislative Rules |                                  |
|--|----------------------------------|
| Legislative Rules                                  | Non-Legislative Rules            |
| Force of Law                                       | Fewer Procedures (Quicker)       |
| Greater Judicial Deference                         | Easier to Change (More Flexible) |
|  | Harder to Challenge in Court     |

### A. Rulemaking Procedures

The procedures that agencies must follow when adopting rules or making decisions through adjudication are set by the APA, which applies to all federal agencies, but can be modified by specific statutes, such as the Clean Water Act. The APA requires agencies to follow either **formal rulemaking**

**procedures** or **informal** (“*notice and comment*”) **rulemaking procedures** when adopting legislative rules, see [5 U.S.C. § 553](#), but it exempts **non-legislative rules** from those procedural requirements. *Id.* § 553(b)(3)(A). **Formal rulemaking** involves a trial-type hearing before an administrative law judge, who makes a decision based on a record presented at the hearing. See 5 U.S.C. §§ [556](#) - [557](#). An agency must adopt rules through formal rulemaking only when the statute that authorizes the agency to make rules requires the agency to make the rules “on the record after opportunity for an agency hearing.” See [5 U.S.C. § 553\(c\)](#). Courts rarely interpret statutes to require formal rulemaking and have not interpreted the Clean Water Act to require formal rulemaking for the regulations adopted by the Corps or EPA.

If an agency is not required to follow formal rulemaking procedures when adopting legislative rules, the agency must follow the APA’s **informal rulemaking procedures**. For informal rulemaking, the APA requires agencies to begin the process by publishing a **notice of proposed rulemaking** in the Federal Register, including the terms or substance of the proposed rule, a reference to the legal authority for the rule, and a statement of the time, place and nature of public rulemaking proceedings. See [5 U.S.C. § 553\(b\)](#). The

| Resources   |
|---|
| OIRA - <a href="#">Rulemaking Primer</a>  |
| OMB’s <a href="#">Reginfo website</a> (Track regulations)   |
| <a href="#">Regulations.gov</a> (Online rulemaking)   |
| <a href="#">Regulation Room</a> (Cornell e-rulemaking project)                                      |
| <a href="#">Congressional Research Service report</a> on Rulemaking and Judicial Review (2011)      |
| <a href="#">Congressional Research Service report</a> re: number of rules issued by agencies (2013) |



agency is not required to hold public hearings, although it can, but the agency *is* required to provide interested persons an **opportunity to comment** on the proposed rule. *Id.* § 553(c). Unlike formal rulemaking, therefore, there is no formal record for the agency's decision and the agency can rely solely on written submissions in formulating its rule. At the end of the comment period, the agency reviews the public input and decides whether to make any changes to the proposed rule based on the comments that the agency received. When the agency has finalized the rule in light of the public input, the APA requires the agency to provide a "**concise general statement of [the] .. basis and purpose**" of the rules, which the agency publishes with the final rule in the Federal Register. *Id.* Agencies do not have to change rules based on the public input, but they must consider the comments, respond to the major comments and identify the "major issues of policy" that they considered in formulating the rule. See [United States of America v. Nova Scotia Food Products Corp., 568 F.2d 240 \(2d Cir. 1977\)](#).

Today, significant portions of the notice-and-comment process take place online, and interested persons are able to view comments submitted by other persons during the comment period, as well as significant amounts of information that the agency relied on in preparing a proposed rule that would not have been as readily accessible before agencies began to carry out the notice and comment process online. See [Regulations.gov](#).

While the APA establishes procedures for **legislative** (or substantive) **rules**, it does not require agencies to follow any specific procedures when adopting **non-legislative rules**. Agencies generally develop such guidance with very little input from the public or notice to the public. Although the APA does not require agencies to follow procedures in **developing** non-legislative rules, the Freedom of Information Act (FOIA) requires federal agencies to **publish**, in the Federal Register, "statements of general policy or interpretations of general applicability formulated and adopted by the agency." See [5 U.S.C. § 552\(a\)\(1\)\(D\)](#). In addition, FOIA requires agencies to **make available to the public** other statements of policy or interpretations that haven't been published in the Federal Register, as well as "administrative staff manuals and instructions to staff that affect a member of the public." *Id.* § 552(a)(2).

Congress can impose additional procedural requirements on the development of legislative or non-legislative rules by agencies and, when it does, the rulemaking process is referred to as **hybrid rulemaking**. However, the Clean Water Act does not require EPA or the Corps to follow additional procedures beyond the APA's when adopting regulations and guidance under the statute.

## APA Procedural Requirements for Rulemaking

| Legislative Rules -<br>Formal Rulemaking   | Legislative Rules -<br>Informal Rulemaking   | Non-Legislative Rules                       |
|--|--|---|
| trial-type hearing<br>before an ALJ;<br>decision “on the<br>record”<br>5 U.S.C. § 556, 557 | notice; opportunity for<br>comment; publication of<br>final rule with a concise<br>general statement of the<br>basis and purpose<br>5 U.S.C. § 553 | publish or make available<br>5 U.S.C. § 552 |

### Research and Drafting Exercise

Most federal agencies post proposed and final rules, as well as guidance documents and other important public information on their websites. In addition, many federal agencies post proposed rulemakings and documents that support the proposed rulemakings online and allow interested persons to comment online through Regulations.gov. Those agencies also make the final rules, supporting documents and comments available on Regulations.gov. Guidance documents and other agency materials are also posted on Regulations.gov.

1. In 2014, EPA and the Corps of Engineers issued a notice of proposed rulemaking to re-define “waters of the United States” under the Clean Water Act. The proposal was posted on Regulations.gov on April 21, 2014. Search Regulations.gov to find the EPA docket for the proposed rule. When you find it, click on the “Open Docket Folder” link. This lists all of the documents that were posted that are associated with the rulemaking. Who were the agency contacts for the rule?

2. Review the proposed rule and identify: (a) the legal authority for the rule adopted by EPA and the Corps; (b) the length of the comment period; (c) the proposed definition of “waters of the United States” that would be included in 33 C.F.R. § 328.3(a); (d) whether EPA or the Corps prepared an environmental impact statement or an environmental assessment for the proposed rulemaking.

3. In the supporting documents for the proposed rule, review the economic analysis prepared for the rule and identify the total low and high estimated incremental annual indirect costs and benefits of the proposed rule (per Exhibit 16). Does EPA estimate that benefits of the rule will be greater than the costs?

4. To get a flavor for the nature of public comments submitted in notice and comment rulemaking, search for the docket for the Federal Motor Carrier Safety Administration’s (FMCSA) rule restricting the use of cellular phones by drivers of commercial vehicles. (FMCSA-2010-0096). When you find that docket, click on the “Open Docket Folder” link and browse through some of the comments submitted to FMCSA for the rule. Compare, for instance, the comments submitted by Robert Paul Smith or Wildon Clyde Renn III, and those submitted by Edison Electric Institute or the Alliance of Automobile Manufacturers. Review the “Tips for Submitting Effective Comments” on the [Regulations.gov](http://www.regulations.gov) page. After reviewing those tips, do you think that the comments of Mr. Smith or the Edison Electric Institute are likely to be more effective?

### **Research and Drafting Exercise (continued)**

5. Regulations.gov allows users to browse through regulations, guidance documents and the other material available on the site by category or by topic, as well as searching by keyword. Click on the “Browse” button on the top of the page, pick a category (i.e., Aerospace and Transportation; Banking and Financial; etc.) and search for all of the proposed rules that are open for comment in that category. Which category did you choose and how many proposed rules did you find that were currently open for comment?

6. Regulations.gov allows you to track a rulemaking’s progress. Choose a proposed rulemaking and sign up for email alerts on the proposed rulemaking.

7. Draft a comment on a proposed rulemaking that you find on Regulations.gov and identify the rulemaking for which the comment is being submitted. **DO NOT SUBMIT THE COMMENT ONLINE!!** Think about the “Tips for Submitting Effective Comments” as you draft your comment. If you cannot find a rulemaking that interests you (like the EPA/Corps rulemaking identified above), draft a comment for the National Highway Traffic Safety Administration’s “Event Data Recorders” rule (docket number NHTSA-2012-0177) or the Consumer Product Safety Commission’s “Safety Standard for Hand-Held Infant Carriers” rule (docket number CPSC-2012-0068). Both of those rules have been finalized, but you can access the dockets for the rules, which will include the proposed rules and supporting documents, by entering the docket number for the rule in the search box at the top of the Regulations.gov page and clicking on the “Open Docket Folder” for the resulting file.

## B. Adjudication Procedures

Just as the APA establishes minimum procedural requirements for federal agency rulemaking, it also establishes minimum procedural requirements for **adjudication**. As with rulemaking, the APA creates distinct procedural requirements for **formal adjudication** and for **informal adjudication**. See [5 U.S.C. § 554](#). The APA requirements for **formal adjudication** are similar to the requirements for formal rulemaking and include a trial-type hearing before an administrative law judge, who makes a decision based on a record presented at the hearing. See 5 U.S.C. §§ [554](#), [556](#) - [557](#).

In contrast to the requirements for **formal adjudication**, the APA includes minimal requirements for **informal adjudication**. If an agency is denying a written application, petition or request of a person, the statute requires the agency to give the person “prompt notice” and “a brief statement of the grounds for denial.” [5 U.S.C. § 555\(e\)](#). The APA does not include any other procedural requirements for informal adjudication, but FOIA requires agencies to “make available for public inspection and copying” any “final opinions ... as well as orders, made in the adjudication of cases.” *Id.* § 552(a)(2)(A).

Agencies must follow the APA’s **formal adjudication** procedures whenever a statute requires the agency to make a decision in adjudication “on the record after opportunity for an agency hearing.” See [5 U.S.C. § 554\(a\)](#). Although formal adjudication is much more common than formal rulemaking, courts have not interpreted the Clean Water Act to require the Corps or EPA to use formal adjudication procedures when taking most actions involving wetland regulation under the Clean Water Act, including issuing or denying permits, vetoing permits, or approving or denying a state’s request to assume federal permitting authority. However, the agencies **must** use formal adjudication procedures when they are imposing Class II penalties, the most severe form of administrative penalties that the Clean Water Act authorizes. See [33 U.S.C. § 1319\(g\)\(2\)\(B\)](#).

## Hypotheticals

1. 33 U.S.C. § 1361 provides that "[t]he [EPA] Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under [the Clean Water Act.]" If EPA planned to issue rules under the Clean Water Act to define the undefined statutory term "waters of the United States", would the agency be required to follow the trial-type procedures in 5 U.S.C. §§ 556 and 557 when issuing those rules?
2. 33 U.S.C. § 1317(b)(1) provides that "[t]he [EPA] Administrator shall, within one hundred and eighty days after October 18, 1972, and from time to time thereafter, publish proposed regulations establishing pretreatment standards for ... [sewage treatment plants]. Not later than ninety days after such publication, and after opportunity for public hearing, the Administrator shall promulgate such pretreatment standards. ..." Does the statute require EPA to use formal rulemaking procedures or notice and comment rulemaking when promulgating pretreatment standards?
3. 33 U.S.C. § 1344(a) provides that "[t]he Secretary [of the Army] may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites." Does the statute require the Secretary to follow the trial-type procedures in 5 U.S.C. §§ 556 and 557 when issuing permits?
4. 33 U.S.C. 1344(i), which focuses on federal oversight of states that have taken over administration of the Clean Water Act Section 404 permitting program, provides that "Whenever the Administrator determines after public hearing that a State is not administering a program approved under ... this section, in accordance with this section, the Administrator shall so notify the State, and if appropriate corrective action is not taken within a reasonable time, ... the Administrator shall ... withdraw approval of such program until the Administrator determines such corrective action has been taken..." Does the statute require EPA to use formal adjudication procedures when determining that a State is not administering a permitting program in accordance with Section 404 of the Clean Water Act? Does the statute require EPA to use formal adjudication procedures when determining that the State has taken corrective action and may take over administration of the permitting program again?

## IV. Judicial Review of Agency Action

### A. Prerequisites for a judicial challenge

In order to challenge an agency action in court, a litigant must generally demonstrate, at a minimum, that: (1) the action is **reviewable**; (2) the court has **jurisdiction** to hear the litigant's challenge and grant the requested relief; (3) the government has **waived sovereign immunity** and authorized the suit; and (4) the litigant has **standing** to sue.

In addition to establishing minimum procedural requirements for federal agencies, the **APA** creates the general framework for judicial review of federal agency actions. It provides that a “final agency action for which there is no other adequate remedy in a court ..[is] subject to judicial review,” [5 U.S.C. § 704](#), and “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” [5 U.S.C. § 702](#). As a result, “**final agency actions**” are presumptively **reviewable** in court. Chapter 10 of this book outlines the actions of the Corps and EPA that are “final agency actions” that are reviewable under the APA. The APA’s judicial review provisions, including the presumption of reviewability, do not apply when a **statute precludes judicial review** or when an **agency action is committed to agency discretion by law**, see [5 U.S.C. § 701\(a\)](#), but neither of those exceptions have significantly limited judicial review of the EPA’s or the Corps’ actions in implementing the federal wetlands protection program. Those exceptions are examined in more detail in Chapter 10 of this book.

The APA does not grant **subject matter jurisdiction** to any court to hear the challenges that it makes reviewable, so litigants must rely on another statute to demonstrate jurisdiction. If the statute that authorizes the agency to take the action that a litigant wants to challenge does not include a provision that grants jurisdiction to a court to hear challenges to that action, litigants can frequently rely on [28 U.S.C. § 1331](#) (the **general federal question** jurisdiction statute) or other general jurisdictional statutes to establish jurisdiction for their lawsuit. The general federal question jurisdiction statute provides “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” *Id.* Although the Clean Water Act includes a judicial review provision that explicitly authorizes courts to review EPA actions outside of the wetlands context, litigants must generally rely on 28 U.S.C. § 1331 to establish jurisdiction to challenge actions of EPA and the Corps in administering the federal wetlands protection program. However, if a litigant is challenging the government’s action as an unconstitutional “taking” of property, federal statutes grant jurisdiction to the Court of Federal Claims or federal district courts (depending on the amount in controversy) to hear those challenges. See 28 U.S.C. §§ [1346](#), [1491](#). Takings claims are discussed at length in Chapter 11 of this book.

The general federal question jurisdiction statute does not waive the government’s **sovereign immunity**, but the **APA** waives sovereign immunity to the extent that a litigant is seeking declaratory and injunctive relief, as opposed to money damages. See [5 U.S.C. § 702](#). In the wetlands context, litigants that are challenging actions of the Corps or EPA are generally seeking declaratory or injunctive relief, rather than money damages, so the APA waiver of sovereign immunity is sufficient for their challenges. When litigants are challenging federal agency actions as a “taking” of their property, the statutes that grant the court jurisdiction to hear those claims waive sovereign immunity of the government for the money damages authorized by those statutes.

As noted above, in addition to demonstrating reviewability, jurisdiction, and a waiver of sovereign immunity, litigants must demonstrate that they have **standing** to sue. Chapter 10 of this book discusses the standing requirement, as well as other limits on judicial review, including mootness, ripeness, and statutes of limitation.

## **B. Standards for judicial review**

Although Congress can vary the standards for review of agency actions, the APA establishes standards that generally apply to judicial review of agency actions under that statute. Specifically, the APA provides that a reviewing court shall:

- (2) hold unlawful and set aside agency action, findings, and conclusions found to be
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B) contrary to constitutional right, power, privilege, or immunity;
  - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - (D) without observance of procedure required by law;
  - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
  - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.”

### [5 U.S.C. § 706.](#)

The standard that applies most frequently on judicial review of an agency’s action is the **arbitrary and capricious standard**. The standard applies to all factual determinations made by agencies outside of formal hearing procedures, as well as policy determinations made by agencies. It is a narrow standard of review, which focuses on whether the agency decision “was based on a consideration of relevant factors and whether there has been a clear error of judgment...” See [Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 \(1971\)](#). As a result, if an agency does not explain its decision, ignores relevant factors in reaching its decision, or makes a decision that seems clearly unreasonable in light of the information considered by the agency, a court will find that the agency’s action is arbitrary and capricious. When an agency is making determinations “within its special expertise, at the frontiers of science,” the Supreme Court has counseled that a reviewing court “must generally be at its most deferential.” See [Baltimore Gas & Electric Co. v. Natural Resources Defense Council, 462 U.S. 87, 103 \(1983\)](#).

Although the standard is quite deferential, courts reviewing an agency's policy determinations occasionally apply a more rigorous, less deferential version of the standard, referred to as "hard look" arbitrary and capricious review. For instance, in [Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Ins. Co.](#), 463 U.S. 29, 43 (1983), the Supreme Court held that an agency decision is arbitrary and capricious if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Regardless of whether a reviewing court is applying a "hard look" standard or the traditional arbitrary and capricious standard, the court will not substitute its judgment for the agency and will normally not make a decision in place of the agency when the court determines that the agency's decision is arbitrary and capricious. See [Securities and Exchange Commission v. Chenery Corp.](#), 318 U.S. 80 (1943). Instead, in those cases, the reviewing court will routinely remand the dispute back to the agency to resolve. *Id.*

While the arbitrary and capricious standard is ubiquitous in judicial review of agency action, it does not generally apply to review of an agency's legal interpretation of a statute. The following landmark administrative law decision addresses that issue.

### **Chevron v. Natural Resources Defense Council**

467 U.S. 837 (1984)

**JUSTICE STEVENS** delivered the opinion of the Court.

In the Clean Air Act Amendments of 1977, \* \* \* Congress enacted certain requirements applicable to States that had not achieved the national air quality standards established by the Environmental Protection Agency (EPA) pursuant to earlier legislation. The amended Clean Air Act required these "nonattainment" States to establish a permit program regulating "new or modified major stationary sources" of air pollution. Generally, a permit may not be issued for a new or modified major stationary source unless several stringent conditions are met. \* \* \* The EPA regulation promulgated to implement this permit requirement

### **Resources for the Case**

[Unedited Opinion](#) (From Justia)  
[Oral Argument](#) (from the Oyez Project)  
[Google Map of all the Cases in the Course Source](#)



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[http://commons.wikimedia.org/wiki/File:Oil\\_refinery\\_canada.jpg](http://commons.wikimedia.org/wiki/File:Oil_refinery_canada.jpg) [CC-BY-SA-2.0 )



allows a State to adopt a plantwide definition of the term "stationary source."<sup>1</sup> Under this definition, an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant. The question presented by these cases is whether EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble" is based on a reasonable construction of the statutory term "stationary source."

The EPA regulations containing the plantwide definition of the term stationary source were promulgated on October 14, 1981. \* \* \* Respondents<sup>3</sup> filed a timely petition for review in the United States Court of Appeals for the District of Columbia Circuit pursuant to 42 U.S.C. § 7607(b)(1).<sup>4</sup> The Court of Appeals set aside the regulations. \* \* \* The court observed that the relevant part of the amended Clean Air Act "does not explicitly define what Congress envisioned as a stationary source, to which the permit program . . . should apply," and further stated that the precise issue was not "squarely addressed in the legislative history." \* \* \* In light of its conclusion that the legislative history bearing on the question was "at best contradictory," it reasoned that "the purposes of the nonattainment program should guide our decision here." \* \* \* Based on two of its precedents concerning the applicability of the bubble concept to certain Clean Air Act programs, \* \* \* the court stated that the bubble concept was "mandatory" in programs designed merely to maintain existing air quality, but held that it was "inappropriate" in programs enacted to improve air quality. \* \* \* Since the purpose of the permit program its "raison d'etre," in the court's view - - was to improve air quality, the court held that the bubble concept was inapplicable in these cases under its prior precedents. \* \* \* It therefore set aside the regulations

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<sup>2</sup> "(i) 'Stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act."

"(ii) 'Building, structure, facility, or installation' means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel."

40 C.F.R. §§ 51.18(j)(1)(i) and (ii) (1983).

<sup>3</sup> National Resources Defense Council, Inc., Citizens for a Better Environment, Inc., and North Western Ohio Lung Association, Inc.

<sup>4</sup> Petitioners, Chevron U.S.A. Inc., American Iron and Steel Institute, American Petroleum Institute, Chemical Manufacturers Association, Inc., General Motors Corp., and Rubber Manufacturers Association were granted leave to intervene and argue in support of the regulation.

embodying the bubble concept as contrary to law. We granted certiorari to review that judgment, \* \* \* and we now reverse.

The basic legal error of the Court of Appeals was to adopt a static judicial definition of the term "stationary source" when it had decided that Congress itself had not commanded that definition. Respondents do not defend the legal reasoning of the Court of Appeals.<sup>7</sup> Nevertheless, since this Court reviews judgments, not opinions, \* \* \* we must determine whether the Court of Appeals' legal error resulted in an erroneous judgment on the validity of the regulations.

## II

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.<sup>9</sup> If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, \* \* \* as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>11</sup>

"The power of an administrative agency to administer a congressionally created . . .

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<sup>7</sup> Respondents argued below that EPA's plantwide definition of "stationary source" is contrary to the terms, legislative history, and purposes of the amended Clean Air Act. The court below rejected respondents' arguments based on the language and legislative history of the Act. It did agree with respondents contention that the regulations were inconsistent with the purposes of the Act, but did not adopt the construction of the statute advanced by respondents here. Respondents rely on the arguments rejected by the Court of Appeals in support of the judgment, and may rely on any ground that finds support in the record. \* \* \*

<sup>9</sup> The judiciary is the final authority on issues of statutory construction, and must reject administrative constructions which are contrary to clear congressional intent. \* \* \* If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law, and must be given effect.

<sup>11</sup> The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. \* \* \*

program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."

*Morton v. Ruiz*, 415 U.S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. \* \* \* Sometimes the legislative delegation to an agency on a particular question is implicit, rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

\* \* \*

We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, \* \* \* and the principle of deference to administrative interpretations

"has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. See, e.g., *National Broadcasting Co. v. United States*, 319 U.S. 190; *Labor Board v. Hearst Publications, Inc.*, 322 U.S. 111; *Republic Aviation Corp. v. Labor Board*, 324 U.S. 793; *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194; *Labor Board v. Seven-Up Bottling Co.*, 344 U.S. 344. . . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."

*United States v. Shimer*, 367 U.S.374, 367 U.S. 382, 383 (1961). \* \* \*

In light of these well-settled principles, it is clear that the Court of Appeals misconceived the nature of its role in reviewing the regulations at issue. Once it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether, in its view, the concept is "inappropriate" in the general context of a program designed to improve air quality, but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one. Based on the examination of the legislation and its history which follows, we agree with the Court of Appeals that Congress did not have a specific intention on the applicability of the bubble concept in these cases, and conclude that the EPA's use of that concept here is a reasonable policy choice for the agency to make. \* \* \*

## VII

\* \* \* We are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress. \* \* \*

### *Legislative History*

In addition, respondents argue that the legislative history and policies of the Act foreclose the plantwide definition, and that the EPA's interpretation is not entitled to deference, because it represents a sharp break with prior interpretations of the Act.

Based on our examination of the legislative history, we agree with the Court of Appeals that it is unilluminating. \* \* \* We find that the legislative history as a whole is silent on the precise issue before us. It is, however, consistent with the view that the EPA should have broad discretion in implementing the policies of the 1977 Amendments.

More importantly, that history plainly identifies the policy concerns that motivated the enactment; the plantwide definition is fully consistent with one of those concerns -- the allowance of reasonable economic growth -- and, whether or not we believe it most effectively implements the other, we must recognize that the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives as well. \* \* \* Indeed, its reasoning is supported by the public record developed in the rulemaking process, \* \* \* as well as by certain private studies. \* \* \*

Our review of the EPA's varying interpretations of the word "source" -- both before and after the 1977 Amendments -- convinces us that the agency primarily responsible for administering this important legislation has consistently interpreted it flexibly -- not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena. The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute. \* \* \*

### *Policy*

The arguments over policy that are advanced in the parties' briefs create the impression that respondents are now waging in a judicial forum a specific policy battle which they ultimately lost in the agency and in the 32 jurisdictions opting for the "bubble concept," but

one which was never waged in the Congress. Such policy arguments are more properly addressed to legislators or administrators, not to judges.<sup>38</sup>

In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests, and is entitled to deference: the regulatory scheme is technical and complex, \* \* \* the agency considered the matter in a detailed and reasoned fashion, \* \* \* and the decision involves reconciling conflicting policies. \* \* \* Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices -- resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges -- who have no constituency -- have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not

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<sup>38</sup> Respondents point out if a brand new factory that will emit over 100 tons of pollutants is constructed in a nonattainment area, that plant must obtain a permit pursuant to § 172(b)(6), and, in order to do so, it must satisfy the § 173 conditions, including the LAER requirement. Respondents argue if an old plant containing several large emitting units is to be modernized by the replacement of one or more units emitting over 100 tons of pollutant with a new unit emitting less -- but still more than 100 tons -- the result should be no different simply because "it happens to be built not at a new site, but within a preexisting plant." \* \* \*

judicial ones: "Our Constitution vests such responsibilities in the political branches." *TVA v. Hill*, 437 U.S. 153, 195 (1978).

We hold that the EPA's definition of the term "source" is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth.

"The Regulations which the Administrator has adopted provide what the agency could allowably view as . . . [an] effective reconciliation of these twofold ends. . . ." *United States v. Shimer*, 367 U.S. at 383.

The judgment of the Court of Appeals is reversed.

It is so ordered.

### Questions and Comments

1. **The Bubble:** Under the Clean Air Act, at the time of the decision, construction of a new major "stationary source" or "modification" of a major "stationary source" in an area of a state that was not meeting air quality standards ("nonattainment") required a permit and compliance with stringent technology-based air pollution limits. Not every change in a stationary source, however, constituted a "modification." A change only constituted a "modification" if it resulted in the emission of a new pollutant or an increase in emissions of existing pollutants. Therefore, as noted in footnote 38 above, therefore, by defining "stationary source" to include an entire plant, an industrial facility could avoid the permitting and new technology requirements of the statute by replacing existing parts of a factory that are emitting pollution with new parts, as long as the new parts emitted the same or less pollution as the existing parts, since the facility would not be "modifying" a source. If, however, each part of the facility that emitted pollution were defined as a separate "source," the construction of a new part would be construction of a "stationary source" which could (if it were a major stationary source) trigger the permitting and new technology requirements, regardless of whether any other portions of the facility were being retired. Why do you think that NRDC opposed the bubble concept, and why did Chevron favor it?
2. **The Two Step:** The Court created a two-step test that is frequently used to review agencies' legal interpretations of statutory terms. At step one, Justice Stevens suggests that courts must ask "whether Congress has directly spoken to the precise question at issue." Is the Court applying a clear statement test at step one? If so, is the Court's review limited to the language of the statute, or can it consider the legislative history or purpose of the statute as well?

3. **Step Two:** If a court determines, at step one, that the statute is silent or ambiguous, then *Chevron* directs the court to defer to the agency's interpretation as long as it is "based on a permissible construction of the statute." Subsequent cases routinely rephrase step two to provide that courts should defer to the agency's interpretation as long as it is reasonable. In practice, courts almost always uphold agency interpretations at step two. Consequently, most of the battles in *Chevron* cases are fought based on statutory construction principles at step one.
4. **Agency Change in Position:** The Court noted that EPA did not always interpret the term "stationary source" to encompass the "bubble concept" and that the agency had previously interpreted the term to apply to separate units within a plant. Does the agency's change in position make its decision unreasonable at step two? Would the result have been the same if the agency had changed its interpretation several times prior to adopting the regulations that were challenged in this case? Would the result have been the same if the agency did not explain why it had changed its interpretation of the term "stationary source"?
5. **Reason for Deference:** In crafting a decision for a unanimous Court, Justice Stevens identified several different reasons why deference to an agency's interpretation is warranted, including: (a) Congress intended that the agency should resolve the issue; (b) agencies have specialized expertise to resolve the issue; and (c) agencies are politically accountable through the democratic process. In determining how far *Chevron* applies outside of the context in which the case arose, courts have struggled to determine whether one rationale carries more weight than others.
6. **Reach of *Chevron*:** *Chevron* involved the review of an agency's interpretation of a statutory term when the agency had interpreted the term as a legislative rule through notice-and-comment rulemaking. Sixteen years later, in [\*Christensen v. Harris County\*, 529 U.S. 576 \(2000\)](#), the Supreme Court held that courts should generally not apply *Chevron* when reviewing an agency's interpretation of a statute through a non-legislative rule, such as a guidance document, policy statement, or interpretative rule. The following year, in [\*United States v. Mead Corp.\*, 533 U.S. 218 \(2001\)](#), the Court held that *Chevron* did not apply to review of a letter ruling issued by the U.S. Customs Service. The Court provided some general guidance regarding when *Chevron* should apply. Specifically, the Court indicated that *Chevron* applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the **force of law**, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* at 226-227 (emphasis added). The Court suggested that an agency could show the necessary delegation of authority "in a variety of ways, as by an agency's power to engage in adjudication or notice and comment rulemaking, or by some other indication of a

comparable congressional intent.” *Id.* at 227. A year later, in [Barnhart v. Walton, 535 U.S. 212, 222 \(2002\)](#), the Court confused the analysis more, suggesting that in determining whether *Chevron* applies, courts should also consider “the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the agency has given the question over a long period of time.” Although the Court’s *Chevron* jurisprudence is very complex, it is probably safe to assume that when a court is reviewing a legislative rule adopted by an agency through formal or informal rulemaking, or is reviewing a decision that an agency has made through formal adjudication, the court will apply *Chevron*. It is also probably safe to assume that in *most cases*, when a court is reviewing an agency’s non-legislative rule, the court will not apply *Chevron* (although the Court has left the door open to the possibility that *Chevron* might apply in a specific case). It is hard to reach a similar broad conclusion regarding whether a court will apply *Chevron* to a decision made by an agency in the context of informal adjudication. The answer will lie in the ultimate clarification of the Court’s decisions in *Mead* and *Barnhart*.

7. **Skidmore:** If a court reviewing an agency’s legal interpretation does not use the *Chevron* analysis, that does not mean that the court will review the statutory interpretation question de novo. Agencies are still accorded deference under an earlier Supreme Court decision, although the deference is weaker than *Chevron* deference. In [Skidmore v. Swift](#), the Supreme Court, reviewing a decision of the Administrator of the Department of Labor’s Wage and Hour Division, held that:

the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

323 U.S. 134, 140 (1944).

8. **Agency interpretations of agency regulations:** *Chevron* involved judicial review of an agency’s interpretation of a statute. However, agencies occasionally adopt regulations that are ambiguous and need to be interpreted further. When a court reviews an agency’s interpretation of its own regulations, rather than the interpretation of a statute, courts accord the agency an even greater level of deference than *Chevron* deference. In [Auer v. Robins, 519 U.S. 452, 461 \(1997\)](#), the Supreme Court held that courts should uphold an agency’s interpretation of its regulations unless it is “plainly erroneous or inconsistent with the regulation.”



## Hypotheticals

1. Focusing on the same statutory language that was interpreted in *Chevron*, assume, for purposes of this hypothetical, that EPA did not promulgate a regulation that allowed states to adopt a plant-wide definition of "stationary source." Instead of adopting a regulation, EPA adopted a "policy statement" that indicated that states could adopt a plant-wide definition of "stationary source". The agency adopted the policy statement because it was not fully committed to that interpretation of the statute and wanted to consider the matter further before issuing a regulation to define the term. Nevertheless, EPA published the policy statement in the Federal Register and posted it on its website. If NRDC were able to challenge EPA's policy statement, should a court review the agency's interpretation of the statute under the *Chevron* analysis or some other analysis?
2. Focusing on the same statutory language that was interpreted in *Chevron*, assume that EPA did not promulgate a regulation that allowed states to adopt a plant-wide definition of "stationary source" and assume that they did not adopt a policy statement to that effect either. Assume that they did not provide any direction to states or regulated industries regarding the definition of "stationary source." Instead, assume that EPA began an administrative penalty proceeding (an informal process) against Chevron alleging that Chevron was violating the Clean Air Act because it had not sought a permit for modifications to its refinery. In the context of that informal administrative proceeding, EPA announced that it was interpreting the term "stationary source" to mean each smokestack in a plant. If Chevron appealed EPA's decision to court, would the reviewing court apply the *Chevron* analysis to EPA's interpretation of "stationary source" or would the court apply some other analysis?
3. Focusing on the same statutory language that was interpreted in *Chevron*, assume that EPA adopted the regulations that it adopted in *Chevron*, allowing States to adopt a plant-wide definition of "stationary source." Assume, however, that the regulations were ambiguous regarding whether a "plant-wide" definition could incorporate smokestacks that were located a mile away from the plant (but were related to the process at the plant), and that EPA began an administrative penalty proceeding against Chevron when Chevron made changes to the off-site processes that increased pollution from an off-site smokestack without obtaining a permit, because the agency determined that the term "stationary source" should not include off-site stacks. If Chevron appealed EPA's decision to court, would the reviewing court apply the *Chevron* analysis to EPA's interpretation of "stationary source" or would the court apply some other analysis?

## Chapter Quiz

Now that you've finished Chapter 3, why not try a CALI lesson on the material at: <http://cca.li/PS>. It should take about 20 minutes.

# Chapter 4

## Regulation of Wetlands and Waters of the United States

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### I. Activities Regulated Under the Clean Water Act

#### A. The Rivers and Harbors Act

Clean Water Act, federal regulation of wetlands was generally limited to regulation under the Rivers and Harbors Appropriation Act of 1899, [33 U.S.C. § 401, et. seq.](#) Section 10 of the Act prohibits obstruction of navigable waters except in accordance with a permit issued by the Corps of Engineers, see [33 U.S.C. § 403](#), and Section 13 of the Act prohibits the deposit of refuse into the navigable waters. See [33 U.S.C. § 407](#). As explored further later in this chapter, though, the main focus of the statute was, and remains, protection of navigability of the nation's waters. The statutory definition of "navigable waters" is driven by that focus, and limited to waters that are "subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." [33 C.F.R. § 329.4](#). As a result, very few wetlands were or are regulated as "navigable waters" under the Rivers and Harbors Act.



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#### B. The Clean Water Act

When Congress adopted the [Federal Water Pollution Control Act Amendments of 1972](#), though, it greatly expanded federal regulation over a broad range of activities in wetlands and other waters, with a focus on protecting water quality rather than protecting navigation. See [33 U.S.C. § 1251\(a\)](#) (providing that the objectives of the Act are to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"). Indeed, in the Act, Congress established, as a national goal, "that the discharge of pollutants into the navigable waters be eliminated by 1985." [Id. § 1251\(a\)\(1\)](#).

**Section 301:** Perhaps the most important provision of the statute, for purposes of federal

regulation of wetlands and other waters, is **Section 301**, which prohibits “the discharge of any pollutant by any person” except in compliance with Section 301 and with several other sections of the statute, including the sections that create the federal permitting programs for point source discharges and discharges into wetlands. [33 U.S.C. § 1311\(a\)](#). The statute further defines “the discharge of a pollutant” to mean the “addition of any pollutant to navigable waters from any point source”. [33 U.S.C. § 1362\(12\)](#).

As a result, Section 301 requires permits and compliance with the other requirements of Section 301 for an activity if **all** of the following requirements are met:

#### Triggers for Section 301 prohibition

- there is an **addition**
- of a **pollutant**
- from a **point source**
- into the **navigable waters**
- by a **person**

**402 and 404 Permit Programs:** The Clean Water Act creates two separate permit programs to regulate discharges of pollutants into navigable waters. While the Section 402 permit program, administered by EPA and the states, is the primary permitting program for point source discharges of pollution into the navigable waters, see [33 U.S.C. § 1342](#), most activities involving wetlands are governed by the Section 404 permit program. See [33 U.S.C. § 1344](#). Section 404 authorizes the Corps, rather than EPA, to issue permits when the regulated activity involves the “discharge of dredged or fill material into the navigable waters at specified disposal sites.” [33 U.S.C. § 1344\(a\)](#), Nevertheless, EPA plays an important role in that permitting process, see [33 U.S.C. § 1344\(b\)-\(c\)](#). In order for the federal government to have Section 404 jurisdiction over an activity in wetlands, therefore, there must be a “discharge of dredged or fill material” into “navigable waters.”

#### Triggers for 404 Jurisdiction

- there is a **discharge of dredged or fill material**
- into the **navigable waters**

When wetlands are ditched, drained, filled or otherwise altered, several of the pre-requisites for regulation under sections 301 and 404 are easily met.

**Point source:** For instance, the Clean Water Act defines “point source” very broadly as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” [33 U.S.C. § 1362\(14\)](#). Ditching, draining, or filling activities in wetlands usually involve heavy construction equipment, such as backhoes, excavators, or loaders, which clearly are “discernible, confined and discrete conveyances.”



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**Pollutant:** Similarly, the statute defines “pollutant” to include “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” [33 U.S.C. § 1362\(6\)](#). Normally, activities impacting wetlands involve the placement, in wetlands, of rocks, soil, silt, organic debris or similar materials, all of which fit comfortably within the definition of “pollutant.”

**Person:** The statute also defines “person” very broadly to include “an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.” [33 U.S.C. § 1362\(5\)](#). As a result, when wetlands are ditched, drained, filled or otherwise altered, it is normally not very difficult to demonstrate that the activity was undertaken by a “person.”

Consequently, whether Section 301 prohibits ditching, draining, filling or otherwise impairing wetlands usually depends on whether the activity at issue involves an **addition** of a pollutant and whether the wetlands at issue are **navigable waters**. Similarly, whether the federal government has jurisdiction under Section 404 over such activities impacting wetlands usually depends on whether the activity involves a **discharge** of dredged or fill material and whether the wetlands at issue are **navigable waters**. Section II of this Chapter examines the scope of the federal government’s jurisdiction over **navigable waters** at length, and Chapter 5 focuses on which activities in wetlands have been held to involve the **addition** of pollutants or the **discharge of dredged or fill material**.

As Section II of this Chapter will describe, the Corps and EPA have defined the statutory term “navigable waters” to include certain wetlands. Before turning to a closer examination

of the scope of federal jurisdiction over navigable waters, therefore, it may be helpful to examine the federal government's regulatory approach to defining and identifying wetlands in more detail.

### C. Identifying and Delineating Wetlands

**Definitions:** Although the Clean Water Act does not include a statutory definition for "wetlands," both EPA and the Corps have adopted regulations that define "wetlands" as follows:

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

[33 C.F.R. § 328.3 \(b\)](#) (Corps' regulations); [40 C.F.R. § 230.3\(t\)](#) (EPA's regulations).

While that definition is the primary definition of wetlands for purposes of the Clean Water Act, there are a few other definitions used by other agencies that have some responsibility over wetlands under the Clean Water Act. As noted in Chapter 2, the Fish and Wildlife Service has some responsibilities regarding wetlands under the Clean Water Act and several other federal statutes. In administering a National Wetlands Inventory, the Fish and Wildlife Service uses a definition of "wetlands" that is similar, but not identical, to the definition adopted by EPA and the Corps. Specifically, the Service defines wetlands as "lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For purposes of this classification, wetlands must have one or more of the following three attributes: (1) at least periodically, the land supports predominantly hydrophytes, (2) the substrate is predominantly undrained hydric soil, and (3) the substrate is nonsoil and is saturated with water or covered by shallow water at some time during the growing season of each year." [L. Cowardin, et al., U.S. Department of the Interior, Fish and Wildlife Service, Classification of Wetlands and Deep-Water Habitats of the United States \(1979\)](#). In addition, the Natural Resources Conservation Service regulates wetlands under the Food Security Act, which has a similar, though not identical, *statutory* definition for wetlands, see [16 U.S.C. § 3801\(27\)](#), but that agency also has some regulatory responsibilities over wetlands on agricultural lands under the Clean Water Act, as discussed below.

Chapter 1 of this book described the scientific bases for determining whether a particular geographic area constitutes a wetland (*i.e.* the presence of specific types of soils, vegetation and hydrology) and outlined the delineation process that is used to identify the boundaries of wetlands. Not surprisingly, the federal regulatory definitions focus on the

three characteristics of wetlands that are central to delineation - vegetation, soils, and hydrology. Because the regulatory definition of wetlands adopted by EPA and the Corps may seem a little difficult to apply to a specific piece of property without further clarification, the federal agencies with jurisdiction over wetlands have provided guidance over the years to help staff and the regulated community determine the scope of the definition.

***Delineation manuals:*** In 1987, the Corps adopted a [Wetlands Delineation Manual](#) that outlined tests and procedures that agency staff could use to determine whether a particular geographic area had the vegetation, soils and hydrology necessary to be classified as a wetland. The manual was a guidance document, rather than a rule, so it was not adopted pursuant to notice and comment rulemaking. In 1988, EPA adopted a different manual, also as a guidance document, which used *different* tests and procedures to delineate wetlands. W.S. Sipple, U.S. Environmental Protection Agency, *Wetland Identification and Delineation Manual* (1988). The EPA manual included a test that relied heavily on an analysis of vegetation for sites of 15 acres or less. Ralph W. Tiner, *WETLAND INDICATORS: A GUIDE TO WETLAND IDENTIFICATION, DELINEATION, CLASSIFICATION, AND MAPPING* 208-209 (CRC Press 1999). Adding to the confusion, at the time, the Fish and Wildlife Service had its own procedures for identifying wetlands, based on the Cowardin definition outlined above, as did the Soil Conservation Service, which regulated wetlands under the Food Security Act. See Soil Conservation Service, U.S. Department of Agriculture, *National Food Security Act Manual* (1985). (Note: The Soil Conservation Service became the Natural Resources Conservation Service in a [1994 USDA reorganization](#).)

In order to eliminate the confusion caused by the sometimes conflicting guidance documents, in 1989, EPA, the Corps, the Fish and Wildlife Service and the Soil Conservation Service developed a uniform manual for delineating wetlands, see [Fish and Wildlife Service, Environmental Protection Agency, Department of the Army, Soil Conservation Service, Federal Manual for Identifying and Delineating Jurisdictional Wetlands \(1989\)](#). Like the predecessor documents, the interagency manual was a guidance document, rather than a rule, and was adopted outside of the notice and comment rulemaking process. Shortly after its adoption, the interagency manual was criticized by landowners and organizations who claimed that the manual would expand jurisdiction to cover a much broader universe of areas as wetlands. See [National Research Council, Wetlands: Characteristics and Boundaries 2 \(The National Academies Press, 1995\)](#).

Because the manual was adopted informally, landowners challenged the use of the manual on the grounds that it was a legislative rule that was adopted in violation of the APA's [notice-and-comment rulemaking procedures](#) and was, therefore, invalid. The United States Court of Appeals for the Fourth Circuit addressed that issue in the following case:



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## Hobbs v. United States

947 F.2d 941 (4<sup>th</sup> Cir. 1991)  
*cert. denied* 504 U.S. 940 (1992)

### Resources for the Case

[Google Map of all the cases in the book](#)  
[Unedited opinion](#) (From Justia)

PER CURIAM:

These appeals arise from a civil enforcement action brought by the Environmental Protection Agency for alleged violations of the Clean Water Act ("CWA"), \* \* \* by Phillip and Dorothy Hobbs as well as the couple's son and daughter-in-law, Paul and Donna Hobbs. The violations stem from the clearing, draining, and constructing of roads on approximately 50 acres of alleged wetlands to create hay fields. All of the Hobbsses were subjected to penalties for violations of the CWA by the district court. The Hobbsses appeal the district court's decision on various grounds. Finding none of their arguments persuasive, we affirm the district court's decision.

I.  
A.

A brief review of the statute is necessary for an understanding of the law of this case. The Clean Water Act is a comprehensive statute designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a)(2) \* \* \*

In accordance with this mandate, the Act bars the discharge of pollutants into waters of the United States except in compliance with a permit issued under the Act. CWA § 301(a) \* \* \* The term pollutant includes dredged and fill material consisting of soil, rock, and sand. CWA § 404 \* \* \* The Hobbises do not contest that their discharge material fits within the definition of a pollutant.

The term "waters of the United States" is not explicitly defined under the statute. The Act does define "navigable waters," however, as waters of the United States. 33 U.S.C. § 1362(7). \* \* \*

"Waters of the United States" is also defined as waters adjacent to other waters of the nation. 40 C.F.R. § 230.3(s); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). EPA defines "adjacent" as bordering, contiguous, or neighboring. 40 C.F.R. § 230.3(a). Moreover, wetlands separated from other waters of the United States by "man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands'" according to the EPA. 40 C.F.R. § 230.3(b). Finally, both the EPA and the Army Corps of Engineers ("Corps") define wetlands as:

those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. 40 C.F.R. § 230(t); 33 C.F.R. § 328(b).

The EPA is authorized under the Act to issue a Finding of Violation and a Compliance Order for any violation of CWA § 301(a). 33 U.S.C. § 1319(a). Moreover, EPA may commence a civil action for appropriate relief for a violation of CWA § 301(a).

For the instant case, there are two relevant manuals for wetlands determinations, one produced by the EPA and the other by the Corps. Both manuals are used to aid in the determination of what constitutes wetlands. Each manual relies on three parameters to make a determination: hydrology, vegetation, and soils. The Corps of Engineers Delineation Manual was adopted in 1987. The EPA manual was adopted April 1988. There is also an interagency manual, adopted by the EPA and the Corps, which was adopted January 10, 1989. The joint manual, like the EPA manual, uses the three parameter test in a manner that expands the definition of wetlands. The jury was allowed to consider the multiparameter standard in each of the manuals.



## II

Phillip and Dorothy Hobbs own about 169 acres in Ware Neck, Gloucester County, Virginia. The Hobbsses' son and daughter-in-law, Paul and Donna, also own 37 acres in the county. The combined property contains approximately 206 acres ("Hobbsses' property"). The jury found this parcel to be wetlands adjacent to the Ware River.

The Hobbsses cleared, drained, and constructed roads on approximately 50 acres of wetlands to create hay fields. In the process, the elder Hobbs discharged, dredged, or filled material onto their wetlands in 1980, 1984, and 1985. The younger Hobbs did the same in 1986, 1987, and 1988. The Hobbsses, however, did not apply for a § 404 permit from the Corps, as required by the CWA.

The Hobbsses contend that they did not apply for a permit because they were under the impression that they were not required to do so. On September 29, 1988 an official of the U.S. Fish and Wildlife Service ("FWS") went to the Hobbsses property and told Paul Hobbs they might be doing work on nontidal wetlands. The FWS official arranged a site visit by a Corps official. The Hobbsses contend they overheard the two men talking and expressing doubt about whether the land was in fact wetlands. When Paul Hobbs asked about the property, the Corps official stated that "it was a grey area of enforcement for the Corps of Engineers ... and he didn't see where the [Hobbsses] had ... done anything wrong." Moreover, the Corps employee told the Hobbsses that he would get back to them about whether their land was wetlands; but he never told them whether the property was wetlands nor did the official tell them about a permit.

EPA issued the Hobbsses a Findings of Violation and Compliance Order, or Administrative Order, on March 23, 1989. EPA subsequently amended the order on April 25, 1989.

## III

On April 25, 1989, the Hobbsses filed a complaint challenging the EPA's Findings of Violation and Compliance Order issued against them under § 404. On May 4, 1989, the district court issued a preliminary injunction allowing the Hobbsses to continue to farm that portion of the land previously converted to hayfields. \* \* \*

[At the trial level, EPA then filed a counterclaim against the Hobbsses for illegally filling the wetlands and the court dismissed the Hobbsses complaint against EPA. On EPA's counterclaim, a jury found that the Hobbsses discharged pollutants onto wetlands on their land in violation of the Clean Water Act. The court allowed the defendants to continue to grow hay on the parcels that they had previously converted to hay fields, but ordered them to pay \$300 in civil penalties and required them to take various actions to restore and/or preserve the other wetlands on their property. The defendants appealed the court's decision on several grounds, including an argument that the delineation manual(s) used by

the government were substantive rules that were invalid because they were not adopted in accordance with the APA.]

#### IV

#### A

\* \* \*

The second issue is whether the EPA's wetlands delineation manuals are interpretive guidance documents or substantive rules with binding legal effect in the determination of what constitutes wetlands under 40 C.F.R. § 230(t) and 33 C.F.R. § 328.3(b). Closely related to this matter is the question of whether the EPA Manual constitutes substantive rules subject to the Administrative Procedure Act ("APA") notice and comment requirements, 5 U.S.C. § 553.

The Hobbsses contend that the EPA manual represents substantive rules subject to the public notice and comment requirements under the APA. Their argument in effect is the manual does not merely clarify and explain the process of wetlands determination, but rather expands federal jurisdiction.

Whether the manual is subject to APA depends on whether it constitutes interpretive rules or substantive rules. The former rules " 'are those which merely clarify or explain existing law or regulations,' and 'do not have the full force and effect of a substantive rule but [are] in the form of an explanation of particular terms.' " *American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir.1987) (citations omitted). In *Jerri's Ceramic Arts v. Consumer Products Safety Comm'n*, 874 F.2d 205 (4th Cir.1989), we noted the distinction between the two rules:

An interpretive rule simply state[s] what the administrative agency thinks the statute means, and only "remind[s]" affected parties of existing duties ... [while] a substantive or legislative rule has the force of law, and creates new law or imposes new rights or duties.

*Id.*, 207. Moreover, this court held that in determining whether a rule was interpretive or substantive courts must consider the agency's intent. *Id.*, at 208.

The intent behind the manuals and absence of the force of law make it clear that they are interpretive rules. The EPA manual states in its preface that it was "developed to address the need for operational and jurisdictional guidance." Moreover, the manual states that the methods offered for wetlands determinations "are the recommended approaches."

While the EPA manual does not possess the force of law, the EPA manual does represent

a significant change in the definition and an expansion of jurisdiction. The change in definition, however, is premised upon the making of certain scientific assumptions regarding the presence of the three parameters for a wetlands determination. The Hobbsses point to nothing in the record to suggest any explicitly political motivation or policy consideration behind the change in the parameter test. Without a showing of intent or legal force, the manuals are no more than interpretive rules.

### Questions and Comments

1. What procedures does the APA require agencies to follow when adopting interpretative rules? How do those procedures differ from the procedures required for substantive (legislative) rules?
2. Are interpretative rules entitled to *Chevron* deference? Do they carry the force of law? Why might the agencies have preferred to adopt the delineation manuals as interpretative rules, as opposed to substantive (legislative) rules?
3. Is an agency's characterization of a rule as "interpretative" or "substantive" outcome determinative? How does this court determine what type of "rule" EPA has adopted?
4. Remember that several federal agencies have jurisdiction over various aspects of wetlands regulation under the Clean Water Act and other statutes. Note that the violation in this case was first identified by a representative of the Fish and Wildlife Service, who arranged a visit by a representative of the Corps of Engineers, but that the enforcement action in the case was brought by EPA. Note, too, that the representatives of the various agencies appeared to view the severity of the violation differently. One of the defendants in the case argued that the government should be estopped from prosecuting him because he constructed the drainage ditches on the property under the supervision of and according to the design specifications of two Soil Conservation Service employees. The court addressed that argument in a separate portion of the opinion. How do you think the court should have ruled? See [\*Office of Personnel Management v. Richmond\*, 496 U.S. 414 \(1990\)](#).
5. As Chapter 10 will explore more fully, the government does not need to prove that a defendant acted intentionally, or with any mental state, to prevail in a civil enforcement action under the Clean Water Act. Nevertheless, the government, and courts, are likely to consider the defendant's mental state when determining the severity of the penalties for violating the Act. Does it appear that the trial court considered the Hobbsses mental state in determining the penalty for the defendant's conduct?

**More Manuals:** In 1991, the Corps and EPA developed updates to the 1989 manual and began a rulemaking process to adopt a new manual. See [56 Fed. Reg. 40,446 \(Aug. 14, 1991\)](#). The 1991 proposal generated controversy when critics argued that it was grounded more in politics than science and would significantly *narrow* jurisdiction over wetlands. Environmental groups claimed that 30-80% of the areas regulated as wetlands under the 1989 manual would be excluded from regulation under the proposed 1991 manual. See Heimlich, R.E., K.D. Wiebe, R. Claassen, D. Gadsby and R.M. House, Economic Research Service, U.S. Department of Agriculture, *Wetlands and Agriculture: Private Interests and Public Benefits*, Agricultural Economic Report No. 765 (1998). The agencies ultimately abandoned the proposed rulemaking.

In response to criticism of the 1989 manual and concerns about the process that the agencies were using to develop the delineation manuals, in 1992, Congress included a rider in appropriations legislation for the Corps that prohibited the Corps from utilizing the 1989 interagency manual or any other manual adopted after the 1989 manual unless the manual was adopted pursuant to notice-and-comment rulemaking procedures. See [Energy and Water Development Appropriations Act of 1993, Pub. L. No. 102-377, 106 Stat. 1315 \(1992\)](#). In light of the legislation, the Corps returned to using its 1987 delineation manual to delineate wetlands under the Clean Water Act. Although the legislation did not apply to EPA, EPA also decided to use the Corps' 1987 manual to delineate wetlands under the Clean Water Act at that time. The Natural Resources Conservation Service, however, returned to its own [National Food Security Act Manual](#).

In 1995, the National Academy of Sciences released a report on characterizing wetlands, see [National Research Council, \*Wetlands: Characteristics and Boundaries\* \(The National Academies Press, 1995\)](#) ("NAS Study"), that was prepared in response to a federal law that required the Academy to prepare such a study to assist in the development of a new federal wetlands delineation manual. See [Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act of 1993, Pub. L. No. 102-389, 106 Stat. 1571 \(1992\)](#). The report included a series of recommendations improving the 1987 Corps' manual, but also found that the approach that the agencies were using under that manual was scientifically sound. See NAS Study, *supra*, at 12.

Although the National Academy of Sciences study suggested that there was a need for a "more efficient, more uniform, ... and more accurate" approach to delineating wetlands, *id.*, EPA and the Corps still use the Corps' 1987 delineation manual to delineate wetlands under the Clean Water Act. However, following up on recommendations in a 2002 Corps report, see [James S. Wakeley, \*Developing a Regionalized Version of the Corps of Engineers Wetlands Delineation Manual: Issues and Recommendations\*, ERDC/EL TR-02-20 \(Aug. 2002\)](#), the Corps adopted a series of 10 regional supplements to the delineation manual, with procedures and tests tailored to the specific vegetation, soils and hydrology conditions of each region. See U.S. Army Corps of Engineers, *Regional Supplements to the Corps Delineation Manual*, available at:

[http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/reg\\_supp.a\\_spx](http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/reg_supp.a_spx)

**Division of authority for determining jurisdiction:** As will be described more fully in Chapters 6 and 10, EPA plays an important role in the permitting process with the Corps and both agencies have enforcement authority under the Clean Water Act. In order to establish efficient coordination between the agencies in making jurisdictional determinations under the Act, EPA and the Corps entered into a Memorandum of Agreement in 1989, see [Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Section 404 Permit Program and the Application of the Exemptions Under Section 404\(f\) of the Clean Water Act \(Jan. 19, 1989\)](#)(MOA), that gave the Corps the responsibility for performing “the majority of the geographic jurisdictional determinations” and provided that the Corps’ determinations would be binding on the Government. The MOA did, however, authorize EPA to make jurisdictional determinations in “special cases” and recognized that EPA would be the lead agency in developing guidance on determining jurisdiction under the Act. *Id.* Because the agencies entered into the agreement in 1989, the MOA provided that the agencies would make determinations using the 1989 interagency delineation manual. *Id.* In 1993, the agencies [amended the MOA](#) to provide that determinations would be made using the 1987 Corps delineation manual, but left the rest of the agreement intact. See [58 Fed. Reg. 4995 \(Jan. 19, 1993\)](#). While most jurisdictional determinations are covered by those MOAs, the Natural Resources Conservation Service takes the lead on delineating wetlands for purposes of the Food Security Act and delineates them using its own manual. See [Environmental Protection Agency, Department of Defense, Department of Agriculture, Department of Interior, Interagency Memorandum of Agreement Concerning Wetlands Determinations for Purposes of Section 404 of the Clean Water Act and Subtitle B of the Food Security Act, \(Jan. 6, 1994\)](#).

While the government agencies are ultimately responsible for determining the geographic limits of wetlands jurisdiction, landowners frequently retain consultants to delineate the wetland boundaries on their property in accordance with the 1987 Corps manual prior to seeking an official jurisdictional determination from the government. [States](#) and professional organizations, such as the [Society of Wetlands Scientists](#), provide training and certification for wetlands delineators, see [Leah Stetson, Association of State Wetlands Managers, State Wetland Delineator Certification Programs, Wetland News \(June-July 2007\)](#), but there is not a national certification program. An official jurisdictional determination, though, can be made only by the government. While the Corps and EPA rely on the same scientific tests to delineate wetlands nationwide, a 2004 General Accounting Office Report determined that those criteria are interpreted and applied unevenly by the various Corps district offices. See [General Accounting Office, Corps of Engineers Needs to Evaluate its District Office Practices in Determining Jurisdiction GAO-04-297 \(Feb. 2004\)](#).

**Types of Jurisdictional Determinations:** The Corps issues two types of jurisdictional determinations - “preliminary jurisdictional determinations” and “approved jurisdictional determinations.” See [U.S. Army Corps of Engineers, Jurisdictional Determinations, Regulatory Guidance Letter 08-02 \(June 26, 2008\) \(hereinafter “RGL 08-02”\)](#). A “preliminary jurisdictional determination” is non-binding, cannot be appealed, and can be used only to indicate that there *may* be wetlands or waters on a piece of property. See [33 C.F.R. § 331.2](#). It cannot be used to indicate that wetlands or waters are *not* present. See [RGL 08-02, §8](#). Landowners might seek preliminary jurisdictional determinations to waive questions regarding jurisdiction and move ahead expeditiously to obtain a development permit or the Corps might use a preliminary jurisdictional determination as the basis for a compliance order when site access may be impractical or unauthorized or in other circumstances when it is not possible to complete an approved jurisdictional determination in a timely manner. [Id. § 4](#).

An “approved jurisdictional determination” is an official determination that “wetlands,” “waters of the United States,” or “navigable waters” are present on the property or *are not present* on the property. See [33 C.F.R. § 331.2](#). The “approved jurisdictional determination” precisely identifies the boundaries of those waters. *Id.* “Approved jurisdictional determinations” are valid for five years and can be challenged administratively. See [RGL 08-02 §2](#).

While jurisdictional determinations can be challenged administratively, courts have generally held that they are not “final agency actions” and are not, therefore, subject to *judicial review*. See, e.g., [Southern Pines Associates v. United States, 912 F.2d 713 \(4<sup>th</sup> Cir. 1990\)](#); [Hoffman Group, Inc. V. EPA, 902 F.2d 567 \(7<sup>th</sup> Cir. 1990\)](#). It is not yet clear, though, whether the Supreme Court’s decision in [Sackett v. EPA, 132 S. Ct. 1367 \(2012\)](#), will change that. Although the jurisdictional determinations have, historically, not been subject to immediate judicial challenge, the determinations can be challenged when the Corps makes a final decision on a permit application that incorporates the determination, or when the government brings an enforcement action based on the determination. See Chapter 10.

### Resources

- [A Corps’ “approved jurisdictional determination” that wetlands exist on a site in Sacramento, California.](#)
- Access the Corps JDs online for the [Baltimore District](#) or [San Francisco District](#).

### Research Problem

Many of the Corps Districts post approved jurisdictional determinations on their websites, as noted above. Browse one of the Corps District's websites to find an approved jurisdictional determination where the Corps has determined that there are wetlands on the property that are waters of the United States, but where the wetlands are not adjacent to traditional navigable waters (TNWs). For that jurisdictional determination, please identify (1) the District; (2) the file number; and (3) the acreage of wetlands that qualify as waters of the United States. In addition, briefly summarize the connection between the wetlands and traditional navigable waters and the factors that demonstrate that the wetlands have a significant nexus to traditional navigable waters.

### Hypothetical

Clarissa Darrow is an attorney with the EPA in the Atlanta Regional Office and has been contacted by an EPA investigator in the Water Branch of the Office regarding the illegal discharge of fill material into wetlands near Naples, Florida by the Valencia Citrus Company. Elvin Kagan, the corporate counsel for the Valencia Citrus Company, informed Darrow that before expanding their orchards last year, Valencia contracted with Carl Kramer as a consultant to delineate their property and determine whether there were any wetlands on the property that Valencia planned to develop. Kagan insisted that Valencia did not add any fill material to wetlands on the property until Kramer informed them that the wetlands were not "waters of the United States." If EPA has not yet instituted any enforcement proceedings against Valencia, and if Kramer is not independently represented by an attorney, may Darrow contact Kramer and question him without seeking approval from Kagan, as long as Kramer consents to the meeting? Could Darrow contact Kramer and question him if he were an employee of the Valencia Fruit Company? See [American Bar Association, Model Rule of Professional Conduct 4.2](#) and [4.3](#) (and associated comments).

### Section Quiz

Now that you've finished the material covering Section I of Chapter 4, why not try a CALI lesson on the material at <http://cca.li/PT>. It should only take about 15 minutes or less.

## II. Waters of the United States

### A. The Corps' Initial Interpretation

The scope of waters, including wetlands, that have been subject to jurisdiction under the Clean Water Act has ebbed and flowed over the years. The statute does not explicitly indicate that it covers wetlands. As noted above, the statute regulates various activities in “navigable waters,” which Congress defined as “waters of the United States, including the territorial seas.” [33 U.S.C. § 1362\(7\)](#). When the Corps first adopted rules to define the term “navigable waters,” it used the definition that it had been using under the Rivers and Harbors Act. See [37 Fed. Reg. 18289 \(Sep. 9, 1972\)](#).

#### 1974 Corps definition of “navigable waters”

The term "navigable waters of the United States" and "navigable waters," as used herein mean those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce. 33 C.F.R. 209.210(d)(1), [39 Fed. Reg. 12115 \(April 3, 1974\)](#).

Under that definition, “navigable” really meant “navigable.” In order to be a navigable water, the water had to be:

- currently navigable;
- historically navigable; or
- potentially navigable

The Corps’ “navigable waters” definition was derived, historically, from a test established by the Supreme Court over one hundred years earlier in [The Daniel Ball, 77 U.S. 557 \(1870\)](#). In that case, the Court rejected the British common law approach that defined navigability based on the ebb and flow of the tide, and adopted a definition that focused on whether the waters “are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” 77 U.S. 563. The tie to commerce was significant, so the mere fact that one could float a canoe on the water was not dispositive if the water could not at least potentially be used as a highway of commerce for trade or travel. (For a primer on “navigability” prepared by American Whitewater, click [here](#).)





Photo 22 USFWS Photo by John and Karen Hollingsworth  
[http://commons.wikimedia.org/wiki/File:Canoes\\_on\\_water\\_in\\_swamp\\_area.jpg](http://commons.wikimedia.org/wiki/File:Canoes_on_water_in_swamp_area.jpg)

Environmental groups, including the Natural Resources Defense Council, felt that the Corps' regulatory interpretation of "navigable waters" was too narrow and that Congress intended to regulate a broader range of waters under the Clean Water Act than were regulated under the Rivers and Harbors Act. Accordingly, NRDC sued the Corps, and the Federal District Court for the District of Columbia issued the following decision.

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

**AUBREY E. ROBINSON, Jr., District Judge.**

\* \* \* [The Plaintiffs'] Motion for Partial Summary Judgment on Count I of the Complaint is granted; and it is DECLARED that: \* \* \*

Congress by defining the term 'navigable waters' in Section 502(7) of the [Clean Water Act] to mean 'the waters of the United States, including the territorial seas,' asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the [Clean] Water Act, the term is not limited to the traditional tests of navigability. \* \* \*

Defendants Howard H. Callaway, Secretary of the Army, and Lt. Gen. William C. Gribble, Chief, Army Corps of Engineers, are without authority to amend or change the statutory definition of navigable waters and they are hereby declared to have acted unlawfully and in derogation of their responsibilities under Section 404 of the [Clean] Water Act by the adoption of the definition of navigability described at 33 C.F.R. § 209.210(d)(1), 39 Federal Register 12119 (April 3, 1974) and 33 C.F.R. 209.260; and it is ordered that Defendants Callaway and Gribble:

1. Revoke and rescind so much of 39 Federal Register 12115, et seq. (April 3, 1974) as limits the permit jurisdiction of the Corps of Engineers by definition or otherwise to other than 'the waters of the United States.'
2. Publish within fifteen (15) days of the date of this Order proposed regulations clearly recognizing the full regulatory mandate of the [Clean] Water Act.
3. Publish within thirty (30) days of the date of this Order final regulations clearly recognizing the full regulatory mandate of the [Clean] Water Act \* \* \* .

### **Questions and Comments**

1. Subsequent decisions examining the regulatory definition of “waters of the United States” frequently invoke the *Chevron* analysis, which accords agency rulemaking a degree of deference. Why did the Court not use that analysis in this case, and would the case have come out differently if the Court had used the *Chevron* analysis?
2. Would the deadlines that the court gave the agency to adopt proposed and final rules to define “navigable waters” be realistic today?
3. If the Court upheld the Corps’ regulatory definition of “navigable waters,” would many wetlands be regulated under the Clean Water Act?
4. How broad was the Corps’ jurisdiction over “waters” after this decision? What limits did the Court impose on the Corps’ authority to regulate waters? Would “navigable waters” need to be “navigable”?

### **B. Expanded Jurisdiction, Adjacent Wetlands and *Riverside-Bayview Homes***

In response to the court’s decision in *N.R.D.C. v. Callaway*, the Corps amended its regulations to significantly broaden the definition of “navigable waters” under the Clean Water Act to advance the water quality protection purposes of the statute, as opposed to the navigability goals of the Rivers and Harbors Act. In 1975, the agency issued interim final regulations that included not only the traditional “navigable waters” that were regulated

under the Rivers and Harbors Act, but also tributaries of those waters and “coastal wetlands” or “freshwater wetlands” that were contiguous to, or adjacent to, traditional navigable waters. See [40 Fed. Reg. 31320 \(July 25, 1975\)](#). The 1975 regulations marked the first time that the Corps defined “navigable waters” under the Clean Water Act to include wetlands. The new regulations also asserted jurisdiction over intrastate lakes, rivers and streams (even if not traditionally navigable) if they were utilized in various ways for interstate commerce. Thus, while the regulations broadened the categories of waters within the Corps’ jurisdiction, the agency limited its jurisdiction to waters with ties to interstate commerce.

In 1982, the Corps refined its regulations but did not significantly expand jurisdiction. Because the Clean Water Act defines “navigable waters” as “waters of the United States,” the Corps adopted a regulatory definition of “waters of the United States” that included the following waters:

- the traditional navigable waters regulated under the 1974 regulations (33 C.F.R. § 323.2(a)(1));
- interstate waters and interstate wetlands (33 C.F.R. § 323.2(a)(2));
- intrastate waters the use, degradation or destruction of which could affect interstate or foreign commerce (33 C.F.R. § 323.2(a)(3));
- impoundments of water otherwise defined as waters of the United States under the definition (33 C.F.R. § 323.2(a)(4));
- tributaries of waters identified in paragraphs (a)(1) - (4) (33 C.F.R. § 323.2(a)(5));
- the territorial sea (33 C.F.R. § 323.2(a)(6)); and
- wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) (33 C.F.R. § 323.2(a)(7))

See [33 C.F.R. § 323 \(1982\)](#).

Those rules were challenged in the following case, which made it to the U.S. Supreme Court in 1985.

## **United States v. Riverside Bayview Homes**

474 U.S. 121 (1985)

**JUSTICE WHITE** delivered the opinion of the Court.

This case presents the question whether the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.*, together with certain regulations promulgated under its authority by the Army Corps of

### **Resources for the Case**

[Oral Argument Audio](#) (from the Oyez Project)

[Unedited opinion](#) (From Justia)

[Google Map of all the cases in the coursebook](#)

Engineers, authorizes the Corps to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries.

## I

The relevant provisions of the Clean Water Act originated in the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, and have remained essentially unchanged since that time. Under §§ 301 and 502 of the Act, 33 U.S.C. §§ 1311 and 1362, any discharge of dredged or fill materials into "navigable waters" -- defined as the "waters of the United States" -- is forbidden unless authorized by a permit issued by the Corps of Engineers pursuant to § 404, 33 U.S.C. § 1344. \* \* \* After initially construing the Act to cover only waters navigable in fact, in 1975 the Corps issued interim final regulations redefining "the waters of the United States" to include not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and nonnavigable intrastate waters whose use or misuse could affect interstate commerce. 40 Fed.Reg. 31320 (1975). More importantly for present purposes, the Corps construed the Act to cover all "freshwater wetlands" that were adjacent to other covered waters. A "freshwater wetland" was defined as an area that is "periodically inundated" and is "normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." 33 C.F.R. § 209.120(d)(2)(h) (1976). In 1977, the Corps refined its definition of wetlands by eliminating the reference to periodic inundation and making other minor changes. The 1977 definition reads as follows:

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

33 C.F.R. § 323.2(c) (1978).

In 1982, the 1977 regulations were replaced by substantively identical regulations that remain in force today. See 33 C.F.R. § 323.2 (1985).<sup>2</sup> Respondent Riverside Bayview Homes, Inc. (hereafter respondent), owns 80 acres of low-lying, marshy land near the shores of Lake St. Clair in Macomb County, Michigan. In 1976, respondent began to place fill materials on its property as part of its preparations for construction of a housing development. The Corps of Engineers, believing that the property was an "adjacent wetland" under the 1975 regulation defining "waters of the United States," filed suit in the United States District Court for the Eastern District of Michigan, seeking to enjoin

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<sup>2</sup> The regulations also cover certain wetlands not necessarily adjacent to other waters. See 33 C.F.R. §§ 323.2(a)(2) and (3) (1985). These provisions are not now before us.

respondent from filling the property without the permission of the Corps.

The District Court held that the portion of respondent's property lying below 575.5 feet above sea level was a covered wetland, and enjoined respondent from filling it without a permit. \* \* \* Respondent appealed, and the Court of Appeals remanded for consideration of the effect of the intervening 1977 amendments to the regulation. \* \* \* On remand, the District Court again held the property to be a wetland subject to the Corps' permit authority.

\* \* \*

Respondent again appealed, and the Sixth Circuit reversed. \* \* \* . The court construed the Corps' regulation to exclude from the category of adjacent wetlands -- and hence from that of "waters of the United States" -- wetlands that were not subject to flooding by adjacent navigable waters at a frequency sufficient to support the growth of aquatic vegetation. The court adopted this construction of the regulation because, in its view, a broader definition of wetlands might result in the taking of private property without just compensation. The court also expressed its doubt that Congress, in granting the Corps jurisdiction to regulate the filling of "navigable waters," intended to allow regulation of wetlands that were not the result of flooding by navigable waters. \* \* \* Under the court's reading of the regulation, respondent's property was not within the Corps' jurisdiction, because its semiaquatic characteristics were not the result of frequent flooding by the nearby navigable waters. Respondent was therefore free to fill the property without obtaining a permit.

We granted certiorari to consider the proper interpretation of the Corps' regulation defining "waters of the United States" and the scope of the Corps' jurisdiction under the Clean Water Act, both of which were called into question by the Sixth Circuit's ruling. \* \* \* We now reverse.

## II

The question whether the Corps of Engineers may demand that respondent obtain a permit before placing fill material on its property is primarily one of regulatory and statutory interpretation: we must determine whether respondent's property is an "adjacent wetland" within the meaning of the applicable regulation, and, if so, whether the Corps' jurisdiction over "navigable waters" gives it statutory authority to regulate discharges of fill material into such a wetland. In this connection, we first consider the Court of Appeals' position that the Corps' regulatory authority under the statute and its implementing regulations must be narrowly construed to avoid a taking without just compensation in violation of the Fifth Amendment.

[The Court then held that neither the imposition of a permit requirement by the Clean Water Act nor the denial of a permit would necessarily constitute a taking. Accordingly, the Court held that it was not necessary to interpret the statute narrowly to avoid takings concerns.]

\* \* \*

### III

Purged of its spurious constitutional overtones, the question whether the regulation at issue requires respondent to obtain a permit before filling its property is an easy one. The regulation extends the Corps' authority under § 404 to all wetlands adjacent to navigable or interstate waters and their tributaries. Wetlands, in turn, are defined as lands that are "inundated or *saturated* by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 323.2(c) (195) (emphasis added). The plain language of the regulation refutes the Court of Appeals' conclusion that inundation or "frequent flooding" by the adjacent body of water is a *sine qua non* of a wetland under the regulation. Indeed, the regulation could hardly state more clearly that saturation by either surface or ground water is sufficient to bring an area within the category of wetlands, provided that the saturation is sufficient to, and does, support wetland vegetation. The history of the regulation underscores the absence of any requirement of inundation. The interim final regulation that the current regulation replaced explicitly included a requirement of "periodi[c] inundation." 33 C.F.R. § 209.120(d)(2)(h) (1976). In deleting the reference to "periodic inundation" from the regulation as finally promulgated, the Corps explained that it was repudiating the interpretation of that language "as requiring inundation over a record period of years." 42 Fed. Reg. 37128 (1977). In fashioning its own requirement of "frequent flooding" the Court of Appeals improperly reintroduced into the regulation precisely what the Corps had excised. \* \* \* Without the nonexistent requirement of frequent flooding, the regulatory definition of adjacent wetlands covers the property here. The District Court found that respondent's property was "characterized by the presence of vegetation that requires saturated soil conditions for growth and reproduction," \* \* \* and that the source of the saturated soil conditions on the property was groundwater. There is no plausible suggestion that these findings are clearly erroneous, and they plainly bring the property within the category of wetlands as defined by the current regulation. In addition, the court found that the wetland located on respondent's property was adjacent to a body of navigable water, since the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of respondent's property to Black Creek, a navigable waterway. Again, the court's finding is not clearly erroneous. Together, these findings establish that respondent's property is a wetland adjacent to a navigable waterway. Hence, it is part of the "waters of the United States" as defined by 33 C.F.R. § 323.2 (1985), and if the regulation itself is valid as a construction of the term "waters of the United States" as used in the Clean Water Act, a question which we now address, the property falls within the scope of the Corps' jurisdiction over "navigable waters" under § 404 of the Act.

## IV

### A

An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress. *Chemical Manufacturers Assn. v. Natural Resources Defense Council, Inc.*, 470 U.S.116, 125 (1985); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S.837, 842-845 (1984). Accordingly, our review is limited to the question whether it is reasonable, in light of the language, policies, and legislative history of the Act, for the Corps to exercise jurisdiction over wetlands adjacent to, but not regularly flooded by, rivers, streams, and other hydrographic features more conventionally identifiable as "waters."<sup>8</sup>

On a purely linguistic level, it may appear unreasonable to classify "lands," wet or otherwise, as "waters." Such a simplistic response, however, does justice neither to the problem faced by the Corps in defining the scope of its authority under § 404(a) nor to the realities of the problem of water pollution that the Clean Water Act was intended to combat. In determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs -- in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of "waters" is far from obvious. Faced with such a problem of defining the bounds of its regulatory authority, an agency may appropriately look to the legislative history and underlying policies of its statutory grants of authority. Neither of these sources provides unambiguous guidance for the Corps in this case, but together they do support the reasonableness of the Corps' approach of defining adjacent wetlands as "waters" within the meaning of § 404(a). Section 404 originated as part of the Federal Water Pollution Control Act Amendments of 1972, which constituted a comprehensive legislative attempt "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101, 33 U.S.C. § 1251. This objective incorporated a broad, systemic view of the goal of maintaining and improving water quality: as the House Report on the legislation put it, "the word *integrity*' . . . refers to a condition in which the natural structure and function of ecosystems [are] maintained." H.R.Rep. No. 92911, p. 76 (1972). Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for "[w]ater moves in hydrologic cycles, and it is essential that discharge

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<sup>8</sup> We are not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water, see 33 C.F.R. §§ 323.2(a)(2) and (3) (1985), and we do not express any opinion on that question.

of pollutants be controlled at the source." S.Rep.No. 92414, p. 77 (1972). In keeping with these views, Congress chose to define the waters covered by the Act broadly. Although the Act prohibits discharges into "navigable waters," see CWA §§ 301(a), 404(a), 502(12), 33 U.S.C. §§ 1311(a), 1344(a), 1362(12), the Act's definition of "navigable waters" as "the waters of the United States" makes it clear that the term "navigable" as used in the Act is of limited import. In adopting this definition of "navigable waters," Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes, and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term. See S.Conf.Rep. No. 921236, p. 144 (1972); 118 Cong. Rec. 33756-33757(1972) (statement of Rep. Dingell). Of course, it is one thing to recognize that Congress intended to allow regulation of waters that might not satisfy traditional tests of navigability; it is another to assert that Congress intended to abandon traditional notions of "waters" and include in that term "wetlands" as well. Nonetheless, the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term "waters" to encompass wetlands adjacent to waters as more conventionally defined. Following the lead of the Environmental Protection Agency, see 38 Fed. Reg. 10834 (1973), the Corps has determined that wetlands adjacent to navigable waters do, as a general matter, play a key role in protecting and enhancing water quality:

"The regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . , but must focus on all waters that together form the entire aquatic system. [\*134] Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system." "For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system."

42 Fed.Reg. 37128 (1977).

We cannot say that the Corps' conclusion that adjacent wetlands are inseparably bound up with the "waters" of the United States -- based as it is on the Corps' and EPA's technical expertise -- is unreasonable. In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act. This holds true even for wetlands that are not the result of flooding or permeation by water having its source in adjacent bodies of open water. The Corps has concluded that wetlands may affect the water quality of adjacent lakes, rivers, and streams even when the waters of those bodies do not actually



inundate the wetlands. For example, wetlands that are not flooded by adjacent waters may still tend to drain into those waters. In such circumstances, the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water, see 33 C.F.R. § 320.4(b)(2)(vii) (1985), and to slow the flow of surface runoff into lakes, rivers, and streams, and thus prevent flooding and erosion, see §§ 320.4(b)(2)(iv) and (v). In addition, adjacent wetlands may

"serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species."

§ 320.4(b)(2)(i). In short, the Corps has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water. Again, we cannot say that the Corps' judgment on these matters is unreasonable, and we therefore conclude that a definition of "waters of the United States" encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act. Because respondent's property is part of a wetland that actually abuts on a navigable waterway, respondent was required to have a permit in this case.<sup>9</sup>

## B

Following promulgation of the Corps' interim final regulations in 1975, the Corps' assertion of authority under § 404 over waters not actually navigable engendered some congressional opposition. The controversy came to a head during Congress' consideration of the Clean Water Act of 1977, a major piece of legislation aimed at achieving "interim improvements within the existing framework" of the Clean Water Act. H.R.Rep. No. 95139, pp. 1-2 (1977). In the end, however, as we shall explain, Congress acquiesced in the administrative construction.

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<sup>9</sup> Of course, it may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as "waters." If it is reasonable for the Corps to conclude that, in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand. That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is, in fact, lacking in importance to the aquatic environment, or where its importance is outweighed by other values the Corps may always allow development of the wetland for other uses simply by issuing a permit. See 33 C.F.R. § 320.4(b)(4) (1986).

[The Court then cited portions of the legislative history of the enactment of the Clean Water Act of 1977 that demonstrated attempts to narrow the definition of navigable waters in the statute.]

\* \* \*

The significance of Congress' treatment of the Corps' § 404 jurisdiction in its consideration of the Clean Water Act of 1977 is twofold. First, the scope of the Corps' asserted jurisdiction over wetlands was specifically brought to Congress' attention, and Congress rejected measures designed to curb the Corps' jurisdiction, in large part because of its concern that protection of wetlands would be unduly hampered by a narrowed definition of "navigable waters." Although we are chary of attributing significance to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it. See *Bob Jones University v. United States*, 461 U.S. 574, 599-601 (1983); *United States v. Rutherford*, 442 U.S. 544, 442 U.S. 554, and n.10 (1979).

Second, it is notable that even those who would have restricted the reach of the Corps' jurisdiction would have done so not by removing wetlands altogether from the definition of "waters of the United States," but only by restricting the scope of "navigable waters" under § 404 to waters navigable in fact *and their adjacent wetlands*. In amending the definition of "navigable waters" for purposes of § 404 only, the backers of the House bill would have left intact the existing definition of "navigable waters" for purposes of § 301 of the Act, which generally prohibits discharges of pollutants into navigable waters. As the House Report explained: "*Navigable waters, as used in section 301, includes all of the waters of the United States, including their adjacent wetlands.*" H.R.Rep. No. 95139, p. 24 (1977). Thus, even those who thought that the Corps' existing authority under § 404 was too broad recognized (1) that the definition of "navigable waters" then in force for both § 301 and § 404 was reasonably interpreted to include adjacent wetlands, (2) that the water quality concerns of the Clean Water Act demanded regulation of at least some discharges into wetlands, and (3) that whatever jurisdiction the Corps would retain over discharges of fill material after passage of the 1977 legislation should extend to discharges into wetlands adjacent to any waters over which the Corps retained jurisdiction. These views provide additional support for a conclusion that Congress in 1977 acquiesced in the Corps' definition of waters as including adjacent wetlands.

Two features actually included in the legislation that Congress enacted in 1977 also support the view that the Act authorizes the Corps to regulate discharges into wetlands. First, in amending § 404 to allow federally approved state permit programs to supplant regulation by the Corps of certain discharges of fill material, Congress provided that the States would not be permitted to supersede the Corps' jurisdiction to regulate discharges

into actually navigable waters and waters subject to the ebb and flow of the tide, "including wetlands adjacent thereto." CWA § 404(g)(1), 33 U.S.C. § 1344(g)(1). Here, then, Congress expressly stated that the term "waters" included adjacent wetlands.<sup>11</sup> Second, the 1977 Act authorized an appropriation of \$6 million for completion by the Department of Interior of a "National Wetlands Inventory" to assist the States "in the development and operation of programs under this Act." CWA § 208(i)(2), 33 U.S.C. § 1288(i)(2). The enactment of this provision reflects congressional recognition that wetlands are a concern of the Clean Water Act, and supports the conclusion that, in defining the waters covered by the Act to include wetlands, the Corps is "implementing congressional policy, rather than embarking on a frolic of its own." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375 (1969).

## C

We are thus persuaded that the language, policies, and history of the Clean Water Act compel a finding that the Corps has acted reasonably in interpreting the Act to require permits for the discharge of fill material into wetlands adjacent to the "waters of the United States." The regulation in which the Corps has embodied this interpretation, by its terms, includes the wetlands on respondent's property within the class of waters that may not be filled without a permit; and, as we have seen, there is no reason to interpret the regulation more narrowly than its terms would indicate. Accordingly, the judgment of the Court of Appeals is

**Reversed.**

### Questions and Comments

1. The Supreme Court reviewed both the legality of the Corps' regulation and the legality of the Corps' interpretation of its regulation. Landmark Supreme Court administrative law decisions provide that an agency's interpretation of its own regulation is controlling unless it is plainly erroneous or inconsistent with the regulation. See [Auer v. Robbins, 519 U.S. 452, 461 \(1997\)](#); [Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 \(1945\)](#). Did the Sixth Circuit use that approach when reviewing the Corps' interpretation of "adjacent wetlands"? Does the Supreme Court cite that precedent or apply that test in reviewing the Corps' interpretation of "adjacent" wetlands?

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<sup>11</sup> To be sure, § 404(g)(1) does not conclusively determine the construction to be placed on the use of the term "waters" elsewhere in the Act (particularly in § 502(7), which contains the relevant definition of "navigable waters"); however, in light of the fact that the various provisions of the Act should be read *in pari materia*, it does at least suggest strongly that the term "waters," as used in the Act, does not necessarily exclude "wetlands."

2. **Groundwater v. Surface Water:** Did the Corps' regulations require a surface water connection between wetlands and other waters for the wetlands to be considered "adjacent" to the waters? Was there a scientific justification for the Corps' interpretation and did the Court accord that any deference? Keep this in mind when reading the Supreme Court's decision in *Rapanos v. United States*. Incidentally, the Corps' current regulations define "adjacent" to mean "bordering, contiguous, or neighboring" and adjacent wetlands include wetlands "separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." See [33 C.F.R. § 328.3\(c\)](#)
3. In reviewing the legality of the Corps' rule that asserted jurisdiction over "adjacent wetlands," did the Court apply the *Chevron* analysis? Did the Court decide the case at Step 1 or Step 2? It is interesting to compare the Supreme Court's application of the *Chevron* analysis in this case, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, and *Rapanos v. United States*.
4. **Navigability and the Commerce Clause:** Does the Court conclude that "waters" must be "navigable" to be regulated under the Clean Water Act? Is the Court's articulation of the breadth of the Corps' jurisdiction under the Act as broad as the *Callaway* court's?
5. Note the Court's focus on the purposes of the Clean Water Act and the legislative history. How does the Corps' interpretation of the statute advance the purposes of the statute or advance Congress' intent? This was a unanimous opinion from the Court and it is interesting to compare the statutory analysis in this case with the textualism adopted by the Supreme Court in many cases today.
6. **Legislative Acquiescence:** What weight should courts accord to Congress' failure to enact legislation that overturns an agency's rules? Are you persuaded by the Court's discussion of Congressional acquiescence?
7. **Values and Functions:** Recall our discussion about the values and functions of wetlands in Chapter 1. The *Riverside Bayview* court acknowledges those values and functions in its opinion and defers to the Corps' scientific judgment in regulating adjacent wetlands because of the values and functions that they provide to the adjacent waters. Again, keep this in mind when reading the Supreme Court's decision in *Rapanos v. United States*.
8. **Adjacent to What?** As noted above, the Corps' 1982 regulations asserted jurisdiction over wetlands adjacent to traditional navigable waters, adjacent to interstate waters, adjacent to tributaries of traditional navigable waters or interstate waters, and adjacent to isolated, intrastate waters the use or misuse of which could affect interstate commerce. Which portions of the Corps' regulations were

challenged in the *Riverside Bayview* case? Did the Court express any opinion regarding the legality of regulating other wetlands?

9. **Post-Script:** The wetlands at issue in the *Riverside Bayview* case were not developed, but were later used as compensatory mitigation for another wetlands development. See Royal C. Gardner, *Lawyers, Swamps and Money* 200 (Island Press 2011).

### C. Isolated Wetlands and Waters

In 1986, the year after the Supreme Court's decision in *Riverside Bayview Homes*, the Corps again amended its regulatory definition of "waters of the United States." The Corps did not change the categories of waters that would be regulated as "waters of the United States," but renumbered the regulations, so that the definition of "waters of the United States" now appears at [33 C.F.R. § 328.3](#). In both the 1982 and 1986 regulations, the Corps defined "waters of the United States" to include certain isolated, intrastate waters that were not traditional navigable waters but that could be regulated because of their ties to interstate commerce. The 1986 regulation, which used essentially the same language as the 1982 regulation, described the "isolated waters" that could be regulated as "waters of the United States" in the following manner:

#### 33 C.F.R. § 328.3(a)(3)

All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes or natural ponds, the use degradation or destruction of which could affect interstate or foreign commerce, including any such waters:

- (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
- (ii) From which fish or shellfish could be taken and sold in interstate or foreign commerce; or
- (iii) Which are used or could be used for industrial purpose by industries in interstate commerce

Although the Corps did not make any significant changes to the categories of “waters of the United States” regulated in the rule itself, the agency provided further guidance in the **preamble** to the rule regarding the types of “isolated waters” that would be regulated under the Clean Water Act. See [51 Fed. Reg. 41206, 41217 \(Nov. 13, 1986\)](#). For instance, the Corps indicated that certain isolated waters would generally not be regulated as “waters of the United States,” although they could be regulated on a case-by-case basis. Those included non-tidal irrigation ditches; artificial lakes or ponds that are used for watering,

irrigation, or settling basins; and various other artificially created waters.

**The Migratory Bird Test:** More significantly, though, the Corps clarified that isolated waters would generally be regulated under 33 C.F.R. § 328.3(a)(3) if the waters:

- a. \* \* \* are or would be used as habitat by birds protected by Migratory Bird Treaties;
- b. \* \* \* are or would be used as habitat by other migratory birds which cross state lines;
- c. \* \* \* are or would be used as habitat for endangered species; or
- d. used to irrigate crops sold in interstate commerce.” See 51 Fed. Reg. at 41217.



Photo 23 Photo by S. Johnson

As noted above, this “migratory bird rule” was not adopted as a regulation but included in the preamble to the regulation as guidance. In the years following the amendment of the rules, federal appellate courts reached opposing conclusions regarding the validity of the “migratory bird rule.” The Ninth Circuit upheld regulation of artificial wetlands in basins that were formerly used in salt production on the grounds that the Corps had determined that the wetlands provided habitat for migratory birds and the endangered salt marsh harvest mouse. See [Leslie Salt v. United States, 896 F.2d 354 \(9<sup>th</sup> Cir. 1990\)](#), cert. denied, 486 U.S. 1126 (1991). The Seventh Circuit, reviewing EPA’s version of the test, initially invalidated the test, see [Hoffman Homes, Inc. v. Administrator, United States EPA, 961 F.2d 1310 \(7<sup>th</sup> Cir. 1992\)](#), but later upheld it. See [Hoffman Homes, Inc. v. Administrator, United States EPA 975 F.2d 1554 \(7<sup>th</sup> Cir. 1992\)](#). The Fourth Circuit expressed deeper concerns and a divided panel of the Circuit suggested that the Corps exceeded its statutory authority in regulating isolated waters generally simply because they *could*, rather than *did*, affect interstate commerce. See [United States v. Wilson, 133 F.3d 251 \(4<sup>th</sup> Cir. 1997\)](#).

The dispute over the Corps’ authority to regulate isolated waters reached the U.S. Supreme Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*. Sixteen years after *Riverside Bayview Homes*, the Court was reviewing another case focusing on the government’s Clean Water Act jurisdiction over “waters of the United States.” Unlike the unanimous decision in *Riverside Bayview Homes*, the *Solid Waste*

Agency case generated greater division among the Court, which issued a 5-4 decision. Justices Rehnquist, O'Connor, Scalia, Kennedy and Thomas were in the majority, with Justices Stevens, Souter, Ginsburg, and Breyer dissenting.

**Solid Waste Agency of Northern Cook County, v. United States Army Corps of Engineers, et al.**

531 U.S. 159 (2001)

**CHIEF JUSTICE REHNQUIST** delivered the opinion of the Court.

**Resources for the Case**

[Oral Argument Audio](#) (from the Oyez Project)  
[Map of the site](#) - now the Heron Woods State Habitat Area - sold by SWANCC in 2001  
[Chicago Tribune news story re: permit denial](#)  
What is a balefill - [Rhode Island Dept. of Env'tl. Mgmt.](#)  
[SWANCC website](#)  
[Unedited opinion](#)  
[Google Map of all the cases in the coursebook](#)

Section 404(a) of the Clean Water Act (CWA or Act), 86 Stat. 884, as amended, 33 U.S.C. § 1344(a), regulates the discharge of dredged or fill material into “navigable waters.” The United States Army Corps of Engineers (Corps), has interpreted § 404(a) to confer federal authority over an abandoned sand and gravel pit in northern Illinois which provides habitat for migratory birds. We are asked to decide whether the provisions of § 404(a) may be fairly extended to these waters, and, if so, whether Congress could exercise such authority consistent with the Commerce Clause, U. S. Const., Art. I, § 8, cl. 3. We answer the first question in the negative and therefore do not reach the second.

Petitioner, the Solid Waste Agency of Northern Cook County (SWANCC), is a consortium of 23 suburban Chicago cities and villages that united in an effort to locate and develop a disposal site for baled nonhazardous solid waste. The Chicago Gravel Company informed the municipalities of the availability of a 533-acre parcel, bestriding the Illinois counties Cook and Kane, which had been the site of a sand and gravel pit mining operation for three decades up until about 1960. Long since abandoned, the old mining site eventually gave way to a successional stage forest, with its remnant excavation trenches evolving into a scattering of permanent and seasonal ponds of varying size (from under one-tenth of an acre to several acres) and depth (from several inches to several feet). The municipalities decided to purchase the site for disposal of their baled nonhazardous solid waste. By law, SWANCC was required to file for various permits from Cook County and the State of Illinois before it could begin operation of its balefill project. In addition, because the operation called for the filling of some of the permanent and seasonal ponds, SWANCC contacted federal respondents (hereinafter respondents), including the Corps, to determine if a federal landfill permit was required under § 404(a) of the CWA, 33 U.S.C. § 1344(a).

Section 404(a) grants the Corps authority to issue permits “for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” *Ibid*. The term “navigable waters” is defined under the Act as “the waters of the United States, including the territorial seas.” § 1362(7). The Corps has issued regulations defining the term “waters of the United States” to include “waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . . .” 33 C.F.R. § 328.3(a)(3) (1999).

In 1986, in an attempt to “clarify” the reach of its jurisdiction, the Corps stated that § 404(a) extends to intrastate waters:

- “a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
- “b. Which are or would be used as habitat by other migratory birds which cross state lines; or
- “c. Which are or would be used as habitat for endangered species; or
- “d. Used to irrigate crops sold in interstate commerce.”

51 Fed. Reg. 41217.

This last promulgation has been dubbed the “Migratory Bird Rule.”<sup>1</sup> The Corps initially concluded that it had no jurisdiction over the site because it contained no “wetlands,” or areas which support “vegetation typically adapted for life in saturated soil conditions,” 33 C.F.R. § 328.3(b) (1999). However, after the Illinois Nature Preserves Commission informed the Corps that a number of migratory bird species had been observed at the site, the Corps reconsidered and ultimately asserted jurisdiction over the balefill site pursuant to subpart (b) of the “Migratory Bird Rule.” The Corps found that approximately 121 bird species had been observed at the site, including several known to depend upon aquatic environments for a significant portion of their life requirements. Thus, on November 16, 1987, the Corps formally “determined that the seasonally ponded, abandoned gravel mining depressions located on the project site, while not wetlands, did qualify as ‘waters of the United States’ . . . based upon the following criteria: (1) the proposed site had been abandoned as a gravel mining operation; (2) the water areas and spoil piles had developed a natural character; and (3) the water areas are used as habitat by migratory bird [*sic*] which cross state lines.” \* \* \* During the application process, SWANCC made several proposals to mitigate the likely displacement of the migratory birds and to preserve a great blue heron rookery located on the site. Its balefill project ultimately received the necessary local and state approval. By 1993, SWANCC had received a special use planned

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<sup>1</sup> The Corps issued the “Migratory Bird Rule” without following the notice and comment procedures outlined in the Administrative Procedure Act, 5 U.S.C. § 553.



development permit from the Cook County Board of Appeals, a landfill development permit from the Illinois Environmental Protection Agency, and approval from the Illinois Department of Conservation.

Despite SWANCC's securing the required water quality certification from the Illinois Environmental Protection Agency, the Corps refused to issue a §404(a) permit. \* \* \*

Petitioner filed suit under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, in the Northern District of Illinois challenging both the Corps' jurisdiction over the site and the merits of its denial of the §404(a) permit. The District Court granted summary judgment to respondents on the jurisdictional issue, and petitioner abandoned its challenge to the Corps' permit decision. On appeal to the Court of Appeals for the Seventh Circuit, petitioner renewed its attack on respondents' use of the "Migratory Bird Rule" to assert jurisdiction over the site. Petitioner argued that respondents had exceeded their statutory authority in interpreting the CWA to cover nonnavigable, isolated, intrastate waters based upon the presence of migratory birds and, in the alternative, that Congress lacked the power under the Commerce Clause to grant such regulatory jurisdiction. The Court of Appeals began its analysis with the constitutional question, holding that Congress has the authority to regulate such waters based upon "the cumulative impact doctrine, under which a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce." \* \* \* The aggregate effect of the "destruction of the natural habitat of migratory birds" on interstate commerce, the court held, was substantial because each year millions of Americans cross state lines and spend over a billion dollars to hunt and observe migratory birds.<sup>2</sup> \* \* \* The Court of Appeals then turned to the regulatory question. The court held that the CWA reaches as many waters as the Commerce Clause allows and, given its earlier Commerce Clause ruling, it therefore followed that respondents' "Migratory Bird Rule" was a reasonable interpretation of the Act. \* \* \* We granted certiorari, \* \* \* and now reverse.

Congress passed the CWA for the stated purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). In so doing, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." §

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<sup>2</sup> Relying upon its earlier decision in *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256 (CA7 1993), and a report from the United States Census Bureau, the Court of Appeals found that in 1996 approximately 3.1 million Americans spent \$1.3 billion to hunt migratory birds (with 11 percent crossing state lines to do so) as another 17.7 million Americans observed migratory birds (with 9.5 million traveling for the purpose of observing shorebirds). See 191 F.3d, at 850.

1251(b). Relevant here, § 404(a) authorizes respondents to regulate the discharge of fill material into “navigable waters,” 33 U.S.C. § 1344(a), which the statute defines as “the waters of the United States, including the territorial seas,” § 1362(7). Respondents have interpreted these words to cover the abandoned gravel pit at issue here because it is used as habitat for migratory birds. We conclude that the “Migratory Bird Rule” is not fairly supported by the CWA.

