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## The Clean Water Act of 1977: Midcourse Corrections in the Section 404 Program

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## Note

# The Clean Water Act of 1977: Midcourse Corrections In The Section 404 Program

Wetlands have increasingly become the focal point in the EPA's efforts to define the jurisdiction and scope of coverage of the section 404 regulatory program. As a result of intense educational efforts by the scientific community, environmental lobbying groups, and concerned federal agencies, Congress has begun to recognize the value of protecting much of the coastal wetlands portion of the aquatic ecosystem lying within the boundaries of traditional "navigable waters."<sup>1</sup>

## I. INTRODUCTION

On October 18, 1972, after well over two decades of protracted congressional struggle in the area of water pollution control,<sup>2</sup> Congress enacted the comprehensive Federal Water Pollution Control Act Amendments (FWPCA) of 1972.<sup>3</sup> Variouslly hailed throughout the halls of Congress as vitally necessary,<sup>4</sup> "the most effective, workable pollution control bill that has ever been devised,"<sup>5</sup> and "one of the most significant achievements of the 92nd Congress,"<sup>6</sup> the FWPCA embarked this country upon a course designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>7</sup> In order to attain that objective, the FWPCA sets forth as one of its six broad goals and policies the

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1. Caplin, *Is Congress Protecting Our Water? The Controversy Over Section 404, Federal Water Pollution Control Act Amendments of 1972*, 31 U. MIAMI L. REV. 445, 456-57 (1977) (citation omitted).
  2. 118 CONG. REC. 10,204 (1972).
  3. 33 U.S.C. §§ 1251 to 1376 (Supp. V 1975) [hereinafter cited as FWPCA]. The FWPCA was the most recent in a series of amendments to the original Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948). Other amendments to the original act include the Water Pollution Control Act Amendments of 1956, ch. 518, 70 Stat. 498; Federal Water Pollution Control Act Amendments of 1961, Pub. L. No. 87-88, 75 Stat. 204; Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903; Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246; and the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91.
  4. 118 CONG. REC. 37,056 (1972).
  5. *Id.* at 10,204.
  6. *Id.* at 37,057.
  7. 33 U.S.C. § 1251(a) (Supp. V 1975).

elimination of pollutant discharges into the navigable waters by 1985.<sup>8</sup>

The likelihood of succeeding in this endeavor is in large part dependent upon the success of the section 404 dredge and fill program.<sup>9</sup> In recognition of the vital role performed by coastal and estuarine wetlands,<sup>10</sup> section 404 was intended, among other things, to preserve the delicate and fragile balance that is so crucial to the survival of the nation's wetlands. Section 404 empowers the Army Corps of Engineers to issue permits to control disposal of dredge and fill material<sup>11</sup> into all of the nation's navigable waters, including small streams, inland lakes, coastal marshes, and wetlands.<sup>12</sup> Under this section, the Corps has been granted principal responsibility for granting or withholding approval for dredge and fill operations in navigable waterways. The precise nature and extent of the Corps' jurisdiction under section 404, however, has been a subject of continuing controversy.<sup>13</sup> On the one hand, "recent history has witnessed an accelerating expansion of the Corps of Engineers jurisdiction [thrusting it] into a role requiring significant environmental responsibility."<sup>14</sup> At the same time, however, the Corps has insisted upon approaching its section 404 re-

8. *Id.* § 1251(a)(1).

9. *Id.* § 1344.

10. Wetlands are those land and water areas subject to regular inundation by tidal, riverine, or lacustrine flowage. Generally included are inland and coastal shallows, marshes, mudflats, estuaries, swamps, and similar areas in coastal and inland navigable waters. Many such areas serve important purposes relating to fish and wildlife, recreation, and other elements of the general public interest. As environmentally vital areas, they constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest.

33 C.F.R. § 209.145(e)(3) (1977).

Economists have valued wetlands at as much as \$50,000-\$80,000 per acre, based on their roles as waste assimilator, water supplier, and wildlife producer, although their true environmental value cannot be calculated. Despite their importance and value, over half of the nation's estimated 70 million acres of wetlands have already been adversely modified, and wetlands are disappearing at the alarming rate of 300,000 acres per year.

Clean Water Act Under Attack, Sierra Club Clean Water Task Force (June, 1977). See also Caplin, *supra* note 1, at 455; PRESIDENT NIXON, ENVIRONMENTAL PROTECTION, H.R. DOC. NO. 247, 92d Cong., 2d Sess. 9 (1972) (message submitted February 8, 1972).

11. For a definition of the term "dredge material," see 33 C.F.R. § 209.145(d)(3) (1977).

12. 33 U.S.C. § 1344 (Supp. V 1975).

13. See, e.g., Comment, *Comprehensive Wetlands Protection: One Step Closer to Full Implementation of § 404 of the FWPCA*, 5 ENVIR. L. REP. 10,099 (1975).

