Chapter 6

Section 404 Permits

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 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.

USDA Photo - Wikimedia

United States v. Huebner

752 F.2d 1235
(7th 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.[5] * * *

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 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

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[5] 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.

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 (9th Cir. 2001)*, aff’d by an equally divided court,* 537 U.S. 99 (2002); *United States v. Larkins*, 852 F.2d 189 (6th 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, *2017 Nationwide Permits, Conditions, District Engineer's Decision, Further Information, and Definitions*.

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 56 Nationwide permits in force, in addition to regional and State-wide general permits. *See* U.S. Army Corps of Engineers, *2021 Nationwide Permits Final Rule Summary Chart*.

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).

The most recent revisions to the nationwide permits were issued in January 2021, just days before the end of the Trump Administration. The revisions were issued earlier than the normal five year schedule, so that the Administration could make changes consistent with its pre-development policies. The rule revised 12 permits, created 4 new permits (primarily for oil and gas pipeline development) and left the remaining 40 permits unchanged. *See* 86 Fed. Reg. 2744 (Jan. 13, 2021). The current nationwide permits are accessible on the Corps website.

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 2017, the Corps received 54,000 comments when it reissued the nationwide permits. *See* 82 Fed. Reg. 1860 (Jan. 6, 2017). A significant portion of the comments that the Corps received over the last decade 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, *2017 Nationwide Permits, Conditions, District Engineer's Decision, Further Information, and Definitions*.

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, *2017 Nationwide Permits, Conditions, District Engineer's Decision, Further Information, and Definitions* 50. 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 (6th 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.*

4. **ESA Compliance**: Shortly after the Corps issued the nationwide permits in 2017, the Northern Plains Resource Council challenged NWP 12, which authorizes discharges of fill material required for construction, maintenance, repair and removal of utility lines, including oil and gas pipelines. In 2020, the District Court of Montana determined that the Corps reissued NWP 12 in 2017 without consulting the Fish and Wildlife Service as required by section 7(a)(2) of the Endangered Species Act. Accordingly, the Court vacated NWP 12 and remanded it to the Corps for compliance with the Endangered Species Act. *See* *Northern Plains Resource Council v. U.S. Army Corps of Engineers,* No. CV-19-44-GF-BMM (D. Mont., Apr. 15, 2020). The court's decision was affirmed by the Ninth Circuit, *see* *Northern Plains Resource Council v. U.S. Army Corps of*

Engineers, No. 20-35412 (9th Cir., May 28, 2021), but the Corps reissued NWP 12 as three separate nationwide permits in 2021, without engaging in consultation under the Endangered Species Act. Consequently, the Center for Biological Diversity sued the Corps for ignoring the required consultation. *See* *Center for Biological Diversity v. Spellmon*, No. CV-21-47-GF-BMM (D. Mont., May 3, 2021).

Research

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
(4th Cir. 2005)

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

LUTTIG, Circuit Judge:

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.

I

* * *

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.[1] 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. * * *[3] 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 factors, including public commentators' opinions, * * * NWP 21's incorporation of SMCRA's requirements, * * * the nature of the coal-mining activities

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[1] 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).

[3] 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.

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 (11th 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 (9th 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 (9th 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, *2017 Nationwide Permits, Conditions, District Engineer's Decision, Further Information, and Definitions (with corrections)* General Condition 32. 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 (4th 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 (4th Cir. 2003).

Resources

Complete list of 2021 NWPs and conditions
Chart summarizing the 2021 NWPs and conditions
Final Decision Documents supporting the 2021 NWPs
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://www.cali.org/aplesson/10728 It should 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
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 (5th 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 FONSIs***" 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 (9th Cir. 1989), *revised at* 884 F.2d 394 (9th 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 (9th 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 (5th 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**

Resource
Corps Video on the 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.

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**

Resources
Corps Video on Alternatives Analysis
Statement of Findings, including alternatives analysis, for Port of Anchorage 404 permit

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 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.

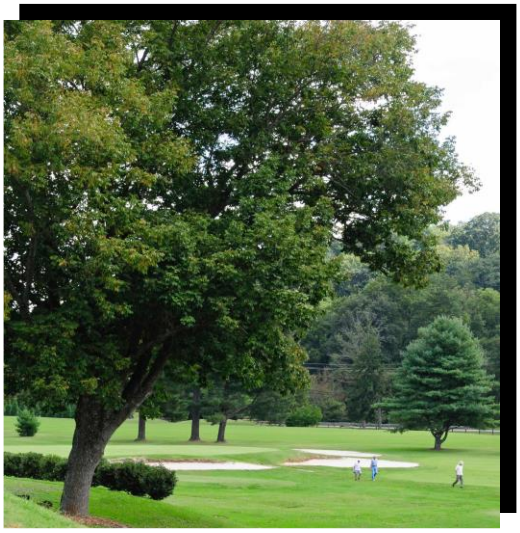

Photo by By Bill Fitzpatrick (Own work) [CC-BY-SA-3.0 (http://creativecommons.org/licenses/by-sa/3.0)]

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.

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
(5th Cir. 1985)

Resources for the Case
Unedited opinion (From Justia)
Google Map of all of the cases in the coursebook

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." * * *

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

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)

Resources

Unedited version of the decision
EPA fact sheet describing elevation process
EPA website regarding 404(q) and elevation

* * * 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. Req. 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 mattes 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 5th 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 (11th Cir. 1996). That court's discussion of the "arbitrary and capricious" standard is black letter administrative law and may help explain the 5th Circuit's deferential decision in *Louisiana Wildlife Federation v. York*.

2. While the 5th 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 5th Circuit?

3. **Plantation Landing Elevation**: It is probably not surprising, in light of the language used by the 5th 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 (10th 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 (4th 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 (8th 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 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. * * *

B. 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 imnpact 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 it's 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 (4th Cir. 1992)(cost of alternative would be 50% higher

than cost of proposed activity); *Friends of the Earth v. Hintz*, 800 F.2d 822 (9th 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://www.cali.org/node/10729 It should only take about 30 minutes.