This is not the first time we have been called upon to evaluate the meaning of § 404(a). In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), we held that the Corps had § 404(a) jurisdiction over wetlands that actually abutted on a navigable waterway. In so doing, we noted that the term “navigable” is of “limited import” and that Congress evidenced its intent to “regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term.” *Id.*, at 133. But our holding was based in large measure upon Congress’ unequivocal acquiescence to, and approval of, the Corps’ regulations interpreting the CWA to cover wetlands adjacent to navigable waters. See *id.*, at 135–139. We found that Congress’ concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands “inseparably bound up with the ‘waters’ of the United States.” *Id.*, at 134.

It was the significant nexus between the wetlands and “navigable waters” that informed our reading of the CWA in *Riverside Bayview Homes*. Indeed, we did not “express any opinion” on the “question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water . . . .” *Id.*, at 131–132, n.8. In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this.

Indeed, the Corps’ *original* interpretation of the CWA, promulgated two years after its enactment, is inconsistent with that which it espouses here. Its 1974 regulations defined § 404(a)’s “navigable waters” to mean “those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.” 33 C.F.R. § 209.120(d)(1). The Corps emphasized that “[i]t is the water body’s capability of use by the public for purposes of transportation or commerce which is the determinative factor.” § 209.260(e)(1). Respondents put forward no persuasive evidence that the Corps mistook Congress’ intent in 1974.<sup>3</sup>

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<sup>3</sup> Respondents refer us to portions of the legislative history that they believe indicate Congress’ intent to expand the definition of “navigable waters.” Although the Conference Report includes the statement that the conferees “intend that the term ‘navigable waters’ be given the broadest possible constitutional interpretation,” S. Conf. Rep. No. 92–1236, p. 144 (1972), neither this, nor anything else in the legislative history to which respondents point, signifies that Congress intended to exert anything more than its commerce power

Respondents next contend that whatever its original aim in 1972, Congress charted a new course five years later when it approved the more expansive definition of “navigable waters” found in the Corps’ 1977 regulations. In July 1977, the Corps formally adopted 33 C.F.R. § 323.2(a)(5) (1978), which defined “waters of the United States” to include “isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.”

Respondents argue that Congress was aware of this more expansive interpretation during its 1977 amendments to the CWA. Specifically, respondents point to a failed House bill, H. R. 3199, that would have defined “navigable waters” as “all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce.” 123 Cong. Rec. 10420, 10434 (1977).<sup>4</sup> They also point to the passage in § 404(g)(1) that authorizes a State to apply to the Environmental Protection Agency for permission “to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce . . . including wetlands adjacent thereto) within its jurisdiction . . . .” 33 U.S.C. § 1344(g)(1). The failure to pass legislation that would have overturned the Corps’ 1977 regulations and the extension of jurisdiction in § 404(g) to waters “other than” traditional “navigable waters,” respondents submit, indicate that Congress recognized and accepted a broad definition of “navigable waters” that includes nonnavigable, isolated, intrastate waters.

Although we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care. \* \* \* “[F]ailed legislative proposals are ‘a particularly dangerous ground on which to rest an interpretation of a prior statute.’” *Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A.*, 511 U.S. 164, 187 (1994) (quoting *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U.S. 633, 650 (1990)). A bill can be proposed for any number of reasons, and it can be rejected for just as many others. The relationship between the actions and inactions of the 95th Congress and the intent of the 92d Congress in passing §404(a) is also considerably attenuated. Because “subsequent history is less illuminating than the contemporaneous evidence,” *Hagen v. Utah*, 510 U.S. 399, 420 (1994), respondents face a difficult task in

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over navigation. Indeed, respondents admit that the legislative history is somewhat ambiguous. See Brief for Federal Respondents 24.

<sup>4</sup> While this bill passed in the House, a similarly worded amendment to a bill originating in the Senate, S. 1952, failed. See 123 Cong. Rec. 26710, 26728 (1977).

overcoming the plain text and import of § 404(a).

We conclude that respondents have failed to make the necessary showing that the failure of the 1977 House bill demonstrates Congress' acquiescence to the Corps' regulations or the "Migratory Bird Rule," which, of course, did not first appear until 1986. Although respondents cite some legislative history showing Congress' recognition of the Corps' assertion of jurisdiction over "isolated waters,"\* \* \* as we explained in *Riverside Bayview Homes*, "[i]n both Chambers, debate on the proposals to narrow the definition of navigable waters centered largely on the issue of wetlands preservation." 474 U.S., at 136. Beyond Congress' desire to regulate wetlands adjacent to "navigable waters," respondents point us to no persuasive evidence that the House bill was proposed in response to the Corps' claim of jurisdiction over nonnavigable, isolated, intrastate waters or that its failure indicated congressional acquiescence to such jurisdiction.

Section 404(g) is equally unenlightening. In *Riverside Bayview Homes* we recognized that Congress intended the phrase "navigable waters" to include "at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Id.*, at 133. But § 404(g) gives no intimation of what those waters might be; it simply refers to them as "other . . . waters." Respondents conjecture that "other . . . waters" must incorporate the Corps' 1977 regulations, but it is also plausible, as petitioner contends, that Congress simply wanted to include all waters adjacent to "navigable waters," such as nonnavigable tributaries and streams. The exact meaning of § 404(g) is not before us and we express no opinion on it, but for present purposes it is sufficient to say, as we did in *Riverside Bayview Homes*, that "§ 404(g)(1) does not conclusively determine the construction to be placed on the use of the term 'waters' elsewhere in the Act (particularly in § 502(7), which contains the relevant definition of 'navigable waters') . . . ." *Id.*, at 138, n.11.\* \* \*

We thus decline respondents' invitation to take what they see as the next ineluctable step after *Riverside Bayview Homes*: holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)'s definition of "navigable waters" because they serve as habitat for migratory birds. As counsel for respondents conceded at oral argument, such a ruling would assume that "the use of the word navigable in the statute . . . does not have any independent significance." \* \* \* We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. We said in *Riverside Bayview Homes* that the word "navigable" in the statute was of "limited effect" and went on to hold that § 404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made. See, e.g., *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407–408 (1940).

Respondents—relying upon all of the arguments addressed above—contend that, at the very least, it must be said that Congress did not address the precise question of § 404(a)'s scope with regard to nonnavigable, isolated, intrastate waters, and that, therefore, we should give deference to the “Migratory Bird Rule.” See, e.g., *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We find § 404(a) to be clear, but even were we to agree with respondents, we would not extend *Chevron* deference here.

Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. See *ibid.* This concern is heightened where the administrative interpretation alters the federal state framework by permitting federal encroachment upon a traditional state power. See *United States v. Bass*, 404 U.S. 336, 349 (1971) (“[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance”). Thus, “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” *DeBartolo, supra*, at 575.

Twice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited. See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). Respondents argue that the “Migratory Bird Rule” falls within Congress' power to regulate intrastate activities that “substantially affect” interstate commerce. They note that the protection of migratory birds is a “national interest of very nearly the first magnitude,” *Missouri v. Holland*, 252 U.S. 416, 435 (1920), and that, as the Court of Appeals found, millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds. These arguments raise significant constitutional questions. For example, we would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce. This is not clear, for although the Corps has claimed jurisdiction over petitioner's land because it contains water areas used as habitat by migratory birds, respondents now, *post litem motam*, focus upon the fact that the regulated activity is petitioner's municipal landfill, which is “plainly of a commercial nature.” \* \* \* But this is a far cry, indeed, from the “navigable waters” and “waters of the United States” to which the statute by its terms extends.

These are significant constitutional questions raised by respondents' application of their regulations, and yet we find nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit such as we have here.

Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the “Migratory Bird Rule” would result in a significant impingement of the States’ traditional and primary power over land and water use. See, e.g., *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994) (“[R]egulation of land use [is] a function traditionally performed by local governments”). Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to “recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . .” 33 U.S.C. § 1251(b). We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents’ interpretation, and therefore reject the request for administrative deference.<sup>8</sup>

We hold that 33 C.F.R. § 328.3(a)(3) (1999), as clarified and applied to petitioner’s balefill site pursuant to the “Migratory Bird Rule,” 51 Fed. Reg. 41217 (1986), exceeds the authority granted to respondents under §404(a) of the CWA. The judgment of the Court of Appeals for the Seventh Circuit is therefore

**Reversed.**

### Questions and Comments

1. Did the *Solid Waste Agency* case involve wetlands? If not, what implications does the case have for regulation of wetlands?
2. **Artificial Wetlands:** Note that the ponds in *Solid Waste Agency of Northern Cook County* were artificially created. Even though the Court did not find jurisdiction over the ponds in this case, man-made ponds and wetlands can be regulated as “waters of the United States” under the Clean Water Act. See, e.g., [Leslie Salt Co. v. United States](#), 896 F.2d 354 (9th Cir. 1990); [Texas Mun. Power Agency v. EPA](#), 836 F.2d 1482 (5th Cir. 1988).
3. Could the “migratory bird rule” have been challenged on procedural grounds? With what success?
4. The “migratory bird rule” was not adopted as a rule through notice and comment rulemaking. Is it appropriate, therefore, to use the *Chevron* analysis to review the Corps’ decision? If *Chevron* doesn’t apply, should courts accord the agency any deference? More or less than under the *Chevron* analysis? What weight should the Corps’ 1974 rules carry, in light of the fact that the Corps rejected the reasoning

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<sup>8</sup> Because violations of the CWA carry criminal penalties, see 33 U.S.C. § 1319(c)(2), petitioner invokes the rule of lenity as another basis for rejecting the Corps’ interpretation of the CWA. Brief for Petitioner 31–32. We need not address this alternative argument. See *United States v. Shabani*, 513 U.S. 10, 17 (1994).

behind them almost 25 years before the *Solid Waste Agency* decision?

5. Does the Court use the *Chevron* analysis in this case? If so, does it decide the case at step 1 or step 2? What canons of statutory analysis are central to the Court's holding?
6. In *Riverside Bayview Homes*, the Court interpreted the Clean Water Act broadly in accordance with its purposes and relied on evidence of Congressional acquiescence in the Corps' interpretation of the statute to uphold the Corps' regulation of adjacent wetlands. Does the Court ignore those purposes and evidence of Congressional acquiescence in this case? Does it focus on other statutory goals? The dissenting Justices argued for a broad interpretation of the statute consistent with the purposes articulated in *Riverside Bayview Homes*. They noted, for instance, that the statute protects significant natural biological functions, including food chain production, general habitat, and nesting spawning, rearing and resting sites for aquatic wildlife and that isolated waters provide those functions, regardless of whether they have any connection to traditional navigable waters. See [531 U.S. at 181-182](#) (Stevens, *dissenting*).
7. *Riverside Bayview Homes* and the D.C. District Court's *Callaway* decision seemed to approve a broad reading of jurisdiction under the Clean Water Act to extend to all waters that could be regulated under the Commerce Clause. Does the majority in this case adopt a narrower vision of the breadth of authority? The dissenting Justices argued that Congress' Commerce Clause power over navigation is clearly more limited than Congress' Commerce Clause power generally. See [531 U.S. at 181](#) (Stevens, *dissenting*).

While the Court does not overrule *Riverside Bayview Homes*, the majority makes it clear that the prior case did not address isolated waters and that the Court upheld the regulation of adjacent wetlands in *Riverside Bayview Homes* because of the "significant nexus" between the wetlands and more traditional "navigable waters." Is the Court saying that the Corps can only regulate traditional navigable waters or waters that have some connection to traditional navigable waters? The dissenting justices asserted that the Court's decision could limit jurisdiction to actually navigable waters, their tributaries, and wetlands adjacent to each. See [531 U.S. at 177](#) (Stevens, *dissenting*).

8. How broad is the Court's decision in the *Solid Waste Agency* case? Is the Court simply striking down the migratory bird test, or is it invalidating the regulation of isolated waters more generally? If the Corps can regulate isolated waters after the *Solid Waste Agency* decision, which isolated waters can it regulate?
9. Did the Court reach the question of whether the regulation of isolated waters based

on the migratory bird test violated the Commerce Clause? The dissent argued that such regulation was clearly constitutional. The portion of the dissenting opinion addressing that issue follows. Are you persuaded? For various views on the impact of the *Solid Waste Agency* decision shortly after the Court issued the decision, see Robin Kundis Craig, *Beyond SWANCC: The New Federalism and Clean Water Act Jurisdiction*, 33 *Envtl. L.* 113 (2003); Christine A. Klein, *The Environmental Commerce Clause*, 27 *Harv. Envtl. L. Rev.* 1 (2003); Bradford C. Mank, *The Murky Future of the Clean Water Act After SWANCC: Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 *Ecology L.Q.* 811 (2003). For an exploration of the issue published prior to the *Lucas* decision, see Stephen M. Johnson, *Federal Regulation of Isolated Wetlands*, 23 *Envtl. L.* 1 (1993).

**Solid Waste Agency of Northern Cook County, v. United States Army Corps of Engineers, et al.**

**JUSTICE STEVENS**, with whom **JUSTICE SOUTER**, **JUSTICE GINSBURG**, and **JUSTICE BREYER** join, dissenting.

\* \* \*

IV

Because I am convinced that the Court's miserly construction of the statute is incorrect, I shall comment briefly on petitioner's argument that Congress is without power to prohibit it from filling any part of the 31 acres of ponds on its property in Cook County, Illinois. The Corps' exercise of its § 404 permitting power over "isolated" waters that serve as habitat for migratory birds falls well within the boundaries set by this Court's Commerce Clause jurisprudence.

In *United States v. Lopez*, 514 U.S. 549, 558-559 (1995), this Court identified "three broad categories of activity that Congress may regulate under its commerce power": (1) channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons and things in interstate commerce; and (3) activities that "substantially affect" interstate commerce. *Ibid.* The migratory bird rule at issue here is properly analyzed under the third category. In order to constitute a proper exercise of Congress' power over intrastate activities that "substantially affect" interstate commerce, it is not necessary that each individual instance of the activity substantially affect commerce; it is enough that, taken in the aggregate, the class of activities in question has such an effect. *Perez v. United States*, 402 U.S. 146 (1971) (noting that it is the "class" of regulated activities, not the individual instance, that is to be considered in the "affects" commerce analysis); see also *Hodel*, 452 U.S., at 277; *Wickard v. Filburn*, 317 U.S. 111, 127-128 (1942).



The activity being regulated in this case (and by the Corps' § 404 regulations in general) is the discharge of fill material into water. The Corps did not assert jurisdiction over petitioner's land simply because the waters were "used as habitat by migratory birds." It asserted jurisdiction because petitioner planned to discharge fill into waters "used as habitat by migratory birds." Had petitioner intended to engage in some other activity besides discharging fill (i. e., had there been no activity to regulate), or, conversely, had the waters not been habitat for migratory birds (i. e., had there been no basis for federal jurisdiction), the Corps would never have become involved in petitioner's use of its land. There can be no doubt that, unlike the class of activities Congress was attempting to regulate in *United States v. Morrison*, 529 U.S. 598, 613 (2000) ("[g]endermotivated crimes"), and *Lopez*, 514 U.S., at 561 (possession of guns near school property), the discharge of fill material into the Nation's waters is almost always undertaken for economic reasons. See V. Albrecht & B. Goode, *Wetland Regulation in the Real World*, Exh. 3 (Feb. 1994) (demonstrating that the overwhelming majority of acreage for which § 404 permits are sought is intended for commercial, industrial, or other economic use).<sup>15</sup>

Moreover, no one disputes that the discharge of fill into "isolated" waters that serve as migratory bird habitat will, in the aggregate, adversely affect migratory bird populations. See, e. g., 1 Secretary of the Interior, *Report to Congress, The Impact of Federal Programs on Wetlands: The Lower Mississippi Alluvial Plain and the Prairie Pothole Region* 79-80 (Oct. 1988) (noting that "isolated," phase 3 waters "are among the most important and also [the] most threatened ecosystems in the United States" because "[t]hey are prime nesting grounds for many species of North American waterfowl ... " and provide "[u]p to 50 percent of the [D. S.] production of migratory waterfowl"). Nor does petitioner dispute that the particular waters it seeks to fill are home to many important species of migratory birds, including the second-largest breeding colony of Great Blue Herons in northeastern Illinois, App. to Pet. for Cert. 3a, and several species of waterfowl protected by international treaty and Illinois endangered species laws, Brief for Federal Respondents 7.<sup>16</sup>

In addition to the intrinsic value of migratory birds, see *Missouri v. Holland*, 252 D. S. 416,

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<sup>15</sup> The fact that petitioner can conceive of some people who may discharge fill for noneconomic reasons does not weaken the legitimacy of the Corps' jurisdictional claims. As we observed in *Perez v. United States*, 402 U.S. 146 (1971), "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Id.*, at 154 (internal quotation marks omitted).

<sup>16</sup> Other bird species using petitioner's site as habitat include the "Great Egret, Green-backed Heron, Black-crowned Night Heron, Canada Goose, Wood Duck, Mallard, Greater Yellowlegs, Belted Kingfisher, Northern Waterthrush, Louisiana Waterthrush, Swamp Sparrow, and Red-winged Blackbird." Brief for Petitioner 4, n.3.

435 (1920) (noting the importance of migratory birds as "protectors of our forests and our crops" and as "a food supply"), it is undisputed that literally millions of people regularly participate in birdwatching and hunting and that those activities generate a host of commercial activities of great value.<sup>17</sup> The causal connection between the filling of wetlands and the decline of commercial activities associated with migratory birds is not "attenuated," *Morrison*, 529 U.S., at 612; it is direct and concrete. *Cf. Gibbs v. Babbitt*, 214 F.3d 483, 492-493 (CA4 2000) ("The relationship between red wolf takings and interstate commerce is quite direct-with no red wolves, there will be no red wolf related tourism ... ").

Finally, the migratory bird rule does not blur the "distinction between what is truly national and what is truly local." *Morrison*, 529 U.S., at 617-618. Justice Holmes cogently observed in *Missouri v. Holland* that the protection of migratory birds is a textbook example of a national problem. 252 U.S., at 435 ("It is not sufficient to rely upon the States [to protect migratory birds]. The reliance is vain ... "). The destruction of aquatic migratory bird habitat, like so many other environmental problems, is an action in which the benefits (e. g., a new landfill) are disproportionately local, while many of the costs (e. g., fewer migratory birds) are widely dispersed and often borne by citizens living in other States. In such situations, described by economists as involving "externalities," federal regulation is both appropriate and necessary. \* \* \* Identifying the Corps' jurisdiction by reference to waters that serve as habitat for birds that migrate over state lines also satisfies this Court's expressed desire for some "jurisdictional element" that limits federal activity to its proper scope. *Morrison*, 529 U.S., at 612.

The power to regulate commerce among the several States necessarily and properly includes the power to preserve the natural resources that generate such commerce. *Cf. Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 953 (1982) (holding water to be an "article of commerce"). Migratory birds, and the waters on which they rely, are such resources. Moreover, the protection of migratory birds is a well established federal responsibility. As Justice Holmes noted in *Missouri v. Holland*, the federal interest in protecting these birds is of "the first magnitude." 252 U.S., at 435. Because of their transitory nature, they "can be protected only by national action." *Ibid.*

Whether it is necessary or appropriate to refuse to allow petitioner to fill those ponds is a question on which we have no voice. Whether the Federal Government has the power to require such permission, however, is a question that is easily answered. If, as it does, the Commerce Clause empowers Congress to regulate particular "activities causing air or

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<sup>17</sup> In 1984, the U. S. Congress Office of Technology Assessment found that, in 1980, 5.3 million Americans hunted migratory birds, spending \$638 million. \* \* \* More than 100 million Americans spent almost \$14.8 billion in 1980 to watch and photograph fish and wildlife. *Ibid.* Of 17.7 million birdwatchers, 14.3 million took trips in order to observe, feed, or photograph waterfowl, and 9.5 million took trips specifically to view other water-associated birds, such as herons like those residing at petitioner's site. \* \* \*

water pollution, or other environmental hazards that may have effects in more than one State," *Hodel*, 452 U.S., at 282, it also empowers Congress to control individual actions that, in the aggregate, would have the same effect. *Perez*, 402 U.S., at 154; *Wickard*, 317 U.S., at 127-128.<sup>18</sup> There is no merit in petitioner's constitutional argument.

Because I would affirm the judgment of the Court of Appeals, I respectfully dissent.



## LEARN MORE

Although we haven't covered the Commerce Clause in detail here, there is a very helpful CALI exercise, authored by Professor Robin Craig, that examines the Commerce Clause and Federalism issues in the context of environmental law. If you are a law student at a CALI member school, you can access the lesson at: <http://www.cali.org/lesson/1142>

### **D. Repercussions of SWANCC - Isolated Waters, Non-Navigable Tributaries and Their Adjacent Wetlands**

While it was clear that the Supreme Court invalidated the Corps' regulation of isolated waters based on the "migratory bird rule," it was unclear whether the Court was placing further limits on the Clean Water Act jurisdiction over "waters of the United States." As noted above, the *SWANCC* court indicated that Court's decision to uphold the regulation of adjacent wetlands in *Riverside Bayview* was based on the "significant nexus" between those wetlands and other waters and the *SWANCC* Court indicated that the term "navigable" in the Clean Water Act "has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." 531 U.S. at 172. Furthermore, in response to arguments that the legislative history of the Clean Water Act demonstrated that Congress intended that "navigable waters" be given "the broadest possible constitutional interpretation", the *SWANCC* Court stressed that the legislative history suggested that Congress only intended to exert its "commerce power over navigation." *Id.* at 168, n.3.

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<sup>18</sup> JUSTICE THOMAS is the only Member of the Court who has expressed disagreement with the "aggregation principle." *United States v. Lopez*, 514 U.S.549, 600 (1995) (concurring opinion).

Consequently, it was unclear, after *SWANCC*, whether the Corps and EPA could continue to exercise jurisdiction over (1) isolated waters that have a sufficient connection to interstate commerce, other than through the “migratory bird rule”; and (2) non-navigable tributaries of traditionally navigable waters and wetlands adjacent to those non-navigable tributaries.

Depending on how the decision was interpreted, the impact on regulated waters could have been significant. A report prepared for the Association of State Wetlands Managers after the *SWANCC* decision suggested that if the Court’s decision were interpreted to allow the government to regulate only traditionally navigable waters and wetlands adjacent to those waters, 80% of the nation’s wetlands would be excluded from federal regulation under the Clean Water Act. See [Jon Kusler, \*State Regulation of Wetlands to Fill the Gap 6\* \(Association of State Wetlands Managers, Inc., 2004\)](#). In that scenario, the major types of wetlands that would be unregulated included prairie potholes, wet meadows, river fringing wetlands along non-navigable rivers and streams, many forested wetlands, playas, and vernal pools. *Id.* The report suggested that up to 95% of the waters in Arizona, 66% of Florida’s wetlands and 90% of Wisconsin’s wetlands could be outside of federal regulation, depending on the interpretation of the *SWANCC* decision. If, on the other hand, the *SWANCC* decision were interpreted to allow the government to regulate traditionally navigable waters, all of their tributaries, and wetlands adjacent to those waters and tributaries, only 40% of the nation’s wetlands would be excluded from federal regulation. *Id.* at 7.

Although States could, theoretically, have regulated the waters that would no longer be subject to federal regulation after *SWANCC*, most States did not have such regulatory programs in place. At the time of the *SWANCC* decision, thirty-two States did not have programs to regulate isolated freshwater wetlands. *Id.* at 13. Prior to *SWANCC*, those States primarily relied on the federal regulatory program and their ability to participate in the permitting program through the Clean Water Act Section 401 certification process (described in Chapter 6) to protect those waters. *Id.* A few States, including Indiana, Ohio, North Carolina and South Carolina, expanded their State programs to regulate isolated wetlands after *SWANCC*, but many did not. *Id.* at 13-14.

## **1. Regulatory Response**

Shortly after the Court’s decision in *SWANCC*, the General Counsel of EPA and the Chief Counsel of the Corps issued a [joint memorandum addressing the Court’s ruling](#). In the guidance, the agencies adopted a narrow reading of the ruling. Although the agencies acknowledged that the decision invalidated jurisdiction over isolated waters based on the “migratory bird rule”, the guidance suggested that regulators could determine, on a case-by-case basis, that isolated waters could be regulated under the Clean Water Act if their use, degradation, or destruction could affect interstate or foreign commerce and that non-

navigable isolated waters might be regulated if they had a “significant nexus” to other waters of the United States. *Id.* § 5. It would be more difficult and time-consuming to demonstrate the ties to interstate commerce on a case-by-case basis without relying on the “migratory bird rule,” but the guidance suggested that such regulation was still appropriate after the *SWANCC* ruling.

The guidance also addressed the agencies’ authority to regulate tributaries of navigable waters and wetlands adjacent to those tributaries. Specifically, the guidance provided that “the holding, the facts, and the reasoning of *United States v. Riverside Bayview Homes* continue to provide authority for the EPA and the Corps to assert jurisdiction over ... all of the traditional navigable waters, all interstate waters, all tributaries to navigable or interstate waters, upstream to the highest reaches of the tributary systems, and over all wetlands adjacent to any and all of those waters.” *Id.*

Two years later, after a change in presidential administrations, the agencies updated their guidance. See [68 Fed. Reg. 1995 \(Jan. 15, 2003\)](#). The 2003 guidance indicated that “generally speaking” the Corps would continue to assert jurisdiction over all tributaries, including non-navigable tributaries, of navigable waters, and to wetlands adjacent to those tributaries. 68 Fed. Reg. at 1996. Regarding non-navigable isolated intrastate waters, the guidance expressed skepticism that the agencies could assert jurisdiction over those waters based on other ties to interstate commerce, but authorized regulators to continue to do so on a case-by-case basis with approval from Headquarters. *Id.*

In January 2003, the Corps and EPA also began the process of developing a new rule to clarify the definition of “waters of the United States” in light of the *SWANCC* decision by issuing an advance notice of proposed rulemaking. See [68 Fed. Reg. 1991 \(Jan. 15, 2003\)](#). The agencies received more than 130,000 comments on the notice and the comments overwhelmingly supported a narrow interpretation of *SWANCC* and broad federal jurisdiction. See [Jon Kusler, State Regulation of Wetlands to Fill the Gap 8 \(Association of State Wetlands Managers, Inc. 2004\)](#). Forty-three States submitted comments and forty of those States encouraged the agencies to retain broad federal jurisdiction over “waters of the United States.” *Id.* Many States were concerned that a broad reading of *SWANCC* would make it difficult to protect wetlands in their States. *Id.* After more than 200 members of Congress signed a letter, in November 2003, asking the Corps and EPA not to issue new rules, EPA announced, in December 2003, that the agencies would not be moving forward with new rules at that time. *Id.*

## **2. Legislative Response**

While the agencies were developing guidance to respond to *SWANCC*, Congress was also focusing on the issue. In 2003, the Clean Water Authority Restoration Act was introduced in the House and Senate. See [S. 473, 108<sup>th</sup> Cong. 1<sup>st</sup> Sess. \(2003\)](#); [H.R. 962, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. \(2003\)](#). The legislation would restore an expansive definition of “waters of the United

States” to include “all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.” S. 473, § 4(3). The legislation did not pass, but was re-introduced in the 109<sup>th</sup> Congress, see *Clean Water Authority Restoration Act of 2005*, [S. 912, 109<sup>th</sup> Cong., 1<sup>st</sup> Sess. \(2005\)](#); [H.R. 1356, 109<sup>th</sup> Cong., 1<sup>st</sup> Sess. \(2005\)](#) and 110<sup>th</sup> Congress, see *Clean Water Restoration Act of 2007* in the 110<sup>th</sup> Congress, see [H.R. 2421, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess. \(2007\)](#); [S. 1870, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess. \(2007\)](#). Similar legislation, with a slightly narrower definition of “waters of the United States” was proposed in the 111<sup>th</sup> Congress, see *Clean Water Restoration Act of 2009* - [S. 787, 111<sup>th</sup> Cong. 1<sup>st</sup> Sess. \(2009\)](#). Ultimately, however, none of those legislative proposals were successful.

### 3. Judicial Response

While the Executive and Legislative branches considered or debated appropriate responses to the SWANCC decision, landowners brought many judicial challenges to federal jurisdiction over non-navigable tributaries and wetlands adjacent to those tributaries. Most of the courts, including the federal appellate courts, that addressed the question concluded that the Clean Water Act authorized regulation of those waters. See [Baccarat Fremont v. U.S. Army Corps of Engineers, 425 F.3d 1150 \(9<sup>th</sup> Cir. 2005\)](#); [United States v. Rueth Development Co., 335 F.3d 598 \(7<sup>th</sup> Cir. 2003\)](#); [United States v. Deaton, 332 F.3d 698 \(4<sup>th</sup> Cir. 2003\)](#); [Community Assn. For Restoration of Environment v. Henry Bosma Dairy, 305 F.3d 943 \(9<sup>th</sup> Cir. 2002\)](#); [Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 \(9<sup>th</sup> Cir. 2001\)](#); but see [In re Needham, 354 F.3d 340 \(5<sup>th</sup> Cir. 2003\)](#). A 2004 Association of Wetlands Managers report noted that 28 of the 31 federal court decisions interpreting SWANCC at that time had interpreted the Clean Water Act broadly, either by interpreting “tributary” broadly to include non-navigable tributaries, by adopting a broad concept of “adjacency” or by adopting a broad concept of the significant nexus. See [Jon Kusler, State Regulation of Wetlands to Fill the Gap 8 \(Association of State Wetlands Managers, Inc. 2004\)](#).

It was not long, however, before the Supreme Court again weighed in on the definition of “waters of the United States.” Before reading the next case, it might be helpful to look a little more closely at sections of the Corps and EPA regulations on “waters of the United States” that have not been described in detail above.

First, in determining jurisdiction over tributaries, the regulations include navigable and non-navigable tributaries, as long as the tributaries have a perceptible “ordinary high water mark” See [33 C.F.R. § 328.4\(c\)](#). An “ordinary high-water mark” is a “line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil,

destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.” [33 C.F.R. § 328.3\(e\)](#). Consequently, the federal regulations assert jurisdiction over a wide variety of intermittent and ephemeral streams, ditches, and other non-navigable tributaries of navigable waters.

Second, the regulations define “adjacent” in a manner that is subject to generous interpretation. Specifically, “adjacent” means “bordering, contiguous, or *neighboring*” (emphasis added) and includes wetlands that are “separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like.” See [33 C.F.R. § 328.3\(c\)](#). Prior to the *Rapanos* case, some of the Corps’ offices had concluded that wetlands were “adjacent” to other bodies of water if they were hydrologically connected to the waters “through directional sheet flow during storm events” or if they were within the 100 year floodplain of the waters. See [General Accounting Office, Corps of Engineers Needs to Evaluate its District Office Practices in Determining Jurisdiction GAO-04-297, 16-18 \(Feb. 2004\)](#).

The Supreme Court was faced with challenges to the government’s regulation of non-navigable tributaries of navigable waters and to regulation of wetlands adjacent to those tributaries in the following case, *Rapanos v. United States*. The case was actually the consolidation of two separate Clean Water Act lawsuits: (1) an enforcement action against John Rapanos for filling wetlands, to build a shopping center, without a Clean Water Act permit; and (2) a challenge by Keith and June Carabell to the denial of a Clean Water Act permit to fill wetlands for a housing development. In both cases, the federal government asserted jurisdiction over the wetlands at issue not because the wetlands were adjacent to traditional navigable waters but because they were adjacent to non-navigable tributaries of navigable waters. In addition, in the *Carabell* case, the wetlands were separated from the non-navigable tributaries by a berm. Ultimately, the Supreme Court split 4-4-1 in deciding the case, so the decision has continued to muddy the waters on the scope of Clean Water Act jurisdiction over “waters of the United States.”



Photo 24 By Famartin (Own work)

[http://commons.wikimedia.org/wiki/File%3AView\\_of\\_an\\_ephemeral\\_stream\\_along\\_the\\_Orange\\_Trail\\_near\\_the\\_Assunpink\\_Creek\\_in\\_the\\_Van](http://commons.wikimedia.org/wiki/File%3AView_of_an_ephemeral_stream_along_the_Orange_Trail_near_the_Assunpink_Creek_in_the_Van) [CC-BY-SA-3.0]

## RAPANOS V. UNITED STATES

547 U.S. 715 (2006)

**Justice Scalia** announced the judgment of the Court, and delivered an opinion, in which **The Chief Justice, Justice Thomas, and Justice Alito** join.

In April 1989, petitioner John A. Rapanos backfilled wetlands on a parcel of land in Michigan that he owned and sought to develop. This parcel included 54 acres of land with sometimes-saturated soil conditions. The nearest body of navigable water was 11 to 20 miles away. 339 F.3d 447, 449 (CA6 2003) (*Rapanos I*). Regulators had informed Mr. Rapanos that his saturated fields were “waters of the United States,” 33 U.S.C. § 1362(7), that could not be filled without a permit. Twelve years of criminal and civil litigation ensued.

The burden of federal regulation on those who would deposit fill material in locations denominated “waters of the United States” is not trivial. In deciding whether to grant or deny a permit, the U.S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot, relying on such factors as “economics,” “aesthetics,” “recreation,” and “in general, the needs and welfare of the people,” 33 C.F.R. § 320.4(a) (2004). \* \* \* The average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915—not counting costs of mitigation or design changes. \* \* \* “[O]ver \$1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.” *Id.*, at 81. These costs cannot be avoided, because the Clean Water Act “impose[s] criminal liability,” as well as steep civil fines, “on a broad range of ordinary industrial and commercial activities.” *Hanousek v. United States*, 528 U.S. 1102, 1103 (2000) (Thomas, J., dissenting from denial of certiorari). In this litigation, for example, for backfilling his own wet fields, Mr. Rapanos faced 63 months in prison and hundreds of thousands of dollars in criminal and civil fines. See *United States v. Rapanos*, 235 F.3d 256, 260 (CA6 2000).

The enforcement proceedings against Mr. Rapanos are a small part of the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations. In the last three decades, the Corps and the Environmental Protection Agency (EPA) have interpreted their jurisdiction over “the waters of the United States” to cover 270-to-300 million acres of swampy lands in the United States—including half of Alaska and an area the size of California in the lower 48 States. And that was just the beginning. The Corps has also asserted jurisdiction over virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or

### Resources for the Case

[Oral argument audio](#) (from Oyez project)  
[EPA Administrative Order re: Rapanos property Carabell permit application](#) and [Corps denial Corps' EA and Public Interest Review - Carabell](#)  
Maps of the properties - [Carabell](#); [Rapanos](#)  
[Unedited opinion](#)  
[Google Map of all the cases in the coursebook](#)



intermittently flow. On this view, the federally regulated “waters of the United States” include storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years. Because they include the land containing storm sewers and desert washes, the statutory “waters of the United States” engulf entire cities and immense arid wastelands. In fact, the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls. Any plot of land containing such a channel may potentially be regulated as a “water of the United States.”

\* \* \*

## II

In these consolidated cases, we consider whether four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditional navigable waters, constitute “waters of the United States” within the meaning of the Act. Petitioners in No. 04–1034, the Rapanos and their affiliated businesses, deposited fill material without a permit into wetlands on three sites near Midland, Michigan: the “Salzburg site,” the “Hines Road site,” and the “Pine River site.” The wetlands at the Salzburg site are connected to a man-made drain, which drains into Hoppler Creek, which flows into the Kawkawlin River, which empties into Saginaw Bay and Lake Huron. \* \* \* The wetlands at the Hines Road site are connected to something called the “Rose Drain,” which has a surface connection to the Tittabawassee River. \* \* \* And the wetlands at the Pine River site have a surface connection to the Pine River, which flows into Lake Huron. \* \* \* It is not clear whether the connections between these wetlands and the nearby drains and ditches are continuous or intermittent, or whether the nearby drains and ditches contain continuous or merely occasional flows of water.

The United States brought civil enforcement proceedings against the Rapanos petitioners. The District Court found that the three described wetlands were “within federal jurisdiction” because they were “adjacent to other waters of the United States,” and held petitioners liable for violations of the CWA at those sites. \* \* \* On appeal, the United States Court of Appeals for the Sixth Circuit affirmed, holding that there was federal jurisdiction over the wetlands at all three sites because “there were hydrological connections between all three sites and corresponding adjacent tributaries of navigable waters.” \* \* \*

Petitioners in No. 04–1384, the Carabells, were denied a permit to deposit fill material in a wetland located on a triangular parcel of land about one mile from Lake St. Clair. A man-made drainage ditch runs along one side of the wetland, separated from it by a 4-foot-wide man-made berm. The berm is largely or entirely impermeable to water and blocks drainage from the wetland, though it may permit occasional overflow to the ditch. The ditch empties into another ditch or a drain, which connects to Auvase Creek, which empties into Lake St. Clair. \* \* \*

After exhausting administrative appeals, the *Carabell* petitioners filed suit in the District Court, challenging the exercise of federal regulatory jurisdiction over their site. The District Court ruled that there was federal jurisdiction because the wetland “is adjacent to neighboring tributaries of navigable waters and has a significant nexus to ‘waters of the United States.’ ” \* \* \* Again the Sixth Circuit affirmed, holding that the Carabell wetland was “adjacent” to navigable waters. 391 F.3d 704, 708 (2004) (*Carabell*).

We granted certiorari and consolidated the cases, \* \* \* to decide whether these wetlands constitute “waters of the United States” under the Act, and if so, whether the Act is constitutional.

### III

The Rapanos petitioners contend that the terms “navigable waters” and “waters of the United States” in the Act must be limited to the traditional definition of *The Daniel Ball*, which required that the “waters” be navigable in fact, or susceptible of being rendered so. See 10 Wall., at 563. But this definition cannot be applied wholesale to the CWA. The Act uses the phrase “navigable waters” as a defined term, and the definition is simply “the waters of the United States.” 33 U.S.C. § 1362(7). Moreover, the Act provides, in certain circumstances, for the substitution of state for federal jurisdiction over “navigable waters ... *other than* those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce ... including wetlands adjacent thereto.” §1344(g)(1) (emphasis added). This provision shows that the Act’s term “navigable waters” includes something more than traditional navigable waters. We have twice stated that the meaning of “navigable waters” in the Act is broader than the traditional understanding of that term, *SWANCC*, 531 U.S., at 167; *Riverside Bayview*, 474 U.S., at 133. \* \* \* We have also emphasized, however, that the qualifier “navigable” is not devoid of significance, *SWANCC*, *supra*, at 172.

We need not decide the precise extent to which the qualifiers “navigable” and “of the United States” restrict the coverage of the Act. Whatever the scope of these qualifiers, the CWA authorizes federal jurisdiction only over “waters.” 33 U.S.C. § 1362(7). The only natural definition of the term “waters,” our prior and subsequent judicial constructions of it, clear evidence from other provisions of the statute, and this Court’s canons of construction all confirm that “the waters of the United States” in § 1362(7) cannot bear the expansive meaning that the Corps would give it.

The Corps’ expansive approach might be arguable if the CWA defined “navigable waters” as “water of the United States.” But “the waters of the United States” is something else. The use of the definite article (“the”) and the plural number (“waters”) show plainly that § 1362(7) does not refer to water in general. In this form, “the waters” refers more narrowly to water “[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,” or “the flowing or moving masses, as of waves or floods, making up such streams or bodies.” Webster’s New International Dictionary 2882 (2d ed. 1954) (hereinafter Webster’s Second). \* \* \* On this definition, “the waters of the United States” include only relatively permanent, standing or flowing bodies of water.<sup>5</sup> The definition refers to water as found in “streams,” “oceans,” “rivers,” “lakes,” and “bodies” of water “forming geographical features.” *Ibid.* All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Even the least substantial of the definition’s terms, namely “streams,” connotes a continuous flow of water in a permanent channel—especially when used in company with other terms such as “rivers,” “lakes,” and “oceans.”<sup>6</sup> None of these terms

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<sup>5</sup> By describing “waters” as “relatively permanent,” we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months—such as the 290-day, continuously flowing stream postulated by Justice Stevens’ dissent (hereinafter the dissent), *post*, at 15. Common sense and common usage distinguish between a wash and seasonal river.

Though scientifically precise distinctions between “perennial” and “intermittent” flows are no doubt available, \* \* \* we have no occasion in this litigation to decide exactly when the drying-up of a stream bed is continuous and frequent enough to disqualify the channel as a “wate[r] of the United States.” It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that the dissent’s “intermittent” and “ephemeral” streams, *post*, at 16 (opinion of Stevens, J.)—that is, streams whose flow is “[c]oming and going at intervals ... [b]roken, fitful,” Webster’s Second 1296, or “existing only, or no longer than, a day; diurnal ... short-lived,” *id.*, at 857—are not.

<sup>6</sup> The principal definition of “stream” likewise includes reference to such permanent, geographically fixed bodies of water: “[a] current or course of water or other fluid, flowing on the earth, as a *river, brook, etc.*” *Id.*, at 2493 (emphasis added). The other definitions of

encompasses transitory puddles or ephemeral flows of water.

The restriction of “the waters of the United States” to exclude channels containing merely intermittent or ephemeral flow also accords with the commonsense understanding of the term. In applying the definition to “ephemeral streams,” “wet meadows,” storm sewers and culverts, “directional sheet flow during storm events,” drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term “waters of the United States” beyond parody. The plain language of the statute simply does not authorize this “Land Is Waters” approach to federal jurisdiction.

In addition, the Act’s use of the traditional phrase “navigable waters” (the defined term) further confirms that it confers jurisdiction only over relatively permanent bodies of water. The Act adopted that traditional term from its predecessor statutes. See *SWANCC*, 531 U.S., at 180 (Stevens, J., dissenting). On the traditional understanding, “navigable waters” included only discrete bodies of water. For example, in *The Daniel Ball*, we used the terms “waters” and “rivers” interchangeably. 10 Wall., at 563. And in *Appalachian Electric*, we consistently referred to the “navigable waters” as “waterways.” 311 U. S., at 407–409. Plainly, because such “waters” had to be navigable in fact or susceptible of being rendered so, the term did not include ephemeral flows. \* \* \*

Moreover, only the foregoing definition of “waters” is consistent with the CWA’s stated “policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources ... .” § 1251(b). This statement of policy was included in the Act as enacted in 1972, see 86 Stat. 816, prior to the addition of the optional state administration

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“stream” repeatedly emphasize the requirement of *continuous flow*: “[a] *steady flow*, as of water, air, gas, or the like”; “[a]nything issuing or moving with *continued succession* of parts”; “[a] *continued current* or course; current; drift.” *Ibid.* (emphases added). The definition of the verb form of “stream” contains a similar emphasis on continuity: “[t]o issue or flow in a stream; to issue freely or move in a *continuous flow or course*.” *Ibid.* (emphasis added). On these definitions, therefore, the Corps’ phrases “intermittent streams,” 33 C.F.R. § 328.3(a)(3) (2004), and “ephemeral streams,” 65 Fed. Reg. 12823 (2000), are—like Senator Bentsen’s “‘flowing gullies,’” *post*, at 16, n.11 (opinion of Stevens, J.)—useful oxymora. Properly speaking, such entities constitute extant “streams” only while they are “continuous[ly] flow[ing]”; and the usually dry channels that contain them are never “streams.” Justice Kennedy apparently concedes that “an intermittent flow can constitute a stream” only “*while it is flowing*,” *post*, at 13 (emphasis added)—which would mean that the channel is a “water” covered by the Act only during those times when water flow actually occurs. But no one contends that federal jurisdiction appears and evaporates along with the water in such regularly dry channels.

program in the 1977 amendments, see 91 Stat. 1601. Thus the policy plainly referred to something beyond the subsequently added state administration program of 33 U.S.C. § 1344(g)–(l). But the expansive theory advanced by the Corps, rather than “preserv[ing] the primary rights and responsibilities of the States,” would have brought virtually all “plan[n]g of] the development and use . . . of land and water resources” by the States under federal control. It is therefore an unlikely reading of the phrase “the waters of the United States.”

\* \* \*

Even if the phrase “the waters of the United States” were ambiguous as applied to intermittent flows, our own canons of construction would establish that the Corps’ interpretation of the statute is impermissible. As we noted in *SWANCC*, the Government’s expansive interpretation would “result in a significant impingement of the States’ traditional and primary power over land and water use.” 531 U.S., at 174. Regulation of land use, as through the issuance of the development permits sought by petitioners in both of these cases, is a quintessential state and local power. See *FERC v. Mississippi*, 456 U.S. 742, 768, n.30 (1982); *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994). The extensive federal jurisdiction urged by the Government would authorize the Corps to function as a de facto regulator of immense stretches of intrastate land—an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board. See 33 C.F.R. § 320.4(a)(1) (2004). We ordinarily expect a “clear and manifest” statement from Congress to authorize an unprecedented intrusion into traditional state authority. See *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 544 (1994). The phrase “the waters of the United States” hardly qualifies.

Likewise, just as we noted in *SWANCC*, the Corps’ interpretation stretches the outer limits of Congress’s commerce power and raises difficult questions about the ultimate scope of that power. See 531 U.S., at 173. (In developing the current regulations, the Corps consciously sought to extend its authority to the farthest reaches of the commerce power. See 42 Fed. Reg. 37127 (1977).) Even if the term “the waters of the United States” were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S.568, 575 (1988).

\* \* \*

In sum, on its only plausible interpretation, the phrase “the waters of the United States” includes only those relatively permanent, standing or continuously flowing bodies of water “forming geographic features” that are described in ordinary parlance as “streams[,] . . . oceans, rivers, [and] lakes.” See Webster’s Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps’ expansive interpretation of the “the waters of the United States” is thus not “based on a permissible construction of the statute.” *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

#### IV

In *Carabell*, the Sixth Circuit held that the nearby ditch constituted a “tributary” and thus a “water of the United States” under 33 C.F.R. § 328.3(a)(5) (2004). See 391 F.3d, at 708–709. Likewise in *Rapanos*, the Sixth Circuit held that the nearby ditches were “tributaries” under § 328(a)(5). 376 F.3d, at 643. But *Rapanos II* also stated that, even if the ditches were not “waters of the United States,” the wetlands were “adjacent” to remote traditional navigable waters in virtue of the wetlands’ “hydrological connection” to them. See *id.*, at 639–640. This statement reflects the practice of the Corps’ district offices, which may “assert jurisdiction over a wetland without regulating the ditch connecting it to a water of the United States.” \* \* \* We therefore address in this Part whether a wetland may be considered “adjacent to” remote “waters of the United States,” because of a mere hydrologic connection to them.

In *Riverside Bayview*, we noted the textual difficulty in including “wetlands” as a subset of “waters”: “On a purely linguistic level, it may appear unreasonable to classify ‘lands,’ wet or otherwise, as ‘waters.’ ” 474 U.S., at 132. We acknowledged, however, that there was an inherent ambiguity in drawing the boundaries of any “waters”:

“[T]he Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of ‘waters’ is far from obvious.” *Ibid.*

Because of this inherent ambiguity, we deferred to the agency’s inclusion of wetlands “actually abut[ting]” traditional navigable waters: “Faced with such a problem of defining the bounds of its regulatory authority,” we held, the agency could reasonably conclude that a wetland that “adjoin[ed]” waters of the United States is itself a part of those waters. *Id.*, at 132, 135, and n.9. The difficulty of delineating the boundary between water and land was central to our reasoning in the case: “In view of the breadth of federal regulatory authority contemplated by the Act itself and the *inherent difficulties of defining precise bounds to regulable waters*, the Corps’ ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.” *Id.*, at 134 (emphasis added).<sup>10</sup>

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<sup>10</sup> Since the wetlands at issue in *Riverside Bayview* actually abutted waters of the United States, the case could not possibly have held that merely “neighboring” wetlands came within the Corps’ jurisdiction. Obiter approval of that proposition might be inferred, however, from the opinion’s quotation without comment of a statement by the Corps describing

When we characterized the holding of *Riverside Bayview* in *SWANCC*, we referred to the close connection between waters and the wetlands that they gradually blend into: “It was the *significant nexus* between the wetlands and ‘navigable waters’ that informed our reading of the CWA in *Riverside Bayview Homes*.” 531 U.S., at 167 (emphasis added). In particular, *SWANCC* rejected the notion that the ecological considerations upon which the Corps relied in *Riverside Bayview*—and upon which the dissent repeatedly relies today, *see post*, at 10–11, 12, 13–14, 15, 18–19, 21–22, 24–25—provided an independent basis for including entities like “wetlands” (or “ephemeral streams”) within the phrase “the waters of the United States.” *SWANCC* found such ecological considerations irrelevant to the question whether physically isolated waters come within the Corps’ jurisdiction. It thus confirmed that *Riverside Bayview* rested upon the inherent ambiguity in defining where water ends and abutting (“adjacent”) wetlands begin, permitting the Corps’ reliance on ecological considerations only to resolve that ambiguity in favor of treating all abutting wetlands as waters. Isolated ponds were not “waters of the United States” in their own right, *see* 531 U.S., at 167, 171, and presented no boundary-drawing problem that would have justified the invocation of ecological factors to treat them as such.

Therefore, only those wetlands with a continuous surface connection to bodies that are “waters of the United States” in their own right, so that there is no clear demarcation between “waters” and wetlands, are “adjacent to” such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to “waters of the United States” do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a “significant nexus” in *SWANCC*. 531 U.S., at 167. Thus, establishing that wetlands such as those at the Rapanos and Carabell sites are covered by the Act requires two findings: First, that the adjacent channel contains a “wate[r] of the United States,” (i.e., a relatively

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covered “adjacent” wetlands as those “ ‘that form the border of or are in reasonable proximity to other waters of the United States.’ ” 474 U.S., at 134 (quoting 42 Fed. Reg. 37128 (1977); emphasis added). The opinion immediately reiterated, however, that adjacent wetlands could be regarded as “the waters of the United States” in view of “the inherent difficulties of defining precise bounds to regulable waters,” 474 U.S., at 134—a rationale that would have no application to physically separated “neighboring” wetlands. Given that the wetlands at issue in *Riverside Bayview* themselves “actually abut[ted] on a navigable waterway,” *id.*, at 135; given that our opinion recognized that unconnected wetlands could not naturally be characterized as “ ‘waters’ ” at all, *id.*, at 132; and given the repeated reference to the difficulty of determining where waters end and wetlands begin; the most natural reading of the opinion is that a wetlands’ mere “reasonable proximity” to waters of the United States is not enough to confer Corps jurisdiction. In any event, as discussed in our immediately following text, any possible ambiguity has been eliminated by *SWANCC*, 531 U.S. 159 (2001).

permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins.

\* \* \*

## VIII

Because the Sixth Circuit applied the wrong standard to determine if these wetlands are covered “waters of the United States,” and because of the paucity of the record in both of these cases, the lower courts should determine, in the first instance, whether the ditches or drains near each wetland are “waters” in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the wetlands in question are “adjacent” to these “waters” in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in *Riverside Bayview*.

We vacate the judgments of the Sixth Circuit in both No. 04–1034 and No. 04–1384, and remand both cases for further proceedings.

\* \* \*

**Justice Kennedy**, concurring in the judgment.

These consolidated cases require the Court to decide whether the term “navigable waters” in the Clean Water Act extends to wetlands that do not contain and are not adjacent to waters that are navigable in fact. In *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC), the Court held, under the circumstances presented there, that to constitute “ ‘navigable waters’ ” under the Act, a water or wetland must possess a “significant nexus” to waters that are or were navigable in fact or that could reasonably be so made. *Id.*, at 167, 172. In the instant cases neither the plurality opinion nor the dissent by Justice Stevens chooses to apply this test; and though the Court of Appeals recognized the test’s applicability, it did not consider all the factors necessary to determine whether the lands in question had, or did not have, the requisite nexus. In my view the cases ought to be remanded to the Court of Appeals for proper consideration of the nexus requirement.

\* \* \*

*Riverside Bayview* and SWANCC establish the framework for the inquiry in the cases now before the Court: Do the Corps’ regulations, as applied to the wetlands in *Carabell* and the three wetlands parcels in *Rapanos*, constitute a reasonable interpretation of “navigable waters” as in *Riverside Bayview* or an invalid construction as in SWANCC? Taken together these cases establish that in some instances, as exemplified by *Riverside Bayview*, the



connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a “navigable water” under the Act. In other instances, as exemplified by *SWANCC*, there may be little or no connection. Absent a significant nexus, jurisdiction under the Act is lacking. Because neither the plurality nor the dissent addresses the nexus requirement, this separate opinion, in my respectful view, is necessary.

A

The plurality’s opinion begins from a correct premise. As the plurality points out, and as *Riverside Bayview* holds, in enacting the Clean Water Act Congress intended to regulate at least some waters that are not navigable in the traditional sense. *Ante*, at 12; *Riverside Bayview*, 474 U.S., at 133; see also *SWANCC*, *supra*, at 167. This conclusion is supported by “the evident breadth of congressional concern for protection of water quality and aquatic ecosystems.” *Riverside Bayview*, *supra*, at 133; see also *Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981) (describing the Act as “an all-encompassing program of water pollution regulation”). It is further compelled by statutory text, for the text is explicit in extending the coverage of the Act to some nonnavigable waters.

\* \* \*

From this reasonable beginning the plurality proceeds to impose two limitations on the Act; but these limitations, it is here submitted, are without support in the language and purposes of the Act or in our cases interpreting it. First, because the dictionary defines “waters” to mean “water ‘[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,’ or ‘the flowing or moving masses, as of waves or floods, making up such streams or bodies,’” *ante*, at 13 (quoting Webster’s New International Dictionary 2882 (2d ed. 1954) (hereinafter Webster’s Second)), the plurality would conclude that the phrase “navigable waters” permits Corps and EPA jurisdiction only over “relatively permanent, standing or flowing bodies of water,” *ante*, at 13–14—a category that in the plurality’s view includes “seasonal” rivers, that is, rivers that carry water continuously except during “dry months,” but not intermittent or ephemeral streams, *ante*, at 13–15, and n.5. Second, the plurality asserts that wetlands fall within the Act only if they bear “a continuous surface connection to bodies that are ‘waters of the United States’ in their own right”—waters, that is, that satisfy the plurality’s requirement of permanent standing water or continuous flow. *Ante*, at 23–24.

The plurality’s first requirement—permanent standing water or continuous flow, at least for a period of “some months,” *ante*, at 13–14, and n.5—makes little practical sense in a statute concerned with downstream water quality. The merest trickle, if continuous, would count as a “water” subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not. Though the plurality seems to presume that such irregular flows are too insignificant to be of concern in a statute focused on

“waters,” that may not always be true. Areas in the western parts of the Nation provide some examples. The Los Angeles River, for instance, ordinarily carries only a trickle of water and often looks more like a dry roadway than a river. \* \* \* Yet it periodically releases water-volumes so powerful and destructive that it has been encased in concrete and steel over a length of some 50 miles. \* \* \* Though this particular waterway might satisfy the plurality’s test, it is illustrative of what often-dry watercourses can become when rain waters flow. \* \* \*

\* \* \*

It follows that the Corps can reasonably interpret the Act to cover the paths of such impermanent streams.

\* \* \*

The plurality’s second limitation—exclusion of wetlands lacking a continuous surface connection to other jurisdictional waters—is also unpersuasive. To begin with, the plurality is wrong to suggest that wetlands are “*indistinguishable*” from waters to which they bear a surface connection. *Ante*, at 37. Even if the precise boundary may be imprecise, a bog or swamp is different from a river. The question is what circumstances permit a bog, swamp, or other nonnavigable wetland to constitute a “navigable water” under the Act—as § 1344(g)(1), if nothing else, indicates is sometimes possible, *see supra*, at 10–11. *Riverside Bayview* addressed that question and its answer is inconsistent with the plurality’s theory. There, in upholding the Corps’ authority to regulate “wetlands adjacent to other bodies of water over which the Corps has jurisdiction,” the Court deemed it irrelevant whether “the moisture creating the wetlands ... find[s] its source in the adjacent bodies of water.” 474 U.S., at 135. The Court further observed that adjacency could serve as a valid basis for regulation even as to “wetlands that are not significantly intertwined with the ecosystem of adjacent waterways.” *Id.*, at 135, n.9. “If it is reasonable,” the Court explained, “for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand.” *Ibid.*

The Court in *Riverside Bayview* did note, it is true, the difficulty of defining where “water ends and land begins,” *id.*, at 132, and the Court cited that problem as one reason for deferring to the Corps’ view that adjacent wetlands could constitute waters. Given, however, the further recognition in *Riverside Bayview* that an overinclusive definition is permissible even when it reaches wetlands holding moisture disconnected from adjacent water-bodies, *id.*, at 135, and n.9, *Riverside Bayview*’s observations about the difficulty of defining the water’s edge cannot be taken to establish that when a clear boundary is evident, wetlands beyond the boundary fall outside the Corps’ jurisdiction.

\* \* \*

SWANCC, likewise, does not support the plurality's surface-connection requirement. SWANCC's holding that "nonnavigable, isolated, intrastate waters," 531 U.S., at 171, are not "navigable waters" is not an explicit or implicit overruling of *Riverside Bayview's* approval of adjacency as a factor in determining the Corps' jurisdiction. In rejecting the Corps' claimed authority over the isolated ponds in SWANCC, the Court distinguished adjacent nonnavigable waters such as the wetlands addressed in *Riverside Bayview*. 531 U.S., at 167, 170–171.

As *Riverside Bayview* recognizes, the Corps' adjacency standard is reasonable in some of its applications. Indeed, the Corps' view draws support from the structure of the Act, while the plurality's surface-water-connection requirement does not.

\* \* \*

As the Court noted in *Riverside Bayview*, "the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water, 33 C.F.R. § 320.4(b)(2)(vii) (1985), and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion, see §§ 320.4(b)(2)(iv) and (v)." 474 U.S., at 134. Where wetlands perform these filtering and runoff-control functions, filling them may increase downstream pollution, much as a discharge of toxic pollutants would. Not only will dirty water no longer be stored and filtered but also the act of filling and draining itself may cause the release of nutrients, toxins, and pathogens that were trapped, neutralized, and perhaps amenable to filtering or detoxification in the wetlands. \* \* \* In many cases, moreover, filling in wetlands separated from another water by a berm can mean that flood water, impurities, or runoff that would have been stored or contained in the wetlands will instead flow out to major waterways. With these concerns in mind, the Corps' definition of adjacency is a reasonable one, for it may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme.

\* \* \*

It bears mention also that the plurality's overall tone and approach—from the characterization of acres of wetlands destruction as "backfilling ... wet fields," *ante*, at 2, to the rejection of Corps authority over "man-made drainage ditches" and "dry arroyos" without regard to how much water they periodically carry, *ante*, at 15, to the suggestion, seemingly contrary to Congress' judgment, that discharge of fill material is inconsequential for adjacent waterways, *ante*, at 26, and n.11—seems unduly dismissive of the interests asserted by the United States in these cases. Important public interests are served by the Clean Water Act in general and by the protection of wetlands in particular. To give just one example, *amici* here have noted that nutrient-rich runoff from the Mississippi River has created a hypoxic, or oxygen-depleted, "dead zone" in the Gulf of Mexico that at times approaches the size of Massachusetts and New Jersey. \* \* \* Scientific evidence indicates

that wetlands play a critical role in controlling and filtering runoff. \* \* \* It is true, as the plurality indicates, that environmental concerns provide no reason to disregard limits in the statutory text, *ante*, at 27, but in my view the plurality’s opinion is not a correct reading of the text. The limits the plurality would impose, moreover, give insufficient deference to Congress’ purposes in enacting the Clean Water Act and to the authority of the Executive to implement that statutory mandate.

Finally, it should go without saying that because the plurality presents its interpretation of the Act as the only permissible reading of the plain text, *ante*, at 20, 23–24, the Corps would lack discretion, under the plurality’s theory, to adopt contrary regulations. The Chief Justice suggests that if the Corps and EPA had issued new regulations after *SWANCC* they would have “enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority” and thus could have avoided litigation of the issues we address today. *Ante*, at 2. That would not necessarily be true under the opinion The Chief Justice has joined. New rulemaking could have averted the disagreement here only if the Corps had anticipated the unprecedented reading of the Act that the plurality advances.

## B

While the plurality reads nonexistent requirements into the Act, the dissent reads a central requirement out—namely, the requirement that the word “navigable” in “navigable waters” be given some importance. Although the Court has held that the statute’s language invokes Congress’ traditional authority over waters navigable in fact or susceptible of being made so, *SWANCC*, 531 U.S., at 172 (*citing Appalachian Power*, 311 U.S., at 407–408), the dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps’ interpretation of the statute does not extend so far.

Congress’ choice of words creates difficulties, for the Act contemplates regulation of certain “navigable waters” that are not in fact navigable. *Supra*, at 10–11. Nevertheless, the word “navigable” in the Act must be given some effect. See *SWANCC*, *supra*, at 172. Thus, in *SWANCC* the Court rejected the Corps’ assertion of jurisdiction over isolated ponds and mudflats bearing no evident connection to navigable-in-fact waters. And in *Riverside Bayview*, while the Court indicated that “the term ‘navigable’ as used in the Act is of limited import,” 474 U.S., at 133, it relied, in upholding jurisdiction, on the Corps’ judgment that “wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water,” *id.*, at 135. The implication, of course, was that wetlands’ status as “integral parts of the aquatic environment”—that is, their significant nexus with navigable waters—was what established the Corps’ jurisdiction over them as waters of the United States.

Consistent with *SWANCC* and *Riverside Bayview* and with the need to give the term “navigable” some meaning, the Corps’ jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense. The required nexus must be assessed in terms of the statute’s goals and purposes. Congress enacted the law to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a), and it pursued that objective by restricting dumping and filling in “navigable waters,” §§ 1311(a), 1362(12). With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage. 33 C.F.R. § 320.4(b)(2). Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase “navigable waters,” if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as “navigable.” When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term “navigable waters.”

Although the dissent acknowledges that wetlands’ ecological functions vis-a-vis other covered waters are the basis for the Corps’ regulation of them, *post*, at 10–11, it concludes that the ambiguity in the phrase “navigable waters” allows the Corps to construe the statute as reaching all “non-isolated wetlands,” just as it construed the Act to reach the wetlands adjacent to navigable-in-fact waters in *Riverside Bayview*, *see post*, at 11. This, though, seems incorrect. The Corps’ theory of jurisdiction in these consolidated cases—adjacency to tributaries, however remote and insubstantial—raises concerns that go beyond the holding of *Riverside Bayview*; and so the Corps’ assertion of jurisdiction cannot rest on that case.

As applied to wetlands adjacent to navigable-in-fact waters, the Corps’ conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone. That is the holding of *Riverside Bayview*. Furthermore, although the *Riverside Bayview* Court reserved the question of the Corps’ authority over “wetlands that are not adjacent to bodies of open water,” 474 U.S., at 131–132, n.8, and in any event addressed no factual situation other than wetlands adjacent to navigable-in-fact waters, it may well be the case that *Riverside Bayview*’s reasoning—supporting jurisdiction without any inquiry beyond adjacency—could apply equally to wetlands adjacent to certain major tributaries. Through regulations or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.

The Corps’ existing standard for tributaries, however, provides no such assurance. As

noted earlier, the Corps deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark, defined as a “line on the shore established by the fluctuations of water and indicated by [certain] physical characteristics,” § 328.3(e). *See supra*, at 3. This standard presumably provides a rough measure of the volume and regularity of flow. Assuming it is subject to reasonably consistent application, \* \* \* it may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute “navigable waters” under the Act. Yet the breadth of this standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it—precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act’s scope in *SWANCC*. \* \* \*

When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries. Given the potential overbreadth of the Corps’ regulations, this showing is necessary to avoid unreasonable applications of the statute. Where an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region. That issue, however, is neither raised by these facts nor addressed by any agency regulation that accommodates the nexus requirement outlined here.

This interpretation of the Act does not raise federalism or Commerce Clause concerns sufficient to support a presumption against its adoption. To be sure, the significant nexus requirement may not align perfectly with the traditional extent of federal authority. Yet in most cases regulation of wetlands that are adjacent to tributaries and possess a significant nexus with navigable waters will raise no serious constitutional or federalism difficulty. *Cf. Pierce County v. Guillen*, 537 U.S. 129, 147 (2003) (upholding federal legislation “aimed at improving safety in the channels of commerce”); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 524–525 (1941) (“[J]ust as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries . . . . [T]he exercise of the granted power of Congress to regulate interstate commerce may be aided by appropriate and needful control of activities and agencies which, though intrastate, affect that commerce”). As explained earlier, moreover, and as exemplified by *SWANCC*, the significant-nexus test itself prevents problematic applications of the statute. *See supra*, at 19–20; 531 U.S., at 174. The possibility of legitimate Commerce Clause and federalism concerns in some circumstances does not

require the adoption of an interpretation that departs in all cases from the Act's text and structure. See *Gonzales v. Raich*, 545 U.S. 1, \_\_\_ (2005) (slip op., at 14) (“[W]hen a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence” (internal quotation marks omitted)).

### III

In both the consolidated cases before the Court the record contains evidence suggesting the possible existence of a significant nexus according to the principles outlined above. Thus the end result in these cases and many others to be considered by the Corps may be the same as that suggested by the dissent, namely, that the Corps' assertion of jurisdiction is valid. Given, however, that neither the agency nor the reviewing courts properly considered the issue, a remand is appropriate, in my view, for application of the controlling legal standard.

\* \* \*

In these consolidated cases I would vacate the judgments of the Court of Appeals and remand for consideration whether the specific wetlands at issue possess a significant nexus with navigable waters.

**Justice Stevens**, with whom **Justice Souter**, **Justice Ginsburg**, and **Justice Breyer** join, *dissenting*.

\* \* \*

The narrow question presented in No. 04–1034 is whether wetlands adjacent to tributaries of traditionally navigable waters are “waters of the United States” subject to the jurisdiction of the Army Corps; the question in No. 04–1384 is whether a manmade berm separating a wetland from the adjacent tributary makes a difference. The broader question is whether regulations that have protected the quality of our waters for decades, that were implicitly approved by Congress, and that have been repeatedly enforced in case after case, must now be revised in light of the creative criticisms voiced by the plurality and Justice Kennedy today. Rejecting more than 30 years of practice by the Army Corps, the plurality disregards the nature of the congressional delegation to the agency and the technical and complex character of the issues at stake. Justice Kennedy similarly fails to defer sufficiently to the Corps, though his approach is far more faithful to our precedents and to principles of statutory interpretation than is the plurality's.

In my view, the proper analysis is straightforward. The Army Corps has determined that wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of our Nation's waters by, among other things, providing habitat for aquatic animals, keeping

excessive sediment and toxic pollutants out of adjacent waters, and reducing downstream flooding by absorbing water at times of high flow. The Corps' resulting decision to treat these wetlands as encompassed within the term "waters of the United States" is a quintessential example of the Executive's reasonable interpretation of a statutory provision. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–845 (1984).

Our unanimous decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), was faithful to our duty to respect the work product of the Legislative and Executive Branches of our Government. Today's judicial amendment of the Clean Water Act is not.

\* \* \*

Unlike *SWANCC* and like *Riverside Bayview*, the cases before us today concern wetlands that are adjacent to "navigable bodies of water [or] their tributaries," 474 U.S., at 123. Specifically, these wetlands abut tributaries of traditionally navigable waters. As we recognized in *Riverside Bayview*, the Corps has concluded that such wetlands play important roles in maintaining the quality of their adjacent waters, see *id.*, at 134–135, and consequently in the waters downstream. Among other things, wetlands can offer "nesting, spawning, rearing and resting sites for aquatic or land species"; "serve as valuable storage areas for storm and flood waters"; and provide "significant water purification functions." 33 C.F.R. § 320.4(b)(2) (2005); 474 U.S., at 134–135. These values are hardly "*independent*" ecological considerations as the plurality would have it, *ante*, at 23—instead, they are integral to the "chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a). Given that wetlands serve these important water quality roles and given the ambiguity inherent in the phrase "waters of the United States," the Corps has reasonably interpreted its jurisdiction to cover non-isolated wetlands. See 474 U.S., at 131–135.

This conclusion is further confirmed by Congress' deliberate acquiescence in the Corps' regulations in 1977. *Id.*, at 136. Both Chambers conducted extensive debates about the Corps' regulatory jurisdiction over wetlands, rejected efforts to limit this jurisdiction, and appropriated funds for a " 'National Wetlands Inventory' " to help the States " 'in the development and operation of programs under this Act.' " *Id.*, at 135–139 (quoting 33 U.S.C. § 1288(i)(2)). We found these facts significant in *Riverside Bayview*, see 474 U.S., at 135–139, as we acknowledged in *SWANCC*. See 531 U.S., at 170–171 (noting that "[b]eyond Congress' desire to regulate wetlands adjacent to 'navigable waters,' respondents point us to no persuasive evidence" of congressional acquiescence (emphasis added)).

The Corps' exercise of jurisdiction is reasonable even though not every wetland adjacent to a traditionally navigable water or its tributary will perform all (or perhaps any) of the water quality functions generally associated with wetlands. *Riverside Bayview* made clear that jurisdiction does not depend on a wetland-by-wetland inquiry. 474 U.S., at 135, n.9.



Instead, it is enough that wetlands adjacent to tributaries generally have a significant nexus to the watershed's water quality. If a particular wetland is "not significantly intertwined with the ecosystem of adjacent waterways," then the Corps may allow its development "simply by issuing a permit." *Ibid.*<sup>6</sup> Accordingly, for purposes of the Corps' jurisdiction it is of no significance that the wetlands in No. 04–1034 serve flood control and sediment sink functions, but may not do much to trap other pollutants, *supra*, at 4–5, and n.2, or that the wetland in No. 04–1328 keeps excess water from Lake St. Clair but may not trap sediment, *see supra*, at 5–6.

\* \* \*

In final analysis, however, concerns about the appropriateness of the Corps' 30-year implementation of the Clean Water Act should be addressed to Congress or the Corps rather than to the Judiciary. Whether the benefits of particular conservation measures outweigh their costs is a classic question of public policy that should not be answered by appointed judges. The fact that large investments are required to finance large developments merely means that those who are most adversely affected by the Corps' permitting decisions are persons who have the ability to communicate effectively with their representatives. Unless and until they succeed in convincing Congress (or the Corps) that clean water is less important today than it was in the 1970's, we continue to owe deference to regulations satisfying the "evident breadth of congressional concern for protection of water quality and aquatic ecosystems" that all of the Justices on the Court in 1985 recognized in *Riverside Bayview*, 474 U.S., at 133.

\* \* \*

Justice Kennedy's "significant nexus" test will probably not do much to diminish the number of wetlands covered by the Act in the long run. Justice Kennedy himself recognizes that the records in both cases contain evidence that "should permit the establishment of a significant nexus," *ante*, at 27, *see also ante*, at 26, and it seems likely that evidence would support similar findings as to most (if not all) wetlands adjacent to tributaries of navigable waters. But Justice Kennedy's approach will have the effect of creating additional work for all concerned parties. Developers wishing to fill wetlands adjacent to ephemeral or intermittent tributaries of traditionally navigable waters will have no certain way of knowing whether they need to get § 404 permits or not. And the Corps will have to make case-by-case (or category-by-category) jurisdictional determinations, which will inevitably increase the time and resources spent processing permit applications. These problems are precisely the ones that *Riverside Bayview*'s deferential approach avoided. *See* 474 U.S., at 135, n.9 (noting that it "is of little moment" if the Corps' jurisdiction encompasses some wetlands "not

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<sup>6</sup> Indeed, "[t]he Corps approves virtually all section 404 permit[s]," though often requiring applicants to avoid or mitigate impacts to wetlands and other waters. GAO Report 8.

significantly intertwined” with other waters of the United States). Unlike Justice Kennedy, I see no reason to change *Riverside Bayview’s* approach—and every reason to continue to defer to the Executive’s sensible, bright-line rule.

\* \* \*

I would affirm the judgments in both cases, and respectfully dissent from the decision of five Members of this Court to vacate and remand. \* \* \* In these cases, \* \* \* while both the plurality and Justice Kennedy agree that there must be a remand for further proceedings, their respective opinions define different tests to be applied on remand. Given that all four Justices who have joined this opinion would uphold the Corps’ jurisdiction in both of these cases—and in all other cases in which either the plurality’s or Justice Kennedy’s test is satisfied—on remand each of the judgments should be reinstated if *either* of those tests is met.<sup>14</sup>

\* \* \*

### Questions and Comments

1. In light of the fact that there was no majority opinion in the *Rapanos* case, it is a little difficult to determine precisely what further limits the Court placed on Clean Water Act jurisdiction. Parsing the opinions closely may help clarify what the Court did and did not hold. For instance, after *SWANCC*, some commentators believed that Clean Water Act jurisdiction might be limited to traditional navigable waters and adjacent wetlands. Did the plurality or any of the Justices adopt that narrow reading of the statute? Is the *SWANCC* focus on limiting jurisdiction to Congress’ commerce power over navigation retained by a majority of the Justices? Is Justice Breyer a voice crying out in the wilderness?
2. As noted above, the *Rapanos* Court focused on whether non-navigable tributaries of traditional navigable waters were “waters of the United States” and on whether wetlands adjacent to non-navigable tributaries were “waters of the United States.” What test does the plurality adopt to answer those two questions? Note the plurality’s distinction between ephemeral or intermittent streams, on the one hand, and seasonal rivers or waters that dry up in extraordinary circumstances. Is the plurality sliding down a slippery slope?

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<sup>14</sup> I assume that Justice Kennedy’s approach will be controlling in most cases because it treats more of the Nation’s waters as within the Corps’ jurisdiction, but in the unlikely event that the plurality’s test is met but Justice Kennedy’s is not, courts should also uphold the Corps’ jurisdiction. In sum, in these and future cases the United States may elect to prove jurisdiction under either test.

3. Prior to *Rapanos*, the lower federal courts routinely deferred to the government's determinations that non-navigable tributaries of traditional navigable waters were "waters of the United States." Does the plurality ignore the *Chevron* analysis? In construing the statute, does the plurality focus on the water quality purposes of the statute or legislative history, as the *Riverside Bayview* Court had done? Why not? On what purposes of the statute does the plurality focus? Which statutory construction canons?
4. What do you think of Justice Scalia's tone in the plurality opinion? What did Justice Kennedy think about it? It is interesting to compare the plurality's factual description of the plight of John Rapanos, who "faced 63 months in prison and hundreds of thousands of dollars in criminal and civil fines" for "backfilling his own wet fields" with the factual descriptions provided by Justice Kennedy and the dissenting Justices, who point out that Rapanos threatened to "destroy" the consultant he hired to delineate his property unless the consultant destroyed the report that identified the wetlands on the property, and that Rapanos ignored numerous cease and desist orders from the State and EPA when he filled the wetlands.
5. Justice Kennedy wrote a separate opinion, concurring in the Court's judgment. Does Kennedy apply the *Chevron* analysis when determining whether the government can regulate "ephemeral" or "intermittent" streams? Why does Justice Kennedy feel such regulation is appropriate? Does he focus on the "significant nexus" in his analysis of the non-navigable waters?
6. What test does Justice Kennedy suggest should apply to determine whether wetlands can be regulated? Does he adopt a different test depending on whether the wetlands are adjacent to traditional navigable waters or whether they are adjacent to non-navigable tributaries? Is his interpretation of the statute based on the plain meaning of the text, the purposes of the statute, the legislative history, or some combination of all three? Does Kennedy apply the *Chevron* analysis? How does he respond to the plurality's federalism and constitutional concerns?
7. **Applying the "Significant Nexus" Test:** Does Kennedy believe that there must be a hydrological connection between the wetlands and a traditional navigable in fact water? Is a hydrological connection sufficient for Justice Kennedy? What types of connections between wetlands and a traditional navigable water might constitute a "significant nexus"? Would Kennedy focus only on the specific wetlands that the government seeks to regulate in determining whether the wetlands have a "significant nexus" to other waters? Do the plurality or dissenting Justices believe that such ecological connections are sufficient to establish jurisdiction?
8. Justice Stevens, in his dissenting opinion, argues for a straightforward application of

the *Chevron* analysis. Steven’s focus on the water quality protection purposes of the Clean Water Act, Congressional acquiescence, and deference to agency expertise echo the approach taken in the Court’s unanimous *Riverside Bayview Homes* decision. Note how the dissenting Justices and Justice Kennedy, in his concurrence, rely heavily on science and the scientific expertise of agencies in crafting their opinions.

9. **A Missed Opportunity?:** Justice Breyer, in a separate dissent, and Justice Roberts, in a separate concurring opinion, both lament the government’s failure to adopt regulations to clarify the meaning of “waters of the United States” after *SWANCC* and both note that the government’s regulations would have been accorded deference under *Chevron* if they had pursued that route. However, Justice Kennedy suggests, in his concurrence, that if the plurality’s reasoning had been adopted by a majority of the Court, the Corps and EPA would not be accorded *Chevron* deference if, after the *Rapanos* decision, they adopted rules to clarify that ephemeral and intermittent streams were “waters of the United States” and to adopt a definition of “adjacent” similar to the approach that they were applying in practice before the decision. Why would those rules not be accorded *Chevron* deference? See [\*National Cable & Telecommunications Association v. Brand X Internet Services\*, 545 U.S. 967 \(2005\)](#).
10. ***Rapanos* Post-script:** The United States finally settled the civil lawsuit against Rapanos in December 2008, and the defendants agreed to pay \$150,000 in civil penalties, create 100 acres of wetlands, and preserve 134 acres of wetlands. The consent decree is available at: <http://www2.epa.gov/sites/production/files/documents/rapanos-cd.pdf>
11. ***Marks* or Counting Noses?:** The Justices divided 4-4-1 in *Rapanos*. Justice Roberts, in a concurring opinion, suggests that lower courts and regulated parties “will now have to feel their way on a case-by-case basis”. [547 U.S. at 758](#) (Roberts, *concurring*). He provides some guidance on how the decision might be read by citing [\*Grutter v. Bollinger\*, 539 U.S. 306 \(2003\)](#) (*discussing* [\*Marks v. United States\*, 430 U.S. 188 \(1977\)](#)). The dissenting Justices suggest an alternative approach for reconciling the various opinions and developing a test for determining when it is appropriate to regulate “non-navigable tributaries” and wetlands adjacent to non-navigable tributaries? Compare the two approaches.
12. For various views on the impact of the *Rapanos* decision shortly after the Court issued the decision, see Robin Kundis Craig, *Justice Kennedy and Ecosystem Services: A Functional Approach to Clean Water Act Jurisdiction After Rapanos*, 38 *Envtl. L.* 635 (2008); Jamison E. Colburn, *Waters of the United States: Theory, Practice and Integrity at the Supreme Court*, 34 *Fla. St. U. L. Rev.* 183 (2007); Bradford C. Mank, *Implementing Rapanos - will Justice Kennedy’s Significant Nexus*

*Test Provide a Workable Standard for Lower Courts, Regulators and Developers?*, 40 Indiana L. Rev. 291 (2007); Mark Squillace, *From 'Navigable Waters' to 'Constitutional Waters'*, 40 U. Mich. J.L. Reform 799 (2007); James Murphy, *Muddying the Waters of the Clean Water Act: Rapanos v. United States and the Future of America's Wetlands*, 31 Vt. L. Rev. 356 (2006).

**E. Post-Rapanos Developments**

After the *Rapanos* decision, there was confusion regarding whether jurisdictional determinations regarding non-navigable tributaries and wetlands adjacent to non-navigable tributaries should be made based on the plurality's test, Justice Kennedy's test, or both. To recap, the following chart highlights the differences between the plurality's opinion and Justice Kennedy's opinion.

|                  | <b><i>Non-Navigable Tributaries</i></b>   | <b><i>Wetlands Adjacent to Non-Navigable Tributaries</i></b>  |
|------------------|---|---|
| <b>Plurality</b> | Jurisdiction exists if the water is a "relatively permanent, continuously flowing" body of water that flows into a traditional navigable water.   | Jurisdiction exists if the wetlands have a "continuous surface connection" with a relatively permanent, continuously flowing body of water that flows into a traditional navigable water.   |
| <b>Kennedy</b>   | Jurisdiction exists if the water has a significant nexus to a traditional navigable water.<br><br>A "significant nexus" exists where the water "either alone or in combination with similarly situated lands in the region, significantly affects the chemical, physical, and biological integrity" of a traditional navigable water. | Jurisdiction exists if the wetlands have a significant nexus to a traditional navigable water.<br><br>A "significant nexus" exists where a wetland "either alone or in combination with similarly situated lands in the region, significantly affects the chemical, physical, and biological integrity" of a traditional navigable water. |

Justice Stevens, for the dissenting Justices, wrote that Justice Kennedy's "significant nexus" test would "probably not do much to diminish the number of wetlands covered by the Act in the long run." [547 U.S. at 808](#) (Stevens, *dissenting*) However, just as elimination

of the “migratory bird” test made it more time-consuming to document and support jurisdictional determinations over “isolated waters,” the requirement that the Corps and EPA demonstrate a “significant nexus” between wetlands or non-navigable tributaries and traditional navigable waters would increase the time and resources necessary to document and support jurisdictional determinations over those waters.

Justice Kennedy’s test would allow the Corps and EPA to regulate a much broader universe of “waters” than the plurality’s test, but there are some “waters” that could be regulated under the plurality’s test that would not be regulated under Kennedy’s test (waters that have continuous surface connections to traditional navigable waters, but for which the government cannot demonstrate a “significant nexus” to the traditional navigable water).

Just as the *SWANCC* decision raised concerns that many isolated waters would be excluded from federal regulation, the *Rapanos* decision raised concerns that many non-navigable tributaries, including intermittent and ephemeral streams, and wetlands adjacent to those non-navigable tributaries, would be excluded from federal regulation. The Environmental Law Institute released a report that outlined, in great detail, the various types of waters that would be unprotected at the State level if not protected at the federal level. See [Environmental Law Institute, \*America’s Vulnerable Waters: Assessing the Nation’s Portfolio of Vulnerable Aquatic Resources since Rapanos v. United States\*, \(Aug. 2011\)](#). In a follow-up report, the Institute warned that 36 states have laws that could restrict the authority of state or local agencies to regulate, under their laws, waters that are excluded from federal regulation. See [Environmental Law Institute, \*State Constraints: State Imposed Limitations on the Authority of Agencies to Regulate waters Beyond the scope of the Federal Clean Water Act 1\* \(May 2013\)](#). The restrictions include “absolute or qualified prohibitions that require state law to be ‘no more stringent than’ federal law; property rights limitations; or a combination of the two.” *Id.* Once again, therefore, State environmental regulators were concerned that the Supreme Court’s interpretation of the Clean Water Act could significantly harm their ability to protect waters and wetlands in their states.

## 1. 2008 Guidance

About a year after the Court’s ruling in *Rapanos*, the Corps and EPA issued [guidance](#) to the Corps’ district offices and EPA regional offices regarding the implications of the ruling for regulating “waters of the United States.” The agencies took public comment on the guidance for seven and a half months and replaced the 2007 joint guidance document with a [revised guidance document](#) in December 2008. In essence, the guidance asserted jurisdiction over waters that would meet *either* the Kennedy or plurality tests. This is the approach that was suggested by the dissenting Justices in *Rapanos*, as Justice Stevens wrote, “Given that all four Justices who have joined this opinion would uphold the Corps’ jurisdiction in both of these cases—and in all other cases in which either the plurality’s or Justice Kennedy’s test is satisfied—on remand each of the judgments should be reinstated

if *either* of those tests is met.” [547 U.S. at 810](#) (Stevens, *dissenting*). More specifically, the guidance provided that the agencies would assert jurisdiction over:

- Traditional navigable waters and wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year round or have continuous flow at least seasonally (e.g. typically three months), and wetlands that direct abut such tributaries

Those are the waters that would be regulated under *Riverside-Bayview Homes* or the *Rapanos* plurality’s opinion.

In addition, the guidance provided that the agencies would decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

Those are the waters that would be regulated under Justice Kennedy’s “significant nexus” test from *Rapanos*.

The guidance also provided that the agencies *would not* exert jurisdiction over swales or gullies with low volume or short or infrequent flows or ditches that are excavated wholly in uplands and drain only in uplands. Many of the determinations that the agencies have made using the guidance have been upheld in court, as the following section describes in more detail.

## **2. Judicial Interpretation of *Rapanos***

As Justice Roberts surmised, courts have been feeling their way on a case-by-case basis to determine the reach of *Rapanos*. There has been a significant amount of litigation in the federal courts focusing on the meaning of “waters of the United States” after *Rapanos*. According to an Environmental Law Institute study, by May 2013, federal cases had been brought in two thirds of all of the states in the United States after *Rapanos* and every federal circuit court, other than the Second Circuit and Tenth Circuit, had issued an opinion in a case involving Clean Water Act jurisdictional issues similar to those in *Rapanos*. See [Environmental Law Institute, \*State Constraints: State Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the scope of the Federal Clean Water Act 4\* \(May 2013\)](#).

Three circuits have held that waters can be regulated if they meet *either* the “significant nexus” test *or* the plurality test. Three circuits have upheld the “significant nexus” test without ruling on whether the plurality test could be utilized in other cases. One circuit has held that the “significant nexus” test is appropriate and the plurality test is not, and two circuits have resolved their cases without deciding which test should be used to determine jurisdiction.

The following chart outlines the split in jurisdictions:

| Test                          | Circuits   |
|-------------------------------|--|
| Kennedy <i>or</i> Plurality   | <ul style="list-style-type: none"> <li>• 1<sup>st</sup> Circuit: <a href="#">United States v. Johnson, 467 F.3d 56 (1<sup>st</sup> Cir. 2006)</a></li> <li>• 3<sup>rd</sup> Circuit: <a href="#">United States v. Donovan, 661 F.3d 174 (3<sup>d</sup> Cir. 2011)</a></li> <li>• 8<sup>th</sup> Circuit: <a href="#">United States v. Bailey, 571 F.3d 791 (8<sup>th</sup> Cir. 2009)</a></li> </ul>   |
| Kennedy / Silent on Plurality | <ul style="list-style-type: none"> <li>• 4<sup>th</sup> Circuit: <a href="#">Precon Development Corp. v. Corps, 633 F.3d 278 (4<sup>th</sup> Cir. 2011)</a></li> <li>• 7<sup>th</sup> Circuit: <a href="#">United States v. Gerke Excavating, Inc., 464 F.3d 723 (7<sup>th</sup> Cir. 2006)</a></li> <li>• 9<sup>th</sup> Circuit: <a href="#">Northern California River Watch v. Wilcox, 633 F.3d 766 (9<sup>th</sup> Cir. 2011)</a></li> </ul> |
| Kennedy Only                  | <ul style="list-style-type: none"> <li>• 11<sup>th</sup> Circuit: <a href="#">United States v. Robison, 505 F.3d 1208 (11<sup>th</sup> Cir. 2007)</a></li> </ul>   |
| Resolved Without Choosing     | <ul style="list-style-type: none"> <li>• 5<sup>th</sup> Circuit: <a href="#">United States v. Lucas, 516 F.3d 316 (5<sup>th</sup> Cir. 2008)</a></li> <li>• 6<sup>th</sup> Circuit: <a href="#">United States v. Cundiff, 555 F.3d 200 (6<sup>th</sup> Cir. 2009)</a></li> </ul>   |

Two trends are clear from those decisions. First, the appellate courts generally agree that if a water satisfies Justice Kennedy’s “significant nexus” test, it can be regulated as a “water of the United States.” Second, none of the appellate courts have found that the *Rapanos* plurality test is a sufficient test, in and of itself, to determine jurisdiction.



### 3. 2011 Guidance and Proposed Rulemaking

While Courts have generally upheld the government's exercise of jurisdiction under Justice Kennedy's "significant nexus" test, the test is time consuming and resource intensive, and implementation of the test on a case-by-case basis led to reductions in the scope of waters covered under the Clean Water Act. After the *Rapanos* decision, the Corps and EPA still preferred to assert jurisdiction broadly over categories of waters rather than making the jurisdictional determination on a case by case basis. Accordingly, the agencies continued to explore amending their "waters of the United States" guidance or adopting regulations to define the term more categorically.

In May 2011, the Corps and EPA prepared draft guidance to replace the 2008 guidance and published the draft guidance in the Federal Register for public comment. See [76 Fed. Reg. 24479 \(May 2, 2011\)](#). The agencies received approximately 230,000 comments on the guidance, but did not take further steps to finalize the guidance. See [Environmental Law Institute, \*The Clean Water Act Jurisdictional Handbook\*, 2d ed. 36 \(May 2012\)](#).

Just as legislators proposed bills to respond to the Supreme Court's *SWANCC* decision, legislators introduced legislation to amend the Clean Water Act after the *Rapanos* decision. In April 2010, Representative Oberstar introduced the *America's Commitment to the Clean Water Act*, which was similar to the previous *Clean Water Restoration Acts*, and would establish broad jurisdiction over streams and wetlands. See [H.R. 5088, 111th Cong. 2d Sess. \(2010\)](#). Other legislators introduced bills to restrict Clean Water Act jurisdiction or to limit the Corps and EPA from finalizing the 2011 guidance or using it as the basis for a rulemaking. See *Defense of Environment and Property Act of 2012*, [S. 2122, 112th Cong., 2d Sess. \(2012\)](#), and *Preserve the Waters of the United States Act*, [S. 2245, 112th Cong., 2d Sess. \(2012\)](#). Like the post-*SWANCC* legislation, though, none of the *post-Rapanos* bills were enacted.

In September 2013, EPA released a draft study, [Connectivity of Streams and Wetlands to Downstream Waters](#), that concluded that all tributaries, including intermittent and ephemeral streams, of downstream rivers are physically, chemically, and biologically connected to the downstream rivers. *Id.* at 1-3. It also found that wetlands and open waters in the flood plains of rivers and riparian areas are connected in the same way to downstream rivers as the tributaries are connected to those rivers. *Id.* at 1-3. Although the report did not find that isolated waters and wetlands that are outside of the floodplains of rivers have a similar connection to downstream rivers, it did suggest that a case-by-case analysis of such wetlands and waters could determine that they have an aggregate impact on downstream rivers. *Id.* at 1-4. EPA's Science Advisory Board then solicited public comment on the proposal, and the agency indicated that the study would be the basis for a proposed rulemaking to clarify the meaning of "waters of the United States." See United States Environmental Protection Agency, *Clean Water Act Definition of "Waters of the United States"*, available at:

<http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm>

Based on that study, which was ultimately [finalized in January 2015](#), the Corps and EPA issued a notice of proposed rulemaking to re-define “waters of the United States.” See [79 Fed. Reg. 22188 \(Apr. 21, 2014\)](#). In the proposed rule, the agencies defined “waters of the United States” to include traditional navigable waters, interstate waters, the territorial seas, all impoundments of those three categories of waters, all tributaries of those three categories of waters and all waters, including wetlands, adjacent to those three categories of waters. *Id.* at 22262-22263. While the agencies were developing the rule, legislators introduced bills to prevent the agencies from finalizing the rule. See *Protecting Water and Property Rights Act of 2014*, [S. 2496, 113<sup>th</sup> Cong., 2d Sess. \(2014\)](#); *Waters of the United States Regulatory Overreach Protection Act*, [H.R. 594, 114<sup>th</sup> Cong., 2d Sess. \(2014\)](#).

On June 29, 2015, EPA and the Corps issued a final rule after providing a 200 day comment period and receiving more than 1 million comments on the proposal.” See [80 Fed. Reg. 37054, 37057 \(June 29, 2015\)](#). According to the agencies, the rule “makes the process of identifying waters protected under the [Clean Water Act] easier to understand, more predictable, and consistent with the law and peer-reviewed science.” *Id.* at 37055. The [Connectivity Study](#) “provided much of the technical basis” for the rule. *Id.* at 37057. Although the rule reduces the circumstances in which agencies must determine, on a case-by-case basis, that waters have a “significant nexus” to traditional navigable waters, interstate waters or the territorial seas, the “significant nexus” standard remains an important element of the agencies’ interpretation of the Clean Water Act. *Id.* at 37056. The agencies identified several categories of waters as “waters of the United States” in the final rule because the agencies concluded that the waters, as a class, had a “significant nexus” to traditional navigable waters, interstate waters or the territorial seas. By reducing the situations in which the Corps and EPA must conduct case-by-case analyses, the new rule should make it easier for the agencies to determine that waters like those at issue in *Rapanos* are protected by the Clean Water Act.

The final rule identifies eight categories of waters as “waters of the United States.” See 33 C.F.R. § 328.3(a). The first three categories of waters have long been regulated as “waters of the United States,” and include traditional navigable waters, *id.* § 328.3(a)(1), interstate waters (including interstate wetlands), *id.* § 328.3(a)(2), and the territorial seas. *Id.* § 328.3(a)(3). Any impoundments of those waters, *id.* § 328.3(a)(4), or tributaries of those waters, *id.* § 328.3(a)(5) are also “waters of the United States.” The rule does not require the Corps or EPA to make a case-by-case determination that an impoundment or tributary of those waters is a “water of the United States.” It includes all such impoundments or tributaries. The rule defines a tributary as “a water that contributes flow, either directly or through another water ... to [a traditional navigable water, interstate water or the territorial seas] that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark.” *Id.* § 328.3(c)(3). Thus, the term is broad enough to include ephemeral and intermittent streams.

In addition to those five categories of “waters,” the rule includes, as “waters of the United States”, waters that are adjacent to waters within any of those five categories of waters. *Id.* § 328.3(a)(6). While the prior regulation defined “waters of the United States” to include **wetlands** that were “adjacent” to other “waters of the United States,” and defined “adjacent” to include “bordering, contiguous or neighboring,” the new rule includes “adjacent” **waters**, as opposed simply to “adjacent” **wetlands**, and defines waters as “neighboring” based on the distances between those waters and specific features of other waters (i.e. ordinary high water mark, 100 year floodplain, high tide line). *Id.* § 328.3(c)(2).

While the prior regulation defined “waters of the United States” to include intrastate waters the use, degradation or destruction of which could affect interstate or foreign commerce, the new rule eliminates that category of “waters.” However, some waters that may have been regulated under that “interstate commerce” category may still be regulated under the new rule as the Corps and EPA include, in the “waters of the United States” definition, a new category that includes prairie potholes, Carolina bays and Delmarva bays, pocosins, Western vernal pools, and Texas coastal prairie wetlands, **if** those wetlands are determined, on a case-by-case basis, to have a significant nexus to a traditional navigable water, interstate water, or the territorial seas. *Id.* § 328.3(a)(7). While that decision must be made on a case-by-case basis, the rule clarifies that the wetland types identified in the category (prairie potholes, bays, pocosins, vernal pools, and coastal prairie wetlands) “are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water...” *Id.*

Finally, the new rule includes, in the definition of “waters of the United States,” all waters located within the 100 year floodplain of a traditional navigable water, interstate water, or the territorial seas and all waters located within 4,000 feet of the high tide line or ordinary high water mark of any of the first five categories of waters of the United States **if** the waters are determined, on a case-by-case basis, to have a significant nexus to a traditional navigable water, interstate water or the territorial seas. *Id.* § 328.3(a)(8).

For purposes of making the case-by-case determination required for the final two categories of “waters of the United States,” the rule defines “significant nexus” to mean that “a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical or biological integrity” of the other water. *Id.* § 328.3(c)(5). The rule also identifies aquatic functions that are relevant to determine whether a water has a “significant nexus” to another water, including sediment trapping; nutrient recycling; pollutant trapping, transformation, filtering and transport; retention and attenuation of flood waters; runoff storage; contribution of flow; export of organic matter; export of food resource; and provision of life cycle dependant aquatic habitat. *Id.*

While the rule outlines eight categories of waters that **are** “waters of the United States,” it

also identifies several categories of waters that are *not* “waters of the United States,” including waste treatment systems, prior converted cropland, artificially irrigated areas that would revert to dry land, other artificial and constructed waters and ornamental pools, as well as depressions, various erosional features, puddles, groundwater, constructed stormwater control features, waste water recycling structures, and many types of ditches. *Id.* § 328.3(b). Most of those features were never regulated in the past, but the new rule was the first rule to explicitly codify the exemptions.

The agencies predict that the new rule will reduce the scope of jurisdiction when compared to jurisdiction prior to the *SWANCC* decision, but could increase jurisdiction by 2.84 - 4.65% when compared to jurisdiction after the *Rapanos* decision. See [U.S. EPA & U.S. Army Corps of Engineers, \*Economic Analysis of the EPA-Army Clean Water Rule\* vii \(May 2015\)](#). They estimate that the annual costs for the regulation will range from \$158.6 million to \$306.6 million, while the annual benefits will range from \$338.9 million to \$349.5 million. *Id.* at x.