14. Hoyer, *Corps of Engineers Dredge and Fill Jurisdiction: Buttressing a Citadel Under Siege*, 26 U. FLA. L. REV. 19, 20 (1973).

sponsibilities within the narrow framework of a definition of navigable waters adopted long ago in *The Daniel Ball*.<sup>15</sup> "[Waters are] navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."<sup>16</sup>

The tension produced as a result of the conflict between the apparent congressional intent to expand the definition of navigable waters under the FWPCA<sup>17</sup> and the Corps' continuing commitment to a limited scope of jurisdiction sparked comment by environmentalists and developers alike,<sup>18</sup> eventually prompting Congress to reexamine the section 404 provisions. The focus of this article will be upon the historical events leading up to that reexamination, a discussion of the new section 404 requirements under the Clean Water Act of 1977,<sup>19</sup> and an analysis of the anticipated effect of the new provisions upon efforts being made to preserve this nation's wetlands.

## II. HISTORICAL BACKGROUND

### A. The Rivers and Harbors Appropriation Act of 1899

The humble beginnings of the federal government's effort to extend statutory control over the quality of navigable waters can be traced back to the Rivers and Harbors Appropriation Act of 1899.<sup>20</sup> Under that act, which is still in effect, although superseded in large part by the FWPCA,<sup>21</sup> it is unlawful to discharge from any ship or

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15. 77 U.S. (10 Wall.) 557 (1870).

16. *Id.* at 563.

17. The Environmental Protection Agency (EPA) interpreted the section 502(7) definition of "navigable waters" as a broad grant of jurisdiction, thereby enabling the EPA to achieve effective pollution control. Moreover, the legislative history of section 404 indicates unequivocally that a broad definition of "navigable waters" was to be adopted: "The conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which would have been made or may be made for administrative purposes." H. R. REP. NO. 1465, 92d Cong., 2d Sess. 144 (1972); S. REP. NO. 1236, 92d Cong., 2d Sess. 144, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3822.

18. See 6 ENVIR. REP. (BNA) 145, 146 (1975); Roe, *Wetlands: Where Developers and Regulatory Programs Meet*, 11 REAL PROP. PROB. & TR. J. 701 (1976).

19. Pub. L. No. 95-217, 91 Stat. 1566 (1977).

20. 33 U.S.C. §§ 401 to 466 (1970) [hereinafter referred to as the Rivers and Harbors Act].

21. For a discussion of the contemporaneous significance of the Rivers and Harbors Act in light of the enactment of the FWPCA, see W. RODGERS, ENVIRONMENTAL LAW § 4.6 (1977); Comment, *Environmental Law—The 1972 Amendments to the Federal Water Pollution Control Act Extend Dredge and Fill Jurisdiction Above the Mean High Water Line*, 6 RUT.-CAM. L.J. 823, 826-29 nn.22-36 & accompanying text (1975).

shore installation into navigable waters or their tributaries "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state . . . ." <sup>22</sup> In addition, the building of any structure in or over any navigable water of the United States and the excavation, filling, or modifying of any lake or channel of any navigable waters without a permit issued by the Corps of Engineers are prohibited. <sup>23</sup> It was thus early in the history of the federal government's regulation of this nation's waters that two trends which have continued to the present were clearly established: (1) the Army Corps of Engineers would be chiefly responsible for regulating discharges into and excavations from streams and waterways; and (2) the scope of that jurisdiction would extend to all "navigable waters."

Much of the controversy over the role that Congress has intended the Corps to play in this field has arisen over the definition of "navigable waters." Because the scope of the Corps' jurisdiction under the Rivers and Harbors Act is limited to "navigable waters" it became necessary early in the history of federal water pollution control efforts to arrive at a workable definition of that term.

Prior to the enactment of the Rivers and Harbors Act, court decisions which addressed the issue sought to formulate a definition of "navigable waters" by focusing upon the goal of preserving and enhancing the flow of commerce over the waters of the United States. <sup>24</sup> Drawing upon the experiences of England, the lower state and federal courts bandied about the definition of "navigable waters" for a number of years.

At common law, all waters subject to the ebb and flow of the tides were deemed navigable. Early in our nation's history this approach, adequate for a country surrounded by tidal waters, such as England, was rejected as too restrictive. Seeing a definition of navigability appropriate to a vast country with an abundance of inland lakes and rivers, the Supreme Court in 1870 adopted a "navigability-in-fact" test. <sup>25</sup>

The classic test of navigability under this approach is whether a river "has been, is, or may be used, with or without reasonable improvements, as a highway for commerce over which trade and travel is, or may be, conducted in the customary modes." <sup>26</sup> For

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22. 33 U.S.C. § 407 (1970 & Supp. V 1975).

23. *Id.* § 403.

24. *See, e.g.,* *Waring v. Clarke*, 46 U.S. (5 How.) 441 (1847); *Orleans v. Phoebus*, 36 U.S. (11 Pet.) 175 (1837); *The Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825).

25. *Hoyer, supra* note 14, at 21-22. *See* note 13 & accompanying text *supra* (full statement of the "navigability-in-fact" test).