Within the first two days after the agencies published the final rule, 27 states filed lawsuits challenging the rule. See Chris Marr, *More Than Half States Sue EPA to Block Rule on Water Jurisdiction*, 46 Env. Reporter 2012 (July 3, 2015). Within another two weeks, 14 agriculture and industry groups filed lawsuits, see Amena H. Saiyid and Anthony Adragna, *Chamber of Commerce Joins in Water Rule Lawsuit*, 46 Env. Reporter 2143 (July 17, 2015), and representative Adrian Smith (R-Neb.) introduced a resolution in Congress to overturn the rule under the Congressional Review Act. See [H.J. Res. 59, 114<sup>th</sup> Cong., 1<sup>st</sup> Sess. \(2015\)](#).

In October 2015, the United States Court of Appeals for the Sixth Circuit issued a nationwide stay of the rule, pending review on the merits. See [In re EPA and Department of Defense Final Rule, \(6th Cir., MDL No. 135, 10/9/15\)](#).

### Resources

- [Final “waters of the United States” rule](#)
- [Economic Analysis of “waters of the United States” rule](#)
- [EPA Website for the “waters of the United States” rule](#)
- Videos - [Clear Protection for Clean Water \(EPA\)](#); [That’s Enough \(“Let it Go” Parody - Missouri Farm Bureau\)](#)
- EPA Infographic - [Why Clean Water Rules](#)
- EPA - [Connectivity Study](#)
- [Analysis of the “waters of the United States” rule](#) (CPR Blog)

## Interviews



Jan Goldman Carter, Senior Manager and Counsel for the National Wildlife Federation's Wetlands and Water Resources Program, discusses the importance of the Clean Water Act's "waters of the United States" language as a foundation for wetlands protection. ([YouTube](#)).



Stephen Samuels, an Assistant Section Chief in the Environmental Defense Section of the Environment and Natural Resources Division of the U.S. DOJ, discusses the Supreme Court cases interpreting the breadth of the Clean Water Act jurisdiction over "waters of the United States", the interpretive difficulties the decisions have created, and the legislative and regulatory efforts to clarify the breadth of jurisdiction. ([YouTube](#)).

## Hypotheticals

1. Will McDonald owns a farm near Washington, Iowa. And on that farm, he has several prairie pothole wetlands. The nearest traditional navigable water, the Iowa River, is located about 20 miles from McDonald's farm. The wetlands are not adjacent to any creeks, streams or other watercourses. There is no evidence that the wetlands are connected by surface water or groundwater to the Iowa River or any other traditional navigable water. However, every spring, thousands of pintails, mallards, and Canada geese rely on the wetlands (in conjunction with other wetlands in the region), for nesting and habitat on their northerly migration. In addition, hundreds of birdwatchers from Illinois, Missouri and other states flock to the Washington area every year to observe the annual migration. Would McDonald need to obtain a Clean Water Act Section 404 permit or a Rivers and Harbors Act Section 10 permit from the Corps of Engineers if he wanted to fill the wetlands? Would your answer be different if it could be demonstrated that the wetlands on McDonald's property, in conjunction with other wetlands in the region, played a vital role in preventing flooding of the Iowa River?

2. Assume, instead, that the wetlands on McDonald's farm are not prairie pothole wetlands, but are adjacent to an unnamed intermittent stream that flows for a mile into a ditch, which is connected, after another mile, to the South Fork of Long Creek. The South Fork of Long Creek flows into Long Creek, which is a tributary of the Iowa River (which is located 20 miles from McDonald's farm). The wetlands on McDonald's property do not have a continuous surface connection to any traditional navigable water. There is also no evidence of a groundwater connection between the wetlands and a traditional navigable water. However, there is evidence that the wetlands, in conjunction with other wetlands in the region, play a significant role in filtering pollution and sediments that would otherwise be deposited in the Iowa River. Would McDonald need to obtain a Clean Water Act Section 404 permit or a Rivers and Harbors Act Section 10 permit to fill the wetlands on his property? Would your answer be different if it could be demonstrated that the wetlands provided important habitat for snakes that were listed on the state's list of endangered species?

3. Assume, finally, that McDonald lives near Burlington, Iowa and owns property adjacent to the Mississippi River. There are a few acres of wetlands on his property that are adjacent to the Mississippi River. Would McDonald need to obtain a Clean Water Act Section 404 permit or a Rivers and Harbors Act Section 10 permit to fill the wetlands on his property?

## Chapter Quiz

Now that you've finished the material covering the federal government's Clean Water Act jurisdiction over "navigable waters" and "waters of the United States", why not try a CALI lesson on the material at <http://cca.li/PU>. It should only take about a half hour or less.

# Chapter 5

## Additions and Discharges

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### I. Regulated Activities

As noted in the previous Chapter, [Section 301 of the Clean Water Act](#) regulates the “discharge” of pollutants, which the statute defines to mean “addition” of a pollutant to navigable waters from a point source. [33 U.S.C. § 1362\(12\)](#). [Section 404](#) of the Act authorizes the Corps of Engineers to issue permits for the “discharge of dredged or fill material into the navigable waters at specified disposal sites.” As a result, whether an activity in wetlands or regulated waters is regulated under the Clean Water Act frequently depends on whether it involves the **addition** of pollutants and on whether it involves the **discharge of dredged or fill material**.

The terms “addition,” “dredged material,” “fill material,” and “discharge of dredged or fill material” are not defined in the Clean Water Act, but the Corps and EPA have defined most of them by regulation. The Corps first adopted regulations defining many of those terms in 1977. See [42 Fed. Reg. 37,121 \(July 19, 1977\)](#). In those regulations, the agency defined **dredged material** and **fill material** as follows:

- **Dredged material:** material that is excavated or dredged from the waters of the United States
- **Fill material:** any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402 \* \* \*

*Id.* While the definition of “dredged material” was simply tied to the nature of the material, the definition of “fill material” was tied to the **purpose** for which the material was being used. The regulations also included a definition of “discharge of dredged material” (“addition of dredged material into the waters of the United States”) and a definition of “discharge of fill material” (“addition of fill material into the waters of the United States”), but



neither was particularly illuminating. *Id.* The regulations did **not** define “addition.”

The regulations that EPA adopted in 1980 included a similar definition of “dredged material,” but they defined “fill material” as: “any ‘pollutant’ which replaces portions of the ‘waters of the United States’ with dry land or which changes the bottom elevation of a water body for any purpose.” See 45 Fed. Reg. 33290, 33421 (May 19, 1980). Thus, the EPA definition of “fill material” **was not** tied to the purpose for which a material was used, but rather the effect of the use of the material. For many years, the EPA and Corps regulatory definitions of “fill material” diverged in that manner.

Since 2002, however, the Corps and EPA have defined the terms “dredged material” and “fill material” consistently in their regulations. The current regulatory definitions of the terms are:

- **Dredged material:** material that is excavated or dredged from waters of the United States.
- **Fill material:** material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States. \* \* \*

[33 C.F.R. § 323.2](#) (Corps’ regulations); [40 C.F.R. § 232.2](#) (EPA’s regulations). Both agencies also include a non-exclusive list of materials that constitute “fill material” within their definition of the term. The list includes “rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.” *Id.*

The evolution of the definitions of “dredged material,” “fill material,” “discharge of dredged material,” and “discharge of fill material” are discussed at length in the sections that follow. However, neither agency has defined “addition” by regulation.

### Hypothetical

Ellen Marshall is an attorney who specializes in real estate development and she represents Stewart Griffith, a shopping mall developer. While meeting with Griffith last week to review a contract to purchase property in Wilmington, Delaware, she learned that Griffith had instructed some of the contractors who were building a mall for him on property near Dover, Delaware to fill in an acre of coastal wetlands without seeking a permit from the Corps of Engineers. Griffith told Marshall that the contractors had found several Black Rail nests in the wetlands. Since Black Rails are an endangered bird, Griffith was sure that the Corps of Engineers would never issue him a permit for the development if he applied for one, so he thought it would be best to fill in the wetlands and hope no one found out about it. Marshall encouraged Griffith to tell the Corps about his actions and to apply for an after the fact permit, but he refused and told her that he would take his chances, because he didn't think anyone other than the contractors knew that the wetlands had been filled. Marshall believes that Griffith will be subject to much more stringent penalties if the Corps discovers the violation independently than if Griffith reports the violation to the Corps. Marshall is also concerned because there are only a few Black Rails left in Delaware and Griffith's action destroyed vital habitat for the birds. If Griffith reports the violation and creates, restores or enhances wetlands in the vicinity of the mall development in Dover, the birds have a better chance for survival. Can Marshall notify the Corps about Griffith's illegal filling activities if Griffin does not want to report the violation? See [American Bar Association, Model Rule of Professional Conduct 1.6](#) (and associated comments). Would your answer be different if the filling significantly increased the likelihood that a hospice near the mall in Dover would be flooded in the event of a hurricane or major tropical storm in the region?

## A. Landclearing

Because neither the statute nor agency regulations define “addition”, there has been significant litigation regarding whether certain activities constitute the “addition” of a pollutant. One question that has arisen frequently concerns whether there is an “addition” of a pollutant when a material is removed from wetlands or other waters of the United States and then replaced within the same waters. This issue arose shortly after the enactment of the 1977 amendments to the Clean Water Act in the context of landclearing. If a person cuts down trees or vegetation in a wetland or other water in order to clear the land, and some of those trees or vegetation are disposed of in the wetlands or water, has there been an “addition” of a pollutant, even though the trees and vegetation were in the wetland or water at the outset of the landclearing activities? The following case explores that issue.



Photo 25 Photo by Nigel Corby

[http://commons.wikipedia.org/wiki/File%3AHarversting\\_timber\\_near\\_Wood\\_-\\_geograph.org.uk\\_-\\_1012869.jpg](http://commons.wikipedia.org/wiki/File%3AHarversting_timber_near_Wood_-_geograph.org.uk_-_1012869.jpg) [CC BY SA 2.0]

## **Avoyelles Sportsmen's League, Inc. v. Marsh**

715 F.2d 897 (5<sup>th</sup> Cir. 1983)

**RANDALL, Circuit Judge:**

This is an appeal from a district court judgment that enjoined the private defendants<sup>1</sup> from any additional clearing, except by permit under 33 U.S.C. § 1344 (Supp. V 1981), of certain lands determined by the district court to be wetlands. The federal defendants<sup>2</sup> contend that the district court should have reviewed the Environmental Protection Agency's ("EPA") final wetlands determination (attached as an appendix to this opinion) on the basis of the administrative record, and that the court erred in adopting its own wetlands determination instead of reviewing the agency's determination under the arbitrary and capricious standard. The federal defendants also dispute the district court's conclusion that the mere removal of vegetation from wetlands constitutes a discharge of a pollutant under section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a) (1976). \* \* \* The private defendants contest the validity of the district court's determination that approximately ninety percent of their land is a wetland, as well as the court's conclusion that their landclearing activities fall under the CWA's prohibition on the discharge of pollutants into waters of the United States.

For the reasons set forth below, to the extent that the district court's decision that ninety percent of the Lake Long Tract is a wetland is inconsistent with the EPA's determination, the decision of the district court is reversed. The court's determination that the private defendants' actual landclearing activities require permits is affirmed.

### **FACTUAL AND PROCEDURAL BACKGROUND**

This case concerns an approximately 20,000 acre tract of land (the "Lake Long Tract") in Avoyelles Parish, Louisiana. The tract lies within the Bayou Natchitoches basin, an area of approximately 140,000 acres, which, along with the Ouachita, Black and Tensas river basins, makes up the Red River backwater area. The Bayou Natchitoches basin is subject to flooding during the spring months, and it experiences an average rainfall of sixty inches per year.

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<sup>1</sup> The private defendants are the owners of the land that is the subject of this litigation.  
\* \* \*

<sup>2</sup> The federal defendants are United States Army Corps of Engineers and Environmental Protection Agency officials. \* \* \*

### **Resources for the Case**

[EDF Website](#) (plaintiffs)  
[Unedited opinion](#) (From Justia)  
[EPA's JD for the property](#)  
[Google Map of all the cases in the coursebook](#)

Much of the basin had been cleared of forest before the private defendants began their landclearing activities, but 80,000 acres were still forested. The Lake Long Tract made up a quarter of this forested area. The topography of the tract itself is uneven, resulting in some areas with permanent water impoundments and other drier areas that support a variety of plant species.

The private defendants own the Lake Long Tract. They decided that the land could be put to agricultural use, specifically soybean production. Consequently, they began a program of large-scale deforestation in June of 1978. \* \* \* Using bulldozers with shearing blades that "floated" along the ground, the defendants cut the timber and vegetation at or just above ground level. The trees were then raked into windrows, burned, and the stumps and ashes were disced into the ground by other machinery. The shearing and raking caused some leveling of the tract, and the defendants dug one drainage ditch.

On August 25, 1978, the Vicksburg District of the Army Corps of Engineers ordered defendant Prevot to halt his activities pending a wetlands determination by the Corps. Thereafter, Dr. Donald G. Rhodes, an expert consultant employed by the Corps, undertook a comprehensive vegetative mapping of the Lake Long Tract and determined that thirty-five percent of it was a wetland. In October, 1978, the Fish and Wildlife Service wrote a letter to the Corps stating that the Service believed that the entire tract was a wetland. After Dr. Rhodes had made his determination, the landowners resumed their activities on the portion of the tract that the Corps had not designated as a wetland.

On November 8, 1978, the plaintiffs<sup>5</sup> brought this citizens' suit \* \* \* against a number of Corps and EPA officials, as well as against the private landowners. The plaintiffs claimed, *inter alia*, that the landclearing activities would result in the discharge of dredged and fill material into the waters of the United States in violation of sections 301(a) and 404 of the CWA, \* \* \* and also result in the discharge of pollutants into the waters of the United States in violation of section 402 of the CWA, \* \* \*. The plaintiffs requested a declaration that the tract was a wetland within the scope of the CWA, \* \* \* that the private defendants could not engage in their landclearing activities without obtaining a permit from the EPA or the Corps, and that the federal defendants had failed to exercise their "mandatory duty" \* \* \* to designate the tract a wetland and to order the private defendants to cease and desist from discharging pollutants and dredged materials. The plaintiffs also sought injunctive relief against the federal defendants to require them to exercise their jurisdiction over the property and to issue cease-and-desist orders until the private defendants obtained the requisite permits. The district court immediately issued a temporary restraining order, preventing the private defendants from engaging in landclearing activities pending

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<sup>5</sup> The plaintiffs are a number of environmental groups and one interested individual.  
\* \* \*

the court's action on the plaintiffs' motion for a preliminary injunction.

On January 17, 1979, the district court granted the plaintiffs' motion for a preliminary injunction and ordered the federal defendants to prepare a final wetlands determination within sixty days. All of the private parties were to have the opportunity to participate in the administrative proceedings, and the federal defendants were to file a preliminary report within forty-five days. The court allowed the private defendants to engage in normal cultivation on the more than 10,000 acres that had been cleared, but ordered them to apply for a permit with respect to the area already designated by the government as a wetland and enjoined them for sixty days from engaging [\*903] in landclearing activities on the remainder of the tract.

The parties complied with the court's preliminary order, and the EPA submitted its final wetlands determination on March 26, 1979. \* \* \* After examining the vegetation, soil conditions, and hydrology of the tract, the EPA concluded that approximately eighty percent of the land was a wetland. In a brief final paragraph, the EPA also offered its views of the types of activities that would require a section 404 permit.

At the private defendants' request, the district court agreed to bifurcate the consideration of the two major issues in the case: (1) how much of the Lake Long Tract was a wetland, and (2) which activities required a section 404 permit. After extensive trials on both issues, the court decided that a section 404 permit was required for the landclearing activities and that over ninety percent of the Lake Long Tract was a wetland. \* \* \* The court then enjoined the private defendants from engaging in any additional landclearing activities, without a section 404 permit, on the land that the court had determined to be a wetland, other than the land already cleared. The defendants timely appealed.

\* \* \*

[In Part II of the opinion, the court concluded that the district court used the wrong standard to review EPA's determination regarding the extent of wetlands on the private defendants' property. The court held that the district court substituted its judgment for the agency and reviewed the determination de novo, when the court should have accorded deference to the agency's determination and upheld it as long as it was not arbitrary or capricious. However, instead of remanding the case to the district court to allow that court to review EPA's determination under the proper standard, the appellate court reviewed it and upheld the agency's finding that eighty percent of the private defendants property was wetlands on the grounds that the agency's determination was not arbitrary or capricious. The court also rejected claims that the agency's regulations asserting jurisdiction over wetlands exceeded the agency's authority under the Clean Water Act and that Congress unconstitutionally delegated legislative power to the agency in the Act.]

\* \* \*

### III. ACTIVITIES REQUIRING A PERMIT

[The court began Part III by indicating that the court would uphold the district court's factual findings unless they were clearly erroneous. After describing the evidence presented below, the court concluded that it could not find on the basis of the record that the district court's factual findings were clearly erroneous. The major factual findings were summarized at the beginning of this opinion. ] \* \* \*

#### B. The Discharge of Pollutants

The district court held that the private defendants' landclearing activities constituted a "discharge of a pollutant" into the waters of the United States, and that engaging in those activities without a section 404 dredge-and-fill permit was a violation of Section 301(a) of the CWA. \* \* \* As the district court did, we must look beyond section 301(a) itself, to the statutory and regulatory definitions, in order to determine whether the district court's holding was correct.

Section 502(12) defines the term "discharge of a pollutant" as "(a) any addition of any pollutant to navigable waters from any point source ...." \* \* \* The question in this case is whether the landclearing activities were (1) a discharge (2) of a pollutant (3) from a point source (4) into navigable waters. Further, we must determine whether the activities were "normal agricultural activities" exempted from the permit requirements by 33 U.S.C. § 1344(f).

As discussed in Part II, these activities did occur in navigable waters, as that term is defined in the statute. Further, we agree with the district court that the bulldozers and backhoes were "point sources," since they collected into windrows and piles material that may ultimately have found its way back into the waters. \* \* \* The question then is whether these activities constituted a "discharge" of a "pollutant."

Emphasizing that the removal of all of the vegetation would destroy the vital ecological function of the wetlands, the district court concluded that the landclearing activities constituted a "discharge" within the meaning of the CWA. Both the federal and private defendants argue that the "mere removal" of wetlands vegetation was not a discharge because the term discharge is defined as the "addition" of pollutants, not the removal of materials. The district court rejected this argument as "untenable" because it believed that the federal defendants' interpretation would frustrate the ecological purposes of the CWA. \* \* \* In the court's view, the federal defendants' argument implied that "the excavation of [a] ditch 6 feet deep and 100 feet long requires a § 404 permit (is destructive of wetlands) but that the clearing of 20,000 acres of forest wetlands by methods involving only de minimis movement of earth does not (is not destructive of wetlands)." \* \* \*

A brief analysis of the district court's factual findings indicates that the dispute about

whether the CWA covers the mere removal of vegetation is a false issue in this case. The EPA has explained on appeal that it agrees with the district court that "if vegetation or other materials are redeposited in the wetland, that activity is a discharge. [Their] point of disagreement with the district court was with its apparent conclusion that removal activities [were] covered by the Act even when nothing is redeposited on the land." Federal Defendants' Reply Brief at 2 n.1<sup>40</sup> The district court's factual findings demonstrate that this is not a "mere removal" case. The court found that "during the clearing process small sloughs were filled in and larger ones partially filled thereby levelling the land." \* \* \* The landowners' own witness admitted to burying logs in holes that he had dug, and the plaintiffs' witnesses testified that material that would not burn was buried. Since the landclearing activities involved the redeposit of materials, rather than their mere removal, we need not determine today whether mere removal may constitute a discharge under the CWA.<sup>241</sup> Any suggestion made by the district court that the term "discharge" does cover removal is pure dicta.

The word "addition", as used in the definition of the term "discharge," may reasonably be understood to include "redeposit." As the district court recognized, this reading of the definition is consistent with both the purposes and legislative history of the statute. The CWA was designed to "restore and maintain the chemical, physical and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and as discussed in Part II, the legislative history indicates that Congress recognized the importance of protecting wetlands as a means of reaching the statutory goals. \* \* \* There is ample evidence in the record to support the district court's conclusion that the landowners' redepositing activities would significantly alter the character of the wetlands and limit the vital ecological functions served by the tract. \* \* \* Since we have concluded that the term "discharge" covers the redepositing of materials taken from the wetlands, we hold that the district court correctly decided that the landclearing activities on the Lake Long Tract constituted a discharge within the meaning of the Act.<sup>43</sup>

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<sup>40</sup> After persistent questioning at oral argument, the federal defendants explained further that, in their view, if the vegetation was cut down without significant disturbance of the soil and then removed to dry land, no permit would be required. They further explained that, in their view, if the vegetation were cut down and put back into the wetlands soil, however, then there would have been a redeposit in the wetland, and hence a discharge.

<sup>41</sup> It is equally clear from the record that the activities in this case did not involve a "de minimis" disturbance; hence we have no reason to determine whether de minimis disturbances are exempted from the Act. \* \* \*

<sup>43</sup> In *National Wildlife*, *supra*, the EPA argued that an activity was a discharge requiring a § 402 permit only if materials were introduced into the water "from the outside world." 693 F.2d at 165. No one has urged here that the materials must come from an external source in order to constitute a discharge necessitating a § 404 permit, nor would we expect them



Similarly, we agree with the district court, the plaintiffs and the federal defendants that the material discharged in this case was "fill," if not "dredged," material and hence subject to the Corps' regulation under section 404, as long as the activities did not fall within the section 404(f) exemption. The term "fill material" is defined in the Corps' regulations as:

any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402 of the Federal Water Pollution Control Act Amendments of 1972.

33 C.F.R. § 323.2(m). The regulations define the "discharge of fill material" as:

the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary to the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

33 C.F.R. § 323.2(n).

As discussed above, the burying of the unburned material, as well as the discing, had the effect of filling in the sloughs on the tract and leveling the land. The landowners insist that any leveling was "incidental" to their clearing activities and therefore the material was not deposited for the "primary purpose" of changing the character of the land. The district court found, however, that there had been significant leveling. The plaintiffs' witnesses testified that sloughs that had contained rainwater in the past had been filled in; thus, the activities were "changing the bottom elevation of the waterbody." Certainly, the activities were designed to "replace the aquatic area with dry land." Accordingly, we hold that the district

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to, since § 404 refers to "dredged" or "fill" material. As discussed infra, "dredged" material is by definition material that comes from the water itself. A requirement that all pollutants must come from outside sources would effectively remove the dredge-and-fill provision from the statute. \* \* \*

court correctly concluded that the landowners were discharging "fill material" into the wetlands.

The district court also found that removal of the vegetation constituted dredging. The regulations define "dredged material" as "material that is excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(k). The district court reasoned that since the vegetation was part of the wetlands, it was also part of the "waters of the United States;" therefore, removal of the vegetation constituted dredging.

The landowners emphasize that dredging is "excavation." They argue that the vegetation is a wetland indicator, not a part of the wetland itself; therefore, the removal of the vegetation from the surface of the wetland is not "dredging." The federal defendants agree with the landowners that the removal of vegetation from above ground is not dredging, but they do not view this as a crucial issue in this case because they agree with the district court that the landowners were discharging "fill material." \* \* \* We note that there was testimony that the landowners' activities included the digging of ditches and holes, which would constitute "dredging" even under the landowners' interpretation of the regulation. Like the federal defendants, however, we do not believe that a decision whether there was a discharge of dredged material is necessary here, since we have concluded that there was a discharge of fill material.

\* \* \*

[The court then determined that the defendants' activities were not exempt from the permit requirements of Section 404 as "normal farming operations."]

\* \* \*

## V. CONCLUSION

\* \* \*

With respect to the activities at issue, we hold: \* \* \*

(2) that in filling in the sloughs and leveling the land, the landowners were redepositing fill material into waters of the United States, and that therefore, [\*930] these activities constituted a 'discharge of a pollutant,' \* \* \*

Accordingly, we affirm the district court's judgment that these landclearing activities may not be carried out without a section 404 dredge-and-fill permit; however, we note that should a section 404 permit application be filed, the Corps will be free to apply its expertise to that permit determination without any constraint from the district court's injunctive determinations except those we have expressly affirmed.

## Questions and Comments

1. This was not a government enforcement action. Who sued? What was the “mandatory duty” that the government failed to perform? Does the government have a duty to bring enforcement actions whenever a person violates the Clean Water Act? Government enforcement and citizen suits will be explored more fully in Chapter 10.
2. Does the court rely on the plain meaning of the term “addition” to conclude that the redeposit of material in the wetlands constitutes an “addition?” On what tools of statutory interpretation did the court rely to reach that determination?
3. Although the court found that the trees and vegetation in this case met the regulatory definition of “fill material,” the same appellate court concluded that trees and vegetation that would be cut and left in wetlands to facilitate the construction of a electricity transmission line were not “fill material” because the wetlands would remain wetlands at the end of the project and would not be converted. See [Save Our Wetlands v. Sands, 711 F.2d 634 \(5<sup>th</sup> Cir. 1983\)](#).
4. At the time of this lawsuit, the Corps still defined “fill material” based on the purpose for which the material was used. Was that important in this case? Would the court have reached a different determination if the Corps defined “fill material”, as they do today, to include material that has the effect of replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water of the United States?
5. The court does not determine whether the trees and vegetation constitute “dredged material” because the court concludes that they are “fill material.” Note, though, that the court suggests that the term “addition” must include some redeposit of materials into waters, since the statute authorizes the Corps to issue permits for the discharge of “dredged material,” which “is by definition material that comes from the water itself.” See *infra*, n.43.
6. If the landowner could have cleared the land without redepositing any of the trees or vegetation in the wetlands, would that activity have been regulated as an “addition” of a pollutant under the court’s opinion? What if the activity involved only the redeposit of a small amount of vegetation or other material?
7. Note the difference between the Corps’ delineation of the wetlands on the property (35%), EPAs’ (80%), and the district court’s (90%). If all were relying on the same delineation manual, why was there such a disparity in results?
8. **The Rest of the Story:** The controversy underlying the *Avoyelles* litigation is

recounted in detail in Oliver A. Houck, *Rescuing Ophelia: Avoyelles Sportsmen's League and the Bottomland Hardwoods Controversy*, 81 Miss. L.J. 1473 (2012).

**Post-script:** In light of the court's decision in *Avoyelles*, the Corps issued a Regulatory Guidance Letter, RGL 85-04, that indicated that the Corps would apply the approach taken by the Fifth Circuit on a national level and would require 404 permits for landclearing activities with mechanized equipment if "the activity would involve burying logs or burying burn residue, or totally or partially filling in sloughs or low areas, or leveling the land." See [Regulatory Guidance Letter 85-04, Avoyelles ¶ 2 \(March 29, 1985\)](#). The RGL also provided that sidecasting of materials from the construction of ditches would require a permit. *Id.* With regard to some of the questions that the *Avoyelles* court did *not* address, the Corps' RGL provided that a 404 permit would not be required for the mere removal of vegetation from wetlands or waters, *id.* ¶ 5, and that a 404 permit would not be required if the landclearing only involved a de minimis discharge of dredged or fill material. *Id.* ¶ 4. The RGL also clarified that a permit would not be required for the felling of a tree, piling of trees, brush and stumps (which don't totally or partially fill in sloughs or level the land), filling in stump holes, or many types of discing, plowing or raking the soil surface in regulated waters. *Id.* ¶ 6.

However, five years later, the Corps issued another Regulatory Guidance Letter, RGL 90-05, in which the agency indicated that "it is our position that mechanized land-clearing activities in jurisdictional wetlands result in a redistribution of soil that is subject to regulation under section 404." See [Regulatory Guidance Letter 90-05, Landclearing Activities Subject to Section 404 Jurisdiction, ¶ 2 \(July 18, 1990\)](#). The guidance indicated that some limited exceptions might occur, "such as cutting trees above the soil's surface with a chain saw." *Id.* Today, the Corps regulates landclearing activities fairly broadly, in part due to changes in the regulatory definition of "discharge of dredged material", which will be discussed in the next section.

## **B. Ditching, Draining and Dredging**

While the Clean Water Act 404 permit requirement is triggered by the "discharge of dredged or fill material" into "waters of the United States", "draining" a wetland, by pumping out the water, constructing ditches outside of the wetlands to drain the water, or otherwise, does not require a permit unless the draining activity involves a "discharge of dredged or fill material" into the wetland. See [Save Our Community v. EPA, 971 F.2d 1155 \(5<sup>th</sup> Cir. 1992\)](#). However, draining activities frequently involve "discharges of dredged or fill material," and when they do, they require a 404 permit.

In addition, since 1990, the Corps has taken the position that wetlands that are subject to 404 jurisdiction and are drained remain subject to 404 jurisdiction even after they are drained, and a permit will be required for any subsequent filling activities on the converted wetlands. See Memorandum from Lance Wood to All Division and District Counsels,

*Evading 404 Jurisdiction by Pumping Water from Wetlands* (Apr. 10, 1990). Since the Corps and EPA define “wetlands” as areas that “under normal circumstances” support wetland vegetation, the Corps has taken the position that wetlands that are drained remain subject to jurisdiction because, “under normal circumstances” (i.e., if they had not been drained), they would support wetland vegetation. *Id.* This reduces the incentive for landowners to drain the wetlands, since the ultimate development activity will still require a permit even though the draining may not.



Photo 26 By U.S. Army Corps of Engineers from USA

[http://commons.wikimedia.org/wiki/File%3ADredge\\_Bill\\_Holman\\_works\\_for\\_Army\\_Corps\\_of\\_Engineers\\_at\\_McAlpine\\_Locks%2C\\_Louisville%252](http://commons.wikimedia.org/wiki/File%3ADredge_Bill_Holman_works_for_Army_Corps_of_Engineers_at_McAlpine_Locks%2C_Louisville%252) [CC-BY-2.0]

“Dredging,” like “draining,” does not require a Section 404 permit unless there is some discharge (addition of a pollutant) into the “waters of the United States” associated with the dredging. The act of “dredging” is generally regulated under the [Rivers and Harbors Act](#), and similar laws. However, dredging in wetlands and other waters of the United States will almost always involve some incidental redeposit of dredged material in the waters during the dredging process. The Corps’ regulation of that material has evolved over the years.

In a 1986 rulemaking defining “discharge of dredged material,” the Corps noted that the material that “incidentally” falls back into the water during the dredging process is considered a “de minimis” discharge and does not require a permit. See [51 Fed. Reg. 41206, 41210 \(Nov. 13, 1986\)](#). The regulation adopted at the time excluded “de minimis,

incidental soil movement occurring during normal dredging operations.” *Id.* at 41232. The agency indicated that if it regulated the fallback, “we would, in effect, be adding the regulation of dredging to section 404 which we do not believe was the intent of Congress.” *Id.* at 41210.

The Corps changed its policy several years later in response to a lawsuit. In 1992, the North Carolina Wildlife Federation sued the Corps of Engineers and Colonel Walter Tulloch, the District Engineer for the Corps’ Wilmington District, because the Corps did not require a landowner to apply for a section 404 permit when the landowner ditched and drained wetlands to convert them and build a housing development. *See North Carolina Wildlife Federation, et al. v. Tulloch*, E.D.N.C. C90-713-CIV-5-BO (E.D. N.C. 1992). Since the ditching and draining only involved de minimis discharges of material into the wetlands, the Corps had declined to require the developer to obtain a 404 permit. *Id.* In order to settle the lawsuit, EPA and the Corps agreed to propose a revision and clarification of the definition of “dredged or fill material.” See [58 Fed. Reg. 45007, 45008 \(Aug. 25, 1993\)](#).

**The Tulloch Rule:** The regulations that the Corps and EPA adopted broadly defined “discharge of dredged or fill material” to mean “any addition, including any redeposit, of dredged material within the United States.” *Id.* at 45,035. The regulations also indicated that the term included “any addition, including redeposit, of dredged material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization and other excavation.” *Id.* At the same time, though, the regulations provided that a permit was not required for “any incidental addition, including redeposit, of dredged material associated with any activity that does not have or would not have the effect of destroying or degrading an area of waters of the United States,” provided that the person undertaking the activity demonstrated to the Corps or EPA, before undertaking the activity, that it would not destroy or degrade an area of waters of the United States.” *Id.* In effect, therefore, incidental fallback would be regulated unless a developer could demonstrate that the fallback would not harm the wetlands or waters of the United States. The rulemaking that the agencies issued to settle the lawsuit became known as “the Tulloch Rule” (in reference to Colonel Tulloch, the defendant in the lawsuit).

The “Tulloch Rule” generated controversy and was challenged, and struck down, in the following case:

### **National Mining Association v. U.S. Army Corps of Engineers**

145 F.3d 1399 (D.C. Cir. 1998)

**WILLIAMS, Circuit Judge:**

\*\*\* In 1986 the Corps issued a

#### **Resources for the Case**

[33 C.F.R. 323.2](#) (1994) (incorp.Tulloch rule)

[Unedited opinion](#) (From Justia)

[Google Map of all the cases in the coursebook](#)

[NMA website](#)

regulation defining the term "discharge of dredged material," as used in § 404, to mean "any addition of dredged material into the waters of the United States," but expressly excluding "*de minimis*, incidental soil movement occurring during normal dredging operations." \* \* \* In 1993, responding to litigation, the Corps issued a new rule removing the *de minimis* exception and expanding the definition of discharge to cover "any addition of dredged material into, *including any redeposit of dredged material within*, the waters of the United States." 33 C.F.R. § 323.2(d)(1) (emphasis added). Redeposit occurs when material removed from the water is returned to it; when redeposit takes place in substantially the same spot as the initial removal, the parties refer to it as "fallback." In effect the new rule subjects to federal regulation virtually all excavation and dredging performed in wetlands.

The plaintiffs, various trade associations whose members engage in dredging and excavation, mounted a facial challenge to the 1993 regulation, claiming that it exceeded the scope of the Corps's regulatory authority under the Act by regulating fallback. The district court agreed and granted summary judgment for the plaintiffs. *American Mining Congress v. United States Army Corps of Engineers*, 951 F. Supp. 267 (D.D.C.1997). The district court also entered an injunction prohibiting the Corps and the Environmental Protection Agency, who jointly administer § 404, from enforcing the regulation anywhere in the United States. *Id.* at 278. We affirm.

\* \* \*

As mentioned above, the Tulloch Rule alters the preexisting regulatory framework primarily by removing the *de minimis* exception and by adding coverage of incidental fallback. Specifically, the rule defines "discharge of dredged material" to include "[a]ny addition, *including any redeposit*, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation." 33 C.F.R. § 323.2(d)(1)(iii) (emphasis added).<sup>3</sup>

\* \* \*

It is undisputed that by requiring a permit for "*any redeposit*," 33 C.F.R. § 323.2(d)(1)(iii) (emphasis added), the Tulloch Rule covers incidental fallback. According to the agencies, incidental fallback occurs, for example, during dredging, "when a bucket used to excavate material from the bottom of a river, stream, or wetland is raised and soils or sediments fall from the bucket back into the water." Agencies Br. at 13 (There is no indication that the rule would not also reach soils or sediments falling out of the bucket even *before* it emerged from the water.) Fallback and other redeposits also occur during mechanized landclearing, when bulldozers and loaders scrape or displace wetland soil, \* \* \* as well as during

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<sup>3</sup> EPA promulgated a parallel rule, which is codified at 40 C.F.R. § 232.2(1)(iii).

ditching and channelization, when draglines or backhoes are dragged through soils and sediments. \* \* \* Indeed, fallback is a practically inescapable by-product of all these activities. In the preamble to the Tulloch Rule the Corps noted that "it is virtually impossible to conduct mechanized landclearing, ditching, channelization or excavation in waters of the United States without causing incidental redeposition of dredged material (however small or temporary) in the process." \* \* \* As a result, the Tulloch Rule effectively requires a permit for all those activities, subject to a limited exception for ones that the Corps in its discretion deems to produce no adverse effects on waters of the United States.

The plaintiffs claim that the Tulloch Rule exceeds the Corps's statutory jurisdiction under § 404, which, as we have noted, extends only to "discharge," defined as the "addition of any pollutant to navigable waters." 33 U.S.C. §§ 1344, 1362(12). It argues that fallback, which returns dredged material virtually to the spot from which it came, cannot be said to constitute an *addition* of anything. Therefore, the plaintiffs contend, the Tulloch Rule conflicts with the statute's unambiguous terms and cannot survive even the deferential scrutiny called for by *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

\* \* \*

The agencies argue that the terms of the Act in fact demonstrate that fallback may be classified as a discharge. The Act defines a discharge as the addition of any pollutant to navigable waters, 33 U.S.C. § 1362(12), and defines "pollutant" to include "dredged spoil," as well as "rock," "sand," and "cellar dirt." *Id.* § 1362(6). The Corps in turn defines "dredged material" as "material that is excavated or dredged from waters of the United States," 33 C.F.R. § 323.2(c), a definition that is not challenged here. Thus, according to the agencies, wetland soil, sediment, debris or other material in the waters of the United States undergoes a legal metamorphosis during the dredging process, becoming a "pollutant" for purposes of the Act. If a portion of the material being dredged then falls back into the water, there has been an addition of a pollutant to the waters of the United States. Indeed, according to appellants National Wildlife Federation et al. ("NWF"), who intervened as defendants below, this reasoning demonstrates that regulation of redeposit is actually *required* by the Act.

We agree with the plaintiffs, and with the district court, that the straightforward statutory term "addition" cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back. Because incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge. As we concluded recently in a related context, "the nearest evidence we have of definitional intent by Congress reflects, as might be expected, that the word 'discharge' contemplates the addition, not the withdrawal, of a substance or substances." *North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir.1997). The agencies' primary counterargument--that fallback constitutes an "addition of any pollutant" because material becomes a pollutant only upon being dredged--is ingenious but unconvincing.



Regardless of any legal metamorphosis that may occur at the moment of dredging, we fail to see how there can be an addition of *dredged material* when there is no addition of *material*. Although the Act includes "dredged spoil" in its list of pollutants, 33 U.S.C. § 1362(6), Congress could not have contemplated that the attempted removal of 100 tons of that substance could constitute an addition simply because only 99 tons of it were actually taken away. \* \* \*

In fact the removal of material from the waters of the United States, as opposed to the discharge of material into those waters, is governed by a completely independent statutory scheme. Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, makes it illegal "to excavate or fill" in the navigable waters of the United States without the Corps's approval. As the general counsel of the Army noted in a law review article published a few years after the passage of the Clean Water Act, Congress enacted "two separate statutory frameworks. Section 10 of the 1899 Act covers the act of dredging, while Section 404 [of the Clean Water Act] covers the disposal of the dredged material." \* \* \*

The agencies, though acknowledging that the Tulloch Rule effectively requires a permit for all mechanized landclearing, ditching, channelization or excavation in waters of the United States, \* \* \* locate their permitting requirement under § 404, not under the Rivers and Harbors Act's explicit coverage of "excavat[ion]." The explanation for this choice is apparently that the scope of the Corps's geographic jurisdiction is narrower under the Rivers and Harbors Act than under the Clean Water Act, extending only to waters subject to the ebb and flow of the tide, or waters that are used, have been used, or may be susceptible for use to transport interstate or foreign commerce. 33 C.F.R. § 329.4; see also id. § 328.1 (noting difference between geographic jurisdiction under the two statutes).

There may be an incongruity in Congress's assignment of extraction activities to a statute (the Rivers and Harbors Act) with a narrower jurisdictional sweep than that of the statute covering discharges (the Clean Water Act). This incongruity, of course, could be cured either by narrowing the jurisdictional reach of the Clean Water Act or broadening that of the Rivers and Harbors Act. But we do not think the agencies can do it simply by declaring that incomplete removal constitutes addition.

\* \* \*

NWF complains that our understanding of "addition" reads the regulation of dredged material out of the statute. They correctly note that since dredged material comes from the waters of the United States, 33 C.F.R. § 323.2(c), any discharge of such material into those waters could technically be described as a "redeposit," at least on a broad construction of that term. The Fifth Circuit made a similar observation fifteen years ago: "[D]redged material is by definition material that comes from the water itself. A requirement that all pollutants must come from outside sources would effectively remove the dredge-and-fill provision from the statute." *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 924

n.43 (5th Cir. 1983). But we do not hold that the Corps may not legally regulate some forms of redeposit under its § 404 permitting authority.<sup>6</sup> We hold only that by asserting jurisdiction over "any redeposit," including incidental fallback, the Tulloch Rule outruns the Corps's statutory authority. Since the Act sets out no bright line between incidental fallback on the one hand and regulable redeposits on the other, a reasoned attempt by the agencies to draw such a line would merit considerable deference. *Cf. Dubois v. U.S. Dep't of Agriculture*, 102 F.3d 1273, 1296-99 (1st Cir. 1996) (although movement of pollutants within the same body of water might not constitute an "addition" for purposes of NPDES permit requirement, movement from one body of water to a separate one with different water quality is an addition). But the Tulloch Rule makes no effort to draw such a line, and indeed its overriding purpose appears to be to expand the Corps's permitting authority to encompass incidental fallback and, as a result, a wide range of activities that cannot remotely be said to "add" anything to the waters of the United States.

\* \* \*

In a press release accompanying the adoption of the Tulloch Rule, the White House announced: "Congress should amend the Clean Water Act to make it consistent with the agencies' rulemaking." \* \* \* While remarkable in its candor, the announcement contained a kernel of truth. If the agencies and NWF believe that the Clean Water Act inadequately protects wetlands and other natural resources by insisting upon the presence of an "addition" to trigger permit requirements, the appropriate body to turn to is Congress. Without such an amendment, the Act simply will not accommodate the Tulloch Rule. The judgment of the district court is

*Affirmed.*

**SILBERMAN, Circuit Judge, concurring:**

I join the opinion of the court and write separately only to make explicit what I think implicit in our opinion. We hold that the Corps's interpretation of the phrase "addition of any pollutant to navigable waters" to cover incidental fallback is "unreasonable," which is the formulation we use when we have first determined under *Chevron* that neither the statutory language nor legislative history reveals a precise intent with respect to the issue presented—in other words, we are at the second step of the now-familiar *Chevron* Step I and Step II analysis. See, e.g., *Whitecliff, Inc. v. Shalala*, 20 F.3d 488 (D.C. Cir.1994); *Fedway Associates, Inc. v. United States Treasury*, 976 F.2d 1416 (D.C. Cir.1992); *Abbott Labs. v. Young*, 920 F.2d 984 (D.C. Cir.1990); *Associated Gas Distribs. v. FERC*, 899 F.2d 1250 (D.C. Cir.1990). As our opinion's discussion of prior cases indicates, the word addition carries both a temporal and geographic ambiguity. If the material that would otherwise fall

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<sup>6</sup> Even the plaintiffs concede that under a broad reading of the term "redeposit," "a redeposit could be an addition to [a] new location and thus a discharge." Plaintiffs' Br. at 17.

back were moved some distance away and then dropped, it very well might constitute an "addition." Or if it were held for some time and then dropped back in the same spot, it might also constitute an "addition." But the structure of the relevant statutes indicates that it is unreasonable to call incidental fallback an addition. To do so perforce converts all dredging--which is regulated under the Rivers and Harbors Act--into discharge of dredged material which is regulated under the Clean Water Act.

Moreover, that Congress had in mind either a temporal or geographic separation between excavation and disposal is suggested by its requirement that dredged material be discharged at "specified disposal sites," 33 U.S.C. § 1344 (1994), a term which simply does not fit incidental fallback.

\* \* \*

### Questions and Comments

1. Did this lawsuit arise in the context of an enforcement action? Had the Corps applied the Tulloch rule to require members of the National Mining Association to obtain permits for the incidental fallback during mining activities? If not, why was there no problem with standing or ripeness of the challenge? Chapter 3 (Administrative Law) and Chapter 10 (Administrative Appeals, Enforcement and Judicial Review) will examine questions like this in more detail.
2. Does the court resolve the case at *Chevron* step one or two? Is the statutory language clear?
3. What impact, if any, does the court's opinion, have on the Corps' regulation of "fill material" under the Clean Water Act?
4. The court appears to leave open the possibility that the Corps can require a Section 404 permit for some redeposit of material that occurs during dredging in wetlands and waters of the United States. In what circumstances might it be appropriate to require a permit? Is that inconsistent with the majority's statement that incidental fallback cannot be a discharge because it "represents a net withdrawal, not an addition, of material"?
5. If, as the court notes, dredging activities are already regulated under the Rivers and Harbors Act, why didn't the Corps rely on its Rivers and Harbors Act authority to protect wetlands?
6. Take a moment to review the APA's standards for judicial review of agency action, particularly [5 U.S.C. § 706\(2\)\(C\)](#). What do you think about the White House's press release in light of those standards?

**Post-script:** In the wake of the D.C. Circuit’s ruling, thousands of acres of wetlands were ditched and converted to other uses. See [Carl H. Herschner, \*Tulloch Drilling, Wetlands Technical Report 99-4\* \(Virginia Institute of Marine Science, May 1999\)](#). The Virginia Institute of Marine Science at the College of William and Mary estimated that 12,000 acres of wetlands in North Carolina and Virginia alone were converted through “Tulloch ditching” in the year after the decision. *Id.* In an attempt to limit those impacts, the agencies, in a 1999 rulemaking, interpreted the *National Mining Association* decision narrowly to prohibit the regulation of “incidental fallback,” but to allow regulation of other redeposit of material in waters of the United States. See [64 Fed. Reg. 25120 \(May 10, 1999\)](#).

**Tulloch II:** Only two years later, the agencies amended their regulations and to clarify the definition of “discharge of dredged material.” The regulations that the agencies adopted in 2001 defined “discharge of dredged material” as “any addition of dredged material into, including any redeposit of dredged material other than incidental fallback within, the waters of the United States.” See [66 Fed. Reg. 4550 \(Jan. 17, 2001\)](#). The agencies defined “incidental fallback” as “the redeposit of *small volumes* of dredged material that is incidental to excavation activity in waters of the United States when such material falls back in *substantially the same place as the initial removal.*” (emphasis added). *Id.*

More controversially, though, the agencies included a presumption in the rule that “the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, instream mining or other earth-moving activity in waters of the United States” results in a discharge of dredged material “unless project-specific evidence shows that the activity results in only incidental fallback. *Id.* Those regulations (“Tulloch II”) were codified at [33 C.F.R. § 323.2 \(2002\)](#).

Not surprisingly, the regulations generated more controversy and the National Association of Home Builders and several other industry trade organizations challenged the rule as exceeding the Corps’ authority under the Clean Water Act, the APA, and the Tenth Amendment of the Constitution. See *National Association of Home Builders v. U.S. Army Corps of Engineers*, No. 01-0274, 2007 U.S. Dist. LEXIS 6366 (D.D.C. 2007). In 2007, the United States District Court for the District of Columbia held that the agency’s definition of “incidental fallback” was invalid and enjoined the agency from enforcing and applying that definition. *Id.* at \*15. The court held that the Corps should have defined “incidental fallback” in terms of the amount of time that material was removed from waters, in addition to the location where it was replaced, and that the agency should not have defined it with respect to the volume of the material being removed. *Id.* at \*11-\*13. In light of the court’s decision, [EPA and the Corps re-adopted the definition of “discharge of dredged material” that they adopted in 1999](#), which did not include a definition for “incidental fallback” or the presumption that the use of mechanized earth moving equipment results in a discharge of dredged material. See [73 Fed. Reg. 79641 \(Dec. 30, 2008\)](#). The current definition is codified at [33 C.F.R. § 323.2 \(2013\)](#).

## Interview



Jan Goldman Carter, Senior Manager and Counsel for the National Wildlife Federation's Wetlands [and](#) Water Resources Program, discusses the Tulloch litigation (in which she was involved) and the aftermath of the litigation. ([YouTube](#)).

### C. Sidecasting

The *National Mining Association* decision focused on the incidental redeposit of material in wetlands in the *same place* and at the *same time* as it is being removed from the wetlands. However, it is quite common, during ditching or dredging activities, to remove material from a wetland or water of the United States and place it in a *different* location within the same wetland or water of the United States. As noted above, the Corps has consistently interpreted that activity, which is known as **sidecasting**, to constitute a “discharge” or “addition” of material (dredged or fill), which requires a Section 404 permit. See, e.g. [Regulatory Guidance Letter 85-04, Avoyelles ¶ 2 \(March 29, 1985\)](#). In 1997, a divided panel of the United States Court of Appeals for the Fourth Circuit could not reach consensus on whether “sidecasting” required a Section 404 permit. See [United States v. Wilson, 133 F.3d 251 \(4<sup>th</sup> Cir. 1997\)](#). However, three years later, a different panel of the Fourth Circuit concluded that “sidecasting” requires a 404 permit in the *United States v. Deaton* case, which follows.



Photo 27 Corps of Engineers Photo  
<http://www.saw.usace.army.mil/Missions/Navigation/Dredging/DistrictPlantDredging/Merritt.aspx>

## United States v. Deaton

209 F.3d 331 (4<sup>th</sup> Cir. 2000)

**MICHAEL, Circuit Judge:**

### Resources for the Case

[Unedited opinion](#) (From Justia)

[Google Map of all the cases in the coursebook](#)

The United States sued James and Rebecca Deaton, alleging that they violated §§ 301 and 404 of the Clean Water Act, \* \* \* by sidecasting dredged material as they dug a drainage ditch through a wetland. The district court ultimately awarded summary judgment to the Deatons, and the government appeals. We reverse, holding that sidecasting in a jurisdictional wetland is the discharge of a pollutant under the Clean Water Act. We dismiss the Deatons' cross-appeal for lack of appellate jurisdiction.

I

On November 22, 1988, James Deaton signed a contract to buy a twelve-acre parcel of land in Wicomico County, Maryland, subject to the condition that it was suitable for developing a small residential subdivision. Deaton immediately applied to the Wicomico County Health Department for a sewage disposal permit for a five-lot "single family subdivision." The Health Department denied the permit on April 26, 1989, because the groundwater elevations were unacceptably high at the disposal sites proposed by Deaton and his consultant. The department commented that "[t]he majority of the parcel... is very poorly drained and would severely restrict the function of the onsite sewage disposal systems." There was a "very limited area" that might warrant evaluation, the department said, if it proved to be within the property boundary. In late April 1989, after the permit was denied, Deaton contacted the U.S. Department of Agriculture, Soil Conservation Service (SCS), to discuss the wetness problem on the twelve-acre parcel. Deaton was referred to Glen Richardson, who agreed to examine the site. According to Deaton, Richardson suggested that the problem could be corrected by digging a ditch through the middle of the property. Deaton and his wife (Rebecca) decided to go ahead with the purchase of the land, and title was transferred to them in June 1989.

Before any ditching work began, the property was also inspected by Michael Sigrist, District Conservationist at the SCS in Wicomico County. Deaton and Sigrist walked over the property together, and Deaton told Sigrist that he wanted to dig a large ditch to drain the area. Sigrist saw hydric soils (which are typical of wetland areas), areas of standing water, "a large, low wet area" in the center of the parcel, and non-tidal wetlands. Water was flowing from the property into a culvert that connects to (or is part of) Perdue Creek. (The waters of Perdue Creek end up in the Wicomico River, a tributary of the Chesapeake Bay.) Sigrist advised Deaton that a large portion of his property contained non-tidal wetlands and that he would need a permit from the U.S. Army Corps of Engineers (the Corps) before

undertaking any ditching work. Deaton ignored Sigrist's advice and hired a contractor to dig a drainage ditch across the property. Using a back hoe, a front-end track loader, and a bulldozer, the contractor dug a 1,240 foot ditch that intersected the areas that Sigrist had identified as wetlands. As he dug, the contractor piled the excavated dirt on either side of the ditch, a practice known as sidecasting.

In July 1990 the Corps learned of possible Clean Water Act violations on the Deaton property. A Corps ecologist, Alex Dolgos, inspected the site and concluded that it contained wetlands, that those wetlands were "waters of the United States" under the Clean Water Act, and that the ditching and fill work that had taken place required a permit. On August 7 and 8, 1990, the Corps issued stop-work orders to Deaton and his contractor, warning them that their placement of fill material in a non-tidal wetland violated § 404 of the Clean Water Act, \* \* \* and that no further work should be done without a permit. Deaton filed a joint state and federal application in December 1990, seeking permits to ditch and fill wetlands in order to construct an eighteen-lot subdivision. That application was returned as incomplete on February 15, 1991, and was never resubmitted. Over the next three years Deaton engaged several consultants to inspect the property, negotiate with the Corps, and prepare a remediation plan. No remediation ever took place, however, and on July 21, 1995, the government filed a civil complaint alleging that the Deatons had violated the Clean Water Act by discharging fill material (the dirt excavated from the ditch) into a regulated wetland.

\* \* \*

[In the district court, both parties moved for summary judgment. The court initially granted partial summary judgment to the government, holding that sidecasting into wetlands on the property was the "discharge of a pollutant." However, while the litigation in the district court continued, the 4<sup>th</sup> Circuit issued the *United States v. Wilson* decision described above. Although there was no majority holding in that case regarding whether sidecasting is regulated under Section 404, the district court vacated its prior determination that sidecasting was the "discharge of a pollutant" and granted summary judgment for the Deatons. The government then appealed.] \* \* \*

## II.

The Clean Water Act prohibits the discharge, without a permit, of any pollutant into "navigable waters." See 33 U.S.C. §§ 1311(a), 1362(6), (7), (12). \* \* \*

The Corps argues and we assume for purposes of this appeal that the Deatons' property contains wetlands that are subject to the Clean Water Act. The narrow issue before us today is whether sidecasting (that is, the deposit of dredged or excavated material from a wetland back into that same wetland) constitutes the discharge of a pollutant under the Clean Water Act. We hold that it does.

The Clean Water Act defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). The definition of pollutant, in turn, specifically includes "dredged spoil" that has been "discharged into water." *Id.* § 1362(6). The piles of dirt dredged up by the Deatons' contractor were, without question, "pollutants" within the meaning of the Act. See *Wilson*, 133 F.3d at 259 (op. of Niemeyer, J.) ("[D]redged materials, including the native soils excavated by ditching activities, may constitute a pollutant within the meaning of the Clean Water Act."); *id.* at 269, 274 & n.12 (op. of Payne, J.) (dredged earth is a pollutant). This conclusion, instead of resolving the dispute, merely brings us to its center because the parties disagree fundamentally about what it means to "discharge... a pollutant" into the waters of the United States.

The Deatons seize on the word "addition" in the phrase "addition of any pollutant" in the statutory definition of discharge. 18 U.S.C. § 1362(12). They argue that the "ordinary and natural meaning of 'addition' means something added, i.e., the addition of something not previously present." \* \* \* Thus, according to the Deatons, no pollutant is discharged unless there is an "introduction of new material into the area, or an increase in the amount of a type of material which is already present." *Wilson*, 133 F.3d at 259 (op. of Niemeyer, J.). Because sidecasting results in no net increase in the amount of material present in the wetland, the Deatons argue, it does not involve the "addition" (or discharge) of a pollutant. See *National Mining Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1404 (D.C. Cir. 1998) ("[W]e fail to see how there can be an addition of dredged material when there is no addition of material."). We are not convinced by this argument.

Contrary to what the Deatons suggest, the statute does not prohibit the addition of material; it prohibits "the addition of any pollutant." The idea that there could be an addition of a pollutant without an addition of material seems to us entirely unremarkable, at least when an activity transforms some material from a nonpollutant into a pollutant, as occurred here. In the course of digging a ditch across the Deaton property, the contractor removed earth and vegetable matter from the wetland. Once it was removed, that material became "dredged spoil," a statutory pollutant and a *type* of material that up until then was not present on the Deaton property. It is of no consequence that what is now dredged spoil was previously present on the same property in the less threatening form of dirt and vegetation in an undisturbed state. What is important is that once that material was excavated from the wetland, its redeposit in that same wetland added a pollutant where none had been before. See 33 U.S.C. § 1362 (6), (12). Thus, even under the definition of "addition" (that is, "something added") offered by the Deatons, sidecasting adds a pollutant that was not present before.

Although we conclude that the Clean Water Act's definition of discharge and its use of the term "addition" are unambiguous, the underlying rationale for defining dredged spoil as a pollutant provides further support for our conclusion. In deciding to classify dredged spoil as a pollutant, Congress determined that plain dirt, once excavated from waters of the United



States, could not be redeposited into those waters without causing harm to the environment. Indeed, several seemingly benign substances like rock, sand, cellar dirt, and biological materials are specifically designated as pollutants under the Clean Water Act. See 33 U.S.C. § 1362(6). Congress had good reason to be concerned about the reintroduction of these materials into the waters of the United States, including the wetlands that are a part of those waters.

Wetlands perform a vital role in maintaining water quality by trapping sediment and toxic and nontoxic pollutants before they reach streams, rivers, or other open bodies of water. See *Office of Technology Assessment, U.S. Congress, Wetlands: Their Use and Regulation* 48-50 (1984). Given sufficient time, many (but not all) of these pollutants will decompose, degrade, or be absorbed by wetland vegetation. See *id.* at 48-49. When a wetland is dredged, however, and the dredged spoil is redeposited in the water or wetland, pollutants that had been trapped may be suddenly released. See *id.* at 49 ("Natural or manmade alterations of the wetland caused by lowering the water table, dredging, and the like, could mobilize large quantities of toxic materials."); *id.* at 124 ("A long-term effect of the disposal of contaminated dredged spoil in or near wetlands is the potential bioavailability of toxic chemicals such as oil and grease, pesticides, arsenic, and heavy metals, when the sediments are resuspended periodically."); *Wilson*, 133 F.3d at 273-74 (op. of Payne, J.) (describing how sidcasting dredged material threatens to release pollutants contained in sub-surface soil). At the same time, the increased drainage brought about by the dredging may render the surrounding wetland unable to reabsorb and filter those pollutants and sediment (the very purpose of dredging is to destroy wetland characteristics). 40 C.F.R. § 230.41(b) (explaining how discharge of dredged or fill material in wetlands "can degrade water quality by obstructing circulation patterns that flush large expanses of wetland systems, by interfering with the filtration function of wetlands, or by changing the aquifer recharge capability of a wetland"). Even in a pristine wetland or body of water, the discharge of dredged spoil, rock, sand, and biological materials threatens to increase the amount of suspended sediment, harming aquatic life. See *id.*; *Office of Technology Assessment, supra*, at 48; see also *Wilson*, 133 F.3d at 274 (op. of Payne, J.).

These effects are no less harmful when the dredged spoil is redeposited in the same wetland from which it was excavated. The effects on hydrology and the environment are the same. Surely Congress would not have used the word "addition" (in "addition of any pollutant") to prohibit the discharge of dredged spoil in a wetland, while intending to prohibit such pollution only when the dredged material comes from outside the wetland. In reaching this conclusion, our understanding of the word "addition" is the same as that of nearly every other circuit to consider the question. See *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923-25 (5th Cir. 1983) (interpretation of "addition" to include "redeposit" of trees and vegetation dredged or excavated from the wetland itself is consistent with both the purposes and legislative history of the Clean Water Act); *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985) (redeposit of spoil churned up by tugboat propellers constituted the discharge of a pollutant under the Clean Water Act),

vacated and remanded on other grounds, 481 U.S. 1034 (1987), readopted in relevant part, 848 F.2d 1133 (11th Cir. 1988); *Rybachek v. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990) (dirt and gravel extracted by gold miners and redeposited into the stream bed from which it was extracted constituted an "addition" of a pollutant under the Clean Water Act); see also *United States v. Bay-Houston Towing Co.*, 33 F. Supp.2d 596, 606 (E.D. Mich. 1999) (adopting reasoning of Judge Payne's Wilson opinion). *But cf. National Mining Ass'n*, 145 F.3d at 1404, 1406 (concluding that "incidental fallback" of dredged material into waterway does not constitute the addition of a pollutant, but distinguishing between incidental fallback and sidecasting).

For these reasons, we hold that the Clean Water Act's definition of discharge as "any addition of any pollutant to navigable waters" encompasses sidecasting in a wetland. We therefore reverse the district court's June 23, 1998, judgment to the contrary.

### Questions and Comments

1. **Transformation:** The court seems to concede that no "material" is being added to the wetlands in the case, but holds that "pollutants" are being added. How can pollutants be added when no material is added?
2. Is the court suggesting that sidecasting *always* constitutes an addition of a pollutant? What is the basis for the court's determination that it is appropriate for the Corps to regulate sidecasting in this case? The plain meaning of the statutory terms? Legislative history? The purposes of the statute?
3. **Time and Place Matter:** Although the Deatons seek to rely on the D.C. Circuit's *National Mining Association* decision, what direction, if any, did that court provide regarding whether, or when, the Corps could regulate redeposit of material in waters of the United States? Did that court address the issue of sidecasting?

### D. Deep Ripping

Another activity that alters wetlands or other waters of the United States, but does not involve the addition of material from outside of those waters is "deep ripping." Deep ripping is a technique used to break up compacted soil, and involves dragging four to seven foot metal blades through the soil. It is generally used to improve site drainage and facilitate deep root growth. Like sidecasting, the activity involves only redeposit of material that was previously in the waters into which it is being placed. However, because the activity can destroy the hydrological integrity of wetlands, the Corps generally requires a Section 404 permit for deep ripping. See [Regulatory Guidance Letter 96-02, Applicability of Exemptions under Section 404\(f\) to "Deep Ripping" Activities in Wetlands \(Dec. 12, 1996\)](#). The United States Court of Appeals for the Ninth Circuit addressed the Corps' authority to regulate deep-ripping in the *Borden Ranch Partnership v. United States Army Corps of Engineers*

case that follows.

**Borden Ranch Partnership v. United States Army Corps of Engineers**  
261 F.3d 810 (9<sup>th</sup> Cir. 2001)

**HAWKINS, Circuit Judge:**

This appeal concerns the authority of the U.S. Army Corps of Engineers ("the Corps") and the Environmental Protection Agency ("EPA") over a form of agricultural activity called "deep ripping" when it occurs in wetlands. We conclude that the Clean Water Act applies to this activity and affirm the district court's findings that Borden Ranch violated the Act by deep ripping in protected wetland swales. \* \* \*

**Resources for the Case**

[Deep Ripping information](#) - from the Western Australia Dept. of Agr. and Food  
Deep Ripping Videos - [YouTube](#) and [Facebook](#)  
[Unedited Opinion](#) (from Justia)  
[Oral Argument Audio](#) - from the Oyez Project  
[Google Map of all the cases in the coursebook](#)

**Facts and Procedural Background**

In June of 1993, Angelo Tsakopoulos, a Sacramento real estate developer, purchased Borden Ranch, an 8400 acre ranch located in California's Central Valley. Prior to Tsakopoulos's purchase, the relevant areas of the ranch had been used primarily as rangeland for cattle grazing. The ranch contains significant hydrological features including vernal pools, swales, and intermittent drainages. Vernal pools are pools that form during the rainy season, but are often dry in the summer. Swales are sloped wetlands that allow for the movement of aquatic plant and animal life, and that filter water flows and minimize erosion. Intermittent drainages are streams that transport water during and after rains. All of these hydrological features depend upon a dense layer of soil, called a "restrictive layer" or "clay pan," which prevents surface water from penetrating deeply into the soil.

Tsakopoulos intended to convert the ranch into vineyards and orchards and subdivide it into smaller parcels for sale. Vineyards and orchards, however, require deep root systems, much deeper than the restrictive layer in the relevant portions of Borden Ranch permitted. For vineyards and orchards to grow on this land, the restrictive layer of soil would first need to be penetrated. This requires a procedure known as "deep ripping," in which four-to seven-foot long metal prongs are dragged through the soil behind a tractor or a bulldozer. The ripper gouges through the restrictive layer, disgoring soil that is then dragged behind the ripper.

Under the Clean Water Act, an individual seeking to fill protected wetlands must first obtain a permit from the Corps. Since 1993, Tsakopoulos and the Corps have disagreed about the Corps' authority to regulate deep ripping in wetlands. Tsakopoulos initiated deep ripping without a permit in the fall of 1993, and the Corps granted him a retrospective permit in the

spring of 1994, when Tsakopoulos agreed to various mitigation requirements. In the fall of 1994, the Corps and the EPA informed Tsakopoulos that he could deep rip in uplands and that he could drive over swales with the deep ripper in its uppermost position, but that he could not conduct any deep ripping activity in vernal pools. The next spring, the Corps discovered that deep ripping had occurred in protected wetlands and promptly issued a cease and desist order. From July 1995 through November 1995, Tsakopoulos again initiated deep ripping on various parcels of land without a permit. The Corps concluded that more protected wetlands had been ripped and again issued a cease and desist order.

In May of 1996, the Corps and the EPA entered into an Administrative Order on Consent with Tsakopoulos that was intended to resolve his alleged Clean Water Act violations. Under the agreement, Tsakopoulos set aside a 1368-acre preserve and agreed to refrain from further violations.

\* \* \*

In March of 1997 the Corps concluded that Tsakopoulos had continued to deep rip wetlands without permission. That April, EPA investigators visited the ranch and observed fully engaged deep rippers passing over jurisdictional wetlands. EPA then issued an Administrative Order to Tsakopoulos.

Tsakopoulos responded by filing this lawsuit, challenging the authority of the Corps and the EPA to regulate deep ripping. The United States filed a counterclaim seeking injunctive relief and civil penalties for Tsakopoulos's alleged violations of the Clean Water Act.

Both parties filed motions for summary judgment. The district court ruled that the Corps has jurisdiction over deep ripping in jurisdictional waters. However, the court found disputed facts with respect to whether such deep ripping had actually occurred. These facts were litigated in a bench trial that began on August 24, 1999, and concluded on September 16, 1999. The district court heard evidence from over twenty witnesses and received hundreds of documentary exhibits.

The district court subsequently entered findings of fact and conclusions of law determining that Tsakopoulos had repeatedly violated the Clean Water Act. The court found 348 separate deep ripping violations in 29 drainages, and 10 violations in a single vernal pool. The district court gave Tsakopoulos the option of paying a \$1.5 million penalty or paying \$500,000 and restoring four acres of wetlands. Tsakopoulos chose the latter option. After denying a motion for more specific findings of fact, the district court entered its final order in favor of the United States.

Tsakopoulos then brought this timely appeal. We have jurisdiction under 28 U.S.C. §§ 1291.

## Analysis

### Corps Jurisdiction over Deep Ripping

\* \* \*

#### A. Discharge of a Pollutant

Tsakopoulos initially contends that deep ripping cannot constitute the "addition" of a "pollutant" into wetlands, because it simply churns up soil that is already there, placing it back basically where it came from. This argument is inconsistent with Ninth Circuit precedent and with case law from other circuits that squarely hold that redeposits of materials can constitute an "addition of a pollutant" under the Clean Water Act. *Rybachek v. United States Env'tl. Prot. Agency*, 904 F.2d 1276 (9th Cir. 1990), considered a claim that placer mining activities were exempt from the Act. We held that removing material from a stream bed, sifting out the gold, and returning the material to the stream bed was an "addition" of a "pollutant." *Id.* at 1285. The term "pollutant" encompassed "the materials segregated from gold in placer mining." *Id.*

Our reasoning in *Rybachek* is similar to that of the Fourth Circuit in *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000). In *Deaton*, a property owner alleged that the Corps could not regulate "sidecasting," which is "the deposit of dredged or excavated material from a wetland back into that same wetland." *Id.* at 334. The property owner asserted that "sidecasting results in no net increase in the amount of material present in the wetland" and therefore could not constitute the "addition of a pollutant." *Id.* at 335. The Fourth Circuit squarely rejected this argument, in language that is worth quoting in full:

Contrary to what the Deatons suggest, the statute does not prohibit the addition of material; it prohibits the "addition of any pollutant." The idea that there could be an addition of a pollutant without an addition of material seems to us entirely unremarkable, at least when an activity transforms some material from a nonpollutant into a pollutant, as occurred here . . . . Once [earth and vegetable matter] was removed [from the wetland], that material became "dredged spoil," a statutory pollutant and a type of material that up until then was not present on the Deaton property. It is of no consequence that what is now dredged spoil was previously present on the same property in the less threatening form of dirt and vegetation in an undisturbed state. What is important is that once that material was excavated from the wetland, its redeposit in that same wetland added a pollutant where none had been before.

*Id.* at 335-36. As the court concluded, "Congress determined that plain dirt, once excavated from waters of the United States, could not be redeposited into those waters without causing harm to the environment." *Id.* at 336; see also *Avoyelles Sportsmen's League, Inc.*

*v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983) (holding that the word "addition" may be reasonably understood to include "redeposit").

These cases recognize that activities that destroy the ecology of a wetland are not immune from the Clean Water Act merely because they do not involve the introduction of material brought in from somewhere else. In this case, the Corps alleges that Tsakopoulos has essentially poked a hole in the bottom of protected wetlands. That is, by ripping up the bottom layer of soil, the water that was trapped can now drain out. While it is true, that in so doing, no new material has been "added," a "pollutant" has certainly been "added." Prior to the deep ripping, the protective layer of soil was intact, holding the wetland in place. Afterwards, that soil was wrenched up, moved around, and redeposited somewhere else. We can see no meaningful distinction between this activity and the activities at issue in *Rybachek* and *Deaton*. We therefore conclude that deep ripping, when undertaken in the context at issue here, can constitute a discharge of a pollutant under the Clean Water Act.<sup>2</sup>

Tsakopoulos also contends that no case has ever held a plow to be a point source, and that a prohibited discharge must be from a point source. This argument has no merit. The statutory definition of "point source" ("any discernible, confined, and discrete conveyance") is extremely broad, 33 U.S.C. §§ 1362(14), and courts have found that "bulldozers and backhoes" can constitute "point sources," *Avoyelles*, 715 F.2d at 922. In this case, bulldozers and tractors were used to pull large metal prongs through the soil. We can think of no reason why this combination would not satisfy the definition of a "point source."

[The court also concluded that the deep ripping did not fit within the "normal farming operations" exemption from the 404 permit requirements because the purpose of the deep ripping was to "bring an area of the navigable waters into a use to which it was not previously subject." 33 U.S.C. § 1344(f)(2).]

\* \* \*

**GOULD, Circuit Judge, *dissenting*:**

I respectfully dissent. The crux of this case is that a farmer has plowed deeply to improve his farm property to permit farming of fruit crops that require deep root systems, and are more profitable than grazing or other prior farm use. Farmers have been altering and transforming their crop land from the beginning of our nation, and indeed in colonial times.

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<sup>2</sup> *National Mining Assoc. v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998), upon which Tsakopoulos heavily relies, does not persuade us to the contrary. That case distinguished "regulable redeposits" from "incidental fallback." *Id.* at 1405. Here, the deep ripping does not involve mere incidental fallback, but constitutes environmental damage sufficient to constitute a regulable redeposit.

Although I have no doubt that Congress could have reached and regulated the farming activity challenged, that does not in itself show that Congress so exercised its power. I conclude that the Clean Water Act does not prohibit "deep ripping" in this setting.

I would follow and extend *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), and hold that the return of soil in place after deep plowing is not a "discharge of a pollutant." In *National Mining*, the court held that the Corps exceeded its authority under section 404 of the Clean Water Act by regulating the redeposit of dredged materials that incidentally fall back in the course of dredging operations. The court explained that "the straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back." *Id.* at 1404. The court rejected the agencies' primary argument that incidental fallback constitutes an "addition" because once dredged the material becomes a pollutant:

Regardless of any legal metamorphosis that may occur at the moment of dredging, we fail to see how there can be an addition of dredged material when there is no addition of material. Although the Act includes "dredged spoil" in its list of pollutants, Congress could not have contemplated that the attempted removal of 100 tons of that substance could constitute [\*820] an addition simply because only 99 tons of it were actually taken away.

*Id.* at 1404 (emphasis omitted).

Those considerations are persuasive here as deep ripping does not involve any significant removal or "addition" of material to the site. The ground is plowed and transformed. It is true that the hydrological regime is modified, but Congress spoke in terms of discharge or addition of pollutants, not in terms of change of the hydrological nature of the soil. If Congress intends to prohibit so natural a farm activity as plowing, and even the deep plowing that occurred here, Congress can and should be explicit. Although we interpret the prohibitions of the Clean Water Act to effectuate Congressional intent, it is an undue stretch for us, absent a more clear directive from Congress, to reach and prohibit the plowing done here, which seems to be a traditional form of farming activity.

*Rybachek v. United States Environmental Protection Agency*, 904 F.2d 1276 (9th Cir. 1990), in my view, is distinguishable. In *Rybachek*, we held that placer mining, "a process in which miners excavate dirt and gravel in and around waterways and, after extracting the gold, discharge the left-over material back into the water," fell within the scope of section 404 of the Clean Water Act. *Id.* at 1285. There, the *Rybachek* court identified the regulable discharge as the discrete act of dumping leftover material into the stream after it had been processed. *Id.* As the concurrence in *National Mining* makes clear, however, "the word addition carries both a temporal and geographic ambiguity. If the material that would otherwise fall back were moved some distance away and then dropped, it very well might

constitute an `addition.' Or if it were held for some time and then dropped back in the same spot, it might also constitute an `addition.' "National *Mining*, 145 F.3d at 1410 (Silberman, J., concurring). Because deep ripping does not move any material to a substantially different geographic location and does not process such material for any period of time, *Rybachek* is not controlling.

Nor is the Fourth Circuit's opinion in *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000), relied on by the majority, persuasive to me in the context presented. A farmer who plows deeply is not, in my view, redepositing dredged or excavated materials. While the Fourth Circuit relied on the fact that a "dredged spoil" is a statutory pollutant, the deep plowing activity here, in my view, is not the same as dredging dirt from and redepositing it in waters.

### Questions and Comments

1. The majority cites the *Rybachek* and *Deaton* cases in support of its decision. Is it relevant that those cases involved redeposit of material in a different place or at a different time? Is it important that the court suggests that the soil is "dragged behind the ripper"? The dissent refers to the "return of soil in place."
2. The majority adopts the transformation theory that *Deaton* adopted and *National Mining Association* rejected. Is the ruling based on the text of the statute, legislative history, or the purposes of the statute? On what does the dissent rely?
3. On appeal, Tsakopoulos argued that the Corps had relied on RGL 96-02 to determine that a permit was required for his deep ripping and that the guidance was invalid because it was a substantive rule that was not adopted pursuant to notice and comment rulemaking. The court declined to address the issue because it was not addressed below. The district court did, however, determine that it was not clear that the Corps relied on the guidance in determining that a permit was required in the case. If the appellate court *had* addressed Tsakopoulos' challenge to RGL 96-02, how might the court have ruled?



4. On Tsakopoulos' petition for certiorari, the Supreme Court agreed to review the Ninth Circuit's decision. Justice Kennedy, born and raised in Sacramento, California, was a friend of Tsakopoulos, the Sacramento real estate developer, so Kennedy did not participate in the case. Without his involvement, the Court split 4-4 and, therefore, affirmed the Ninth Circuit's decision, which upheld the Corps' jurisdiction over deep ripping. See *Borden Ranch Partnership v. Army Corps of Engineers*, [537 U.S. 99 \(2002\)](#).

### Hypothetical

Jeremy and Casey Wright purchased an 80 acre tract of land in northern Minnesota near the Saint Louis River. The Wrights planned to build a house on the property, but discovered that 60 acres of the property were wetlands that are regulated as "waters of the United States" under the Clean Water Act. Rather than building the house on the 20 acres that are not wetlands, Jeremy rented a backhoe and dug a ditch in the wetlands located on the western portion of the property to drain those wetlands. Jeremy used most of the excavated material to level an upland portion of the property where he planned to build a garage, but he placed some of the excavated material in the wetlands located a few acres east of the ditch. In addition, while he was digging the ditch, small amounts of the soil and vegetation that he was removing from the wetlands spilled out of the bucket of the backhoe into the wetlands that he was draining. After he completed construction of the ditch, a consultant that he retained to delineate the wetlands on the property indicated that there were only 30 acres of wetlands on the property, and that the wetlands were located on the portion of the property situated east of the drainage ditch. Based on that information, Jeremy cleared 10 acres of the western portion of the property that formerly were wetlands, re-graded the area, incorporating several hundred cubic yards of dirt that he purchased from the Minnesota Sand and Gravel Company, and built his new home on that portion of the property. Jeremy did not obtain a Section 404 permit for any of his activities.

Should a permit have been required for (1) the construction of the drainage ditch; (2) the placement of the excavated material in the wetlands east of the ditch; (3) the use of the excavated materials to level the property for the garage; or (4) the placement of the dirt and construction of the home on the western portion of the property?

Should a permit have been required for the construction of the drainage ditch if no soil or vegetation spilled out of the backhoe bucket during the construction of the ditch?



Photo 29 By JW Randolph (Friend's work)  
<http://commons.wikimedia.org/wiki/File%3AMTR1.jpg> [Public domain]



Photo 28 By Roston (Own work)  
<http://commons.wikimedia.org/wiki/File%3AEniceblast6.JPG> [Public domain]



Photo 30 By Flashdark (Own work) [http://commons.wikimedia.org/wiki/File%3AMartin\\_County\\_home.jpg](http://commons.wikimedia.org/wiki/File%3AMartin_County_home.jpg) [Public domain]

### **E. Competing Permitting Programs - 404 versus 402 - What is Fill Material?**

As noted in Chapter 4, there are two permit programs in the Clean Water Act that regulate the addition of pollutants into the navigable waters. EPA administers the [Section 402](#) permit program, which applies generally to point source discharges of pollutants into the navigable waters, while the Corps administers the [Section 404](#) permit program, which applies to discharges of dredged or fill material into the navigable waters. More than 90% of the activities regulated under the Section 404 permit program are authorized pursuant to general permits and the Corps generally denies less than 1% of individual Section 404 permit applications. See [Claudia Copeland, \*Wetlands: An Overview of Issues\*, Congressional Research Service RL 33483 \(July 12, 2010\)](#). Needless to say, EPA's Section 402 permit program is somewhat more demanding. Consequently, persons engaging in activities that involve addition of pollutants into navigable waters have frequently argued that, if their activities are regulated at all, they involve the discharge of fill material and require a Section 404 permit rather than a Section 402 permit.

For many years, this issue was central to the controversy over the regulation of mountaintop removal mining. Mountaintop removal mining is a surface mining practice that involves removing the tops of mountains to expose coal seams that lie below the mountaintops. See U.S. Environmental Protection Agency, *Mid-Atlantic Mountaintop Mining*, available at: <http://www3.epa.gov/region03/mtntop/> To extract the coal, large amounts of rock and soil (called "spoils") are removed from the mountain. See [Claudia Copeland, \*Mountaintop Mining: Background on Current Controversies\*, Congressional Research Service RS21421 \(Dec. 2, 2013\) \[hereinafter "CRS Mountaintop Mining Report"\]](#) Although the Federal Surface Mining Control and Reclamation Act (SMCRA) requires mining companies to return the spoils to the mined area to return the area to its "approximate original contour" (AOC), [30 U.S.C. § 1265\(b\)\(3\)](#), it is normally impossible to do that with mountaintop removal mining because "broken rock takes up more volume than did the rock prior to mining and because there are stability concerns with the spoil pile." *CRS Mountaintop Mining Report, supra*, at 1. SMCRA includes a provision that provides for waiver of the AOC requirement in certain circumstances, though, see [30 U.S.C. § 1265\(c\)\(3\)](#), and, as a result, the spoils from mountaintop removal are usually placed in "valley fills" on the sides of the mountains, frequently burying streams in the valley below. See *CRS Mountaintop Mining Report, supra*, at 1. The practice became very popular in the Appalachian region of the United States in the 1990s. *Id.* Almost 1.2 million acres of land have been surface mined in the Central Appalachian region and 500 mountains have been severely impacted or destroyed by mountaintop mining in that region. See [Appalachian Voices, \*Mountaintop Removal 101\*](#).

Residents of the Appalachian region and environmentalists raised concerns about the environmental impacts of mountaintop mining for years and, in a recent report, EPA concluded that mountaintop removal mining and valley fills have the following impacts:

- (1) springs, and ephemeral, intermittent streams, and small perennial streams are permanently lost with the removal of the mountain and from burial under fill,
- (2) concentrations of major chemical ions are persistently elevated downstream,
- (3) degraded water quality reaches levels that are acutely lethal to standard laboratory test organisms,
- (4) selenium (Se) concentrations are elevated, reaching concentrations that have caused toxic effects in fish and birds, and
- (5) macroinvertebrate and fish communities are consistently and significantly degraded.

See [U.S. Environmental Protection Agency, The Effects of Mountaintop Mines and Valley Fills on Aquatic Ecosystems of the Central Appalachian Coalfields 1 \(EPA 600/R-09/138f\) \(March 2011\)](#).

In the Clean Water Act context, residents of Appalachia and environmentalists argued that the valley fills required Section 402 permits from EPA. The mining companies, on the other hand, argued that the mining spoils that were being disposed of in the streams were “fill material,” which could be authorized by the Corps of Engineers under Section 404.

As noted above, for many years, EPA and the Corps relied on different regulatory definitions of “fill material.” The Corps’ 1977 regulation, which remained in place until 2002, defined “fill material” as “any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402.” See [42 Fed. Reg. 37,121, 37,145 \(July 19, 1977\)](#). EPA’s regulations, on the other hand, at least since 1980, have focused on whether materials have the “effect” of replacing water with dry land or changing the bottom elevation of water, regardless of the “purpose” of the placement of the material. See 45 Fed. Reg. 33290, 33421 (May 19, 1980). Pursuant to the Corps’ regulations, opponents of mountaintop mining argued that the purpose of the valley fills was waste disposal, regulated by EPA under Section 402, while the mining companies argued that the valley fills involved the discharge of fill material and were regulated under Section 404. In the 1990s, when mountaintop removal mining was becoming increasingly popular, the Corps authorized most valley fills under a general permit, Nationwide Permit 21, instead of requiring mining companies to obtain individual Section 404 permits. See [33 C.F.R. § 330.5\(a\)\(21\) \(1992\)](#).

In 1998, several environmental groups and concerned citizens sued the Corps, arguing that valley fills should be regulated by EPA under the Section 402 permit program, rather than

under Section 404. See *Bragg v. Robertson*, 54 F. Supp.2d. 635 (S.D. W.Va. 1999), *aff'd in part, vacated in part sub nom Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275 (4<sup>th</sup> Cir. 2001). The Fourth Circuit did not resolve the question of whether Section 402 or 404 applied to the valley fills, but the case did result in some changes to the federal regulation of valley fills. Pursuant to a partial settlement agreement of the case, the Corps agreed to require companies to obtain individual permits, rather than rely on the agency's nationwide permit, for many of the larger valley fills, and the Corps agreed to prepare an environmental impact statement on mountaintop removal mining and valley fills. 54 F. Supp.2d at 639. The Corps, along with EPA, the Fish and Wildlife Service, and the West Virginia Department of Environmental Protection, completed the final environmental impact statement in 2005. See [U.S. Environmental Protection Agency, Final Programmatic Environmental Impact Statement \(PEIS\) on Mountaintop Mining/Valley Fills in Appalachia, EPA 903-R-05-002 \(Oct. 2005\)](#).

Although the Fourth Circuit, in *Bragg*, did not resolve the question of whether Section 402 or 404 applied to valley fills, the court was faced with the question again a few years later in the following case. Prior to the court's decision, the Corps began the process of amending its regulations to adopt a definition of "fill material" that mirrored EPA's definition and would define material as "fill material" if it had the effect of replacing a water of the United States with dry land or of changing the bottom elevation of a water of the United States. See [65 Fed. Reg. 21,292 \(Apr. 20, 2000\)](#). In the proposal, EPA and the Corps indicated that, prior to the proposal, the agencies generally agreed that valley fills would be regulated under Section 404 and, while the proposal would change the Corps' definition of "fill material," it would not change the division of authority between the agencies with regard to valley fills. *Id.* at 21,295. However, the action challenged in the case was taken by the Corps under the existing Corps' regulations, which defined "fill material" in terms of the purpose for which the material was used.

## **Kentuckians for the Commonwealth v. Rivenburgh**

317 F.3d 425 (4<sup>th</sup> Cir. 2003)

**NIEMEYER, Circuit Judge:**

### **Resources for the Case**

[Corps letter authorizing Beech Fork Mine under NWP 21 Unedited opinion](#) (From Justia)  
[Google Map of all the cases in the coursebook](#)  
Videos of Mountaintop Removal from [Appalachian Voices](#), [Smithsonian](#), and [Discovery](#)  
[Kentuckians for the Commonwealth web page](#)

This appeal presents the issue of whether the U.S. Army Corps of Engineers has authority under the Clean Water Act and under its now-superseded 1977 regulation implementing the Act to issue permits for valley fills in connection with mountaintop coal mining. It does not present the question of whether mountaintop coal mining is useful, desirable, or wise.

Kentuckians for the Commonwealth, Inc., a nonprofit corporation formed to promote "social

justice and quality of life for all Kentuckians," commenced this action for declaratory and injunctive relief to declare illegal the Corps' interpretation of the Clean Water Act and to require the Corps to revoke the permit that it issued to Martin County Coal Corporation under § 404 of the Act, authorizing Martin Coal to place excess overburden from one of its coal mining projects into 27 valleys in Martin County, Kentucky.

On cross-motions for summary judgment, the district court "found and concluded" that "fill material" as used in § 404 referred only to "material deposited for some beneficial primary purpose," not for waste disposal, and therefore that the Corps' "approval of waste disposal as fill material under § 404 [of the Clean Water Act] [was] *ultra vires*" and "beyond the authority" of the Corps. Because Martin Coal's assignee of the permit, Beech Fork Processing, Inc., proposed "to re-engineer [the] existing mine plan to place no spoil in waters of the United States without a constructive primary purpose," the court found there to be no "imminent probable irreparable injury" to Kentuckians for the Commonwealth. The court determined that in the absence of injury, Kentuckians' application for injunctive relief with regard to the Martin Coal authorization "must be denied." But on the basis of its conclusion that the Corps acts *ultra vires* whenever it issues permits for valley fills without a beneficial primary purpose, the district court entered a purely prospective permanent injunction against the Corps. This injunction prohibits the Corps from "issuing any further § 404 permits within the Huntington District [covering portions of five states] that have no primary purpose or use but the disposal of waste," in particular, any permit to create valley fills with the spoil of mountaintop coal mining for the sole purpose of waste disposal.

Because we conclude that the Corps' practice of issuing § 404 permits, including the permit to Martin Coal, to create valley fills with the spoil of mountaintop coal mining is not *ultra vires* under the Clean Water Act and that the injunction issued by the district court was overbroad, we reverse the court's declaratory judgment; we vacate its injunction and the memorandums and orders of May 8 and June 17, 2002; and we remand for further proceedings not inconsistent with this opinion.

I.

Martin County Coal Corporation ("Martin Coal"), having obtained a mining permit from the Commonwealth of Kentucky in November 1999 to undertake a surface mining project in Martin County, Kentucky, applied to the U.S. Army Corps of Engineers ("the Corps") for authorization under § 404 of the Clean Water Act and under the Corps' Nationwide Permit 21 ("NWP 21") "to construct hollow fills and sediment ponds in waters of the United States" in connection with the proposed mining project. On June 20, 2000, the Corps "authorized" Martin Coal's project, permitting it to place mining-operations "spoil" from "excess overburden" in 27 valleys, filling about 6.3 miles of streams. "Overburden" is the soil and rock that overlies a coal seam, and overburden that is excavated and removed is "spoil." In connection with surface mining operations in mountains where the mine operator must return the mountains to their approximate original contour, the spoil is placed temporarily in

valleys while the coal is removed from the seam and then returned to the mining location. However, because spoil takes up more space than did the original overburden, all surface mining creates excess spoil that must be placed somewhere. The permit in this case authorized Martin Coal to create 27 valley fills with the excess spoil, which in turn would bury some 6.3 miles of streams at the heads of the valleys.

The Corps' exercise of authority under NWP 21 to permit the creation of valley fills in connection with mining operations was consistent with its past practices and with the understanding of the Corps and the EPA as to how the Clean Water Act divides responsibility for its administration. While court cases have, over the years, evinced confusion over that division based on the agencies' differing approaches to defining "fill material" in their regulations, see, e.g., *Resource Investments, Inc. v. U.S. Army Corps of Eng'rs*, 151 F.3d 1162 (9th Cir.1998); *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir.1983), the Corps and the EPA have in fact exercised their authority consistently in interpreting the Clean Water Act to give the Corps authority to issue permits for the creation of valley fills in connection with surface coal mining activities.

At the time that the Corps issued its authorization to Martin Coal in this case, it had already published notice, together with the EPA, of their intent to amend their regulations to resolve ambiguities in both agencies' regulatory definitions of "fill material" and to clarify the division of authority between the two agencies. As the Corps and the EPA stated in the public notice of the intended amendments, issued on April 20, 2000:

With regard to proposed discharges of coal mining overburden, we believe that the placement of such material into waters of the U.S. has the effect of fill and therefore, should be regulated under CWA section 404. This approach is consistent with existing practice and the existing EPA definition of the term "fill material." In Appalachia in particular, such discharges typically result in the placement of rock and other material in the heads of valleys, with a sedimentation pond located downstream of this "valley fill." This has required authorization under CWA section 404 for the discharges of fill material into waters of the U.S., including the overburden and coal refuse, as well as the berms, or dams, associated with the sedimentation ponds. The effect of these discharges is to replace portions of a water body with dry land. Therefore, today's proposal makes clear that such material is to be regulated under CWA section 404.

65 Fed. Reg. 21,292, 21,295 (Apr. 20, 2000). This public notice also pointed out that the EPA would, in connection with coal mining activities, continue to regulate "effluent discharged into waters of the U.S. from sedimentation ponds," pursuant to § 402 of the Clean Water Act. *Id.* at 21,296.

In August 2001, Kentuckians for the Commonwealth, Inc. ("Kentuckians"), commenced this action against the Corps under the Administrative Procedure Act ("APA"), challenging the

Corps' action in issuing the June 20, 2000 permit to Martin Coal to create 27 valley fills and to bury 6.3 miles of streams. \* \* \* In support of their request for declaratory and injunctive relief, Kentuckians alleged that the Corps had violated § 404 of the Clean Water Act as well as its own regulations and had "acted in a manner that is arbitrary, capricious, an abuse of discretion, and otherwise contrary to law, in violation of the APA, 5 U.S.C. § 706(2)." Kentuckians asked the court to "[d]eclare that Defendants' June 20, 2000 decision granting authorization under NWP 21 to [Martin Coal] is contrary to Section 404 of the CWA and its implementing regulations ... in violation of the APA," and to "[i]ssue an order requiring Defendants to revoke [Martin Coal's] authorization under NWP 21 or, in the alternative, to suspend that authorization pending completion of EPA's Section 404(c) proceeding and/or unless and until Defendants comply with their obligations herein under the APA, CWA, and NEPA [National Environmental Policy Act]." \* \* \*

[O]n May 8, 2002, the district court ruled on the pending cross-motions for summary judgment, concluding that the efforts of the Corps and the EPA, as well as their past applications of § 404, were inconsistent with the Clean Water Act. *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 204 F. Supp.2d 927 (S.D.W.Va.2002). The court declared that "fill material" as used in § 404 of the Clean Water Act "refers to material deposited for some beneficial primary purpose: for construction work, infrastructure, improvement and development in waters of the United States, not waste material discharged solely to dispose of waste." Accordingly, the court declared that the Corps' "approval of a waste disposal as fill material under § 404 is *ultra vires*, that is, beyond the authority of either [the Corps or the EPA]." \* \* \*

Although the court refused to grant Kentuckians' motion for an injunction requiring the Corps to revoke its permit to Martin Coal because Martin Coal's assignee was prepared to reengineer the project so as not to create valley fills of waste material,\* \* \* it issued a permanent injunction against the Corps prohibiting it from issuing "any further § 404 permits that have no primary purpose or use but the disposal of waste." As the court restated its order, it enjoined the issuance of "mountaintop removal overburden valley fill permits solely for waste disposal under § 404." The court did not, however, strike down the New Rule, as no party had challenged it. But it declared the New Rule to be *ultra vires*: \* \* \*

The district court issued a revised memorandum and order dated June 17, 2002, in which it stated that the injunction did not have nationwide application; rather, it prohibited the Corps from issuing § 404 permits "from their ordinary place of business, the Huntington District," which the court stated would have "substantial national impact" because 97% of "stream length affected by valley fills in the nation" was approved in the Huntington District in 2000. *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 206 F. Supp.2d 782 (S.D. W.Va.2002). The court also stated that the injunction did not enjoin the New Rule, 33 C.F.R. § 323.2 (2002). The court repeated, however, its declaration that the New Rule was "inconsistent with the statutory scheme, and therefore *ultra vires*." \* \* \*



[In Part II of the opinion, the court concluded that the injunction issued by the district court was overbroad and the court vacated the injunction.]

### III

[At the beginning of Part III of the opinion, the court discussed which parts of the district court's opinion were dicta and which parts would be reviewed on appeal.]

\* \* \*

The judgment of the district court, as contained in its two orders of May 8 and June 17, 2002, and the positions of the parties thus bring us to the single question whether § 404 of the Clean Water Act, in providing that the Corps "may issue permits... for the discharge of dredged or fill material into navigable waters," authorizes the Corps to issue permits for the creation of valley fills in connection with coal mining activities, when the valley fills serve no purpose other than to dispose of excess overburden from the mining activity. This question is presented particularly in Kentuckians' challenge of the Corps' action in issuing the permit to Martin Coal.

### B

When reviewing a particular agency action challenged under § 706(2) of the APA, "[t]he court is first required to decide whether the [agency] acted within the scope of [its] authority." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). The first step in this analysis is an examination of the statute providing authority for the agency to act. As the Supreme Court explained in *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995):

[W]hen we confront an expert administrator's statutory exposition, we inquire first whether "the intent of Congress is clear" as to "the precise question at issue." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If so, "that is the end of the matter" *Ibid*. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment "controlling weight." *Id.* at 844.

This analytical approach applies not only when a regulation is directly challenged, as in *Chevron*, but also when a particular agency action is challenged, as in *NationsBank*.

Moreover, when an agency acts pursuant to a regulation, a reviewing court must, if there is any dispute about the meaning of the regulation, interpret the meaning of the regulation to

determine whether the agency's action is consistent with the regulation. The reviewing court does not have much leeway in undertaking this interpretation, however, because the agency is entitled to interpret its own regulation and the agency's interpretation is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks and citation omitted). This requirement of binding deference to agency interpretations of their own regulations, unless "plainly erroneous or inconsistent with the regulation," is known as *Seminole Rock* deference, having first been articulated in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

Finally, if there is any question whether an agency action taken pursuant to a regulation exceeds the agency's statutory authority, the statutory inquiry under Chevron step one (whether the intent of Congress is clear) must take place prior to interpreting the agency's own regulation. This ordering is a function of the Chevron test itself: If Congress has spoken clearly to the issue, then the regulation is inapplicable. *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002) (applying an analytical approach by which the validity of an action taken in reliance a regulation depends, in the first instance, on whether the regulation itself exceeds the issuing agency's statutory authority); *see also* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 627 n.78 (1996) ("It is important to note that because a regulation must be consistent with the statute it implements, any interpretation of a regulation naturally must accord with the statute as well.... [T]o get to *Seminole Rock* deference, a court must first address the straightforward *Chevron* question whether an agency regulation, as interpreted, violates the statute. *Seminole Rock* addresses the further question whether the agency's interpretation is consistent with the regulation").

## C

In this case the Corps contends that "[t]he district court erred as a matter of law in holding that the Corps lacks authority under CWA Section 404 to regulate as 'fill material' the discharge of excess spoil from surface coal mining into waters of the United States." \* \* \* It notes that Congress did not define "fill material" and left that to the agencies charged with administering § 404. It concludes that the practice followed by it and by the EPA over the years is "a permissible one entitled to deference" under *Chevron*. It claims that the new dual-agency construction in the New Rule reflects the agencies' past practices and "falls easily within the most obvious reading of the term 'fill material,'" and is consistent with the statutory scheme and purposes of the Clean Water Act.

\* \* \*

Kentuckians contends that "[t]he district court correctly held that the Corps lacks authority under § 404 of the Clean Water Act to allow the filling of waters of the United States solely for waste disposal," but Kentuckians asserts that it "reaches that conclusion on grounds

that differ, in part, from those relied on by the district court." Although Kentuckians agrees that "fill material" has not been defined in the Clean Water Act, it argues that Congress' intent is clear from the context of the Clean Water Act and that Congress did not mean for any provision of the Act to permit the Corps to "evade the water quality standards" mandated by the Act. Kentuckians asserts that to construe "fill material" in any way other than that given by the district court would violate the clear intent of the Clean Water Act "to restore and maintain the chemical, physical and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). Kentuckians contends alternatively that even if the Act is ambiguous, the Corps' interpretation is unreasonable and impermissible because "[e]vasion of a statute's core mandate and purpose can scarcely be considered a 'reasonable' interpretation." Finally, Kentuckians asserts that the Corps' interpretation is internally inconsistent because the Corps' construction gives it authority over "mining waste, but excludes trash and garbage." It argues that such a construction produces an absurd result because the burial of a stream by mining waste is "much more devastating" than degradation of water by trash or garbage.