26. *United States v. Sunset Cove, Inc.*, 3 ENVIR. L. REP. 20,370, 20,372 (D. Or. 1973), *aff'd in part*, 514 F.2d 1089 (9th Cir. 1975). *See also* *United States v. Appa-*

constitutional support for this definition, the courts turned to article I, section 8 of the Constitution, which gave Congress the power to regulate commerce among the several states.<sup>27</sup> Prior to 1899, a well-reasoned line of cases had thus been developed establishing navigability-in-fact as the test for determining whether a given river or stream was to be considered a "navigable water." In 1899, Congress passed the Rivers and Harbors Act and cast the jurisdiction of the Army Corps of Engineers in terms of navigability by extending the Corps' scope of authority to all navigable waters of the United States.<sup>28</sup> Given the historical framework of this legislation and the preceding years of judicial interpretation of the phrase "navigable waters," it is clear that the central, if not sole, concern of Congress in the early days of the Act was the protection and enhancement of commerce over navigable waterways. As will become apparent, the end result of protecting navigation has remained constant, although the focus under the Act slowly began to shift to include the threat of obstruction not only from bridges, causeways, dams and dikes, but in addition the threat to navigability posed by the discharge of pollutants into navigable waterways.

The Rivers and Harbors Act required the Corps to define, in addition to that general class of rivers and streams that were to be deemed "navigable waters," the physical boundaries of any one particular river or stream that it was to regulate.<sup>29</sup> To resolve this problem, the Corps adopted two techniques to define its scope of authority under the Act. After a number of revisions and refinements, what are known today as the mean high water line<sup>30</sup> and the harbor line<sup>31</sup> were implemented to assist in this determination.

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lachian Elec. Power Co., 311 U.S. 377, 407-09 (1940); Economy Light & Power Co. v. United States, 256 U.S. 113, 123 (1921); The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).

27. See United States v. Banister Realty Co., 155 F. 583, 589 (E.D.N.Y. 1907).

28. 33 U.S.C. § 403 (1970).

29. Once it was determined that a given river or stream was navigable by applying the "navigability-in-fact" test enunciated in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870), it then became necessary to determine, for that given river or stream, where the Corps' jurisdiction terminated, i.e., what the physical boundaries of the waterway were.

30. The mean high water line is that point on the shore corresponding to the average daily height of all high waters over an 18.6 year period (or over a shorter period extrapolated to 18.6 years). The 18.6 year period is the duration of the "lunar cycle," which has a small but measurable effect on the tides. The term "lunar cycle" refers to the period of rotation of (1) the plane of the moon's orbit around the earth (lunar ecliptic) about (2) the plane of the earth's orbit around the sun (solar ecliptic). The tidal records are kept by the United States Coast and Geodetic Survey.

Comment, *supra* note 21, at 823 (citations omitted); see 33 C.F.R. § 209.120(d)(2)(ii)(b) (1977).

31. 33 U.S.C. § 403 (1970) provides that "it shall not be lawful to build or com-

The mean high water line or mean high water mark is a naturally-created line on the shore of a river or stream established by averaging all high tides over a period of 18.6 years.<sup>32</sup> Regulations promulgated by the Corps state that navigable waters include "[c]oastal waters that are navigable waters of the United States subject to the ebb and flow of the tide, shoreward to their mean high water mark."<sup>33</sup> Harbor lines are those artificially created lines which define the limits of a harbor in a generic sense and are used in conjunction with the implementation of section 403 of the Act.<sup>34</sup> Taken together, mean high water marks and harbor lines have been employed by the Corps as a method of limiting its jurisdiction for a particular navigable waterway to that portion of the river or stream which is actually necessary for navigation. Viewing this approach as consistent with the congressional intent of protecting and fostering commerce on navigable waters,<sup>35</sup> the Corps' use of these two techniques received early support from the courts.<sup>36</sup> This, together with the definition of "navigable waters" developed in the early days of the Act, set the stage for the Corps' scope of authority under the Rivers and Harbors Act for a number of years.

As a result of these early jurisdictional restrictions, the Rivers and Harbors Act lay dormant and virtually unrecognized as a tool for environmental reform for a number of years. It was not until the landmark case of *Zabel v. Tabb*<sup>37</sup> that the Corps was instructed to consider, before granting dredging permits under the Rivers and Harbors Act, the environmental ramifications of such

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mence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States outside established harbor lines . . . ." Viewing its principal responsibility under the Rivers and Harbors Act as one of protecting and enhancing navigation, the Corps establishes harbor lines to separate and protect navigable channels and harbor areas from those areas not essential to navigation. Permits were necessary only for those dredge and fill operations which were within the area defined by the harbor lines. In response to criticism that this approach left large areas of submerged land unprotected, the Corps revised its regulations in 1972 so that "all existing and future harbor lines are declared to be guidelines" and to require permits "for any work which is commenced shoreward of existing or future harbor lines." 33 C.F.R. § 209.150(b)(2) (1972). See also Clary, *Water Quality Control Yesterday, Today, and Tomorrow*, 5 NAT. RESOURCES L. 224, 226-27 (1972); Hoyer, *supra* note 14, at 24.

32. See note 30 *supra*.

33. 33 C.F.R. § 209.120(d)(2)(i)(a) (1977).

34. See note 31 *supra*.

35. 32 CONG. REC. 2297 (1899).

36. See, e.g., *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-09 (1940); *Economy Light & Power Co. v. United States*, 256 U.S. 113, 123 (1921).

37. 296 F. Supp. 764 (M.D. Fla. 1969), *rev'd*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

actions. In that case, plaintiff-landowners sought to compel the Army Corps of Engineers to issue a dredge and fill permit under the Rivers and Harbors Act for the construction of a bulkhead and bridge in Boca Ciega Bay near St. Petersburg, Florida. Dredged material taken from the bay was to be deposited inside the bulkhead in order to form an island upon which a trailer park was to be constructed. The trial court first noted:

The Secretary of the Army, in denying the application, found that issuance of the permit:

- "1. Would result in a distinctly harmful effect on the fish and wildlife resources in Boca Ciega Bay,
- "2. Would be inconsistent with the purposes of the Fish and Wildlife Coordination Act of 1958, as amended (16 U.S.C. § 662.),
- "3. Is opposed by the Florida Board of Conservation on behalf of the State of Florida, and by the County Health Board of Pinellas County and the Board of Commissioners of Pinellas County, and
- "4. Would be contrary to the public interest."<sup>38</sup>

In addition to these findings, plaintiffs contended and the defendants admitted that the proposed project "would have no material adverse effect on navigation."<sup>39</sup> Because of this lack of any adverse effect on navigable waters, the trial court ruled that the Corps had improperly withheld the dredge and fill permit, concluding in the process that the Secretary of the Army has no discretionary authority to withhold such permit where he has found that the proposed project would not interfere with navigation.<sup>40</sup> On appeal, the United States Court of Appeals for the Fifth Circuit reversed the lower court decision ordering the Corps to grant the dredge and fill permit.<sup>41</sup> In so holding, the court ruled that the Rivers and Harbors Act places no limitation upon those factors which the Secretary of the Army may consider when deciding whether to grant or withhold a permit:

The establishment [Corps of Engineers] was entitled, if not required, to consider ecological factors and, being persuaded by them, to deny that which might have been granted routinely five, ten, or fifteen years ago before man's explosive increase made all, including Congress, aware of civilization's potential destruction from breathing its own polluted air and drinking its own infected water and the immeasurable loss from a silent-spring-like disturbance of nature's economy.<sup>42</sup>

Virtually without precedent,<sup>43</sup> the court ruled that environmen-

38. *Id.* at 766-67.

39. *Id.* at 766.

40. *Id.* at 771.

41. 430 F.2d 199 (1970).

42. *Id.* at 201.

43. The court did refer to one case which stands as an exception to the general rule that only navigational reasons may be addressed when considering an application for a dredge and fill permit. *United States ex rel. Greathouse v. Dern*, 289 U.S. 352 (1933), an action in equity, held that although the Corps



tal factors may properly be considered under the Rivers and Harbors Act when granting dredge and fill permits.<sup>44</sup> Moreover, the court concluded that the decision to grant or deny a permit need not rest on navigational grounds.<sup>45</sup> Two years prior to the *Zabel* decision the Corps had promulgated regulations in which it served notice that it would consider

[a]ll factors that may be relevant to the proposal. . . . [A]mong those factors are conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood-damage prevention, land-use classifications, navigation, recreation, water supply, water quality, and, in general, the needs and welfare of the people. No permit will be granted unless its issuance is found to be in the public interest.<sup>46</sup>

Much to the dismay of environmentalists, the criteria set forth in the foregoing regulations did not receive the judicial imprimatur of approval until two years later when *Zabel* was decided. *Zabel* marked the beginning of a new line of cases which would eventually result in a shift in emphasis and focus under the Rivers and Harbors Act.<sup>47</sup> This expanded consideration of environmental criteria would pave the way for an expanded definition of navigable waters that was to come with the enactment of the FWPCA and subsequent court decisions.<sup>48</sup> No longer would the principal focus under the act be upon fostering and protecting the flow of commerce over navigable waters. Instead, environmentalists now began to urge the courts to find in section 13<sup>49</sup> a broad new prohibition against the discharge of pollutants into navigable waters. Congress also expressed an interest in requiring the Corps to

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must offer a reason for denying a permit, that reason does not have to be one based upon navigability. See also *Citizens Comm. for the Hudson Valley v. Volpe*, 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 97 (2d Cir. 1970).

44. 430 F.2d at 214.

45. *Id.* at 213.

46. 33 C.F.R. § 209.120(f) (1977).

47. See, e.g., *United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655 (1973); *United States v. Dexter Corp.*, 507 F.2d 1038 (7th Cir. 1974); *United States v. White Fuel Corp.*, 498 F.2d 619 (1st Cir. 1974); *United States v. Kennebec Log Driving Co.*, 491 F.2d 562 (1st Cir. 1973), *cert. denied*, 417 U.S. 910 (1974); *United States v. American Cyanamid Co.*, 480 F.2d 1132 (2d Cir. 1973); *Natural Resources Defense Council, Inc. v. Grant*, 355 F. Supp. 280 (E.D.N.C. 1973); *United States v. Consolidation Coal Co.*, 354 F. Supp. 173 (N.D.W. Va. 1973); *United States v. Florida Power & Light Co.*, 311 F. Supp. 1391 (S.D. Fla. 1971).

48. See, e.g., *P.F.Z. Properties, Inc. v. Train*, 393 F. Supp. 1370 (D.D.C. 1975); *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181 (D. Ariz. 1975); *Sun Enterprises, Ltd. v. Train*, 7 E.R.C. 2110 (S.D.N.Y. 1975); *United States v. Smith*, 7 E.R.C. 1937 (E.D. Va. 1975); *Leslie Salt Co. v. Froehlke*, 403 F. Supp. 1292 (N.D. Cal. 1974); *United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974).