As with any issue of statutory interpretation, we begin with the language of the statute. If congressional intent is clear from application of "traditional tools of statutory construction," *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 161 (4th Cir.1998), *aff'd*, 529 U.S. 120 (2000), "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress," *Chevron*, 467 U.S. at 842-43. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Because the Clean Water Act does not define "fill material," nor does it suggest on its face the limitation of "fill material" found by the district court, the statute is silent on the issue before us, and such silence "normally creates ambiguity. It does not resolve it." *Barnhart v. Walton*, 535 U.S. 212 (2002); *see also Piney Run Preservation Ass'n v. County Comm'rs*, 268 F.3d 255, 267 (4th Cir.2001) \* \* \*

The district court concluded, however, that its facial interpretation -- that a permit issued under § 404 can only authorize the discharge of fill material into navigable waters "for some beneficial primary purpose... not waste material discharged solely to dispose of waste" -- was supported by § 404(f)(2) of the Clean Water Act, by the Act's succession to the Rivers and Harbors Act, and by the Act's relation to the Surface Mining Control and Reclamation Act ("SMCRA"). We examine each of these to determine whether any unambiguously indicates a clear congressional intent with respect to the definition of "fill material" as used in § 404(a). \* \* \*

[The court then examined, and rejected, each of those findings of the district court and disagreed with the district court's conclusion that the statutory language was clear.]

The district court's application of traditional tools of statutory construction thus could not leave it with a clear congressional intent that the undefined term "fill material" as used in § 404 means material deposited for a beneficial primary purpose. Indeed, the lack of clarity in the term itself prompted the agencies to undertake efforts to develop the term's meaning from the context of the permit programs and the interrelationship between § 402 permits and § 404 permits. While the statute authorizes the EPA to issue permits "for the discharge of any pollutant," defining "pollutant" to include "rock, sand, dirt and industrial, municipal and agricultural waste," 33 U.S.C. § 1362(6), the EPA is not authorized to issue a permit for "fill material," 33 U.S.C. § 1342(a)(1). Yet, when a permit is issued by the Corps under § 404 for the discharge of fill material that has a substantive adverse effect on municipal waters, fish, and wildlife, the EPA can veto the Corps' permit. 33 U.S.C. §1344 (c). The statute's silence on the definition of "fill material" thus gives rise to ambiguity, particularly when a broad definition of "fill material" is employed.

Based on our de novo review of whether Congress has spoken clearly on the meaning of "fill material," see *Holland v. Pardee Coal Co.*, 269 F.3d 424, 430 (4th Cir. 2001) (holding that an issue of statutory construction is a "pure question of law" subject to de novo review), we conclude that Congress has not clearly spoken on the meaning of "fill material" and, in particular, has not clearly defined "fill material to be material deposited for some beneficial primary purpose." Accordingly, we proceed into *Chevron* step-two analysis to determine whether the Corps' action is based on a permissible construction of § 404. See *Capitol Mortgage Bankers, Inc. v. Cuomo*, 222 F.3d 151, 155 (4th Cir.2000) (determining that the district court's *Chevron* step-one holding was incorrect and stating that "[w]e must therefore proceed to the second step of the *Chevron* analysis and consider, with deference to [the agency's] expertise in this area, whether the agency's interpretation of the statute ... is based on a permissible construction of the statute").

#### D

Although the district court rested its holding principally on a statutory interpretation of the Clean Water Act under *Chevron* step one, concluding that "§ 404 is neither silent nor ambiguous on the issue of § 404 fills and their purposes," it addressed alternatively, albeit conclusorily, the reasonableness of the Corps' interpretation of the statute under *Chevron* step two. The court stated that its "examination of the legislative and regulatory history, interagency agreements, and related statutes demonstrates any interpretation of § 404 fill material that ignores and deliberately eliminates the primary purpose test for fill authorization is contrary to the purpose, principles, and policy of the CWA. [Citation omitted]. Such an agency interpretation is not permissible." The court thus reiterated the conclusion it reached in its *Chevron* step-one analysis, and its *Chevron* step-two analysis did not give any deference to the agency's interpretation of this regulation nor did it explain why such deference would be inappropriate.

Because the agency action at issue in this case was taken at a time when the Corps' 1977

Regulation was in effect, the appropriate inquiry under *Chevron* step two is whether that regulation, as interpreted by the Corps, is based on a permissible reading of the Clean Water Act, and, if so, whether the agency acted consistently with the regulation in issuing a permit to Mountain Coal to create valley fills in connection with coal mining activities.

The Corps' 1977 Regulation defines "fill material" as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a[] waterbody." 33 C.F.R. 323.2(e) (2001). The regulation provides further that "[t]he term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act." *Id.* At the time when this 1977 Regulation was promulgated, the Corps, explaining the "waste" exclusion, stated that in its experience:

several industrial and municipal discharges of solid waste materials have been brought to our attention which technically fit within our definition of "fill material" but which are intended to be regulated under the NPDES program [i.e., the EPA's program created under § 402]. These include the disposal of waste materials such as sludge, garbage, trash, and debris in water.

\* \* \*

The Corps and the Environmental Protection Agency feel that the initial decision relating to this type of discharge should be through the NPDES program.

42 Fed. Reg. 37,122, 37,130 (July 19, 1977).

To demonstrate that the Corps' understanding of its authority to issue permits for valley fills was based on a longstanding division of authority between the Corps and the EPA that reflected the interpretations of both agencies with regard to their respective regulatory authority under the Clean Water Act, the Corps submitted to the district court over 120 pages of correspondence with the EPA and with regulated parties addressing valley fill permits issued under Section 404. This correspondence, which spans approximately ten years from 1990 through 2000, includes actual permit grants, EPA objections to Corps actions, and evaluations by the Corps and the EPA of mitigation plans. To the extent that this correspondence reveals any disputes about the Corps' exercise of its permitting authority, these disputes focus on whether the impact of a particular valley fill would be more than minimal, thus requiring the issuance of an individual permit rather than authorization under a nationwide permit. The basic division of authority, including the Corps' authority to issue valley fill permits, is apparent throughout this record of both agencies' practices. The Corps also submitted the affidavit of Michael B. Cook, the director of EPA's Office of Wastewater Management in Washington, D.C. since 1991. According to Mr. Cook:

While the effluent guidelines address certain discharges of pollutants associated with coal mining operations (e.g., coal preparation plants and mine drainage), the regulations do not address discharges of soil, rock and vegetation (i.e., overburden) that is excavated in order to access coal reserves and then placed in waters of the United States, as in the case of valley fills. To our knowledge, such discharges have only been authorized by permits issued under section 404 of the CWA by the Army Corps of Engineers.

In short, the evidence submitted to the district court revealed a longstanding and consistent division of authority between the Corps and the EPA with regard to the issuance of permits under CWA Section 402 and CWA Section 404.

Moreover, when the Corps issued the permit to Martin Coal on June 20, 2000, it continued to operate with an understanding that it was authorized to regulate discharges of fill, even for waste, unless the fill amounted to effluent that could be subjected to effluent limitations. It certainly did not interpret its own 1977 Regulation to impose a beneficial primary purpose requirement. This is evidenced by its public notice given on April 17, 2000, two months prior to the issuance of the permit at issue in this action, when the Corps joined with the EPA to propose a joint rule that would "not alter current practice," but rather was "intended to clarify what constitutes 'fill material' subject to CWA section 404." 65 Fed. Reg. at 21,292. The Corps and the EPA recognized that some courts had interpreted the Corps' regulation to impose a primary-purpose test applied without regard to the traditional division of authority between the Corps and the EPA, and that the ambiguities of this test had caused confusion. As one specific example of this confusion, the Corps and the EPA pointed to dicta in an opinion issued by the district court in an earlier valley-fill case in which the district court determined that "the Corps lacked authority to regulate under CWA section 404 the placement into waters of the U.S. of rock, sand, and earth overburden from coal surface mining operations, because the 'primary purpose' of the discharge was waste disposal." *Id.* at 21,295. Disclaiming any interpretation of the Corps' 1977 Regulation that would strip the Corps of authority to issue § 404 permits for valley fills, the Corps and the EPA described what they understood the appropriate division of labor to be:

The section 402 program is focused on (although not limited to) discharges such as wastewater discharges from industrial operations and sewage treatment plants, stormwater and the like.... Pollutant discharges are controlled under the section 402 program principally through the imposition of effluent limitations, which are restrictions on the "quantities, rates, and concentrations of chemical, physical, biological and other constituents which are discharged from point sources into navigable waters".... There are no statutory or regulatory provisions under the section 402 program designed to address discharges that convert waters of the U.S. to dry land.

\* \* \*

[S]ection 404 focuses exclusively on two materials: dredged material and fill material. The term "fill material" clearly contemplates material that fills in a water body, and thereby converts it to dry land or changes the bottom elevation. Fill material differs fundamentally from the types of pollutants covered by section 402 because the principal environmental concern is the loss of a portion of the water body itself. For this reason, the section 404 permitting process focuses on different considerations than the section 402 permitting program.

*Id.* at 21,293.

This contemporaneous explanation by the two agencies charged with the responsibility of administering the Clean Water Act provides a rational interpretation of the 1977 Regulation that is neither plainly erroneous nor inconsistent with the text of the regulation. The 1977 Regulation seeks to divide the statutory responsibilities between the agencies charged with different responsibilities by defining "fill material" that is subject to regulation by the Corps and "waste" that is subject to regulation by the EPA through the administration of effluent limitations. Moreover, the resolution among agencies of the line dividing their responsibilities is just the type of agency action to which the courts must defer. See *Echazabal*, 122 S. Ct. at 2052 (noting that the EEOC's resolution of a tension between the Americans with Disabilities Act and the Occupational Safety and Health Act "exemplifies the substantive choices that agencies are expected to make when Congress leaves the intersection of competing objectives both imprecisely marked and subject to administrative leeway").

A reviewing court can set aside the agency's interpretation of its own regulation only if that interpretation is "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (internal quotation marks and citation omitted). When we examine the Corps' 1977 Regulation and its interpretations of that regulation, we conclude that the Corps' interpretations of the 1977 Regulation -- made both by interpretations published in the Federal Register and by its application of that regulation in issuing permits -- were neither plainly erroneous nor inconsistent with the text of the regulation.

We next determine whether the 1977 Regulation itself, as construed by both the Corps and the EPA, was also a permissible reading of the Clean Water Act.

The stated goal of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To that end, the Clean Water Act prohibits discharges of pollutants into the waters of the United States, except in compliance with a permit issued by one of the permit regimes established by the Act. 33 U.S.C. § 1311(a). Two principal regimes are created in §§ 402 and 404 of the Act. Section 402 creates a permit program under the National Pollutant Discharge Elimination System, a combination of State and EPA regulatory activities that is administered by the EPA. Section

404 creates a permit program administered by the Corps, authorizing the Corps to issue permits only in connection with the "discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). The two sections are linked by cross-references, exclusions, and vetoes. Section 402 authorizes the EPA to issue permits for the discharge of any pollutant or combination of pollutants, except as provided in § 404. And § 404 in turn provides that the Corps may issue permits for the limited discharges relating to dredged or fill material, providing that the Corps' permits are always subject to the veto power of the EPA when the dredged or fill material would have "an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas ... wildlife, or recreational areas." 33 U.S.C. § 1344(c). Thus, a § 404 permit is always subject to the EPA's determination that a discharge will have an "unacceptable adverse effect" on certain specified waters, reinforcing the fill-effluent distinction that has been followed by the agencies.

Because the Clean Water Act clearly intended to divide functions between the Corps and the EPA based on the type of discharge involved, we conclude that it was consistent with the Act for the Corps to have adopted its 1977 Regulation defining "fill material" to be

any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402 of the Clean Water Act.

33 C.F.R. § 323.2(e) (2001). The first sentence of this regulation adopts an inclusive test that focuses on the purposeful displacement of water with solid material. The second sentence provides, as construed by the agencies, an exclusion which defers to the EPA's authority to regulate "waste." Because it was not plainly erroneous or inconsistent with the regulation for the Corps to have asserted that its use of the term "waste" in the 1977 Regulation was not intended to defer to the EPA on all material deposited for disposal, as we have already concluded, we read the 1977 Regulation to include that interpretation and, as so interpreted, conclude that the 1977 Regulation was a rational interpretation of the Clean Water Act. Section 404 confers on the Corps all responsibility to issue permits for the discharges of "fill material," but it gives the EPA a veto when those discharges might adversely affect the quality of certain waters. Section 402 confers on the EPA responsibility to regulate the discharge of pollutants into waters under mechanisms to administer effluent limitations. The two authorizations might overlap on certain types of "fill material" that adversely affect the quality of water, and the 1977 Regulation, as interpreted by the Corps, reasonably addresses this potential ambiguity.

In sum, we conclude that the Corps' interpretation of "fill material" as used in § 404 of the Clean Water Act to mean all material that displaces water or changes the bottom elevation of a water body except for "waste" -- meaning garbage, sewage, and effluent that could be regulated by ongoing effluent limitations as described in § 402 -- is a permissible



construction of § 404. And as an interpretation of its 1977 Regulation, it is neither plainly erroneous nor inconsistent with the text of the regulation.

The Corps' issuance of the permit to Martin Coal on June 20, 2000, therefore, was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law insofar as Kentuckians alleged in Count I of the complaint. On this issue, we reverse the judgment of the district court.

### Questions and Comments

1. This case involved a question of whether the 1977 Corps regulatory definition of “fill material” was authorized by the Clean Water Act and whether the Corps’ interpretation of that regulation was appropriate. As in the Supreme Court’s *Riverside Bayview Homes* case, the Fourth Circuit noted, in this case, that the *Chevron* analysis applied to the first question, while the *Auer* analysis applied to the second question. The order in which the court addressed those questions, though, is a bit unorthodox. The court begins the opinion with a focus on *Chevron* step 1, moves to *Auer*, then returns to *Chevron* step 2. Why might the court have structured the opinion in that manner?
2. ***Chevron***: Although the district court determined that the Clean Water Act was clear and did not authorize the Corps to regulate valley fills as “fill material,” the appellate court concluded that the statute is ambiguous, so the agency’s interpretation is entitled to deference at *Chevron* step 2. At *Chevron* step 1, the appellate court seems to focus solely on the text of the statute to find that the Clean Water Act is ambiguous with regard to whether “fill material” means “material deposited for some primary beneficial purpose.” On what basis, then, does it conclude, at *Chevron* step 2, that the Corps’ interpretation of the ***statute*** (rather than the regulation) is reasonable? Has the court set the *Chevron* bar very high?
3. Kentuckians for the Commonwealth argued that permits issued under Section 402 of the Clean Water Act incorporate standards to protect water quality that are not included in Section 404 permits, and that the Corps could not define “fill material” in a way that would include valley fills because such a regulation would evade the implementation of those standards and violate the water quality protection purposes of the statute. Does the appellate court address that argument or focus on those purposes of the statute in interpreting it? A regulation that defined “fill material” to be limited to materials primarily used for a beneficial purpose would seem to advance that purpose.
4. ***Auer***: When will an agency’s interpretation of its regulations be “plainly erroneous or inconsistent with the regulation” under *Auer*? The Corps’ regulations provided that “fill material” “does not include any pollutant discharged into the water primarily to

dispose of waste.” Regardless of the long-standing nature of the Corps and EPA’s interpretation of the Corps’ regulation, is there any purpose for the disposal of the mining spoils in the valley other than waste disposal?

5. The district court also concluded that the rule that the Corps proposed in 2000 to redefine “fill material” (the “new rule”) was outside of the agency’s authority. Why do you think that the appellate court vacated that determination without much discussion?
6. After the case was decided, the Corps finalized the “new rule” mentioned in the case and adopted EPA’s definition of “fill material,” which is based on the “effect” of the placement of material, rather than its purpose. See [33 C.F.R. §323.2](#). Under the new regulation, it is certainly easier to argue that “valley fills” have the “effect” of changing the bottom elevation of waters of the United States or replacing a portion of the waters of the United States with dry land, regardless of their purpose. Thus, the Corps’ interpretation of the new rule would clearly seem to be entitled to *Auer* deference. Could the new rule still be challenged as beyond the Corps’ statutory authority, though? Would such a challenge likely be successful in the Fourth Circuit?
7. **Scope of Injunction:** The injunction issued by the district court was a regional injunction, rather than a national injunction. Note, however, that the appellate court pointed out that activities authorized by one district office of the Corps of Engineers in Kentucky accounted for 97% of the stream length affected by valley fills in the nation in 2000.
8. **Environmental Justice:** Note that the plaintiff, Kentuckians for the Commonwealth, is described in the opinion as “a nonprofit corporation formed to promote ‘social justice and quality of life for all Kentuckians.’” Numerous studies over several decades have demonstrated that low income and minority communities are disparately impacted by pollution. See Stephen M. Johnson, *Economics v. Equity: Do Market-Based Environmental Reforms Exacerbate Environmental Injustice?*, 56 Wash. & Lee L. Rev. 111, 117 (1999). The mountaintop removal mining issue is another example of this trend. See Patrick McGinley, *Collateral Damage: Turning a Blind Eye to Environmental and Social Injustice in the Coalfields*, 19 J. Env’tl. & Sustainability L. 305 (2013). The Appalachia region, where most mountaintop removal mining takes place, is one of the poorest regions in the country. See e.g. [Appalachian Regional Commission, Economic Overview of Appalachia - 2011](#) (per capita income in Appalachia is 18% lower than the national average). As Professor Patrick McGinley notes, “After a century of mining in the ‘billion dollar coalfields’, local communities lack funds to upgrade aging schools, tens of thousands live below the federal ‘poverty line’; and public services such as fire, police, sewage treatment, and libraries struggle to survive . . .” [Patrick C. McGinley, From Pick & Shovel to Mountaintop Removal: Environmental Injustice in the Appalachian Coalfields](#), 34

[Envir. L. 21, 23 \(2004\)](#). Because of the implementation of new technologies and practices like mountaintop removal mining, mining employment decreased in Kentucky by two thirds between 1980 and 2006, although production from the mines decreased only slightly. See [Kentuckians for the Commonwealth, \*How Does Mountaintop Removal Affect the Economy?\*](#) Perhaps these factors played some role in the court's statement at the outset of the opinion that the case "does *not* present the question of whether mountaintop coal mining is useful, desirable, or wise."

9. **More Resources:** Additional information about mountaintop removal mining is available on the websites of [EPA](#), [NRDC](#), [Sierra Club](#), [Earthjustice](#), [Appalachian Voices](#), and [Kentuckians for the Commonwealth](#).
10. **Post-Script:** After another Fourth Circuit ruling in 2009, [Ohio Valley Environmental Coalition v. Aracoma Coal Company, 556 F.3d 1777 \(4<sup>th</sup> Cir. 2009\)](#), in which the court rejected challenges that the Corps violated the National Environmental Policy Act and acted arbitrarily in approving four valley fill permits, EPA announced that it would review all pending surface coal mining permit requests in Appalachia pursuant to its authority under Section 404 to review and comment on permits issued by the Corps. In June, 2009, EPA, the Corps and the Department of Interior signed a Memorandum of Understanding that established a series of actions to reduce the environmental impacts of mountaintop mining. See [Memorandum of Understanding among the U.S. Department of the Army, U.S. Department of the Interior, and U.S. Environmental Protection Agency Implementing the Interagency Action Plan on Appalachian Surface Coal Mining \(June 11, 2009\)](#). As part of the action plan in that MOU, EPA and the Corps began using an Enhanced Coordination Procedure ("ECP") for evaluating 79 coal mining permits that EPA identified for additional environmental review. See [CRS Mountaintop Mining Report, supra](#) at 6. Coal companies complained that the process significantly delayed permit decisions and they challenged the ECP in court. In [National Mining Association v. Jackson, 816 F. Supp. 2d 37 \(D.D.C. 2011\)](#), the United States District Court for the District of Columbia held that the ECP unlawfully transferred Clean Water act authority from the Corps to EPA. Although the court set aside the ECP, EPA and the Corps subsequently issued memoranda to the field reminding staff that the agencies should coordinate their review of mining permits in accordance with existing agency regulations. See [Nancy Stoner, Acting Assistant Administrator, U.S. Environmental Protection Agency, Office of Water, Transmittal of Department of the Army Memo on "Decision in National Mining Association et al. v. Jackson, et al"](#). The D.C. Circuit later overturned the decision of the district court and upheld the ECP. See [National Mining Association v. McCarthy, No. 12-5310 \(D.C. Cir. July 11, 2014\)](#). EPA's role in the 404 permitting process is discussed in detail in Chapter 6 of this book.

In addition to the litigation discussed above, mountaintop removal mining has spurred litigation focusing on the appropriate scope of coverage of nationwide

permits and EPA's authority to veto Section 404 permits. Those cases, and the underlying controversies, will be explored in detail in Chapters 6 (Permits) and 8 (EPA Vetoes).

11. **Landfills:** When the Corps amended its regulatory definition of fill material, it included a non-exclusive list of materials that met the definition (rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States) and specifically provided that the term “does not include trash or garbage.” See [33 C.F.R. §323.2](#). In addition, in the preamble to the rule, the agency indicated that fill material used to create liners, berms and other infrastructure associated with solid waste landfills would be regulated as fill material under Section 404, rather than under section 402. See [67 Fed. Reg. 31129, 31134 \(May 9, 2002\)](#).

#### Interview



Professor Pat McGinley, Charles H. Haden II Professor of Law at West Virginia College of Law and frequent mountaintop removal mining litigator discusses:

- The history of mountaintop removal mining ([YouTube](#))
- Valley fills and their environmental impacts ([YouTube](#))
- Other impacts of mountaintop removal mining ([YouTube](#))
- Benefits to communities from mountaintop removal mining ([YouTube](#))
- The environmental justice impacts of mountaintop removal mining ([YouTube](#))
- Representing communities affected by mountaintop removal mining ([YouTube](#)).

While there has been significant litigation surrounding mountaintop removal mining, more traditional mining activities have also spawned Section 404 litigation. In 2004, Coeur Mining sought to reopen the Kensington Mine, located near the Tongass National Forest in Alaska, which had ceased operations in 1928. As noted above, EPA and the Corps regulate the disposal of a variety of types of mining waste as the “discharge of fill material,” requiring a Section 404 permit rather than a Section 402 permit. Accordingly, Coeur Mining sought, and received, a Section 404 permit from the Corps of Engineers that authorized the disposal of mining waste from the Kensington Mine in the Lower Slate Lake in Alaska. As noted above, when EPA issues Section 402 permits, the permits often include limits on pollution discharges based on technology-based and water quality based standards. Those

limits are not included in Section 404 permits that the Corps issues. The controversy arose in the Kensington Mine case because EPA had developed technology-based pollution limits that would have significantly limited or precluded Coeur from disposing of its mining waste in the Lower Slate Lake if Coeur were required to obtain a Section 402 permit. However, since Coeur was not required to obtain a Section 402 permit, the EPA standards did not apply to Coeur's disposal of waste in the Lake, but *did* apply to any pollution that was released from the Lake. The Southeast Alaska Conservation Council, a local environmental group, challenged the permit, arguing that the Corps lacked authority under the Clean Water Act to issue the Section 404 permit and that the permit should have been issued by EPA under Section 402.



**Photo 30 Lower Slate Lake Before and After - Photo by EarthJustice [http://blog.nwf.org/2012/10/the-clean-water-act-40-years-and-still-a-work-in-progress/lowerslate\\_beforeandafter/](http://blog.nwf.org/2012/10/the-clean-water-act-40-years-and-still-a-work-in-progress/lowerslate_beforeandafter/)**

## Coeur Alaska, Inc. v. Southeast Alaska Conservation Council

557 U.S. 261 (2009)

**Justice Kennedy** delivered the opinion of the Court

### Resources for the Case

[Unedited opinion](#) (From Justia)  
[Google Map of all the cases in the coursebook](#)  
[Oral Argument Audio](#) (from the Oyez Project)  
[Information on “froth flotation”](#)  
[Corps 404 permit for Coeur](#); [EPA NPDES permit](#)  
[Coeur operating plan](#)  
[Alaska DNR Resource Page](#)  
Websites for [Coeur](#) and [SEACC](#); [Colbert Report](#)

These cases require us to address two questions under the Clean Water Act (CWA or Act). The first is whether the Act gives authority to the United States Army Corps of Engineers, or instead to the Environmental Protection Agency (EPA), to issue a permit for the discharge of mining waste, called slurry. The Corps of Engineers has issued a permit to petitioner Coeur Alaska, Inc. (Coeur Alaska), for a discharge of slurry into a lake in Southeast Alaska. The second question is whether, when the Corps issued that permit, the agency acted in accordance with law. We conclude that the Corps was the appropriate agency to issue the permit and that the permit is lawful.

With regard to the first question, § 404(a) of the CWA grants the Corps the power to “issue permits ... for the discharge of ... fill material.” 86 Stat. 884; 33 U.S.C. § 1344(a). But the EPA also has authority to issue permits for the discharge of pollutants. Section 402 of the Act grants the EPA authority to “issue a permit for the discharge of any pollutant” “[e]xcept as provided in” §404. 33 U.S.C. § 1342(a). We conclude that because the slurry Coeur Alaska wishes to discharge is defined by regulation as “fill material,” 40 C.F.R. § 232.2 (2008), Coeur Alaska properly obtained its permit from the Corps of Engineers, under § 404, rather than from the EPA, under § 402.

The second question is whether the Corps permit is lawful. Three environmental groups, respondents here, sued the Corps under the Administrative Procedure Act, arguing that the issuance of the permit by the Corps was “not in accordance with law.” 5 U.S.C. § 706(2)(A). The environmental groups are Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation (collectively, SEACC). The State of Alaska and Coeur Alaska are petitioners here.

SEACC argues that the permit from the Corps is unlawful because the discharge of slurry

would violate an EPA regulation promulgated under § 306(b) of the CWA, 33 U.S.C. § 1316(b). The EPA regulation, which is called a “new source performance standard,” forbids mines like Coeur Alaska’s from discharging “process wastewater” into the navigable waters. 40 C.F.R. § 440.104(b)(1). Coeur Alaska, the State of Alaska, and the federal agencies maintain that the Corps permit is lawful nonetheless because the EPA’s performance standard does not apply to discharges of fill material.

Reversing the judgment of the District Court, the Court of Appeals held that the EPA’s performance standard applies to this discharge so that the permit from the Corps is unlawful.

I

A

Petitioner Coeur Alaska plans to reopen the Kensington Gold Mine, located some 45 miles north of Juneau, Alaska. The mine has been closed since 1928, but Coeur Alaska seeks to make it profitable once more by using a technique known as “froth flotation.” Coeur Alaska will churn the mine’s crushed rock in tanks of frothing water. Chemicals in the water will cause gold-bearing minerals to float to the surface, where they will be skimmed off.

At issue is Coeur Alaska’s plan to dispose of the mixture of crushed rock and water left behind in the tanks. This mixture is called slurry. Some 30 percent of the slurry’s volume is crushed rock, resembling wet sand, which is called tailings. The rest is water.

The standard way to dispose of slurry is to pump it into a tailings pond. The slurry separates in the pond. Solid tailings sink to the bottom, and water on the surface returns to the mine to be used again.

Rather than build a tailings pond, Coeur Alaska proposes to use Lower Slate Lake, located some three miles from the mine in the Tongass National Forest. This lake is small — 800 feet at its widest crossing, 2,000 feet at its longest, and 23 acres in area. See App. 138a, 212a. Though small, the lake is 51 feet deep at its maximum. The parties agree the lake is a navigable water of the United States and so is subject to the CWA. They also agree there can be no discharge into the lake except as the CWA and any lawful permit allow.

Over the life of the mine, Coeur Alaska intends to put 4.5 million tons of tailings in the lake. This will raise the lakebed 50 feet — to what is now the lake’s surface — and will increase the lake’s area from 23 to about 60 acres. *Id.*, at 361a (62 acres), 212a (56 acres). To contain this wider, shallower body of water, Coeur Alaska will dam the lake’s downstream shore. The transformed lake will be isolated from other surface water. Creeks and stormwater runoff will detour around it. *Id.*, at 298a. Ultimately, lakewater will be cleaned by purification systems and will flow from the lake to a stream and thence onward. *Id.*, at 309a–312a.

## B

Numerous state and federal agencies reviewed and approved Coeur Alaska's plans. At issue here are actions by two of those agencies: the Corps of Engineers and the EPA.

### 1

The CWA classifies crushed rock as a "pollutant." 33 U.S.C. § 1362(6). On the one hand, the Act forbids Coeur Alaska's discharge of crushed rock "[e]xcept as in compliance" with the Act. CWA §301(a), 33 U.S.C. §1311(a). Section 404(a) of the CWA, on the other hand, empowers the Corps to authorize the discharge of "dredged or fill material." 33 U.S.C. § 1344(a). The Corps and the EPA have together defined "fill material" to mean any "material [that] has the effect of ... [c]hanging the bottom elevation" of water. 40 C.F.R. §232.2. The agencies have further defined the "discharge of fill material" to include "placement of ... slurry, or tailings or similar mining-related materials." *Ibid.*

In these cases the Corps and the EPA agree that the slurry meets their regulatory definition of "fill material." On that premise the Corps evaluated the mine's plan for a § 404 permit. After considering the environmental factors required by §404(b), the Corp issued Coeur Alaska a permit to pump the slurry into Lower Slate Lake. App. 340a–378a.

In granting the permit the Corps followed the steps set forth by § 404. Section 404(b) requires the Corps to consider the environmental consequences of every discharge it allows. 33 U.S.C. § 1344(b). The Corps must apply guidelines written by the EPA pursuant to §404(b). See *ibid.*; 40 C.F.R. pt. 230 (EPA guidelines). Applying those guidelines here, the Corps determined that Coeur Alaska's plan to use Lower Slate Lake as a tailings pond was the "least environmentally damaging practicable" way to dispose of the tailings. App. 366a. To conduct that analysis, the Corps compared the plan to the proposed alternatives.

The Corps determined that the environmental damage caused by placing slurry in the lake will be temporary. And during that temporary disruption, Coeur Alaska will divert waters around the lake through pipelines built for this purpose. *Id.*, at 298a. Coeur Alaska will also treat water flowing from the lake into downstream waters, pursuant to strict EPA criteria. *Ibid.*; see Part I–B–2, *infra*. Though the slurry will at first destroy the lake's small population of common fish, that population may later be replaced. After mining operations are completed, Coeur Alaska will help "recla[im]" the lake by "[c]apping" the tailings with about 4 inches of "native material." App. 361a; *id.*, at 309a. The Corps concluded that

"[t]he reclamation of the lake will result in more emergent wetlands/vegetated shallows with moderate values for fish habitat, nutrient recycling, carbon/detrital export and sediment/toxicant retention, and high values for wildlife habitat." *Id.*, at 361a.



If the tailings did not go into the lake, they would be placed on nearby wetlands. The resulting pile would rise twice as high as the Pentagon and cover three times as many acres. Reply Brief for Petitioner Coeur Alaska 27. If it were chosen, that alternative would destroy dozens of acres of wetlands—a permanent loss. App. 365a–366a. On the premise that when the mining ends the lake will be at least as environmentally hospitable, if not more so, than now, the Corps concluded that placing the tailings in the lake will cause less damage to the environment than storing them above ground: The reclaimed lake will be “more valuable to the aquatic ecosystem than a permanently filled wetland ... that has lost all aquatic functions and values.” *Id.*, at 361a; see also *id.*, at 366a.

2

The EPA had the statutory authority to veto the Corps permit, and prohibit the discharge, if it found the plan to have “an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas ... , wildlife, or recreational areas.” CWA § 404(c), 33 U.S.C. § 1344(c). After considering the Corps findings, the EPA did not veto the Corps permit, even though, in its view, placing the tailings in the lake was not the “environmentally preferable” means of disposing of them. App. 300a. By declining to exercise its veto, the EPA in effect deferred to the judgment of the Corps on this point.

The EPA’s involvement extended beyond the agency’s veto consideration. The EPA also issued a permit of its own—not for the discharge from the mine into the lake but for the discharge from the lake into a downstream creek. *Id.*, at 287a–331a. Section 402 grants the EPA authority to “issue a permit for the discharge of any pollutant,” “[e]xcept as provided in [CWA § 404].” 33 U.S.C. § 1342(a). The EPA’s §402 permit authorizes Coeur Alaska to discharge water from Lower Slate Lake into the downstream creek, subject to strict water-quality limits that Coeur Alaska must regularly monitor. App. 303a–304a, 309a.

The EPA’s authority to regulate this discharge comes from a regulation, termed a “new source performance standard,” that it has promulgated under authority granted to it by §306(b) of the CWA. Section 306(b) gives the EPA authority to regulate the amount of pollutants that certain categories of new sources may discharge into the navigable waters of the United States. 33 U.S.C. § 1316(b). Pursuant to this authority, the EPA in 1982 promulgated a new source performance standard restricting discharges from new froth-flotation gold mines like Coeur Alaska’s. The standard is stringent: It allows “no discharge of process wastewater” from these mines. 40 C.F.R. § 440.104(b)(1).

Applying that standard to the discharge of water from Lower Slate Lake into the downstream creek, the EPA’s § 402 permit sets strict limits on the amount of pollutants the water may contain. The permit requires Coeur Alaska to treat the water using “reverse osmosis” to remove aluminum, suspended solids, and other pollutants. App. 298a; *id.*, at 304a. Coeur Alaska must monitor the water flowing from the lake to be sure that the

pollutants are kept to low, specified minimums. *Id.*, at 326a–330a.

## C

SEACC brought suit against the Corps of Engineers and various of its officials in the United States District Court for the District of Alaska. The Corps permit was not in accordance with law, SEACC argued, for two reasons. First, in SEACC’s view, the permit was issued by the wrong agency—Coeur Alaska ought to have sought a §402 permit from the EPA, just as the company did for the discharge of water from the lake into the downstream creek. See Part I–B–2, *supra*. Second, SEACC contended that regardless of which agency issued the permit, the discharge itself is unlawful because it will violate the EPA new source performance standard for froth-flotation gold mines. (This is the same performance standard described above, which the EPA has already applied to the discharge of water from the lake into the downstream creek. See *ibid.*) SEACC argued that this performance standard also applies to the discharge of slurry into the lake. It contended further that the performance standard is a binding implementation of §306. Section 306(e) of the CWA makes it “unlawful” for Coeur Alaska to “operate” the mine “in violation of” the EPA’s performance standard. 33 U.S.C. § 1316(e).

Coeur Alaska and the State of Alaska intervened as defendants. Both sides moved for summary judgment. The District Court granted summary judgment in favor of the defendants. The Court of Appeals for the Ninth Circuit reversed and ordered the District Court to vacate the Corps of Engineers’ permit. *Southeast Alaska Conservation Council v. United States Army Corps of Engs.*, 486 F.3d 638, 654–655 (2007).

The Court of Appeals concluded that Coeur Alaska required a § 402 permit for its slurry discharge, that the Corps lacked authority to issue such a permit under § 404, and that the proposed discharge was unlawful because it would violate the EPA new source performance standard and § 306(e).

The decision of the Court of Appeals in effect reallocated the division of responsibility that the Corps and the EPA had been following. The Court granted certiorari. We now hold that the decision of the Court of Appeals was incorrect.

## II

The question of which agency has authority to consider whether to permit the slurry discharge is our beginning inquiry. We consider first the authority of the EPA and second the authority of the Corps. Our conclusion is that under the CWA the Corps had authority to determine whether Coeur Alaska was entitled to the permit governing this discharge.

## A

Section 402 gives the EPA authority to issue “permit[s] for the discharge of any pollutant,” with one important exception: The EPA may not issue permits for fill material that fall under the Corps’ § 404 permitting authority. \* \* \*

Section 402 thus forbids the EPA from exercising permitting authority that is ‘provided [to the Corps] in § 404.

\* \* \*

The Act is best understood to provide that if the Corps has authority to issue a permit for a discharge under § 404, then the EPA lacks authority to do so under § 402.

Even if there were ambiguity on this point, the EPA’s own regulations would resolve it. Those regulations provide that “[d]ischarges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA” “do not require permits” from the EPA. 40 C.F.R. § 122.3.

In SEACC’s view, this regulation implies that some “fill material” discharges are not regulated under § 404—else, SEACC asks, why would the regulation lack a comma before the word “which,” and thereby imply that only a subset of “discharges of ... fill material” are “regulated under section 404.” *Ibid.*

The agencies, however, have interpreted this regulation otherwise. In the agencies’ view the regulation essentially restates the text of § 402, and forbids the EPA from issuing permits for discharges that “are regulated under section 404.” 40 C.F.R. § 122.3(b); cf. CWA § 402(a) (“[e]xcept as provided in ... [§ 404], the Administrator may . . . issue a permit”). Before us, the EPA confirms this reading of the regulation. Brief for Federal Respondents 27. The agency’s interpretation is not “plainly erroneous or inconsistent with the regulation”; and so we accept it as correct. *Auer v. Robbins*, 519 U.S.452, 461 (1997) (internal quotation marks omitted).

The question whether the EPA is the proper agency to regulate the slurry discharge thus depends on whether the Corps of Engineers has authority to do so. If the Corps has authority to issue a permit, then the EPA may not do so. We turn to the Corps’ authority under § 404.

## B

Section 404(a) gives the Corps power to “issue permits ... for the discharge of dredged or fill material.” 33 U.S.C. § 1344(a). As all parties concede, the slurry meets the definition of fill material agreed upon by the agencies in a joint regulation promulgated in 2002. That regulation defines “fill material” to mean any “material [that] has the effect of ... [c]hanging the bottom elevation” of water—a definition that includes “slurry, or tailings or similar

mining-related materials.” 40 C.F.R. § 232.2.

SEACC concedes that the slurry to be discharged meets the regulation’s definition of fill material. Brief for Respondent SEACC et al. 20. Its concession on this point is appropriate because slurry falls well within the central understanding of the term “fill,” as shown by the examples given by the regulation. See 40 C.F.R. § 232.2 (“Examples of such fill material include, but are not limited to: rock, sand, soil, clay . . . .”). The regulation further excludes “trash or garbage” from its definition. *Ibid.* SEACC expresses a concern that Coeur Alaska’s interpretation of the statute will lead to §404 permits authorizing the discharges of other solids that are now restricted by EPA standards. Brief for Respondent SEACC et al. 44–45 (listing, for example, “feces and uneaten feed,” “litter,” and waste produced in “battery manufacturing”). But these extreme instances are not presented by the cases now before us. If, in a future case, a discharger of one of these solids were to seek a § 404 permit, the dispositive question for the agencies would be whether the solid at issue—for instance, “feces and uneaten feed”—came within the regulation’s definition of “fill.” SEACC cites no instance in which the agencies have so interpreted their fill regulation. If that instance did arise, and the agencies were to interpret the fill regulation as SEACC fears, then SEACC could challenge that decision as an unlawful interpretation of the fill regulation; or SEACC could claim that the fill regulation as interpreted is an unreasonable interpretation of § 404. The difficulties are not presented here, however, because the slurry meets the regulation’s definition of fill.

Rather than challenge the agencies’ decision to define the slurry as fill, SEACC instead contends that § 404 contains an implicit exception. According to SEACC, § 404 does not authorize the Corps to permit a discharge of fill material if that material is subject to an EPA new source performance standard.

But §404’s text does not limit its grant of power in this way. Instead, § 404 refers to all “fill material” without qualification. Nor do the EPA regulations support SEACC’s reading of § 404. The EPA has enacted guidelines, pursuant to § 404(b), to guide the Corps permitting decision. 40 C.F.R. pt. 230. Those guidelines do not strip the Corps of power to issue permits for fill in cases where the fill is also subject to an EPA new source performance standard.

SEACC’s reading of § 404 would create numerous difficulties for the regulated industry. As the regulatory regime stands now, a discharger must ask a simple question—is the substance to be discharged fill material or not? The fill regulation, 40 C.F.R. § 232.2, offers a clear answer to that question; and under the agencies’ view, that answer decides the matter—if the discharge is fill, the discharger must seek a § 404 permit from the Corps; if not, only then must the discharger consider whether any EPA performance standard applies, so that the discharger requires a § 402 permit from the EPA.

Under SEACC’s interpretation, however, the discharger would face a more difficult problem.

The discharger would have to ask—is the fill material also subject to one of the many hundreds of EPA performance standards, so that the permit must come from the EPA, not the Corps? The statute gives no indication that Congress intended to burden industry with that confusing division of permit authority.

The regulatory scheme discloses a defined, and workable, line for determining whether the Corps or the EPA has the permit authority. Under this framework, the Corps of Engineers, and not the EPA, has authority to permit Coeur Alaska’s discharge of the slurry.

[In Part III of the opinion, the Court determined that the Corps did not act unlawfully by failing to include conditions in the Section 404 permit that would be necessary to comply with the new source performance standards of Section 306 of the Clean Water Act.]

\* \* \*

**Justice Ginsburg**, with whom **Justice Stevens** and **Justice Souter** join, *dissenting*:

Petitioner Coeur Alaska, Inc., proposes to discharge 210,000 gallons per day of mining waste into Lower Slate Lake, a 23-acre subalpine lake in Tongass National Forest. The “tailings slurry” would contain concentrations of aluminum, copper, lead, and mercury. Over the life of the mine, roughly 4.5 million tons of solid tailings would enter the lake, raising the bottom elevation by 50 feet. It is undisputed that the discharge would kill all of the lake’s fish and nearly all of its other aquatic life.<sup>1</sup>

Coeur Alaska’s proposal is prohibited by the Environmental Protection Agency (EPA) performance standard forbidding any discharge of process wastewater from new “froth-flotation” mills into waters of the United States. See 40 C.F.R. § 440.104(b)(1) (2008). Section 306 of the Clean Water Act directs EPA to promulgate such performance standards, 33 U.S.C. § 1316(a), and declares it unlawful for any discharger to violate them, § 1316(e). Ordinarily, that would be the end of the inquiry.

Coeur Alaska contends, however, that its discharge is not subject to EPA’s regulatory regime, but is governed, instead, by the mutually exclusive permitting authority of the Army Corps of Engineers. The Corps has authority, under § 404 of the Act, § 1344(a), to issue permits for discharges of “dredged or fill material.” By regulation, a discharge that has the effect of raising a water body’s bottom elevation qualifies as “fill material.” See 33 C.F.R. § 323.2(e) (2008). Discharges properly within the Corps’ permitting authority, it is undisputed,

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<sup>1</sup> Whether aquatic life will eventually be able to inhabit the lake again is uncertain. Compare *ante*, at 5, with App. 201a–202a; and *Southeast Alaska Conservation Council v. United States Army Corps of Engineers*, 486 F.3d 638, 642 (9<sup>th</sup> Cir. 2007).

are not subject to EPA performance standards. See *ante*, at 20; Brief for Petitioner Coeur Alaska 26; Brief for Respondent Southeast Alaska Conservation Council et al. 37.

The litigation before the Court thus presents a single question: Is a pollutant discharge prohibited under § 306 of the Act eligible for a § 404 permit as a discharge of fill material? In agreement with the Court of Appeals, I would answer no. The statute's text, structure, and purpose all mandate adherence to EPA pollution-control requirements. A discharge covered by a performance standard must be authorized, if at all, by EPA.

I

A

Congress enacted the Clean Water Act in 1972 “to restore and maintain the chemical, physical, and biological integrity” of the waters of the United States. 33 U.S.C. § 1251(a). “The use of any river, lake, stream or ocean as a waste treatment system,” the Act's drafters stated, “is unacceptable.” S. Rep. No. 92–414, p. 7 (1971). Congress announced in the Act itself an ambitious objective: to eliminate, by 1985, the discharge of all pollutants into the Nation's navigable waters. 33 U.S.C. § 1251(a).

In service of its goals, Congress issued a core command: “[T]he discharge of any pollutant by any person shall be unlawful,” except in compliance with the Act's terms. § 1311(a). \* \* \*

The Act instructs EPA to establish various technology-based, increasingly stringent effluent limitations for categories of point sources. *E.g.*, §§ 1311, 1314. These limitations, formulated as restrictions “on quantities, rates, and concentrations of chemical, physical, biological, and other constituents,” § 1362(11), were imposed to achieve national uniformity among categories of sources. See, *e.g.*, *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 129–130 (1977). The limitations for a given discharge depend on the type of pollutant and source at issue. \* \* \*

Of key importance, new sources must meet stringent “standards of performance” adopted by EPA under § 306. That section makes it “unlawful for any ... new source to operate ... in violation of” an applicable performance standard. 33 U.S.C. § 1316(e) (emphasis added). In line with Congress' aim “to insure ... ‘maximum feasible control of new sources,’ ” *du Pont*, 430 U.S., at 138, the preferred standard for a new source is one “ ‘permitting no discharge of pollutants,’ ” *id.*, at 137–138 (quoting 33 U.S.C. § 1316(a)(1) (emphasis added)). Moreover, new sources, unlike existing sources, are not eligible for EPA-granted variances from applicable limitations. 430 U.S., at 138. \* \* \*

In 1982, EPA promulgated new source performance standards for facilities engaged in mining, including those using a froth-flotation milling process. See *Ore Mining and Dressing Point Source Category Effluent Limitations Guidelines and New Source*

*Performance Standards*, 47 Fed. Reg. 54598 (1982). Existing mills, the Agency found, were already achieving zero discharge; it was therefore practicable, EPA concluded, for new mills to do as well. *Id.*, at 54602. Accordingly, under 40 C.F.R. § 440.104(b)(1), new mines using the froth-flotation method, as Coeur Alaska proposes to do, may not discharge wastewater directly into waters of the United States.

## B

The nationwide pollution-control requirements just described are implemented through the National Pollution Discharge Elimination System (NPDES), a permitting scheme set forth in § 402 and administered by EPA and the States. The NPDES is the linchpin of the Act, for it transforms generally applicable effluent limitations into the individual obligations of each discharger. *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 (1976). The discharge of a pollutant is generally prohibited unless the source has obtained a NPDES permit. *E.g.*, *EPA v. National Crushed Stone Assn.*, 449 U.S. 64, 71 (1980) (“Section 402 authorizes the establishment of the [NPDES], under which every discharger of pollutants is required to obtain a permit.”).

The Act also establishes a separate permitting scheme, administered by the Corps, for discharges of “dredged or fill material.” 33 U.S.C. § 1344(a). Section 404 hews to the Corps’ established expertise in matters of navigability and construction. The § 404 program does not implement the uniform, technology-based pollution-control standards set out, *inter alia*, in § 306. Instead, § 404 permits are subject to regulatory guidelines based generally on the impact of a discharge on the receiving environment. *See* § 1344(b); *ante*, at 4–5.

As the above-described statutory background indicates, Coeur Alaska’s claim to a § 404 permit carries weighty implications. If eligible for that permit, Coeur Alaska can evade the exacting performance standard prescribed by EPA for froth-flotation mills. It may, instead, use Lower Slate Lake “as the settling pond and disposal site for the tailings.” App. 360a (Corps’ Record of Decision).

## II

Is a pollutant discharge prohibited under § 306(e) eligible to receive a § 404 permit as a discharge of fill material? All agree on preliminary matters. Only one agency, the Corps or EPA, can issue a permit for the discharge. *See ante*, at 10, 22. Only EPA, through the NPDES program, issues permits that implement § 306. *See supra*, at 2. Further, § 306(e) and EPA’s froth-flotation performance standard, unless inapplicable here, bar Coeur Alaska’s proposed discharge. *See ante*, at 14–15.

No part of the statutory scheme, in my view, calls into question the governance of EPA’s performance standard. The text of § 306(e) states a clear proscription: “[I]t shall be unlawful for any owner or operator of any new source to operate such source in violation of any

standard of performance applicable to such source.” 33 U.S.C. § 1316(e). Under the standard of performance relevant here, “there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process” for mining gold. 40 C.F.R. § 440.104(b)(1). The Act imposes these requirements without qualification.

Section 404, stating that the Corps “may issue permits” for the discharge of “dredged or fill material,” does not create an exception to §306(e)’s plain command. 33 U.S.C. § 1344(a). *Cf. ante*, at 12. Section 404 neither mentions § 306 nor states a contrary requirement. The Act can be home to both provisions, with no words added or omitted, so long as the category of “dredged or fill material” eligible for a § 404 permit is read in harmony with § 306. Doing so yields a simple rule: Discharges governed by EPA performance standards are subject to EPA’s administration and receive permits under the NPDES, not § 404.

This reading accords with the Act’s structure and objectives. It retains, through the NPDES, uniform application of the Act’s core pollution-control requirements, and it respects Congress’ special concern for new sources. Leaving pollution-related decisions to EPA, moreover, is consistent with Congress’ delegation to that agency of primary responsibility to administer the Act. Most fundamental, adhering to § 306(e)’s instruction honors the overriding statutory goal of eliminating water pollution, and Congress’ particular rejection of the use of navigable waters as waste disposal sites. *See supra*, at 2–3. *See also* 33 U.S.C. § 1324 (creating “clean lakes” program requiring States to identify and restore polluted lakes). \* \* \*

### Questions and Comments

1. Did the case involve any addition of pollutants into wetlands? If not, does it have any implications for disposal of slurry and mining waste in wetlands?
2. In its recitation of the facts, the majority indicates that the Corps determined that disposal of the slurry in Lower Slate Lake was the “least environmentally damaging practicable” way to dispose of the tailings and the court contrasted the harm that would be caused to the lake with the permanent loss of wetlands that would occur under one of the alternative proposals that involved storing the tailings near the mine in a “dry tailings facility.” However, the Court does not mention that the “dry tailings facility” alternative would destroy the most common types of wetlands in Alaska, while the activities associated with disposal in the Lake would affect a greater variety of wetland types. *See* [U.S. Department of Agriculture, U.S. Environmental Protection Agency, U.S. Army Corps of Engineers, Alaska Department of Natural Resources, Kensington Gold Project, Final Environmental Impact Statement § 4.12.3 \(Dec. 2004\)](#). EPA determined that the alternative involving the construction of the “dry tailings facility” was the “environmentally preferred alternative.” *Id.* at 5. The Court also indicates that EPA deferred to the



Corps' determination that the disposal of the tailings in the Lake was "environmentally preferable" because EPA did not veto the Corps permit. Do you agree? What is the standard for EPA's exercise of its veto? See [33 U.S.C. § 1344\(c\)](#). What considerations impact EPA's decision regarding whether to veto a Corps permit? Chapter 8 of this book examines EPA's veto authority in detail.

3. The case involves two questions: (a) whether the Corps or EPA has authority to issue a permit for the addition of the slurry to the Lower Slate Lake; and (b) whether the Corps acted in accordance with the law when it issued the Section 404 permit to Coeur. With regard to the first question, does the Court address the question whether the slurry is "fill" material under the Corps' regulatory definition and, if so, whether the regulatory definition is within the Corps' authority under the Clean Water Act? If not, why not?
4. What is the basis for SEACC's argument that the Corps does not have authority under Section 404 to issue permits for the disposal of the mine slurry in Lower Slate Lake? On what tools of statutory interpretation does the majority rely to conclude that the Corps can issue such permits? In light of the approach taken by the majority, could EPA change its interpretation of the statute and assert jurisdiction over disposal activities like Coeur's in the future? Does the dissent agree with the majority that industries like the mining industry would find it difficult to determine whether EPA had adopted technology based standards that applied to their pollution discharges?
5. Does the Court's decision provide industries with an end run around EPA's technology-based standards? If EPA issued the permit under section 402, rather than the Corps issuing the permit under Section 404, the permit would prohibit Coeur from discharging any "process wastewater" from the mine into the Lake. On what statutory interpretation tools does the dissent rely to determine that EPA, rather than the Corps, should issue permits for discharges of fill material by industries when EPA has adopted technology based standards that apply to those industries?
6. On the second question, regarding whether the Corps acted within its authority in issuing a Section 404 permit for the disposal of the mine slurry without requiring the permittee to comply with EPA's technology based standards, the majority concluded that the statute and regulations were ambiguous, but that the agencies' interpretation of the ambiguous regulations was reasonable and entitled to *Auer* deference. While Justice Scalia concurred in the result, he wrote separately to criticize the majority's approach. He pointed out that [United States v. Mead, 533 U.S. 218 \(2001\)](#), a case from which he dissented, limited the situations in which *Chevron* deference applied. See *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 295 (Scalia, *dissenting*). Although he

disagreed with *Mead*, Scalia criticized the majority for, in essence, creating an end run around *Mead* by holding that the agencies' interpretation of the Clean Water Act was not entitled to *Chevron* deference but according the agencies a similar degree of deference in reviewing their interpretation of their regulations. *Id.* He argued that the Court should not accord agencies *Auer* deference when the statute *and* regulation being interpreted are both ambiguous. *Id.* Nevertheless, he concurred with the majority's ruling, because he thought that the agencies actions were reasonable, and he wrote, "I favor overruling *Mead*. Failing that, I am pleased to join an opinion that effectively ignores it." 557 U.S. at 296.

7. **Post-script:** The Kensington Mine began operations on July 3, 2010 and currently has over 300 employees. Operating costs at the mine for 2013 were \$890 per ounce. See [Coeur Mining, Kensington, Alaska](#). In 2006, before the mine started operations, it paid a fine of \$18,334 to EPA for stormwater violations associated with construction. See [Elizabeth Bluemink, Kensington Gold Mine Operator to Pay \\$170,000 Federal Fine, Anchorage Daily News \(Dec. 15, 2010\)](#). The following year, it began discharging sediment and acidic stormwater into a nearby creek in violation of the Clean Water Act. *Id.* EPA discovered the violations the following year and the mine operator paid a \$170,000 fine in 2010 for violations between 2006 and 2010. *Id.*

## Chapter Quiz

Now that you've finished the material covering activities regulated under Section 404, why not try a CALI lesson on the material at <http://cca.li/PV>. It should only take about a half hour or less.

# Chapter 6

## Section 404 Permits

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The cornerstone of federal wetlands protection is the Clean Water Act Section 404 permit program. Chapters 4 and 5 of this book outlined the scope of activities that require a Section 404 permit, but this Chapter will begin with a brief explanation of a few statutory exemptions to the permit requirement that were not discussed in those chapters. Most of the chapter, though, focuses on the processes and standards for the two types of Section 404 permits: General Permits and Individual Permits.

### I. Permit Exemptions

[Section 404\(f\)\(1\)](#) of the Clean Water Act exempts from the Section 404 permit requirement several categories of activities that are primarily associated with farming. Section 404(f)(1)(A), for instance, exempts discharges associated with “normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber and forest products, or upland soil and water conservation projects”. The exemptions in Section 404(f)(1), though, are



Photo 31 USDA Photo - <http://commons.wikimedia.org/wiki/File:GreenCountyWI.jpg>

tempered by a “recapture” provision in Section 404(f)(2), which requires a permit for the activities if they are carried out for the purpose of changing the use of the property and they impair the flow or circulation of navigable waters or reduce their reach. The exemption for “normal farming, silviculture and ranching activities” is described in the following excerpt.

## United States v. Huebner

752 F.2d 1235  
(7<sup>th</sup> Cir. 1985)

### Bauer, Circuit Judge

### Resources for the Case

[Unedited opinion](#) (From Justia)  
[Google Map of all the cases in the coursebook](#)

In 1978, pursuant to litigation commenced under the Clean Water Act (CWA), \* \* \* by the United States Army Corps of Engineers (Corps), defendants Roland G. Huebner, William Huebner and the Petenwell Potato Farms (Huebners), entered into a consent decree with the Corps regarding the maintenance of the wetlands on their property. In 1983, following a six-day hearing, the district court found the Huebners in contempt of the 1978 order and ordered them to comply with a restoration plan developed by the Corps. The Huebners appeal the lower court's contempt order and restoration plan. We affirm the district court's finding of contempt \* \* \*

In 1977, the Huebners, owners of a 4,000 acre vegetable farm, acquired "Bear Bluff Farms," a 5,000 acre property in Jackson County, Wisconsin, the largest continuous area of wetlands in Wisconsin. \* \* \* Since the turn of the century Bear Bluff has been used intermittently for a variety of agricultural purposes, including the production of dryland crops, such as corn and oats. For the twenty years preceding the Huebners' ownership, however, only cranberries have been grown on the land. \* \* \* The record indicates that the Huebners intended to expand the cranberry operations of Bear Bluff Farms and to use a portion of the farm for growing vegetables and other upland crops.

In 1977, the Huebners began to plow sections of the farm to clear out existing ditches and dig new ones. On September 2, 1977, the St. Paul District of the United States Army Corps of Engineers issued several cease and desist orders to the Huebners, alleging that their ditching activities constituted a permitless "discharge of dredged or fill material" into the Bear Bluff wetlands in violation of section 301 of the Federal Water Pollution Control Act, \* \* \* On November 10, 1977 the Corps filed a complaint in the district court seeking a permanent injunction and a financial penalty against the Huebners. In June, 1978 the parties settled the action by entering into a consent decree approved by District Judge James E. Doyle.

The Huebners complied with the immediate restoration provisions of the consent order. On November 16, 1982, however, the government moved for an order to show cause why the Huebners should not be held in contempt for violating the 1978 order. The government, through its affidavits, charged that dredged material had been placed on the sides of Beaver Creek and was sliding into the adjacent wetlands, that a portion of the wetland had been plowed and furrowed by a marsh plow, and that the dikes of the Hunter's Peak,

Juleane and Unnamed Reservoirs had been leveled and scraped by a bulldozer without notice to the Corps and without any Corps permit allowing such activity. The Huebners had planted barley in a plowed portion of the Hunter's Peak, and stated that they intended to plant corn.<sup>5</sup> \* \* \*

On August 4, 1983 the district court entered an order holding the Huebners in civil contempt of the court's 1978 consent order on the grounds that the government had proved by "clear and convincing evidence" that the Huebners had made permitless discharges of dredged and fill material into the Bear Bluff wetlands in violation of the 1978 order. The Huebners allege that they are not in contempt of the district court's 1978 order because the activities in which they engaged in on their land did not require a Corps permit. They allege that the district court erred in its interpretation of the agricultural exemptions of the CWA, as relevant to the 1978 consent order, in determining when permits are required. \* \* \*

The Huebners did not challenge the authority of the Corps to regulate parts of Bear Bluff Farms as wetlands in the district court, but argued that their activities were exempt from the CWA's permit process under Section 1344(f)(1). The district court held that the phrase "discharge of dredged or fill material" in the 1978 consent order incorporated the legal meaning of those terms under the CWA and therefore the question of whether the Huebners' permitless activities violated the terms of the 1978 consent decree hinged on the court's interpretation of the scope of Section 1344(f)(1)'s exemptions. The district court held that "[i]t is clear that the amendments that created the subsection (f) exceptions on which defendants rely were not intended to exempt all farming operations from the permit requirements, but only those whose effect upon wetlands or other waters was so minimal as not to warrant federal review and supervision." R. 118, Order at 17-18. The court then analyzed the defendants' actions in light of the purposes of the Clean Water Act, the intent of Congress in enacting the farming exceptions, and the terms of the 1978 order. Our review of the legislative history confirms the conclusion reached by the lower court.

Section 1344(f)(1) provides exemptions from the permit process for discharges into wetlands caused by agricultural activities, such as plowing and the maintenance of dikes, ponds, and farm roads.\* \* \* The exceptions of Section 1344(f)(1) are subject to section 1344(f)(2), however, which provides that discharges are not exempt from the permit process if they bring "an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced."

Our review of the legislative history of the agricultural exemptions convinces us that

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<sup>5</sup> The Huebners stated that they needed an immediate cash crop to pay for the equipment costs of their dredge and fill activities. R. 51. Cranberries take several years to become fully productive.

because of the significance of inland wetlands, which make up eighty-five percent of the nation's wetlands, \* \* \* Congress intended that Section 1344(f)(1) exempt from the permit process only "narrowly defined activities ... that cause little or no adverse effects either individually or cumulatively [and which do not] convert more extensive areas of water into dry land or impede circulation or reduce the reach and size of the water body." 3 LEGISLATIVE HISTORY at 420 (statement of Rep. Harsha, member of the conference committee, during House debates). See also *id.* at 474. The Fifth Circuit also has held that Sec. 1344(f)(1) was designed to be a "narrow exemption." *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 925 n.44 (5th Cir.1983).

Recognizing that "there has been widespread concern that many activities that are normally considered routine would be prohibited or made extremely difficult because of the complex regulatory procedures," 4 LEGISLATIVE HISTORY 897 (statement of Sen. Randolph), Congress enacted in the 1977 amendments a delicate balance of exceptions that protected wetlands while permitting routine activities to go on unimpeded.

The drainages exemption is very clearly intended to put to rest, once and for all, the fears that permits are required for draining poorly drained farm or forest land of which millions of acres exist. No permits are required for such drainage. Permits are required only where ditches or channels are dredged in a swamp, marsh, bog or other truly aquatic area. 4 LEGISLATIVE HISTORY 1042 (statement of Sen. Muskie). \* \* \* We therefore affirm the district court's narrow interpretation of the agricultural exemptions and its incorporation of the purpose of those exemptions into the finding of contempt against the Huebners for violation of the 1978 consent decree.

### Questions and Comments

1. Note that the court interpreted the exemption in Section 404(f)(1) *narrowly* to only exempt activities that "cause little or no adverse effects" on waters of the United States. Other Circuits have taken a similar approach. See *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810 (9<sup>th</sup> Cir. 2001), *aff'd by an equally divided court*, 537 U.S. 99 (2002); *United States v. Larkins*, 852 F.2d 189 (6<sup>th</sup> Cir. 1988). Note, also, that the recapture provision of Section 404(f)(2) focuses on both the *purpose* of an activity ("bringing an area of the navigable waters into a use to which it was not previously subject") and the *effect* of the activity ("where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced"). For a more general outline of the environmental regulation of farming, see J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 Ecology L. Q. 263 (2000).
2. **Other exemptions:** Section 404(f)(1) also exempts, from the Section 404 permit requirement, discharges associated with maintenance of dikes, dams, levees, and similar structures (404(f)(1)(B)); construction or maintenance of farm or stock ponds

or irrigation ditches or maintenance of drainage ditches (404(f)(1)(C)); construction of temporary sedimentation basins (404(f)(1)(D)); construction of various farm, forest, or mining roads constructed in accordance with best management practices (404(f)(1)(E)); and discharges from activities with respect to approved non-point source programs (404(f)(1)(F)).

3. **Regulations and guidance:** The Corps regulations implementing the Section 404(f)(1) exemptions are codified at [33 C.F.R. § 323.4](#). In addition, in May 1990, EPA and the Corps issued a joint memorandum addressing the exemptions. See [U.S. Environmental Protection Agency, U.S. Department of the Army, Memorandum: Clean Water Act Section 404 Regulatory Program and Agricultural Activities \(May 1990\)](#). The regulations and memo make it clear that farmers who have been farming wetlands as part of an established, ongoing operation do not have to obtain a Section 404 permit for those activities as long as the farmer doesn't convert the wetlands to dray land. *Id.*
4. **Interaction with Swampbuster:** The Corps regulatory definition of "waters of the United States" excludes "prior converted cropland." [33 C.F.R. § 328.3\(a\)\(8\)](#). Thus, if a wetland was converted to cropland prior to the enactment of the Food Security Act, see Chapter 2, *infra*, and meets the definition of "prior converted cropland", a Section 404 permit is not required for activities in that cropland. However, although the Natural Resources Conservation Agency makes determinations regarding the delineation of wetlands and the application of the Swampbuster provisions to farmers, see Chapter 2, *infra*, the Corps' regulations explicitly provide that "Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA." [33 C.F.R. § 328.3\(a\)\(8\)](#).

## II. Nationwide and Other General Permits

Five years after Congress created the Section 404 permit program, it amended the Clean Water Act to authorize the Corps of Engineers to approve the discharge of dredged or fill material through **general permits**, in addition to **individual permits**. See [33 U.S.C. § 1344\(e\)](#). Unlike individual permits, persons can often engage in the activities authorized by a general permit without applying to the Corps of Engineers for an individualized review of their activities and the effect of their activities on the environment. Instead, as long as the persons are engaged in activities authorized by the general permit and are complying with any terms or conditions of the permit, they do not need to obtain an individual Section 404 permit. For instance, the Corps of Engineers has issued nationwide general permits that authorize landowners to construct temporary recreational structures, reshape drainage ditches, build boat ramps and engage in a variety of other activities without applying for individual Section 404 permits, as long as they comply with the conditions in the nationwide

general permit. See [U.S. Army Corps of Engineers, 2012 Nationwide Permits, Conditions, District Engineer's Decision, Further Information, and Definitions \(with corrections\)](#).

Landowners can save significant time and money if their activities are authorized by a general permit. Even though some general permits require individualized review, as described below, the average time for processing nationwide general permits in 2010 was 32 days, compared to an average of 221 days for processing individual permit applications. See [U.S. Army Corps of Engineers, Reissuance of Nationwide Permits, 77 Fed. Reg. 10184, 10190 \(Feb. 21, 2012\)](#). Regarding cost, a 2002 study found that the cost of preparing the documentation necessary to undertake activities authorized by a nationwide permit was about 1/10 the cost of preparing the documentation necessary for an individual permit. See [David Sunding & David Zilberman, The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process, 42 Nat. Res. J. 59, 74 \(2002\)](#).

Most of the discharges of dredged or fill material that take place every year are authorized by general permits, rather than individual permits. In 2007 and 2008, for instance, approximately 95% of the discharges that were authorized by a Section 404 permit were authorized by a general permit, rather than an individual permit. See Royal C. Gardner, *Lawyers, Swamps, and Money* 102 (Island Press, 2011). There are currently 50 Nationwide permits in force, in addition to regional and State-wide general permits. See [U.S. Army Corps of Engineers, 2012 Nationwide Permits, Conditions, District Engineer's Decision, Further Information, and Definitions \(with corrections\)](#).

While general permits provide many advantages for landowners, the Clean Water Act limits the duration of nationwide permits and other general permits to five years. See [33 U.S.C. § 1344\(e\)\(2\)](#). In addition, the Corps has the authority to revoke or modify general permits if it determines, after opportunity for a public hearing, “that the activities authorized by the general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.” *Id.* Both the Corps and EPA have adopted general permit regulations. See [33 C.F.R. Part 325](#) (Corps’ regulations); [40 C.F.R. § 230.7](#) (EPA’s regulations).

#### **A. Issuance of General Permits**

The Clean Water Act authorizes the Corps of Engineers, “after notice and opportunity for public hearing” to issue general permits “on a State, regional or nationwide basis”, [33 U.S.C. § 1344\(e\)](#), and the agency has issued all of those types of permits. The three categories of general permits that the Corps issues are: (1) ***nationwide permits***; (2) ***state and regional permits***; and (3) ***programmatic general permits***. See [33 C.F.R. § 325.5\(c\)](#). ***Nationwide permits*** authorize dredge and fill activities on a national basis and the agency issues those permits through the traditional notice and comment rulemaking process. See [33 C.F.R. § 330.1\(b\)](#). While nationwide permits are developed at the Corps’ headquarters,



**state and regional permits** are issued by the district or division offices of the Corps of Engineers after a public notice and authorize activities within the State or region that issued the permit. See [33 C.F.R. § 325.3](#). **Programmatic general permits** are founded on existing federal, state or local programs to avoid duplication with those programs, so they may be issued on a national, state or regional level. See [33 C.F.R. § 325.5](#). In addition to general permits, the Corps authorizes some activities through **letters of permission**, another streamlined alternative to individual permits. *Id.* § 325.5(b)(2). The abbreviated procedures for letters of permission do not include a public notice. See [33 C.F.R. § 325.2\(e\)\(1\)](#).

### Questions and Comments

1. **Public participation:** The level and tone of public comments on the nationwide permits has evolved significantly over the years. The first nationwide permits were issued by the Corps in 1977 and the Corps received 163 comments on the proposal, most of which were positive comments. See [42 Fed. Reg. 37122, 37130 \(July 19, 1977\)](#). When the permits were reissued in 1996, the Corps received 4000 comments after one national public hearing and six regional public hearings. See [61 Fed. Reg. 65874 \(Dec. 13, 1996\)](#). By 2007, the number of public comments grew to 22,500, see [72 Fed. Reg. 11092 \(March 12, 2007\)](#), and in 2012, the Corps received 26,600 comments when it reissued the nationwide permits. See [77 Fed. Reg. 10184 \(Feb. 21, 2102\)](#). 26,300 of 26,600 comments were form letters addressing a single nationwide permit (NWP 21). *Id.* A significant portion of the comments that the Corps received were critical of various provisions of the program. How might that impact the time or resources required by the agency to reissue nationwide permits?
2. **Publication of the permits:** Until 1996, the nationwide general permits issued by the Corps of Engineers were published in the Federal Register as an Appendix to the nationwide permit regulations at 33 C.F.R. § 330. When the permits were reissued in 1996, however, the agency indicated that from that time forward, the nationwide permits would be published in the Federal register and announced with regional conditions in the public notices issued by the Corps' district offices and posted on the Internet. See [61 Fed. Reg. 65874 \(Dec. 13, 1996\)](#). What are the advantages of publication in that manner?
3. **Challenging NWPs:** Is the issuance of nationwide permits a final agency action that can be challenged in court? See *National Association of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272 (D.C. Cir. 2005). What other impediments might litigants face if they wanted to make a facial challenge to nationwide permits immediately upon their adoption?

## B. Conditions of General Permits

Although general permits are issued through a different process than individual permits and authorize activities by numerous actors, as opposed to a single applicant, general permits are still Section 404 permits and must comply with the legal requirements that apply to those permits. Accordingly, general permits will include conditions that are necessary to comply with the requirements of the Clean Water Act and any other applicable laws. In some cases, the conditions will even require an individualized review by the Corps of the prospective permittee's proposed activities.

Most significantly, the permits must include conditions to comply with the **Section 404(b)(1) guidelines**, described in the next section, that were developed by EPA and the Corps to establish the standards that apply to the review and issuance of all Section 404 permits. See [33 U.S.C. § 1344\(e\)\(1\)\(A\)](#). Thus, some general permits may require landowners to mitigate the harm to wetlands caused by their activities by creating, restoring, enhancing or preserving other wetlands. See Chapter 7, *infra*.

In addition, as outlined in Part III of this Chapter, depending on the nature and location of the activity being authorized by the Corps, the **Coastal Zone Management Act**, [16 U.S.C. §§ 1451, et seq.](#), the **Endangered Species Act**, [16 U.S.C. §§ 1531, et seq.](#), the **National Historic Preservation Act**, [16 U.S.C. §§ 470, et seq.](#), and other laws may require the Corps to consult with other agencies or may impose limits on the scope of the activities the Corps can authorize when it issues Section 404 permits. In order to comply with those laws, the Corps may consult with the other agencies as part of the process for issuing the general permits and the Corps will include conditions in the general permits required by the other laws or suggested by the agencies through the consultation process. See [U.S. Army Corps of Engineers, 2012 Nationwide Permits, Conditions, District Engineer's Decision, Further Information, and Definitions \(with corrections\)](#).

For instance, the Clean Water Act includes a process, **Section 401 certification**, whereby States can veto or impose conditions on a variety of federal permits, including Section 404 permits, to ensure that the permits comply with State water quality standards. See [33 U.S.C. § 1341](#). To comply with that process, the Corps will frequently seek 401 certification from States when developing a general permit and the Corps is required to seek such certification before issuing a nationwide permit. See [33 C.F.R. § 330.4\(c\)\(1\)](#). While States can certify that the general permit, as proposed, will meet their water quality standards, they can also refuse certification (in essence, prohibiting the use of the general permit in their State) or they can require the Corps to include conditions in the general permit to comply with State water quality standards (including a condition that requires approval from the State for individual projects that will be conducted under the general permit.) *Id.* § 330.4(c). The Corps of Engineers issued a Regulatory Guidance Letter in 1992 to address the relationship between general permits and the Section 401 certification process, including the conditions that States could appropriately include in those permits. See [U.S.](#)

[Army Corps of Engineers, RGL 92-04, Section 401 Water Quality Certification and Coastal Zone Management Act Conditions for Nationwide Permits \(Sept. 1992\).](#)

When developing general permits, the Corps engages in similar consultation with States that have approved Coastal Zone Management Plans to ensure that the permits include conditions necessary to comply with the Coastal Zone Management Act. *Id.* While the Corps consults with States and other agencies when developing general permits if another statute requires the Corps to consult when issuing permits, a Corps nationwide permit might not incorporate conditions to comply with **all** federal, state and local laws, so the agency's regulations clearly provide that nationwide permits "do not obviate the need to obtain other Federal, state or local permits, approvals or authorizations required by law." See [33 C.F.R. § 330.4\(b\)\(2\).](#)

In addition to the conditions described above, the Corps frequently includes a condition in general permits that requires persons who intend to undertake activities authorized by the permit to notify the Corps prior to undertaking those activities (provide a "**pre-construction notification**"). See [U.S. Army Corps of Engineers, 2012 Nationwide Permits, Conditions, District Engineer's Decision, Further Information, and Definitions \(with corrections\) 37.](#) In some cases, the permit also includes a condition that precludes persons from undertaking actions authorized by the permit until the Corps has reviewed and approved their proposed action. *Id.* at 37-41. Even in those cases, though, the process for the landowner is faster than the individual Section 404 permit process.

### Questions and Comments

1. **National Environmental Policy Act compliance:** The National Environmental Policy Act requires federal agencies to prepare an **environmental impact statement (EIS)** for major federal actions that significantly affect the quality of the human environment, see [42 U.S.C. § 4332\(2\)\(C\).](#) The EIS examines the environmental effects of the proposed agency action and alternatives to the agency action and is developed with public participation. *Id.* If it is not clear whether an action will have a sufficient impact on the environment to require the preparation of an EIS, agencies generally are required to prepare an **environmental assessment (EA)** to determine if an environmental impact statement is necessary. See [40 C.F.R. § 1501.4.](#) An EA is a more streamlined study of the effects of the action and alternatives. *Id.* [§ 1508.9.](#) When the agency completes the EA, it will either determine that the impacts of the action are not significant enough to require an EIS and it will issue a "**finding of no significant impact**" (**FONSI**) or it will determine that an EIS is necessary, and it will prepare one. *Id.* [§ 1501.4.](#) Since the issuance of a permit is a federal action under NEPA, the Corps must prepare an EIS or EA when issuing a Section 404 permit, either as an individual permit or a general permit.

When the Corps issues nationwide permits or other general permits, it usually

prepares an EA or EIS for the permit before it provides notice of the proposed permit and the Corps provides for the public participation required by NEPA as part of the development of the permit. See [33 C.F.R. § 330.5\(b\)\(3\)](#). Even though the Corps generally prepares at least an EA when issuing a nationwide permit, courts have invalidated several of the Corps' general permits on the grounds that the agency failed to prepare adequate environmental analyses under NEPA.

For instance, NWP 29, the nationwide permit that the Corps issued to authorize discharges for construction of single family housing was invalidated in 1998 in *Alaska Center for the Environment v. West*, 31 F. Supp. 714 (D. Alaska 1998), but it was subsequently reissued in a modified form. More recently, the United States Court of Appeals for the Sixth Circuit invalidated NWP 21, the nationwide surface coal mining permits that authorized the discharges associated with valley fills discussed in Chapter 5 of this book, see [Kentucky Riverkeeper, Inc. v. Rowelette, 714 F.3d 402 \(6<sup>th</sup> Cir. 2013\)](#).

2. **Modification, Suspension or Revocation of NWPs:** As noted above, the Corps has statutory authority to revoke or modify general permits if the agency determines that the activities authorized by the permit have an adverse impact on the environment or are more appropriately authorized by individual permits. See [33 U.S.C. § 1344\(e\)\(2\)](#). Accordingly, the Corps' regulations for nationwide permits provide that the agency can modify the permits (by imposing additional or revised terms or conditions on the permit), suspend the permits or revoke the permits for a geographic area, class of activity, class of waters, or even for specific individual activities. See [33 C.F.R. § 330.4\(e\)](#).
3. **Expiring RGLs:** RGL 92-04, and some of the other RGLs cited in this book, may have technically expired, but the Corps issued a regulatory guidance letter in 2005 that provides that many of the RGLs that technically have expired "provide useful information and ... are still generally applicable to current program execution". See [U.S. Army Corps of Engineers, RGL 05-06, Expired Regulatory Guidance Letters 2-3 \(Dec. 7, 2005\)](#). RGL 92-04 and the other RGLs cited in this book are in the category of RGLs listed in RGL 05-06 as "still generally applicable". *Id.*

## Research Problems

1. The Wilson family live just outside of Savannah, Georgia on a 5 acre lot. George and Martha Wilson would like to build a pond in a wet portion of their back yard to attract birds and other wildlife. Unfortunately, in order to construct the pond, they will be placing fill material in the wetlands on their property. The company that will be building the pond has indicated that the construction will likely impact about 1 acre of wetlands and the surface area of the pond will be about 2 acres. Before the Wilsons begin work on the pond, they have sought your advice regarding whether they need to apply for an individual Section 404 permit or whether a national or regional general permit might authorize their project. Assuming that the wetlands are jurisdictional waters of the United States, please advise them accordingly. In addition, if the construction of the pond may be authorized by a general permit, please advise them whether they need to notify the Corps of Engineers before they begin the project and whether they will need to provide any compensatory mitigation for the impacts to the wetlands.

2. The Mitchell family would like to build a new ocean-front home in Florida. Construction of the foundation and building pad for the home will require an addition of fill material into tidal wetlands. Can the Mitchell's rely on a nationwide general permit to authorize the construction of their new home? If so, do they need to notify the Corps of Engineers before they begin construction?

### C. Similar in Nature / Minimal Environmental Effects

There are limits on the activities that the Corps can authorize through general permits. The Clean Water Act allows the agency to issue general permits for categories of activities involving discharge of dredged or fill material if the agency determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. See [33 U.S.C. § 1344\(e\)\(1\)](#).

#### Activities that Could Be Covered in a General Permit

- Similar in nature
- Minimal adverse effects by the activities individually *and*
- Minimal adverse effects by the activities cumulatively

The following case and notes explore the meaning and application of those terms.

**Ohio Valley Environmental Coalition v. Bulen**

429 F.3d 493 (4<sup>th</sup> Cir. 2005)

**LUTTIG, Circuit Judge**

**Resources for the Case**

[NWPs in effect at the time of the case](#)  
[Unedited opinion](#) (From Justia)  
[Google Map of all of the cases in the coursebook](#)

This case presents the question whether the United States Army Corps of Engineers ("the Corps") exceeded its authority under the Clean Water Act ("CWA") when it promulgated Nationwide Permit 21 ("NWP 21"), a general permit for the discharge of dredged or fill material into the waters of the United States that allows projects to proceed only after receiving individualized authorization from the Corps. We conclude that the Corps complied with the CWA when it promulgated NWP 21. The contrary judgment of the district court is therefore vacated.

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\* \* \*

The Army Corps of Engineers has authority under the CWA to issue two types of permits for the discharge of dredged or fill material: individual permits and general permits. The Corps issues individual permits under section 404(a) on a case-by-case basis for discharges at "specified disposal sites," after providing notice and opportunity for public hearing. *Id.* § 1344(a). The Corps issues general permits, which authorize "categories of activities" rather than individual projects, under section 404(e). \* \* \*

Pursuant to section 404(e), the Corps has promulgated a number of general permits, all but one of which authorize projects that comply with the permits' terms to proceed without prior approval by the Corps. The exception, NWP 21 - which authorizes discharges of dredged or fill material associated with surface coal mining and reclamation projects - requires that projects be individually authorized by the Corps. NWP 21 authorizes:

discharges of dredged or fill material into waters of the U.S. associated with surface coal mining and reclamation operations provided the coal mining activities are authorized by the DOI, Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 and provided the permittee notifies the District Engineer in accordance with the "Notification" General Condition. In addition, to be authorized by this NWP, the District Engineer must determine that the activity complies with the terms and

conditions of the NWP and that the adverse environmental effects are minimal both individually and cumulatively and must notify the project sponsor of this determination in writing.

Issuance of Nationwide Permits, 67 Fed.Reg.2020, 2081 (Jan. 15, 2002).

In this litigation, plaintiffs, a coalition of environmental groups, have raised various challenges to NWP 21. The district court did not reach most of those challenges, holding simply that NWP 21 is facially invalid under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because it conflicts with the unambiguous meaning of section 404(e). \* \* \* The district court accordingly suspended existing authorizations under NWP 21 and enjoined the Corps from issuing further NWP 21 authorizations in the Southern District of West Virginia. \* \* \* This appeal followed.

## II

The district court concluded that NWP 21 conflicts with the unambiguous meaning of section 404(e) for essentially four reasons. First, it concluded that NWP 21 "defines a procedure instead of permitting a category of activities." \* \* \* Second, it concluded that section 404(e) "unambiguously requires determination of minimal impact before, not after, the issuance of a nationwide permit," and that, in violation of this requirement, "NWP 21 provides for a post hoc, case-by-case evaluation of environmental impact." \* \* \* [The district court also concluded that the procedure used by the agency was inadequate and that a condition included in the permit was in excess of the agency's jurisdiction.] None of these conclusions withstands scrutiny. \* \* \*

## A

The district court first concluded that NWP 21 fails to comply with section 404(e) because it "defines a procedure instead of permitting a category of activities." \* \* \* We disagree. NWP 21 plainly authorizes a "category of activities." The category of activities authorized by NWP 21 consists of those discharges of dredged or fill material that (1) are associated with surface coal mining and reclamation operations, so long as those operations are authorized by the Department of Interior or by states with approved programs under the Surface Mining Control and Reclamation Act of 1977, (2) are preceded by notice to the Corps, and (3) are approved by the Corps after the Corps concludes that the activity complies with the terms of NWP 21 and that its adverse environmental effects are minimal both individually and cumulatively. \* \* \*

The district court erroneously reasoned that NWP 21 does not authorize a "category of activities" because it is defined by procedural requirements "rather than objective requirements or standards." \* \* \* ("NWP 21 imposes no limit on the number of linear feet of a stream, for example, that might be impacted by a valley fill or surface impoundment. It

does not limit the total acreage of a watershed that might be impacted."). As an initial matter, we note that, by virtue of its incorporation of the requirements of the Surface Mining Control and Reclamation Act ("SMCRA"), NWP 21 does contain substantive requirements.<sup>1</sup> More importantly, nothing in section 404(e) or in logic prohibits, much less unambiguously prohibits, the use of procedural, in addition to substantive, parameters to define a "category." The district court therefore erred when it concluded that NWP 21 does not define a "category of activities." \* \* \*

## B

The district court next concluded that NWP 21 violates the unambiguous terms of section 404(e) because it allows the Corps to defer the statutorily-required minimal-environmental-impact determinations until after issuance of the nationwide permit. \* \* \*<sup>3</sup> Section 404(e) allows the Corps to issue a general permit only "if [it] determines ... that the activities in [the subject] category ... will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." 33 U.S.C. § 1344(e). The district court concluded that the Corps did not make the required minimal-impact determinations before issuing NWP 21, but instead opted to make those determinations on a case-by-case basis after issuance of the permit. \* \* \*

It is clear from the record before us that the Corps did make the required minimal-impact determinations before it issued NWP 21. \* \* \* The Decision Document for NWP 21 and the supplement to that document, set forth at pages 469-512 of the Joint Appendix, contain the Corps' pre-issuance analysis of the anticipated environmental impact of the activities authorized by NWP 21. \* \* \* The Corps' impact analysis took account of a variety of

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<sup>1</sup> SMCRA imposes a host of "performance standards" on "all surface coal mining and reclamation operations." 30 U.S.C. § 1265(b). For example, under SMCRA, all surface coal mining operations must "minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation." *Id.* § 1265(b)(10).

<sup>3</sup> The Corps argues that section 404(e) does not unambiguously require that the minimal-impact determinations be made before issuance of a nationwide permit. The Corps believes that the statute allows it to issue a nationwide permit so long as it makes the minimal-impact determinations before the permit is actually used to authorize discharges, even if after issuance of the permit. At the very least, the Corps argues, section 404(e)'s minimal impact determination requirement is temporally ambiguous, and the Corps' reading is a permissible construction entitled to *Chevron* deference. Because we conclude that the Corps made the required minimal-impact determinations before issuing NWP 21, we do not reach these contentions.



factors, including public commentators' opinions, \* \* \* NWP 21's incorporation of SMCRA's requirements, \* \* \* the nature of the coal-mining activities authorized by NWP 21, \* \* \* the applicability of a variety of General Conditions to NWP 21, \* \* \* and data about usage of previous versions of NWP 21 \* \* \* Based on these considerations and others, the Corps concluded that the activities authorized by NWP 21 "will not result in significant degradation of the aquatic environment." \* \* \* This determination was sufficient to meet the requirements of section 404(e).

The district court held that the Corps did not satisfy section 404(e) because it did not provide an *ex ante* guarantee that the activities authorized by NWP 21 would have only a minimal impact. The district court reasoned that, under section 404(e), "[t]he issuance of a nationwide permit ... functions as a guarantee ab initio that every instance of the permitted activity will meet the minimal impact standard," and that, by permitting the Corps to engage in "post hoc, case-by-case evaluation of environmental impact," NWP 21 "runs afoul of the statutory requirement of initial certainty." \* \* \*

The district court erred. It is simply not the case that issuance of a general permit functions as a guarantee ab initio that every instance of the permitted activity will have only a minimal impact. \* \* \*

For two reasons, we do not believe that an interpretation of section 404(e) that would require initial certainty is tenable. First, section 404(e)(2) gives the Corps authority to revoke or modify a general permit if, after issuing the permit, it "determines that the activities authorized by such general permit have an adverse impact on the environment." 33 U.S.C. § 1344(e)(2). This provision demonstrates that Congress anticipated that the Corps would make its initial minimal-impact determinations under conditions of uncertainty and that those determinations would therefore sometimes be inaccurate, resulting in general permits that authorize activities with more-than-minimal impacts. It also demonstrates that Congress expected that the Corps would engage in post-issuance policing of the activities authorized by general permits in order to ensure that their environmental impacts are minimal. \* \* \*

Second, it is impossible for the Corps' *ex ante* determinations of minimal impact to be anything more than reasoned predictions. Even under the paradigmatic general permit envisioned by the district court, where the parameters of the authorized activities are delineated in objective, measurable terms, the Corps' minimal-impact determinations would necessarily be a forecast only. This is so because the environmental impact of the activities authorized by a general permit depends on factors that, as a practical matter, are outside the Corps' ability to predict with certainty *ex ante*. This uncertainty is especially acute when the Corps issues a nationwide permit like NWP 21 because the Corps must attempt to forecast the environmental effects the authorized activities could have if undertaken anywhere in the country under any set of circumstances. \* \* \*

Nor can we agree with the district court's implicit conclusion that the Corps may not rely on the availability of post-issuance procedures, such as NWP 21's requirement of post-issuance individualized authorization, when it makes its pre-issuance minimal-impact determinations. \* \* \* The statute is silent on the question whether the Corps may make its pre-issuance minimal impact determinations by relying in part on the fact that its post-issuance procedures will ensure that the authorized projects will have only minimal impacts. We must therefore defer to the Corps' conclusion that it may do so if that conclusion is permissible in light of the statutory language and is reasonable. It is both. \* \* \*

In concluding that section 404(e) permits the Corps to rely in part on post-issuance procedures to make its pre-issuance minimal-impact determinations, we do not suggest that section 404(e) permits the Corps *completely* to defer the minimal-impact determinations until after issuance of the permit. We would have substantial doubts about the Corps' ability to issue a nationwide permit that relied solely on post-issuance, case-by-case determinations of minimal impact, with no general pre-issuance determinations. In such a case, the Corps' "determinations" would consist of little more than its own promise to obey the law. \* \* \*

However, we are satisfied, based on our review of the Corps' decision document, that the Corps did actually make, in advance, the minimal-impact determinations required by the statute. It made those determinations after undertaking a good-faith, comprehensive, pre-issuance review of the anticipated environmental effects of the activities authorized by NWP 21, and its partial reliance on post-issuance procedures to ensure minimal impacts did not make those determinations any less valid. \* \* \*

In sum, we conclude that the Corps complied with section 404(e) when it issued NWP 21. \* \* \* The contrary judgment of the district court and the injunction against NWP 21 authorizations are vacated and the case is remanded for further proceedings not inconsistent with this opinion.

### Questions and Comments

1. **Categories of activities that are similar in nature / scope and conditions:** Are there limits on the breadth of the categories of activities that can be regulated through a general permit? In the case above, NWP 21 authorized discharges of dredged or fill material associated with surface coal mining and reclamation activities if the discharges were authorized under the Surface Mining Control and Reclamation Act. While that category seems quite broad, the Corps narrowed it by limiting authorization to discharges when the discharger notifies the Corps that it plans to discharge under the permit and the Corps affirmatively authorizes the discharge, after reviewing the potential environmental effects of the discharge. Would the permit have sufficiently identified a category of activities that are similar in nature without the notification and approval procedures? What concerns are raised if

the category of activities is defined too broadly? While courts have frequently upheld the authorization of fairly broad categories of activities under general permits, they usually have done so after concluding that the conditions in the permit sufficiently narrow the categories so that they are “similar in nature.” In addition to the instant case, see [Sierra Club v. U.S. Army Corps of Engineers, 508 F.3d 1332 \(11<sup>th</sup> Cir. 2007\)](#) (upholding a general permit to cover “suburban development” activities over a 48,000 acre area based on the limiting conditions in the permit, but recognizing concerns about circumvention of the notice and public hearing requirements that would apply to individual permitting); [Alaska Center for the Environment v. West, 157 F.3d 680 \(9<sup>th</sup> Cir. 1998\)](#) (upholding a general permit that authorized discharges associated with construction of “residential buildings” and a broad range of other activities in the City of Anchorage based on the limiting conditions in the permit).

Prior to 1996, one of the most widely used nationwide permits that the Corps issued was NWP 26, which authorized a broad range of activities in waters above headwaters and in isolated waters. Many critics argued that the activities authorized by that permit were not “similar in nature,” and the Corps replaced the permit with a series of permits that addressed more narrowly tailored categories of activities. See [61 Fed. Reg. 65874 \(Dec. 13, 1996\)](#).

2. **Statutory / regulatory definition of “similar in nature”:** Does “similar in nature” refer to the nature of the projects, the nature of the effects, or both? Does the statute define “similar in nature”? The 404(b)(1) guidelines (regulations) limit the issuance of general permits to categories of activities where the activities are similar in nature *and* similar in their impact on water quality and the aquatic environment. See [40 C.F.R. § 230.7\(a\)](#) If the statute is silent and there is a regulation that interprets the statutory language, how does that impact judicial review of the language? See [Alaska Center for the Environment v. West, 157 F.3d 680 \(9<sup>th</sup> Cir. 1998\)](#) (upholding Corps determination that a broad range of activities authorized by the general permit were “similar in nature” because they would have similar impacts, when limited by the conditions in the permit).
3. **Documentation:** The 404(b)(1) guidelines require the Corps to prepare a written evaluation of the individual and cumulative impacts of the activities that will be authorized by a general permit, to demonstrate that they will be minimal, and an explanation of why the activities to be authorized are “similar in nature” before the agency issues the permit. See [40 C.F.R. § 230.7\(b\)](#).
4. **Minimal impacts:** In a footnote, in *Ohio Valley Environmental Coalition v. Bulen*, the court indicated that it would not reach the Corps’ contention that the Clean Water Act authorized the Corps to make the minimal impact determination for a general permit after the permit is issued, as long as the determination is made before the permit is used. If the court does not “reach the contentions”, does it provide some

guidance regarding whether the Corps' interpretation of the statute is reasonable?

5. **Post-issuance review:** As noted above, many of the nationwide permits issued by the Corps of Engineers include a "pre-construction notification" requirement, so that persons who intend to take actions authorized by the permit must notify the Corps prior to undertaking those actions. In most cases, if the actor provides that notice and the Corps does not notify them within 45 days that they *can't* proceed with their activity, they can undertake the activity authorized by the permit even though the Corps did not respond to their notice. See [U.S. Army Corps of Engineers, 2012 Nationwide Permits, Conditions, District Engineer's Decision, Further Information, and Definitions \(with corrections\) General Condition 31](#). In the *Ohio Valley Environmental Coalition v. Bulen* case, above, the presumption was reversed for NWP 21, so that persons could not undertake activities under the permit until the Corps affirmatively authorized the activities.
6. Should nationwide and other general permits include more stringent limits on the total acreage of wetlands that can be filled under those permits? See Steven G. Davison, *General Permits Under Section 404 of the Clean Water Act*, 26 Pace Envtl. L. Rev. 35 (2009).

#### D. **Combining permits**

In light of the fact that the Corps has issued many general permits on a national, regional, or State-wide basis, questions arise regarding whether a landowner can rely on (1) a combination of general permits; (2) multiple uses of a single general permit; or (3) a combination of general permits and individual permits to authorize discharges of dredged or fill material.

In situations where a project would require an **individual** Section 404 permit, the permittee may be able to undertake a *portion* of the project through a general permit while the Corps is processing the individual permit application but *only* if the portion of the project that would be authorized by the general permit "would have independent utility" and would be "able to function or meet [its] purpose independent of the total project." See [33 C.F.R. § 330.6\(d\)](#).

For situations where a developer would like to rely on multiple general permits, rather than an individual permit, to authorize a project, the Corps allows persons to combine two or more *different* nationwide permits, but only if they are being combined to authorize a "single and complete project." *Id.* [§ 330.6\(c\)](#). If the activities being authorized by the combination of general permits are really only part of a larger project and do not have "independent utility", they are not a "single and complete project" and the Corps' regulations do not allow developers to combine general permits to authorize the activities. See [Crutchfield v. County of Hanover, Virginia, 325 F.3d 211 \(4<sup>th</sup> Cir. 2003\)](#). Similarly, the Corps' regulations prohibit

*multiple* use of the *same* nationwide permit on a “single and complete project.” See [33 C.F.R. § 330.6\(c\)](#). The limits that the Corps places on the use of multiple general permits are designed to prevent developers from evading the individual permit requirement for a project by segmenting the project into a lot of smaller activities which could qualify for general permits. See [Crutchfield v. County of Hanover, Virginia, 325 F.3d 211 \(4<sup>th</sup> Cir. 2003\)](#).

### Resources

[Complete list of 2012 NWP's and conditions](#)

[Chart summarizing the 2012 NWP's and conditions](#)

[Final Decision Documents supporting the 2012 NWP's](#)

Examples of Regional and Programmatic permits - [Region GP 96-07](#);

Maryland Programmatic GP [MDSPG-4](#);

[Letter of Permission Process for California](#) (Sacramento District)

General permit regulations of the [Corps](#) and [EPA](#)

### Section Quiz

Now that you've finished the material on permit exemptions and general permits, why not try a CALI lesson on the material at: <http://cca.li/PW>. It will only take about fifteen minutes.

## III. Individual Permits

As noted above, most development activities in wetlands are authorized through general permits, rather than individual permits. Less than 5% of the projects authorized by the Corps each year are authorized through individual permits. See Royal C. Gardner, *Lawyers, Swamps, and Money* 102 (Island Press, 2011). Although the individual permit process is longer and more expensive than the general permit process, in most cases, the Corps will issue a permit at the end of the process. In 2007 and 2008, while the Corps evaluated more than 150,000 development activities for authorization under individual or general permits, it denied fewer than 750 individual permit applications (less than 1%). *Id.* That permit denial rate has remained fairly constant over the years. For instance, in 1981, the Corps denied 2.7% of the individual permit applications. See [U.S. Congress, Office of Technology Assessment, OTA-O-206, Wetlands: Their Use and Regulation 143-144 \(Mar. 1984\)](#). Once issued, individual permits generally authorize permittees to leave dredged or

fill material in wetlands indefinitely, see [33 C.F.R. § 325.6](#), but the Corps has the authority to modify, suspend or revoke the permits as “necessary by considerations of the public interest. *Id.* [§ 325.7](#).

## A. The Process

The Corps of Engineers reviews and issues or denies individual Section 404 permits through an informal process that involves public participation and review by EPA and other federal and state agencies. In most cases, the decision whether to issue or deny the permit will be made at the district level, by the District Engineer. See [33 C.F.R. § 325.2\(a\)\(6\)](#). While the Corps administers the Section 404 permit program, EPA plays an important role as well. In addition to reviewing and commenting on the individual permit applications, EPA, in consultation with the Corps, wrote the rules (the Section 404(b)(1) guidelines) that the Corps uses to determine whether to issue or deny permits and EPA has the authority to veto the Corps’ permits. See [33 U.S.C. § 1344\(c\)](#) (discussed in Chapter 8, *infra*).