49. 33 U.S.C. § 407 (1970 & Supp. V 1975).

address and consider a broader spectrum of criteria when considering whether to grant a dredge and fill permit:

The Corps of Engineers, which is charged by Congress with the duty to protect the nation's navigable waters, should, when considering whether to approve applications for landfills, dredging and other works in navigable waters, increase its consideration of the effects which the proposed work will have, not only on navigation, but also on conservation of natural resources, fish and wildlife, air and water quality, esthetics, scenic view, historic sites, ecology, and other public interest aspects of the waterway.<sup>50</sup>

By the early seventies, what had once been a tool for the protection of navigable waters for the sake of enhancing commerce over those waterways had in addition become, at the behest of environmentalists, a new weapon in the arsenal available for use against polluters.

## B. The Federal Water Pollution Control Act Amendments of 1972

In 1972, Congress amended the Federal Water Pollution Control Act,<sup>51</sup> thereby initiating a new era of anti-pollution efforts and drastically increasing the power of the federal government to control pollution of the nation's waterways. The Army Corps of Engineers' dredge and fill jurisdiction, once a loosely defined morass of rules, regulations, and court decisions is now set forth in section 404 of the FWPCA.<sup>52</sup> Under this section, the Secretary of the Army,

50. *Our Waters and Wetlands: How the Corps of Engineers Can Help Prevent Their Destruction and Pollution*, H.R. REP. NO. 917, 91st Cong., 2d Sess. (1970).

51. 33 U.S.C. §§ 1251 to 1376. (Supp. V 1975).

52. Section 404, 33 U.S.C. § 1344 (Supp. V 1975), provides that:

(a) The Secretary of the Army, acting through the Chief of Engineers, 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.

(b) Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary of the Army (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary of the Army, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 403(c), and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secre-

acting through the Chief of the Corps of Engineers, is required to issue permits before dredge or fill material can be discharged into "navigable waters." Those who qualify for a permit under section 404 are exempted from the requirements of the National Pollutant Discharge Elimination System (NPDES) established in section 402 of the FWPCA.<sup>53</sup> Moreover, those permits which were issued under section 13 of the Rivers and Harbors Act continue in force, but no additional permits are to be issued under that section.<sup>54</sup> In short, the NPDES permit system, coupled with the section 404 dredge and fill permit system, is designed to control "the discharge of any pollutant by any person [into navigable waters]."<sup>55</sup>

The enactment of section 404 did not, however, bring an end to the controversy over the definition of "navigable waters." Section 502(7) of the FWPCA, which is deceptively brief, defines navigable waters as "waters of the United States, including the territorial seas."<sup>56</sup> In the early days of the Act, the Corps took the position that section 404 did not expand its traditionally limited jurisdiction over navigable waters as it existed under the Rivers and Harbors Act. Proposed regulations promulgated by the Corps on May 10, 1973, took the somewhat confusing position that "[t]he term 'navigable waters' as defined in the Federal Water Pollution Control Act . . . means the waters of the United States, including the territorial seas."<sup>57</sup> But in addition, the Corps promulgated proposed regulations on that same date which defined navigable waters for all other purposes (other than under the FWPCA) as "those waters of the United States which are presently, or have been in the past, or may be in the future susceptible for use for purpose of

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tary of the Army. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

53. *Id.* § 1342. The NPDES permit system takes the place of the Rivers and Harbors dredge and fill permit program, which was cumbersome to administer and enforced only sporadically. Section 402 authorizes the Administrator of the Act to "issue a permit for the discharge of any pollutant, or combination of pollutants" subject to certain conditions set forth elsewhere in the Act. In addition, this section anticipates eventual state implementation of the NPDES permit system: section 402(a)(5) allows the Administrator "[t]o authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act, to issue permits for discharges into the navigable waters within the jurisdiction of such state."

54. *Id.* § 1342(a)(4).

55. *Id.* § 1311(a).

56. *Id.* § 1362(7). Section 502(8), 33 U.S.C. § 1362(8) (Supp. V 1975) in turn defines territorial seas as "the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles."

57. 38 Fed. Reg. 12,217, 12,218 (1973).

interstate or foreign commerce."<sup>58</sup> This latter definition was the one historically employed under the Rivers and Harbors Act and presumably superseded by section 404 of the FWPCA.<sup>59</sup> The reason for this dual definition was therefore not entirely clear.

Seven months later the confusion was resolved when the Corps issued its final revised permit regulations.<sup>60</sup> "Navigable waters of the United States" and "navigable waters" were defined synonymously as "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce."<sup>61</sup> By adopting this definition of navigable waters, the Corps had effectively limited its jurisdiction under the FWPCA to that which had existed under the Rivers and Harbors Act, notwithstanding the clear legislative intent to expand the Corps' scope of authority.<sup>62</sup> Environmentalists pointed to the legislative history of the Act and argued persuasively that the Corps' approach was simply inadequate. The Administrator of the Environmental Protection Agency (EPA), charged with overall authority under the FWPCA,<sup>63</sup> urged the Corps to expand its jurisdiction over navigable waters consistent with the clear intent of the Act.<sup>64</sup>

The Corps stood steadfast by its definition and environmentalists, unable to persuade the Corps that its definition of navigable waters was unduly restrictive and inconsistent with the legislative history of the Act, finally brought suit on August 16, 1974. In addressing the issue of the scope of "navigable waters" under the

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58. *Id.*

59. The legislative history of the FWPCA states in pertinent part:

The conference bill defines the term "navigable waters" broadly for water quality purposes. It means all "the waters of the United States" in a geographical sense. It does not mean "navigable waters of the United States" in the technical sense as we sometimes see in some laws. . . .