### Resources

[Corps Video on the permitting process](#)  
Description of the permit process ([Corps HQ](#)); ([Corps Regional Office](#))  
[Graphical representation](#) of the permit process (Corps)  
[404 Permit application form](#)  
[404 Permit application instructions](#)  
[Fill out a Section 404 application online](#)  
[EPA web page re: Section 404 permitting](#)  
Search for [recently issued and pending Section 404 permits](#)  
404 permit regulations - [Corps](#); [EPA Veto](#);  
[EPA 404\(b\)\(1\) Guidelines](#)

Section 404 of the Clean Water Act provides that the Corps “may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” See [33 U.S.C. § 1344\(a\)](#). The Corps has interpreted that language to authorize it to issue permits through an informal process, rather than through the formal adjudication procedures of the Administrative Procedures Act, and courts have upheld that interpretation. See [Buttrey v. United States, 690 F.2d 1170 \(5<sup>th</sup> Cir. 1982\)](#). The Corps’ regulations that address the Section 404 permit process are codified at [33 C.F.R. Part 325](#).

## 1. Application, public notice and comment

The Corps encourages, but does not require, permit applicants who are proposing major projects to meet with the agency before filing their application for a brief pre-application consultation. See [33 C.F.R. § 325.1\(b\)](#). After an applicant files a *complete application* and pays the application fee (ranging from \$10 - \$100), the Corps issues a public notice of the permit application and invites public comment on the application. See [33 C.F.R. § 325.3](#). The notice is posted [online](#), in the post office or other public buildings in the area, sent to the applicant, adjoining property owners, appropriate federal, state and local agencies, the news media, and a variety of other interested parties and includes information outlined in the regulations that is “sufficient ... to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment.” [Id. § 325.3\(a\)](#).

The Corps normally provides for a 30 day public comment period and consults with EPA, the Fish and Wildlife Service, and several other agencies during this comment period to comply with other federal laws, as described below. All of the comments that the Corps receives from the public or other agencies are included in the administrative record for the agency’s ultimate decision and the agency provides the applicant with an opportunity to provide additional information in response to those comments. See [33 C.F.R. § 325.2\(a\)\(3\)](#).

## 2. Coordination with other agencies

In light of its authority to veto section 404 permits, see Chapter 8, *infra*, and its authority to bring enforcement actions for illegal discharges of dredged or fill material, see Chapter 10, *infra*, EPA is involved in the review and commenting process for Section 404 permits at an early stage. As the primary author of the Section 404(b)(1) guidelines, the standards that the Corps will use to evaluate the permit, EPA can provide vital comments regarding whether an application complies with those standards. The Fish and Wildlife Service also provides comments based on its authority under the [Fish and Wildlife Coordination Act](#) and the Endangered Species Act, discussed *infra*, and the [National Oceanographic and Atmospheric Administration](#) (NOAA), within the Department of Commerce provides comments on permits based on authority in the Endangered Species Act and Coastal Zone Management Act, discussed *infra*. The Corps has entered into Memoranda of Agreement with EPA, see [Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army, Section 404\(q\) \(August 11, 1992\)](#), the Fish and Wildlife Service, see [Memorandum of Agreement Between the Department of the Interior and the Department of the Army, Section 404\(q\) \(December 21, 1992\)](#) and NOAA, see [Memorandum of Agreement Between the Department of Commerce and the Department of the Army, Section 404\(q\) \(December 21, 1992\)](#) to coordinate their involvement in the review of permits and to minimize delays in processing the permits, as required by the statute. See [33 U.S.C. § 1344\(q\)](#). While the Corps consults with EPA, the Fish and Wildlife Service, and NOAA as part of the permit review process, the Corps retains the ultimately authority to decide whether to issue or deny the Section 404 permit. See [U.S. Army Corps](#)

[of Engineers, RGL 92-01, Federal Agencies Roles and Responsibilities \(May 12, 1992\).](#)

Many of those agencies, as well as states and other federal agencies, consult or comment during the permit process because the Corps' decision to issue or deny a Section 404 permit triggers provisions of other statutes or other provisions of the Clean Water Act.

For instance, Section 7(a)(2) of the **Endangered Species Act (ESA)**, [16 U.S.C. § 1536\(a\)\(2\)](#), requires federal agencies to insure that actions that they authorize, such as through the issuance of a Section 404 permit, are not likely to "jeopardize ... endangered ... or threatened species" or destroy or adversely modify their critical habitat. The ESA requires federal agencies to follow specific procedures to consult with the Fish and Wildlife Service or the National Marine Fisheries Service within NOAA (for marine species) to ensure that the agencies' actions don't violate Section 7. *Id.* § 1536(a); [50 C.F.R. Part 402, Subpart B](#) (Department of Interior's regulations). Accordingly, when the Corps receives a section 404 permit application, it reviews the application and, if the proposed activity may affect endangered or threatened species, it begins the consultation process required by the ESA. See [33 C.F.R. § 325.2\(b\)\(5\)](#). As part of the formal consultation process, the Fish and Wildlife Service or the National Marine Fisheries Service will prepare an environmental study called a biological opinion that evaluates whether the proposed activity will jeopardize the continued existence of an endangered or threatened species. See [50 C.F.R. § 402.14](#). If the Corps ultimately concludes that the activity proposed in a permit will jeopardize and endangered or threatened species or destroy or adversely modify its critical habitat, the agency must deny the permit.

The **Coastal Zone Management Act (CZMA)**, [16 U.S.C. §§ 1451 et seq.](#), also limits the Corps authority to issue Section 404 permits. If a state has an approved coastal zone management program under the CZMA, the Corps cannot issue a permit for an activity that affects the coastal zone unless the state certifies that the proposed activity complies with the state's program. *Id.* § 1456(c)(3). When the Corps receives a permit application for such an activity, the applicant must include a certification that the activity complies with the state's coastal zone management program. See [33 C.F.R. § 325.2\(b\)\(2\)](#). The Corps forwards that certification to the state for concurrence. *Id.* If the state objects, the Corps cannot issue the permit. *Id.* On the other hand, if the state concurs or fails to object within six months, the Corps can issue the permit. *Id.*

The **NEPA** and **Clean Water Act Section 401 certification** requirements discussed in the section above regarding *general permits* also apply to the Corps' evaluation of *individual permits*. Thus, when the Corps receives a Section 404 permit application, it will prepare either an **environmental assessment** or **environmental impact statement**, depending on the magnitude of the impacts of the activities authorized by the permit, as part of the permitting process. See [33 C.F.R. Part 325, App. B](#). NEPA requires public involvement in the preparation of those documents, so the Corps provides notice and appropriate opportunities to comment on the EA or EIS as part of the Section 404 permit review



process. *Id.* NEPA is a procedural statute and does not require agencies to take actions that have the least harmful impacts on the environment, so, as long as the Corps prepares the environmental assessment or environmental impact statement in accordance with the procedures and requirements of NEPA, the agency can issue or deny the Section 404 permit without further restrictions from NEPA.

In order to comply with the **Clean Water Act Section 401 certification** requirements, the Corps asks the applicant to submit the certification (that the discharge won't violate state water quality standards) from the State where the discharge will occur as part of the application. See [33 C.F.R. § 325.2\(b\)\(1\)](#). If the applicant does not provide the certification, the Corps seeks the certification from the State. *Id.* If, after the Corps issues the initial public notice for a permit application, EPA determines that additional states need to provide Section 401 certification, EPA will notify those states. *Id.* As noted above, in response to a request for certification, states can agree to the certification or they can object to the certification and seek to have conditions imposed on the discharge. The Corps cannot issue a Section 404 permit until states issue the 401 certification or waive their right to do so, by failing to act on a request for certification within 60 days. *Id.*

### 3. Hearings and Decision-making

Unless the other federal laws outlined above require a hearing because of the nature of a particular permit application, the Corps' regulations give the district engineers discretion to decide whether it is necessary to hold a public hearing on a Section 404 permit application. [Id. § 325.2\(a\)\(5\)](#). Few hearings are held, even though the Corps' regulations provide that the agency will hold a public hearing whenever any person requests a hearing during the comment period, unless the agency determines "that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing." [Id. § 327.4\(b\)](#). When the Corps holds a hearing on a permit application, it is not a formal trial-type hearing. The district engineer is usually the presiding officer at the hearing and any person may present oral or written testimony at the hearing and call witnesses to present statements, but there is no cross-examination of witnesses. See [33 C.F.R. Part 327](#).

When the Corps has completed its review of the permit application under the Clean Water Act standards discussed in the next section and has completed the consultation and review required by the laws outlined above, the agency will issue or deny the permit, or issue it with conditions. If the Corps issues a permit before other agencies have completed their review of the activities authorized by the permit, the Corps will normally condition the permit on approval by the other agencies. See [33 C.F.R. § 325.2\(d\)\(4\)](#). When the Corps makes a final decision on the permit application, it supports the decision with a written **statement of findings** or **record of decision** (if an EIS was prepared), which explains the basis for the agency's decision. [Id. § 325.2\(b\)\(6\)](#).

If the Corps denies a permit application or includes conditions in the permit that lead the

applicant to decline the permit, the applicant, but no third party, can appeal the Corps' permit decision administratively. See [33 C.F.R. § 331.6](#). The administrative process is described in Chapter 10 of this book. Permit applicants must appeal the Corps' decision through those administrative processes before they can appeal the decision in court. [Id. § 331.12](#). Since the administrative appeal process is only available to permit applicants, anyone else who wants to challenge the Corps' decision to issue, condition, or deny a Section 404 permit must challenge it in court. Chapter 10 of this book explores the judicial review and citizen suit provisions of the Clean Water Act in detail.

### Questions and Comments

1. **Timing:** The Corps' permit regulations require the Corps to make a determination regarding whether a permit application is complete within 15 days after receiving the application, and require the Corps to make a decision on a permit application within 60 days after the agency determines that the application is complete, unless specific conditions identified in the regulation are met. See [33 C.F.R. § 325.2](#). Not surprisingly, the process normally takes longer than that. Although the authors of a 2002 study claimed that it took, on average, about 788 days to process an individual Section 404 permit, see [Sunding & Zilberman, \*supra\*, at 74](#), the Corps indicates that it took, on average, about 221 days to process individual permits in 2010. See [U.S. Army Corps of Engineers, \*Reissuance of Nationwide Permits\*, 77 Fed. Reg. 10184, 10190 \(Feb. 21, 2012\)](#).
2. **The rest of the story re: permit denials:** Although the Corps denies a very small percentage of individual Section 404 permit applications each year, many permit applications are withdrawn before the Corps makes a decision on the permit, and many permits include conditions that the applicant did not originally propose or might prefer were not included. In 2007 and 2008, for instance, 14% of permit applications were withdrawn. See Royal C. Gardner, *Lawyers, Swamps, and Money* 102 (Island Press, 2011).
3. **NEPA Issues:** As will be discussed in the next section, when a landowner receives a permit to discharge dredged or fill material into wetlands (or other waters of the United States), the Corps frequently requires the permittee to create, restore, enhance, or preserve other wetlands to mitigate the environmental harm caused by the discharge. When the Corps is determining whether the effects of a discharge authorized by a permit are significant enough to require the preparation of an environmental impact statement, the Corps often focuses on the *net* effects of the discharge when considering any *mitigation* that will take place as part of the permit, rather than simply focusing on the environmental effects of the discharge itself. By doing this, the adverse impacts are often reduced to a level where they are not significant, so the Corps can issue a FONSI. Although environmental groups have criticized this approach, the Council on Environmental Quality has issued guidance

that authorizes “**mitigated FONSI**s” if the mitigation is enforceable and monitored. See [Nancy Sutley, Chair, Council on Environmental Quality, Memorandum for Heads of Federal Departments and Agencies, Appropriate Use of Mitigation and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact \(Jan. 14, 2011\)](#).

Another issue that arises with regard to NEPA is the scope of the project to be reviewed under NEPA. If a project will involve a discharge of dredged or fill material into waters of the United States but also includes development of uplands, the Corps normally only evaluates the portions of the project that take place in waters of the United States as part of the environmental review under NEPA. See [33 C.F.R. Part 325, App. B, § 7](#). The Corps’ approach has been upheld by the Ninth Circuit. See *Sylvester v. U.S. Army Corps of Engineers*, [871 F.2d 817 \(9<sup>th</sup> Cir. 1989\)](#), revised at [884 F.2d 394 \(9<sup>th</sup> Cir. 1989\)](#).

4. **Compliance with other laws:** In addition to the laws outlined above, the Corps must also comply with the **National Historic Preservation Act**, [16 U.S.C. §§ 470 et seq.](#), when issuing a Section 404 permit. The Corps’ regulations establish a process for review and consultation to comply with the statute as part of the 404 permit process. See [33 C.F.R. Part 325, App. C](#).
5. **Surface coal mining:** In light of all the controversy surrounding the Corps’ issuance of permits for valley fills from mountaintop removal mining, the Corps, EPA and the Fish and Wildlife Service entered into a Memorandum of Understanding in 2005 to coordinate review of such permits. See [Memorandum of Understanding for the Purpose of Providing Concurrent and Coordinated Review and Processing of Surface Coal Mining Applications Proposing Placement of Dredged and/or Fill Material in Waters of the United States \(Feb. 10, 2005\)](#).
6. **The hearing requirement:** What is the standard of review that courts will apply when the Corps determines that it is not necessary to hold a public hearing for a Section 404 permit? See [Friends of the Payette v. Horseshoe Bend Hydroelectric Co.](#), [988 F.2d 989 \(9<sup>th</sup> Cir. 1993\)](#).

When the Corps holds a hearing for Section 404 permits, it holds an informal hearing. Does due process require a more formal hearing than the hearing provided by the Corps as part of the Section 404 permit process? Does due process require that the Corps provide that hearing for every permit decision? See [AJA Associates v. U.S. Army Corps of Engineers](#), [817 F.2d 1070 \(3d Cir. 1987\)](#); [Buttrey v. United States](#), [690 F.2d 1170 \(5<sup>th</sup> Cir. 1982\)](#).

7. **After the fact permits:** The Corps’ regulations authorize the agency, in limited circumstances, to issue “after the fact” permits for activities that have already taken

place. See [33 C.F.R. § 326.3\(e\)](#). The agency uses this as an enforcement tool, and the permittee must follow the normal permit application procedures. *Id.*

### Research Problems

**Pending or final permits:** The Corps provides, on the website of the Corps' headquarters, a searchable list of individual Section 404 permits issued by the agency and pending individual permit applications. The list does not, however, include links to the actual permits, which are available from the district offices. In addition, the Regulatory sections of the Corps district offices usually post public notices of pending permit applications on their websites. Although the notices do not usually include the permit application, they provide more information than is available for pending applications on the Corps' headquarters website. Relying on those sources, answer the following questions:

1. How many individual Section 404 permits and letters of permission were issued by the Sacramento District of the Corps in February, 2014? What activity was authorized by the permit issued to Scott Murphy and the City of Montrose?
2. What is the website address where you will find public notices of pending Section 404 permit applications in the Seattle, Washington area? If you can find a pending permit application, please identify the applicant and indicate when the comment period for that notice expires.

## B. The Standards for Permit Review

The primary standards that the Corps of Engineers uses to evaluate whether to issue or deny a Section 404 permit, or the conditions to include in a Section 404 permit are the **Section 404(b)(1) guidelines**. See [40 C.F.R. Part 230](#). However, when evaluating Section 404 permit applications, the Corps also conducts a **public interest review**.

### 1. Public Interest Review

Although it is not explicitly required by the Clean Water Act, the Corps conducts a "public interest review" of each Section 404 permit application (and Rivers and Harbors Act section 10 permit application). Pursuant to its regulations, the Corps evaluates "the probable impacts, including cumulative impacts of the proposed activity and its intended use on the public interest." See [33 C.F.R. § 320.4\(a\)](#). The factors that the Corps considers as part of its public interest review include:

|                                |                                      |                                     |
|--------------------------------|--------------------------------------|-------------------------------------|
| Conservation                   | Economics                            | Aesthetics                          |
| General Environmental Concerns | Wetlands                             | Historic Properties                 |
| Fish and Wildlife Values       | Flood Hazards                        | Floodplain Values                   |
| Land Use                       | Navigation                           | Shore Erosion                       |
| Recreation                     | Water Supply and Conservation        | Water Quality                       |
| Mineral Needs                  | Considerations of Property Ownership | The Needs and Welfare of the People |

*Id.*

Because the review includes such a broad range of factors, it has been criticized as “virtually standardless”. See Royal C. Gardner, *Lawyers, Swamps, and Money* 75 (Island Press, 2011).

For purposes of the public interest review, the regulations create a presumption in favor of granting the permit, providing that “a permit will be granted unless the [Corps] determines that it would be contrary to the public interest.” See [33 C.F.R. § 320.4\(a\)](#). However, the regulations also provide that the Corps should not issue permits to alter “important” wetlands unless the Corps determines that the benefits of alteration outweigh the damage to the wetlands. *Id.* While the Corps evaluates Section 404 permit applications under the public interest review, as a practical matter, the agency never denies a permit based on the public interest review alone. See Royal C. Gardner, *Lawyers, Swamps, and Money* 75 (Island Press, 2011). The primary standards for review of Section 404 permit applications are the 404(b)(1) guidelines.

## 2. Section 404(b)(1) Guidelines

The Clean Water Act authorizes the Corps of Engineers to issue permits for discharge of dredged or fill material “through the application of guidelines developed by the Administrator, in conjunction with the Secretary ...” See [33 U.S.C. § 1344\(b\)\(1\)](#). Although they are called the **404(b)(1) guidelines**, the “guidelines” are binding legislative rules, which were issued through the notice and comment rulemaking process, see [45 Fed. Reg. 85336 \(Dec. 24, 1980\)](#), and are codified at [40 C.F.R. Part 230](#).

|   |
|---|
| <p><b>Resource</b></p> <p><a href="#">Corps Video on the 404(b)(1) Guidelines</a></p> |
|---|

The guidelines place **four major restrictions** on discharges of dredged or fill material.

**First**, they prohibit discharges if there is “a **practicable alternative** to the proposed discharge which would have less adverse impact on the aquatic ecosystem.” See [40 C.F.R. § 230.10\(a\)](#).

**Second**, they prohibit discharges that violate or contribute to violation of several other listed provisions of the Clean Water Act, Endangered Species Act, and the [National Marine Sanctuaries Act](#). *Id.* § 230.10(b).

**Third**, they prohibit discharges that will “cause or contribute to **significant degradation** of the waters of the United States.” *Id.* § 230.10(c).

**Fourth**, they prohibit discharges unless “appropriate and practicable steps have been taken which will **minimize potential adverse impacts** ... on the aquatic ecosystem.” *Id.* § 230.10(d).

If a discharge violates any one of those requirements, the Corps will deny the permit for the discharge or condition the permit so that the discharge will not violate the requirements.

The fourth restriction identified above is the basis for the **mitigation** requirements that are included in Section 404 permits and will be explored at length in Chapter 7 of this book. Regarding the third restriction, the guidelines provide further elaboration on the meaning of “significant degradation”, see [33 C.F.R. § 230.11](#), but courts have rarely overturned Section 404 permits on the grounds that the permit would cause or contribute to “significant degradation.” See Margaret Strand, *Wetlands Deskbook* 90 (Environmental Law institute, 3d ed., 2009) The second restriction identified above is rather straightforward and is designed to ensure that the activities authorized by the Corps do not violate specific environmental standards that are frequently implicated by the discharge of dredged or fill material. Consequently, the remainder of this chapter will focus on the practicable alternatives restriction in the 404(b)(1) guidelines.

#### a. Practicable alternatives

As noted above, the Section 404(b)(1) guidelines prohibit discharges of dredged or fill material if there is “a **practicable alternative** to the proposed discharge which would have less adverse impact on the aquatic ecosystem.” See [40 C.F.R. § 230.10\(a\)](#). An alternative is a “**practicable**” alternative if “it is available and capable of being done after taking into consideration cost, existing technology and logistics in light of the overall project purpose.” *Id.* § 230.10(a)(2). Thus, when the Corps evaluates a Section

#### Resources

[Corps Video on Alternatives Analysis Statement of Findings, including alternatives analysis, for Port of Anchorage 404 permit](#)

404 permit application, it focuses, in part, on whether the permit applicant could proceed with the proposed project on *other land* or in a *different manner on the same land* in a way that would have a less adverse impact on the aquatic ecosystem. If there is a practicable alternative with less adverse impacts, the Corps must deny the permit. For instance, taking a very simplified example, if a developer owns two parcels of land adjacent to a major highway, only one of which has wetlands on it, and the developer seeks a Section 404 permit to build a shopping mall on the parcel of land with the wetlands, but could build the mall on the other parcel (considering cost and the project purpose), the Corps should deny the permit to the developer since construction on the other parcel is a practicable alternative that would have a less adverse impact on the aquatic ecosystem.

The guidelines also establish **two presumptions** regarding practicable alternatives when the activity to be permitted involves a discharge into a “special aquatic site” (which, per the guidelines, includes wetlands, see [40 C.F.R. § 230.41](#).

**First**, if an activity to be permitted is not **water-dependent** (does not require access or proximity to or siting within the special aquatic site to fulfill its basic purpose), the guidelines presume that **practicable alternatives exist that do not involve special aquatic sites**, “unless clearly demonstrated otherwise.” See [40 C.F.R. § 230.10\(a\)\(3\)](#). Thus, while a dock would be water-dependent, a golf course would generally not be water-dependent. Accordingly, in the permitting process, the golf course developer would have the burden of demonstrating that there were no practicable alternatives to constructing the golf course in the location and manner proposed in the permit application.



**Second**, for activities that involve discharges into special aquatic sites, the guidelines presume that any **practicable alternatives** to the proposed discharge **that do not involve special aquatic sites will have less adverse impact on the aquatic environment**, “unless clearly demonstrated otherwise.” *Id.* Accordingly, if there was another location available where the golf course developer in the last example could build the golf course without filling wetlands and the location was a “practicable” alternative, the developer would have to rebut the presumption that the alternative would have a less adverse impact on the aquatic environment before the Corps could issue a Section 404 permit.

Photo 32 By Bill Fitzpatrick (Own work)  
[http://commons.wikimedia.org/wiki/File%3AMunicipal\\_Golf\\_Course.jpg](http://commons.wikimedia.org/wiki/File%3AMunicipal_Golf_Course.jpg) [CC-BY-SA-3.0]

## ***Project Purpose***

One issue that has been the source of controversy over the years has been the identification of the purpose of a project for which a Section 404 permit is being sought. If the purpose is defined sufficiently narrowly, the range of alternatives that will achieve that purpose and be considered “practicable” will be narrowed as well. Similarly, the manner in which the project purpose is framed can greatly affect whether the project is considered “water dependent.” As a result, for many years, disputes arose concerning whether the project purpose was ultimately determined by the Corps or the applicant. The issue is addressed (1) in the following case and (2) in the following memorandum issued by the Corps in response to a request from EPA and the Department of Commerce to elevate a permit dispute to the Corps’ headquarters for resolution. (Note: When EPA, FWS or NOAA cannot resolve disputes with the Corps regarding Section 404 permit applications at the regional level, the agencies have adopted a process, pursuant to Section 404(q) of the Clean Water Act, to elevate those disputes to higher levels within the agencies for resolution. The elevation process is described in detail in Chapter 8 of this book).

### **Louisiana Wildlife Federation, Inc. v. York**

761 F.2d 1044 (5<sup>th</sup> Cir. 1985)

PER CURIAM:

Six environmental organizations object to the issuance by the U.S. Army Corps of Engineers of six individual permits allowing private landowners to clear and convert to agriculture approximately 5200 acres of bottomland hardwood wetlands. \* \* \* As to the six individual permits, we agree with the district court that the Corps properly followed both the National Environmental Policy Act (NEPA), and the Environmental Protection Agency's regulatory guidelines in making its determination. \* \* \*

The district court opinion efficiently distilled a voluminous record and described in detail \* \* \* the physical characteristics of the six tracts affected by the permit applications. \* \* \* We, therefore, do not attempt to repeat the factual background of this case.

The six permits granted by the Corps authorize the agricultural conversion of 5200 acres of wetlands. For environmental protection purposes, such wetlands are denominated "special aquatic sites." \* \* \* Both the Environmental Protection Agency's Guidelines and the Corps of Engineers' regulations treat all special aquatic sites as worthy of extra protection, and state as "[t]he guiding principle ... that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources." \* \* \*

### **Resources for the Case**

[Unedited opinion](#) (From Justia)

[Google Map of all of the cases in the coursebook](#)



Such heightened solicitude for wetlands is manifest in the regulations stating the considerations that must be taken into account when evaluating a proposed alteration to wetlands acreage. When a discharge of dredged or fill material is proposed, the Corps' Guidelines prohibit issuance of a permit if there is a "practicable alternative that would have less adverse impact on the aquatic ecosystem..." \* \* \* A "practicable alternative," in turn, is defined as one that is, "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." \* \* \* With respect to wetlands, however, the Guidelines specify:

[w]here the activity associated with a discharge which is proposed for a special aquatic site ... does not require access or proximity to or siting within the special aquatic site in question to fulfill the basic purpose (i.e. is not 'water dependent'), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. \* \* \*

"Thus, the guidelines couple a general presumption against all discharges into aquatic ecosystems with a specific presumption that practicable alternatives to the fill of wetlands exist." \* \* \*

In each of the six permit-application proceedings, the Corps characterized the applicant's basic purpose for the project as being, "to increase soybean production or to increase net return on assets owned by the company." \* \* \* It is undisputed that soybean production is a non-water dependent activity. As shown above, this fact "necessitate[s] a more persuasive showing than otherwise concerning the lack of alternatives." \* \* \*

The environmental protection organizations argue on appeal that the applicants failed to make the required showing, and that the Corps erroneously granted them permits by interpreting "practicable alternatives" to mean "profit-maximizing alternatives." In addition, they contend that the Corps erred in viewing the alternatives with the applicants' objectives in mind instead of with an eye towards environmental maintenance. Both arguments must be rejected. \* \* \*

[The Court held that the Corps, in granting the permits, often approved an alternative that was not "profit maximizing", so the court rejected the environmental organizations initial argument.]

The environmental protection organizations' second contention, that the alternatives may not be viewed with the applicant's objectives in mind, is not substantiated by either case law or the applicable regulations. As the district court recognized, the Preamble to the Guidelines states, "... [w]e consider implicit that, to be practicable, an alternative must be capable of achieving the best purpose of the proposed activity." \* \* \* In turn, the text of the Guidelines provides that an alternative is practicable if it is available and capable of being done after taking into account costs, existing technology and logistics in light of the overall

project purposes. \* \* \* Under these Guidelines, therefore, not only is it permissible for the Corps to consider the applicant's objective; the Corps has a duty to take into account the objectives of the applicant's project.\* \* \* Indeed, it would be bizarre if the Corps were to ignore the purpose for which the applicant seeks a permit and to substitute a purpose it deems more suitable.

The case law, although sparse, is in accord with our conclusion. In *Hough v. Marsh, supra*, residents of Edgartown, Massachusetts challenged a Corps permit authorizing the filling of a coastal tract to construct two private homes and a tennis court. The District Engineer had found that the project was not "water dependent," and undertook the requisite examination to discover the existence of "practicable alternatives." The Engineer defined the basic purpose of the project as "providing two homes and a tennis court." \* \* \* Although the district court remanded for the landowners to demonstrate more clearly that no practicable alternatives to the proposed fill existed, the court did not question the Engineer's formulation of the project's objective, and did not suggest that the alternatives were not considered from the proper perspective. \* \* \*

The district court's findings that the Corps properly analyzed all six permit applications and correctly decided to grant permission to clear the tracts for agricultural use is amply supported by the record. Nothing in it convinces us that the Corps' actions were arbitrary, capricious, or otherwise not in accordance with law, the sole standards by which we review such actions.

### **Permit Elevation, Plantation Landing Resort**

#### **Resources**

[Unedited version of the decision](#)  
[EPA fact sheet describing elevation process](#)  
[EPA website regarding 404\(q\) and elevation](#)

Patrick Kelly, Brigadier General Memorandum Thru Commander, U.S. Army Engineer Division, Lower Mississippi Valley For Commander, U.S. Army Engineer District, New Orleans, *Permit Elevation, Plantation Landing Resort, Inc.* (Apr. 21, 1989)

\* \* \* By memorandum dated 3 February 1989, the Assistant Secretary of the Army (Civil Works) advised me that he had granted the request of the Environmental Protection Agency (EPA) and the Department of Commerce (DOC) to elevate the permit case for Plantation Landing Resort, Inc., to HQUSACE for national policy level review concerning the practicable alternatives and mitigation provisions of the 404(b)(1) Guidelines. My review of the case record \* \* \* leads me to conclude that Corps policy \* \* \* should be clarified in certain respects. \* \* \*

Please re-evaluate the subject permit case in light of the guidance provided in the attachment, and take action accordingly. \* \* \*

#### Attachment

\* \* \* 5. One essential aspect of applying the “practicable alternative” and “water dependency” provisions of the Guidelines to a particular 404 permit case is to decide what is the “basic purpose” of the planned activity requiring the proposed discharge of dredged or fill material. The preamble to the Guidelines provides the following guidance on the meaning of “basic purpose”:

“Non-water-dependent” discharges are those associated with activities which do not require access or proximity to or siting within the special aquatic site to fulfill their *basic* purpose. An example is a fill to create a restaurant site, since restaurants do not need be in wetlands to fulfill their *basic* purpose of feeding people. (45 Fed. Reg. 85339, Dec. 24, 1980; emphasis added)

6. The 404(b) (1) analysis for the Plantation Landing Resort, Inc., application, even when read in conjunction with the Statement of Findings (SOF) and the Environmental Assessment (EA), does not deal with the issues of practicable alternatives and water dependency in a satisfactory manner. \* \* \*

7. One significant problem in the [New Orleans District’s] approach to the 404(b)(1) review is found in the following, which is the only statement in the [New Orleans District’s] 404(b)(1) evaluation document presenting a project-specific reference to the Plantation Landing case with respect to the practicable alternative requirement of the Guidelines:

Several less environmentally damaging alternatives were identified in the Environmental Assessment. The applicant stated and supplied information indicating that these alternatives would not be practicable in light of his overall project purposes. Recent guidance from [the Lower Mississippi Valley Division] states that the applicant is the authoritative source of information regarding practicability determinations, therefore no less environmentally damaging practicable alternatives are available. ([New Orleans District’s] “Evaluation of Section 404(b)(1) Guidelines”, \* \* \* )

This statement appears to allow the applicant to determine whether practicable alternatives exist to his project. Emphatically, that is not an acceptable approach for conducting the alternatives review under the 404(b)(1) Guidelines. The Corps is responsible for controlling every aspect of the 404(b)(1) analysis. While the Corps should consider the views of the applicant regarding his project’s purpose and the existence (or lack of) practicable alternatives, the Corps must determine and evaluate these matters itself, with no control or direction from the applicant, and without undue deference to the applicant’s wishes. \* \* \*

9. A reading of the entire record indicates that [the New Orleans District] accepted the applicant's assertion that the project as proposed must be accepted by the Corps as the basis for the 404(b) (1) Guidelines practicability analysis. The applicant proposed a fully-integrated, waterfront, contiguous water-oriented recreational complex, in the form the applicant proposed. Consequently, [the New Orleans District] apparently presumed that no alternative site could be considered if it could not support in one, contiguous waterfront location the same sort of fully integrated recreational complex that the applicant proposed to build. \* \* \*

11. The effect of NOD'S deferring to and accepting the applicant's definition of the basic purpose of his project as a contiguous, fully-integrated, and entirely waterfront resort complex in the form the applicant had proposed was to ensure that no practicable alternative could exist. Nevertheless, the , administrative record nowhere provides any rationale for why the applicant's proposed complex had to be "contiguous" or "fully integrated" or why all features of it had to be "waterfront." The only reason appearing on the record to indicate why NOD presumed that the project had to be contiguous, fully integrated, and entirely waterfront is that the applicant stated that that was his proposal, thus by definition that was the official project purpose which the Corps must use. That is not an acceptable approach to interpret and implement the 404(b)(1) Guidelines. Only if the Corps, independently of the applicant, were to determine that the basic purposes of the project cannot practicably be accomplished unless the project is built in a "contiguous", "fully integrated," and entirely "waterfront" manner would those conditions be relevant to the 404(b) (1) Guidelines' alternative review. The fact that those conditions may be part of the proposal as presented by the applicant is by no means determinative of that point. Once again, the Corps, not the applicant, must define the basic purpose underlying the applicant's proposed activity. \* \* \*

### Questions and Comments

1. **Standard of Review of Corps' alternatives analysis:** What standard of review did the 5<sup>th</sup> Circuit apply to the Corps' identification of the purposes of the permit applicants' projects and the analysis regarding whether practicable alternatives existed to achieve those purposes? Does "increas[ing] net return on assets owned by the company" seem to be an appropriate purpose?

For another case discussing the standard of review that applies to the Corps' decision-making in many aspects of the 404 permit review, including the alternatives analysis, see [Fund for Animals v. Rice, 85 F.3d 535, 541-542 \(11<sup>th</sup> Cir. 1996\)](#). That court's discussion of the "arbitrary and capricious" standard is black letter administrative law and may help explain the 5<sup>th</sup> Circuit's deferential decision in *Louisiana Wildlife Federation v. York*.

2. While the 5<sup>th</sup> Circuit deferred to the Corps' identification of the project purpose in *Louisiana Wildlife Federation v. York*, how much deference does the Court suggest is due to the applicant's identification of the purpose? Who makes the final determination, according to the 5<sup>th</sup> Circuit?
3. **Plantation Landing Elevation:** It is probably not surprising, in light of the language used by the 5<sup>th</sup> Circuit in *Louisiana Wildlife Federation v. York*, that the New Orleans District of the Corps of Engineers deferred to the applicant's identification of the project purpose in carrying out the alternatives analysis for the Plantation Landing permit application. It should be clear, though, that after that guidance, the Corps makes an independent determination of the project's purpose, as well as whether alternatives are practicable and have less adverse effects on the aquatic environment. Subsequent to the guidance in the Plantation Landing permit elevation case, the Corps issued similar guidance in several other permit elevation cases, including the [Hartz Mountain Elevation](#) and the [Old Cutler Bay Elevation](#).

The Corps regulations that implement NEPA review for the Section 404 permit process explicitly provide “[W]hile generally focusing on the applicant’s statement, the Corps will, in all cases, exercise independent judgment in defining the purpose and need for the project from the applicant’s and the public’s perspective.” See [33 C.F.R. Part 325, App. B\(9\)\(c\)\(4\)](#). Although those regulations don’t apply on their face to the alternatives analysis, the Corps has taken the same approach in conducting the alternatives analysis since the elevation decisions above.

4. **Flexibility in application:** In 1993, recognizing that the impacts from discharges of dredged or fill material vary greatly, the Corps and EPA jointly issued guidance that provides that the Guidelines “do not contemplate that the same intensity of analysis will be required for all types of projects but instead envision a correlation between the scope of the evaluation and the potential extent of adverse impacts on the aquatic environment.” See [U.S. Army Corps of Engineers, RGL 93-02, Guidance on Flexibility of the 404\(b\)\(1\) Guidelines and Mitigation Banking 3 \(Aug. 23, 1993\)](#). Accordingly, the guidance suggests that “[t]he amount of information needed to make such a determination [that there is no practicable alternative to a proposed discharge] and the level of scrutiny required by the Guidelines is commensurate with the severity of the environmental impact \* \* \* resource and the nature of the proposed activity) and the scope/cost of the project.” *Id.* at 2. How might this flexibility in application of the guidelines impact the deference accorded to the Corps when a court reviews the agency’s alternatives analysis? See [Greater Yellowstone Coalition v. Flowers, 359 F.3d 1257 \(10<sup>th</sup> Cir. 2004\)](#).
5. **Water-dependent:** The characterization of a project's purpose will greatly influence whether the project is deemed to be "water-dependent" for purposes of the alternatives analysis. For instance, in *Shoreline Associates v. Marsh*, when the

permit applicant sought permission to discharge fill material to build a boat storage area and boat launch in conjunction with a townhouse development, the court upheld the Corps' determination that the basic purpose of the project was construction on the townhouse community, which was not water dependent, and that the construction of the boat launch was only incidental to the basic purpose of the project. See [555 F. Supp. 169 \(D. Md. 1983\)](#), *aff'd* 725 F.2d 677 (4<sup>th</sup> Cir. 1984). Several years later, when a permit applicant sought to reopen a river channel to provide boat access to a residential community, the U.S. Court of Appeals for the Eighth Circuit upheld the Corps' determination that the basic purpose of the project was to provide boat access to the community, which was a water-dependent activity. See [National Wildlife Federation v. Whistler, 27 F.3d 1341 \(8<sup>th</sup> Cir. 1994\)](#). The Court distinguished the Shoreline case and cases like it on the grounds that the residential community in the case under review was being constructed in uplands and did not require a permit, so the only activity triggering the permit requirement was the construction of the boat access. *Id.* at 1345. Although the Corps rejected the applicant's purpose in one case and accepted it in the other, in both cases, the courts deferred to the agency because they concluded that the agency's determination was not arbitrary or capricious.

### ***Alternatives - Availability and Practicability***

Since the 404(b)(1) guidelines prohibit the Corps from issuing a permit when practicable alternatives to the proposed discharge are available that have less adverse impacts on the aquatic environment, it is important to spend a little time examining how to determine when an alternative is "**available**" and when an available alternative is "**practicable**." Although the applicant may suggest that certain alternatives are or are not available or practicable,

the Corps has the ultimate authority to determine which alternatives are practicable alternatives, just as it has the ultimate authority to determine the basic purpose of the project. The following case focuses on determining when alternatives are "available."



Photo 33 By S. Johnson

## **Bersani v. Robichaud**

850 F.2d 36 (2d Cir. 1988)

### **Resources for the case**

[Unedited opinion](#) (From Justia)

[Google Map of all the cases in the coursebook](#)

This case arises out of Pyramid's attempt to build a shopping mall on certain wetlands in Massachusetts known as Sweedens Swamp. Acting under the Clean Water Act, \* \* \* EPA vetoed the approval by the Corps of a permit to build the mall because EPA found that an alternative site had been available to Pyramid at the time it entered the market to search for a site for the mall. The alternative site was purchased later by another developer and arguably became unavailable by the time Pyramid applied for a permit to build the mall.

On appeal, the thrust of Pyramid's argument is a challenge to what it calls EPA's "market entry" theory, i.e., the interpretation by EPA of the relevant regulation, which led EPA to consider the availability of alternative sites at the time Pyramid entered the market for a site, instead of at the time it applied for a permit. Pyramid argues principally (1) that the market entry approach is contrary to the regulatory language and past practice; and (2) that since the Corps, another agency which was jointly responsible with EPA for administering the program in question, interpreted the pertinent regulation in a different way than EPA had, and since the market entry issue does not involve environmental expertise, this Court should not defer to EPA's interpretation of the regulation. \* \* \*

We hold (1) that the market entry theory is consistent with both the regulatory language and past practice; (2) that EPA's interpretation, while not necessarily entitled to deference, is reasonable; and (3) that EPA's application of the regulation is supported by the administrative record. We agree with the district court's conclusion that EPA's findings were not arbitrary and capricious. We also hold that Pyramid's other arguments \* \* \* lack merit.

We affirm.

I.

\* \* \*

A. Statutory and Regulatory Framework \* \* \*

The 404(b)(1) guidelines \* \* \* are regulations containing the requirements for issuing a permit for discharge of dredged or fill materials. 40 C.F.R. Sec. 230.10(a)2 covers "non-water dependent activities" (i.e., activities that could be performed on non-wetland sites, such as building a mall) and provides essentially that the Corps must determine whether an alternative site is available that would cause less harm to the wetlands. Specifically, it provides that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative" to the proposal that would have a "less adverse impact" on the "aquatic ecosystem". It also provides that a practicable alternative may include "an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity." \* \* \* It further provides that, "unless clearly demonstrated otherwise", practicable alternatives are (1) "presumed to be available" and (2) "presumed to have less adverse impact on the aquatic ecosystem". \* \* \* Thus, an applicant such as Pyramid must rebut both of these presumptions in order to obtain a permit. Sections 230.10(c) and (d) require that the Corps not permit any discharge that would contribute to significant degradation of the nation's wetlands and that any adverse impacts must be mitigated through practicable measures. \* \* \*

Under Section 404(c) of the Act \* \* \* , EPA has veto power over any decision of the Corps to issue a permit. It is this provision that is at the heart of the instant case. \* \* \*

Factual Background of the Swedens Swamp Project

Sweedens Swamp is a 49.5 acre wetland which is part of an 80 acre site near Interstate 95 in South Attleboro, Massachusetts. Although some illegal dumping and motorbike intrusions have occurred, these activities have been found to have had little impact on the site which remains a "high-quality red maple swamp" providing wildlife habitat and protecting the area from flooding and pollution.

The effort to build a mall on Sweedens Swamp was initiated by Pyramid's predecessor, the Edward J. DeBartolo Corporation ("DeBartolo"). DeBartolo purchased the Swamp some time before April 1982. At the time of this purchase an alternative site was available in North Attleboro (the "North Attleboro site"). Since Massachusetts requires state approval (in addition to federal approval) for projects that would fill wetlands, DeBartolo applied to the Massachusetts Department of Environmental Quality Engineering ("DEQE") for permission to build on Sweedens Swamp. DEQE denied the application in April 1982.

Pyramid took over the project in 1983 while the appeal of the DEQE denial was pending. In



April 1983, Massachusetts adopted more rigorous standards for approval of permits. The new standards added wildlife habitat as a value of wetlands to be protected and required the absence of a "practicable alternative". In March 1985, DEQE granted approval under the old, less stringent, regulations. The Massachusetts District Court reversed on the ground that DEQE should have applied the new regulations, but the Massachusetts Supreme Judicial Court ultimately upheld DEQE's approval. \* \* \*

One of the key issues in dispute in the instant case is just when did Pyramid begin searching for a suitable site for its mall. EPA asserts that Pyramid began to search in the Spring of 1983. Pyramid asserts that it began to search several months later, in September 1983. The difference is crucial because on July 1, 1983--a date between the starting dates claimed by EPA and Pyramid--a competitor of Pyramid, the New England Development Co. ("NED"), purchased options to buy the North Attleboro site. This site was located upland and could have served as a "practicable alternative" to Sweedens Swamp, if it had been "available" at the relevant time. Thus, if the relevant time to determine whether an alternative is "available" is the time the applicant is searching for a site (an issue that is hotly disputed), and if Pyramid began to search at a time before NED acquired options on the North Attleboro site, there definitely would have been a "practicable alternative" to Sweedens Swamp, and Pyramid's application should have been denied. On the other hand, if Pyramid did not begin its search until after NED acquired options on the North Attleboro site, then the site arguably was not "available" and the permit should have been granted. Of course it also is possible that the North Attleboro site remained "available" after NED's acquisition of the options, since Pyramid arguably could have purchased the options from NED. Moreover, since the North Attleboro site indisputably was "available" when Pyramid's predecessor, DeBartolo, purchased Sweedens Swamp, one might argue, as EPA does, that Pyramid should be held to stand in its predecessor's shoes. The district court apparently agreed with Pyramid on the issue of when Pyramid entered the market, stating that "Pyramid initially became interested in developing a shopping mall in the Attleboro area in September 1983." \* \* \*

In December 1983, Pyramid purchased Sweedens Swamp from DeBartolo. In August 1984, Pyramid applied under Sec. 404(a) to the New England regional division of the Corps (the "NE Corps") for a permit. It sought to fill or alter 32 of the 49.6 acres of the Swamp; to excavate nine acres of uplands to create artificial wetlands; and to alter 13.3 acres of existing wetlands to improve its environmental quality. Later Pyramid proposed to mitigate the adverse impact on the wetlands by creating 36 acres of replacement wetlands in an off-site gravel pit.

During the review of Pyramid's application by EPA, by the Fish and Wildlife Service ("FWS") and by the Corps, Pyramid submitted information on "practicable alternatives", especially the North Attleboro site. In rejecting that site as an alternative, Pyramid asserted that building a mall there was not feasible, not that the site was unavailable. In the words of the district court, Pyramid claimed that

"the site lacked sufficient traffic volume and sufficient access from local roads, potential department store tenants had expressed strong doubts about the feasibility of the site and previous attempts to develop the site had met with strong resistance from the surrounding community." \* \* \*

In November 1984, EPA and FWS submitted official comments to the NE Corps recommending denial of the application because Pyramid's proposal was inconsistent with the 404(b)(1) guidelines. Pyramid had failed (1) to overcome the presumption of the availability of alternatives and (2) to mitigate adequately the adverse impact on wildlife. EPA threatened a Sec. 404(c) review. Pyramid then proposed to create additional artificial wetlands at a nearby upland site, a proposal it eventually abandoned.

In January 1985, the NE Corps hired a consultant to investigate the feasibility of Sweedens Swamp and the North Attleboro site. The consultant reported that either site was feasible but that from a commercial standpoint only one mall could survive in the area. On February 19, 1985, the NE Corps advised Pyramid that denial of its permit was imminent. On May 2, 1985, the NE Corps sent its recommendation to deny the permit to the national headquarters of the Corps. Although the NE Corps ordinarily makes the final decision on whether to grant a permit, see 33 C.F.R. Sec. 325.8 (1982), in the instant case, because of widespread publicity, General John F. Wall, the Director of Civil Works at the national headquarters of the Corps, decided to review the NE Corps' decision. Wall reached a different conclusion. He decided to grant the permit after finding that Pyramid's offsite mitigation proposal would reduce the adverse impacts sufficiently to allow the "practicable alternative" test to be deemed satisfied. \* \* \*

Although he did not explicitly address the issue, Wall apparently assumed that the relevant time to determine whether there was a practicable alternative was the time of the application, not the time the applicant entered the market. In other words, Wall appears to have assumed that the market entry theory was not the correct approach. \*\*\*

[On May 13, 1986, EPA vetoed the permit and found] (2) that the North Attleboro site could have been available to Pyramid at the time Pyramid investigated the area to search for a site; \* \* \* [and] (4) that the North Attleboro site was feasible and would have a less adverse impact on the wetland environment \* \* \* In the second of these findings, EPA used what Pyramid calls the 'market entry' approach.

On July 1, 1986, Pyramid commenced the instant action in the district court to vacate EPA's final determination as arbitrary and capricious. \* \* \* On October 6, 1987, the court granted EPA's motion for summary judgment. The court stated that, with regard to the market entry theory, EPA's interpretation of its regulations was entitled to deference. This appeal followed.

For the reasons which follow, we affirm.

## II

One of Pyramid's principal contentions is that the market entry approach is inconsistent with both the language of the 404(b)(1) guidelines and the past practice of the Corps and EPA.

### A

With regard to the language of the regulations, Pyramid reasons that the 404(b)(1) guidelines are framed in the present tense, while the market entry approach focuses on the past by considering whether a practicable alternative was available at the time the applicant entered the market to search for a site. To support its argument that the 404(b)(1) guidelines are framed in the present tense, Pyramid quotes the following language:

"An alternative is practicable if it is available.... If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered." \* \* \*

While this argument has a certain surface appeal, we are persuaded that it is contrary to a common sense reading of the regulations; that it entails an overly literal and narrow interpretation of the language; and that it creates requirements not intended by Congress.

First, while it is true that the language is in the present tense, it does not follow that the "most natural" reading of the regulations would create a time-of-application rule. As EPA points out, "the regulations do not indicate when it is to be determined whether an alternative 'is' available," (emphasis in original), *i.e.*, the "present" of the regulations might be the time the application is submitted; the time it is reviewed; or any number of other times. Based upon a reading of the language in the context of the controlling statute and the regulations as a whole, moreover, we conclude that when the agencies drafted the language in question they simply were not thinking of the specific issues raised by the instant case, in which an applicant had available alternatives at the time it was selecting its site but these alternatives had evaporated by the time it applied for a permit. We therefore agree with the district court that the regulations are essentially silent on the issue of timing and that it would be appropriate to consider the objectives of the Act and the intent underlying the promulgation of the regulations.

Second, as EPA has pointed out, the preamble to the 404(b)(1) guidelines states that the purpose of the "practicable alternatives" analysis is "to recognize the special value of wetlands and to avoid their unnecessary destruction, particularly where practicable alternatives were available in non-aquatic areas to achieve the basic purpose of the

proposal." 45 Fed. Reg. 85,338 (1980) (emphasis added). In other words, the purpose is to create an incentive for developers to avoid choosing wetlands when they could choose an alternative upland site. Pyramid's reading of the regulations would thwart this purpose because it would remove the incentive for a developer to search for an alternative site at the time such an incentive is needed, i.e., at the time it is making the decision to select a particular site. If the practicable alternatives analysis were applied to the time of the application for a permit, the developer would have little incentive to search for alternatives, especially if it were confident that alternatives soon would disappear. Conversely, in a case in which alternatives were not available at the time the developer made its selection, but became available by the time of application, the developer's application would be denied even though it could not have explored the alternative site at the time of its decision.

Pyramid attacks this reasoning by arguing that few developers would take the risk that an available alternative site would become unavailable and that EPA's reading improperly considers the motives and subjective state of mind of the applicant. These arguments are wide of the mark. Whether most real-life developers would take such a risk is irrelevant. The point is that Pyramid's time-of-application theory is completely at odds with the expressed intent of the regulations to provide an incentive to avoid choosing wetlands. Similarly, EPA's interpretation does not require courts to investigate the subjective state of mind of a developer. EPA discusses state-of-mind issues only because it is discussing the purpose behind the regulations, which is concerned with incentives, and thus in fact is indirectly concerned with the developer's state of mind.

In short, we conclude that a common sense reading of the statute can lead only to the use of the market entry approach used by EPA.

## B

With regard to the past practice of the Corps and EPA, Pyramid asserts that neither has ever applied a market entry approach. It first cites two previous final determinations of EPA \* \* \* On the basis of these determinations, Pyramid argues that, had EPA been using a market entry approach in these cases, it would have examined whether alternatives were available at earlier times and that EPA had failed to make such an examination. \* \* \*

Our examination of these prior decisions has satisfied us, however, that the issue raised in the instant case simply has not been addressed before. [The court then discussed why the issue was not relevant in the prior decisions cited by Pyramid.] \* \* \*

We believe that the issue essentially is one of first impression. We view EPA's action in the instant case as an application of the regulatory language to the specific needs of the case which arose here for the first time. We therefore hold that EPA has not acted contrary to prior practice under the regulations.

### III

[In Part III of the opinion, the court addressed Pyramid's claim that EPA's interpretation of the Guidelines was not entitled to deference because the Corps was charged with issuing Section 404 permits and the Corps had adopted a different interpretation of the Guidelines. The Court did not ultimately determine whether EPA's interpretation, as opposed to the Corps', was entitled to a greater level of deference because (1) the court felt that it was unclear whether the Corps was evaluating alternatives based on a "time of application" theory or a "market entry" theory; and (2) regardless of whether EPA was entitled to a greater level of deference than the Corps, EPA's decision was valid under the normal standard of review that would apply in the case - the arbitrary and capricious standard.]

#### Questions and Comments

1. **EPA's veto:** As mentioned above and as will be discussed in detail in Chapter 8, *infra*, EPA can veto permits issued by the Corps if EPA determines that the permitted discharge will have unacceptable adverse effects. Since EPA vetoed the permit, the court is reviewing EPA's decision, rather than the Corps. In light of EPA's veto authority, it is probably more accurate to say that the government, rather than the Corps, has the ultimate authority to determine whether alternatives are available and practicable.
2. **Timing of availability:** In determining whether an alternative is "available" to a permit applicant, what is the appropriate time period to examine, according to the court? Should the Corps examine the alternatives that are available at the time of the permit application? What are the disadvantages of that approach, according to the court? Does the market entry approach achieve the goal of the statute and regulations if there are alternatives available at the time of application that were not available when the applicant entered the market? As an alternative, should the Corps examine the alternatives that are available at the time the agency is deciding whether to issue or deny the permit, regardless of what alternatives were available earlier? The dissent, in a portion of the opinion not reproduced above, suggests that a "time of decision" rule would be most consistent with the goals of the statute and regulations. Do you understand why? If you read the dissent's opinion, you'll notice that the dissent has an "interesting" view regarding the goals of the Clean Water Act and the 404(b)(1) Guidelines.
3. **Applying the market entry test:** If the government will examine the alternatives that are available to a permit applicant at the time the applicant enters the market for the project in the permit application, when does the applicant "enter" the market? When the first internal memo is circulated? When they hire a consultant? Did the court articulate a precise test to determine when an applicant "enters" the market?

Did it have to do so in this case?

4. **Property not owned by the applicant:** As was evident in this case, the 404(b)(1) Guidelines provide that “available” alternatives include areas “not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity.” See [40 C.F.R. § 230.10\(a\)\(2\)](#).
5. **Fairness:** What role do considerations of fairness play in this case? On the one hand, the majority suggested that it might be appropriate to examine alternatives that existed at the time that the permit applicant’s *predecessor* entered the market, because the *applicant* received a permit from the *State of Massachusetts* for the project under state standards that had been replaced because the applicant took over its predecessor’s permit application, which was proceeding under the old standards and was grand-fathered.

On the other hand, the permit applicant argued that the government’s decision to apply a “market entry” test to determine whether alternatives were “available” was a retroactive application of a new standard. Was it? Can agencies make decisions in adjudication that apply retroactively? What are the limits on the agency?

6. **Changing positions:** The permit applicant argued that EPA’s decision to apply a “market entry” approach should be invalidated because the “market entry” test represented a change in the agency’s interpretation of the Guidelines and was inconsistent with the prior interpretation of the Guidelines. The court did not believe that the agency was changing its past interpretation or practice. How would the court’s analysis have differed if EPA’s interpretation represented a change in its prior interpretation of the Guidelines? Can agencies change their interpretations of regulations over time? If so, are there any limits on those changes? Could EPA have adopted a “market entry” approach if it had previously adopted a regulation that indicated that alternatives would be evaluated based on alternatives that are available at the time of the permit application?
7. **Dueling agencies:** The permit applicant argued that EPA’s interpretation of the 404(b)(1) Guidelines is not entitled to deference in this case because the Corps, rather than EPA, administers the Section 404 permit program on a daily basis. The court did not ultimately determine whether EPA’s interpretation was entitled to greater deference than the Corps’ interpretation because the court concluded that EPA’s interpretation was not arbitrary or capricious and was valid even without any additional deference. However, if the court had to decide the question, would EPA’s interpretation be entitled to greater deference than the Corps if they interpreted the Guidelines differently? What is the analysis that should be used to resolve that issue?

8. **Less adverse impact - Buy down:** The Corps granted the permit in this case because the decisionmaker concluded that the practicable alternatives to the proposed discharge would *not* have less adverse impact on the aquatic environment when compared to the impacts of the proposed discharge, taking into consideration the off-site mitigation for the proposed discharge. At the time, it was not unusual for the Corps to allow permit applicants to satisfy the alternatives analysis by “buying down” (reducing) the effects of a proposed discharge to a level where they would be equal to or less than the effects of practicable alternatives. However, in 1990, EPA and the Corps entered into a Memorandum of Agreement that clarified that compensatory mitigation should not be considered in determining the effects of a proposed discharge for purposes of the alternatives analysis required by the Section 404(b)(1) Guidelines. See [U.S. Army Corps of Engineers & U.S. Environmental Protection Agency, Memorandum of Agreement: The Determination of Mitigation Under the Clean Water Act Section 404\(b\)\(1\) Guidelines \(Feb. 6, 1990\)](#). The Corps and EPA still follow that approach today. See [33 C.F.R. § 332.1\(f\)\(2\)](#).
9. **Considering cost in determining practicability:** The preamble to the 404(b)(1) Guidelines provides that “[t]he mere fact that an alternative may cost somewhat more does not mean it is not practicable.” See [45 Fed. Reg. 85336, 85339 \(Dec. 24, 1980\)](#). However, if the alternative is “unreasonably expensive”, it will not be considered to be “practicable.” *Id.* at 85343. Although the analysis is very fact-sensitive, cases where courts have found that alternatives are not “practicable” due to the cost include [James City County v. U.S. Environmental Protection Agency, 955 F.2d 254 \(4<sup>th</sup> Cir. 1992\)](#) (cost of alternative would be 50% higher than cost of proposed activity); [Friends of the Earth v. Hintz, 800 F.2d 822 \(9<sup>th</sup> Cir. 1986\)](#) (alternative would have increased costs by \$1 million per year).
10. Professor Oliver Houck outlines the history of the alternatives analysis and provides an early critique of the process in *Hard Choices: The Analysis of Alternatives Under Section 404 of the Clean Water Act and Similar Environmental Laws*, 60 U. Colo. L. Rev. 774 (1989).

## Hypothetical

Several years ago, Springfield FC, a minor league professional soccer team, moved out of the city of Springfield because the club felt that the city did not adequately maintain the stadium in which they played. The owners of the club, who leased the stadium from the city, complained that the city did not adequately maintain the turf, the locker rooms, or the training fields. In addition, the owners of the club complained that there was not adequate parking at the stadium and that the two lane access roads to the stadium were too small. It was surprising that so many fans attended the games because the stadium was located within a mile of the city's retired solid waste landfill, and the smell that emanated from the landfill was rather unpleasant.

In order to attract another professional soccer team to Springfield, city officials formed the Springfield Stadium Development Authority (SSDA) on October 31, 2011 to spearhead the construction of a new stadium in Springfield. The SSDA decided that the stadium should be located downtown, so that it could spur redevelopment of the city's central business district. In January, 2012, the SSDA began to explore potential locations for the stadium. The first property that they considered was a 40 acre parcel of land in the central business district that was an abandoned zipper factory. Construction on that site would not have impacted any wetlands, but the SSDA was concerned that the costs of demolishing the factory and cleaning up any pollution from the site would be exorbitant. An environmental consultant estimated that clean-up costs could exceed \$30 million.

A few weeks later, the SSDA visited a 30 acre plot of undeveloped land that was located a mile away from the zipper factory, but still in the central business district. At the time, Ned Rooney, the owner of the site, was listing the property at \$7 million. Construction on the site would not have impacted any wetlands, and the SSDA strongly considered purchasing that property until they found the Sturridge Family Trust Property.

The Sturridge property is a 40 acre plot of land that is located just outside of the central business district, near the Springfield River, and was advertised for sale at \$6 million. Although it is located outside of the central business district, SSDA believed that development of the stadium on that site will still spur redevelopment in the central business district. Unfortunately, the property contained 20 acres of wetlands, and it would be very difficult to build the stadium on the property without impacting the wetlands.

In addition to those sites, the SSDA looked at a 50 acre parcel of undeveloped land that was located in the northern suburbs of Springfield. Construction of the stadium on that site would not have impacted any wetlands, but the SSDA rejected the site because it was not located near the central business district. Further, the Springfield city manager identified a 30 acre parcel of vacant land that was located near the central business district (the Portsmouth site), but the SSDA rejected that site because it was not for sale at the time. Construction on that site would have impacted 2 acres of isolated wetlands.



The SSDA also considered upgrading the existing soccer stadium and expanding the parking and access roads to the stadium, which was located just outside the central business district. Those improvements would not have impacted any wetlands. Although the improvements would have cost about \$15 million, an economist for the SSDA forecast that the improvements would increase the value of the stadium by \$30 million and could attract a professional soccer team that would lease the stadium and pay the city enough money to cover the redevelopment costs within 15 years.

However, the economist also advised the SSDA that construction of a new stadium on the Sturridge property would likely provide income that was twice as much as the city could receive if it upgraded the existing stadium.

After exploring all of those sites, the SSDA decided to purchase the Sturridge property. At the time that they bought the property, the Rooney property had already been sold to another developer, who had begun construction of a mall on the property.

Since construction of the stadium on the Sturridge property involved a discharge of dredged or fill material into wetlands that are adjacent to the Springfield River, the SSDA applied to the Corps of Engineers for a Section 404 permit. The proposed development would destroy 15 acres of wetlands that provide flood control for the downtown area of the city and important wildlife habitat. The SSDA identified the purpose of the project, in its permit application as "to construct a soccer stadium for a professional soccer team in an area of Springfield that will spur redevelopment of the city's central business district."

Which of the properties identified above are likely to be considered "available" alternatives in the Corps' review of the permit application? Are there any practicable alternatives to the SSDA's development proposal that would have less adverse impact on the aquatic ecosystem? Do any presumptions apply to the Corps' review of the permit application? Is it likely that the Corps will issue the permit to SSDA for the project as proposed by SSDA?

## Chapter Quiz

Now that you've finished Chapter 6, why not try a CALI lesson on individual Section 404 permits at: <http://cca.li/PX>. It should only take about 30 minutes.

# Chapter 7

## Mitigation

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When the Corps issues a Section 404 permit that authorizes the discharge of dredged or fill material into wetlands, at least some wetlands are likely to be destroyed or degraded, even though the permit applicant has taken measures to avoid and minimize the impacts. For that reason, the Corps has, from the early days of the Section 404 permit program, included conditions in permits that require the permittee to offset those environmental harms by providing **compensatory mitigation**.

### I. Types of Mitigation

There are basically four types of compensatory mitigation:

- **Restoration**
- **Enhancement**
- **Creation**
- **Preservation**

**Restoration** of wetlands involves re-establishing or rehabilitating wetlands with the goal of returning natural or historic functions to a former wetland or a degraded wetland. See [33 C.F.R. § 332.2](#). Wetlands are re-established or rehabilitated by manipulating the physical, chemical or biological characteristics of a site. *Id.* For instance, a wetland that has been drained may be restored by removing underground drain tiles, plugging open ditches, or building small dikes. See [Michigan Department of Natural Resources, Wetland Restoration Techniques](#). Restoration often provides the most cost-effective improvement in wetland function. See [U.S. Department of Agriculture, Engineering Field Handbook, Part 650, Chapter 13, Wetland Restoration, Enhancement or Creation 13-2 \(Apr. 2008\)](#) [hereinafter “USDA Engineering Field



Photo 34 Wetlands Restoration - USDA  
Photo on  
[http://commons.wikimedia.org/wiki/File:Wetlands\\_restoration\\_hughes\\_co\\_south\\_dakota.jpg](http://commons.wikimedia.org/wiki/File:Wetlands_restoration_hughes_co_south_dakota.jpg)

[Handbook”](#)]. Sites that will be restored often have wetlands soils and some wetland plants and mainly require re-establishment of the former hydrology and topography.

**Enhancement** of wetlands involves manipulating the physical, chemical or biological characteristics of an existing wetland to improve a particular function or functions. See [33 C.F.R. § 332.2](#). For instance, enhancement projects might involve diverting a small stream into a wetland to change the water depth or planting different vegetation in the wetland in order to provide habitat for different varieties of fish, birds, or other wildlife. See [USDA Engineering Field Handbook 13-2](#). By improving some functions of wetlands, though, enhancement projects might impair other functions. See [33 C.F.R. § 332.2](#). For example, by improving the habitat for some varieties of fish and wildlife, a project may degrade the habitat for others. Enhancement projects do not generally increase the acreage of existing wetlands. *Id.* While restoration and enhancement projects can both take place in degraded wetlands, restoration projects focus on returning the site to a prior condition, while enhancement focuses on changing the functions of the site, without regard to the prior condition of the site. Wetlands enhancement projects generally require more management and are more expensive than wetlands restoration projects. See [USDA Engineering Field Handbook 13-2](#).

**Creation** (or establishment) of wetlands involves manipulating the physical, chemical or biological characteristics of land to establish wetlands in uplands or on lands where wetlands did not previously exist. See [33 C.F.R. § 332.2](#). Wetland creation is the most difficult type of compensatory mitigation because it requires bringing water to a site where it does not naturally occur and establishing vegetation on soils that are not hydric soils. See [National Oceanographic and Atmospheric Administration, An Introduction and User’s Guide to Wetland Restoration, Creation and Enhancement 11](#). Consequently, wetland creation is more expensive and requires more management than other mitigation options. See [USDA Engineering Field Handbook 13-2](#). Wetlands are often created for only one function, such as providing wildlife habitat, educational opportunities, or improving water quality of non-point source runoff. *Id.* If successful, though, wetland creation provides an increase in the functions and acreage of wetlands. See [33 C.F.R. § 332.2](#)

**Preservation** of wetlands involves the permanent protection of ecologically important wetlands through the implementation of appropriate legal and physical mechanisms, such as conservation easements or transfer of title. See [40 C.F.R. §230.93\(h\)](#). It does not provide an increase in wetland functions or acreage. See [33 C.F.R. § 332.2](#)

The purpose of compensatory mitigation is to develop long term self-sustaining aquatic resources that offset adverse effects and are not dependent on human intervention after the mitigation has been established. See [U.S. Army Corps of Engineers, Sacramento District, Mitigation](#).

Of the four types of compensatory mitigation, **restoration** is generally the preferred option

because it has a greater likelihood of success and impacts potentially ecologically important uplands less than wetlands creation, and because it provides greater gains in wetlands functions than wetlands enhancement or preservation. See [33 C.F.R. § 332.3\(a\)\(2\)](#). **Preservation** is limited to preserving ecologically important wetlands and resources and normally is only accepted as part of a package of mitigation that also includes restoration, enhancement or creation of wetlands resources. See [40 C.F.R. § 230.93\(h\)](#).

Thus, when the Corps issues a Section 404 permit that authorizes the destruction or degradation of wetlands, the Corps will generally include conditions in the permit that require the permittee to offset those environmental harms by restoring, enhancing, creating and/or preserving wetlands.

As will be explained further below, the Corps may require the permittee to carry out and manage the mitigation project itself, or it may allow the permittee to provide the required mitigation by purchasing mitigation credits from a mitigation bank that restores, enhances, creates or preserves wetlands or by paying a fee, “in lieu” of doing the mitigation itself, to an organization that been approved by the Corps to restore, enhance, create or preserve wetlands. “**Permittee-responsible mitigation**”, “**mitigation banking**” and the “**in lieu fee programs**” will be discussed in detail below.

## II. Legal Authority for Mitigation

The Clean Water Act does not explicitly state that Section 404 permits must include compensatory mitigation requirements, but the statute provides that the 404(b)(1) Guidelines, which establish the criteria for permit evaluation, should be based on criteria comparable to the ocean dumping criteria in Section 403(c) of the Clean Water Act, and those criteria require avoidance and minimization of impacts. See [33 U.S.C. § 1344\(b\)\(1\)](#).

Until 2008, the 404(b)(1) Guidelines also did not explicitly require compensatory mitigation, although they required permittees to take “appropriate and practicable steps ... [to] minimize potential adverse impacts ... on the aquatic ecosystem.” See [40 C.F.R. § 230.10\(d\)](#). For several decades, therefore, the Corps and EPA used guidance documents, such as memoranda of agreement, action plans, and Regulatory Guidance Letters, to explain and administer the compensatory mitigation requirements in Section 404 permits.

In 2003, however, Congress included a provision in Section 314 of the [National Defense Authorization Act for Fiscal Year 2004, P.L. 108-136, 117 Stat. 1392](#), that required the Corps, within two years, to promulgate regulations governing mitigation and mitigation banking for the Section 404 permitting program. In response, in 2008, a few years late, the Corps and EPA published compensatory mitigation rules. See [73 Fed. Reg. 19594 \(Apr. 10, 2008\)](#). The new rules superseded most of the guidance documents that the agencies

previously used to administer the compensatory mitigation requirements. See [33 C.F.R. § 332.1\(f\)](#).

Incidentally, those regulations also suggest that compensatory mitigation can be required in order to ensure that an activity authorized by a Clean Water Act Section 404 permit or a Rivers and Harbors Act Section 10 permit is “not contrary to the public interest.” *Id.* § 332.1(d). However, as noted earlier, the Corps rarely relies solely on its “public interest” authority to support decisions involving Section 404 permits.

The Corps has also cited the National Environmental Policy Act (NEPA) as a basis for the mitigation requirements that are included in Section 404 permits. See [Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency: The Determination of Mitigation Under the Clean Water Act Section 404\(b\)\(1\) Guidelines § II.A. \(Feb. 1990\) \[hereinafter “1990 MOA”\]](#).

#### **Mitigation Resources**

[Corps Video on Mitigation](#)

[National Academy of Sciences Report on Compensatory Mitigation](#)

[1990 MOA on Mitigation Between the Corps and EPA](#)

[Corps Mitigation Regulations \(33 C.F.R. Part 332\)](#)

EPA Mitigation Regulations ([404\(b\)\(1\) Guidelines](#) - especially [40 C.F.R. Part 230, Subpart J](#)) and [EPA Fact Sheet on Mitigation](#)

[Example of a Restrictive Covenant for Permittee Mitigation \(Corps/Md.\)](#)

[Model Mitigation Plan Checklist \(EPA/Corps - 2003\)](#)

### **III. Mitigation Sequencing and Permit Conditions**

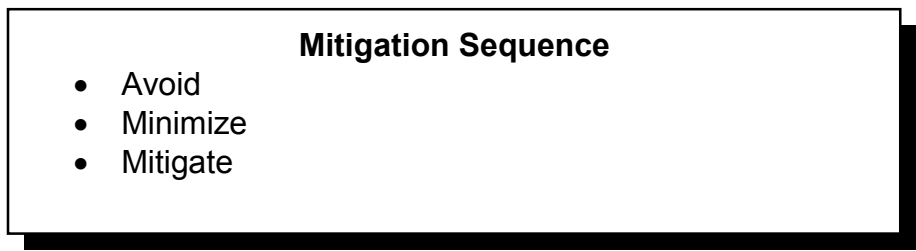
Mitigation requirements are formulated by the Corps, with input from EPA, the Fish and Wildlife Service and National Marine Fisheries Service, and are included as conditions in Section 404 permits. If EPA, the Fish and Wildlife Service, or the National Marine Fisheries Service disagree with the mitigation requirements that the Corps plans to include in a permit, they can elevate their dispute to higher levels within the agencies pursuant to the 404(q) dispute resolution process described in the last chapter. While the Corps makes the final determination regarding the mitigation conditions included in the permit, EPA retains the authority to veto the permit if it concludes that the mitigation is not adequate. See Chapter 8, *infra*.

Since mitigation requirements are included as conditions in the permit, the Corps can bring enforcement actions against the permittee if the permittee does not comply with the mitigation requirements. See [33 U.S.C. § 1344\(s\)](#).

As noted in the last chapter, when the Corps evaluates alternatives to a permit applicant's proposed project under the Section 404(b)(1) Guidelines to determine whether there are practicable alternatives that have less adverse impacts on the aquatic environment, the Corps compares the effects of the alternatives to the effects of the proposed project, without regard to any mitigation. It does not compare the effects of alternatives to the effects of the proposed project, as reduced by mitigation measures. It is only after the Corps determines that there are no practicable alternatives to the proposed discharge that the Corps addresses mitigation. This approach was first announced in a 1990 Memorandum of Agreement between the Corps and EPA. See [1990 MOA](#), *supra*.

The 1990 MOA creates a **mitigation sequencing** process to implement the requirement in the Section 404(b)(1) Guidelines that the Corps must require permittees to take "appropriate and practicable steps ... [to] minimize potential adverse impacts ... on the aquatic ecosystem." See [40 C.F.R. § 230.10\(d\)](#). The three step sequence consists of (1)

**avoidance**;  
(2)  
**minimization**; and (3)  
**compensatory mitigation**;  
in that  
order.



**Avoid:** As the first step in the process, the Corps must ensure that the proposed discharge avoids impacts to wetlands and the aquatic ecosystem. It does this through the alternatives analysis described above. If there is a practicable alternative to the proposed discharge that would have less adverse impacts on the aquatic environment, the Corps may not issue a permit authorizing the proposed discharge. The 1990 MOA explicitly provided that "Compensatory mitigation may not be used as a method to reduce environmental impacts in the evaluation of the least environmentally damaging practicable alternatives for the purposes of requirements under Section 230.10(a)." See [1990 MOA, § II.C.1](#). The alternatives analysis, therefore, helps ensure that the permittee avoids impacts to wetlands and aquatic resources if practicable.

**Minimize:** The second step in the mitigation sequence is minimization. Impacts to wetlands and the aquatic environment that cannot be avoided must be minimized. As the 1990 MOA notes, the 404(b)(1) Guidelines provide that appropriate and practicable steps to minimize adverse impacts will be required through project modifications and permit conditions. See [40 C.F.R. § 230.10\(d\)](#) Subpart H of the Guidelines outlines several actions to minimize impacts, including actions concerning the location of the discharge (*i.e.*, confining it to minimize smothering organisms); actions concerning the material to be discharged (*i.e.*, to reduce the potency and availability of pollutants); actions controlling the material after discharge (*i.e.*, capping contaminated material with clean material); actions affecting the method of dispersion (setting limits on the amount of material discharged per unit of time or volume of receiving water); actions affecting plant and animal populations (*i.e.*, avoiding sites having unique habitat value) and others. See [40 C.F.R. Part 230, Subpart H](#). The Corps includes such requirements as conditions of Section 404 permits.

**Mitigate:** The final step in the mitigation sequence is **compensatory mitigation**. Since a proposed discharge may still cause adverse impacts to the aquatic environment after the Corps has required the permittee to avoid and minimize the impacts, the Corps includes conditions in Section 404 permits to require compensatory mitigation for those remaining adverse effects. The MOA provides “Appropriate and practicable compensatory mitigation is required for unavoidable adverse impacts which remain after all appropriate and practicable minimization has been required.” See [1990 MOA § II.C.3](#).

In addition to creating the mitigation sequence to be used when evaluating Section 404 permit applications, the 1990 MOA clearly provided that mitigation requirements “shall be conditions” of Section 404 permits and that the Corps should deny Section 404 permits “[i]f the mitigation plan necessary to ensure compliance with the Guidelines is not reasonably implementable or enforceable.” [Id. § III.E](#).

The 1990 MOA was challenged shortly after the agencies entered into the agreement, but the federal district court hearing the challenge held that the MOA was an interpretive rule, rather than a substantive or legislative rule, and that the challenge to the MOA was not ripe. See *Municipality of Anchorage v. United States*, [21 ELR 20119 \(D. Alaska 1990\)](#), *aff’d* [980 F.2d 1320 \(9<sup>th</sup> Cir. 1992\)](#).

The legality of mitigation sequencing no longer depends on the legality or enforceability of the 1990 MOA, however, as the Corps and EPA incorporated the sequencing requirement into the 2008 mitigation regulations. See [33 C.F.R. § 332.1\(c\)](#). While those regulations superseded most of the other mitigation guidance documents issued by the Corps prior to the regulations, the regulations provided that the 1990 MOA remained in effect, except for portions of the MOA that addressed the amount, type and location of compensatory mitigation projects. *Id.* § 332.1(f)(2).

#### IV. Amount and Type of Mitigation Required

##### A. No Net Loss

The presumptions and policies that the Corps uses to determine how much compensatory mitigation and what type of compensatory mitigation are required have evolved over time, but have always left considerable discretion in the hands of the individuals that are reviewing the permit applications. However, the overarching goal to be used in calculating the amount and type of mitigation has remained fairly constant. Beginning with the 1990 MOA, the Corps and EPA indicated that they would “strive”, in making decisions regarding compensatory mitigation, “to achieve a goal of **no overall net loss of values and functions**.” See [1990 MOA § II.B](#). However, they stressed that the goal “may not be achieved in each and every permit action.” *Id.* In theory, therefore, in most cases, the compensatory mitigation that will be required for each permit should replace the **values and functions** (and not simply acreage) of the wetlands that will be destroyed or degraded by the project authorized by the permit. The “no net loss” policy was re-affirmed in Regulatory Guidance Letters in 2001, see [U.S. Army Corps of Engineers , RGL 01-01, Guidance for the Establishment and Maintenance of Compensatory Mitigation Projects Under the Corps Regulatory Program Pursuant to Section 404\(a\) of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 \(Oct. 31, 2001\)](#), and 2002, see [U.S. Army Corps of Engineers, RGL 02-02, Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 § 2.c. \(Dec. 24, 2002\)](#) (clarifying that Districts will strive to achieve the goal on a cumulative basis, even though it may not be achieved for every permit action, and that the Corps will achieve the goal programmatically). While the Corps’ 2008 permit regulations did not explicitly codify the “no net loss” policy, the preamble to the regulations indicated that the portions of the 1990 MOA that created the policy were not superseded by the regulations. See [70 Fed. Reg. at 19603](#).

##### B. On-site and in-kind

While the “no overall net loss of values and functions” goal has not changed, the manner in which it has been implemented in permit decisions has changed over time. The 1990 MOA established preferences for “**on-site**” compensatory mitigation and “**in-kind**” compensatory mitigation. The MOA indicated that compensatory actions “should be undertaken, when practicable, in areas adjacent or continuous to the discharge site.” See [1990 MOA § II.C.3](#). In addition, it provided that “[i]f on-site compensatory mitigation is not practicable, off-site compensatory mitigation should be undertaken in the same geographic area if practicable.” *Id.* Since the goal of the mitigation was to replace the values and functions of the wetlands destroyed or degraded by the permitted discharge, mitigation measures at or near the site of those wetlands were deemed to be more likely to replace those values and functions. If a wetland is providing flood control for a particular area, for



instance, creation of another wetland at a different location is unlikely to serve that same function. The preference for “in-kind” compensation (replacement of a particular type of wetland lost with a similar type of wetland) was based on similar considerations. As noted in Chapter 1, *infra*, a freshwater marsh will likely provide values and functions that may not be replaced by a forested swamp. The policy presumed that wetlands were more likely to replace the values and functions of wetlands destroyed or degraded if the mitigation wetlands were the same type of wetlands as those destroyed or degraded.

On-site and in-kind mitigation may be more likely to replace the values and functions of the wetlands being destroyed or degraded by a section 404 permitted discharge than off-site or out-of-kind mitigation *if* the mitigation measures are actually being implemented successfully. However, in 2001, the **National Research Council of the National Academy of Sciences** issued a report that suggested that the Corps was not adequately monitoring mitigation projects and that the literature on mitigation at the time suggested that “required mitigation projects often are not undertaken or fail to meet permit conditions.” See [National Research Council. \*Compensating for Wetland Losses Under the Clean Water Act 3\* \(The National Academies Press, 2001\) \[hereinafter “NRC Mitigation Report”\]](#). The Council suggested that the Corps should consider the values and functions that wetlands serve within a watershed when making mitigation decisions, rather than simply focusing on the impacts at or near the site. *Id.* at 3-4. The Council suggested that “a preference for on-site and in-kind mitigation should not be automatic, but should follow from an analytically based assessment of the wetland needs in the watershed and the potential for the compensatory wetland to persist over time.” *Id.* The Council’s report explained that on-site mitigation measures may frequently be unsuccessful because the hydrology, soils and vegetation at the site may not support the mitigation project, and recommended selection of sites to promote development of self-sustaining mitigation. *Id.* at 4-5. Regarding the preference for “in-kind” mitigation, the report also noted that some types of wetlands, such as fens and bogs, could not be restored based on the knowledge at the time of the report. *Id.* at 4.

The Corps responded to the National Research Council Report by issuing a **2001 Regulatory Guidance Letter** that softened the preferences. See [RGL 01-01](#), *supra*. The agency was heavily criticized because it made major changes to the 1990 MOA in the RGL without involving EPA or other agencies in the development of the policy, so the agency replaced that Guidance Letter a year later with a new Regulatory Guidance Letter that it developed with input from the other agencies. See [RGL 02-02](#), *supra*. The new guidance indicated that mitigation should be used to “maintain wetland functional levels within a watershed” and that off-site mitigation could be used “when it provides more watershed benefit than on-site mitigation.” *Id.* § 2.g. Similarly, the guidance indicated that out-of-kind mitigation was appropriate when it was “practicable and provides more environmental or watershed benefit than in-kind compensation.” *Id.* § 2.h.

That Guidance was superseded by the 2008 regulations, though, which now establish a hierarchy for selecting compensatory mitigation and which establish a preference for

selecting mitigation based on a **watershed approach**. See [33 C.F.R. § 332.3\(b\)\(4\)](#). Thus, the 1990 MOA preference for on-site, in-kind mitigation has been replaced by a preference for selecting mitigation on a watershed basis. In situations where a watershed approach is not practicable, though, the regulations maintain a preference for on-site and in-kind mitigation over off-site and out-of-kind mitigation. *Id.* § 332.3(b)(5).

### C. Ratios and Timing

Two other important issues that arise concerning compensatory mitigation involve the amount of mitigation that will be required and the timing of the mitigation project. Regarding the **amount** of mitigation, the 1990 MOA recognized that implementation of the “no net loss” goal meant that mitigation should provide at least a one to one replacement of the **values and functions** of wetlands, and not simply a one to one replacement of **acreage**. See [1990 MOA § II.B](#). However, the MOA also provided that in the absence of more definitive information on the functions and values of specific wetlands, a minimum **1 to 1 acreage replacement ratio** may be used as a reasonable surrogate for no net loss of values and functions. *Id.* Thus, if 10 acres of wetlands were being destroyed or degraded, the Corps could require the permittee to provide 10 acres of wetlands mitigation in the absence of more definitive information on the values and functions of those wetlands.

Even if it is possible to precisely identify the values and functions that are being lost when a wetland is destroyed or degraded and to precisely identify the values and functions that could be provided by wetlands that may be restored, enhanced, created, or preserved, the ratio adopted by the Corps for mitigation projects will vary depending on the type of project (restoration, enhancement, creation, or preservation) because some types of mitigation projects, like preservation, do not provide any increase in values or functions to offset the values and functions lost, and because some mitigation projects, like restoration, may have greater chances to succeed than others, like wetlands creation.

The **1990 MOA** recognized this dynamic, providing that the 1 to 1 ratio “may be greater where the functional values of the area being impacted are demonstrably high and the replacement wetlands are of lower functional value or the likelihood of success of the mitigation project is low [and that] ... the ratio may be less than 1 to 1 for areas where the functional values associated with the area being impacted are demonstrably low and the likelihood of success associated with the mitigation proposal is high.” *Id.* Accordingly, while the Corps might require a permittee to restore 10 acres of wetlands to replace 10 acres of wetlands (1:1 ratio), they may require the permittee to create 30 acres (3:1 ratio), instead of restoring 10, to replace those wetlands, since the likelihood of successful wetland creation may be lower than the likelihood of successful restoration.

The Corps re-affirmed the 1990 MOA approach in the 2002 Regulatory Guidance Letter, see [RGL 02-02](#), *supra*, but the 2008 regulations superseded both that RGL and the portion of the 1990 MOA that created that approach. The regulations adopt a similar approach,

though, and provide little more certainty regarding specific ratios than the prior guidance provided. Specifically, the regulations indicate that the amount of compensatory mitigation must be sufficient to replace “lost aquatic functions”, based on “appropriate functional or conditional assessment methods or other suitable metrics.” See [33 C.F.R. § 332.3\(f\)\(1\)](#). Where those methods or metrics aren’t available, the regulations provide that “a minimum one to one acreage or linear foot compensation ratio must be used.” *Id.* They also require the permit issuer (district engineer) to require a ratio greater than one to one “to account for the method of compensatory mitigation (e.g., preservation), the likelihood of success, differences between the functions lost at the impact site and the functions expected to be produced by the compensatory mitigation project, temporal losses of aquatic resource functions, the difficulty of restoring or establishing the desired aquatic resource type and functions, and/or the distance between the affected aquatic resource and the compensation site.” *Id.* § 332.3(f)(2).

While the guidance and regulations leave considerable discretion to the permit issuer to identify specific ratios for compensatory mitigation, in practice, most Districts have adopted guidance that identify ratios for specific types of mitigation projects. See Margaret Strand, *Wetlands Deskbook* 93 (Environmental Law institute, 3d ed., 2009).

Regarding the **timing** of compensatory mitigation, in light of concerns that many mitigation projects were not being implemented or were not succeeding, the 2001 National Research Council report recommended that “compensatory mitigation should be in place concurrent with, and preferably before, permitted activity” and that “there should be effective legal and financial assurances for long-term site sustainability and monitoring of all compensatory wetland projects”. See [NRC Mitigation Report](#), *supra*, at 7. The 2008 regulations codified those requirements, (1) providing that “[i]mplementation of the compensatory mitigation project shall be, to the maximum extent practicable, in advance of or concurrent with the activity causing the authorized impacts”; (2) requiring additional compensatory mitigation to offset any losses of wetland functions that occur between the time of the discharge and the implementation of the mitigation, see [33 C.F.R. § 332.3\(m\)](#); and (3) requiring “sufficient financial assurances to ensure a high level of confidence that the compensatory mitigation project will be successfully completed.” *Id.* § 332.3(n).

## Questions and Comments

- Monitoring:** Although the 1990 MOA indicated that monitoring was an important aspect of mitigation, see [1990 MOA § III.D](#), the 2001 National Academy of Sciences National Research Council Report suggested that the Corps was not adequately monitoring and tracking the success of mitigation projects associated with Section 404 permits. See [NRC Mitigation Report](#), *supra*, at 3. A 2005 Government Accountability Office (GAO) report also concluded that the Corps was infrequently monitoring and rarely inspecting compensatory mitigation projects. See [U.S. Government Accountability Office, GAO-05-898, Corps of Engineers Does Not Have an Effective Oversight Approach to Ensure That Compensatory Mitigation is Occurring \(Sept. 8, 2005\)](#). In light of those reports, the Corps' 2008 mitigation regulations require permittees to monitor the mitigation and submit reports pursuant to a monitoring plan approved by the Corps, but the regulations provide flexibility to the Corps to tailor the monitoring requirements and reporting frequency to the specific mitigation project. See [33 C.F.R. § 332.6](#). For a detailed examination of the role that outside organizations have played, or should play, in monitoring and enforcing mitigation requirements, see Jessica Owley, *The Increasing Privatization of Environmental Permitting*, 46 Akron L. Rev. 1091 (2013).
- Success of mitigation:** Various studies have found that (1) fewer than 30% of the mitigation sites reviewed were successful in replacing the functions of the wetlands sites that they replaced; (2) fewer than 50% of mitigation sites reviewed were ecologically successful; and (3) failure rates for some types of wetlands are significantly higher than the failure rate for other types of wetlands, resulting in a shift in the predominance of various types of wetlands. See [Rebecca L. Kihlslinger, Success of Wetland Mitigation Projects, 30:2 National Wetlands Newsletter 14, 15 \(2008\)](#). In addition, a recent EPA Office of the Inspector General report criticized EPA for claiming that the agency reported “no net loss” of wetlands in the Section 404 regulatory program for fiscal years 2009-2011 because the agency presumed that mitigation projects for permitted activities will meet performance standards, when many of the projects failed to meet those standards. See [U.S. Environmental Protection Agency, Office of the Inspector General, Report No. 14-P-0191, EPA Needs to Clarify its Claim of “No Net Loss” of Wetlands 1-3 \(April 16, 2014\)](#). How should the information reported by Rebecca Kihlslinger and the information in the Inspector General report affect permitting and mitigation decisions?
- Mitigation Planning:** The 2008 mitigation regulations also established planning requirements for mitigation, so that each mitigation project must have a **mitigation plan** approved by the Corps including the following elements:

|                                   |   |
|-----------------------------------|---|
| <b>Objectives</b>                 | Amount, Type and Method (restoration, etc.) of mitigation and the manner in which it addresses the needs of the watershed     |
| <b>Site Selection</b>             | Factors considered in selecting the mitigation site   |
| <b>Site Protection Instrument</b> | Legal instruments to be used to protect the mitigation site (e.g. conservation easement)                                      |
| <b>Baseline information</b>       | Description of the mitigation site before mitigation  |
| <b>Determination of credits</b>   | Explanation of how the proposed mitigation site provides sufficient compensation for impacts from the permitted activity      |
| <b>Mitigation Work Plan</b>       | Detailed work plan for developing the mitigation project  |
| <b>Maintenance Plan</b>           | Plan for maintenance after initial construction is completed  |
| <b>Performance standards</b>      | Ecologically-based standards to be used to determine whether the mitigation is meeting its objectives                         |
| <b>Monitoring Requirements</b>    | Plan outlining parameters to be monitored, and the timing of monitoring and reporting   |
| <b>Long Term Management Plan</b>  | Plan for long-term sustainability, including financing and identification of the persons responsible for long-term management |
| <b>Adaptive Management Plan</b>   | Strategy to address unforeseen changes in site conditions or other components of the mitigation project                       |
| <b>Financial Assurances</b>       | Financial assurances for the project (e.g. performance bond)  |

See [33 C.F.R. § 332.4\(c\)](#).

4. Shortly after the agencies adopted the 2008 mitigation rule, several members of the National Research Council's Committee on Mitigating Wetland Losses critiqued the rule, discussing the importance of the watershed approach, adaptive management and implementation of the rule. See [Royal C. Gardner, Joy Zedler, Ann Redmond, R. Eugene Turner, Carol A. Johnston, Victoria R. Alvarez, Karen L. Prestegaard, and William J. Mitsch, \*Compensating for Wetland Losses Under the Clean Water Act \(Redux\): Evaluating the Federal Compensatory Mitigation Regulation\*, 33 Stetson L. Rev. 213 \(2009\)](#). For a detailed examination of the ecosystem focus of the new regulations, see [J.B. Ruhl, James Salzman & Iris Goodman, \*Implementing the New Ecosystem Services Mandate of the Section 404 Compensatory Mitigation Program - A Catalyst for Advancing Science and Policy\*, 38 Stetson L. Rev. 251 \(2009\)](#).

## V. Mitigation Banking

Although the Corps initially required permittees to undertake compensatory mitigation projects themselves on land that they owned or would acquire (***permittee responsible mitigation***), other mitigation alternatives have gained popularity over time and the 2008 mitigation regulations established a preference for those other alternatives. The major alternatives to permittee responsible mitigation are ***mitigation banking*** and ***in lieu fee programs*** (which will be discussed later in this chapter).

In ***mitigation banking***, a person or entity restores, enhances, creates or preserves wetlands in a compensatory mitigation project and generates ***credits*** that can be used to satisfy mitigation requirements for a Section 404 permit. See [33 C.F.R. § 332.2](#). While the first mitigation banks generated credits that the banker would use to satisfy mitigation requirements for projects that the banker was undertaking, many mitigation banks today are ***entrepreneurial banks***, and sell credits to third parties who are engaged in development projects and need to provide compensatory mitigation as a condition of obtaining a Section 404 permit.

Although the 1990 MOA between the Corps and EPA provided that mitigation banking could be an acceptable form of compensatory mitigation, see [1990 MOA § III.C](#), the MOA limited the situations in which banking could be used, since the MOA created the preference for on-site, in-kind mitigation described above. Entrepreneurial banks, by their nature, will be used to provide mitigation for many different projects and will not generally be on-site of any of those projects. As the preference for on-site, in-kind mitigation softened and the Corps developed mitigation banking guidance, see [Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, 68 Fed. Reg. 58605 \(Nov. 28, 1995\) \[hereinafter "Mitigation Banking Guidance"\]](#), mitigation banking became much more popular.

### A. Benefits of Mitigation Banking

Mitigation banking provides benefits for ***the environment, the government*** and ***permit applicants***. As noted above, the National Academy of Sciences raised concerns that many of the traditional permittee-responsible mitigation projects were not successful. Mitigation banking addresses that problem because the mitigation banks must meet performance standards before credits are released and can be used to satisfy permit requirements. See [33 C.F.R. § 332.8](#). Thus, it is less likely that the mitigation will result in a loss of wetland functions. In addition, mitigation banks are more likely to generate successful mitigation because they can bring together money and expertise that the individual permittees would not be able to access if they were developing mitigation projects on-site separately. See [Mitigation Banking Guidance](#) at 58,607. Mitigation banks can provide additional environmental benefits compared to a series of separate, smaller mitigation projects, in that

“[i]t may be more advantageous for maintaining the integrity of the aquatic ecosystem to consolidate compensatory mitigation into a single large parcel or contiguous parcels”. *Id.*

The Corps and EPA benefit from mitigation banking because it is easier to monitor and enforce mitigation requirements when the mitigation projects are consolidated in a large parcel or contiguous parcels, as opposed to dozens or hundreds of locations around a state. *Id.* Better monitoring and enforcement also benefits the environment, by increasing the likelihood that the mitigation will be successful. While a 2005 GAO report criticized the Corps’ monitoring of mitigation banking projects, it concluded that the Corps provided more oversight for those projects than it provided for the permittee-responsible projects. See [GAO Mitigation Oversight Report](#), *supra*.

Finally, permit applicants benefit from mitigation banking because applicants can obtain permits quicker and at a lower cost if they can obtain credits from a mitigation bank than if they develop permittee responsible mitigation projects. See [Mitigation Banking Guidance](#) at 58,607. Applicants will save time because the Corps should be able to review a mitigation project involving purchase of credits from a mitigation bank much more quickly than it could evaluate a site-specific mitigation proposal prepared by the permit applicant. Applicants should be able to save money because the economies of scale involved in developing a mitigation bank should make mitigation credits from banks less expensive than on-site mitigation projects.

Permit applicants also receive another important benefit through mitigation banking. When a permit applicant satisfies its mitigation requirement by purchasing credits from a mitigation bank approved by the Corps of Engineers, the Corps will include that as a condition of the permit and the mitigation banker, rather than the permittee, will be responsible for the success of the mitigation. The permittee will not be required to provide alternative mitigation if the bank’s mitigation fails.

### Questions and Comments

1. **Size matters:** Although the federal guidance suggested that it *may* be more advantageous to consolidate mitigation into a larger parcel, environmental advocates have pointed out that small, isolated wetlands provide unique ecological and water quality functions and that an assemblage of a series of small wetlands scattered across a wide geographic area can provide habitat benefits that a single large wetland cannot provide. See [Environmental Law Institute, \*Banks and Fees: The Status of Off-Site Wetland Mitigation in the United States\* 28 \(Sept. 2002\) \[hereinafter “ELI Mitigation Banking Study”\]](#).

2. **Success:** Despite the benefits outlined above, some studies have suggested that mitigation banks are no more successful at replacing wetland values and functions than permittee-responsible mitigation. See [Rebecca L. Kihslinger, \*Success of Wetland Mitigation Projects\*, 30:2 National Wetlands Newsletter 14, 15 \(2008\)](#).
3. **Takings:** What effect might a robust mitigation banking system as an option for compensatory mitigation have on wetland permitting decisions and the likelihood and success of takings challenges based on Section 404 permit denials? See Chapter 11, *infra*, for an extended discussion of regulatory takings.
4. **Limitations:** If compensatory mitigation is designed to replace the functions and values of wetlands that are destroyed or degraded by a Section 404 permitted activity, can you see where that might be difficult to do in some cases by relying on mitigation banking? Can mitigation banking be reconciled with the goal of “no net loss”?

## B. Historical Development

As noted above, the 1990 MOA authorized mitigation banking as a form of compensatory mitigation, but created some roadblocks to its broad adoption by establishing the on-site, in-kind mitigation preference. In the early years of mitigation banking, most of the mitigation banks were **single-user** banks, where an entity that was engaged in a series of development projects that required Section 404 permits would develop a large compensatory mitigation project in advance of those development projects, and would rely on that project to serve as compensatory mitigation for the Section 404 permits that it would need to obtain for the future development projects. While some of those early banks were operated by private developers, most were operated by public entities. By 1992, for instance, almost half of the mitigation banks in existence were developed by state departments of transportation for their road development projects. See [ELI Mitigation Banking Study](#) at 15. Congress encouraged this trend by making federal highway funding available for such mitigation banks in the [Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. 102-240, 105 Stat. 1914 \(2001\)](#).

Mitigation banking began to gain popularity after the Corps, EPA, the Natural Resources Conservation Agency and NOAA issued federal mitigation banking guidance in 1995. See [Mitigation Banking Guidance](#), *supra*. The guidance identified legal authority for mitigation banking and outlined a process for review and approval of mitigation banks, creating much more certainty for prospective mitigation bank developers. *Id.* It also emphasized that the agencies’ preference for on-site mitigation should not preclude the use of mitigation banking when banking is environmentally preferable. *Id.* § II.D.4.

In 1998, Congress fueled the growth of mitigation banks further by expressing a preference for their use on federally funded highway projects. See [Transportation Equity Act for the](#)



[21<sup>st</sup> Century, Pub. L. No. 105-178, 112 Stat. 107 \(1998\)](#). Between 1993 and 2000, the number of mitigation banks approved by the Corps of Engineers grew from 44 to more than 230. See Royal C. Gardner, *Mitigation* in *Wetlands Law and Policy: Understanding Section 404* 266 (American Bar Association, Section on Environment, Energy and Resources 2005). By 2005, 405 mitigation banks had been approved by the Corps, and 72% of those were entrepreneurial banks. See Royal C. Gardner, *Lawyers, Swamps, and Money* 119 (Island Press 2011). Despite the growth in popularity of banks, developers complained that the agency's mitigation guidelines placed them at a disadvantage with respect to traditional permittee-responsible mitigation. According to a 2006 study, permittee-responsible mitigation still accounted for approximately 60% of wetland mitigation at that time, based on mitigation acreage. *Id.* at 140.

In 2008, when the Corps adopted its mitigation regulations, the agency indicated that the rule applied equivalent standards and criteria to all sources of compensatory mitigation, to the maximum extent practicable. See [73 Fed. Reg. 19594 \(Apr. 10, 2008\)](#). However, the final rules largely abandoned the on-site mitigation preference and created a hierarchy of preferred methods of compensatory mitigation, with mitigation banking at the top of the hierarchy. See [33 C.F.R. § 332.3\(b\)](#). The hierarchy proceeds as follows:

- Mitigation Banking
- In Lieu Fee Programs
- Permittee-responsible mitigation under a watershed approach
- Permittee-responsible mitigation through on-site and in-kind mitigation
- Permittee-responsible mitigation through off-site and out-of-kind mitigation

*Id.* Within a few years after the regulations were adopted, the number of banks approved by the Corps had grown to over 1000. See Royal C. Gardner, *Lawyers, Swamps, and Money* 119 (Island Press 2011).

### C. Nuts and Bolts of Mitigation Banking

A mitigation bank can only generate credits that can be used for compensatory mitigation if the bank is authorized to do so by the Corps of Engineers through an approved a ***mitigation banking instrument***. See [33 C.F.R. § 332.8](#).

In order to receive approval from the Corps, the bank must prepare a mitigation plan that includes the same elements described above for permittee-responsible mitigation (*i.e.*, objectives, baseline information, work plan, financial assurances, etc.). See [33 C.F.R. § 332.4\(c\)](#). Mitigation banking instruments are reviewed by an ***interagency review team (IRT)*** that includes representatives of the Corps, EPA, Fish and Wildlife, NOAA, and can include representatives of state, local and tribal resource agencies in appropriate

circumstances. See [40 C.F.R. § 230.98\(b\)](#).

When a bank is approved by the Corps, it will be approved with a specific geographic **service area**, meaning that the credits generated by mitigation from the bank can only be used as compensatory mitigation for projects within that service area. See [33 C.F.R. § 332.3\(b\)\(2\)](#). Normally, mitigation banks can only sell credits for use within the **watershed** in which the bank is located. *Id.* § 332.3(b)(1). While bankers would prefer larger service areas that include more potential customers, it is more likely that the mitigation provided by the bank will offset the impacts of the development for which the mitigation is provided when the bank is located in the same watershed as the development. While banks may be allowed to sell some credits before their mitigation project has been completed, the mitigation banking instrument will outline milestones that the bank must meet before issuing specific amounts of credits. *Id.* § 332.3(b)(1). The regulations provide that a significant share of the credits from the bank should be withheld until the bank fully achieves the ecological performance standards set forth in the banking instrument. See [40 C.F.R. § 230.98\(o\)\(8\)](#).

### Questions and Comments

1. **Cost of credits:** Neither the Corps nor any other agency regulates the cost of mitigation credits sold by banks. The bank can determine the price that it would like to charge for the credits and Section 404 permit applicants can decide whether to buy the credits at that price, buy from another banker at a different price, or develop their own mitigation proposal. The Ecosystem Marketplace estimates that the average cost of mitigation credits in 2008 was \$74,535 per acre, although the prices ranged from \$3,000 to \$653,000 per acre. See [Ecosystem Marketplace, U.S. Wetland Banking](#). They also estimated that developers spent over \$1 billion on wetland mitigation credits in 2008. *Id.*
2. **Responsibility:** As noted above, when a permit applicant receives approval from the Corps to satisfy the compensatory mitigation requirements for a Section 404 permit by purchasing credits from a mitigation bank, the bank is then responsible, rather than the permit applicant, for the success of the mitigation. See [33 C.F.R. § 332.2](#). Thus, if the mitigation fails, the Corps will not bring an enforcement action against the permittee for violating the permit conditions and will not require the permittee to provide alternate mitigation. Instead, the Corps will likely suspend the mitigation bank's operation and prevent additional credit releases and sales.
3. **Size:** As of 2011, the average size of approved mitigation bank sites was 466 acres, although the average size varied considerably by region. For instance, the average size of banks in Minnesota, which had the most approved and operational banks at that time, was 49 acres, while the average size of banks in Florida was 1,999 acres. See Steven Martin and Robert Brumbagh, *Entering a New Era: What Will RIBITS*

*Tell Us About Mitigation Banking?*, 33 Natl. Wetlands Newsletter, 3:16 (2011).

4. In addition to wetland mitigation banking, several other emerging markets, such as water quality trading, species conservation banks, and greenhouse gas trading, can encourage wetland preservation. For an interesting overview of the issues raised by the commodification of wetlands, see Fred Bosselman, *Swamp Swaps: The 'Second Nature' of Wetlands*, 39 *Envtl. L.* 577 (2009). See also, James Salzman & J.B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 *Stanford L. Rev.* 607 (2000).
5. For a detailed description of the development of mitigation banking and the operation of mitigation banks, see Royal C. Gardner, *Banking on Entrepreneurs: Wetlands, Mitigation Banking and Takings*, 81 *Iowa L. Rev.* 527 (1996).

### **Mitigation Banking Resources**

[RIBITS](#) (Corps' Regulatory In Lieu Fee and Bank Information Tracking System - search for mitigation banks, service area, credits available, reports, etc.)

[1995 Mitigation Banking Guidance](#) (superseded by the 2008 mitigation regulations)

[EPA Mitigation Banking Website](#)

National Mitigation Banking Association (NMBA) [website](#)

Information about [NMBA wetland mitigation banks](#) (contact info, service area, etc.)

[2005 GAO Mitigation Oversight Report](#)

[ELI Report on Mitigation Banking \(2002\)](#)

[Ecosystem Marketplace - Cost of Mitigation Credits \(2008\)](#)

[Model Mitigation Banking Instrument](#) (Corps - but predates 2008 regulations)

[Example of a Mitigation Banking Restrictive Covenant \(Corps/Md.\)](#)

The Conservation Fund - [Mitigation Bank Training for IRT members](#) (includes many sample documents)

### Research Problems

**Agency Data:** The Corps of Engineers maintains an online database of approved mitigation banks (RIBITS) that permit applicants can use to find mitigation credits for their projects. Using that database, answer the following questions:

1. How many commercial mitigation banks in Missouri are currently approved to sell wetland mitigation credits? Remember that single client banks do not **sell** credits and remember to focus on banks that sell **wetland** credits, as the Corps database also includes banks that sell stream mitigation credits.

2. The Corps of Engineers is requiring a permit applicant in Sturgeon Lake, Minnesota to provide 1 acre of “shallow marsh” wetlands as mitigation for a project on his property on Island Lake Road in Sturgeon Lake, Minnesota. Please identify any mitigation banks that he could contact to buy those credits. It may be helpful to know that the longitude and latitude coordinates of the property where the project will take place are 46.415175, -92.730863.

## VI. In Lieu Fee Programs

***In lieu fee mitigation programs*** are the other alternative to traditional permittee-responsible compensatory mitigation. In this scenario, the Corps authorizes the permittee, in lieu of implementing a compensatory mitigation project itself, to pay a third party that is implementing a compensatory mitigation project approved by the Corps. See [33 C.F.R. § 332.2](#). The entity that is performing the mitigation project must be a government or non-profit natural resources management entity. *Id.* Prior to the 2008 regulations, the Corps frequently entered into Memoranda of Agreement with the government or non-profit entities to establish guidelines for the mitigation, see Royal C. Gardner, *Money for Nothing? The Rise of Fee Mitigation*, 19 Va. Env'tl. L. J. 1, 23-30 (2000), but the responsibilities of the program sponsors are now governed by the 2008 mitigation regulations. See [73 Fed. Reg. 19594 \(Apr. 10, 2008\)](#). As with mitigation banking, in lieu fee programs involve “off-site” compensatory mitigation projects.

### A. Benefits and Concerns

In lieu fee programs are different from mitigation banking programs because, in an in lieu fee program, the government or non-profit entity usually collects money from several permittees before implementing a mitigation project, and there could be a significant delay between the collection of the money and the implementation of the project. See [ELI Mitigation Banking Study](#) at 8. Unlike mitigation banking, even if in lieu fee programs

ultimately replace the functions of wetlands that are destroyed or degraded by Section 404 permitted activities, there will generally be temporal losses of wetland functions. *Id.* However, in lieu fee programs can be used to restore a variety of wetland types of varying sizes in varying locations, while mitigation banks usually create, restore, enhance and/or preserve a single large site. *Id.* In addition, in lieu fee programs make it easier for the Corps to require mitigation for some small projects, such as those authorized by nationwide permits, for which the Corps might not otherwise require mitigation. See Royal C. Gardner, *Lawyers, Swamps, and Money* 129 (Island Press 2011).

For Section 404 permit applicants, in lieu fee programs provide the same benefits as mitigation banking. They make it quicker and cheaper to obtain a permit, see [U.S. General Accounting Office, GAO-01-325, Wetlands Protection: Assessments Needed to Determine Effectiveness of In-Lieu Fee Mitigation 9 \(May 2001\) \[hereinafter "GAO In Lieu Fee Report"\]](#), and they provide certainty to the permittee by shifting the responsibility for the success of the mitigation to a third party, the in lieu fee program sponsor.

For the government, to the extent that in lieu fee programs may involve smaller, scattered mitigation projects, as opposed to large, contiguous projects, in lieu fee programs may not provide the same monitoring and enforcement efficiency as mitigation banking. However, by consolidating the mitigation responsibilities in fewer entities with greater resources, the Corps still achieves a greater level of efficiency in monitoring and enforcement than it would in permittee-responsible mitigation, see [GAO In Lieu Fee Report](#) at 9, and the chances of mitigation success may be greater due to the greater flexibility that is available to the in lieu fee program sponsor in selecting a site for the mitigation project. See [Environmental Law Institute, The Status and Character of In Lieu Fee Mitigation in the United States 3 \(June 2006\)](#).

While in lieu fee programs provide benefits for the environment, the permit applicant, and the government, they have also been criticized. In a 2001 report, the U.S. General Accounting Office raised concerns that the in lieu fees that were being collected were not being used to implement mitigation projects in a timely manner, that the Corps was not adequately monitoring mitigation projects in the programs, and that the mitigation provided by the projects was not offsetting the impacts authorized by the Section 404 permits. See [GAO In Lieu Fee Report](#) at 10. Similarly, a 2005 ELI report found that 58 of the 87 in lieu fee programs that were in place at the time of the study did not require that the funds collected be spent on mitigation within a specific time frame. See [ELI Mitigation Banking Study](#) at 110. Prior to the adoption of the 2008 regulations, in lieu fee programs were also criticized because they frequently authorized preservation as a mitigation method. *Id.* at 119-120 (88% of in lieu fee programs authorized preservation).

## B. History and Regulation

The Corps established the first in lieu fee program in the Vicksburg, Mississippi District in 1987, and had established 63 programs throughout the country by September, 2000. See [GAO In Lieu Fee Report](#) at 7.

In 2000, at about the same time that the GAO was issuing its report criticizing in lieu fee programs, the Corps, EPA, the Fish and Wildlife Service and NOAA issued comprehensive in lieu fee guidance. See [Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act \(Oct. 2000\)](#). By 2005, the Corps had approved 87 programs in 27 states. See [ELI Mitigation Banking Study](#) at 99. According to a 2006 study, in lieu fee programs accounted for about 8.4% of the acreage of compensatory mitigation required in permits at that time. See Royal C. Gardner, *Lawyers, Swamps, and Money* 119 (Island Press 2011).

In lieu fee programs were regulated under the federal guidance document until the Corps adopted the mitigation regulations in 2008, which superseded the guidance. See [33 C.F.R. § 332.1\(f\)\(1\)](#). As noted above, the regulations were structured to provide “equivalent” regulation of all types of compensatory mitigation, but created a hierarchy or preferred mitigation options, which placed in lieu fee programs below mitigation banking, but above permittee-responsible mitigation. See [33 C.F.R. § 332.3\(b\)](#).

The regulations now require in lieu fee programs to be administered pursuant to an in lieu fee program instrument, similar to mitigation banking instruments, see [33 C.F.R. § 332.2](#), to be approved by an interagency review team, similar to mitigation banks, see [40 C.F.R. § 230.98\(b\)](#), and to prepare mitigation plans that address the same 12 factors as the plans prepared by mitigation banks and by permittees engaged in permittee-responsible mitigation (i.e., objectives, baseline information, work plan, financial assurances, etc.). See [33 C.F.R. § 332.4\(c\)](#). The regulations also require the Corps to identify a geographic **service area** in which credits from in lieu fee programs can be used, usually limited to the watershed in which the mitigation project will take place. See [33 C.F.R. § 332.3\(b\)](#). As with mitigation banking, if a permittee is authorized to satisfy its mitigation requirements by providing funds to an in lieu fee program, the program sponsor, rather than the permittee is then responsible for the success of the mitigation. See [33 C.F.R. § 332.2](#). As noted above, the Corps would then seek relief for any mitigation failure from the in lieu fee program manager through contract law.

Although the regulations treat in lieu fee programs in a manner that is similar to mitigation banking in many respects, there is still one important difference between the programs. Unlike mitigation banks, in lieu fee programs can sell some credits and raise money as soon as the program instrument has been approved and do not have to wait until the mitigation project can demonstrate that it has met various milestones. See [33 C.F.R. §](#)

[332.8\(n\)](#). As the mitigation project is implemented and meets milestones, the program sponsors can sell additional advance credits. *Id.*

### **In Lieu Fee Program Resources**

[RIBITS](#) (Corps' Regulatory In Lieu Fee and Bank Information Tracking System - search for mitigation banks, service area, credits available, reports, etc.)

[2008 Corps/EPA Mitigation Regulations](#)

[2000 Federal In Lieu Fee Guidance \(superseded\)](#)

[ELI Report on Mitigation Banking and In Lieu Fee Programs \(2002\)](#)

[ELI Report on the Status and Character of In Lieu Fee Mitigation in the U.S. \(2006\)](#)

[In Lieu Fee Mitigation: Model Instrument Language and Resources \(ELI - 2009\)](#)

[ELI In Lieu Fee Training Webinars \(2013\)](#)

[In Lieu Fee Programs Approved by the Corps' Sacramento District](#)

### **Hypothetical**

In a 2006 article, Professors J.B. Ruhl and James Salzman pointed out that when a developer uses mitigation banking, as opposed to on-site, in-kind mitigation, to satisfy mitigation requirements for Section 404 permits, the environmental and public benefits provided by the wetlands that are being destroyed are transferred from the area where the development is taking place to the area where the mitigation bank is located. See [J.B. Ruhl & James Salzman, \*The Effects of Wetland Mitigation Banking on People\*, 28 Natl. Wetlands Newsletter 8 \(2006\)](#). Professors Ruhl and Salzman noted that this often means that development is destroying wetlands in urban areas and replacing them with wetlands in rural areas. *Id.* Mitigation banking, therefore, may raise some environmental justice concerns in its administration.

Consider that as you read the following dialogue between a lawyer and a client regarding mitigation requirements for a Clean Water Act Section 404 permit. The client has applied to the Corps of Engineers for a permit to fill 1 acre of coastal wetlands to build a parking deck in downtown Mobile, Alabama.

**Scene:** Lawyers Office in downtown Mobile, Alabama

**Lawyer:** Thanks for stopping by this morning. I know that you're busy, but I just wanted to update you on your permit application.

**Client:** Great. I've been sitting on that swampland for years. It will be great to finally get some money out of it.

**Lawyer:** Well, you'll be happy to know that the Corps will probably grant your permit for the parking deck, but we just need to come to some agreement on the mitigation requirements.

**Client:** OK. So what are my options? The last time we talked about this, you told me that the Corps wanted me to clean up some of the other wetlands near my property or build new ones near my property. I think you said that they wanted 4 acres of wetlands to make up for the 1 that I was filling. Is that still what they want?

**Lawyer:** They still would prefer that mitigation, but they are also willing to allow you to buy mitigation credits from the South Alabama Mitigation Bank in Citronelle, Alabama. If you bought credits from the mitigation bank, it would cost about \$80,000 for the credits.

**Client:** That sounds better than the \$100,000 it was going to cost me to clean up or build swamps near my property.

**Lawyer:** I agree that credits from the mitigation bank will be less expensive, but I think that there are some other factors that you might want to consider in choosing the mitigation. When we discussed mitigation with the Corps before, they were exploring the on-site options because a lot of the coastal wetlands around Mobile are being developed and they felt that restoration or creation of wetlands on or near your property would help prevent flooding in Mobile and would help protect the shrimp fisheries in the Mobile Bay. The South Alabama Mitigation bank is located about 40 miles north of Mobile, so the wetlands that they have created and restored up there won't really provide any protection to the fisheries or to the folks who might be flooded by storms in the Mobile Bay. That's been happening a lot here in Alabama. Wetlands are being destroyed by development in the cities and being replaced by wetlands in mitigation banks in rural areas. Then, when the flooding hits, the cities get hit hard.

**Client:** Would my parking deck be affected by flooding?

**Lawyer:** It's hard to tell, but I think that you've got it designed and located so that any impacts should be minimal. Plus, we've got some good insurance lined up for it.

**Client:** Well, I don't see why I should worry about the fisheries or flooding, then. Besides, how much of an impact can my project have, anyway? I'm only filling an acre of swamp for my parking deck.



**Lawyer:** Yes, but lots of people are only filling an acre or a couple acres by the bay. Before you know it, half of our wetlands are gone. Which is why I think that there are benefits to restoring or creating wetlands near your property.

**Client:** I hired you to represent me and not the citizens of Mobile or the Gulf Coast Shrimpers Union. All I'm concerned about is that I get my permit at the lowest cost without violating any laws. If I buy the mitigation credits, that will be legal, and I won't be sued by anyone when I build my parking deck?

**Lawyer:** If you buy the mitigation credits, the Corps will issue you the permit and you won't be sued by the government as long as you comply with the permit. The government's regulations actually create a preference for mitigation banking, but they allow on-site mitigation when the mitigation would restore an outstanding resource, like it would in your case. The Clean Water Act allows citizens to sue for some violations of the law, but they won't be able to sue you as long as you have a permit from the Corps to build your parking deck.

You may be able to buy some good will with the Mobile community, though, by restoring or creating some wetlands near your property instead of just buying mitigation credits. If you do a good job on the mitigation, it could really make the area around the parking deck look nice and it might make folks want to park in your parking deck instead of some of the other decks downtown. It could look like a little nature preserve in the middle of an urban jungle.

**Client:** Location is everything with parking decks. If I'm near where folks need to park, I'll get folks parking in my garage. If I'm not, I won't. I don't think that building some swamps near my garage is going to increase my business. Besides, I've never built swamps. What happens if they don't work the way they're supposed to? Won't the government come after me then?

**Lawyer:** Well, you're right that if we go with the on-site mitigation option and the restoration or creation doesn't work, the Corps can ask you to provide alternative mitigation. You don't have to worry about that with the mitigation bank. Once you buy the credits from an approved bank and the Corps signs off on that in your permit, you won't be responsible for providing any other mitigation if the mitigation bank's mitigation doesn't work.

**Client:** Well, it sounds like a no-brainer, then. Let's go with the credits from the mitigation bank and get that permit, so that we can start building the garage.

**Lawyer:** OK. I'll contact the Corps this afternoon. I'll let you know if anything else comes up.

## Questions

1. Is it appropriate for the lawyer to raise concerns about the fisheries or flooding, or business concerns (such as the potential increased use of the garage if the area around the garage looks like a nature preserve) in counseling the client? See [American Bar Association, Model Rule of Professional Conduct 2.1](#). (and associated comments); David Dana, *Environmental Lawyers and the Public Service Model of Lawyering*, 74 Or. L. Rev. 57 (1995)
2. If the lawyer strongly disagreed with the client's mitigation choice, would it be appropriate for the lawyer to withdraw from representing the client? See [American Bar Association, Model Rule of Professional Conduct 1.16](#) (and associated comments)

## Interview



Alexandra Dunn, Executive Director and General Counsel for the Environmental Council of the States, discusses State wetland mitigation programs, in contrast to the federal program. ([YouTube Video](#))

## Chapter Quiz

Now that you've finished Chapter 7, why not try a CALI lesson on the material at: <http://cca.li/PY>. It should only take about 30 minutes.

# Chapter 8

## EPA's Role in Permitting and EPA's Veto Authority

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### I. EPA's Role in the Section 404 Permitting Process

As a result of Congressional compromises, the Clean Water Act vests significant authority for administering and enforcing the Section 404 permit program in the U.S. Army Corps of Engineers *and* the U.S. Environmental Protection Agency. In general, the two agencies have significantly different missions, so it is not surprising that they have adopted conflicting positions, at times, in interpreting and administering the Section 404 program.

While the Corps administers the permitting program on a day to day basis and has the ultimate authority to issue or deny Section 404 permits, Congress gave EPA several important duties and responsibilities with respect to the program. **First**, Congress gave EPA the authority, in conjunction with the Corps, to write the **404(b)(1) Guidelines**, which are the rules that the Corps uses to review permit applications when determining whether to issue or deny permits and when determining the conditions to include in those permits. See [33 U.S.C. § 1344\(b\)\(1\)](#). The Guidelines were described in detail in Chapters 6 and 7 of this book. **Second**, EPA provides **comments** to the Corps of Engineers during the permit review process regarding the agency's views on the application of the Guidelines to the permit application, whether the permit should be issued or denied, and any conditions that should be included in the permit, if issued. EPA's role in the permitting process was outlined in detail in Chapter 6 of this book. **Third**, while the Corps may have the ultimate authority to issue or deny Section 404 permits, EPA is authorized to **veto** permits and **prohibit discharges** of dredged or fill material in specific areas regardless of whether the Corps determines a discharge is appropriate. See [33 U.S.C. § 1344\(c\)](#). Not surprisingly, in light of this authority, the Corps must give significant weight to the comments that EPA provides during the Section 404 permit review process. EPA's veto authority is discussed in the next section of this Chapter. **Fourth**, the Clean Water Act authorizes both the Corps, see [33 U.S.C. § 1344\(s\)](#), and EPA, see [33 U.S.C. § 1319](#), to bring administrative actions and to refer judicial actions to the Department of Justice to enforce the Section 404 permitting program. Those authorities, and the manner in which the agencies have divided those responsibilities, are discussed in Chapter 10 of this book. In addition to the powers outlined above, EPA also has authority, with the Corps, to determine whether a site is within federal jurisdiction as "waters of the United States." Chapter 4 of this book outlined the manner in which the Corps and EPA have divided that responsibility.

In order to facilitate efficient and timely processing of Section 404 permits by the Corps, Congress directed EPA and the other agencies routinely involved in review of those permits to enter into agreements with the Corps to “minimize ... duplication, needless paperwork, and delays in the issuance of [Section 404] permits.” See [33 U.S.C. § 1344\(q\)](#). The agreement that EPA entered into with the Corps also includes dispute resolution provisions to address the inevitable disagreements between the agencies in the permit review process. The Section 404(q) MOA and dispute resolution processes are discussed in the next section of this Chapter.

## II. EPA’s Veto Authority

### A. Authority and Procedures

Although Section 404(c) is often referred to as EPA’s “veto” authority, that provision grants EPA broader authority to limit discharges of dredged or fill material than simply the authority to “veto” a Section 404 permit. Section 404(c) provides:

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.

[33 U.S.C. § 1344\(c\)](#). Thus, while EPA usually uses its Section 404(c) authority to veto permits issued by the Corps, the agency has the authority to **prohibit, deny, restrict,** or **withdraw** the specification of an area as a disposal site in a variety of contexts. EPA retains that authority even if a State takes over administration of the Section 404 permit program. See [40 C.F.R. § 231.1](#).

#### 1. Section 404(q) and Elevation of Permit Disputes

Although EPA has only exercised its Section 404(c) authority 13 times in the history of the Section 404 program, see [U.S. Environmental Protection Agency, Chronology of 404\(c\) Actions](#), it usually exercises it to “veto” a permit that the Corps is about to issue or has issued. In most cases, EPA has raised concerns about the permitted activity during the comment period, before

#### Resources

[EPA/Corps 404\(q\) MOA](#)

[EPA 404\(q\) fact sheet](#)

[Chronology of 404\(q\) elevations](#)

[EPA web page of 404\(q\) resources](#)

the Corps has decided to issue the permit.

EPA permit vetoes are rare. In the vast majority of cases, EPA and the Corps work out any disagreements that they have regarding the issuance or denial of a permit, and the conditions to be included in a permit, at the field level. However, when disputes arise between the agencies at the field level, the disputes can be “elevated” to higher levels within the agencies for resolution pursuant to a Memorandum of Agreement that EPA and the Corps signed in 1992 to comply with Section 404(q) of the Clean Water Act. See [U.S. Environmental Protection Agency & U.S. Army Corps of Engineers, Memorandum of Agreement: Clean Water Act Section 404\(q\) \[hereinafter “1992 MOA”\]](#).

Under the MOA, if EPA is concerned that a project *may* result in “substantial and unacceptable impacts to “aquatic resources of national importance” (ARNI), regional representatives of the agency must notify the Corps’ District Engineer about those concerns during the comment period for the permit for the project. *Id.* ¶ IV.3.(a). In determining whether a site is an ARNI, EPA examines the economic importance of the resource, its rarity or uniqueness, and/or the importance of the resource to the protection, maintenance or enhancement of the quality of the nation’s waters. See [U.S. Environmental Protection Agency, Section 404\(q\) Dispute Resolution Process](#). If EPA and the Corps cannot work out their differences, the EPA Regional Administrator can send a letter to the Corps District Engineer (within 25 days after the comment period ends), indicating that the project *will* have substantial and unacceptable impacts to an ARNI. See [1992 MOA ¶ IV.3.\(b\)](#).

If the Corps plans to issue the permit for the project regardless of EPA’s concerns, the District Engineer must notify the EPA Regional Administrator, and the Regional Administrator can ask EPA headquarters (EPA Assistant Administrator) to request review (elevation) of the dispute by the Corps’ headquarters (Assistant Secretary of the Army (Civil Works)). *Id.* ¶ IV.3. Although the Corps will not issue the permit during the elevation review process, the Assistant Secretary of the Army (Civil Works) can ultimately decide that the permit should be issued after reviewing the dispute. *Id.* The Assistant Secretary might also decide that the permit should not be issued, or that it should be issued with specific conditions, and might provide case specific guidance for the agency. *Id.* When the Assistant Secretary makes a decision, the Assistant Secretary should immediately notify EPA’s Assistant Administrator. *Id.* If the Corps determines that it will issue the section 404 permit regardless of EPA’s concerns, EPA must then decide whether to begin the Section 404(c) veto process.

Just as it is unusual for EPA to veto a Corps permit, it is unusual for EPA and the Corps to be unable to resolve their differences regarding a permit application at the regional level. While the Corps processes approximately 60,000 permits per year, EPA has only sought elevation of Corps permits 11 times in the 20 years since the agencies entered into the Section 404(q) MOA, and 8 times before they signed the MOA. See [U.S. Environmental](#)

### Research Problems

EPA posts the permit elevation requests from regional offices to headquarters and the subsequent correspondence between EPA headquarters, the region and the Army on its website. Based on the information posted there, please answer the following questions:

1. How many times, after the EPA and Corps of Engineers entered into the 1992 MOA to implement Section 404(q), has EPA headquarters declined to pursue the request of a Regional Office of EPA to elevate a permit dispute? Please identify the permits at issue in those cases.
2. Did the Corps ultimately issue or deny a permit for the Breckenridge Ski Area in Colorado when EPA's Assistant Administrator for Water requested review of the permit?
3. According to EPA, how many acres of wetlands would be adversely impacted by the project authorized by the permit for the Florida Power Corporation near Tampa, Florida?

## 2. Section 404(c) Procedures

Section 404(c) requires EPA, before making a decision to prohibit, deny, restrict, or withdraw specification of an area as a disposal site, to consult with the Corps. See [33 U.S.C. § 1344\(c\)](#). The statute also requires EPA to “set forth in writing and make public [the] ... findings and reasons” for making those decisions. *Id.* EPA has adopted regulations to implement those requirements. See [40 C.F.R. Part 231](#). The regulations outline a three step process that applies regardless of whether EPA is vetoing a permit or prohibiting, denying, restricting, or withdrawing specification of a disposal area in other contexts. See [40 C.F.R. § 231.1](#). Normally, though, EPA uses its 404 (c) authority when the agency and the Corps have not been able to work out disagreements regarding a Section 404 permit application and the Corps has issued a notice that it intends to issue the permit. The elevation process and the 404(c) process are separate processes, and there is no requirement that EPA attempt to resolve disagreements with the Corps through formal elevation before commencing the 404(c) process.

### Resources

- [EPA Section 404\(c\) regulations](#)
- [EPA Section 404\(c\) fact sheet](#)
- [Chronology of EPA Section 404\(c\) actions](#)

## Section 404(c) Process

Notice of Proposed Determination



Recommended Determination



Final Determination

The Section 404(c) process begins at the regional level of EPA. If a Regional Administrator of EPA finds that a discharge of dredged or fill material will have “unacceptable adverse effects” on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas, the Administrator notifies the Corps that the Administrator intends to issue a public notice of a proposed determination to withdraw, prohibit, deny or restrict the specification of the area as a disposal site. See [40 C.F.R. §231.3\(a\)\(1\)](#). If EPA is beginning the process because someone is seeking a permit from the Corps to discharge in the area, the Regional Administrator notifies the permit applicant as well. *Id.* Unless it is demonstrated to the Regional Administrator that the discharge **won’t** have unacceptable adverse effects, within 15 days after notifying the Corps and any permit applicant that it intends to issue a notice, the Administrator publishes, in the Federal Register, a **Notice of Proposed Determination** to withdraw, prohibit, deny, or restrict the area as a disposal site. *Id.* § 231.3(a)(2). If EPA begins the process while the Corps is reviewing a permit application for the site, the Corps will not issue the permit until EPA finishes the 404(c) process. *Id.* See also [33 C.F.R. § 323.6\(b\)](#).

After EPA publishes the notice of proposed determination, the agency provides an opportunity for public comment on the notice and may hold a public hearing. See [40 C.F.R. § 231.4](#). At the end of the comment period, the Regional Administrator either withdraws the proposed determination **or** forwards a **Recommended Determination** (and administrative record for the determination) to EPA headquarters (the EPA Assistant Administrator for Water). See [40 C.F.R. § 231.5](#). Within 30 days after the EPA Assistant Administrator receives the recommended determination, the Assistant Administrator contacts the Corps, the property owner, and the permit applicant (if there is a permit application), so that they can take “corrective action” to prevent unacceptable adverse effects. See [40 C.F.R. § 231.6](#). Within 60 days after the Assistant Administrator receives the recommended determination from the Regional Administrator, the Assistant Administrator must issue, and publish in the Federal Register, a **Final Determination** affirming, modifying, or rescinding the recommended determination. *Id.*

## Questions and Comments

- Judicial Review:** Which of the following actions are reviewable final agency actions?: (1) a Regional Administrator's Proposed Determination; (2) a Regional Administrator's Withdrawal of a Proposed Determination; (3) a Regional Administrator's Recommended Determination; (4) a Final Determination of the Assistant Administrator. See [40 C.F.R. part 231](#). What if EPA never initiates the 404(c) process at all? Is the agency's failure to veto a permit or failure to initiate the 404(c) process with respect to a disposal site reviewable? Compare [Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers, 87 F.3d 1242 \(11<sup>th</sup> Cir. 1996\)](#) (EPA's decision whether to exercise its 404 (c) authority is discretionary and can't be challenged in a citizen suit) with [National Wildlife Federation v. Hanson, 859 F.2d 313 \(4<sup>th</sup> Cir. 1988\)](#) (EPA has a non-discretionary duty to exercise its 404(c) authority when the Corps has made an erroneous wetland determination) and [Alliance to Save Mattaponi v. United States Army Corps of Engineers, 515 F. Supp. 2d 1 \(D.D.C. 2007\)](#) (EPA's failure to exercise its 404(c) authority cannot be challenged in a citizen suit, but can be challenged under the Administrative Procedures Act).
- Nature of hearings:** Section 404(c) requires EPA to make determinations "after notice and opportunity for public hearings." Does that language require the agency to hold formal trial-type hearings before an administrative law judge? How has the agency interpreted the language? See [40 C.F.R. § 231.4](#). How does that impact the standard of review that applies to the factual determinations made by EPA in a final determination under section 404 (c)? See [James City County v. Environmental Protection Agency, 12 F.3d 1330 \(4<sup>th</sup> Cir. 1993\)](#) (relying on the arbitrary and capricious standard after previously applying the substantial evidence standard).
- Frequency:** EPA exercises its 404(c) authority sparingly. It has only issued 13 vetoes since 1972, and did not issue *any* veto decisions over an 18 year period between 1990 and 2008. See [U.S. Environmental Protection Agency, Chronology of 404\(c\) Actions](#). While EPA vetoed 11 projects between 1981 and 1990, the decline in permit vetoes was likely influenced by two factors. First, several bills were introduced in Congress in the early 1990s that would have eliminated EPA's Section 404(c) authority. See, e.g., Wetlands Regulatory Reform Act of 1995, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1995); Wetlands Protection and Regulatory Reform Act of 1991, H.R. 404, 102d Cong., 1<sup>st</sup> Sess (1991). Second, and perhaps more importantly, in 1992, EPA entered into the MOA with the Corps establishing the elevation procedures, which provide a process to resolve inter-agency disputes which might otherwise lead to permit vetoes. See [1992 MOA](#).



### Research Problems

EPA posts the proposed and final determinations in the 404(c) process on its website. Based on the information posted there, please answer the following questions:

1. When EPA vetoed the Lake Alma Impoundment permit in Georgia, was it concerned about the impacts of the project on (a) municipal water supplies; (b) recreational areas; or (c) wildlife?
2. When EPA vetoed the Two Forks Water Supply Impoundments permit in Colorado, was it concerned about the impacts of the project on (a) fisheries; (b) municipal water supplies; or (c) wildlife?
3. In how many 404(c) proceedings has EPA modified a final determination after the agency issued a determination? Please identify the proceedings.

#### B. Timing of the “Veto”

As noted above, while EPA normally uses its authority under Section 404(c) to veto a permit that the Corps *plans to issue* or *has already issued*, the statutory language does not limit EPA’s exercise of authority to those situations. The statute does not refer to a “veto” at all. Instead, it authorizes EPA to *prohibit, deny, restrict* or *withdraw* the specification of a defined area as a disposal site. See [33 U.S.C. § 1344\(c\)](#). EPA has interpreted that language, through regulation, to mean that the agency can exercise its authority *before* anyone applies for a permit, *while* the Corps is processing a permit application, and *after* the Corps issues a permit. See [U.S. Environmental Protection Agency, Clean Water Act Section 404 \(c\) “Veto Authority”](#). Below are EPA’s regulatory definitions that support that broad exercise of authority.

| Statutory Term   | Regulatory Definition  |
|--|--|
| Prohibit Specification   | Prevent the designation of an area as a present or future disposal site - <a href="#">40 C.F.R. § 231.2(b)</a> .   |
| Deny or Restrict the Use of Any Defined Area for Specification | Deny or restrict the use of any area for the present or future discharge of any dredged or fill material - <a href="#">40 C.F.R. § 231.2(c)</a> .  |
| Withdraw Specification   | Remove from designation an area already specified as a disposal site by the U.S. Army Corps of Engineers or by a state which has assumed the Section 404 program, or any portion of such area - <a href="#">40 C.F.R. § 231.2(a)</a> . |

While the agency’s regulations authorize EPA to exercise its Section 404(c) powers in a broad range of situations, in most cases, EPA exercises its authority **when the Corps is reviewing a Section 404 permit application** and is likely to issue the permit, but has not yet issued the permit. 10 of the 13 EPA “vetoes” arose in that context. See Brief for the Respondent in Opposition to Petition for Writ of Certiorari at 14, *Mingo Logan Coal Company v. Environmental Protection Agency*, No. 13-599 (U.S. Feb. 14, 2014). In the other 3 cases, EPA acted to limit the use of an area as a disposal site **after the Corps had issued a permit** authorizing the discharge. *Id.* at 5. In 2 of those cases, EPA acted shortly after the permit was issued or when a permit modification was being sought. *Id.* In one case, however, EPA exercised its Section 404(c) authority **four years** after the Corps issued a Section 404 permit for a mountaintop removal mining project. That was EPA’s most recent exercise of its authority and was challenged in the following case.

**Mingo Logan Coal Company v. U.S. Environmental Protection Agency**  
714 F.3d 608 (D.C. Cir. 2013)  
*cert. denied* 134 S. Ct. 1540 (2014)

**KAREN LECRAFT HENDERSON,**  
**Circuit Judge:**

| Resources for the Case  |
|---|
| <a href="#">Unedited opinion</a> (From court’s website)<br><a href="#">Google Map of all the cases in the coursebook</a><br><a href="#">D.C. Circuit Oral Argument Audio</a><br><a href="#">EPA letter initiating 404(c) process</a><br><a href="#">Arch Coal Company website</a> |

The Mingo Logan Coal Company (Mingo Logan) applied to the United States Army Corps of Engineers (Corps) for a permit under section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344, to discharge dredged or fill material from a mountain-top coal mine in West Virginia into three streams and their tributaries. The Corps—acting on behalf

of the Secretary of the Army (Secretary) and without objection from the Administrator of the United States Environmental Protection Agency (Administrator, EPA), who has “veto” authority over discharge site selection under CWA subsection 404(c), \* \* \* issued the permit to Mingo Logan, approving the requested disposal sites for the discharged material. Four years later, EPA invoked its subsection 404(c) authority to “withdraw” the specifications of two of the streams as disposal sites, thereby prohibiting Mingo Logan from discharging into them. Mingo Logan filed this action challenging EPA’s withdrawal of the specified sites on the grounds that (1) EPA lacks statutory authority to withdraw site specification after a permit has issued and (2) EPA’s decision to do so was arbitrary and capricious in violation of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.* The district court granted summary judgment to Mingo Logan on the first ground without reaching the second. We reverse the district court, concluding that EPA has post-permit withdrawal authority, and remand for further proceedings.

## I.

The CWA provides that “the discharge of any pollutant by any person shall be unlawful” except as in compliance with specifically enumerated CWA provisions, including section 404. \* \* \* Subsection 404(a) authorizes the Secretary to issue permits allowing discharge of dredged or fill material “at specified disposal sites,” which are to be “specified for each such permit by the Secretary . . . through the application of guidelines developed by the Administrator, in conjunction with the Secretary.” \* \* \* The Secretary’s authority to specify a disposal site is expressly made “[s]ubject to subsection (c) of [section 404].” \* \* \* Subsection 404(c) authorizes the Administrator, after consultation with the Corps, to veto the Corps’s disposal site specification—that is, the Administrator “is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and . . . to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site”—“whenever he determines” the discharge will have an “unacceptable adverse effect” on identified environmental resources. \* \* \*

In June 1999, Hobet Mining, Inc., Mingo Logan’s predecessor, applied for a section 404 permit to discharge material from the Spruce No. 1 Mine into four West Virginia streams and their tributaries. In 2002, after the Corps prepared a draft Environmental Impact Statement, EPA expressed its concern that “even with the best practices, mountaintop mining yields significant and unavoidable environmental impacts that had not been adequately described in the document.” \* \* \* In the end, however, EPA declined to pursue a subsection 404(c) objection. \* \* \* On January 22, 2007, the Corps issued Mingo Logan a section 404 permit, effective through December 31, 2031, which authorized Mingo Logan to dispose of material into three streams—Pigeonroost Branch, Oldhouse Branch and Seng Camp Creek—and certain tributaries thereto. \* \* \* The permit expressly advised that the Corps “may reevaluate its decision on the permit at any time the circumstances warrant” and that “[s]uch a reevaluation may result in a determination that it is appropriate to use the

suspension, modification, and revocation procedures contained in 33 C.F.R. 325.7.” \* \* \* The permit made no mention of any future EPA action.

On September 3, 2009, EPA wrote the Corps requesting it “use its discretionary authority provided by 33 C.F.R. 325.7 to suspend, revoke or modify the permit issued authorizing Mingo Logan Coal Company to discharge dredged and/or fill material into waters of the United States in conjunction with the construction, operation, and reclamation of the Spruce Fork No. 1 Surface Mine,” based on “new information and circumstances . . . which justifi[ed] reconsideration of the permit.” \* \* \* EPA noted in particular its “concern[] about the project’s potential to degrade downstream water quality.” \* \* \* The Corps responded that there were “no factors that currently compell[ed it] to consider permit suspension, modification or revocation.” \* \* \* EPA wrote back: “We intend to issue a public notice of a proposed determination to restrict or prohibit the discharge of dredged and/or fill material at the Spruce No. 1 Mine project site consistent with our authority under Section 404(c) of the Clean Water Act and our regulations at 40 C.F.R. Part 231.” \* \* \*

EPA’s Regional Director published the promised notice of proposed determination on April 2, 2010, requesting public comments “[p]ursuant to Section 404(c) . . . on its proposal to withdraw or restrict use of Seng Camp Creek, Pigeonroost Branch, Oldhouse Branch, and certain tributaries to those waters in Logan County, West Virginia to receive dredged and/or fill material in connection with construction of the Spruce No. 1 Surface Mine.” \* \* \* The Regional Director followed up with a Recommended Determination on September 24, 2010, limited to withdrawal of the specification of Pigeonroost Branch and Oldhouse Branch and their tributaries. On January 13, 2011, EPA published its Final Determination, which, adopting the Regional Director’s recommendation, formally “withdraws the specification of Pigeonroost Branch, Oldhouse Branch, and their tributaries, as described in [the Spruce Mine Permit] . . . as a disposal site for the discharge of dredged or fill material for the purpose of construction, operation, and reclamation of the Spruce No. 1 Surface Mine” and “prohibits the specification of the defined area . . . for use as a disposal site associated with future surface coal mining that would be expected to result in a nature and scale of adverse chemical, physical, and biological effects similar to the Spruce No. 1 mine.” \* \* \*

Mingo Logan filed this action in district court immediately following the Proposed Determination, challenging EPA’s authority to “revoke” the three-year-old permit, \* \* \* and amended its complaint in February 2011 to challenge the Final Determination, asserting it is both ultra vires and arbitrary and capricious. \* \* \* On cross-motions for summary judgment, the district court granted judgment to Mingo Logan on March 23, 2012. \* \* \* The court concluded EPA “exceeded its authority under section 404(c) of the Clean Water Act when it attempted to invalidate an existing permit by withdrawing the specification of certain areas as disposal sites after a permit had been issued by the Corps under section 404(a).” \* \* \* The United States filed a timely notice of appeal on behalf of EPA. The Corps joined EPA on brief. \* \* \*

## II.

In granting summary judgment, the district court agreed with Mingo Logan's interpretation of subsection 404 to preclude EPA from withdrawing a site specification once the Corps has issued a permit. "We review a grant of summary judgment de novo applying the same standards as those that govern the district court's determination." *Troy Corp. v. Browner*, 120 F.3d 277, 283 (D.C. Cir. 1997). "Moreover, insofar as the agency's determination amounts to or involves its interpretation of . . . a statute entrusted to its administration, we review that interpretation under the deferential standard of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)." *Id.* Under *Chevron*:

We first ask "whether Congress has directly spoken to the precise question at issue," in which case we "must give effect to the unambiguously expressed intent of Congress." If the "statute is silent or ambiguous with respect to the specific issue," however, we move to the second step and defer to the agency's interpretation as long as it is "based on a permissible construction of the statute."

*Natural Res. Def. Council v. EPA*, 706 F.3d 428, 431 (D.C. Cir. 2013) (quoting *Chevron*, 467 U.S. at 842–43). We construe subsection 404(c) under *Chevron* step 1 because we believe the language unambiguously expresses the intent of the Congress.

As noted earlier, \* \* \* section 404 vests the Corps, rather than EPA, with the authority to issue permits to discharge fill and dredged material into navigable waters and to specify the disposal sites therefor. \* \* \* Nonetheless, the Congress granted EPA a broad environmental "backstop" authority over the Secretary's discharge site selection in subsection 404(c), which provides in full:

### (c) Denial or restriction of use of defined areas as disposal sites

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

33 U.S.C. § 1344(c); see Legislative History at 177 ("[T]he Conferees agreed that the Administrator . . . should have the veto over the selection of the site for dredged spoil

disposal and over any specific spoil to be disposed of in any selected site.”).<sup>2</sup> Section 404 imposes no temporal limit on the Administrator’s authority to withdraw the Corps’s specification but instead expressly empowers him to prohibit, restrict or withdraw the specification “*whenever*” he makes a determination that the statutory “unacceptable adverse effect” will result. 33 U.S.C. § 1344(c) (emphasis added). Using the expansive conjunction “whenever,” the Congress made plain its intent to grant the Administrator authority to prohibit/deny/restrict/withdraw a specification at *any* time. See 20 Oxford English Dictionary 210 (2d ed.1989) (defining “whenever,” used in “a qualifying (conditional) clause,” as: “At whatever time, no matter when.”). Thus, the unambiguous language of subsection 404(c) manifests the Congress’s intent to confer on EPA a broad veto power extending beyond the permit issuance.<sup>3</sup>

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<sup>2</sup> Thus, subsection 404(c) affords EPA two distinct (if overlapping) powers to veto the Corps’s specification: EPA may (1) “prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site” or (2) “deny or restrict the use of any defined area for specification (including the withdrawal of specification).” In withdrawing the specifications here, EPA did not clearly distinguish between the two powers. See Final Determination, 76 Fed. Reg. at 3127 (“EPA Region III published in the Federal Register a Proposed Determination to prohibit, restrict, or deny the specification or the use for specification (including withdrawal of specification) of certain waters at the project site as disposal sites for the discharge of dredged or fill material for the construction of the Spruce No. 1 Surface Mine.”). It appears, however, that EPA exercised the first authority—“to prohibit”/“withdraw[]”—given the post-permit timing. See *id.* at 3128 (“EPA’s Final Determination withdraws the specification of Pigeonroost Branch, Oldhouse Branch, and their tributaries, as described in DA Permit No. 199800436-3 (Section 10: Coal River), as a disposal site for the discharge of dredged or fill material for the purpose of construction, operation, and reclamation of the Spruce No. 1 Surface Mine. This Final Determination also prohibits the specification of the defined area constituting Pigeonroost Branch, Oldhouse Branch, and their tributaries for use as a disposal site associated with future surface coal mining that would be expected to result in a nature and scale of adverse chemical, physical, and biological effects similar to the Spruce No. 1 mine.”).

<sup>3</sup> Based on the plain meaning of the statutory language, EPA has consistently maintained this interpretation for over thirty years. See Section 404(c) Procedures, 44 Fed. Reg. 58,076, 58,077 (Oct. 9, 1979) (“The statute on its face clearly allows EPA to act after the Corps has issued a permit; it refers twice to the ‘withdrawal of specification,’ which clearly refers to action by EPA after the Corps has specified a site (e.g. issued a permit or authorized its own work).”); Final Determination of the Administrator Concerning the North Miami Landfill Site Pursuant to Section 404(c) of the Clean Water Act at 1-2 (Jan. 26, 1981) (JA 239-40) (exercising 404(c) authority “to restrict the use of [of the North Miami Landfill] for specification (including the withdrawal of specification) as a disposal site” almost five years after Corps issued permit therefor). The Corps has made clear by joining EPA in this litigation that it agrees with EPA’s interpretation. See *supra* \* \* \* .

This construction is further buttressed by subsection 404(c)'s authorization of a "withdrawal" which, as EPA notes, is "a term of retrospective application." \* \* \* EPA can *withdraw* a specification only after it has been made. See 20 Oxford English Dictionary 449 (2d ed.1989) (defining "withdraw" as "[t]o take back or away (something that has been given, granted, allowed, possessed, enjoyed, or experienced)"). Moreover, because the Corps often specifies final disposal sites in the permit itself—at least it did here, \* \* \* —EPA's power to withdraw can *only* be exercised post-permit. Mingo Logan's reading of the statute would eliminate EPA's express statutory right to withdraw a specification and thereby render subsection 404(c)'s parenthetical "withdrawal" language superfluous—a result to be avoided. See *Corley v. United States*, 556 U.S. 303, 314 (2009) (applying "one of the most basic interpretative canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant") (brackets and quotation marks omitted).

Notwithstanding the unambiguous statutory language, Mingo Logan presses its own view of the language, the statutory structure and section 404's legislative history to maintain that the Congress intended to preclude post-permit withdrawal. We find none of its arguments persuasive.

First, Mingo Logan argues that the statutory language itself contemplates that specification occurs before (rather than when) the permit issues and therefore can (and must) be withdrawn pre-permit. We find no such intent in the statutory directive Mingo Logan quotes—that "each such disposal site shall be specified for each such permit by the Secretary . . . through the application of guidelines developed by the Administrator, in conjunction with the Secretary." 33 U.S.C. § 1344(b). This language is at least as consistent with specification by the Corps at the time the permit issues as it is with pre-permit specification. Moreover, as noted earlier, \* \* \* the Corps expressly "specified" the final sites in the Spruce Mine Permit itself. Nor does the permitting process—including the "extensive coordination process during which EPA can review the Corps's statement of findings/record of decision," \* \* \* require that the specification be made before the permit issues. During the permitting process, the disposal sites are proposed, reviewed—perhaps even "specified," as Mingo Logan contends—but the final specifications are included in the permit itself.

Second, Mingo Logan asserts EPA's interpretation conflicts with section 404 "as a whole." \* \* \* Mingo Logan claims, for example, that "EPA's reading obliterates the choice Congress made to give the permitting authority with all of its attributes to the Corps, not EPA." \* \* \* While it is true that subsections 404(a)-(b) unambiguously authorize the Secretary to issue a discharge permit—and to specify the disposal site(s) therefor—section 404(b) makes equally clear \* \* \* that the Administrator has, in effect, the final say on the specified disposal sites "whenever" he makes the statutorily required "unacceptable adverse effect" determination. Thus, insofar as site specification may be considered, as Mingo Logan

asserts, an “attribute[]” of the permitting authority, the statute expressly vests final authority over this particular attribute in the Administrator.

Mingo Logan also contends that EPA’s interpretation “tramples on provisions like sections 404(p) and 404(q) that are intended to give permits certainty and finality.” \* \* \* Subsection 404(p) provides: “Compliance with a permit issued pursuant to [section 404], including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of [enforcement actions brought under] sections 1319 and 1365 of [title 33] . . . .”<sup>4</sup> According to Mingo Logan, “absent . . . permit violations or public interest considerations, the permittee can rely on the permit shield of section 404(p).” \* \* \* But again, section 404(c)’s language is plain with regard to its enumerated “unacceptable adverse effects”: the Administrator retains authority to withdraw a specified disposal site “whenever” he determines such effects will result from discharges at the sites. And when he withdraws a disposal site specification, as he did here, the disposal site’s “terms and conditions specified” in the permit \* \* \* are in effect amended so that discharges at the previously specified disposal sites are no longer in “[c]ompliance with” the permit—although the permit itself remains otherwise in effect to the extent it is usable.<sup>5</sup> Moreover, as EPA notes, subsection 404(c) was enacted in 1972 and its plain meaning did not change when 404(p) was enacted five years later. \* \* \* As Mingo Logan acknowledges, if “the text of section 404(c) clearly and unambiguously gave EPA the power to act post-permit”—a reading it rejects—then section 404(p) “cannot be read to implicitly overturn section 404(c).” \* \* \* As we have repeatedly stated throughout this opinion, the text of section 404(c) does indeed clearly and unambiguously give EPA the power to act post-permit. Thus, subsection 404(p) does not implicitly limit section 404(c)’s scope. Nor does EPA’s express statutory authority to act *post*-permit interfere with subsection 404(q)’s directive that the Secretary enter into agreements with other agency heads “to minimize, to the maximum extent

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<sup>4</sup> Sections 1319 and 1365 of title 33 authorize an action by, respectively, (1) EPA against a violator of, *inter alia*, the terms of a section 404 permit; and (2) a citizen against a violator of a CWA effluent limitation or against EPA for failure to perform a non-discretionary “act or duty” under the CWA. 33 U.S.C. §§ 1319, 1365.

<sup>5</sup> In this case for example, EPA left intact the specification as disposal site of “the Right Fork of Seng Camp Creek and its tributaries . . . in part because some of those discharges have already occurred and because the stream resources in Right Fork of Seng Camp Creek were subject to a higher level of historic and ongoing human disturbance than those found in Pigeonroost Branch or Oldhouse Branch.” Final Determination, 76 Fed. Reg. at 3127 n.1.

In addition, EPA has made clear that a permittee may not be penalized for discharges that occurred in compliance with the permit before the effective date of the withdrawal of the specification.



practicable, duplication, needless paperwork, and delays *in the issuance of permits* under this section” and “to assure that, to the maximum extent practicable, a decision *with respect to an application for a permit* under subsection (a) of this section will be made not later than the ninetieth day after the date the notice for such application is published under subsection (a) of this section.” 33 U.S.C. § 1344(q) (emphases added). The enumerated obligations apply only *pre*-permit and are therefore unaffected by EPA’s post-permit actions.

Finally, Mingo Logan argues that the legislative history “confirms that Congress intended EPA to act under section 404(c), if at all, prior to permit issuance.” \* \* \* In particular, it relies on the statement of then-Senator Edmund Muskie that

*prior* to the issuance of any permit to dispose of spoil, the Administrator must determine that the material to be disposed of will not adversely affect municipal water supplies, shellfish beds, and fishery areas (including spawning and breeding areas), wildlife or recreational areas in the specified site. Should the Administrator so determine, no permit may issue.

118 Cong. Rec. at 33,699, *reprinted in* Legislative History at 177 (emphasis added). “Assuming legislative history could override the plain, unambiguous directive” of section 404(c) and “putting to one side the fact that this was the statement of a single member of Congress,” the quoted language is “not necessarily inconsistent with” EPA’s interpretation. See *Natural Res. Def. Council v. EPA*, 706 F.3d 428, 437 (D.C. Cir. 2013) (quotation marks and brackets omitted); see also *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 752 (2012) (“[T]he views of a single legislator, even a bill’s sponsor, are not controlling.”). That EPA should review the preliminary specifications pre-permit to determine whether discharges will have the required “unacceptable adverse effect”—as EPA in fact did here—does not mean it is foreclosed from doing so post-permit as well—as it also did here.<sup>6</sup> “Thus, ‘this case does not present the very rare situation where the legislative history of a statute is more probative of congressional intent than the plain text.’” *Va. Dep’t of Med. Assistance Servs. v. U.S. Dep’t of Health & Human Servs.*, 678 F.3d 918, 923 (D.C. Cir. 2012) (quoting *Consumer Elecs. Ass’n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003)) (brackets omitted).

For the foregoing reasons, we reverse the district court insofar as it held that EPA lacks statutory authority under CWA section 404(c) to withdraw a disposal site specification post-permit. Because the district court did not address the merits of Mingo Logan’s APA

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<sup>6</sup> Similarly, post-permit withdrawal is not precluded by 33 C.F.R. § 323.6(b) (“The Corps will not issue a permit where the regional administrator of EPA has notified the district engineer and applicant in writing pursuant to 40 C.F.R. 231.3(a)(1) that he intends to issue a public notice of a proposed determination to prohibit or withdraw the specification, or to deny, restrict or withdraw the use for specification, of any defined area as a disposal site in accordance with section 404(c) of the Clean Water Act.”).

challenge to the Final Determination and resolution of the issue is not clear on the present record, we follow our usual practice and remand the issue to the district court to address in the first instance. See *Friends of Blackwater v. Salazar*, 691 F.3d 428, 434 n.\* (D.C. Cir. 2012) (citing *Piersall v. Winter*, 435 F.3d 319, 325 (D.C. Cir. 2006)).

### Questions and comments

1. **Deference:** The Corps and EPA both play a role in administering the Section 404 permit program. If EPA and the Corps disagree about the interpretation of Section 404(c), which agency's interpretation is entitled to deference? Did the court have to resolve that issue in this case?
2. **Consistent interpretation:** Why is it significant that EPA interpreted its authority under Section 404(c) consistently over thirty years? Is there evidence that Congress was aware of that interpretation? Is that relevant?
3. On a cert petition to the Supreme Court, Mingo Logan argued that the appellate court's decision would chill investment in development because it calls into question the finality of Corps' permits. However, is there another way that the government could have prevented the Mingo Logan Coal Company from continuing to discharge fill material besides EPA's exercise of its 404(c) authority? How "final" are the Corps' permits?
4. A familiar statutory interpretation canon provides that when two statutes conflict, the statute enacted last prevails. Another canon provides that repeals by implication are disfavored. Yet another canon provides that when two statutes conflict, the specific controls over the general. Were any of those canons relevant to Mingo Logan's argument that Section 404(p) demonstrated Congress' intent that EPA should not have the authority to veto a permit after the Corps has issued it?
5. **Projects vetoed:** The project in the Mingo Logan case would have been the largest surface coal mine in West Virginia. However, many of the cases where EPA has exercised its 404(c) authority involve infrastructure development projects, such as dams, water supply impoundments, flood control projects and landfills or recycling plants. See [U.S. Environmental Protection Agency, Clean Water Act Section 404 \(c\) "Veto Authority"](#). Consequently, when Mingo Logan file a petition for writ of certiorari to the Supreme Court seeking review of the D.C. Circuit's decision, amicus briefs were filed by 27 States and the U.S. Conference of Mayors, as well as the National Mining Association, National Association of Home Builders, American Petroleum Institute, and the Chamber of Commerce. See [SCOTUSblog, Mingo Logan Coal Company v. Environmental Protection Agency](#). The Court denied the petition on March 24, 2014.

6. **Remand:** On remand, the District Court of the District of Columbia held that EPA's decision to exercise its 404(c) authority "was reasonable, supported by the record, and based on considerations within the agency's purview." See [Mingo Logan Coal Company, Inc. v. U.S. Environmental Protection Agency, Case No. 10-0541 \(D.D.C. 2014\)](#).
  
7. **Pre-emptive vetoes:** Although EPA's regulations authorize the agency to prohibit the specification of an area as a disposal site even before anyone has applied to the Corps for a permit, EPA rarely exercises that authority. In 1987, when the agency was vetoing Corps permits that would have authorized the developer to discharge into two sites, the agency prohibited discharges into a third site nearby, even though the developer had not yet sought a permit to discharge there. See [52 Fed. Reg. 38519, 38520 \(Oct. 16, 1987\)](#). While that project involved a relatively small parcel of land (60 acres of wetlands), in 2014, EPA began Section 404(c) proceedings to address impacts from an open pit mining project in Alaska that would cover almost 70 square kilometers and could destroy between 1200 and 4900 acres of wetlands. See [Environmental Protection Agency, EPA 910-R-14-001ES, An Assessment of the Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska 11,13 \(Jan. 2014\)](#). Several tribes asked EPA to begin the Section 404(c) proceedings before developers applied to the Corps for a permit for the Pebble Mine project. See [Environmental Protection Agency, Why We Studied the Bristol Bay Watershed](#). When the agency received those requests, it decided to conduct a scientific assessment of the Bristol Bay watershed to understand how large scale mining could impact water quality and the ecosystem, which is home to one of the largest sockeye salmon populations in the world. *Id.* After completing the assessment, EPA decided to begin the 404(c) process even though a developer had not yet sought a Section 404 permit from the Corps. See [Letter from Dennis J. McLerran, Regional Administrator, Environmental Protection Agency to Thomas Collier, Joe Balash, and Colonel Christopher D. Lestochi \(Feb. 28, 2014\)](#). The developer immediately sued EPA, but the Ninth Circuit rejected the challenge, concluding that EPA's initiation of the 404(c) process was not a "final agency action." See [Pebble Limited Partnership v. EPA, 9<sup>th</sup> Cir., No. 3:14-cv-00097-HRH, ruling 5/28/15](#) (unpublished opinion).

### C. Standards for the Veto

Section 404(c) empowers EPA to exercise its authority whenever the Administrator determines that a discharge will have an **unacceptable adverse effect** on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas. See [33 U.S.C. § 1344\(c\)](#). The statute does not further define “**unacceptable adverse effect**”, but EPA’s regulations define it as an “impact on an aquatic or wetland ecosystem which is likely to result in significant degradation of municipal water supplies (including surface or ground water) or significant loss of or damage to fisheries, shellfishing, or wildlife habitat or recreation areas.” See [40 C.F.R. § 231.2\(e\)](#). More importantly, perhaps, the regulations provide that “In evaluating the unacceptability of such impacts, consideration should be given to the relevant portions of the section 404(b)(1) guidelines.” *Id.*

Since neither the statute nor the regulations provide a clear substantive standard for EPA’s exercise of authority, the agency frequently commences Section 404(c) proceedings when it concludes that the Corps is planning to issue, or has issued, a permit in violation of the 404(b)(1) guidelines. For instance, in [James City County v. U.S. Environmental Protection Agency, 955 F.2d 254 \(4<sup>th</sup> Cir. 1992\)](#), EPA initially vetoed a Corps permit because the agency determined that the Corps incorrectly determined that there were no practicable alternatives for the proposed project. Similarly, in [Bersani v. Robichaud, 850 F.2d 36 \(2d Cir. 1988\)](#), the Second Circuit upheld EPA’s veto of a mall development project based on the agency’s determination that the Corps incorrectly applied the alternatives analysis.

Since many of the projects that EPA has vetoed have been public works projects, developers and local governments have argued that EPA should weigh and balance the “public interest” of a project against any environmental harms when determining whether a discharge would have an **unacceptable** adverse effect. However, courts have generally rejected that argument. As the Fourth Circuit wrote in [James City County v. Environmental Protection Agency, 12 F.3d 1330 \(4<sup>th</sup> Cir. 1993\)](#), in response to an argument that EPA should weigh the necessity of an enlarged water supply for the community against the environmental harms of the project:

“Congress obviously intended the Corps ... in the initial permitting process to consider the total range of factors bearing on the necessity or desirability of building a dam in the Nation’s waters, including whether the project was in the public interest. ... Ultimately, however, recognizing the EPA’s expertise and concentrated concern with environmental matters, Congress gave the final decision whether to permit a project to that agency. Its authority to veto to protect the environment is practically unadorned. ... In our view, the EPA’s only function relating to the quantities of available water is limited to assuring purity in whatever quantities the state and local agencies provide. For those reasons, we think its veto based solely on environmental harms was proper.”

## Questions and comments

1. **Basis for decision:** Although EPA frequently exercises its Section 404(c) authority when it determines that the Corps has misapplied the 404(b)(1) guidelines, the agency also exercises its authority by making a more general determination that a discharge is likely to cause a significant degradation of water supplies or significant loss of, or damage to, fisheries, shellfishing, or wildlife habitat or recreation areas. When the agency exercises its authority in advance of a permit application, as in the Pebble Mine case, it cannot rely on the 404(b)(1) guidelines, as there is no project proposal to evaluate against the guidelines.
2. **Standard of Review:** What standard of review will courts apply to EPA's determination that a discharge will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas? See [James City County v. Environmental Protection Agency, 12 F.3d 1330 \(4<sup>th</sup> Cir. 1993\)](#). To the extent that EPA's decision is based on the 404(b)(1) guidelines, does EPA owe any deference to the Corps' interpretation of, or application of, the guidelines? See in [Bersani v. Robichaud, 850 F.2d 36 \(2d Cir. 1988\)](#).

## Drafting Exercise

The Freedom of Information Act, [5 U.S.C. § 552](#), allows any person to request and obtain agency records on any topic, although it exempts nine categories of records from the disclosure requirement. *Id.* § 552(b). The statute requires agencies to respond to requests within specific time periods and authorizes agencies to charge reasonable fees to find, duplicate and review documents that will be disclosed. *Id.* § 552(a). The statute also authorizes agencies to disclose the documents without charging fees “if the disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *Id.* § 552(a)(4)(A)(iii). Federal agencies adopt their own regulations to implement FOIA and EPA’s regulations are codified at [40 C.F.R. § 2.100, et. seq.](#) The agency also maintains a FOIA reference guide that outlines the process for making a FOIA request at <http://www.epa.gov/foia/guide.html>

For this drafting exercise, you will be drafting a FOIA request to EPA, but **DO NOT USE EPA’S ONLINE FOIA REQUEST FORM**. Instead, you should model your request on sample letters like those provided by the [National Freedom of Information Coalition](#), [George Washington University](#), or the [Department of the Treasury](#). EPA’s regulations will identify the appropriate person to whom your request should be directed.

For purposes of this drafting exercise, you are an attorney with Defenders of the Canadian River, a non-profit environmental advocacy group. Several years ago, the Corps of Engineers issued a Clean Water Act Section 404 permit to the Mammoth Quarry Company, authorizing mining activities that impact wetlands adjacent to the Canadian River. Your organization believes that the discharges authorized by the permit are having a much greater impact on those wetlands than the Corps anticipated when it issued the permit. Recently, EPA has been considering initiating Section 404(c) proceedings to “withdraw the specification” of the site of Mammoth’s discharge as a disposal site. You have heard that sometime in the last two months, Senator Letitia Fen, a supporter of the quarry, met with EPA to express her opposition to Section 404(c) proceedings. You have also heard that representatives of the Mammoth Quarry Company met with EPA, within the last month, to provide the agency with studies that indicate that the discharge of dredged or fill material from the quarry is not harming the wetlands adjacent to the Canadian River. After those meetings, EPA announced that it had decided that it would not take any further action under Section 404(c) at this time.

You don’t know whether Senator Fen provided EPA with any documents at her meeting with the agency or whether the agency kept any minutes regarding the meetings with Senator Fen or the Mammoth Quarry Company, but you would like to see **any documents that the Senator or the Quarry Company provided to EPA, any documents that EPA provided to the Senator or the Quarry Company, any minutes of the meetings, and any communications between Senator Fen and EPA or the Quarry Company and EPA relating to those meetings**. In order to obtain those records, you need to make a request to EPA under the Freedom of Information Act.

A.

Prepare a FOIA request for the documents, minutes and communications described above. In preparing your request, please be sure to direct the request to the appropriate contact person. Assume that you would like the agency to waive any fees for locating or reproducing these records and include, in your letter, a request for a waiver of those fees. Include any information that is necessary to obtain the fee waiver.

B.

In two weeks, you are scheduled to meet with several other non-profit environmental groups to develop an advocacy strategy regarding the Mammoth Quarry permit and you would like to have the EPA records by that time. Is EPA required to provide you the records within that time frame? If not, can you ask EPA to expedite your request and is it likely that they will grant your request to expedite if the reason for the request is as described above?

## Chapter Quiz

Now that you've finished Chapter 8, why not try a CALI lesson on the material at: <http://cca.li/PZ>. It should only take about 15 minutes.

# Chapter 9

## States' Roles and State Programs

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Although the Corps of Engineers and the Environmental Protection Agency jointly administer the Clean Water Act Section 404 program, States play a vital role in the protection of wetlands. States can protect wetlands by: (1) creating their own State laws, regulations and programs to protect wetlands, which can be more stringent and regulate more wetlands than the Section 404 program; (2) assuming authority from the Corps of Engineers to administer the federal Section 404 permit program, or streamlining permitting under that program through the implementation of a State programmatic general permit; (3) “vetoing” or imposing conditions on Section 404 permits through the Clean Water Act Section 401 certification process; and (4) preventing the issuance of a Section 404 permit for activities that violate State plans under the Coastal Zone Management Act.

### State Authorities

- State Wetland Protection Programs
- 404 Assumption or Programmatic General Permits
- 401 Certification
- Coastal Zone Management Act Certification

State programs to protect wetlands are especially important to address wetlands or activities that are outside the jurisdiction of the Section 404 program. See Chapters 4 and 5, *supra*.

#### I. State Programs

##### A. Federal/State Relationship

The Clean Water Act, like most federal environmental laws, adopts a **cooperative federalism** approach, recognizing “the primary responsibilities and rights of States to prevent, reduce and eliminate pollution...” See [33 U.S.C. § 1251\(b\)](#). The statute explicitly provides that the Clean Water Act does not pre-empt State or local water pollution control programs, and recognizes that States and local governments can establish programs that



are **more restrictive** and **regulate more waters and activities** than the federal program. See [33 U.S.C. § 1370](#). Section 510 of the statute provides:

Except as expressly provided in this chapter, nothing in this chapter shall

(1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce

(A) any standard or limitation respecting discharges of pollutants, or

(B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or

(2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

*Id.* Under this **floor preemption** approach, programs of states and local governments can be **more restrictive**, but **not less restrictive**, than the federal program.

In theory, therefore, states can provide vital protection for wetlands by addressing waters and activities that **are not** regulated under the Section 404 program, or by imposing additional limits on activities that **are** regulated under that program. However, a recent study prepared by the Environmental Law Institute found that over 2/3 of states have enacted laws that **could limit** the authority of states to regulate waters that are not regulated under the Clean Water Act. See [Environmental Law Institute, \*State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act \(May 2013\)\*](#). Many of those laws were not targeted specifically at wetlands regulation, but apply broadly to state environmental regulation or state regulation of a range of activities. According to the ELI report, thirteen states have adopted laws that require that state regulations must be “no more stringent than” federal regulations. *Id.* at 1. Twenty-three other states have adopted laws that prohibit states from adopting regulations that are more stringent than federal regulations **unless** certain requirements are met. *Id.* at 13-14. In addition to those limitations, the report notes that twenty-two states have adopted laws that could limit state protection of wetlands because the laws require state officials to compensate landowners for reductions in property value caused by regulation or require state officials to assess their actions for takings implications

or other impacts on private property rights. *Id.* at 24. The report suggests that those laws could chill state regulation of activities in wetlands that are not regulated under federal law. *Id.*

Although many states have laws that **could** limit the authority of the states to regulate activities that are not regulated under the Clean Water Act, half of the states have adopted laws and regulations that provide some protection to wetlands that are not regulated under the Clean Water Act and many states have adopted laws that require permits for activities that are not regulated under the Clean Water Act despite the limits identified in the ELI report. In fact, the ELI report noted that 17 states that had enacted laws that **could limit** state regulation of waters and activities that are not regulated under the Clean Water Act nevertheless regulated those activities. *Id.* at 2. Those programs, and state programs that provide additional protection to wetlands that are already regulated under the Clean Water Act, are described in the next section.

### Research Problems

**State Laws:** Using the tools that you learned in your legal research class regarding researching state laws, see if you can answer the following questions. When answering the questions, please provide citations to support your answers.

1. When will a government action constitute a “taking” under Texas law?
2. In Mississippi, when a state action prohibits or severely limits the right of a landowner to conduct forestry or agricultural activities on forest or agricultural land (but does not result in a taking), the landowner may still sue for compensation in an inverse condemnation action. What level of reduction in property value triggers that right under Mississippi law? Is the landowner entitled to compensation if the government is acting to prohibit a nuisance by the landowner?
3. Does Idaho law place any limits on the authority of state agencies to adopt rules to protect wetlands and waters that are more stringent than the rules adopted by the federal government? If so, please describe the general limits.

## B. A Survey of State Programs

While the Clean Water Act **allows** states and local governments to administer their own programs to protect wetlands and water quality, it does not **require** them to do so. Nevertheless, according to a report prepared by the Environmental Law Institute in 2008, twenty three states have enacted laws and regulations to require state **permits** for dredge and fill activities in wetlands and other waters in the state. See [Environmental Law Institute, State Wetland Protection: Status, Trends & Model Approaches 9 \(March 2008\) \[hereinafter “ELI State Wetland Protection Report”\]](#). Eight of those states limit the permit requirement to

activities in coastal and tidal wetlands, while the other fifteen regulate activities in freshwater wetlands as well as in coastal, tidal and shoreline areas. *Id.* at 10. In states with their own wetlands permitting programs, a discharge may often require **both a federal and state** wetlands permit. If the Corps and the state have not streamlined the permitting process through a State Programmatic General Permit, *see infra*, the project developer will need to obtain permits from both the Corps and the state. As noted in Chapter 6, if the Corps completes its review of a section 404 permit and issues the permit before other agencies (including the state) have completed their reviews, the Corps will normally condition the permit on approval by the other agencies. See [33 C.F.R. § 325.2\(d\)\(4\)](#).

In light of the fact that state programs can regulate waters that are outside of federal jurisdiction, six states regulate “geographically isolated” wetlands, such as the wetlands at issue in the *Solid Waste Agency of Northern Cook County* case, although some of those programs are not permitting programs. See [ELI State Wetland Protection Report](#) at 11.

| <b>States with permit programs for freshwater, coastal and tidal wetlands</b>   | <b>States with permit programs for coastal and tidal wetlands only</b>                                | <b>States with programs for geographically isolated wetlands</b>    |
|---|---|---|
| Connecticut, Florida, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia | California, Delaware, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Washington | Indiana, North Carolina, Ohio, Tennessee, Washington, and Wisconsin |

*Id.* While some of the states with wetlands permitting programs have adopted dedicated wetlands permitting programs, other states rely on a patchwork of laws, such as water pollution laws, growth management laws, shoreline management laws, and other laws, to regulate activities in wetlands. *Id.* at 11. In most states, permits are issued by a state agency, but some states have created programs that authorize local agencies to administer wetlands permit programs. *Id.*

Regardless of whether states have adopted state wetlands **permitting** programs, every state has adopted a definition of “waters” (by legislation or regulation) that includes wetlands, and forty-two states have adopted statutory or regulatory definitions for “wetlands.” *Id.* at 15, 18.

State wetlands programs are often similar to the federal program in many respects. For instance, most states delineate wetlands using the 1987 Corps delineation manual, although eighteen states rely on other delineation criteria or guidelines, in addition to, or instead of, the Corps manual. *Id.* at 19-20. Regarding mitigation, thirty six states have adopted legislation or policies to authorize and regulate mitigation for impacts to wetlands

or other aquatic resources. *Id.* at 23. Twenty-two states specifically authorize or require mitigation banking through legislation, regulations or guidance. *Id.* at 26. Eighteen states specifically address “in lieu fee mitigation” through legislation, regulations or guidance. *Id.* at 28. Although only fourteen states have adopted statewide goals regarding wetland restoration, most of those states have adopted a “no net loss” goal, similar to the federal goal, or a goal of restoring a specific amount of wetland acreage within a specific time-frame. *Id.* at 47.

State wetland programs are also similar to the federal program in that several agencies are usually involved in wetland regulation, management or protection in each state. *Id.* at 32. In twenty-six states, two resource or environmental agencies oversee wetland activities, with one agency generally focusing on regulatory activities, while the other focuses on non-regulatory activities. *Id.* at 32. In eleven states, authority over wetlands is divided among three or more agencies. *Id.* at 33. In twelve states, though, a single state agency administers all of the wetland programs in the state. *Id.* at 32.

Not surprisingly, the scope of activities regulated, the resources dedicated to wetlands regulation, protection and restoration, and the level of monitoring and enforcement of state wetland protection laws vary greatly from state to state. Only sixteen states have monitoring and/or assessment programs that focus on wetlands, and only eight states implement a program to recruit community members as volunteer monitors for wetlands. *Id.* at 42, 44. The level of wetland protection afforded by states is often constrained by the level of funding available for wetland protection activities. Most states rely on federal grants and general state appropriations to fund wetland programs, but more than half of the states rely, in part, on fees, and fifteen states rely, in part, on dedicated state appropriations. *Id.* at 36.

### Research Problems

**State Laws:** When answering the following questions, please provide citations to support your answers.

1. How does the Minnesota Water Pollution Control Act define “waters of the state”? Which agencies make “determinations” regarding projects that result in fill, excavation or drainage of wetlands under the state’s Wetland Conservation Act? Which state agency is responsible for enforcing the state laws preserving and protecting groundwater quantity, wetlands and public waters?
2. What activities require a permit under Georgia’s “Coastal Marshlands Protection Act of 1970”? Who issues the permits? How are “marshlands” defined under that Act?

## Interviews



Alexandra Dunn, Executive Director and General Counsel of the Environmental Council of the States responds to the following questions:

- Are there regional or other variations in the attitudes that States take toward wetlands regulation? ([YouTube Video](#))
- Do many States operate their own State wetland permitting programs and could you describe them generally? ([YouTube Video](#))
- What are the most effective tools that States are using to protect wetlands? ([YouTube Video](#))
- What are the greatest impediments to wetland protection in the States? ([YouTube video](#))
- What is the Association of Wetlands Managers and what role do they play in wetland protection? ([YouTube Video](#))



Jan Goldman Carter, Senior Manager and Counsel for the National Wildlife Federation's Wetlands and Water Resources Program, discusses the variety State wetland protection programs and the political pressure on State programs ([YouTube Video](#)).

## II. State Assumption of the Section 404 Program and State Programmatic General Permits

### A. Assumption of the 404 Permitting Program

In addition to preserving the authority of states to administer their own state wetland protection programs, the Clean Water Act, like most federal environmental laws, authorizes states to take over and administer the federal wetlands permitting program in lieu of the Corps of Engineers.

Pursuant to Section 404(g) of the Clean Water Act, a state can **assume** the authority to issue permits for the

#### Resources

[EPA State Program Rules - 40 C.F.R. Part 233](#)  
[Michigan MOA w/ EPA and Corps for assumption and Michigan program regs.](#)  
[New Jersey MOA w/ EPA and Corps for assumption and N.J. program regs.](#)  
[ASWM web page re: assumption](#) and  
[Handbook for States/Tribes re: assumption](#)

discharge of dredged or fill material into waters regulated under the Clean Water Act ***other than traditional navigable waters or waters seaward of the high water mark***. See [33 U.S.C. § 1344\(g\)](#). EPA's regulations also authorize tribes to assume that authority within their jurisdiction. See [40 C.F.R. § 233.2](#) (defining "state" to include "indian tribe"). In order to assume authority to administer the Section 404 permitting program, a state must enact laws and regulations to create a program that meets several requirements outlined in the statute that are designed to ensure that the state has the same authority to administer the Section 404 permitting program as the Corps would have. See [33 U.S.C. § 1344\(h\)\(1\)](#). The requirements of the state program must be at least as stringent as, and may be more stringent than, the federal requirements. See [40 C.F.R. § 233.1\(c\)-\(d\)](#). Although the Corps administers the Section 404 permitting program, Congress gave EPA, rather than the Corps, the authority to review applications by states to assume Section 404 permitting authority. If EPA determines that the state program meets the requirements of the statute, the agency will approve the program and the state will assume authority to issue Section 404 permits in lieu of the Corps. See [33 U.S.C. § 1344\(h\)\(2\)](#). The Corps will, however, continue to have authority to issue permits for discharges into traditional navigable waters and waters seaward of the high water mark. In addition, to the extent that the state program is more stringent than the federal program, those more stringent provisions can only be enforced by the state and are not subject to federal oversight and enforcement. See [40 C.F.R. § 233.1\(c\)](#).

The rest of the state program is, however, subject to federal oversight. After EPA approves a state's request to assume Section 404 permitting authority, the state must still provide EPA notice and an opportunity to comment on individual and general permits that the state reviews or prepares. See [33 U.S.C. § 1344\(j\)](#). EPA can, however, waive its authority to review categories of discharges in the state, by adopting regulations to waive the authority. *Id.* § 1344(k)-(l). If EPA doesn't waive its authority to review permits issued by the state, EPA solicits comments from the Corps, the Fish and Wildlife Service and the National Marine Fisheries Service when determining whether to submit comments to the state and when framing comments for the permit. See [40 C.F.R. § 233.50\(b\)](#). If EPA objects to a permit that the state plans to issue, the state cannot issue the permit unless EPA withdraws its objection. See [33 U.S.C. § 1344\(j\)](#). If the state does not deny the permit or revise it to address EPA's objections, the state loses the authority to issue that permit and the Corps processes that permit application. *Id.*

While a State is administering the Section 404 permitting program, EPA also retains the authority to bring enforcement actions, just as it would if the Corps were administering the program. See [33 U.S.C. § 1344\(n\)](#). Finally, if EPA determines that a state that has assumed authority to issue Section 404 permits is not administering the program in accordance with federal standards, the agency can, after notice and a hearing, withdraw the state's authority to administer the program. *Id.* § 1344(i).

Although the Clean Water Act authorizes states to assume Section 404 permitting authority

in lieu of the Corps, only two states have done so. Michigan assumed authority for the program in 1984, see [40 C.F.R. § 233.70](#), and New Jersey assumed authority for the program in 1994. See [40 C.F.R. § 233.71](#).

## B. State Programmatic General Permits

States that do not assume Section 404 permitting authority from the Corps can still play a greater role in the administration of the federal program and streamline permitting for developers in the state through a State Programmatic General Permit. As noted in Chapter 6, *supra*, Section 404(e)

authorizes the Corps of Engineers to issue general permits “on a state, regional or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.” See [33 U.S.C. § 1344\(e\)](#).

Pursuant to that authority, the Corps has issued ***programmatic general permits*** in several states that provide that persons who obtain a permit under the state wetlands permitting program do not have to apply for an individual Section 404 permit from the Corps as long as they comply with the terms of the programmatic general permit. See, e.g. [Department of the Army Programmatic General Permit, State of Maryland - MDSPGP-4 \(Oct. 1, 2011\)](#).

The general permit only applies to specific categories of activities in the state (*i.e.*, discharges in a specific region, discharges that have impacts below a specific threshold, discharges associated with specific types of activities) and the Corps issues the permit pursuant to the normal general permitting procedures described in Chapter 6 after the Corps determines that the activities in the permit are similar in nature and will cause only minimal adverse effect on the environment. See [33 U.S.C. § 1344\(e\)](#). The programmatic general permit, therefore, streamlines the permitting process in those states for persons engaged in the activities authorized by the permit. Like other general permits, programmatic general permits are issued for a five year term, but can be revoked if the Corps determines, after opportunity for a public hearing, that the activities authorized by the permit have an adverse effect on the environment or are more appropriately authorized by individual permits. *Id.*

When the Corps issues a programmatic general permit, the permit will include conditions that specify whether, and to what extent, the Corps, EPA and other federal agencies will review or comment on the use of the general permit by a discharger. See, e.g. [MDSPGP-4, supra](#) at 6-9. For activities that have very little impact, the permit may provide very limited federal review. *Id.* The states for which the Corps has issued programmatic general permits are listed below.

### Resources

[ASWM Website re: SPGPs](#)

### States with Programmatic General Permits

- [Connecticut](#) (all waters)
- [Delaware](#) (all waters)
- [Florida](#) (limited waters)
- [Louisiana](#) (limited waters)
- [Maine](#) (all waters)
- [Maryland](#) (all waters)
- [Massachusetts](#) (all waters)
- [New Hampshire](#) (all waters)
- [New Jersey](#) (all waters)
- [North Carolina](#) (coastal zone)
- [Pennsylvania](#) (all waters)
- [Rhode Island](#) (all waters)
- [Utah](#) (limited waters)
- [Vermont](#) (all waters)
- [Virginia](#) (limited waters)

### Questions and Comments

1. Why do you think that more states have not assumed administration of the Section 404 permitting program from the Corps, when so many states have taken over the Clean Water Act Section 402 permitting program and other federal environmental permitting programs? What are the benefits and disadvantages of taking over the federal program? See [Association of State Wetland Managers, \*Clean Water Act Section 404 State Assumption\* \(2010\)](#).
2. What are the similarities and differences between assumption of the Section 404 permitting program and a statewide programmatic general permit?
3. For a more detailed examination of state assumption of the Clean Water Act 404 program, see Lance D. Wood, *The ECOS Proposal for Expanded State Assumption of the CWA §§ 404 Program: Unnecessary, Unwise and Unworkable*, 31:3 Nat'l Wetlands Newsletter 13 (2009); Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 Md. L. Rev. 1242 (1995). Professor



Jonathan Adler explores whether federal regulation has “crowded out” state wetlands regulation in *When is Two a Crowd? The Impact of Federal Action on State Environmental Regulation*, 31 Harv. Envtl. L. Rev. 67 (2007).

### Interview



Alexandra Dunn, Executive Director and General Counsel for the Environmental Council of the States, discusses impediments to assumption by States of the 404 permitting program. ([YouTube Video](#))

### Research Problems

**State PGPs:** State PGPs can be found on the Corps’ websites for the Division in which a State is located or on the website of the State agency that regulates water quality. Please answer the following questions regarding the PGPs of Louisiana and North Carolina.

1. Does the Louisiana Programmatic General Permit apply to the discharge of dredged or fill material into waters outside of the Louisiana Coastal Zone? Would minor road crossings that cause the loss of less than .5 acres of special aquatic sites be regulated as Category I or Category II activities under that permit? If a person submits a complete application to request authorization to undertake a Category I activity under the Programmatic General Permit, and has not received an authorization to proceed with the activity from the Corps, must the person wait for authorization or can they proceed with their activity?
2. What activities are authorized by the North Carolina Programmatic General Permit? Does the permit impose any limits on mechanized land-clearing activities in waters or wetlands?

### III. 401 Certification

While states can adopt their own state wetlands permitting programs, assume the federal permitting program and streamline regulation through state programmatic general permits, almost half of the states do not take those approaches and rely solely on the Clean Water Act Section **401 certification** process to regulate wetlands in their state. According to a

2008 ELI report, 22 states do not have any wetlands regulatory program and rely solely on the 401 certification process to regulate wetlands. See [ELI State Wetland Protection Report](#) at 13. An additional 15 states regulate coastal wetlands, isolated wetlands, or other subcategories of wetlands through a state permitting program, but rely on section 401 certification as the primary form of regulation for other wetlands in the state. *Id.* Thus, section 401 certification is probably the most important tool in the Clean Water Act for state regulation of wetlands.

Section 401 of the Clean Water Act provides:

Any applicant for a Federal license or permit to conduct any activity ...which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate ... that any such discharge will comply with [state water quality standards and several other requirements of the Clean Water Act] ... No license or permit shall be granted until the certification required by this section has been obtained or has been waived ... No license or permit shall be granted if certification has been denied by the State ....

[33 U.S.C. § 1341\(a\)\(1\)](#). In light of that requirement, whenever a person applies to the Corps for a Section 404 permit, or whenever a person applies for **any** Federal license or permit that results in a discharge into the navigable waters (including jurisdictional wetlands), they must provide the permitting or licensing agency with a certification from the State that the activity to be authorized by the permit complies with state water quality standards and other requirements of the Clean Water Act. The state can (1) **certify** that the discharge meets the state standards and requirements; (2) **deny certification**; or (3) **attach comments or conditions** to any permit that the Corps issues to ensure that the discharge complies with state water quality standards and “appropriate requirement[s] of state law”. *Id.* § 1341(d). The Corps (or other permitting or licensing agency) cannot issue the permit unless the State certifies that the activity complies with the state standards or waives its right to certify. *Id.* § 1341(a). If a state fails or refuses to act on a request for 401 certification within 60 days after receiving the request, the state waives its right to veto or condition the permit. See [33 C.F.R. § 325.2\(b\)\(1\)\(ii\)](#). Any conditions that the state attaches to a 401 certification become conditions of the federal permit or license. See [33 U.S.C. § 1341\(d\)](#).

In deciding whether to certify a discharge, deny certification or include conditions in the permit for the discharge, states can consider not only the immediate effects of the discharge on water quality in the state, but the longer term effects of the activity authorized by the discharge on water quality. See [40 C.F.R. § 121.2\(a\)\(3\)-\(4\)](#); [33 C.F.R. § 320.3\(a\)](#); [PUD No. 1 of Jefferson County v. Washington Department of Environmental Quality, 511 U.S. 700 \(1994\)](#).

As a result, even when a state does not have a state wetlands permitting program, they can exert some control over discharges into wetlands in their state, as long as the discharges require a Section 404 permit (or other federal permit or license), and as long as the state's water quality standards or "other appropriate requirements of state law" provide protection for wetlands. The 2008 ELI report found that states rarely deny or waive 401 certification, although they may frequently include conditions in their certifications. See [ELI State Wetland Protection Report](#) at 15. The number of 401 certifications issued each year by states varies greatly, from Connecticut, issuing fewer than 20 certifications per year, to California, issuing more than 1000 certifications per year. *Id.* States that have their own state wetland permitting and regulatory programs generally rely less frequently on Section 401 certification to protect wetlands.

As noted above, in determining whether to grant, deny or condition 401 certification for a discharge into wetlands, states focus on whether the discharge violates state **water quality standards** and other appropriate requirements of state law. The Clean Water Act requires **states** to establish water quality standards, which are reviewed and approved by EPA, for the waters in the state that are regulated under the Act. See [33 U.S.C. § 1313](#). Water quality standards generally include **use designations** for waters in the state and **water quality criteria** to protect the various uses of water. See [40 C.F.R. § 131.3\(i\)](#). The standards are set at levels to "protect the public health or welfare, enhance the quality of water and serve the purposes of the Act." *Id.*

Regarding use designations, states can establish a range of acceptable uses for waters in the state, including recreation, drinking water supplies, fishing, and others. See [40 C.F.R. § 131.10](#). Water quality criteria are then established for each use, or for all waters in the state, to ensure that the waters can be used for the designated uses. *Id.* [§ 131.11](#). The criteria may be specific **numerical limits** on pollutant levels in a body of water or they may be **narrative criteria** that don't include specific numerical limits. *Id.* States assign use designations to each body of water in the state that is regulated under the Clean Water Act (and can assign different use designations for different segments of the water), and the water quality criteria that apply to the assigned use, or to all waters in the state, set the pollution limits for that body of water (or segment of the body of water). See [40 C.F.R. § 131.10](#). Georgia's water quality standards are linked [here](#) as an example.

As noted above, every state has adopted a definition of "waters" that includes wetlands. However, most states have not adopted water quality standards that are specifically designed to provide protection to wetlands (*i.e.*, by designating uses for wetlands or developing specific criteria for wetlands). According to the Environmental Law Institute's 2008 50 state survey, only 13 states have adopted water quality standards that are specifically targeted at protecting wetlands. See [ELI State Wetland Protection Report](#) at 37. That doesn't mean that water quality standards in the other states might not provide protection to wetlands and might not be used as the basis for denying or conditioning 401 certification for a discharge that affects wetlands. Indeed, other water quality standards

may provide incidental protection to wetlands, even though they were not adopted with that specific goal in mind. For instance, water quality standards that are not wetland-specific often include limits to address flood control, sediment trapping, habitat protection, pollution control, shoreline protection, and maintenance of stream flow. *Id.* at 38.

While a variety of water quality standards may provide incidental protection to wetlands, wetland-specific water quality standards can be a more effective way to provide wetland protection and to serve as a basis for denial or conditioning of 401 certification. EPA published guidance in 1990 to assist states in developing water quality standards specifically targeted to protect wetlands. See [U.S. Environmental Protection Agency, EPA 440/S-90-011, Water Quality Standards for Wetlands: National Guidance \(July 1990\)](#). Frequently, whether a state adopts wetland-specific water quality standards depends on the broader range of tools that the state uses to protect wetlands. Most of the states that **have** adopted wetland-specific water quality standards do not have a permitting program that applies to all wetlands in the state and **rely heavily** on the Section 401 certification process to regulate wetlands. *Id.* at 37. Similarly, many of the 37 states that have **not** adopted wetland-specific water quality standards **do not rely** primarily on the 401 certification process to protect wetlands. *Id.* at 39.

While the Section 401 certification process primarily protects the interests of the state where a discharge of dredged or fill material will occur, the statute also authorizes EPA to notify other states about potentially permitted discharges if the agency determines that the discharge may affect the water quality in the other states. See [33 U.S.C. § 1341\(a\)\(2\)](#). Based on recommendations from the state and EPA, the federal permitting agency may then include conditions in the federal license or permit necessary to meet water quality standards in the other states or may deny the permit if it is not possible to condition the permit to meet those standards. *Id.*

### Questions and Comments

1. **Water Quality Standards:** In addition to designated uses and water quality criteria, state water quality standards usually include provisions to ensure compliance with a state “anti-degradation policy.” The anti-degradation policy is designed to maintain existing water uses and a level of water quality necessary to protect and maintain existing water uses. See [40 C.F.R. § 131.12](#). In [PUD No. 1 of Jefferson County v. Washington Department of Environmental Quality, 511 U.S. 700 \(1994\)](#), the Supreme Court held that a state can deny 401 certification or condition it on compliance with any one of the three components of water quality standards - uses, criteria, or standards necessary to comply with an anti-degradation policy.

2. **Appropriate requirements of state law:** Section 401 authorizes states to deny or condition permits on compliance with “appropriate requirements of state law.” While the Supreme Court, in the *PUD No. 1 of Jefferson County* case, held that water quality standards were “appropriate requirements of state law”, the Court refused to “speculate on what additional state laws, if any, might be incorporated” by that language.

#### 401 Certification Resources

[401 Certification and wetlands - EPA](#)

[Water Quality Standards for Wetlands - EPA](#)

[EPA Guidance on Water Quality Standards for Wetlands](#)

[Section 401 Certification Handbook for States and Tribes \(EPA\)](#)

[EPA Guidance on Setting Nutrient Criteria for Wetlands in WQ Standards](#)

[ASWM report on Section 401 Certification Best Practices for States](#)

[Water Quality Standard Regulations - 40 C.F.R. Part 131](#)

[Water Quality Standards - EPA Web Page](#)

[Water Quality Standards Handbook - EPA](#)

#### Interview



Alexandra Dunn, Executive Director and General Counsel for the Executive Council of the States, discusses the way in which States use the 401 certification process to protect wetlands. ([YouTube Video](#)).

#### Research Problems

**State Laws:** When answering the following questions, please provide citations to support your answers.

1. What agency is responsible for adopting water quality standards in the State of North Carolina? How are wetlands defined by regulation for purposes of that law?
2. What agency is responsible for adopting water quality standards in the State of Wyoming? How are wetlands defined by regulation for purposes of that law?

#### IV. Coastal Zone Management Act Certification

In addition to the tools outlined above, some states can also utilize the Coastal Zone Management Act's certification process to protect wetlands in the state. Under the Act, coastal states (states that border the Atlantic, Pacific and Arctic Oceans, the Gulf of Mexico, the Long Island Sound, or one or more of the Great Lakes) prepare coastal zone management plans, which are reviewed and approved by the Secretary of Commerce. See [16 U.S.C. § 1455](#). Approved programs are eligible for federal funding to assist in implementation of the programs. *Id.* Twenty-nine states have approved coastal zone management programs. See [U.S. Department of Commerce, National Oceanographic and Atmospheric Administration, State Coastal Management Program Manager and Federal Consistency Contacts](#). The states with approved programs are: Alabama, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Virginia, Washington, and Wisconsin. *Id.*

To ensure consistency with the state programs, any person who applies for a federal permit or license to conduct an activity that will affect land or water use or natural resources of the coastal zone must provide, as part of the permit or license application, "a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program." See [16 U.S.C. § 1456\(c\)\(3\)\(A\)](#). Consequently, if a proposed discharge of dredged or fill material will affect the land, water or resources of the coastal zone in a state with an approved coastal zone management program, the applicant for a section 404 permit will need to submit a certification from the state that the discharge complies with, and is consistent with, the state's coastal zone management program. If the applicant does not submit the certification, the Corps will not issue the Section 404 permit. See [33 C.F.R. § 325.2\(b\)\(2\)\(ii\)](#). Pursuant to this authority, therefore, a state could refuse to certify a discharge that would harm wetlands in the coastal zone if the discharge was not consistent with the state's program or did not comply with the program.

## Hypothetical

The State of Colorado does not have any laws that require persons to obtain permits from the State to undertake activities that impact wetlands in the State. Assume, for purposes of this question, that Colorado does not issue Clean Water Act Section 402 permits and that those permits are issued by EPA. The City of Alamosa, Colorado is upgrading its sewage treatment plant and has applied to EPA to amend its permit under Section 402 of the Clean Water Act to discharge treated wastewater into the Rio Grande River. The State of Colorado is concerned that high levels of nutrients and chlorine discharged from the sewage treatment plant might harm the freshwater wetlands that are located downstream of the treatment plant, adjacent to the Rio Grande River. Will the city be required to obtain a permit or other approval from the State of Colorado as part of the Section 402 permit process? Is there any action that Colorado can take to limit the amount of nutrients or chlorine that the plant will be allowed to discharge under its Section 402 permit? Could the State rely on a local ordinance of the City of Alamosa that limits the amount of nutrients that are discharged into the Rio Grande River?

The Rio Grande River flows south from Colorado into New Mexico. If the state of New Mexico is also concerned about the levels of nutrients and chlorine that will be discharged by the treatment plant, is there any action that it can take to limit the amount of nutrients or chlorine that the plant will be allowed to discharge under its Section 402 permit? With what success? It is not necessary to provide specific state statutory provisions to answer these questions.

## Chapter Quiz

Now that you've finished Chapter 9, why not try a CALI lesson on the material at: <http://cca.li/Q0>. It should only take about 15 minutes.

# Chapter 10

## Administrative Appeals, Judicial Review and Enforcement

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When the Corps of Engineers or EPA takes an action under the Clean Water Act, or fails to take an action, landowners, interest groups, states, and any number of other persons may seek to challenge the agencies' action or inaction. Part I of this chapter examines the administrative and judicial avenues for appealing those decisions.