Thus the new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill.

118 CONG. REC. 33,756-57 (1972).

60. 39 Fed. Reg. 12,115 (1974).

61. *Id.* at 12,119.

62. See notes 16 & 51 *supra*.

63. 33 U.S.C. § 1251(d) (Supp. V 1975).

64. Letter from John Quarles for Russell Train, EPA Administrator, to Lt. Gen. W.C. Gribble Jr., Chief of Engineers (June 19, 1974), *discussed in* Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment at 24-25, Natural Resources Defense Council, Inc. v. Cal-laway, No. 74-1242 (D.D.C. Mar. 27, 1975); see 3 ENVIR. L. REP. 1240 (1973).

FWPCA, the court in *Natural Resources Defense Council, Inc. v. Callaway*<sup>65</sup> concluded that the term "navigable waters" was "not limited to the traditional tests of navigability [and thus the defendants] have acted in derogation of their responsibilities under Section 404 of the Water Act by the adoption of the definition of navigability described at . . . 39 Federal Register 12119 . . . ."<sup>66</sup> The defendants were ordered to rescind the old regulations and to publish proposed regulations within fifteen days and final regulations within 30 days.<sup>67</sup>

In response to this order, the Corps issued its proposed regulations on May 6, 1975.<sup>68</sup> They were issued in the form of four alternative proposals. The Corps' jurisdiction under Alternative I, the version favored by environmental groups and the EPA, would extend to every coastal and inland artificial or natural waterbody, including all navigable waters and tributaries up to their headwaters. Alternative II would extend the Corps' jurisdiction over all tidal waters and all inland navigable waters and primary tributaries up to their headwaters. Although this alternative is an expansion of existing Corps policy, it is more limited than Alternative I. Alternative III is essentially the same as Alternative I, with the exception that the states, not the Corps, would process permit applications. Alternative IV, favored by the Corps, "adopts the limited jurisdictional definition of Alternative II and the preliminary state certification procedure of Alternative III."<sup>69</sup>

At the same time that these proposed regulations were published, the Corps also issued a press release which stated that Alternative I would require a federal permit for the "rancher who wants to enlarge his stock pond, or the farmer who wants to deepen an irrigation ditch or plow a field, or the mountaineer who wants to protect his land against stream erosion."<sup>70</sup> This, together with an earlier statement by the Corps that "[c]ertain of these proposed regulations, if adopted, will require a Department of the Army permit for the water disposal of dredged or fill material in virtually every natural and artificial water in the United States,"<sup>71</sup> rankled environmentalists, prompting them to charge that the Corps has instituted a "nationwide scare campaign" designed to frustrate congressional intent under the FWPCA.<sup>72</sup> The press release drew swift response from the Administrator of the EPA, who

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65. 392 F. Supp. 685 (D.D.C. 1975).

66. *Id.* at 686.

67. *Id.*

68. 40 Fed. Reg. 19,766 (1975).

69. Comment, *supra* note 13, at 10,102.

70. 6 ENVIR. REF. (BNA) 145, 146 (1975).

71. 40 Fed. Reg. 19,766 (1975).

72. 6 ENVIR. REF. (BNA) 145 (1975).

advised the Corps to clarify the misunderstandings it had created.<sup>73</sup> The Natural Resources Defense Council was joined by the National Wildlife Federation, Environmental Defense Fund, Sierra Club, Environmental Policy Center, American Rivers Conservation Council, Friends of the Earth, Wilderness Society, Izaak Walton League, and the National Parks and Conservation Association in denouncing the Corps' actions as deliberately misleading.<sup>74</sup>

On July 15, 1975, the Assistant Secretary of the Army for Civil Works declared that "the Department of the Army will continue to maintain its commitment to protect nationwide environmental concerns and to comply with the directions of Congress as interpreted by the judiciary."<sup>75</sup> Ten days later the Corps issued its interim final regulations<sup>76</sup> in response to the order of the court in *Natural Resources Defense Council*, which were developed with the participation and advice of the EPA. Apparently as a result of the public outcry over the press release that the Corps had earlier issued, these regulations represented a significant departure from the four alternative proposals published two months earlier. In these "interim final" regulations,<sup>77</sup> the Corps defined "navigable waters" to include "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce . . . ."<sup>78</sup> This expanded definition was viewed by environmentalists as a distinct improvement over the four alternative proposals.<sup>79</sup> In addition, the interim final regulations delegated to the states significant responsibility in the section 404 procedure:

A § 404 permit cannot be issued if the state in which the discharge will occur denies a water quality certification for the activity under § 401 of the Act, or a certification that the activity will comply with its coastal zone management plan, if it has one. In the absence of a timely response from the state, however, the permit application will be processed to a conclusion. If a state which has an existing program to regulate the same type of

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73. *Id.*

74. *Id.* at 146.

75. *Hearings on the Development of New Regulations by the Corps of Engineers Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 94th Cong., 1st Sess. 2 (1975), reprinted in 6 ENVIR. REP. (BNA) 471 (1975).