However, the Corps and EPA are not simply *defendants* in administrative and judicial proceedings. Whenever a person fails to comply with the permitting requirements or other requirements of the Clean Water Act, the agencies can take a variety of administrative or judicial enforcement actions. Part II of this chapter examines those enforcement options.

### I. Administrative Appeals and Judicial Review

#### A. Administrative Appeals of Corps' decisions

The Clean Water Act does not explicitly provide for an administrative process to review the Corps' actions in administering the Section 404 permit program and there was no administrative appeal process for the program for the first several decades of its existence. To the extent that persons wanted to challenge a Corps decision to issue or deny a permit or to take some other action, they could only challenge those actions in court, if at all. However, in 1999 and 2000, the Corps of Engineers adopted regulations that created an administrative appeal program for final permit decisions, see [64 Fed. Reg. 11,708 \(March 9, 1999\)](#) and final jurisdictional determinations. See [65 Fed. Reg. 16,486 \(March 28, 2000\)](#). One of the advantages of the program for the Corps and for landowners is that it should lead to more uniform and consistent decision-making. As noted in Chapters 4 and 5, absent an appeal, final permit decisions and final jurisdictional determinations are made at the District level,

#### Resources

[Corps Administrative Appeal Regulations Fact Sheet and Request for Appeal](#) (Seattle District of the Corps)  
[Corps videos](#) describing appeals process  
Flow chart of appeal process for [permit decisions](#) and for [approved jurisdictional determinations](#)  
[RGL 06-01](#) - Timeliness of a request for appeal



by 43 different District Engineers. The appeal process adopted by the Corps provides for review at the Division level. Since there are only 9 Divisions, as opposed to 43 Districts, the decision-making should be more uniform and consistent. (Note: Although there are 9 Divisions, the Transatlantic Division does not issue Section 404 permits, since the Division only encompasses the Middle East and Asia).

Since administrative processes are generally quicker and less expensive than judicial processes, the administrative appeal process should also save the Corps and challengers time and money by keeping challenges out of court. It should also provide the Corps with an additional opportunity to develop a record that can withstand judicial challenge if the agency's decision is ultimately contested in court.

## 1. Reviewable Actions

The Corps' regulations limit the agency actions that can be appealed administratively. Under the regulations, landowners and permit applicants can appeal: (1) an **approved** jurisdictional determination; (2) a written denial of an individual permit application with prejudice (**a permit denial**); and (3) an individual permit or letter of permission that the applicant has declined to accept because he has objections to the terms and conditions of the permit (**a declined permit**). See [33 C.F.R. § 331.2](#).

**Appealable action** means an approved jurisdictional determination, a permit denial, or a declined permit. [33 C.F.R. § 331.2](#).

Consequently, a **preliminary** jurisdictional determination, in which the Corps indicates that there **may** be jurisdictional waters on a parcel of property or which indicates the approximate location of jurisdictional waters on a parcel of property, **cannot** be appealed administratively, while an **approved** jurisdictional determination **can** be appealed administratively. *Id.* As noted in Chapter 4, *supra*, an **approved** jurisdictional determination is an official determination by the Corps that there **are, or are not**, jurisdictional waters on a parcel of property, and outlining the limits of the waters. See [33 C.F.R. § 331.2](#).

Regarding permit decisions, if the Corps denies an individual permit request **without prejudice**, for instance, because a state denied Section 401 certification or refused to certify that the discharge was consistent with a coastal zone management plan, the Corps' permit denial cannot be administratively appealed. *Id.* The Corps' denial of an individual permit request can only be challenged administratively when the Corps denies the permit **with prejudice**. Further, if the Corps determines that a **general permit** does not authorize a particular activity, that decision cannot be appealed administratively. The administrative appeal process is limited to individual permit decisions. *Id.*

In addition to limiting the actions that can be challenged administratively, the regulations

limit **who** can raise those challenges. Only “**affected parties**”, defined as permit applicants, landowners or other persons with a substantial and identifiable legal interest in the property at issue, can bring administrative challenges. *Id.* Neighbors, competitors, interest groups, state or local governments, and other interested parties can only challenge actions of the Corps judicially, if at all.

## 2. Review Process

At the time that the Corps makes a decision at the District level that can be appealed under its regulations, the agency provides a notice to the person to whom the decision is directed that the decision can be appealed, a fact sheet describing the appeal process, and a form that the person can use to request an appeal of the decision. See [33 C.F.R. § 331.4](#). If the permit applicant or landowner wishes to appeal, they must file a request for appeal, stating the reasons for the appeal, within sixty days of the notice from the Corps. [Id. § 331.6](#).

While EPA’s administrative appeal process and the administrative appeal processes of many agencies provide for review and decision-making by a centralized body, usually at the headquarters level, the Corps’ regulations provide for review and ultimate decision-making on appeals at the Division level. [Id. § 331.9](#). Thus, when a permit applicant or landowner appeals a decision of a Corps District, a Review Officer for the Division will oversee the appeal. [Id. § 331.3](#). The regulations do not require that the Corps provide public notice of the appeal and do not provide for a formal hearing. Instead, the regulations authorize an informal meeting or conference call for appeals of jurisdictional determinations and an informal conference for appeals of permit decisions. [Id. § 331.7](#).

Ultimately, the Division Engineer has limited authority to overturn the District’s decisions. The Division Engineer can only overturn the District Engineer’s **factual** findings if they are not supported by **substantial evidence** on the administrative **record** prepared by the District. [Id. § 331.9](#). In addition, the Division Engineer can only overturn other portions of the decision below if they are “arbitrary, capricious, an abuse of discretion, ..., or plainly contrary to a requirement of law, regulation, an Executive Order, or officially promulgated Corps policy guidance.” *Id.* § 331.9(b). The Division Engineer must issue a final decision in writing, *id.*, and should normally make the decision within 90 days after the permit applicant or landowner begins the appeal process. [Id. § 331.8](#).

The Corps’ regulations provide that decisions on appeals are “only applicable to the instant appeal and [have] no other precedential effect.” [Id. § 331.7\(g\)](#). Nevertheless, each of the Divisions that is involved in Section 404 permitting makes those decisions available on a website for the Division. The following table provides links for the Divisions.

|  |                                    |                                |                              |
|--|------------------------------------|--------------------------------|------------------------------|
| <a href="#">Great Lakes and Ohio River</a> | <a href="#">Mississippi Valley</a> | <a href="#">North Atlantic</a> | <a href="#">Northwestern</a> |
| <a href="#">Pacific Ocean</a>              | <a href="#">South Atlantic</a>     | <a href="#">South Pacific</a>  | <a href="#">Southwestern</a> |

## Questions and Comments

1. Preliminary jurisdictional determinations of the Corps cannot be administratively appealed. Neither can permit denials without prejudice, cease and desist orders issued by the Corps, delays in processing of Corps permits, and many other Corps actions. Why do you think that the Corps did not provide for administrative appeals of a broader range of actions? Similarly, why did the Corps establish the appeals process for permit decisions and jurisdictional determinations in separate rulemakings? See [65 Fed. Reg. 16,486 \(March 28, 2000\)](#); [64 Fed. Reg. 11,708 \(March 9, 1999\)](#).
2. **Third parties:** Only permit applicants and landowners can file administrative appeals of Corps actions. While federal rules for intervention may provide opportunities for third parties to become involved in *judicial challenges* to Corps actions, those rules do not apply to *administrative proceedings*. Instead, the Corps regulations do not provide any procedure for third parties to seek to be involved in the appeal process and only provide limited authority for the Review Officer to invite appropriate third parties to participate informally in the proceedings. See [33 C.F.R. § 331.7\(e\)\(3\)](#).
3. **Volume:** When the Corps issued the initial notice of proposed rulemaking for the administrative appeals program, it anticipated that the program would consume significant resources because there would be a high volume of appeals. See 60 Fed. Reg. 37,280, 37,283 (July 19, 1995). However, fewer than 1% of individual permit and jurisdictional determinations are appealed. See Kim D. Connolly, *The Corps Administrative Appeal Process*, in *Wetlands Law and Policy: Understanding Section 404 361* (American Bar Association, Section on Environment, Energy and Resources 2005).
4. **Issue Exhaustion:** To the extent that the Corps' regulations require persons to challenge the agency's decisions administratively before challenging the decisions in court, see [33 C.F.R. § 331.12](#), general administrative law principles require challengers to alert the agency to their specific positions and contentions in the administrative appeal "in order to allow the agency to give the issue meaningful consideration" or face dismissal of those challenges in court for failure to exhaust administrative remedies. See, e.g., [Forest Guardians v. United States Forest Service](#), 641 F.3d 423 (10<sup>th</sup> Cir. 2011).

## Hypotheticals

In which of the following cases could the challenger pursue an administrative appeal?

1. Juan Lagares would like to challenge the preliminary jurisdictional determination that the Corps issued because the Corps concluded that the wetlands on his property may be “waters of the United States.”
2. Phyllis Jones would like to challenge the approved jurisdictional determination that the Corps issued to her neighbor, Juan Lagares, because the Corps ultimately concluded that the wetlands on his property were not “waters of the United States.”
3. Rollie Wright planned to build a dock on his property and indicated to the Corps that he planned to construct the dock in accordance with a regional general permit issued by the local Corps district. The local Corps district informed Wright that the construction was not authorized by the general permit, and he would like to challenge that decision.
4. Rollie Wright applied to the Corps for an individual Section 404 permit to authorize construction of his dock, but the State refused to issue a Section 401 certification. Accordingly, the Corps denied Wright’s permit application without prejudice. Wright would like to challenge that decision.
5. The Shea Development Corporation applied to the Corps for an individual Section 404 permit to authorize construction of a golf course. The Corps issued the permit with a condition that Shea restore or enhance 50 acres of wetlands in the watershed in which the development will take place or purchase mitigation credits to restore or enhance 50 acres of wetlands in that watershed. Shea would like to challenge the mitigation condition in the permit.

## Research Problems

Although the Corps' administrative appeal decisions are not available on Westlaw or Lexis, the Corps' Divisions post the decisions on their websites, as noted above. Please answer the following questions based on the information provided on the agency's websites.

1. Your client was denied a Section 404 permit for development in Cherry Hill, New Jersey and you are considering an administrative appeal. Between 2001 and 2013, how frequently did the Corps Division that will hear your appeal find that an appeal of a permit denial or proffered permit had merit?

2. Your client wants to challenge an approved jurisdictional determination for property that she owns in Galveston, Texas, as she believes that the ponds on her property are not "waters of the United States." You have heard that the Division that would hear your appeal overturned a jurisdictional determination from your district with similar facts in 2012. Although the Corps' administrative appeal decisions are not precedential, you are interested in examining that decision. Please find that decision and identify the reasons that the Division concluded that the landowner's appeal had merit.

3. For decisions appealed in 2011, in the South Atlantic Division, from which District did most of the meritorious appeals to permitting decisions originate? From which district did most of the meritorious appeals to jurisdictional determinations originate? Between 2000 and 2012, when permit applicants challenged a permit denial to the Division, how frequently did the challenge ultimately result in a permit issuance by the Corps District?

## B. Judicial Review

### 1. Reviewable Actions

Although the Clean Water Act includes a **judicial review provision** that authorizes review of many EPA actions, the provision does not apply to any of EPA's actions regarding the Section 404 program, and it does not apply to any actions of the Corps of Engineers. See [33 U.S.C. § 1369](#). The Act also includes a **citizen suit provision**, discussed later, that authorizes suits against **EPA** if the agency fails to perform a non-discretionary duty. See [33 U.S.C. § 1365](#). However, most of the lawsuits that might be brought against EPA regarding wetlands, such as a challenge to regulations implementing Section 404, approval or denial of state program assumption, exercise of a Section 404 veto, or an enforcement order, involve the exercise of **discretion** by the agency, rather than a failure to perform a **non-discretionary duty**. The citizen suit provision is even less helpful with regard to challenging actions of the Corps, as the statute only explicitly authorizes suits against "the Administrator" (EPA), and not the Corps. While the Corps takes some actions regarding wetlands pursuant to its Rivers and Harbors Act authority, that statute also does not have a provision authorizing judicial review of the Corps' actions. The only provision in either statute that expressly authorizes judicial review of an action by EPA or the Corps is a

provision, discussed later, that authorizes review of administrative penalties imposed by EPA. See [33 U.S.C. § 1319\(g\)\(8\)](#).

Consequently, persons seeking judicial review of actions of the Corps or EPA regarding wetlands must rely on the Administrative Procedures Act (APA). The APA provides that a “final agency action for which there is no other adequate remedy in a court ..[is] subject to judicial review”, see [5 U.S.C. § 704](#), and “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” See [5 U.S.C. § 702](#). Significantly, the APA defines “agency action” to include a “failure to act.” See [5 U.S.C. § 551\(13\)](#). The APA waives the government’s sovereign immunity to the extent that the challenger is seeking declaratory or injunctive relief. See [5 U.S.C. § 702](#). While the APA does not grant jurisdiction to any court to hear the challenges that it makes reviewable, litigants can usually rely on [28 U.S.C. § 1331](#) (the general federal question jurisdiction statute) or other general jurisdictional statutes to establish jurisdiction for their lawsuit. The general federal question jurisdiction statute provides “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” *Id.*

Thus, persons who can demonstrate standing to sue, as discussed below, will generally be able to challenge actions of EPA or the Corps regarding wetlands in federal district court as long as the action is a **final agency action**. In general, the Supreme Court has held that for an action to be final, it “must mark the ‘consummation’ of the agency’s decisionmaking process” (not be of a tentative or interlocutory nature) and “must be one by which ‘rights or obligations have been determined’ or from which ‘legal consequences will flow.” See [Bennett v. Spear, 520 U.S. 154,178 \(1997\)](#).

One might assume that a **permit applicant** could challenge the Corps’ **denial of a Section 404 permit with prejudice** or any **unwanted conditions included in a Section 404 permit** issued by the Corps as a final agency action under the APA, but the Corps’ administrative appeals regulations require permit applicants to appeal those decisions administratively **before** suing in court. See [33 C.F.R. § 331.12](#). If the Corps affirms the denial of the permit or affirms the inclusion of the unwanted conditions when it makes a decision on the administrative appeal, the permit applicant can challenge those decisions in court at that time.

Persons other than the permit applicant who want to challenge the Corps’ decision to issue a permit, deny a permit, or include conditions in the permit have no obligation to pursue any administrative appeal process before suing in court because they have no right to appeal in the administrative process. However, if they challenge the Corps’ decision to issue or deny a permit and the permit applicant is pursuing, or could still pursue, an administrative appeal, a court will likely conclude that the challenger cannot bring their lawsuit until the administrative process has concluded, because the agency’s decision is not “the ‘consummation’ of the agency’s decision-making process” and is not a final agency action.

See [33 C.F.R. § 331.10](#). (identifying the final decision of the Corps in the event of an administrative appeal).

For jurisdictional determinations, a **preliminary jurisdictional determination** (a decision that there may be waters of the United States on a parcel of land) is likely not subject to judicial review because it is tentative and subject to further review and modification within the agency. See [33 C.F.R. § 331.2](#). An **approved jurisdictional determination** (a decision that waters of the United States exist or do not exist on a parcel of land and outlining the extent of the jurisdictional waters) can be appealed administratively, but EPA and the Corps argue that an approved jurisdictional determination that confirms the presence of waters of the United States on property is not a **final agency action** that can be challenged in court. Instead, they argue that persons can only challenge that decision in court after they apply for a permit and the Corps or EPA make a decision on the permit. In [Fairbanks North Star Borough v. U.S. Army Corps of Engineers, 543 F.3d 586 \(9<sup>th</sup> Cir. 2008\)](#), the Ninth Circuit concluded that an approved jurisdictional determination was not a final agency action because it was not an action from which legal consequences flowed. It is not yet clear whether the Supreme Court's decision in [Sackett v. Environmental Protection Agency, 566 U.S. \(2012\)](#), will change that, but in [Belle Corp., L.L.C. v. U.S. Army Corps of Engineers, No. 13-30262 \(5<sup>th</sup> Cir. July 30, 2014\)](#), a case decided after *Sackett*, the Fifth Circuit applied the *Sackett* analysis and determined that an approved jurisdictional determination was not a final agency action because it was not "an action by which rights of obligations have been determined or from which legal consequences flow." Belle's successor sought review of the decision in the Supreme Court, but the Court denied certiorari in [Kent Recycling Services LLC v. U.S. Army Corps of Engineers, U.S., No. 14-493, cert. denied, 3/23/15](#). However, in April, 2015, the Eighth Circuit held that an approved jurisdictional determination by the Corps **is** a final agency action that can be challenged in court. See [Hawkes Co., Inc. v. U.S. Army Corps of Engineers, 782 F.3d 994 \(8<sup>th</sup> Cir. 2015\)](#). Since the *Hawkes* decision created a circuit split, Kent Recycling asked the Supreme Court to rehear its cert. petition, see [Kent Recycling Services LLC v. U.S. Army Corps of Engineers, U.S., No. 14-493, rehearing pet. filed, 4/16/15](#) and the United States sought cert. on the *Hawkes* case. See [U.S. Army Corps of Engineers v. Hawkes Co., Inc., No. 15-290, cert. pet. Filed, 9/8/2015](#).

While the Corps and EPA assert that an **approved jurisdictional determination** that **confirms the presence of waters of the United States** on property cannot be challenged in court at the time of the determination, they do not resist judicial review of an **approved jurisdictional determination** that finds that there are **no waters of the United States present** on a parcel of land. In those cases, the government's determination is not tentative and, in essence, authorizes the landowner to move ahead with development projects without seeking a Section 404 permit. The landowner is unlikely to challenge that decision, but neighbors, competitors, interest groups and other third parties may challenge the decision. See [Golden Gate Audubon Society v. United States Army Corps of Engineers, 717 F. Supp. 1417 \(N.D. Cal. 1988\)](#).

Regarding other permitting decisions, when the Corps or EPA determines that an activity **doesn't qualify** for a general permit or a permit exemption, the agencies argue that the developer must apply for an individual permit and can only challenge the general permit or exemption determination judicially as part of a challenge to the agencies' ultimate decision on the permit application. In *Avella v. U.S. Army Corps of Engineers*, 916 F.2d 721 (11<sup>th</sup> Cir. 1990), the Eleventh Circuit affirmed a district court's finding that the Corps' determination that a developer's activity was not authorized by a nationwide permit was not a final agency action because the agency's decision did not have a binding legal effect on the developer. If, however, the government determines that an activity **qualifies** for a general permit or a permit exemption, the decision can generally be challenged in court at that time, since the government's decisionmaking process is complete and has a similar binding legal effect as the issuance of an individual permit. See [\*Orleans Audubon Society v. Lee\*, 742 F.2d 901 \(5<sup>th</sup> Cir. 1984\)](#).

There are many actions that EPA and the Corps take in administering Section 404 of the Clean Water Act other than issuing or denying permits and making jurisdictional determinations. However, for all of those other actions, the road to the courthouse door is the same as for the permitting and jurisdictional decisions. The agencies' actions are reviewable if they are final agency actions. Although the cases are fact-sensitive, this means that regulations adopted by the Corps or EPA will frequently be subject to APA challenge as final agency actions, since they are legally binding and often have direct legal effect on challengers, while guidance documents and policy statements will not be subject to review, since they are not legally binding and don't have a direct legal effect. EPA's exercise of its Section 404(c) authority represents the consummation of the agency's procedures and has the same legal effect on a landowner as the denial of a Section 404 permit, so it will generally be judicially reviewable.

In the enforcement context, for many years, EPA and the Corps argued that cease and desist orders and administrative enforcement orders issued by the agencies could not be challenged because they were not final agency action and because the statute implicitly precluded review of the orders. Several courts agreed with the agencies until the Supreme Court issued the following decision.



**Sackett v. Environmental Protection Agency**

566 U.S. \_\_\_\_ (2012)

**JUSTICE SCALIA** delivered the opinion of the Court.

**Resources for the Case**

[Unedited opinion](#) (From Justia)  
[Google Map of all of the cases in the coursebook](#)  
[Oral Argument audio](#) (from the Oyez Project)  
[EPA Compliance Order at issue](#)  
[Administrative Record](#)  
[EPA Guidance Post-Sackett](#)  
[EPA News Release re: administrative order](#)  
[Local media article re: the Sackett case](#)

We consider whether Michael and Chantell Sackett may bring a civil action under the Administrative Procedure Act \* \* \* to challenge the issuance by the Environmental Protection Agency (EPA) of an administrative compliance order under § 309 of the Clean Water Act, 33 U.S.C. § 1319. The order asserts that the Sacketts’ property is subject to the Act, and that they have violated its provisions by placing fill material on the property; and on this basis it directs them immediately to restore the property pursuant to an EPA work plan.

I

The Clean Water Act prohibits, among other things, “the discharge of any pollutant by any person” \* \* \* without a permit, into the “navigable waters,” \* \* \* which the Act defines as “the waters of the United States” \* \* \* . If the EPA determines that any person is in violation of this restriction, the Act directs the agency either to issue a compliance order or to initiate a civil enforcement action. § 1319(a)(3). When the EPA prevails in a civil action, the Act provides for “a civil penalty not to exceed [\$37,500] per day for each violation.” \* \* \* § 1319(d). And according to the Government, when the EPA prevails against any person who has been issued a compliance order but has failed to comply, that amount is increased to \$75,000—up to \$37,500 for the statutory violation and up to an additional \$37,500 for violating the compliance order.

The particulars of this case flow from a dispute about the scope of “the navigable waters” subject to this enforcement regime. Today we consider only whether the dispute may be brought to court by challenging the compliance order—we do not resolve the dispute on the merits. \* \* \*

The Sacketts \* \* \* own a 2/3-acre residential lot in Bonner County, Idaho. Their property lies just north of Priest Lake, but is separated from the lake by several lots containing permanent structures. In preparation for constructing a house, the Sacketts filled in part of their lot with dirt and rock. Some months later, they received from the EPA a compliance order. The order contained a number of “Findings and Conclusions,” including the following:

“1.4 [The Sacketts’ property] contains wetlands within the meaning of 33 C.F.R. § 328.4(8)(b); the wetlands meet the criteria for jurisdictional wetlands in the 1987 ‘Federal Manual for Identifying and Delineating Jurisdictional Wetlands.’

“1.5 The Site’s wetlands are adjacent to Priest Lake within the meaning of 33 C.F.R. § 328.4(8)(c). Priest Lake is a ‘navigable water’ within the meaning of section 502(7) of the Act, 33 U.S.C. § 1362(7), and ‘waters of the United States’ within the meaning of 40 C.F.R. § 232.2.

“1.6 In April and May, 2007, at times more fully known to [the Sacketts, they] and/or persons acting on their behalf discharged fill material into wetlands at the Site. [They] filled approximately one half acre. . . .

“1.9 By causing such fill material to enter waters of the United States, [the Sacketts] have engaged, and are continuing to engage, in the ‘discharge of pollutants’ from a point source within the meaning of sections 301 and 502(12) of the Act, 33 U.S.C. §§ 1311 and 1362(12).. . .

“1.11 [The Sacketts’] discharge of pollutants into waters of the United States at the Site without [a] permit constitutes a violation of section 301 of the Act, 33 U.S.C. § 1311.” App. 19–20.

On the basis of these findings and conclusions, the order directs the Sacketts, among other things, “immediately [to] undertake activities to restore the Site in accordance with [an EPA-created] Restoration Work Plan” and to “pro- vide and/or obtain access to the Site . . . [and] access to all records and documentation related to the conditions at the Site . . . to EPA employees and/or their designated representatives.” *Id.*, at 21–22, ¶¶2.1, 2.7.

The Sacketts, who do not believe that their property is subject to the Act, asked the EPA for a hearing, but that request was denied. They then brought this action in the United States District Court for the District of Idaho, seeking declaratory and injunctive relief. Their complaint contended that the EPA’s issuance of the compliance order was “arbitrary [and] capricious” under the Administrative Procedure Act (APA) \* \* \* and that it deprived them of “life, liberty, or property, without due process of law,” in violation of the Fifth Amendment. The District Court dismissed the claims for want of subject- matter jurisdiction, and the United States Court of Appeals for the Ninth Circuit affirmed \* \* \* . It concluded that the Act “preclude[s] pre-enforcement judicial review of compliance orders,” \* \* \* and that such preclusion does not violate the Fifth Amendment’s due process guarantee \* \* \* . We granted certiorari. \* \* \*

## II

The Sacketts brought suit under Chapter 7 of the APA, which provides for judicial review of “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. §704. We consider first whether the compliance order is final agency action. There is no doubt it is agency action, which the APA defines as including even a “failure to act.” §§ 551(13), 701(b)(2). But is it final? It has all of the hallmarks of APA finality that our opinions

establish. Through the order, the EPA “ ‘determined’ ” “ ‘rights or obligations.’ ” *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quoting *Port of Boston Marine Terminal Assn. v. Re-deriaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). By reason of the order, the Sacketts have the legal obligation to “restore” their property according to an agency-approved Restoration Work Plan, and must give the EPA access to their property and to “records and documentation related to the conditions at the Site.” App. 22, ¶2.7. Also, “ ‘legal consequences . . . flow’ ” from issuance of the order. *Bennett, supra*, at 178 (quoting *Marine Terminal, supra*, at 71). For one, according to the Government’s current litigating position, the order exposes the Sacketts to double penalties in a future enforcement proceeding.<sup>2</sup> It also severely limits the Sacketts’ ability to obtain a permit for their fill from the Army Corps of Engineers \* \* \* . The Corps’ regulations provide that, once the EPA has issued a compliance order with respect to certain property, the Corps will not process a permit application for that property unless doing so “is clearly appropriate.” 33 C.F.R. § 326.3(e)(1)(iv) (2011).<sup>3</sup>

The issuance of the compliance order also marks the “ ‘consummation’ ” of the agency’s decisionmaking process. *Bennett, supra*, at 178 (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S.103, 113 (1948)). As the Sacketts learned when they unsuccessfully sought a hearing, the “Findings and Conclusions” that the compliance order contained were not subject to further agency review. The Government resists this conclusion, pointing to a portion of the order that invited the Sacketts to “engage in informal discussion of the terms and requirements” of the order with the EPA and to inform the agency of “any allegations [t]herein which [they] believe[d] to be inaccurate.” App. 22–23, ¶2.11. But that confers no entitlement to further agency review. The mere possibility that an agency might reconsider in light of “informal discussion” and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal.

The APA’s judicial review provision also requires that the person seeking APA review of final agency action have “no other adequate remedy in a court,” 5 U.S.C. § 704. In Clean Water Act enforcement cases, judicial review ordinarily comes by way of a civil action brought by the EPA under 33 U.S.C. § 1319. But the Sacketts cannot initiate that process, and each day they wait for the agency to drop the hammer, they accrue, by the Government’s telling, an additional \$75,000 in potential liability. The other possible route to

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<sup>2</sup> ...We do not decide today that the Government’s position is correct, but assume the consequences of the order to be what the Government asserts.

<sup>3</sup> The regulation provides this consequence for “enforcement litigation that has been initiated by other Federal . . . regulatory agencies.” 33 C.F.R. § 326.3(e)(1)(iv) (2011). The Government acknowledges, however, that EPA’s issuance of a compliance order is considered by the Corps to fall within the provision. \* \* \* Here again, we take the Government at its word without affirming that it represents a proper interpretation of the regulation.

judicial review—applying to the Corps of Engineers for a permit and then filing suit under the APA if a permit is denied—will not serve either. The remedy for denial of action that might be sought from one agency does not ordinarily provide an “adequate remedy” for action already taken by another agency. The Government, to its credit, does not seriously contend that other available remedies alone foreclose review under § 704. Instead, the Government relies on § 701(a)(1) of the APA, which excludes APA review “to the extent that [other] statutes preclude judicial review.” The Clean Water Act, it says, is such a statute.

### III

Nothing in the Clean Water Act expressly precludes judicial review under the APA or otherwise. But in determining “[w]hether and to what extent a particular statute precludes judicial review,” we do not look “only [to] its express language.” *Block v. Community Nutrition Institute*, 467 U.S. 340, 345 (1984). The APA, we have said, creates a “presumption favoring judicial review of administrative action,” but as with most presumptions, this one “may be overcome by inferences of intent drawn from the statutory scheme as a whole.” *Id.*, at 349. The Government offers several reasons why the statutory scheme of the Clean Water Act precludes review.

The Government first points to 33 U.S.C. § 1319(a)(3), which provides that, when the EPA “finds that any person is in violation” of certain portions of the Act, the agency “shall issue an order requiring such person to comply with [the Act], or . . . shall bring a civil action [to enforce the Act].” The Government argues that, because Congress gave the EPA the choice between a judicial proceeding and an administrative action, it would undermine the Act to allow judicial review of the latter. But that argument rests on the question-begging premise that the relevant difference between a compliance order and an enforcement proceeding is that only the latter is subject to judicial review. There are eminently sound reasons other than insulation from judicial review why compliance orders are useful. The Government itself suggests that they “provid[e] a means of notifying recipients of potential violations and quickly resolving the issues through voluntary compliance.” \* \* \* It is entirely consistent with this function to allow judicial review when the recipient does not choose “voluntary compliance.” The Act does not guarantee the EPA that issuing a compliance order will always be the most effective choice.

The Government also notes that compliance orders are not self-executing, but must be enforced by the agency in a plenary judicial action. It suggests that Congress therefore viewed a compliance order “as a step in the deliberative process[,] . . . rather than as a coercive sanction that itself must be subject to judicial review.” \* \* \* But the APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction. And it is hard for the Government to defend its claim that the issuance of the compliance order was just “a step in the deliberative process” when the agency rejected the Sacketts’ attempt to obtain a hearing and when the next step will either be taken by the

Sacketts (if they comply with the order) or will involve judicial, not administrative, deliberation (if the EPA brings an enforcement action). As the text (and indeed the very name) of the compliance order makes clear, the EPA's "deliberation" over whether the Sacketts are in violation of the Act is at an end; the agency may still have to deliberate over whether it is confident enough about this conclusion to initiate litigation, but that is a separate subject.

The Government further urges us to consider that Congress expressly provided for prompt judicial review, on the administrative record, when the EPA assesses administrative penalties after a hearing, see § 1319(g)(8), but did not expressly provide for review of compliance orders. But if the express provision of judicial review in one section of a long and complicated statute were alone enough to overcome the APA's presumption of reviewability for all final agency action, it would not be much of a presumption at all.

\* \* \*

Finally, the Government notes that Congress passed the Clean Water Act in large part to respond to the inefficiency of then-existing remedies for water pollution. Compliance orders, as noted above, can obtain quick remediation through voluntary compliance. The Government warns that the EPA is less likely to use the orders if they are subject to judicial review. That may be true—but it will be true for all agency actions subjected to judicial review. The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into "voluntary compliance" without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction. Compliance orders will remain an effective means of securing prompt voluntary compliance in those many cases where there is no substantial basis to question their validity.

\* \* \*

We conclude that the compliance order in this case is final agency action for which there is no adequate remedy other than APA review, and that the Clean Water Act does not preclude that review. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

*It is so ordered.*

**JUSTICE GINSBURG**, concurring.

Faced with an EPA administrative compliance order threatening tens of thousands of dollars in civil penalties per day, the Sacketts sued "to contest the jurisdictional bases for the order." \* \* \* "As a logical prerequisite to the issuance of the challenged compliance

order,” the Sacketts contend, “EPA had to determine that it has regulatory authority over [our] property.” \* \* \* The Court holds that the Sacketts may immediately litigate their jurisdictional challenge in federal court. I agree, for the Agency has ruled definitively on that question. Whether the Sacketts could challenge not only the EPA’s authority to regulate their land under the Clean Water Act, but also, at this pre-enforcement stage, the terms and conditions of the compliance order, is a question today’s opinion does not reach out to resolve. Not raised by the Sacketts here, the question remains open for another day and case. On that understanding, I join the Court’s opinion.

### Questions and Comments

1. **Final agency action:** Would the Court have reached the same conclusion regarding the finality of EPA’s compliance order if the agency did not take the position that it could double the penalties that it could recover in a judicial enforcement action by issuing a compliance order? Does the Court believe that EPA is likely to modify a compliance order based on informal discussions with the alleged violator after the order is issued? If EPA routinely made such changes, should that affect the Court’s conclusion?
2. **Preclusion of review:** As noted in the *Sackett* opinion, while the APA includes a presumption that final agency actions are reviewable, it includes an exception to reviewability if statutes preclude review. See [5 U.S.C. § 701\(a\)\(1\)](#). As evidenced by the Court’s opinion in *Sackett*, the presumption in favor of reviewability is very strong. Although it can be rebutted either expressly or implicitly, the *Sackett* Court was unwilling to find that the Clean Water Act precluded judicial review of compliance orders despite arguments based on the structure and purposes of the statute.
3. **Terms of the Order:** Did the Court hold that EPA’s order was invalid and that the agency lacked jurisdiction over the wetlands at issue? If the Sacketts want to challenge the restoration plan required by the order, or EPA’s requirement that they provide records to the agency, does the Court’s opinion authorize them to raise those challenges in court?
4. **Jurisdictional determinations:** *Sackett* involved judicial review of an EPA compliance order. Would the rationale of the decision also apply to a preliminary or approved jurisdictional determination? Would they constitute final agency action, based on the Court’s analysis, or can they be distinguished?
5. **Due Process:** Does the Court resolve the Sackett’s due process claim? If so, how? If not, why not? What sort of a hearing is required by due process? Could a hearing before an administrative tribunal suffice? Could a hearing after an initial decision by the government suffice?

6. **Impact of decision:** How might the Court's decision affect how frequently EPA issues administrative compliance orders to address Section 404 violations, as opposed to using other enforcement tools? How might it impact the documentation that EPA prepares in support of compliance orders? (Note, though, that EPA prepared a [detailed administrative record](#) supporting its determination that the Sacketts were discharging fill material into wetlands that were regulated under the Clean Water Act.)

Is the Court's decision likely to accelerate resolution of disputes over Clean Water Act jurisdiction over waters of the United States or will it severely hamper government enforcement efforts? Are there less stringent alternatives to administrative compliance orders? Would they be subject to judicial review? At oral argument, Justice Scalia predicted, "They'll just issue warnings is what they'll do." See Craig N. Johnston, *Sackett: The Road Forward*, 42 *Envtl. L.* 993 (2012); Albert Ferlo & Tom Lindley, *Practical Impacts of the Sackett Decision*, 42 *Envtl. L.* 1009 (2012); Richard E. Glaze Jr., *A Detailed Look at the Effects of Sackett v. EPA on Administrative Enforcement Orders*, 42 *Envtl. L. Rep. News & Analysis* 11030 (Nov. 2012).

7. **Waters of the United States:** In a concurring opinion that is not reproduced above, Justice Alito chastised Congress and EPA for failing to provide concrete rules outlining the boundaries of federal jurisdiction over "waters of the United States" and called for Congress to clarify the reach of the statute.
8. **Non-enforcement:** The *Sackett* case involved an APA challenge to an EPA enforcement order. However, can a person who is upset because EPA or the Corps are *not* bringing an enforcement action against someone bring suit against the agencies based on the APA, since agency action can include a failure to act? See [5 U.S.C. § 701\(a\)\(2\)](#); [Heckler v. Chaney, 470 U.S. 821 \(1985\)](#). Could they bring a suit against EPA or the Corps for non-enforcement under the citizen suit provisions of the Clean Water Act, alleging that the agencies failed to perform a non-discretionary duty? See [Sierra Club v. U.S. Environmental Protection Agency, 268 F.3d 898 \(9<sup>th</sup> Cir. 2001\)](#).

## Hypotheticals

1. Walt Pinkman recently observed Jessie White dumping several tons of dirt onto wetlands on her property to build a new tennis court. He immediately contacted EPA, and the agency sent an investigator to her house to determine whether she was violating the Clean Water Act. After conducting an inspection of the property, the EPA investigator issued Jessie a “notice of violation” under [Section 309\(a\) of the Clean Water Act](#), which indicated that she was discharging fill material into “waters of the United States” and that she could potentially be fined and ordered to restore the wetlands to their natural state. The notice was not, however, an administrative compliance order, and did not require her to take any immediate action. Can Jessie challenge the notice in court?
2. Shortly after EPA issued the notice of violation, a representative of the Corps of Engineers visited the property and issued a preliminary jurisdictional determination, finding that the wetlands on White’s property may be “waters of the United States”. Can Jessie challenge the jurisdictional determination in court?
3. When Jessie did not cease her wetland filling activities, EPA issued an administrative compliance order, notifying her that she was discharging fill material into “waters of the United States” and ordering her to restore the wetlands pursuant to a restoration plan that was included in the order. Jessie will not challenge the agency’s determination that the wetlands on her property are “waters of the United States”, but she would like to challenge the terms of the restoration plan. Can Jessie challenge the terms of the restoration plan in court?
4. Jessie ultimately applies for a Section 404 permit to authorize the construction of her tennis court, but the Corps of Engineers denies the permit application on the grounds that there are practicable alternatives to the project that would have less adverse impacts on the aquatic environment. Jessie does not appeal the permit denial administratively within the period in which appeals can be brought. Can Jessie challenge the permit denial in court if she can no longer challenge it administratively?

## 2. Limits on Judicial Review

Even if a litigant can demonstrate that the action of the EPA or the Corps that they wish to challenge is a final agency action, they may face some additional obstacles to bringing their lawsuit.

A primary roadblock for some plaintiffs may be the **standing** requirement. In order to bring suit, a plaintiff must demonstrate that (1) they **have suffered**, or **imminently will suffer**, an **injury** that was **caused** by the action that they are challenging and which can be **redressed** by the relief that they are seeking in the lawsuit; and (2) the interest that they are suing to protect is arguably within the **zone of interests** sought to be protected by the statute under which they are suing. See [Bennett v. Spear, 520 U.S. 154 \(1997\)](#). The first requirement, the “injury in fact” requirement, derives from Article III of the Constitution,



which limits the judicial role to resolving “cases or controversies.” For many years, the Supreme Court referred to the second requirement, the “zone of interests” requirement, as a *prudential* limit imposed on plaintiffs by courts based on concerns for a limited judicial role in a democratic society. *Id.* However, in [Lexmark International, Inc. v. Static Control Components, Inc.](#), 134 S. Ct. 1377, 1387 (2014), the Court held that the “zone of interests” analysis should not be identified as a standing test, prudential or otherwise, and that the test is not a jurisdictional test. According to the Court, the “zone of interests” analysis still applies in cases involving challenges to agency actions, but the analysis focuses on the statutory interpretation question of whether Congress authorized the plaintiff to bring the cause of action against the agency.” *Id.*

When a permit applicant is challenging a permit denial, the conditions included in a permit, or an EPA veto of a permit, or a landowner is challenging a determination that their property contains waters of the United States, the challenger should have little trouble demonstrating that they have standing to sue under that test. Normally, the permit denial or the conditions in the permit will cause the applicant or landowner some economic injury that can be avoided if the permit is granted or the conditions are removed or altered. Similarly, if a landowner or permittee has been issued an enforcement order and can demonstrate that the government’s action is final agency action, they should usually be able to demonstrate that they meet the requirements for standing. The order will likely cause them some economic injury or other injury, which could be avoided if the order were rescinded. However, when neighboring landowners, competitors, or other third parties challenge the government’s decisions to issue permits, cover activities through general permits, exempt activities from permitting requirements, or find that property does not contain waters of the United States, it may be more difficult to demonstrate the standing requirements. See, e.g. [Save Ourselves v. U.S. Army Corps of Engineers](#), 958 F.2d 659 (5<sup>th</sup> Cir. 1992). The plaintiffs may not yet have suffered any injury and may have a difficult time proving that they *will* be imminently injured in a concrete way by the government action or that the relief that they are seeking will redress that injury. Similarly, when regulated entities, interest groups, or other persons challenge regulations issued by the Corps or EPA, standing may be an obstacle to suit.

In addition to the standing limitation, a plaintiff may find that their lawsuit against the EPA or the Corps will be dismissed if it is not brought in a timely manner. While the Clean Water Act does not have a judicial review provision that establishes time limits for actions against EPA and the Corps relating to the Section 404 program, the general six year **statute of limitations** for civil actions against the United States applies to those lawsuits. See [28 U.S.C. § 2401\(a\)](#). That statute runs from the time the cause of action first arose. *Id.* There are more restrictive time limits for citizen suits against the government for failure to perform a non-discretionary duty, but those time limits will be discussed in the citizen suit section of this chapter, since there are few, if any, lawsuits that could be brought against EPA or the Corps for failure to perform a non-discretionary duty with regard to the Section 404 program. There are also more restrictive time limits that apply to appeals of administrative

penalty orders, but they will be discussed in the enforcement section of this chapter.

Even if a plaintiff brings their lawsuit within the six year statute of limitations, a court may dismiss the action as untimely if the claims in the lawsuit are *moot*. For instance, in [\*Vieux Carre Property Owners v. Brown\*, 948 F.2d 1436 \(5<sup>th</sup> Cir. 1991\)](#), the Fifth Circuit held that a litigant's claim that the Corps did not comply with the National Environmental Policy Act when deciding to issue a section 404 permit was moot because the retail complex that was authorized by the permit was substantially completed at the time of the lawsuit. Similarly, in *Sierra Club v. U.S. Army Corps of Engineers*, 277 Fed. Appx. 170 (3d Cir. 2008), the Third Circuit held that a litigant's challenge to the Corps' issuance of a Section 404 permit was moot when the plaintiff brought the challenge after 98% of the wetlands at issue were filled, structures had been built for the project and mitigation had been completed.

### 3 Standards of Review and Remedies

Since judicial challenges to actions of the Corps and EPA regarding wetlands will be brought pursuant to APA authority, the judicial review provisions of the APA apply in those actions. In general, courts review the decisions of EPA and the Corps based on the record prepared by the agencies to support their decisions and the justifications articulated by the agencies for those decisions, and do *not* hold evidentiary hearings or gather new evidence. See [\*Preserve Endangered Areas of Cobb's History v. U.S. Army Corps of Engineers\*, 87 F.3d 1242, 1246-1247 \(11<sup>th</sup> Cir. 1996\)](#); [\*Friends of the Earth v. Hintz\*, 800 F.2d 822, 828-829 \(9<sup>th</sup> Cir. 1986\)](#); [\*Avoyelles Sportsmen's League v. Marsh\*, 715 F.2d 897, 907 \(5<sup>th</sup> Cir. 1983\)](#).

When reviewing the record prepared by the agencies, courts do not generally engage in de novo review. Instead, they review the agencies' decisions under very deferential standards. The judicial review provisions of the APA indicate that a reviewing court shall

- “(2) hold unlawful and set aside agency action, findings, and conclusions found to be
- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B) contrary to constitutional right, power, privilege, or immunity;
  - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - (D) without observance of procedure required by law;
  - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
  - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.”

See [5 U.S.C. § 706](#).

As noted in earlier chapters, when a court reviews an agency's interpretation of a statute adopted through legislative rulemaking or in some other contexts, the court will apply the *Chevron* analysis. See Chapter 4, *supra*. If the court is not reviewing an agency's interpretation of a statute, it will normally review the agency's decision under the **arbitrary and capricious** standard, another deferential standard, and uphold the agency's decision as long as it is reasonable. As the Supreme Court has indicated, the arbitrary and capricious standard of review "is a narrow one" and the "court is not empowered to substitute its judgment for that of the agency." See [Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 \(1971\)](#).

If the reviewing court ultimately decides that an action taken by the Corps or EPA is arbitrary and capricious, the court will usually set aside the decision and remand the matter to the agency to reconsider. On remand, the agency can resolve the matter differently than it did initially, but it is also free to make the same decision as it made initially, as long as it addresses the court's concerns and can support the decision as reasonable. See [Securities and Exchange Commission v. Chenery, 332 U.S. 194 \(1947\)](#).

### Questions and Comments

1. **Beyond the record:** While APA review of most actions of the Corps and EPA is limited to the administrative record prepared by the agency, in rare situations, a court may take evidence if the record is incomplete or if there is a strong showing of bad faith or improper behavior.
2. **Intervention:** Since the judicial review provisions of the Clean Water Act do not apply to review of actions of the Corps or EPA regarding Section 404, intervention in lawsuits against the Corps and EPA is governed by the normal federal rules of civil procedure. See [Fed. R. Civ. P. 24](#).

### II. Enforcement

The Corps of Engineers and EPA share enforcement authority over Section 404 violations under the Clean Water Act. In 1989, the agencies entered into a Memorandum of Agreement to coordinate their enforcement activities. See [U.S. Environmental Protection Agency & U.S.](#)

[Army Corps of Engineers, Memorandum of Agreement: Federal Enforcement for the Section 404 Program of the Clean Water Act \(Jan. 19, 1989\)](#). Pursuant to the agreement, in most cases, the Corps conducts initial investigations of Section 404 violations, making a determination of whether waters of the United States are present on the property where a

#### Resources

[EPA Citizen Violation Report Form](#)

[EPA IG report re: Enforcement](#)

[EPA Wetland Enforcement Web Page](#)

[EPA Region 9 Wetlands Enforcement Web Page](#)

[EPA Enforcement Web Page](#)

discharge occurred and whether there has been a violation of Section 404. *Id.* While the Corps conducts most initial investigations, the memorandum provides that EPA will normally be the lead enforcement agency for discharges where the violator does not have a permit, while the Corps will be the lead enforcement agency for discharges that violate a Corps permit. *Id.*

As noted in Chapter 4, *supra*, the prohibition on filling wetlands derives from Section 301 of the Clean Water Act, which, when read in conjunction with Section 502 (the definition section), prohibits the **addition** of a **pollutant** into **navigable waters** from a **point source** by a **person** unless the person is adding the pollutant **in accordance with a Section 404 permit** or a Section 402 permit, and is complying with other requirements of the statute listed in Section 301. See [33 U.S.C. § 1311](#). Section 404 permits are issued to authorize the **discharge of dredged or fill material** into navigable waters. See [33 U.S.C. § 1344](#). Thus, if the Corps or EPA bring an enforcement action against someone for filling wetlands without a Section 404 permit or in violation of a Section 404 permit, they have **the burden of proving** that there was an addition of a pollutant into navigable waters from a point source by a person (to demonstrate a violation of section 301) and that there was a discharge of dredged or fill material (to demonstrate that a Section 404 permit, rather than a Section 402 permit, was required.) If the enforcement action is based on violation of the terms or conditions of a Section 404 permit, the government has the burden of proving that the defendant violated the permit terms or conditions. If the defendant argues that a Section 404 permit is not required because the activity that caused the alleged violation was exempt from the permit requirement or because it was covered by a general permit, the **defendant** has the burden of proof.

Except in criminal enforcement proceedings, in making out the prima facie case, the government does not have to prove that the defendant acted with a specific mental state. The government merely has to prove that the defendant took the action that was prohibited by the Clean Water Act. See [Kelly v. United States, 203 F.3d 519 \(7<sup>th</sup> Cir. 2000\)](#); [Stoddard v. Western Carolina Regional Sewer Authority, 784 F.2d 1200 \(4<sup>th</sup> Cir. 1986\)](#). The statute defines “person” broadly to include an “individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.” See [33 U.S.C. § 1362\(5\)](#). EPA’s regulations clarify that a Federal agency, its agents and employees, and an “agent or employee” of any entity listed in the statutory definition can also be liable as a “person”. See [40 C.F.R. § 232.2](#).

The enforcement process begins when EPA or the Corps learn about a potential section 404 violation. The Corps encourages members of the public to report violations, see [33 C.F.R. § 326.3\(a\)](#), so the government may become aware of violations from citizen complaints. In addition, the Corps works with state, local and other federal agencies to watch for potential violations, so the Corps or one its partners may discover a violation through its surveillance program. *Id.* The Corps relies on those tools to identify violations of permit conditions as well as unpermitted discharges, because, unlike other environmental

statutes, the Clean Water Act does not require Section 404 permittees to monitor their activities or file periodic reports with the Corps. EPA has limited field resources and relies on reports from citizens or referrals from the Corps or other federal agencies to identify potential violations. However, a 2009 report of EPA's Office of Inspector General found that the agency's passive and reactive approach to wetlands enforcement was not effective in identifying violations. See [U.S. Environmental Protection Agency, Office of Inspector General, 10-P-0009, EPA Needs a Better Strategy to Identify Violations of Section 404 of the Clean Water Act \(Oct. 6, 2009\)](#). Consequently, the Inspector General recommended that the agency implement "a § 404 enforcement strategy that includes increased communication/coordination with enforcement partners, a system to track repeat and flagrant violators, performance measures, and cross-training" and the agency agreed to make those changes. *Id.* at 6.

Once the Corps or EPA discover a potential violation, they can choose from a broad range of administrative and judicial enforcement options, including both civil and criminal sanctions. The Clean Water Act gives the agencies broad discretion to choose the appropriate enforcement tool and does not mandate a specific type of enforcement action for any particular violation.

#### A. Administrative Enforcement

##### 1. Administrative Compliance Orders and Cease and Desist Letters

#### Resources

[Corps Enforcement Regulations](#)  
[EPA Enforcement Regulations](#)  
[EPA Region 9 Enforcement Web Page](#) - incl. compliance orders and consent decrees  
Example of an [EPA compliance order](#)

Most violations will be resolved administratively, rather than in court. The least stringent enforcement tools available to the agencies are notices of violation and administrative orders. The Clean Water Act authorizes **EPA** to issue orders (**administrative compliance orders**) that require persons to comply with the Clean Water Act or with Section 404 permits that are issued by States, see [33 U.S.C. § 1319\(a\)\(3\)](#), and authorizes the **Corps** to issue orders (**cease and desist letters**) that require persons to comply with the terms and conditions of Section 404 permits that the Corps issued. See [33 U.S.C. § 1344\(s\)](#). If a permittee has already completed the fill activity that violates a permit, the Corps will usually issue a notice of violation and request for remedial action, instead of a cease and desist letter. See 33 C.F.R. § 326.3(c). When EPA issues an administrative compliance order or the Corps issues a cease and desist letter, the agencies provide a copy of the order or letter to the state where the violation occurred and any other states affected by the violation. See 33 U.S.C. §§ [1319\(a\)\(4\)](#); [1344\(s\)\(2\)](#).

If the person who receives an order does not comply with the order, the agencies can only enforce the order by bringing an action in court, *id.* §§ [1319\(b\)](#); [1344\(s\)\(3\)](#). As the *Sackett*

Court noted, in a judicial action to enforce an administrative order, the government will seek to recover penalties for the violation of the order, as well as for the violation that led to the issuance of the order.

Although the Clean Water Act does not explicitly authorize persons who receive administrative compliance orders or cease and desist letters to challenge them in court, the *Sackett* Court held that the recipient of an EPA administrative compliance order could challenge the agency's jurisdictional determination in that order in court. The Court's decision did not, however, address cease and desist letters of the Corps.

## 2. Administrative Penalty Orders

Both EPA and the Corps have authority to impose administrative penalties on violators. Section 309(g) authorizes both agencies to assess civil penalties on persons who fill wetlands without a permit (or otherwise violate the Clean

Water Act) or who violate the terms or conditions of a permit, although, as noted above, the Corps generally takes the lead on violations of permits issued by the Corps. See [33 U.S.C. § 1319\(g\)\(1\)](#). The statute establishes two categories of administrative penalties, based on the severity of the violation. **Class I penalties** may not exceed \$11,000 per violation or \$32,500 overall, and **Class II penalties** may not exceed \$11,000 per day of violation or \$157,500 overall. See [33 U.S.C. § 1319\(g\)\(2\)](#); [40 C.F.R. § 19.4](#). (Note: The original maximum penalty amounts in the statute were lower, and were increased by the Debt Collection Improvement Act, 31 U.S.C. § 3701).

For **Class I penalties**, the statute requires the government to provide notice and an opportunity for a hearing **before** assessing a penalty. See [33 U.S.C. § 1319\(g\)\(2\)\(A\)](#). The hearing is an informal hearing, though, and the statute only requires the government to provide the potential recipient of the order "a reasonable opportunity to be heard and to present evidence." *Id.*

For **Class II penalties**, the statute requires the government to provide notice and the opportunity for a **formal hearing** following the procedures of the APA ([5 U.S.C. § 554](#)) before assessing a penalty. See [33 U.S.C. § 1319\(g\)\(2\)\(B\)](#).

In determining the amount of the penalties, the statute directs the agencies to "take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require." *Id.* [§ 1319\(g\)\(3\)](#).

### Resources

[EPA's Administrative Penalty Regulations](#)  
[Corps' Administrative Penalty Regulations](#)  
[EPA's Civil Penalty Policy](#)  
[EPA's Environmental Appeals Board](#)

For both types of penalties, the Corps or EPA must also provide **public notice** of the proposed penalty order and an **opportunity to comment** on the order before issuing the order. See [33 U.S.C. § 1319\(g\)\(4\)](#). Unlike administrative compliance orders, the statute explicitly provides that persons who are assessed an administrative penalty **or** persons who commented on the administrative penalty order can challenge the order in court, as long as they challenge the order within 30 days. *Id.* [§ 1319\(g\)\(8\)](#). Class I penalties must be challenged in federal district court, while Class II penalties must be challenged in the federal appellate courts. *Id.* The general rules regarding judicial review, discussed above (*i.e.* review limited to the record, application of the arbitrary and capricious standard), apply to review of these orders. However, if the Class II penalties are issued after a formal hearing, the appellate court reviews the agency's **factual findings** under the **substantial evidence** test. See [5 U.S.C. § 706\(2\)\(E\)](#).

Before challenging an administrative penalty order in court, recipients of the orders must exhaust their administrative remedies. There is no administrative appeal process for Class I penalty orders, so recipients can challenge those orders immediately. However, recipients of a Class II penalty order must appeal the order administratively before challenging the order in court. See [40 C.F.R. § 22.27\(d\)](#).

If the Corps or EPA issues an administrative penalty order and the recipient does not comply with the order, the Clean Water Act authorizes the government to bring an action in federal district court to recover the penalties. See [33 U.S.C. § 1319\(g\)\(9\)](#). Significantly, in that action, “the validity, amount and appropriateness of ...[the] penalty shall not be subject to review.” *Id.*

### Questions and Comments

1. **Jury Trial:** When courts review administrative penalty orders, they generally limit review of the order to the record created by the agency and review the decision based on the arbitrary and capricious standard. In [Sasser v. Administrator, 990 F.2d 127 \(4<sup>th</sup> Cir. 1993\)](#), the Fourth Circuit rejected an argument that such a procedure violated the order recipient's 7<sup>th</sup> Amendment right to a jury trial. The court concluded that the case involved a dispute over “statutory public rights,” to which the 7<sup>th</sup> Amendment did not apply.
2. **Civil Penalty Policy:** While the statute outlines criteria for EPA and the Corps to consider in determining the amount of administrative penalties, EPA has also developed a civil penalty policy to establish uniformity and consistency in calculating administrative and judicial civil penalties for Clean Water Act Section 404 violations. See [U.S. Environmental Protection Agency, Issuance of Revised CWA Section 404 Settlement Penalty Policy \(Dec. 21, 2001\)](#). The policy identifies the **minimum** amounts that the agency should recover in **settlements**, but acknowledges that the

agency will seek and attempt to recover more if settlement is not possible. The policy creates the following formula for determining the minimum civil penalty:

Penalty = Economic Benefit + (Preliminary Gravity Amount +/- Gravity Adjustment Factors) - Litigation Considerations - Ability to Pay - Mitigation Credit for SEPs.

*Id.* at 8. Under the formula, EPA is primarily concerned with ensuring that the violator does not receive any economic benefit by violating the statute. The agency calculates the economic benefit using a computer model (BEN). *Id.* at 9. In calculating and adjusting the “gravity” of the violation, the agency assigns numerical rankings to factors such as harm to human health or welfare, extent of impacts, severity of impacts, duration of violation, degree of culpability, compliance history of the violator, and the need for deterrence, among others. *Id.* at 9-15. After determining an appropriate penalty based on the economic benefit and gravity factors, the agency may reduce the penalty that it is seeking based on litigation considerations (i.e. weaknesses in the case), the ability of the violator to pay, and the violator’s agreement to implement a supplemental environmental project (SEP). SEPs are “environmentally beneficial projects that a violator agrees to undertake as part of a settlement, but is not otherwise legally obligated to perform.” *Id.* at 20. Thus, EPA may be willing to reduce the penalty it assesses a violator when the violator agrees to take an environmentally beneficial action that the agency could not have forced them to take otherwise.

3. **After the fact permits:** In addition to the administrative options outlined above, when the Corps discovers an illegal discharge of dredged or fill material, it can issue an “after the fact” permit to authorize the discharge, which protects the violator from further enforcement action. See [33 C.F.R. § 326.3\(e\)](#). As noted in Chapter 6, *supra*, the illegal discharger must follow the normal permit application procedures, the Corps processes the application through the normal procedures for individual permits, and EPA retains the right to veto the permit. The Corps regulations provide, though, that the Corps will not accept an after the fact permit application when the district engineer determines that legal action is appropriate, or where federal, state or local regulatory agencies have initiated litigation against the applicant. *Id.*

**B. Judicial Enforcement - Civil and Criminal**

While the Corps and EPA will address most violations through administrative processes, they also have judicial enforcement tools, and

**Resources**

[EPA Region 9 Wetlands Enforcement](#)

Example of a Wetlands Enforcement [Consent Decree](#)

DOJ ENRD [Proposed Consent Decrees](#) (not just wetlands)

EPA - [Summary of Case Settlements](#) (not just wetlands)



they do not have to pursue administrative remedies before seeking judicial relief. Similarly, they can pursue judicial relief even though they have already pursued administrative remedies.

The Clean Water Act authorizes the government to seek a broad range of civil and criminal penalties for violations of the statute, although the Department of Justice brings the lawsuits on behalf of the agencies. While EPA's regulations do not indicate precisely the violations that would motivate the agency to refer a case to the Department of Justice for judicial enforcement, the Corps' regulations suggest that appropriate cases for referral involve violations that are "willful, repeated, flagrant, or of substantial impact." See [33 C.F.R. § 326.5](#). In addition, in 1990, EPA and the Corps issued guidance regarding judicial enforcement priorities. See [U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, Guidance on Judicial Civil and Criminal Enforcement Priorities \(Dec. 1990\)](#). As part of that guidance, the agencies suggested that enforcement personnel should consider the following factors when deciding whether to refer a case for civil enforcement: (1) quality of the waters affected; (2) impact of the discharge; (3) culpability of the violator; (4) deterrence value; (5) benefit from the violation; and (6) equitable considerations. *Id.*

## **1. Civil Enforcement**

The Clean Water Act authorizes EPA and the Corps to seek civil penalties and injunctive relief for any violations of the Clean Water Act, the terms and conditions of any Section 404 permit, or any administrative orders issued under the Act. See 33 U.S.C. §§ [1319\(b\), \(d\)](#); [1344\(s\)](#). The lawsuits must be brought in federal district court in the district in which the defendant is located, resides, or does business, and the government must notify the state where the discharge occurs when the government files the suit. *Id.* The government will normally refrain from filing suit if a state is pursuing an enforcement action, but the statute does not preclude federal enforcement simply because a state is also bringing an enforcement action.

In an enforcement action under the Clean Water Act, courts can award penalties up to \$37,500 per day per violation. *Id.* Although the statute originally authorized a maximum penalty of \$25,000 per day per violation, the amount has been increased over time in accordance with the Federal Civil Penalties Inflation Adjustment Act, 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act, 31 U.S.C. § 3701. See [40 C.F.R. § 19.4](#). The government takes the position, and several courts have agreed, that each day that dredged or fill material remains in place constitutes a separate day of violation. See, e.g. *United States v. Cumberland Farms of Conn., Inc.*, 647 F. Supp. 1166, 1183 (D. Mass. 1986), *aff'd* [826 F.2d 1151 \(1<sup>st</sup> Cir. 1987\)](#), *cert denied* 484 U.S. 1061 (1988); *United States v. Tull*, 615 F. Supp. 610, 626 (E.D. Va. 1983), *aff'd* [769 F.2d 182 \(4<sup>th</sup> Cir. 1985\)](#), *rev'd on other grounds* 481 U.S. 412 (1987). Under this "continuing violation" theory, therefore, if a defendant illegally filled wetlands, the defendant would be subject to \$37,500 penalties not only for each day during which the filling occurred, but also for each day during which the

fill remained in place.

Just as the statute outlines factors for the agencies to consider in determining an appropriate administrative penalty amount, the statute identifies a similar list of factors that courts should consider in determining the amount of civil penalties. The statute directs courts to consider the following factors in setting civil penalties: “the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.” See 33 U.S.C. §§ [1319\(d\)](#); [1344\(s\)](#). Since the factors outlined in the statute are similar for administrative and judicial penalties, the Department of Justice relies on the same EPA civil penalty policy in judicial settlement negotiations as the agency relies on in administrative settlement negotiations. Ultimately, the penalties that are recovered are paid into the general fund of the United States Treasury, and are not paid to EPA, the Corps or the Department of Justice.

In addition to civil penalties, the statute authorizes courts to award declaratory relief and temporary and permanent injunctive relief. See 33 U.S.C. §§ [1319\(b\), \(d\)](#); [1344\(s\)](#). Pursuant to that authority, courts frequently order defendants to cease any discharging activities, remove dredged or fill material, and to restore sites where dredged or fill material has been discharged to their condition before the filling activity occurred. If restoration is not possible, the government will normally seek appropriate mitigation.

The statute does not include a statute of limitations, so courts apply the general five year limit on federal civil penalty actions to Clean Water Act civil penalty suits. See [28 U.S.C. § 2462](#). However, courts have held that the statute does not begin to run until the government becomes aware of the violation, see *United States v. Hobbs*, 736 F. Supp. 1406 (E.D. Va. 1990), *aff'd* [947 F.2d 941 \(4<sup>th</sup> Cir. 1991\)](#), *cert. denied* 504 U.S. 940 (1992), and the statute does not apply to suits for injunctive relief, so courts can order defendants to cease prohibited activities, remove dredged or fill material, and restore wetlands, even though the five year statutory time period for a civil penalty action has expired. See [United States v. Banks](#), 115 F.3d 916, 919 (11<sup>th</sup> Cir. 1997).

Although most cases settle before trial, if a Clean Water Act enforcement action reaches the trial stage, the Supreme Court has held that defendants have a constitutional right to a jury trial in those actions. See [Tull v. United States](#), [481 U.S. 412 \(1987\)](#). However, the *Tull* Court only held that defendants have a right to a jury trial on the issue of liability. *Id.* As a result, the judge, rather than the jury, determines the appropriate remedy, regardless of whether the remedy is a civil penalty or injunctive relief. In addition, if the government is only seeking injunctive relief, there is no constitutional right to a jury trial, even on liability, since the Seventh Amendment right is limited to actions at common law. See [U.S. Const., Amend. VII](#).

As noted above, in an enforcement action, the government has the burden of proving all of the elements of a Section 301/404 violation, while the defendant has the burden of proving any affirmative defenses. The statute does not identify specific affirmative defenses, but a defendant might argue that their activity is exempt from the Section 404 permit requirement or is covered by a general permit. In addition, to the extent that a permittee is complying with a Section 404 permit, including a general permit, the Clean Water Act provides that the permittee is complying with Sections 301, 307 and 403 of the Act, for purposes of federal enforcement actions and citizen suits. See [33 U.S.C. § 1344\(p\)](#).

A defendant cannot avoid an enforcement action by arguing that the application of the Clean Water Act constitutes a taking of their property. See [United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 \(1985\)](#). While the defendant can bring a separate action for a taking of property, see Chapter 11, *infra*, the claim is not a defense to an enforcement action.

### Research Problems

While DOJ makes pending consent decrees available online, once the decrees are finalized, it is more difficult to search for them online. Consent decrees involving EPA are available on Lexis and on EPA's website, as noted above. Consent decrees involving the Corps are not available on Lexis, Westlaw, or the agency's website. Without using Lexis, please answer the following questions:

1. In 2012, the U.S. and defendants resolved the case of *United States v. Snowden*, involving illegal fill of wetlands at Falls Creek Farm in Sterling, Connecticut, through a consent decree. What was the amount of civil penalties that the defendants agreed to pay? What are the amounts of stipulated penalties that the parties agreed upon in the event that the defendants fail to timely fulfill requirements of the consent decree?
2. Pursuant to the consent decree in *United States v. Savoy Senior Housing Corporation*, what is the total amount of money that the defendants agreed to pay as civil penalties and to fund the injunctive relief required by the decree? Can representatives of the United States enter the defendants' property to oversee the restoration activities under the consent decree?

## 2. Criminal Enforcement

The final, and most severe, enforcement option that the government can pursue is criminal prosecution. The Clean Water Act authorizes criminal prosecution for negligent violations, knowing violations, and knowing endangerment (placing someone in danger of death or injury). See [33 U.S.C. §§ 1319\(c\)\(1\)-\(3\)](#). For purposes of criminal sanctions, the statute defines “person” to include “responsible corporate officers”. *Id.* § 1319(c)(6). The government normally refrains from bringing criminal enforcement actions unless the defendant’s action caused significant environmental harm, the defendant continued to engage in illegal conduct after repeated warnings from the Corps or EPA, or the defendant will receive significant economic benefit from continuing to violate the statute. Conversely, when a person self-reports a violation, discovered a violation through an environmental audit, or implements compliance programs to improve compliance after discovering a violation, the government will be less likely to pursue a criminal action against the person. See [U.S. Department of Justice, Environment and Natural Resources Division, Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator \(July 1, 1991\)](#). The government generally prefers to prosecute high visibility cases, to maximize the deterrent effect of the prosecution.

Courts can impose fines between \$2,500 and \$25,000 per day per violation and imprisonment up to one year for **negligent** violations of the Clean Water Act. *Id.* § 1319(c)(1). For **knowing** violations, courts can impose fines that are twice as high and imprisonment for up to three years. *Id.* § 1319(c)(2). Finally, for **knowing endangerment**, courts can impose fines up to \$250,000 per violation (or \$1,000,000 per violation for organizations) and imprisonment for up to fifteen years. *Id.* § 1319(c)(3). In all cases, the maximum penalties are doubled for violations committed after the defendant has been previously convicted. See [33 U.S.C. §§ 1319\(c\)\(1\)-\(3\)](#). According to EPA’s website, the most significant criminal wetlands case involved the development of a subdivision that impacted 260 acres. In that case, *United States v. Lucas*, 516 F.3d 316 (5<sup>th</sup> Cir. 2008), the court fined Robert Lucas Jr, his daughter and his engineer \$15,000 each, assessed restitution of \$1,407,400 for each defendant, and fined Lucas’ two companies \$5,300,000. See [U.S. Environmental Protection Agency, Section 404 Enforcement](#).

The following case examines when courts will consider a violation to be a **knowing** violation under the Clean Water Act.

### Resources

[Search EPA Database of Criminal Prosecutions](#)

[EPA Criminal Enforcement Web Page](#)

## United States v. Wilson

133 F.3d 251 (4<sup>th</sup> Cir. 1997)

**NIEMEYER, Circuit Judge**, writing for the court on parts I, II, V and VI:

### Resources for the Case

[Unedited opinion](#) (From Justia)

[Google Map of all the cases in the coursebook](#)

The defendants in this case were convicted of felony violations of the Clean Water Act for knowingly discharging fill and excavated material into wetlands of the United States without a permit. On this appeal they challenge: (1) the validity of federal regulations purporting to regulate activities that "could affect" interstate commerce; \* \* \* [and] (4) the district court's interpretation of the mens rea required for a felony conviction under the Act \* \* \*

Because we conclude that 33 C.F.R. § 328.3(a)(3) (1993) (defining waters of the United States to include those waters whose degradation "could affect" interstate commerce) is unauthorized by the Clean Water Act as limited by the Commerce Clause and therefore is invalid, and that the district court erred in failing to require mens rea with respect to each element of an offense defined by the Act, we reverse and remand for a new trial.

In February 1996, after a seven-week trial, a jury convicted James J. Wilson, Interstate General Co., L.P., and St. Charles Associates, L.P., on four felony counts charging them with knowingly discharging fill material and excavated dirt into wetlands on four separate parcels without a permit, in violation of the Clean Water Act, 33 U.S.C. §§ 1319(c)(2)(A) & 1311(a). The district court sentenced Wilson to 21 months imprisonment and 1 year supervised release and fined him \$1 million. It fined the other two defendants \$3 million and placed them on 5 years probation. The court also ordered the defendants to implement a wetlands restoration and mitigation plan proposed by the government.

Wilson, a land developer with more than 30 years of experience, was the chief executive officer and chairman of the board of directors of Interstate General. He was personally responsible for various decisions relevant to the defendants' convictions in this case. Interstate General was a publicly traded land development company with 340 employees, 2,000 shareholders, and assets of over \$100 million. It was the general partner of St. Charles Associates, a limited partnership that owned the land being developed within the planned community of St. Charles, which lies between the Potomac River and the Chesapeake Bay in Charles County, Maryland. The convictions involve discharges onto four parcels that are part of St. Charles.

\* \* \*

At trial, the government introduced evidence that during the period from 1988 to 1993, the defendants attempted to drain at least three of the four parcels of land involved in this case by digging ditches. The excavated dirt was deposited next to the ditches--a process known

as "sidecasting." The government also introduced evidence that the defendants transported a substantial amount of fill dirt and gravel and deposited it on three of the parcels; only one parcel involved sidecasting without the addition of fill. The government presented evidence that all four of these parcels contained wetlands and that the defendants failed to obtain permits from the Army Corps of Engineers \* \* \* prior to making efforts to drain and fill the parcels.

Although the parcels in question were not, because of neighboring development, located in pristine wilderness areas, the government presented substantial evidence about the physical characteristics which identified them as wetlands, including testimonial and photographic evidence of significant standing water, reports of vegetation typical to hydrologic soils, and infrared aerial photographs showing a pattern of stream courses visible under the vegetation. Evidence also showed that the properties were identified as containing wetlands on public documents including the National Wetlands Inventory Map and topographical maps of Charles County and the State of Maryland. The government demonstrated that water from these lands flowed in a drainage pattern through ditches, intermittent streams, and creeks, ultimately joining the Potomac River, a tributary of the Chesapeake Bay.

The government also produced evidence of the defendants' awareness of the physical conditions of their land. The very development work underlying the present prosecution involved efforts to improve the drainage of the areas to make building feasible. Substantial fill was later added in an attempt to raise the ground level of the parcels. Some construction work involved repeated reshoring efforts because of wetness-induced ground shifting and collapse. Evidence was introduced that bids for work at one of the parcels actually contained different price quotations for wet and dry work because of the level of moisture on parts of the property. And witnesses gave testimony that despite the attempts at drying the property through ditching and draining or through the pumping off of standing water, and even after hundreds of truck loads of stone, gravel and other fill had been added to three of the parcels, wetland-loving plants continued to sprout through the fill.

Witnesses also testified at trial that a private consulting firm retained by the defendants informed the defendants that its observations of conditions on the parcels led it to conclude that the parcels contained wetlands. The firm recommended seeking permits from the Army Corps of Engineers before beginning development. The defendants were also contacted by Charles County zoning authorities concerned about the possible presence of wetlands in the vicinity of the new construction projects. Finally, the government presented evidence that even as the defendants complied with an Army Corps of Engineers order to cease construction on one of the parcels and remove fill dirt that had already been added, they continued to develop the other parcels without notifying the Corps or making an effort to ascertain whether a permit was necessary.

The defendants introduced contradictory evidence suggesting that whether the four parcels

were wetlands under the Clean Water Act was unclear. They offered evidence which they claim showed that the Army Corps of Engineers was inconsistent in asserting jurisdiction over the parcels in question, claiming that the Corps took action on only one parcel, even though it had been aware for years of the ongoing development. Defendants also introduced an internal Corps memorandum that stated that while the areas in the St. Charles community have the "necessary parameters ... to be considered wetlands when using the Corps Wetland Delineation Manual," "it is not clear to me that these areas can be interpreted as 'waters of the United States' within the meaning or purview of Section 404." That memo suggested obtaining guidance from higher authority as to what constitutes "waters of the United States." The defendants also introduced evidence indicating their belief that they had legally drained three parcels prior to introducing fill, and that no fill was discharged into the fourth which was being drained by the digging of ditches.

Following 15 hours of deliberation, the jury convicted all defendants of the four felony counts. Because of the felony convictions, the defendants were not convicted of four misdemeanor counts for the "negligent" violations of the Clean Water Act involving the same parcels.

\* \* \*

V

The defendants \* \* \* contend that the district court erred in instructing the jury about the criminal intent, the "mens rea," required to prove a felony violation of the Clean Water Act. They argue (1) that the statute requires a showing that they were aware of the illegality of their conduct, and (2) that the required mens rea, however it is defined, must accompany each element of the offense. They note that the district court's jury instructions comported with neither requirement.

The district court charged the jury that the government must prove each of four elements of the offense beyond a reasonable doubt:

First, that is the defendant knowingly ... discharged or caused to be discharged a pollutant.

Second, that the pollutant was [dis]charged from a point source.

Third, that the pollutant entered a water of the United States; and fourth, that the discharge was unpermitted.

The court defined an act as "knowingly" done "if it is done voluntarily and intentionally and not because of ignorance, mistake, accident or other innocent reason." For each felony count, the court stated,

the government must prove that the defendants knew, one, that the areas which are the subject of these discharges had the general characteristics of wetland; and, two, the general nature of their acts. The government does not have to prove that the defendants knew the actual legal status of wetlands or the actual legal status of the materials discharged into the wetlands. The government does not have to prove that the defendants knew that they were violating the law when they committed their acts. (Emphasis added).

Finally, the court instructed on willful blindness, which it stated could stand in the place of actual knowledge.

Determining the mens rea requirement of a felony violation of the Clean Water Act requires us to make an interpretation based on "construction of the statute and ... inference of the intent of Congress." \* \* \* We thus begin our analysis by looking at the language of 33 U.S.C. § 1319, as well as its place in the larger statutory structure.

Section 1319(c)(2)(A), making an illegal discharge of a pollutant a felony if accompanied by the defined mens rea, provides: "Any person who knowingly violates section 1311 ... shall be punished." (Emphasis added). Section 1311 makes unlawful "the discharge of any pollutant" without a permit. And finally, § 1362 defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source" and defines "navigable waters" as "waters of the United States." \* \* \* Within that statutory structure, we must determine the nature of intent that the statute requires for each element of the offense.

On a first reading of the clause, "any person who knowingly violates section 1311 shall be punished," the order of words suggests that "knowingly" modifies "violates" so that the clause imposes punishment only when one violates the statute with knowledge that he is violating it, i.e. with knowledge of the illegality of his conduct. But the statute's structure, the architecture of which includes a series of sections incorporating other sections, its legislative history, and the body of Supreme Court jurisprudence addressing mens rea of federal criminal statutes caution that our first reading may not so simply lead us to the proper interpretation.

Our first concern is a pragmatic one engendered by the overall structure of the Clean Water Act. The conduct that is made criminal with the "knowingly violates" language encompasses numerous elements from other substantive statutory sections. See 33 U.S.C. § 1319(c)(2)(A). Each of those substantive sections may also be enforced with other civil and criminal penalties if the actions proscribed therein are performed with different scienter. See *generally* 33 U.S.C. § 1319. If Congress intended that the "knowing" mens rea accompany each element of the offense, as we have previously assumed is the case, \* \* \* the task of inserting the alternative mens rea requirements for the multiple civil and criminal



enforcement provisions within each substantive prohibition would require confusingly repetitious drafting. A shorthand method of accomplishing the same purpose thus would be to insert "knowingly" in a single place where the conduct is made criminal, in this case, § 1319(c)(2)(A). See *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 562 (1971) (the phrase "knowingly violates [applicable regulations]" was "a shorthand designation for specific acts or omissions which violate the act").

Our second and more profound problem with our first-blush interpretative proposal arises from a recognition of two general common law principles regarding mens rea. First, in Anglo-American jurisprudence, criminal offenses are ordinarily required to have a mens rea. \* \* \* This supposition is based on "the contention that an injury can amount to a crime only when inflicted by intention." \* \* \* Indeed, statutes requiring no mens rea are generally disfavored. \* \* \* But a second and deeply-rooted common law principle is that ignorance of the law provides no defense to its violation. \* \* \* Thus, while some level of deliberateness is usually required to impose criminal punishment, it is also usually true that the defendant need not appreciate the illegality of his conduct. Applying those principles to a statute similar to the one before us, the Supreme Court in *International Minerals* declined "to attribute to Congress the inaccurate view that [the] Act requires proof of knowledge of the law, as well as the facts." \* \* \* In that case, the statute--which provided that whoever "knowingly violates any such regulation" shall be fined or imprisoned--was held to be a "shorthand designation" for knowledge of the specific acts or omissions which violate the Act. \* \* \* When so viewed, the Court noted, "the Act ... does not signal an exception to the rule that ignorance of the law is no excuse." \* \* \* In light of these background rules of common law, we may conclude that mens rea requires not that a defendant know that his conduct was illegal, but only that he "know the facts that make his conduct illegal," \* \* \* unless Congress clearly specifies otherwise. And this knowledge must generally be proven with respect to each element of the offense. \* \* \*

Finally, our first-blush reading of the phrase "knowingly violates" is cast into doubt by the legislative history, which suggests that Congress, by amending the statute in 1987, intended to facilitate enforcement of the Clean Water Act and increase the impact of sanctions by creating a separate felony provision for deliberate, as distinct from negligent, activity. Before the amendment, the Act imposed a single set of criminal penalties for "willful or negligent" violations. See 33 U.S.C. § 1319(d)(1) (1986). The 1987 amendments, however, segregated the penalties for negligent violations, making them misdemeanors, and added felony provisions for knowing violations. See 33 U.S.C. § 1319(c)(1)(A) ("negligent" violation) & § 1319(c)(2)(A) ("knowing" violation). Thus, before 1987, the statute proscribed "willful or negligent" violations and after 1987 it proscribed separate "knowing" and "negligent" violations. In changing from "willful" to "knowing," we should assume that Congress intended to effect a change in meaning. \* \* \* Because "willful" generally connotes a conscious performance of bad acts with an appreciation of their illegality, \* \* \* we can conclude that Congress intended to provide a different and lesser standard when it used the word "knowingly." If we construe the word "knowingly" as

requiring that the defendant must appreciate the illegality of his acts, we obliterate its distinction from the willfulness.

Based upon these interpretative guides, then, we cannot conclude that Congress intended to require the defendant to know that his conduct was illegal when it stated that "Any person who knowingly violates [incorporated statutory sections] ... shall be punished." The ready alternative interpretation is that Congress intended that the defendant have knowledge of each of the elements constituting the proscribed conduct even if he were unaware of their legal significance. This interpretation would not carry with it the corollary that the defendant's ignorance of his conduct's illegality provides him a defense, but would afford a defense for a mistake of fact. Thus, if a defendant thought he was discharging water when he was in fact discharging gasoline, he would not be guilty of knowingly violating the act which prohibits the discharge of pollutants. See *United States v. Ahmad*, 101 F.3d 386, 393 (5th Cir.1996); see also *International Minerals*, 402 U.S. at 563-64 \* \* \*

Accordingly, we hold that the Clean Water Act \* \* \* requires the government to prove the defendant's knowledge of facts meeting each essential element of the substantive offense, \* \* \* but need not prove that the defendant knew his conduct to be illegal \* \* \* .

In light of our conclusion that the government need only prove the defendant's knowledge of the facts meeting each essential element of the substantive offense and not the fact that defendant knew his conduct to be illegal, in order to establish a felony violation of the Clean Water Act, we hold that it must prove: (1) that the defendant knew that he was discharging a substance, eliminating a prosecution for accidental discharges; (2) that the defendant correctly identified the substance he was discharging, not mistaking it for a different, unprohibited substance; (3) that the defendant knew the method or instrumentality used to discharge the pollutants; (4) that the defendant knew the physical characteristics of the property into which the pollutant was discharged that identify it as a wetland, such as the presence of water and water-loving vegetation; (5) that the defendant was aware of the facts establishing the required link between the wetland and waters of the United States;\* and (6) that the defendant knew he did not have a permit. This last requirement does not require the government to show that the defendant knew that permits were available or required. Rather, it, like the other requirements, preserves the availability of a mistake of fact offense if the defendant has something he mistakenly believed to be a permit to make the discharges for which he is being prosecuted.

While we thus reject the defendants' challenge to the district court's instructions based on the contention that the government must prove awareness of the illegality of their conduct, we agree that the instructions did not adequately impose on the government the burden of proving knowledge with regard to each statutory element. For this reason, a new trial is required.

## Questions and Comments

1. Compare the instructions given by the trial court regarding the prima facie case to the instructions required by the appellate court. Do you understand the difference?
2. **Mistake of fact v. mistake of law:** Note that the Court suggests that a mistake of fact defense may still be available in a criminal prosecution for a wetlands violation, even though a mistake of law defense is not. If the wetlands at issue were not adjacent to a traditionally navigable water, could a defendant avoid criminal liability by providing evidence that the defendant was not aware that the wetlands had any connection to other waters of the United States? What if the defendant was aware that the wetlands were adjacent to a non-navigable stream, but the defendant did not know that the stream had a “significant nexus” to a traditionally navigable water?
3. **Administrative orders and notice:** The court notes that the defendants were complying with an administrative order from the Corps for filling wetlands at the same time that they continued to discharge fill material on other wetlands on the property. One factor that may motivate the government to bring a criminal action is a defendant’s violation of an administrative order. However, if the defendant in *Wilson* was not violating the order, do you understand why the issuance of the order is relevant to the question of whether the defendant was “knowingly” violating the Clean Water Act?
4. **Standard of proof:** Note that the district court required the government to prove each element of the case beyond a reasonable doubt. In criminal prosecutions under the Clean Water Act, all of the normal protections afforded to criminal defendants apply.
5. **Other circuits:** The Ninth Circuit interpreted the knowing requirement of the Clean Water Act in a manner similar to the *Wilson* court in a case that did not involve discharges into wetlands. See [United States v. Weitzenhoff, 35 F.3d 1275 \(9th Cir. 1994\)](#). The Second Circuit adopted a similar reading of the statute, in another case that didn’t involve wetlands, but extended liability to persons who deliberately and consciously avoided knowledge of the facts surrounding a violation. See [United States v. Hopkins, 53 F.3d 533 \(2d Cir. 1995\)](#).
6. **Press coverage of criminal enforcement:** While EPA limits criminal enforcement actions and tries to select high profile cases that will deter violators, criminal wetlands prosecutions can lead to bad press for EPA, regardless of the nature of the defendant’s actions. For instance, in the early 1990s, EPA brought a criminal prosecution against John Pozgai, a landowner who bought wetlands at a reduced price, knowing that they were wetlands, and who filled 4 acres of wetlands with 400 truckloads of fill, flooding his neighbors properties, while ignoring cease and desist

letters from the Corps, as well as a temporary restraining order from federal district court. See Royal C. Gardner, *Mitigation* in *Wetlands Law and Policy: Understanding Section 404 170* (American Bar Association, Section on Environment, Energy and Resources 2005). Despite his conduct, the local press generally vilified the agency as jackbooted thugs unfairly prosecuting a Hungarian immigrant and violating his private property rights. *Id.*

7. **Public involvement in settlement of enforcement actions:** When DOJ settles environmental enforcement cases and prepares a consent decree, the Department provides public notice of the consent decree and allows the public to comment on the decree for 30 days. See [28 C.F.R. § 50.7](#). Among other places, the proposed consent decrees are available on the website for the Environment and natural Resources Division of the Department. See [U.S. Department of Justice, Environment and Natural Resources Division, Welcome to ENRD](#). Depending on the comments, the Department may decide to withdraw from the settlement or proceed to file the order with the court. *Id.*

#### Interview



Stephen Samuels, an Assistant Section Chief in the Environmental Defense Section of the Environment and Natural Resources Division of the U.S. Department of Justice, explains how federal wetland enforcement priorities are set. ([YouTube](#))

## Hypotheticals

1. Oliver Douglas recently purchased 100 acres of farmland in Springfield, Iowa from Virgil Haney. Haney was aware that there were several prairie pothole wetlands on the property and he did not farm on those sections of the property. However, he did not ever mention anything to Douglas about the wetlands. Douglas moved to Iowa from New York City and was unfamiliar with farming or prairie potholes. At the time that he bought the property, there was no water in the potholes and they did not look like wetlands to Douglas' untrained eye. Although the plants that were growing in the wetlands were wetland plants, Douglas did not recognize them as such. Similarly, he did not know that the water marks on a few trees near the wetlands were evidence of periodic inundation of the area. Since his wife, Lisa, was not pleased with the size of the small farmhouse on the property, Douglas hired a construction company to build an addition to the house. When the construction company dug a new basement and foundation, Douglas directed the company to dump the dirt from the construction into several depressional areas on the property (the prairie potholes) to level them out. If EPA, upon learning about Douglas' activities, brought a criminal action against Douglas for "knowingly" violating Section 301 of the Clean Water Act, could he likely be held liable for criminal fines and imprisonment?

2. Assume that there was no continuous surface or groundwater connection between the prairie potholes in question 1 and any other traditionally navigable water, but that the potholes provided flood protection and filtered pollutants out of water that eventually flowed into the Springfield River, a traditionally navigable water. In addition, many tourists visited Springfield each fall to observe migratory birds that relied on the potholes in the region as temporary habitat during their migration. If Douglas was aware that the potholes were wetlands, but was not aware of the connections between the wetlands and the Springfield River or the migratory birds, and Douglas directed the construction company to dump the dirt into the potholes, could he likely be held criminally liable for "knowingly" violating Section 301 of the Clean Water Act?

3. Assume that Douglas was aware that the potholes were wetlands and a representative of the Corps of Engineers visited his property while he was building the house and told him that he could not dump the dirt from the construction into the wetlands. If Douglas' attorney incorrectly informed him that the fill was authorized by a general permit that the Corps had issued and Douglas relied on that information, could he likely be held criminally liable for "knowingly" violating Section 301 of the Clean Water Act?

## Hypothetical

As outlined above, the Federal government has many enforcement options when a person fills wetlands in violation of the Clean Water Act. The following hypothetical focuses on the choice of an appropriate enforcement tool.

In March 2008, Wilbur Dunphy contacted the Corps of Engineers because he planned to purchase property near Interstate 70 west of Columbia, Missouri to build a shopping center and he was concerned that the construction might impact some wetlands on the property. Representatives of the Corps visited the site and verbally told Dunphy that the wetlands on the property were not connected, in any way, to jurisdictional waters, and were not “waters of the United States” that were regulated under the Clean Water Act. Although there were many other parcels of land available that did not have any wetlands on them, Dunphy preferred the parcel that the Corps examined because it was located adjacent to an exit off the Interstate. If the wetlands on the parcel were “waters of the United States,” it is unlikely that Dunphy would have been able to acquire a permit to authorize the shopping center construction.

Based on the information that Dunphy received from the Corps, he bought the property and filled 50 acres of wetlands to build the shopping center. Six years later, a local citizens group complained to EPA that the construction of the shopping center was contributing to pollution problems in the nearby Missouri River, a traditionally navigable water. Although the wetlands that were filled did not have a continuous surface connection to the Missouri River, a series of ditches, gullies, and intermittent streams had connected the wetlands to the Missouri River. In fact, a few years before Dunphy had contacted the Corps, and unbeknownst to the Corps, a Natural Resource Conservation Service employee had examined the site and had collected data to demonstrate that the wetlands decreased sedimentation, pollutants and flood waters to the Missouri River. Before the citizens group contacted EPA, the agency was not aware that any filling activity had taken place on Dunphy’s property. The citizens group believed that recent major floods near Columbia would not have been as extreme if the wetlands had not been destroyed. The citizens group also believes that the wetlands that were destroyed had provided habitat for several different species of endangered amphibians, which were killed when the wetlands were converted.

At the same time that the citizens group complained to EPA about the filling activity, they complained to the Corps. A representative of the Corps met with the citizens group and, after reviewing the data collected by the Natural Resource Conservation Service employee, told the members of the citizens group that it is often difficult, after the *Rapanos* decision, to demonstrate that wetlands adjacent to non-navigable waters are “waters of the United States.” Nevertheless, the representative of the Corps told the citizens group that she would explore enforcement options with management at the District.

The shopping center is very profitable and is currently worth over \$15 million. It is an economic hub for the area and provides hundreds of jobs for local residents. It would be impossible to restore the wetlands on the property at this time without tearing down major portions of the shopping center. Which agency, if any, should pursue an enforcement action at this time? If the Corps or EPA pursue an enforcement action, what relief should they seek? Should the agency pursue administrative remedies, judicial civil remedies, or judicial criminal remedies? What are the advantages and disadvantages of each option?

## C. Citizen Suits

Like many federal environmental statutes, the Clean Water Act anticipates that federal or state governments will take the lead in enforcing the law, but allows citizens to file lawsuits to enforce the law in the absence of government enforcement. Thus, citizen suit authority serves multiple purposes. In some cases, the threat of a citizen suit may spur the government to take enforcement action. In other cases, citizen suits fill the enforcement gap when the government fails to take action against persons who violate the Clean Water Act. The language of the citizen suit provision of the Clean Water Act is reproduced below:

### Resources

[CWA citizen suit primer and model complaint](#) - Stack & Associates  
[Citizens Guide to CWA Enforcement](#) - Ohio Environmental Council  
Example of CWA citizen suit complaints - plaintiffs - [Quad Cities Waterkeeper](#) and [Resources for Sustainable Communities](#)

Except as provided in subsection (b) of this section \* \* \* **any citizen** may commence a civil action on his own behalf

(1) against **any person** (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is **alleged to be in violation** of (A) an **effluent standard or limitation** under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the **Administrator** where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is **not discretionary** with the Administrator

### [33 U.S.C. § 1365\(a\)](#).

#### 1. Suits allowed

As is apparent from the language above, the statute authorizes citizen suits in two types of situations: (1) suits against anyone who violates an effluent standard or limit or administrative order regarding an effluent standard or limit; and (2) suits against EPA for failing to perform a non-discretionary duty. As noted above, there are few mandatory requirements for EPA in the Clean Water Act Section 404 program, so there are very few citizen suits based on that authority. Most of the Clean Water Act wetlands citizen suits are brought under Section 505(a)(1), 33 U.S.C. § 1365(a)(1), against persons who violate effluent standards or limits or orders related to those standards or limits.

For purposes of the citizen suit provision, the Clean Water Act defines “**effluent standard or limitation**” to include Section 401 certifications and actions that violate section 301(a) of the Act, among other things. See [33 U.S.C. § 1365\(f\)\(1\),\(5\)](#). Thus, **citizens** can sue any persons who fill wetlands **without a Section 404 permit**, if one is required, since the persons would be violating an effluent standard or limitation by violating Section 301(a). While Section 505(a)(1) allows citizens to sue persons who fill wetlands **without a permit**, it is not clear that the provision authorizes them to sue persons who **have a Section 404 permit** (including general permit) and who **violate the terms or conditions of the permit**. The Clean Water Act explicitly defines “effluent standard or limitation” to include a **Section 402 (NPDES) permit** or conditions in a Section 402 permit, but it does not explicitly define the term to include **Section 404 permits**, so some courts have held that citizens cannot sue persons who violate the terms or conditions of a Section 404 permit. See [Atchafalaya Basinkeeper, et al. v. Chustz, 682 F.3d 356 \(5<sup>th</sup> Cir. 2012\)](#); [Northwest Environmental Defense Center v. U.S. Army Corps of Engineers, 118 F. Supp. 2d 1115 \(D. Ore. 2000\)](#).

Since the statute limits citizen suits to situations where persons are **alleged to be in violation**, citizens cannot sue persons who violated the Clean Water Act **in the past**, but are **no longer violating it at the time of the lawsuit**. See [Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, 484 U.S. 49, 64 \(1987\)](#). The Supreme Court has interpreted the “**alleged to be in violation**” language to limit citizen suit jurisdiction to cases where the plaintiff can “make a **good faith allegation of continuous or intermittent violation**” of an effluent standard or limit. *Id.* If the Clean Water Act violation challenged is not continuing or reasonably likely to recur after the date that the lawsuit is filed, courts will dismiss the citizen suit. *Id.* However, to the extent that litigants advance, and courts are willing to embrace, the government’s theory that each day that fill material remains in place constitutes a separate day of violation, plaintiffs should be able to avoid the *Gwaltney* limit for cases where the illegal fill remains in place.

Section 505(a)(1) also clarifies that **persons** who can be sued for violating effluent standards or limits include the United States, federal agencies, states and state agencies (subject to limits imposed by the 11<sup>th</sup> Amendment). However, the remedies available in those citizen suits are limited. Plaintiffs can only obtain **injunctive relief and “coercive” civil penalties** (fines imposed to induce agencies to comply with injunctions or other judicial orders designed to modify behavior prospectively) and not “punitive” civil penalties, when suing the federal government for filling wetlands without a permit. See [Department of Energy v. Ohio, 503 U.S. 607 \(1992\)](#) (interpreting the citizen suit provisions of the Clean Water Act and the Resource Conservation and Recovery Act, but not involving Section 404 violations). Further, the 11<sup>th</sup> Amendment likely prevents plaintiffs from bringing citizen suits against states to recover civil penalties, see [Seminole Tribe v. Florida, 517 U.S. 44 \(1996\)](#) (finding that Congress can only abrogate state immunity if Congress unequivocally expresses its intent to do so and acts pursuant to authority of the 14<sup>th</sup> Amendment), but plaintiffs can probably bring citizen suits against **state officials** for **injunctive relief** (*i.e.*



cessation of filling activities or restoration of wetlands) when a state or state agency is illegally filling wetlands. See [\*Ex Parte Young\*, 209 U.S. 123 \(1908\)](#); [\*Natural Resources Defense Council v. California Department of Transportation\*, 96 F.3d 420 \(9<sup>th</sup> Cir. 1996\)](#).

## 2. Jurisdiction, Venue and Relief available

The Clean Water Act authorizes citizens to file their lawsuits in federal district court. See [33 U.S.C. § 1365\(a\)](#). When the plaintiff is alleging that the defendant is violating an effluent standard or limitation or an order regarding an effluent standard or limitation, the plaintiff must bring the suit in the district in which the source of the violation is located. *Id.* § 1365(c). The district courts can order persons violating effluent standards, limits, or orders to comply with those requirements and can order the Administrator to perform non-discretionary duties. *Id.* § 1365(a). In addition, the court can impose civil penalties on the defendant (subject to the limits discussed above for federal and state defendants). *Id.* As with government enforcement, though, the civil penalties are paid into the general fund of the United States Treasury and are not paid to the plaintiffs. The statute does not authorize the court to award any damages to plaintiffs, and there is no implied right of action for damages, so plaintiffs must rely on common law theories to recover any compensation for personal injury, property damage or similar injuries. See [\*Middlesex County Sewerage Authority v. National Sea Clammers Association\*, 453 U.S. 1 \(1981\)](#).

The statute also authorizes the court to award litigation costs, including reasonable attorneys fees and expert witness fees, to any **prevailing or substantially prevailing party** whenever the court determines an award is **appropriate**. *Id.* § 1365(d). In order to be a prevailing or substantially prevailing party, the party seeking costs must have succeeded on a significant issue in the litigation. See [\*Public Interest Research Group of New Jersey, Inc. v. Windall\*, 51 F.3d 1179 \(3d Cir. 1995\)](#) (Clean Water Act case that didn't involve wetlands). Prior to 2001, many courts held that a plaintiff could recover attorneys fees as a prevailing party when their lawsuit acted as a **catalyst** for a voluntary change in the defendant's conduct that achieved the outcome that the plaintiff desired to achieve in bringing the citizen suit. However, in [\*Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources\*, 532 U.S. 598 \(2001\)](#), a case involving the Americans with Disabilities Act and the Fair Housing Amendments Act, the Supreme Court held that a party must secure a judgment on the merits or a court-ordered consent decree, which can include a consent decree that enforces a settlement agreement, to recover attorneys' fees as a prevailing party.

### 3. Limits on citizen suits

#### Standing

Section 505(a) of the Clean Water Act authorizes **any citizen** to bring a citizen suit, and the statute defines a **citizen** as “a person or persons having an interest which is or maybe adversely affected.” See [33 U.S.C. § 1365\(g\)](#). While the statute authorizes a broad category of persons to sue, Congress cannot eliminate Article III standing requirements through legislation, so plaintiffs must still demonstrate that they have suffered or imminently will suffer an injury that was caused by the Clean Water Act violation about which they are suing and that the relief that they are seeking in the citizen suit (injunction, damages, etc.) will redress their injury. See [Friends of the Earth, Inc. v. Laidlaw Environmental Services, 528 U.S. 167, 181-183 \(2000\)](#) (noting that aesthetic injuries suffered by the plaintiff can suffice, as can injuries suffered by the plaintiff that are caused by the plaintiff’s reasonable concerns that the defendant’s conduct will cause harm). Depending on the facts of the case, a plaintiff may have a difficult time demonstrating that they have already been injured by the defendant’s conduct or that they will imminently be injured by the conduct, or that an injunction or civil penalties will redress their injuries.