76. 33 C.F.R. § 209.120 (1976), published in final form, 33 C.F.R. § 209.120 (1977). For further explanation, see 33 C.F.R. § 209.260 (1977).

77. Interim final regulations are subject to further revision in response to public comment received within 90 days of the rules' date of promulgation. 40 Fed. Reg. 31,320 (1975).

78. 33 C.F.R. § 209.120(d)(1) (1976).

79. For an excellent discussion of the precise scope of this definition of "navigable waters," see Comment, *Corps Issues Interim Rules for Discharges of Dredged and Fill Materials*, 5 ENVIR. L. REP. 10,143 (1975).

activities covered by § 404 denies a permit for a particular discharge, the Corps will not issue a § 404 permit for that activity. On the other hand, if the state issues a permit, the Corps will generally not deny a § 404 permit for the discharge unless overriding national factors of the public interest dictate such action . . . .<sup>80</sup>

The implementation of the interim final regulations was to be approached by the Corps in three separate phases. In the initial stage, beginning on the date that the regulations were promulgated, the Corps would require permits for discharges of dredged or fill material in all coastal waters, navigable rivers, lakes, streams, and their contiguous or adjacent wetlands. Phase II, scheduled to begin July 1, 1976, would expand the scope of regulation and require permits for discharges into primary tributaries of the waters covered in Phase I. Finally, Phase III would employ the full scope of the new regulations by regulating all waters subject to the section 404 jurisdiction. This final phase was to begin on July 1, 1977.

For a number of reasons, however, the program devised by the Corps was never fully implemented. Shortly after the regulations were adopted in final form, the Corps' approach drew rapid-fire criticism. It was suggested from some quarters that "[n]o justification exists which can support the far-reaching regulatory activities and administrative definitions under the § 404 regulations . . . ."<sup>81</sup> A suit was instituted in Wyoming challenging the regulations as unconstitutional;<sup>82</sup> it was alleged that the intent of Congress had been exceeded by such a broad exercise of jurisdiction. More importantly, a group of twenty senators requested President Ford to halt implementation of Phase II of the program.<sup>83</sup> On July 2, 1976, President Ford responded by suspending Phase II in order to allow the Senate to reconsider the scope of the Corps' jurisdic-

80. *Id.* at 10,144.

81. Boxer, *Every Pond and Puddle—or, How Far Can the Army Corps Stretch the Intent of Congress*, 9 NAT. RESOURCES L. 467, 475 (1976).

82. *Wyoming v. Hoffman*, No. 76-95 (D. Wyo., filed May 19, 1976); see 7 ENVIR. L. REP. 65,374-75 (1977).

83. The following senators signed a letter requesting President Ford to delay implementation and enforcement of the section 404 regulations pending congressional resolution of the problem: Dewey F. Bartlett (R-Okla.), J. Glenn Beall, Jr. (R-Md.), Henry Bellmon (R-Okla.), Lloyd M. Bentsen (D-Tex.), Carl T. Curtis (R-Neb.), Robert Dole (R-Kan.), James O. Eastland (D-Miss.), Paul J. Fannin (R-Ariz.), Jake Garn (R-Utah), Clifford P. Hansen (R-Wyo.), Jesse A. Helms (R-N.C.), J. Bennett Johnston, Jr. (D-La.), Paul Laxalt (R-Nev.), Russell B. Long (D-La.), Gale W. McGee (D-Wyo.), Mike Mansfield (D-Mont.), Ted Stevens (R-Alas.), Strom Thurmond (R-S.C.), John G. Tower (R-Tex.), and Milton R. Young (R-N.D.). For a general discussion of the content of the letter, see 7 ENVIR. REP. (BNA) 285 (1976).

tion under section 404.<sup>84</sup> Hearings were set before the Senate Public Works Committee<sup>85</sup> to consider an amendment to section 404,<sup>86</sup> recently passed by the House,<sup>87</sup> which would limit the Corps' jurisdiction to "navigable waters and adjacent wetlands."<sup>88</sup> This amendment, offered by Representative Wright of Texas, would have substantially altered the Corps' 404 jurisdiction over dredge and fill activities, in effect foreclosing the Corps from regulating discharges into (1) all coastal wetlands inundated by fresh water, (2) coastal wetlands not contiguous or adjacent to tidally-influenced navigable waters, (3) freshwater wetlands not contiguous or adjacent to "other navigable waters," and (4) nontidal saline and brackish water wetlands.<sup>89</sup>

On September 1, 1976, the Senate rejected the House of Representative's narrowly-drawn amendment to the section 404 program in favor of the Baker-Randolph Amendment formulated by the Senate Public Works Committee, which contained a traditional definition of navigable waters.<sup>90</sup> Three weeks later, on September 22, 1976, House and Senate conferees met in an attempt to resolve the conflicts between the Wright Amendment and the Baker-Randolph Amendment to section 404. Unable to reach a satisfactory compromise, the conference was adjourned and the 94th Congress

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84. Those connected with the decision said it was spurred by the passage of HR 9560, the announced intention of the Senate Public Works Committee to conduct oversight hearings July 26 and 27 on the dredge or fill permits program, and two letters from Senators seeking to freeze the program at Phase I pending congressional action on HR 9560.