As noted above, in order to demonstrate standing, plaintiffs normally also must show that their interest in the litigation is arguably within the zone of interests sought to be protected by the statute under which they are suing. However, this **prudential standing** requirement is less problematic for plaintiffs in the Clean Water Act context than the **Article III** standing (injury in fact) requirement. It is less problematic because it is an easy test to meet in most cases. In [Clarke v. Securities Industry Association, 479 U.S. 388, 399-400 \(1987\)](#), the Supreme Court held that standing will be denied under that test only if the plaintiff’s interests are “so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.” In [Bennett v. Spear, 520 U.S. 154 \(1997\)](#), the Supreme Court clarified that, in determining whether the zone of interests test is met, the court examines the purpose of the section of the statute under which the plaintiff is suing, rather than the general purposes of the statute. Thus, in a citizen suit alleging violations of Section 404, the plaintiff would have to demonstrate that their interests not simply marginally related to or inconsistent with the purposes of Section 404. When citizens are alleging environmental injuries caused by the defendant’s Section 404 violation, it is not difficult to demonstrate that the injuries are within the zone of interests sought to be protected by Section 404. However, if the plaintiffs are competitors of the defendants and are alleging that they have suffered economic harm caused by the violation, it may be more difficult to satisfy the zone of interest test.

It is likely, though, that the zone of interests test will not serve as a roadblock to citizen suits in any case because it probably does not apply at all in the Clean Water Act citizen suit context. Although Congress cannot eliminate Article III standing requirements through legislation, the Supreme Court held, in [Bennett v. Spear, 520 U.S. 154 \(1997\)](#), that

Congress eliminated the “zone of interest” requirement for citizen suits under the Endangered Species Act when it enacted a broadly worded citizen suit provision that authorized **any person** to sue for violations of the statute. Since Section 505 also broadly authorizes **any citizen** to sue, there is a strong argument available to plaintiffs that Congress eliminated the zone of interest requirement for citizen suits under the Clean Water Act, as well. However, in finding that the language of the Endangered Species Act citizen suit provision was broad enough to demonstrate Congress’ intent to eliminate the “zone of interest” requirement for that statute, the Supreme Court pointed out that the language was broader than the language used in other environmental statutes, specifically contrasting the language of Section 505 of the Clean Water Act. Thus, it is possible that Clean Water Act citizen suit plaintiffs may still need to satisfy the zone of interest test.

### **Notice and Diligent Prosecution Bar**

As noted above, citizen enforcement is designed to supplement, rather than replace, government enforcement. Consequently, before a plaintiff can file a citizen suit, they must provide, to the defendant, EPA, and the state where the violation is occurring, a notice of their intent to sue at least 60 days before filing suit. See [33 U.S.C. § 1365\(b\)](#). If they are suing EPA for failure to perform a non-discretionary duty, they must provide EPA with notice of their intent to sue at least 60 days before filing suit. *Id.* EPA has adopted regulations that further specify the content of the required notice, the manner in which it must be served, and the persons to whom it must be directed. See [40 C.F.R. §§ 135.1 - 135.3](#). If a plaintiff files their citizen suit without filing the required 60 day notice, the court will dismiss the suit for lack of jurisdiction. See [Hallstrom v. Tillamook County, 493 U.S. 20, 26 \(1989\)](#) (interpreting similar language in RCRA).

If a citizen files their notice of intent to sue a defendant for violating an effluent standard or limitation or order regarding an effluent standard or limitation, and EPA or the state **commence** and are **diligently prosecuting** a civil or criminal action in **state or federal court** to enforce the standard, limitation or order **before the plaintiff files a citizen suit**, the plaintiff is precluded from filing suit. See [33 U.S.C. § 1365\(b\)](#). That limit is consistent with the goal of the statute to establish the government as the primary enforcement authority. The Clean Water Act also prohibits citizen suits when the Corps, EPA or States are diligently prosecuting administrative penalty proceedings.” See [33 U.S.C. § 1319\(g\)\(6\)](#). While courts are reluctant to find that the government is not **diligently prosecuting** a lawsuit if the government has commenced the lawsuit in court, there are cases where a plaintiff can prove lack of diligent prosecution. For instance, a Clean Water Act case that didn’t involve wetlands or Section 404 reached the Supreme Court when the district court allowed the citizen suit to go forward, finding that a state enforcement action was not being diligently prosecuted because the defendant drafted the complaint against itself, drafted the settlement agreement, filed the lawsuit against itself and paid the filing fee, and because the agreement was entered into with “unusual haste” and provided for civil penalties that were less than the economic benefit that the defendant received by violating the Clean

Water Act. See [Friends of the Earth, Inc. v. Laidlaw Environmental Services, 528 U.S. 167 \(2000\)](#). The *Laidlaw* case is unusual, though, and judicial enforcement actions by government usually will preclude citizen suits. If the plaintiff cannot bring a citizen suit because the government is diligently prosecuting an enforcement action, the statute authorizes the citizen to intervene as of right in enforcement actions brought in federal court. See [33 U.S.C. § 1365\(b\)](#).

While the statute bars citizen suits when the government is diligently prosecuting an enforcement action, if a plaintiff files a notice of intent to sue in accordance with the statute and neither the state nor the federal government commence a judicial enforcement action, the plaintiff can file its citizen suit and can proceed with the suit *even* if the state or federal government bring an enforcement action *after* the plaintiff files the citizen suit. The bar on citizen suits in Section 505 only applies when the government brings enforcement actions *before* the plaintiff files suit. When the plaintiff brings a citizen suit, though, the Clean Water Act requires the plaintiff to serve a copy of the complaint on the Attorney General and EPA and authorizes EPA to intervene in the citizen suit as of right. See [33 U.S.C. § 1365\(c\)](#). In addition, the statute prohibits the court from entering a consent judgment in a citizen suit if the United States isn't a party to the suit until 45 days after the Attorney General and EPA receive a copy of the proposed consent judgment. *Id.* EPA's regulations provide more detail regarding the manner of service of the complaint and consent judgment. See [40 C.F.R. §§ 135.4 - 135.5](#).

### Interview



Jan Goldman Carter, Senior Manager and Counsel for the National Wildlife Federation's Wetlands and Water Resources Program, discusses:

1. the mission and structure of the National Wildlife Federation, and work that the organization does to protect wetlands ([YouTube](#)).
2. the role that litigation plays in protecting wetlands, and the manner in which the National Wildlife Federation chooses litigation priorities. ([YouTube](#)).

## Hypotheticals

The Griffin Heavy Equipment Company, which manufactures construction vehicles, recently broke ground on a new factory in the suburbs of Seattle, Washington. Flanders Construction Company, a competitor of Griffin, has most of its manufacturing facilities on the east coast, but hoped to open a factory on the west coast and was in negotiations to acquire the property which Griffin eventually acquired. The city provided Griffin with significant tax incentives and Flanders has not been able to find another suitable location in the state of Washington.

While driving by the Griffin property in April of last year, Ed Flanders, the CEO of Flanders Construction Company, noticed that Griffin was filling 20 acres of wetlands on the property to build the factory. Ed Flanders was still upset that Griffin acquired the property that he wanted to acquire for his factory, so he consulted his corporate counsel to see whether he could do anything to “make life difficult” for Griffin.

After speaking to his attorney and learning that Griffin did not have a permit authorizing the filling activity, Flanders sent a letter to the Griffin Heavy Equipment Company, copying EPA and the Washington State Department of Ecology, indicating that Flanders intended to sue Griffin under Section 505(a)(1) of the Clean Water Act, because Griffin was violating Section 301 of the Clean Water Act by discharging fill material into navigable waters without a permit.

A week later, Griffin completed the filling of wetlands and poured the concrete pad for the factory. Flanders waited another 3 months before taking any other action. Griffin did not engage in any additional filling activities during that time and neither EPA nor the State of Washington took any administrative, civil or criminal action against Griffin. Three and a half months after sending the letter to Griffin threatening a lawsuit, Flanders filed a citizen suit against Griffin under Section 505(a)(1) of the Clean Water Act in the Federal District Court for the Eastern District of Washington, located in Spokane, Washington. Flanders felt that the judges in that court would be more sympathetic to his case than the judges in the Western District, where the property was located.

In his complaint, Flanders alleged that he had an economic interest in bringing suit and would be injured, as a competitor, because Griffin was able to lower its operating costs by building a factory without complying with the Clean Water Act. Flanders did not allege any interest in clean water or the environment in his complaint. What defenses could Griffin raise in response to the complaint? With what success? If EPA brought an enforcement action under Section 309 after Flanders sued, and EPA sought civil penalties, but did not seek restoration of the wetlands, could Flanders proceed with his suit?

## Drafting Exercise

You have been retained by Friends of the Ocmulgee (“Friends”), a non-profit organization, to file a citizen suit against Middle Georgia River Runners, Inc. (“MGRRI”), because MGRRI allegedly discharged dredged or fill material into navigable waters without a Clean Water Act Section 404 permit. Friends was incorporated in Georgia and has its headquarters at 12345 Sixth Street, Macon, Georgia, 31207. Their phone number is (478) 987-6543. MGRRI is a corporation that was incorporated in Georgia, has its headquarters on River Road in Juliette, Georgia, 31046, and is doing business in Georgia.

Friends was created to protect and advocate for the water quality of the Ocmulgee River and the recreational use and enjoyment of the River. Friends has numerous members in Macon, Juliette, and Middle Georgia who live, work or travel along the Ocmulgee River and recreate in or near the River (by fishing, hiking, walking, photographing, plant gathering and boating).

MGRRI operates a rafting tour business from its property on River Road, which is adjacent to the Ocmulgee River. On October 10, 2014, members of Friends observed employees of MGRRI using a Caterpillar Backhoe Loader to clear ½ acre of wetlands adjacent to the Ocmulgee River on the River Road property. On the same day, they observed those employees using the Backhoe Loader to add rock and soil to the wetlands to construct a parking lot for the rafting tour business. For purposes of this exercise, assume that the Ocmulgee River is a tributary of an interstate water. MGRRI did not have a Section 404 permit that authorized the clearing or filling of the wetlands. The fill material remains in place today.

The recreational, economic, aesthetic and/or health interests of Friends and its members have been, are being, and will be adversely affected by MGRRI’s violations of the Clean Water Act. The relief sought in the lawsuit will redress the injuries to those interests.

Friends would like to bring a citizen suit against MGRRI under the Clean Water Act for a declaratory judgment that MGRRI is violating the Act, an injunction to require MGRRI to remediate the harm caused by the violation, imposition of civil penalties, an award of costs, including attorneys’ fees and expert witness fees, and other appropriate relief.

1. Draft the 60 day notice required by the Clean Water Act. EPA’s regulations regarding the notice requirements are codified at [40 C.F.R. §§ 135.1 - 135.3](#). The materials included in the “Resources” box at the beginning of the section of this Chapter that addresses “Citizen Suits” should also be helpful in drafting the notice.

2. Draft the complaint for the citizen suit. The materials included in the “Resources” box, referenced in the last question, should be helpful in drafting the notice. For purposes of this exercise, you do not need to conform the pleading to the local rules of the federal district court in which you will file the complaint. Remember to include the 60 day notice that you prepared in response to the last question as an attachment.

## Chapter Quiz

Now that you've finished Chapter 10, why not try a CALI lesson on the material at: <http://cca.li/Q1>. It should take about 45 minutes.

# Chapter 11

## Regulatory Takings

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### I. Background

From the early days of the Clean Water Act Section 404 program through today, private property rights advocates have criticized government regulation of wetlands. Although the Corps denies very few Section 404 permit applications, over the years, several landowners have challenged wetland permit denials as “takings” of their property. In light of the fact that almost 75% of the remaining wetlands in the lower 48 states are privately owned, the takings issue is likely to remain an important consideration in the design and implementation of wetlands protection programs.

To the extent that “takings” claims arise regarding federal or state wetlands regulation, the claims usually arise when the government denies a permit to a landowner that would authorize development in wetlands, although some landowners have raised takings claims as soon as the government has asserted jurisdiction over wetlands on their property. Landowners have also raised takings challenges when the government issues a permit, but includes conditions or limits in the permit that the landowners oppose.

Takings claims are based on the Fifth Amendment of the United States Constitution, which provides that private property shall not be “taken for public use, without just compensation.” See [U.S. Const., Amend. 5](#). While the Fifth Amendment provides the basis for takings claims against the Corps of Engineers and other **federal** agencies, the takings prohibition is also made applicable to states and state agencies through the Due Process Clause of the Fourteenth Amendment of the Constitution. See [Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 \(1897\)](#).



Photo 35 By Ian Paterson

[http://commons.wikimedia.org/wiki/File%3APrivate\\_Property\\_-\\_geograph.org.uk\\_-\\_838016.jpg](http://commons.wikimedia.org/wiki/File%3APrivate_Property_-_geograph.org.uk_-_838016.jpg)  
[CC-BY-SA-2.0]



Although early court decisions focused on physical invasion or appropriation of property by government as takings, the Supreme Court has held, since 1922, that government regulation of property that restricts the use of the property can constitute a taking *if* the regulation “**goes too far.**” See [Pennsylvania Coal v. Mahon, 260 U.S. 393 \(1922\)](#). At the same time, though, Justice Holmes, writing for the Court, stressed that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” *Id.* at 413.

Fifty years later, the Court provided some guidance to help determine when government regulation “goes too far,” so that is a taking. In [Penn Central Transportation Company v. New York City, 438 U.S. 104, 124 \(1978\)](#), the Court eschewed adopting any bright line rules, but held that several factors are significant in evaluating whether government regulation constitutes a taking, including (1) the **economic impact** of the regulation on the claimant; (2) the extent to which the regulation has **interfered with investment-backed expectations** of the claimant; and (3) the **character** of the government action. Regarding the **character** of the government action, the Court suggested that it was less likely that government regulation would be a taking when the interference with private property rights “arises from some public program adjusting the benefits and burdens of economic life to promote the common good.” *Id.* According to the Court, the three factor *Penn Central* test requires an ad hoc, factual analysis in each case. *Id.* The *Penn Central* Court again stressed that the government is not required to pay for every reduction in property value caused by regulation, but is only required to pay when the regulation “goes too far.” *Id.* In [Hadacheck v. Sebastian, 239 U.S. 394 \(1915\)](#), a case cited by the *Penn Central* Court, the Supreme Court upheld a law prohibiting the operation of a brickyard in a residential neighborhood against a taking challenge even though the regulation reduced the landowner’s property value by more than 90%.

## II. Jurisdiction and Timing of Takings Claims

According to the Tucker Act, takings claims against the United States must be brought in the [United States Court of Federal Claims](#) if the plaintiff is seeking more than \$10,000. See [28 U.S.C. § 1491](#). Takings claims for less than \$10,000 can be brought in the federal district courts. See [28 U.S.C. § 1346](#). The Court of Federal Claims does **not** have jurisdiction to adjudicate the validity of the Corps’ denial or issuance of a Section 404 permit, an EPA veto of a permit, or a jurisdictional determination by EPA or the Corps, so a landowner who is seeking more than \$10,000 in compensation for a taking based on those actions must bring two separate actions if they want to challenge the validity of the underlying agency determination that is allegedly a taking. Decisions of the U.S. Court of Federal Claims can be appealed to the [United States Court of Appeals for the Federal Circuit](#). Consequently, most of the takings jurisprudence developed outside of the Supreme Court is developed in the Court of Federal Claims and the Federal Circuit.

Since a court determining whether a government regulation constitutes a taking must

conduct an ad hoc factual analysis of the impact of the government regulation on the property, the Supreme Court has stressed that a takings claim “is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.” See [Williamson County Regional Planning v. Hamilton Bank, 473 U.S. 172 \(1985\)](#). In that case, the Court held that a developer could not challenge, as a taking, a county planning commission’s decision to deny approval for a development proposal because the developer had not yet sought a variance that might have allowed the development to proceed. In the following year, in [McDonald et al v. County of Yolo, 477 U.S. 340, 351 \(1986\)](#), the Court again stressed that a landowner cannot pursue a takings challenge based on the application of a government regulatory program to its land until the landowner receives the government’s “final, definitive position regarding how it will apply the regulations at issue to the particular land in question.” In *McDonald*, the Court determined that, even though the government had denied the landowner’s subdivision proposal, it was possible that the government would approve a more limited subdivision proposal if the landowner sought approval, so the Court could not determine the extent of the government interference with the landowner’s property rights until the government identified a final, definitive position on the limits on the development of the property. *Id.*

There are, however, limits to this line of authority. In [Palazzolo v. Rhode Island, 533 U.S. 606, 620 \(2001\)](#), the Supreme Court held that “once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened.” In that case, the government argued that the plaintiff’s takings challenge to regulation limiting the development of wetlands was unripe because the plaintiff had not submitted additional development proposals after three development proposals were rejected, but the Court concluded that the plaintiff could pursue a takings claim because it was clear that the government would not allow any development of the wetlands even if the plaintiff submitted another development proposal. *Id.* Thus, if the limits that the government will ultimately place on a landowner’s property can be determined to a reasonable degree of certainty, the landowner’s taking claim will be ripe and they do not have to pursue variance procedures or advance other development proposals that would be futile.

In light of ripeness concerns like those in the *Williamson County* and *McDonald* cases, landowners are generally unable to bring takings challenges based on a preliminary or approved jurisdictional determination by the Corps or EPA. See [United States v. Riverside Bayview Homes, 474 U.S. 121 \(1985\)](#). Since a landowner might still be able to obtain a Section 404 permit to develop their property after the government has determined that the property contains jurisdictional waters, it is not clear, at the time of the jurisdictional determination, what restrictions, if any, will be placed on the landowner’s use of their property. Similarly, a landowner will generally not be able to challenge a cease and desist order or administrative compliance order as a taking, since the landowner may ultimately be able to engage in the prohibited development of their property if they seek and obtain a

Section 404 permit. See [Tabb Lakes, Ltd. v. United States, 10 F.3d 796 \(Fed. Cir. 1993\)](#). For the same reasons, when the government determines that an activity is not exempt from the Section 404 permit requirement or that an activity is not authorized by a general permit, a landowner will generally be unable to challenge the government decision as a taking because the landowner may still apply for, and perhaps obtain, an individual Section 404 permit. In each of the preceding scenarios in this paragraph, though, if it is clear that *any* application for a Section 404 permit would be ultimately rejected, a landowner may be able to argue their takings challenge is ripe in light of the *Palazzolo* decision.

Once landowners apply for a permit and the Corps or EPA (though a veto) make a final decision on the permit, it becomes easier for landowners to raise takings challenges, although some of those decisions may still not be ripe for a takings challenge. If the Corps has issued a Section 404 permit to a landowner and the landowner wants to challenge the restrictions placed on his property by the conditions included in the permit, the landowner's claim is probably ripe for review, since the permit reflects the government's final definitive application of the Clean Water Act regulatory program to the landowner's property.

If, however, a Section 404 permit application is withdrawn or denied "without prejudice" because the applicant did not provide all of the information required to process the permit application or because the applicant was not able to obtain the necessary state or local approvals for the development project (*i.e.* State permit, 401 certification, CZMA consistency, local zoning approval, etc.), the landowner will probably not be able to pursue a takings claim against the Corps at that time. See *Heck v. United States*, 37 Fed. Cl. 245 (1997). After all, it is not clear, at that time, whether the Corps would have issued a permit or included specific conditions in the permit if the applicant had obtained the other necessary approvals. If the Corps, in denying the permit "without prejudice", indicates that it would have denied the permit anyway, though, a court may determine that a takings claim against the agency is ripe. See *City National Bank v. United States*, 33 Fed. Cl. 224 (1995).

When the Corps denies a permit and does not deny it "without prejudice", landowners are in the best position to pursue a ripe takings challenge. Although the Corps might argue that the landowner must re-submit a less ambitious permit application before challenging the denial as a taking, in light of the *Williamson County* and *McDonald* precedent, the Court of Federal Claims frequently rejects that argument, finding that additional permit applications would be futile. See, *e.g.*, *Cristina Inv. Corp. v. United States*, 40 Fed. Cl. 571 (1998); *City National Bank v. United States*, 30 Fed. Cl. 715 (1994).

## Questions and Comments

1. **Ripeness and Appeals:** Pursuant to the Corps' regulations, permits denied with prejudice and declined permits can be appealed administratively and cannot be challenged in court if they are not challenged administratively. See 33 C.F.R. § 331.12. In light of those regulations, it is unclear whether the Court of Federal Claims will allow a landowner to pursue a takings challenge to a permit denial or permit conditions if the landowner has not exhausted its administrative remedies. If the landowner *has* sought administrative review, though, the Court of Federal Claims will not review a takings claim until the Corps has made a final decision on the appeal. See *Bay-Houston Towing Co. v. United States*, 58 Fed. Cl. 462 (2003).
2. **Swampbuster:** Landowners have not generally brought takings claims based on a denial of farm benefits due to the Swampbuster provisions of the Food Security Act. Do you understand why not?
3. **State Laws Providing Compensation for Diminution in Value:** Although the Supreme Court has held that the government is not required to pay for every reduction in property value, but is only required to compensate landowners when government regulation “goes too far,” many states have passed laws that require government entities to compensate landowners when government regulation reduces property values by a specific degree (i.e., 50%, 70%, etc.) See [Environmental Law Institute, \*State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act 20-23 \(May 2013\)\*](#). The laws are not based on the federal or state constitutions, but create additional limits on government regulation to protect “private property rights.” Many of the laws allow states to avoid paying compensation by waiving the application of the regulation to the landowner challenging the government action. *Id.* What impact might these laws have on federal or state regulation of wetlands?

## Hypotheticals

1. Alex Pritchett owns an acre of land in Glynn County, Georgia. She would like to build a dock on the property, which is primarily coastal wetlands, but the Corps of Engineers has just issued an approved jurisdictional determination, finding that the entire parcel of land is “waters of the United States.” Without focusing on whether the Corps’ action ultimately would be a taking, can she bring a taking action in federal district court seeking \$8,000 in damages (the amount that she paid for the property) based on the Corps’ jurisdictional determination? If the Corps subsequently informs her that her plans to build her dock on the property do not qualify for the regional general permit that the Corps district issued to authorize the construction of small docks, can she bring her takings lawsuit at that time? Would it make a difference if the Corps simultaneously told her that she would never be able to build a dock on her property because any construction on her property would harm a sensitive breeding area for several species of snakes and rodents?

2. Arthur Gomez applied to the Corps of Engineers for a Section 404 permit to fill 7 acres of wetlands on a 10 acre plot of land that he owned, so that he could develop the property as a residential subdivision. When the State would not provide a Section 401 certification for his proposed development, the Corps denied his permit without prejudice, although they encouraged him to submit a new application that would impact fewer acres of wetlands because they would never approve a proposal to fill all 7 acres of wetlands on his property. Without focusing on whether the Corps’ action would ultimately be a taking, can he bring a taking action in federal district court seeking \$500,000 (the amount that he paid for the property)? Would your answer be different if the State provided the Section 401 certification but the Corps denied the permit application after the agency asked Gomez to submit a development proposal that would impact 5 acres or less of wetlands on the property and Gomez refused? Should Gomez appeal the permit denial administratively before bringing his takings claim?

### III. The Takings Analysis

In determining whether government regulation constitutes a taking, courts generally engage in an ad hoc, fact-sensitive analysis using the *Penn Central* analysis. However, the Supreme Court has established a few categorical rules that apply in takings cases. The following case examines one of those rules. As additional background for the case, it is helpful for the reader to know that, prior to this case, the Supreme Court held that a landowner can recover compensation when a government regulation “temporarily” takes their property, even though the regulatory restriction is later removed. See [\*Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency\*, 535 U.S. 302 \(2002\)](#); [\*First English Evangelical Lutheran Church of Glendale v. County of Los Angeles\*, 482 U.S. 304 \(1987\)](#).



Photo 36 By Cugirl (Own work)  
<http://commons.wikimedia.org/wiki/File:Iop.jpg> [Public domain]

## Lucas v. South Carolina Coastal Council

505 U.S. 1003 (1992)

**JUSTICE SCALIA** delivered the opinion of the Court.

### Resources for the Case

[Unedited Opinion](#) (From Justia)  
[Google Map of all the cases in the coursebook](#)  
[Oral argument](#) (from the Oyez Project)  
[Photos, Documentary and Court Documents](#) (from Duke Law - American Voices Project)

In 1986, petitioner David H. Lucas paid \$975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina, on which he intended to build single-family homes. In 1988, however, the South Carolina Legislature enacted the Beachfront Management Act, \* \* \* which had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels. \* \* \* A state trial court found that this prohibition rendered Lucas's parcels "valueless." \* \* \* This case requires us to decide whether the Act's dramatic effect on the economic value of Lucas's lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of "just compensation." U.S. Const., Amend. 5.

I

A

South Carolina's expressed interest in intensively managing development activities in the so-called "coastal zone" dates from 1977 when, in the aftermath of Congress's passage of

the federal Coastal Zone Management Act of 1972, \* \* \* the legislature enacted a Coastal Zone Management Act of its own. \* \* \* In its original form, the South Carolina Act required owners of coastal zone land that qualified as a "critical area" (defined in the legislation to include beaches and immediately adjacent sand dunes, \* \* \* to obtain a permit from the newly created South Carolina Coastal Council (Council) (respondent here) prior to committing the land to a "use other than the use the critical area was devoted to on [September 28, 1977]." \* \* \*

In the late 1970's, Lucas and others began extensive residential development of the Isle of Palms, a barrier island situated eastward of the city of Charleston. Toward the close of the development cycle for one residential subdivision known as "Beachwood East," Lucas in 1986 purchased the two lots at issue in this litigation for his own account. No portion of the lots, which were located approximately 300 feet from the beach, qualified as a "critical area" under the 1977 Act; accordingly, at the time Lucas acquired these parcels, he was not legally obliged to obtain a permit from the Council in advance of any development activity. His intention with respect to the lots was to do what the owners of the immediately adjacent parcels had already done: erect singlefamily residences. He commissioned architectural drawings for this purpose.

The Beachfront Management Act brought Lucas's plans to an abrupt end. Under that 1988 legislation, the Council was directed to establish a "baseline" connecting the landwardmost "point[s] of erosion ... during the past forty years" in the region of the Isle of Palms that includes Lucas's lots. \* \* \* In action not challenged here, the Council fixed this baseline landward of Lucas's parcels. That was significant, for under the Act construction of occupable improvements<sup>2</sup> was flatly prohibited seaward of a line drawn 20 feet landward of, and parallel to, the baseline. \* \* \* The Act provided no exceptions.

## B

Lucas promptly filed suit in the South Carolina Court of Common Pleas, contending that the Beachfront Management Act's construction bar effected a taking of his property without just compensation. Lucas did not take issue with the validity of the Act as a lawful exercise of South Carolina's police power, but contended that the Act's complete extinguishment of his property's value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives. Following a bench trial, the court agreed. Among its factual determinations was the finding that "at the time Lucas purchased the two lots, both were zoned for single-family residential construction and ... there were no restrictions imposed upon such use of the property by either the State of South Carolina,

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<sup>2</sup> The Act did allow the construction of certain nonhabitable improvements, e. g., "wooden walkways no larger in width than six feet," and "small wooden decks no larger than one hundred forty-four square feet."

the County of Charleston, or the Town of the Isle of Palms." \* \* \* The trial court further found that the Beachfront Management Act decreed a permanent ban on construction insofar as Lucas's lots were concerned, and that this prohibition "deprive[d] Lucas of any reasonable economic use of the lots, ... eliminated the unrestricted right of use, and render[ed] them valueless." \* \* \* The court thus concluded that Lucas's properties had been "taken" by operation of the Act, and it ordered respondent to pay "just compensation" in the amount of \$1,232,387.50. \* \* \*

The Supreme Court of South Carolina reversed. It found dispositive what it described as Lucas's concession "that the Beachfront Management Act [was] properly and validly designed to preserve ... South Carolina's beaches." \* \* \* Failing an attack on the validity of the statute as such, the court believed itself bound to accept the "uncontested ... findings" of the South Carolina Legislature that new construction in the coastal zone-such as petitioner intended-threatened this public resource. \* \* \* The court ruled that when a regulation respecting the use of property is designed "to prevent serious public harm," \* \* \* (*citing, inter alia, Mugler v. Kansas*, 123 U.S. 623 (1887)), no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value.

Two justices dissented. They acknowledged that our *Mugler* line of cases recognizes governmental power to prohibit "noxious" uses of property-*i. e.*, uses of property akin to "public nuisances"-without having to pay compensation. But they would not have characterized the Beachfront Management Act's "primary purpose [as] the prevention of a nuisance." \* \* \* To the dissenters, the chief purposes of the legislation, among them the promotion of tourism and the creation of a "habitat for indigenous flora and fauna," could not fairly be compared to nuisance abatement. \* \* \* As a consequence, they would have affirmed the trial court's conclusion that the Act's obliteration of the value of petitioner's lots accomplished a taking.

We granted certiorari. \* \* \*

### III

Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), it was generally thought that the Takings Clause reached only a "direct appropriation" of property \* \* \* or the functional equivalent of a "practical ouster of [the owner's] possession," \* \* \* Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. 260 U.S., at 414-415. \* \* \*

Nevertheless, our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth



Amendment. In 70-odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any "'set formula' " for determining how far is too far, preferring to "engag[e] in ... essentially ad hoc, factual inquiries." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) (quoting *Goldblatt v. Hempstead*, 369 U.S. 590,594 (1962)). \* \* \* We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. \* \* \*

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. See *Agins v. City of Tiburon*, 447 U.S. 255, 260; see also *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 [\*1016] U.S. 264, 295-296 (1981). \* \* \* As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests or denies an owner economically viable use of his land." *Agins, supra*, at 260 (citations omitted) (emphasis added).<sup>7</sup>

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<sup>7</sup> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. (For an extreme-and, we think, unsupportable-view of the relevant calculus, see *Penn Central Transportation Co. v. New York City*, 42 N.Y.2d 324, 333-334, 366 N.E.2d 1271, 1276-1277 (1977), *aff'd*, 438 U.S. 104 (1978), where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the takings claimant's other holdings in the vicinity.) Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. Compare *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) (law restricting subsurface extraction of coal held to effect a taking), with *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497-502 (1987) (nearly identical law held not to effect a taking); see also *id.*, at 515-520 (REHNQUIST, C. J., dissenting); \* \* \* The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property-*i. e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left

We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. See *San Diego Gas & Electric Co. v. San Diego*, 450 U.S., at 652 (dissenting opinion). "[F]or what is the land but the profits thereof[?]" 1 E. Coke, Institutes, ch. 1, § 1 (1st Am. ed. 1812). Surely, at least, in the extraordinary circumstance when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life," *Penn Central Transportation Co.*, 438 U.S., at 124, in a manner that secures an "average reciprocity of advantage" to everyone concerned, *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 415. And the functional basis for permitting the government, by regulation, to affect property values without compensation—that

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,"

*id.*, at 413 - does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.

On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. See, e.g., *Annicelli v. South Kingstown*, 463 A.2d 133, 140-141 (R.I. 1983) (prohibition on construction adjacent to beach justified on twin grounds of safety and "conservation of open space"); *Morris County Land Improvement Co. v. Parsippany-Troy Hills Township*, 40 N.J. 539, 552-553, 193 A.2d 232, 240 (1963) (prohibition on filling marshlands imposed in order to preserve region as water detention basin and create wildlife refuge). As Justice Brennan explained:

"From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property."

*San Diego Gas & Elec. Co.*, *supra*, at 652 (dissenting opinion). The many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands

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each of Lucas's beachfront lots without economic value.

altogether, suggest the practical equivalence in this setting of negative regulation and appropriation. \* \* \*

We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.<sup>8</sup>

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<sup>8</sup> JUSTICE STEVENS criticizes the "deprivation of all economically beneficial use" rule as "wholly arbitrary," in that "[the] landowner whose property is diminished in value 95% recovers nothing," while the landowner who suffers a complete elimination of value "recovers the land's full value." *Post*, at 1064. This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and ... the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). It is true that in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these "all or-nothing" situations.

JUSTICE STEVENS similarly misinterprets our focus on "developmental" uses of property (the uses proscribed by the Beachfront Management Act) as betraying an "assumption that the only uses of property cognizable under the Constitution are developmental uses." *Post*, at 1065, n.3. We make no such assumption. Though our prior takings cases evince an abiding concern for the productive use of, and economic investment in, land, there are plainly a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause. See, e. g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982) (interest in excluding strangers from one's land).

## B

The trial court found Lucas's two beachfront lots to have been rendered valueless by respondent's enforcement of the coastal-zone construction ban.<sup>9</sup> Under Lucas's theory of the case, which rested upon our "no economically viable use" statements, that finding entitled him to compensation. Lucas believed it unnecessary to take issue with either the purposes behind the Beachfront Management Act, or the means chosen by the South Carolina Legislature to effectuate those purposes. The South Carolina Supreme Court, however, thought otherwise. In its view, the Beachfront Management Act was no ordinary enactment, but involved an exercise of South Carolina's "police powers" to mitigate the harm to the public interest that petitioner's use of his land might occasion. \* \* \*

It is correct that many of our prior opinions have suggested that "harmful or noxious uses" of property may be proscribed by government regulation without the requirement of compensation. For a number of reasons, however, we think the South Carolina Supreme Court was too quick to conclude that that principle decides the present case. The "harmful or noxious uses" principle was the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power. \* \* \* "Harmful or noxious use" analysis was, in other words, simply the progenitor of our more contemporary statements that "land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' ...." *Nollan, supra*, at 834 (quoting *Agins v. Tiburon*, 447 U.S., at 260); see also *Penn Central Transportation Co., supra*, at 127; *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-388 (1926).

The transition from our early focus on control of "noxious" uses to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between "harm-preventing" and "benefit-conferring" regulation is often in the eye of the beholder. It is quite possible, for example, to describe in either fashion the ecological, economic, and esthetic concerns that inspired the South Carolina Legislature in the present case. One could say that imposing a servitude on Lucas's land is necessary in order to prevent his use of it from "harming" South Carolina's ecological resources; or, instead, in order to achieve the "benefits" of an ecological preserve.<sup>11</sup> Compare, e. g., *Claridge v. New Hampshire* [\*1025] *Wetlands Board*,

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<sup>11</sup> In the present case, in fact, some of the "[South Carolina] legislature's 'findings'" to which the South Carolina Supreme Court purported to defer in characterizing the purpose of the Act as "harm-preventing," \* \* \* seem to us phrased in "benefit conferring" language instead. For example, they describe the importance of a construction ban in enhancing "South Carolina's annual tourism industry revenue," \* \* \* in "provid[ing] habitat for numerous species of plants and animals, several of which are threatened or endangered,"

125 N.H. 745, 752, 485 A.2d 287, 292 (1984) (owner may, without compensation, be barred from filling wetlands because landfilling would deprive adjacent coastal habitats and marine fisheries of ecological support), *with, e. g., Bartlett v. Zoning Comm'n of Old Lyme*, 161 Conn. 24, 30, 282 A.2d 907, 910 (1971) (owner barred from filling tidal marshland must be compensated, despite municipality's "laudable" goal of "preserv[ing] marshlands from encroachment or destruction"). Whether one or the other of the competing characterizations will come to one's lips in a particular case depends primarily upon one's evaluation of the worth of competing uses of real estate. \* \* \* A given restraint will be seen as mitigating "harm" to the adjacent parcels or securing a "benefit" for them, depending upon the observer's evaluation of the relative importance of the use that the restraint favors. *See Sax, Takings and the Police Power*, 74 Yale L.J. 36, 49 (1964) ("[T]he problem [in this area] is not one of noxiousness or harm-creating activity at all; rather it is a problem of inconsistency between perfectly innocent and independently desirable uses"). Whether Lucas's construction of single family residences on his parcels should be described as bringing "harm" to South Carolina's adjacent ecological resources thus depends principally upon whether the describer believes that the State's use interest in nurturing those resources is so important that any competing adjacent use must yield.<sup>12</sup>

When it is understood that "prevention of harmful use" was merely our early formulation of

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\* \* \* and in "provid[ing] a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being," \* \* \* It would be pointless to make the outcome of this case hang upon this terminology, since the same interests could readily be described in "harm-preventing" fashion.

JUSTICE BLACKMUN, however, apparently insists that we must make the outcome hinge (exclusively) upon the South Carolina Legislature's other, "harm-preventing" characterizations, focusing on the declaration that "prohibitions on building in front of the setback line are necessary to protect people and property from storms, high tides, and beach erosion." \* \* \* He says "[n]othing in the record undermines [this] assessment," \* \* \* apparently seeing no significance in the fact that the statute permits owners of existing structures to remain (and even to rebuild if their structures are not "destroyed beyond repair," \* \* \* ), and in the fact that the 1990 amendment authorizes the Council to issue permits for new construction in violation of the uniform prohibition \* \* \*

<sup>12</sup> In JUSTICE BLACKMUN'S view, even with respect to regulations that deprive an owner of all developmental or economically beneficial land uses, the test for required compensation is whether the legislature has recited a harm-preventing justification for its action. *See post*, at 1039, 1040-1041, 1047-1051. Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.

the police power justification necessary to sustain (without compensation) any regulatory diminution in value; and that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings" -which require compensation -from regulatory deprivations that do not require compensation. A fortiori the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed. The South Carolina Supreme Court's approach would essentially nullify Mahon's affirmation of limits to the noncompensable exercise of the police power. Our cases provide no support for this: None of them that employed the logic of "harmful use" prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land. See *Keystone Bituminous Coal Assn.*, 480 U.S., at 513-514 (REHNQUIST, C. J., dissenting) \* \* \*

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. \* \* \* This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 413. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). See *Andrus v. Allard*, 444 U.S. 51, 66-67 (1979) (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture. \* \* \*

Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S., at 426 -though we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the land title. \* \* \*

We believe similar treatment must be accorded confiscatory regulations, *i. e.*, regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be

newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts-by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.<sup>16</sup>

On this analysis, the owner of a lakebed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was always unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit. \* \* \* In light of our traditional resort to "existing rules or understandings that stem from an independent source such as state law" to define the range of interests that qualify for protection as "property" under the Fifth and Fourteenth Amendments, *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); see, e. g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011-1012 (1984); *Hughes v. Washington*, 389 U.S. 290, 295 (1967) (Stewart, J., concurring), this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those "existing rules or understandings" is surely unexceptional. When, however, a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.<sup>17</sup>

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<sup>16</sup> The principal "otherwise" that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of "real and personal property, in cases of actual necessity, to prevent the spreading of a fire" or to forestall other grave threats to the lives and property of others. *Bowditch v. Boston*, 101 U.S. 16, 18-19 (1880); see *United States v. Pacific R. Co.*, 120 U.S. 227, 238-239 (1887).

<sup>17</sup> Of course, the State may elect to rescind its regulation and thereby avoid having to pay compensation for a permanent deprivation. See *First English Evangelical Lutheran Church*, 482 U. S., at 321. But "where the [regulation has] already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Ibid.*

The "total taking" inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, *see, e. g., Restatement (Second) of Torts* §§ 826, 827, the social value of the claimant's activities and their suitability to the locality in question, *see, e. g., id.*, §§ 828(a) and (b), 831, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike, *see, e. g., id.*, §§ 827(e), 828(c), 830. The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so, *see id.*, § 827, Comment g. So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.

It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the "essential use" of land, *Curtin v. Benson*, 222 U.S. 78, 86 (1911). The question, however, is one of state law to be dealt with on remand. We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*. As we have said, a "State, by ipse dixit, may not transform private property into public property without compensation ...." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). Instead, as it would be required to do if it sought to restrain Lucas in a commonlaw action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing.<sup>18</sup>

The judgment is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

So ordered.

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<sup>18</sup> JUSTICE BLACKMUN decries our reliance on background nuisance principles at least in part because he believes those principles to be as manipulable as we find the "harm prevention" / "benefit conferral" dichotomy, *see post*, at 1054-1055. There is no doubt some leeway in a court's interpretation of what existing state law permits-but not remotely as much, we think, as in a legislative crafting of the reasons for its confiscatory regulation. We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an objectively reasonable application of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.



## Questions and Comments

1. **Categorical Rule:** After *Lucas*, if government regulation of wetlands denies a landowner “all economically beneficial or productive use” of their property, the government will be required to compensate the landowner. If the impact of the government action is less than a denial of all economically beneficial or productive use of property, though, the court will continue to use the ad hoc, three factor *Penn Central* analysis to determine whether the government action is a taking.
2. **Denial of All Economically Beneficial or Productive Use:** Did the Court provide any direction regarding how to determine when government regulation denies “all economically beneficial or productive use” of a landowner’s property? In a separate statement, Justice Souter suggested that the determination that the state regulation deprived Lucas of his entire economic interest in his property was “highly questionable”, and Souter suggested that the Court should dismiss the writ of certiorari and await a case to directly address the issue of what constitutes a “total deprivation” of use. 505 U.S. at 1076, 1078. In his dissenting opinion, Justice Blackmun labeled the determination “implausible”. 505 U.S. at 1036. Why did the South Carolina Coastal Council never challenge the trial court’s determination that the regulation denied the landowner all economically beneficial or productive use of his property?
3. **Temporary v. Permanent Taking:** David Lucas bought the lots at issue in this litigation in 1986. The Beachfront Management Act, which limited Lucas’ development of the property, was enacted in 1988. In 1990, after Lucas challenged the statute and government regulation as a taking, the Act was amended to authorize landowners like Lucas to apply for a permit to develop their property. Lucas never applied for the permit, but pressed forward with his takings challenge. If the Supreme Court was reviewing Lucas’ challenge as a permanent taking claim, would the challenge be ripe? The Court did not review the challenge as a permanent taking claim but, rather, as a claim that the state regulation constituted a “temporary taking” from the time that the Beachfront Management Act was enacted until it was amended to provide an opportunity to seek a permit (1988-1990). In a portion of the opinion not reproduced above, the majority indicated that Lucas could still apply for a permit even after the Supreme Court’s decision in the case. If Lucas were to receive a permit to develop his property after the Court’s decision, what damages could he recover for the temporary taking?
4. **An Exception to the Categorical Rule:** Prior to the *Lucas* decision, it was believed that there was a “noxious use” exception in takings jurisprudence, whereby governments would not have to provide compensation, regardless of the extent of economic harm caused by regulation, if the government was regulating to prevent a

“noxious use” of property. As the *Lucas* Court noted, the South Carolina Coastal Council argued that regulation designed to prevent harm should be treated differently than regulation to confer benefits on citizens. Although the *Lucas* Court rejected that approach, how is the exception to the categorical rule created by the Court different from the “noxious use” exception? Justice Blackmun, in dissent, argues that the new test adopted by the Court could be as malleable as the harm prevention/benefit conferral analysis that the Court was rejecting. What “background principles of the State’s law of property and nuisance” will be considered in determining that a regulated use of property is not “part of [the landowner’s] title to begin with”, so that government regulation can extinguish that use without paying compensation? Should the exception be limited to common law principles or can it include state statutory provisions? In a concurring opinion, Justice Kennedy suggested that reasonable expectations regarding property use should be “understood in light of the whole of our legal tradition” and that the Court should not limit its focus to the common law of nuisance and property. 505 U.S. at 1035. Did the *Lucas* Court find that background principles of South Carolina nuisance or property law prohibited the uses of property prohibited by the Beachfront Management Act?

5. **Background Principles in Wetlands Cases:** Although the *Lucas* Court allows the government to avoid paying compensation when prohibiting uses of property that, based on background principles of state property or nuisance law, are not part of the landowner’s title to begin with, that exception has had little influence in wetlands cases so far. The Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit have generally rejected claims that wetland filling activities are nuisances which can be prohibited by the government without compensation. See, e.g., [\*Loveladies Harbor, Inc. v. United States\*, 28 F.3d 1171 \(Fed. Cir. 1994\)](#); *Florida Rock Industries v. United States*, 45 Fed. Cl. 21 (1999); *Bowles v. United States*, 31 Fed. Cl. 37 (1994); *Florida Rock Industries v. United States*, 21 Cl. Ct. 161 (1990), *vacated on other grounds*, 18 F.3d 1560 (Fed. Cir. 1994), *cert denied* 513 U.S. 1109 (1995). While some state courts have viewed the “public trust” doctrine as a background principle of state law that justifies regulation without compensation, see *Just v. Marinette County*, 201 N.W.2d. 761 (Wis. 1972); *McQueen v. South Carolina Coastal Council*, 580 S.E.2d 116 (S.C. 2003), the Court of Federal Claims and the Federal Circuit have not adopted that approach.

For an outline of the “public trust” doctrine and a proposal for a new theoretical framework for the doctrine, see Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 Notre Dame L. Rev. 699 (2013). For an exploration of whether “background principles” can evolve to incorporate natural capital and ecosystem services, see J.B. Ruhl, *The ‘Background Principles’ of Natural Capital and Ecosystem services - Did Lucas Open Pandora’s Box?*, 22 J. Land Use & Envtl L. 525 (2007). Professor Timothy M. Mulvaney also explores the

scope of “background principles” in *Foreground Principles*, 20 Geo. Mason L. Rev. 837 (2013). Professors Michael C. Blumm and Lucas Ritchie explore the rise in categorical defenses to takings claims resulting from the *Lucas* focus on “background principles” in *Lucas’s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 Harv. Envtl. L. Rev. 321 (2005).

6. ***Agins v. City of Tiburon***: The *Lucas* Court noted that the Supreme Court, in [\*Agins v. City of Tiburon\*, 447 U.S. 255 \(1980\)](#), held that government regulation can be a taking if it does not substantially advance legitimate state interests or if it denies an owner economically viable use of his land. Although the Supreme Court routinely cited that test in takings decisions, suggesting that government regulation that did not deny an owner economically viable use of his land could still be a taking if the regulation did not substantially advance legitimate state interests, the Court later held, in [\*Lingle v. Chevron, U.S.A.\*, 544 U.S. 528 \(2005\)](#), that the requirement that government regulation substantially advance legitimate state interests is based on the Due Process clause, and is not part of the takings analysis. That decision had little impact on wetlands taking litigation, since few challengers ever asserted that the government regulation of wetlands did not substantially advance legitimate government interests.
7. **Subsequent History**: On remand, the South Carolina Supreme Court found that there were no background principles of South Carolina law that limited Lucas’ construction of a home on his property, so that the restrictions on his development constituted a temporary taking of his property. See [\*Lucas v. South Carolina Coastal Council\*, 424 S.E.2d 424, 23 E.L.R. 20297 \(S.C. 1992\)](#). The South Carolina Supreme Court then remanded the case to the trial court to make specific findings of damages from the date of enactment of the Beachfront Management Act through the date of the court’s order. *Id.* South Carolina ultimately settled the case for \$1.5 million, buying the two lots from Lucas for \$425,000 each, and paying legal fees, costs, and interest. See [H. Jane Lehman, \*Case Closed: Settlement Ends Property Rights Lawsuit\*, Chicago Tribune, July 25, 1993](#). The State subsequently sold the lots to a private developer for \$750,000. See Royal C. Gardner, *Lawyers, Swamps, and Money* 207 (Island Press 2011). In 1996, a 4200 square foot home was built on Lot 22, and it was valued at \$2,124,999 in 2013, according to the [Charleston County tax records](#) (search for 11 Beachwood East, Isle of Palms). In 2001, a 3400 square foot home was built on Lot 24, and it was valued at \$2,700,000 in 2013. *Id.* (Search for 13 Beachwood East, Isle of Palms). Professor Oliver Houck outlines the history of the *Lucas* litigation in detail in *More Unfinished Stories: Lucas, Atlanta Coalition, and Palila/Sweet Home*, 75 U. Colo. L. Rev. 331 (2004).

#### IV. Applying *Lucas* and *Penn Central* in the Wetlands Context

While *Lucas* created a categorical rule for total deprivations of economically beneficial or productive uses of property, which the Court of Federal Claims has applied in one case involving the denial by the Corps of a Section 404 permit, see *Lost Tree Village Corp. v. United States*, No. 08-117L (Fed. Cl. 03/14/2014), most takings claims based on wetland regulation continue to be analyzed under the *Penn Central* analysis. As noted above, the analysis focuses on the extent of **economic impact** on the landowner's property caused by the government action, the interference with the landowner's **reasonable investment backed expectations**, and the **character** of the government action.

In calculating the extent of **economic impact**, courts generally compare the fair market value of the landowner's property immediately before the government action challenged as a taking to the value of the property immediately after the action. See [\*Florida Rock Industries v. United States\*, 18 F.3d 1560 \(Fed. Cir. 1994\)](#), cert denied 513 U.S. 1109 (1995); *Bowles v. United States*, 31 Fed. Cl. 37 (1994). Courts are no more willing to create bright line rules regarding the extent of economic impact that could trigger a taking in the wetlands context than in other contexts. While cases where plaintiffs have prevailed on takings claims for wetland permit denials usually involve reductions in property value of 90% or more, see [\*Loveladies Harbor, Inc. v. United States\*, 28 F.3d 1171 \(Fed. Cir. 1994\)](#) (99% reduction); *Florida Rock Industries v. United States*, 21 Cl. Ct. 161 (1990) (95% reduction) the Court of Federal Claims has found that a 73% reduction in property value could constitute a taking of property, when considered in light of the other *Penn Central* factors. See *Florida Rock Industries v. United States*, 45 Fed. Cl. 21 (1999). While landowners frequently assert that Corps permit denials require them to leave wetlands in a natural state and render their property valueless, the increase in mitigation banking, creating opportunities to reap economic benefits from restoring, enhancing, preserving or creating wetlands, may impact the analysis of the economic impact of development restrictions in more cases.

For the second *Penn Central* factor, in reviewing the extent to which government regulation interferes with a landowner's **reasonable investment-backed expectations**, courts focus on the regulatory landscape that was in place at the time that the landowner acquired the property. Although the Supreme Court has rejected a bright line rule that would prohibit



Photo 37 "Brass scales with cupped trays" by Toby Hudson - Own work. [http://commons.wikimedia.org/wiki/Category:Unbalanced\\_scales\\_of\\_justice#mediaviewer/File:Brass\\_scales\\_with\\_cupped\\_trays.png](http://commons.wikimedia.org/wiki/Category:Unbalanced_scales_of_justice#mediaviewer/File:Brass_scales_with_cupped_trays.png) [CC-BY-SA-3.0]

landowners from recovering for a taking if the regulatory scheme that allegedly triggers the taking was in place at the time the landowner acquired the property, see [Palazzolo v. Rhode Island, 533 U.S. 606 \(2001\)](#), it is more difficult for the landowner to prove that the government regulation interfered with reasonable investment backed expectations in such a case. Thus, when a landowner acquired property after the Clean Water Act Section 404 permit program was implemented and it was clear that the program applied to wetlands, it will be more difficult for the landowner to prevail on a claim that restrictions on development of the property based on the 404 program constitute a taking than it will be for a landowner who acquired property before the Section 404 program was implemented and applied to wetlands. After all, to the extent that it was clear, at the time that the landowner acquired the property, that a permit would be required to develop the property, any expectation that the property can be developed without obtaining the permit, is unreasonable.

The final factor in the *Penn Central* analysis is the **character of the government action**. As noted earlier, in focusing on this factor, courts often examine the “average reciprocity of advantage” created by the government regulatory scheme. If a landowner receives a benefit from restrictions placed on his property because other landowners are subject to similar restrictions, courts will be less likely to find that the government restriction is a taking. On the other hand, if courts feel that a landowner is being unfairly singled out and forced to shoulder a significant share of the burden to protect a broad social interest, courts will be more likely to find that the government restriction is a taking.

### Questions and Comments

1. **Compensation:** If a permit denial, a condition in a permit, or other land use restriction in a wetlands protection program “takes” a landowner’s property, the government will be required to pay compensation for the restriction. To the extent that the restriction deprives the landowner of all or almost of the property value, the government can acquire title to the property in exchange for the payment of compensation. However, if a government regulation only deprives a landowner of 70% of their property value, what should the remedy be? See *Florida Rock Industries v. United States*, 45 Fed. Cl. 21 (1999).
2. **Temporary Takings:** While landowners can recover compensation for temporary takings caused by a government restriction on the use of property which is later removed, courts have **not** found that the delay caused by the processing of a Section 404 permit application constitutes a temporary taking. See *Bay-Houston Towing Co. v. United States*, 58 Fed. Cl. 462 (2003). However, a landowner may be able to recover compensation for damages suffered between the time that the Corps denied the landowner a Section 404 permit and the time that the Corps eventually issued the permit, following a judicial challenge to the initial permit denial, see [Resource Investments, Inc. v. United States, 85 Fed. Cl. 447 \(2009\)](#), or for the damages suffered between the time that the Corps issued a cease and desist order

and the time that a court remanded the matter to the Corps after a judicial challenge. See *Creppel v. United States*, 30 Fed. Cl. 323 (1994), *aff'd* 41 F.3d 627 (Fed. Cir. 1994). To the extent that such claims are allowed, courts analyze the claims under the *Lucas* or *Penn Central* frameworks, depending on the severity of the deprivation of property use.

3. **Litigation Trends:** The government prevailed in the first wetlands-related takings lawsuit in 1970, [\*Zabel v. Tabb\*, 430 F.2d 199 \(1970\)](#), *cert. denied* 401 U.S. 910 (1971), as well as most of the takings lawsuits brought against it through the mid-1980s. See, e.g., *Deltona Corp. v. United States*, 657 F.2d 1184 (Cl. Ct. 1981), *cert. denied*, 455 U.S. 1017 (1982); *Jentgen v. United States*, 657 F.2d 1210 (Cl. Ct. 1981), *cert. denied*, 455 U.S. 1017 (1982). From the mid-1980s through the mid-1990s, courts found that Corps' wetland permit denials constituted takings in several cases, including two on the same day in 1990. See *Florida Rock Industries v. United States*, 21 Cl. Ct. 161 (1990); *Loveladies Harbor v. United States*, 21 Cl. Ct. 153 (1990). The United States fared better between 1994 and 2005, prevailing in every wetlands taking lawsuit except one. See Robert Meltz, *Wetlands and Regulatory Takings*, in *Wetlands Law and Policy: Understanding Section 404* 429 (American Bar Association, Section on Environment, Energy and Resources 2005). However, the government did not fare as well in the recent litigation surrounding the Lost Tree Village development in Florida, discussed after the next note.
4. **Parcel as a Whole:** One issue that is significant for wetlands takings cases and was raised in a footnote, but not resolved, in *Lucas* concerns the extent of the property that courts examine when determining whether government regulation constitutes a total deprivation of economically beneficial or productive use, for *Lucas*, and that courts examine when determining the economic impact of government regulation for *Penn Central*. If a person owns 100 acres of land that includes 20 acres of wetlands, and the government regulatory scheme limits the development of the 20 acres of wetlands, but does not limit the development of the other 80 acres, should the court focus on the economic impact of the government regulation on the 20 acres or the 80 acres? The Supreme Court has repeatedly held that courts should focus their analysis on the "parcel as a whole", see [\*Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency\*, 535 U.S. 302 \(2002\)](#); [\*Penn Central Transportation Company v. New York City\*, 438 U.S. 104 \(1978\)](#); but the Court has not provided concrete guidance on how to determine what constitutes the "parcel as a whole." In footnote 7 in *Lucas*, the Court did not establish a bright line rule but noted, instead, that "[t]he answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property- *i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value."

Although the Supreme Court focused on state property law as the basis for determining the extent of property to be evaluated in a takings case, when a landowner contemporaneously acquires or owns several lots in the vicinity of a lot containing wetlands, the Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit frequently focus on the expectations of the landowner and the manner in which the landowner treated the property for development purposes in determining whether the parcel to be evaluated is limited to the lot containing the wetlands or whether the parcel includes other lots in the vicinity that the landowner owns or acquired contemporaneously with the lot containing the wetlands. See, e.g., *Palm Beach Isles Associates v. United States*, 208 F.3d 1374 (Fed. Cir. 2000); *Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999).

The following case demonstrates the approach taken by the Federal Circuit.

**Lost Tree Village Corporation v. United States**

43 E.L.R. 20012 (Fed. Cir. 2013)

**RADER, Chief Judge**

**Resources for the Case**

[Unedited Opinion](#) (includes a map) (Court's website)

[Google Map of all the cases in the coursebook](#)

[Oral Argument](#) - from Federal Circuit website

The United States Court of Federal Claims determined that the Army Corps of Engineers did not effect a regulatory taking compensable under the Fifth Amendment when it denied Lost Tree Village Corporation's application for a permit to fill wetlands on its 4.99 acre plat (Plat 57). In reaching this conclusion, the Court of Federal Claims found Lost Tree's parcel as a whole includes Plat 57, a neighboring upland plat (Plat 55), and scattered wetlands in the vicinity owned by Lost Tree at the time the permit was denied. Because the Court of Federal Claims erred in its determination of the relevant parcel, this court reverses and remands for further proceedings.

I

In 1968, Lost Tree Village Corporation (Lost Tree) entered an Option Agreement to purchase approximately 2,750 acres of property on Florida's mid-Atlantic coast, near the City of Vero Beach. The property covered by the Option Agreement encompasses a barrier island on the Atlantic Ocean, which is bisected by the A-1-A Highway, and stretches westward to interior land and islands on the Indian River. Lost Tree purchased substantially all of the land covered by the Option Agreement in a series of transactions during the period 1969-1974. In 1974, Lost Tree purchased the 4.99 acres now known as Plat 57 as part of a transaction in which it acquired the entire peninsula on which Plat 57 is located (known as the Island of John's Island), Gem Island, and other parcels in and along the

Indian River.

Beginning in 1969 and continuing through the mid-1990s, Lost Tree developed approximately 1,300 acres of the property purchased under the 1968 Option Agreement into the upscale gated residential community of John's Island. The John's Island community includes most of Lost Tree's holdings on the barrier island, Gem Island, and the Island of John's Island. The John's Island community also includes some property that was not covered by the 1968 Option Agreement and was never owned by Lost Tree. Lost Tree built the infrastructure for the community, including utilities, sewage systems, and the majority of the roads and bridges within the community. The community includes two golf courses, a beach club, a private hotel, condominiums, and single family homes. \* \* \*

In 1980, Lost Tree submitted to the Army Corps of Engineers (Corps) an application for a permit under § 404 of the Clean Water Act \* \* \* to make numerous infrastructure improvements including construction of causeways connecting the barrier island, Gem Island, and the Island of John's Island. The application also sought approval to dredge canals and fill some wetland areas to create developable lots. Lost Tree's application was accompanied by plans and drawings for its proposed development of the Island of John's Island and Gem Island (the 1980 Development Plan). A drawing in the 1980 Development Plan depicts a substantial portion of Plat 57, as well as other areas, shaded in green and labeled "wildlife preserve." \* \* \*

The Corps did not act on Lost Tree's 1980 permit application as submitted because the State of Florida required numerous changes to Lost Tree's plans. Lost Tree submitted a revised proposal to the Corps in 1982. The proposal stated that "all originally proposed project features are being deleted from this application except the bridge from John[']s [Island] to Gem Island and its approaches." \* \* \* The Corps approved a modified version of the 1982 application, and development of the Island of John's Island and Gem Island proceeded throughout the 1980s and 1990s "in a manner that diverged in significant ways from the 1980 Application." \* \* \* During development, Lost Tree sought and received two additional § 404 permits for infrastructure improvements and construction of canals, and reserved various parcels as conservation easements by deed restrictions recorded in favor of the local, state, or federal government. Plat 57 was not among the land dedicated for conservation.

Plat 57 lies on Stingaree Point, a small peninsula located on the southwestern portion of the Island of John's Island. Lost Tree developed Stingaree Point in 1985-1986. At that time, the company built Stingaree Point Road, installed water and sewer lines, and recorded Plat 40, which is comprised of six lots to the south and west of the road. Also in 1985, Lost Tree "stubbed out" water and sewer lines to Plat 40 and to unplatted land on the eastern end of the Point that was later recorded as Plat 55. Lost Tree sold the six lots on Plat 40 within a few years after the plat was recorded. Homes have been built on those properties.



To east of Plat 40, on the north side of Stingaree Point Road, is the 4.99 acre tract eventually recorded as Plat 57. Plat 57 consists of 1.41 acres of submerged lands and 3.58 acres of wetlands with some upland mounds installed by Florida's "Mosquito Control" authority. To the east of Plat 57 is a mosquito control impoundment, a narrow, 323 foot long shoulder along the north side of the road, and then Plat 55. Although Lost Tree neither "stubbed out" nor recorded Plat 57 when it developed the rest of Stingaree Point, an April 1986 appraisal stated that "Stingaree Point development is substantially completed, with the exception of the entrance area, landscaping, and a final layer of asphalt on the road."  
\* \* \*

As the trial court found, Plat 57 was "ignored entirely" during Lost Tree's development of Stingaree Point and the rest of John's Island. \* \* \* In 1994, when "most knowledgeable people considered development of the community of John's Island to have been completed, the property constituting Plat 57 had not been platted, utilities had not been extended to it, nor had it been dedicated to any use such as mitigation for a project on other plats." \* \* \*

Lost Tree did not consider Plat 57 for development until approximately 2002, when the company learned it would obtain "mitigation credits" as a result of improvements a neighboring landowner had agreed to make as part of a development project. Lost Tree identified Plat 57 as a property that could be developed profitably to exploit the mitigation credits. In August 2002, Lost Tree filed an application with the Town of Indian River Shores requesting approval for a preliminary plat and permission to fill 2.13 acres of wetland on the property. The company then filed a corresponding application for a § 404 wetlands fill permit from the Corps. Lost Tree obtained all state and local approvals to develop Plat 57 into a site for one residential home. The Corps, however, denied Lost Tree's § 404 permit application in August 2004, stating that less environmentally damaging alternatives were available, and that Lost Tree "has had very reasonable use of its land at John's Island."  
\* \* \*

## II

The Court of Federal Claims held a seven-day trial, after which it denied Lost Tree's takings claim. The trial court rejected the government's argument that the entire John's Island community is the relevant parcel for the takings analysis, finding Lost Tree's development of Plat 57 was "physically and temporally remote from" its development of the rest of the community. \* \* \* The court also rejected Lost Tree's argument that the relevant parcel was Plat 57 alone. Instead, the court determined that the relevant parcel is "Plat 57 and Plat 55, plus those scattered wetlands still owned by Lost Tree within the community of John's Island." \* \* \* The court found that, while Plats 55 and 57 are "distinct legal parcels, they are undoubtedly contiguous." \* \* \* Further, it found Lost Tree has comparable usage objectives for the two plats, because it hopes to sell for profit the lots on each plat.

Based on its relevant parcel determination, the trial court found the Corps' denial of the § 404 permit application for Plat 57 "diminished the value of Lost Tree's property by approximately 58.4%." \* \* \* After analyzing the factors set forth in *Penn Central Transportation Co. v. City of New York* \* \* \* , the court found the diminution in value insufficient support a takings claim. Lost Tree appeals, and this court has jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

### III

\* \* \*

Lost Tree asserts the denial of a § 404 permit to fill wetlands on Plat 57 by the Corps effectively deprived Lost Tree of its property such that it is entitled to just compensation under the Fifth Amendment. While the Government's authority to "prevent a property owner from filling or otherwise injuring or destroying vital wetlands" is unquestioned, the issue is whether the denial of a fill permit for a particular project imposes a disproportionate loss on the affected landowner. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1175 (Fed. Cir. 1994) \* \* \*

Regulations requiring land to be left substantially in its natural state – such as when a wetlands fill permit is denied – may sometimes "leave the owner of land without economically beneficial or productive options for its use." *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992). In the "relatively rare situations where the government has deprived a landowner of all economically beneficial uses," the regulatory action is recognized as a "categorical taking" that must be compensated. *Id.*; see *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1564-65 (Fed. Cir. 1994). \* \* \*

Most regulatory takings cases, however, are analyzed under the framework set out in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). \* \* \*

In many cases, as here, the definition of the relevant parcel of land is a crucial antecedent that determines the extent of the economic impact wrought by the regulation. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 496 (1987) ("Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'") \* \* \* ; *Palm Beach Isles*, 208 F.3d at 1380 (discussing the "denominator problem"). Definition of the relevant parcel affects not only whether a particular regulation is a categorical taking under *Lucas*, but also affects the *Penn Central* inquiry into the economic impact of the regulation on the claimant and on investment-backed expectations. The relevant parcel determination is a question of law based on underlying facts. *Palm Beach Isles*, 208 F.3d at 1380.

The Supreme Court has not settled the question of how to determine the relevant parcel in regulatory takings cases, but it has provided some helpful guideposts. See *Lucas*, 505 U.S. at 1016 n.7. First, the property interest taken is not defined in terms of the regulation being challenged; the takings analysis must focus on "the parcel as a whole." \* \* \* Second, the "parcel as a whole" does not extend to all of a landowner's disparate holdings in the vicinity of the regulated property. *Lucas*, 505 U.S. 1003, 1017 n.7, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (characterizing as "extreme" and "unsupportable" the state court's analysis in *Penn Central Transportation Co. v. New York City*, 42 N.Y.2d 324, 333-34, (N.Y. 1977) *aff'd*, 438 U.S. 104 (1978), which examined the diminution in a particular parcel's value in light of the total value of the takings claimant's other holdings in the vicinity).

This court has taken a "flexible approach, designed to account for factual nuances," in determining the relevant parcel where the landowner holds (or has previously held) other property in the vicinity. *Loveladies*, 28 F.3d at 1181. In this inquiry, the "critical issue is 'the economic expectations of the claimant with regard to the property.'" *Norman v. United States*, 429 F.3d 1081, 1091 (Fed. Cir. 2005) (quoting *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir.1999)). When a "developer treats several legally distinct parcels as a single economic unit, together they may constitute the relevant parcel." *Forest Props.*, 177 F.3d at 1365 (holding relevant parcel included 53 upland acres and 9 acres of lake bottom where tracts were acquired at different times but "economic reality" was that owner treated the property as single integrated project).

Conversely, even when contiguous land is purchased in a single transaction, the relevant parcel may be a subset of the original purchase where the owner develops distinct parcels at different times and treats the parcels as distinct economic units. *Palm Beach Isles*, 208 F.3d at 1381 (holding relevant parcel consisted of 50.7 acre wetland portion of original 311.7 acre purchase where landowner "never planned to develop the parcels as a single unit," and sold 261 acres of upland, oceanfront property prior to enactment of relevant regulatory scheme); *Loveladies*, 28 F.3d at 1181 (holding relevant parcel consisted of 12.5 acres from original 250 acre purchase where landowner developed and sold 199 acres before regulatory scheme was enacted and deeded remaining 38.5 acres to state in exchange for development permits).

Here, Lost Tree did not treat Plat 57 as part of the same economic unit as other land it developed into the John's Island community. The trial court correctly found that Lost Tree did not include Plat 57 in its formal or informal development plans for the community. \* \* \* The only proposal that ever addressed Plat 57 was the unapproved 1980 Permit Application. While the 1980 application proposed dedicating Plat 57 as a wildlife preserve to mitigate other development, Lost Tree withdrew that application. Thus, when the Corps eventually granted Lost Tree's permit application, Plat 57 had no designated use.

The government argues Plat 57 was informally part of the John's Island development because Lost Tree intentionally included undeveloped land within the perimeter of its gated

community. Lost Tree advertised such "open spaces" as part of the unique environment offered by John's Island. However, Lost Tree expressly planned open spaces in its development of the community, through the use of large lots for single family homes, and inclusion of golf courses and dedicated conservation wetlands. Lost Tree's failure to plan for Plat 57 even as open space supports the trial court's conclusion that the parcel was "ignored"--rather than intentionally left undeveloped--when the company carried out the John's Island project. \* \* \*

Lost Tree's actual course of development further demonstrates that it did not treat Plat 57 as part of the John's Island community. Lost Tree did not seek a fill permit or run utility service to the area that became Plat 57 when it developed the rest of Stingaree Point. Plat 55, by contrast, was brought to grade and water and sewer lines were stubbed out to that area. Although the company did not immediately plat the land that became Plat 55, it developed it in the mid-1980s in preparation for eventual sale as part of the John's Island community. Plat 57, by contrast, was absent from Lost Tree's development plans until 2002--at least seven years after the development of the John's Island community was considered complete. \* \* \*

Indeed, the record shows that after 1982, Lost Tree was essentially unaware of its ownership of Plat 57 until the company prepared an inventory of its residual properties in 1995. At that time, Lost Tree had already transitioned its business from real estate development to focus on investment in commercial properties. The company also was working to divest itself of remaining real estate holdings in the vicinity of John's Island. When the Corps denied Lost Tree's § 404 permit application in 2002, the company held only the "West Acreage," which lies well outside the John's Island community, Plat 55, Plat 57, and scattered wetlands within John's Island. The objective evidence of Lost Tree's actions demonstrates that the company considered the John's Island community completed long before it proposed to fill wetlands on Plat 57. The company's long hiatus from development efforts reinforces the conclusion that Lost Tree did not consider Plat 57 part of the same economic unit as the John's Island community.

In short, this court sees no error in the trial court's factual findings that "Lost Tree's belated decision to develop Plat 57 was not part of its planned actual or projected use of the property constituting the community of John's Island." \* \* \* This finding, however, conflicts with the court's conclusion that the relevant parcel comprises not just Plat 57, but also Plat 55 and "scattered wetlands still owned by Lost Tree within the community of John's Island." \* \* \* Unlike Plat 57, Lost Tree treated Plat 55 as part of the John's Island community, developing it for eventual sale as three single family home sites at the same time that it developed Plat 40 on Stingaree Point.

The Court of Federal Claims erred by aggregating Plat 57, Plat 55, and the scattered wetlands as the relevant parcel. The only links between the two plats identified by the trial court are: 1) they are connected by the 323 foot strip of land owned by Lost Tree and

therefore "undoubtedly contiguous," and 2) both currently are held with the "usage objective[ ] . . . to sell for profit the lots" on each plat. \* \* \* Similarly, the scattered wetlands are only linked to Plat 57 by their geographic location within the gated community of John's Island. Here, the mere fact that the properties are commonly owned and located in the same vicinity is an insufficient basis on which to find they constitute a single parcel for purposes of the takings analysis. \* \* \* *Loveladies*, 28 F.3d at 1180 (holding relevant parcel excludes 6.4 acres of previously-developed uplands purchased in same transaction as regulated parcel and owned by claimant when § 404 permit was denied).

After a careful review of the entire record, this court determines that the relevant parcel is Plat 57 alone. The trial court's factual findings support the conclusion that Lost Tree had distinct economic expectations for each of Plat 57, Plat 55, and its scattered wetland holdings in the vicinity. Because the Court of Federal Claims erred in its determination of the relevant parcel, this court reverses the judgment and remands for further proceedings. On remand, the court first should determine the loss in economic value to Plat 57 suffered by Lost Tree as a result of the Corps' denial of the § 404 permit, and then apply the appropriate framework to determine whether a compensable taking occurred. In determining the loss in value to Plat 57, the court may revisit the property values it adopted in the course of determining the impact of the Plat 57 permit denial on Lost Tree under its definition of the relevant parcel. \* \* \*

#### IV

For the reasons set forth above, the judgment of the Court of Federal Claims is reversed and remanded for further proceedings.

#### Questions and Comments

1. **The Remand:** On remand, the Court of Federal Claims concluded that the value of Plat 57 in light of the Corps' permit denial was \$27,500, which the court characterized as "a nominal amount that does not reflect any economic use." See *Lost Tree Village Corp. v. United States*, No. 08-117L (Fed. Cl. 03/14/2014). Thus, the court held that the Corps' action was a categorical taking under *Lucas*. Despite reaching that conclusion, the court also analyzed the Corps' action under the *Penn Central* analysis. For purposes of that analysis, the court suggested that the 99.4% reduction in property value that resulted from the Corps' permit denial was a factor that weighed in favor of finding a taking. *Id.* The court also suggested that the character of the government action weighed in favor of finding a taking, because the court was persuaded that the landowner was singled out for adverse treatment in the case, and that the Corps would have issued a permit for the proposed development if a different developer had applied for the permit. *Id.*

2. **Strategic Behavior:** Justice Stevens, in a dissenting opinion in *Lucas*, predicted that the Court's decision in that case could be manipulated in light of the lack of a clear definition of the "parcel as a whole." 505 U.S. at 1065. Stevens predicted, "developers and investors may market specialized estates to take advantage of the Court's new rule. The smaller the estate, the more likely that a regulatory change will effect a total taking. Thus, an investor may, for example, purchase the right to build a multifamily home on a specific lot \* \* \*"

### Hypothetical

Toby Mercer bought 100 acres of land in Monroe County, Georgia in 1970 from Lucy Tift for \$100,000. Lucy sold the land, the Tift's family farm, when her father, Herschel, died. In 1985, Mercer subdivided the property into 75 lots, ranging in size from ½ acre to 2 acres, and a 10 acre lot, which he planned to set aside as a nature preserve for the subdivision. Between 1985 and 1998, Mercer developed or sold all of the lots, other than the 10 acre lot, for \$1.5 million. In 2008, he decided to develop the remaining 10 acre lot. At that time, he subdivided the lot into 10 lots, ranging in size from ½ acre to an acre, and a 2 acre lot. He sold the 10 lots for \$200,000 and sought a Clean Water Act Section 404 permit from the Corps of Engineers to fill the entire 2 acres of wetlands on the remaining lot, in order to build a house on the property.

During the public hearings on Mercer's proposal, Maggie Green vigorously protested the permit because she owned an organic farm on the property adjacent to Mercer's property and Mercer's proposal to fill the wetlands on his property would greatly increase flooding on her property and destroy her farm. Although Mercer and the Corps discussed other development options that would impact fewer acres of wetlands, the Corps ultimately told Mercer that they would not authorize him to fill any of the wetlands on his property, and they denied his permit application.

Mercer is upset because the property can now only be used as a nature preserve. A realtor he retained has indicated that the property is worth about \$8,000, but would be worth about \$130,000, if he could build a house on the property. Mercer files a lawsuit against the Corps of Engineers in the U.S. Court of Federal Claims, alleging that the denial of his permit application constitutes a taking of his property. Should the court award Mercer compensation for a taking of his property?

## V. Mitigation, Permit Conditions and Exactions

Although most takings challenges in the wetlands context involve permit denials, conditions included in a permit, such as mitigation requirements, can also be challenged as takings based on a line of Supreme Court decisions that prohibit "exactions" takings. In [\*Nollan v. California Coastal Commission\*, 483 U.S. 825, 836-37 \(1987\)](#), when a landowner

challenged the California Coastal Commission's decision to require the landowner to provide an easement for public beach access as a condition of approving a permit to allow construction of a house on the beach, the Supreme Court held that there must be an "essential nexus" between a legitimate state interest and a condition imposed in a permit or the permit condition will constitute a taking. The Court began its analysis by indicating that if California had simply required the Nollans to provide an easement for public access outside of the permitting context, it would clearly constitute a taking of property. *Id.* at 831. At the same time, the Court recognized that the state could deny the Nollan's development permit without facing a constitutional challenge if the permit denial substantially advanced a legitimate state interest. *Id.* at 835-836. Consequently, the Court held that the state could include conditions in the permit that serve the same legitimate purpose without violating the Constitution. *Id.* at 836. The Court's decision seemed to be based, in part, on the Court's holding, in *Agins v. City of Tiburon*, that a regulation can be a taking if it does not substantially advance a legitimate state interest.

A few years later, the Supreme Court returned to the exactions issue in [\*Dolan v. City of Tigard\*, 512 U.S. 374 \(1994\)](#). In that case, a landowner challenged the decision of the city planning commission, when approving the expansion of her store and paving of the parking lot for the store, to condition the approval on dedication of land for a greenway and a bike path. *Id.* The Court reiterated the "essential nexus" requirement of *Nollan*, but added a requirement that the permit issuer must make an individualized determination that the permit condition is "related both in nature and extent to the impact of the proposed development." *Id.* at 391. The Court required that the condition must be "roughly proportional" to the impact of the proposed development. *Id.* Rather than simply citing *Agins* as authority for the new takings limits, the *Dolan* Court based its holding on the "unconstitutional conditions" doctrine, which provides that "the government may not require a person to give up a constitutional right - here the right to receive just compensation when property is taken for a public use - in exchange for a discretionary benefit where the benefit sought has little or no relationship to the property." *Id.* at 385.

In light of *Nollan* and *Dolan*, when a permit condition is challenged as an unconstitutional taking, the government has the burden of demonstrating that there is an essential nexus between the permit condition and a legitimate state objective and that the condition is roughly proportional to the impact of the proposed development. Although the Supreme Court held, in [\*Lingle v. Chevron\*, 544 U.S. 528 \(2005\)](#), that the "substantially advances a legitimate state interest" requirement in *Agins* was based on the process clause, rather than the takings clause, the *Lingle* Court held that its holding did not require it to disturb the holdings in *Nollan* and *Dolan*. *Id.*

In the wetlands context, the government should normally be able to meet the requirements of *Nollan* and *Dolan* when including conditions in Section 404 permits. When the Corps or EPA include conditions in permits to minimize harm to wetlands or to require compensatory mitigation for such harm, there is an "essential nexus" between those conditions and the

legitimate government interest in protecting water quality and the environment. With mitigation conditions especially, the government makes an individualized determination of the amount and type of mitigation that are necessary to compensate for the values and functions of the wetlands that will be lost due to the development activity authorized by the permit. In most cases, therefore, this individualized analysis should meet the “rough proportionality” requirement of *Dolan*.

### Questions and Comments

- 1. Mitigation Ratios:** As discussed in Chapter 7, the ratio of mitigation acreage that the government will require compared to the acreage of wetlands harmed by an activity authorized by a Section 404 permit will vary depending on whether the mitigation involves creation, restoration, enhancement, or preservation of wetlands, and depending on the location and type of wetlands being harmed and being protected. Although the mitigation ratios will vary, the goal of the government in fashioning the mitigation requirements is to replace the values and functions of the wetlands that are being harmed. As long as the government can demonstrate those connections in litigation, the mitigation requirements should meet the “essential nexus” and “rough proportionality” tests.
- 2. Mitigation Banking and In Lieu Fee Mitigation:** Mitigation banking may involve protection of different types of wetlands than the wetlands that are harmed by development authorized by a Section 404 permit and will usually involve protection of wetlands that are not located at the site of the development project. Is it harder to defend mitigation banking conditions in a wetland permit under the *Nollan* and *Dolan* tests than it would be to defend a condition that required on-site, in-kind mitigation? What if the mitigation bank was authorized to issue mitigation credits in watersheds other than the watershed where the permitted activity occurred? Are there concerns raised by in lieu fee mitigation permit conditions that are not raised by mitigation banking or on-site, in-kind mitigation?
- 3. Burden of Proof:** When the Corps of Engineers denies a Section 404 permit or EPA vetoes a Section 404 permit, the landowner, in a takings action, has the burden of demonstrating that the government’s action has “gone too far” under the *Penn Central* analysis. Note, though, that when a landowner challenges the conditions included in a permit issued by the government, the government has the burden of demonstrating that the conditions meet the “essential nexus” and “rough proportionality” requirements.
- 4.** Professor Timothy M. Mulvaney explores the constitutional constraints on the ability of local governments to attach conditions to land use permits to address future cumulative impacts of the proposed development in *Exactions for the Future*, 64



Baylor L. Rev. 511 (2012).

5. **Scope of *Nollan* and *Dolan*:** The Supreme Court’s rulings in *Nollan* and *Dolan* both involved cases where a government entity required a landowner to provide public access to their property as a condition for approval of a permit or development proposal. The following case examines whether *Nollan* and *Dolan* apply when the government denies a permit or approval because the landowner won’t agree to a permit condition and whether they apply to conditions that do not involve requiring public access to property.

### **Koontz v. Saint John’s River Water Management District**

133 S. Ct. 2586 (2013)

**Justice Alito** delivered the opinion of the Court.

#### **Resources for the Case**

[Unedited opinion](#) (From Justia)  
[Google Map of all the cases in the coursebook](#)  
[Oral argument audio](#) - from the Oyez Project  
[Lecture on the case by Tim Mulvaney](#) (Texas A&M Law )  
[Orange County Property Records for property](#)  
[Pacific Legal Foundation website re: Koontz](#)

Our decisions in *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), provide important protection against the misuse of the power of land-use regulation. In those cases, we held that a unit of government may not condition the approval of a land-use permit on the owner’s relinquishment of a portion of his property unless there is a “nexus” and “rough proportionality” between the government’s demand and the effects of the proposed land use. In this case, the St. Johns River Water Management District (District) believes that it circumvented *Nollan* and *Dolan* because of the way in which it structured its handling of a permit application submitted by Coy Koontz, Sr., whose estate is represented in this Court by Coy Koontz, Jr. \* \* \* The District did not approve his application on the condition that he surrender an interest in his land. Instead, the District, after suggesting that he could obtain approval by signing over such an interest, denied his application because he refused to yield. The Florida Supreme Court blessed this maneuver and thus effectively interred those important decisions. Because we conclude that *Nollan* and *Dolan* cannot be evaded in this way, the Florida Supreme Court’s decision must be reversed.

I

A

In 1972, petitioner purchased an undeveloped 14.9-acre tract of land on the south side of Florida State Road 50, a divided four-lane highway east of Orlando. The property is located less than 1,000 feet from that road's intersection with Florida State Road 408, a tolled expressway that is one of Orlando's major thoroughfares.

A drainage ditch runs along the property's western edge, and high-voltage power lines bisect it into northern and southern sections. The combined effect of the ditch, a 100 foot wide area kept clear for the power lines, the highways, and other construction on nearby parcels is to isolate the northern section of petitioner's property from any other undeveloped land. Although largely classified as wetlands by the State, the northern section drains well; the most significant standing water forms in ruts in an unpaved road used to access the power lines. The natural topography of the property's southern section is somewhat more diverse, with a small creek, forested uplands, and wetlands that sometimes have water as much as a foot deep. A wildlife survey found evidence of animals that often frequent developed areas: raccoons, rabbits, several species of bird, and a turtle. The record also indicates that the land may be a suitable habitat for opossums.

The same year that petitioner purchased his property, Florida enacted the Water Resources Act, which divided the State into five water management districts and authorized each district to regulate "construction that connects to, draws water from, drains water into, or is placed in or across the waters in the state." \* \* \* Under the Act, a landowner wishing to undertake such construction must obtain from the relevant district a Management and Storage of Surface Water (MSSW) permit, which may impose "such reasonable conditions" on the permit as are "necessary to assure" that construction will "not be harmful to the water resources of the district." \* \* \*

In 1984, in an effort to protect the State's rapidly diminishing wetlands, the Florida Legislature passed the Warren S. Henderson Wetlands Protection Act, which made it illegal for anyone to "dredge or fill in, on, or over surface waters" without a Wetlands Resource Management (WRM) permit. \* \* \* Under the Henderson Act, permit applicants are required to provide "reasonable assurance" that proposed construction on wetlands is "not contrary to the public interest," as defined by an enumerated list of criteria. \* \* \* Consistent with the Henderson Act, the St. Johns River Water Management District, the district with jurisdiction over petitioner's land, requires that permit applicants wishing to build on wetlands offset the resulting environmental damage by creating, enhancing, or preserving wetlands elsewhere.

Petitioner decided to develop the 3.7-acre northern section of his property, and in 1994 he applied to the District for MSSW and WRM permits. Under his proposal, petitioner would

have raised the elevation of the northernmost section of his land to make it suitable for a building, graded the land from the southern edge of the building site down to the elevation of the high-voltage electrical lines, and installed a dry-bed pond for retaining and gradually releasing stormwater runoff from the building and its parking lot. To mitigate the environmental effects of his proposal, petitioner offered to foreclose any possible future development of the approximately 11 acre southern section of his land by deeding to the District a conservation easement on that portion of his property.

The District considered the 11 acre conservation easement to be inadequate, and it informed petitioner that it would approve construction only if he agreed to one of two concessions. First, the District proposed that petitioner reduce the size of his development to 1 acre and deed to the District a conservation easement on the remaining 13.9 acres. To reduce the development area, the District suggested that petitioner could eliminate the dry-bed pond from his proposal and instead install a more costly subsurface stormwater management system beneath the building site. The District also suggested that petitioner install retaining walls rather than gradually sloping the land from the building site down to the elevation of the rest of his property to the south.

In the alternative, the District told petitioner that he could proceed with the development as proposed, building on 3.7 acres and deeding a conservation easement to the government on the remainder of the property, if he also agreed to hire contractors to make improvements to District-owned land several miles away. Specifically, petitioner could pay to replace culverts on one parcel or fill in ditches on another. Either of those projects would have enhanced approximately 50 acres of District-owned wetlands. When the District asks permit applicants to fund offsite mitigation work, its policy is never to require any particular offsite project, and it did not do so here. Instead, the District said that it “would also favorably consider” alternatives to its suggested offsite mitigation projects if petitioner proposed something “equivalent.” \* \* \*

Believing the District’s demands for mitigation to be excessive in light of the environmental effects that his building proposal would have caused, petitioner filed suit in state court. Among other claims, he argued that he was entitled to relief under Fla. Stat. §373.617(2), which allows owners to recover “monetary damages” if a state agency’s action is “an unreasonable exercise of the state’s police power constituting a taking without just compensation.” \* \* \*

II

A

We have said in a variety of contexts that “the government may not deny a benefit to a person because he exercises a constitutional right.” \* \* \*

*Nollan* and *Dolan* “involve a special application” of this doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005); *Dolan*, 512 U.S., at 385 (invoking “the well-settled doctrine of ‘unconstitutional conditions’”). Our decisions in those cases reflect two realities of the permitting process. The first is that land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner’s deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. \* \* \* So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government’s demand, no matter how unreasonable. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.

A second reality of the permitting process is that many proposed land uses threaten to impose costs on the public that dedications of property can offset. Where a building proposal would substantially increase traffic congestion, for example, officials might condition permit approval on the owner’s agreement to deed over the land needed to widen a public road. Respondent argues that a similar rationale justifies the exaction at issue here: petitioner’s proposed construction project, it submits, would destroy wetlands on his property, and in order to compensate for this loss, respondent demands that he enhance wetlands elsewhere. Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack. \* \* \*

*Nollan* and *Dolan* accommodate both realities by allowing the government to condition approval of a permit on the dedication of property to the public so long as there is a “nexus” and “rough proportionality” between the property that the government demands and the social costs of the applicant’s proposal. \* \* \* Our precedents thus enable permitting authorities to insist that applicants bear the full costs of their proposals while still forbidding the government from engaging in “out-and-out . . . extortion” that would thwart the Fifth Amendment right to just compensation. \* \* \* Under *Nollan* and *Dolan* the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.

## B

The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so. We have often

concluded that denials of governmental benefits were impermissible under the unconstitutional conditions doctrine. \* \* \* In so holding, we have recognized that regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.

A contrary rule would be especially untenable in this case because it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval. Under the Florida Supreme Court's approach, a government order stating that a permit is "approved if" the owner turns over property would be subject to *Nollan* and *Dolan*, but an identical order that uses the words "denied until" would not. Our unconstitutional conditions cases have long refused to attach significance to the distinction between conditions precedent and conditions subsequent. See *Frost & Frost Trucking Co. v. Railroad Comm'n of Cal.*, 271 U.S. 583 –593 (1926) (invalidating regulation that required the petitioner to give up a constitutional right "as a condition precedent to the enjoyment of a privilege"); *Southern Pacific Co. v. Denton*, 146 U.S. 202, 207 (1892) (invalidating statute "requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution"). \* \* \* To do so here would effectively render *Nollan* and *Dolan* a dead letter.

The Florida Supreme Court puzzled over how the government's demand for property can violate the Takings Clause even though " 'no property of any kind was ever taken,' " \* \* \* but the unconstitutional conditions doctrine provides a ready answer. Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.

Nor does it make a difference, as respondent suggests, that the government might have been able to deny petitioner's application outright without giving him the option of securing a permit by agreeing to spend money to improve public lands. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Virtually all of our unconstitutional conditions cases involve a gratuitous governmental benefit of some kind. \* \* \* Yet we have repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights. E.g., *United States v. American Library Assn., Inc.*, 539 U.S. 194, 210 (2003) ("[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit" (emphasis added and internal quotation marks omitted)); *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952) (explaining in unconstitutional conditions case that to focus on "the facile generalization that there is no

constitutionally protected right to public employment is to obscure the issue”). Even if respondent would have been entirely within its rights in denying the permit for some other reason, that greater authority does not imply a lesser power to condition permit approval on petitioner’s forfeiture of his constitutional rights. See *Nollan*, 483 U.S., at 836–837 (explaining that “[t]he evident constitutional propriety” of prohibiting a land use “disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition”).

That is not to say, however, that there is no relevant difference between a consummated taking and the denial of a permit based on an unconstitutionally extortionate demand. Where the permit is denied and the condition is never imposed, nothing has been taken. While the unconstitutional conditions doctrine recognizes that this burdens a constitutional right, the Fifth Amendment mandates a particular remedy—just compensation—only for takings. In cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law but of the cause of action—whether state or federal—on which the landowner relies. Because petitioner brought his claim pursuant to a state law cause of action, the Court has no occasion to discuss what remedies might be available for a *Nollan/Dolan* unconstitutional conditions violation either here or in other cases. \* \* \*

We hold that the government’s demand for property from a land use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit \* \* \*. The Court expresses no view on the merits of petitioner’s claim that respondent’s actions here failed to comply with the principles set forth in this opinion and those two cases. The Florida Supreme Court’s judgment is reversed, and this case is remanded for further proceedings not inconsistent with this opinion.

### Questions and Comments

- 1. Burden of Proof:** In light of this decision, when the government denies a permit because the applicant refuses to agree to a condition proposed for the permit, in a takings challenge, the government will have the burden of proving that the rejected condition meets the “essential nexus” and “rough proportionality” tests. As noted above, if the landowner were challenging the permit denial as a taking because of the impact of the denial on the landowner’s use of property, the landowner would have the burden of demonstrating that the denial constituted a taking under the *Penn Central* analysis. Did the *Koontz* Court determine that the government demonstrated that either of the mitigation proposals it requested met the “essential nexus” and “rough proportionality” tests?
- 2. Compensation:** When a regulation “goes too far”, a property owner is entitled to just compensation. If the government denies a permit application because the applicant won’t agree to a condition that violates the *Nollan* or *Dolan* tests, but the

permit denial doesn't "go too far" under the *Penn Central* analysis, what remedy is available to the landowner? Has anything been taken?

3. **Which Conditions are Examined?** The Section 404 permit application process frequently will involve negotiations regarding mitigation requirements or other permit conditions. The Corps may propose some conditions which it later decides to take off the table. Does *Koontz* suggest that a court should strike down a permit denial whenever *any* of the conditions proposed in negotiations violate the *Nollan* or *Dolan* tests, or do courts only look at the last offer that was on the table before the government denied a permit? How might the *Koontz* decision and the manner in which courts answer the question above affect the permit negotiation process? If the government can deny a permit outright without "going too far" to limit property usage under *Penn Central*, should it invite potential litigation by requesting permit conditions in the negotiation process that might be challenged under *Nollan* and *Dolan*?
4. **Money Payments:** In a portion of the opinion not reproduced above, the *Koontz* Court also held that *Nollan* and *Dolan* applied when the government asks a landowner, through a permit condition, to spend money instead of providing an easement over property. The Court wrote: "if we accept this argument it would be very easy for land use permitting officials to evade the limitations of *Nollan* and *Dolan*. Because the government need only provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standards, a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value. Such so called 'in lieu of' fees are utterly commonplace \* \* \* and they are functionally equivalent to other types of land use exactions. For that reason and those that follow, we reject respondent's argument and hold that so-called 'monetary exactions' must satisfy the nexus and rough proportionality requirements \* \* \*" In light of the Court's holding, it seems fairly clear that conditions included in Section 404 permits that require mitigation through the use of in lieu fee mitigation programs would be analyzed under the *Nollan* and *Dolan* tests.
5. Professors J.B. Ruhl and John Echeverria discussed the impact of *Koontz* on environmental law in a presentation at Vermont Law School entitled *Koontz: A Big Yawn for Environmental Law?* Video of their presentation is available on [YouTube](#).

## VI. Other Takings-Related Requirements

Because of the financial liability associated with takings, the Corps, EPA and wetland regulators routinely consider the likelihood that their actions will be challenged as takings when deciding whether to issue or deny permits and when deciding what conditions to include in permits. Even if they did not have a financial incentive to undertake that analysis,

federal wetland regulators are required, by a Presidential Executive Order, to consider the takings implications of their actions. Executive Order 12630, issued in 1988, requires federal agencies, among other things, to consider the takings implications of actions before undertaking those actions and to document the takings analysis for regulations in the notice of proposed rulemaking, and to submit to the Office of Management and Budget, annually, a list of actions that have been challenged as, or held to be, takings. See [Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, 53 Fed. Reg. 8859 \(Mar. 15, 1988\)](#). For permits, the Executive Order requires that conditions in the permit “serve the same purpose that would have been served by a prohibition of the use or action; and ... substantially advance that purpose.” *Id.* ¶ 4. In addition, the Order provides that “When a proposed action would place a restriction on a use of private property, the restriction imposed on the use shall not be disproportionate to the extent to which the use contributes to the overall problem that the restriction is imposed to redress.” *Id.*

In a 2003 report, the General Accounting Office (GAO) examined the implementation of the Executive Order by the Corps, EPA, the Department of Agriculture and the Department of Interior, and concluded that the Order was not being aggressively implemented. See [General Accounting Office, GAO-03-1015, Regulatory Takings: Implementation of Executive Order on Government Actions Affecting Private Property Use \(Sept. 2003\)](#). GAO criticized the Department of Justice for failing to update guidelines regarding the implementation of the Executive Order and noted that OMB had informed agencies, in 1994, that they did not have to submit annual reports outlining the just compensation challenges or awards against the agencies. *Id.* at 4. Since takings claims against federal agencies are litigated by the Department of Justice, GAO was able to obtain data from the Department regarding the volume of takings claims against the four agencies during the three fiscal years preceding the report. *Id.* at 5. Between FY 2000 and FY 2002, 44 takings lawsuits were filed against the Corps, EPA, the Department of Agriculture or the Department of Interior. *Id.* The plaintiffs prevailed in 14 of those cases and received \$36.5 million in awards or settlements. *Id.* GAO determined that the Executive Order did not apply to the actions of the agencies in 11 of those 14 cases, and determined that the four agencies generally only conducted the takings analysis required by the Executive Order in 1 out of every 3 cases where the Order did apply. *Id.* By the end of 2002, plaintiffs filed 54 more takings lawsuits against one or more of the four agencies. *Id.*

Just as federal agencies are required to evaluate the takings implications of actions before they undertake the actions, many state agencies are required to engage in similar analyses before undertaking actions. According to a 2013 study prepared by the Environmental Law Institute, at least 17 states have adopted legislation that requires state government officials to assess their actions for potential constitutional takings implications or for other impacts on private property rights. See [Environmental Law Institute, State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act 24 \(May 2013\)](#). Most of the states require the government



officials to assess their own actions, but 3 states require agency officials to have at least some rulemakings reviewed for compliance by the attorney general or a legislative committee.

## Interviewing and Drafting Problem

Doctor Leslie McCoy, a cardiologist from Charlotte, North Carolina, bought some property on Ocracoke Island, North Carolina a few years ago to build a vacation home. Apparently, there were some wetlands on the property that she bought. A few years later, she built a house on one of the lots that she bought and sold that house. Within the past few months, though, she tried to build a house on the other lot, but the Corps of Engineers would not grant her a Clean Water Act permit to fill the wetlands on the property. She thinks that challenging the validity of the permit denial is futile, but she wants to challenge the permit denial as a taking of her property. She says that the property is basically worthless now, and she bought it for \$100,000.

### Questions

1. Draft a series of questions that you would ask Doctor McCoy in order to evaluate the strength of any takings claim that she might have, based on the Corps' Section 404 permit denial. If you are not familiar with client interviewing techniques, or have not conducted client interviews in the past, the attached [short summary of client interviewing](#) may be helpful. The interview should include a mix of open-ended and closed-ended questions that will elicit the information that is necessary to determine whether the client can establish the prima facie case for a taking (*i.e.*, economic impact of the decision, interference with reasonable investment-backed expectations, character of the government action, rationale for the government's action, identification of the parcel as a whole, final definitive agency position, etc.).
2. Doctor McCoy has arranged to meet with you to explore whether she should pursue a takings claim against the Corps of Engineers. Interview her and gather the information that you will need to assess the strength of her takings claim. For purposes of this simulation, it is not necessary to discuss financial arrangements for the representation. The confidential information for Doctor McCoy is in the teacher's manual.

## Chapter Quiz

Now that you've finished Chapter 11, why not try a CALI lesson on the material at: <http://cca.li/Q2>. It should take about 30 minutes.