*Id.* at 435-36. Environmentalists speculated that the action was in part a result of the Corps of Engineers' press release which accompanied the issuance of the proposed regulations. *Id.*

85. Caplin, *supra* note 1, at 460.

86. The text of the amendment to H.R. 9560, redesignated as S2710, also known as the Wright Amendment, appears at 122 CONG. REC. H5267 (daily ed. June 3, 1976).

87. *Id.* at H5280.

88. *Id.* at H5267.

89. Caplin, *supra* note 1, at 460.

90. The portion of the Baker-Randolph proposal concerning section 404 jurisdiction provided:

[T]he jurisdiction of the Secretary of the Army shall be limited to those portions of the navigable waters (1) that are subject to the ebb and flow of the tide shoreward to their mean high water mark (mean higher high water mark on the Pacific coast), and (2) that have been used, are now used, or are susceptible to use as a means to transport interstate commerce, up to the head of their navigation, and (3) that are contiguous or adjacent wetlands, marshes, shallows, swamps, mudflats, and similar areas.

122 CONG. REC. S15,168 (daily ed. Sept. 1, 1976).



came to a close, deadlocked over the section 404 program.<sup>91</sup>

### III. THE CLEAN WATER ACT OF 1977

#### A. Proposed House and Senate Versions of the Amendments

With the 95th Congress came renewed efforts to amend the section 404 program and, in the process, to redefine the Corps' jurisdiction over dredge and fill operations. On April 5, 1977, the House of Representatives struck the first blow when it passed H.R. 3199,<sup>92</sup> a proposal virtually identical to the Wright Amendment which died in conference the year before. Many viewed the "commercial navigability" standard established in H.R. 3199 as not only substantially narrower than the definition of "navigable waters" set forth in section 502(7) of the FWPCA,<sup>93</sup> but also as narrower than the historical definition of "navigable waters" established under the Rivers and Harbors Act.<sup>94</sup>

The Senate, meanwhile, elected to defer consideration of any substantive amendments in the section 404 program until later in the session, instead deciding to concentrate its attention on funding for sewage treatment plant construction.<sup>95</sup> On July 28, 1977, action was finally taken when Senator Muskie introduced S. 1952, the Senate's version of H.R. 3199.<sup>96</sup> The Senate bill established a program whereby "[those states] desiring to administer the permit program for controlling discharges of dredged or fill material into the navigable waters"<sup>97</sup> could submit a plan for such regulation to the Administrator of the EPA for approval. Upon approval, all discharges of dredged or fill material into

all navigable waters within the State except any coastal waters of the United States subject to the ebb and flow of the tide, including any adjacent marshes, shallows, swamps, and mudflats, and any inland waters of the United States that are used, have been used or are susceptible to use for transport of interstate or foreign commerce, including any adjacent marshes, shallows, swamps, and mudflats<sup>98</sup>

are subject to state regulation. On August 4, 1977, after considerable debate, S. 1952 (H.R. 3199) was passed by the Senate on a vote

91. See Comment, *Congress Fails to Amend the Clean Air Act or § 404 of the FWPCA*, 6 ENVIR. L. REP. 10,246 (1976).

92. 123 CONG. REC. H3063 (daily ed. Apr. 5, 1977).

93. 33 U.S.C. § 1362(7) (Supp. V 1975).

94. See Comment, *The Move to Amend § 404 of FWPCA: House Passes Bill Limiting Federal Authority Over Dredge-and-Fill Activities*, 7 ENVIR. L. REP. 10,082 (1977).

95. *Id.* at 10,084.

96. 123 CONG. REC. S13,004 (daily ed. July 28, 1977) (remarks of Sen. Muskie).

97. 123 CONG. REC. S13,627 (daily ed. Aug. 4, 1977).

98. *Id.* at S13,628.

of 96 to 0,<sup>99</sup> thereby leaving intact the broad definition of "navigable waters" as it existed under FWPCA of 1972.

The differences between the House and Senate versions of the new section 404 program were substantial, thus setting the stage for a potentially controversial conference hearing. The interests of all involved were well represented by lobbyists urging adoption of the particular plan most favorable to their constituency. The House version, H.R. 3199, was assailed by environmentalists as inadequate to protect the nation's vital wetlands. In particular, they alleged that the Corps' jurisdiction under section 16<sup>100</sup> would be limited "to approximately 2% of stream miles and 20% of wetland areas,"<sup>101</sup> thereby allowing the discharge of toxic materials into the vast majority of the nation's waterways. Although environmentalists found the Senate version of H.R. 3199 to be, in general, more acceptable, they pointed to provisions exempting non-routine farming and forestry activities from the permit program and the delegation of that program to the states as major weaknesses in the act.<sup>102</sup> Instead it was urged that the broad jurisdiction over navigable waters which the Corps currently exercises should be retained under H.R. 3199.<sup>103</sup>

After extensive consideration of the House and Senate versions of H.R. 3199, during which the proposed amendments to the section 404 program proved to be the most controversial, the conference committee finally reached an agreement on November 10, 1977, to adopt, in large part, the version advanced by the Senate. The conference report was filed on December 6, 1977,<sup>104</sup> and shortly thereafter both Houses approved the Clean Water Act of 1977.<sup>105</sup>

## B. The Dredge and Fill Program Under the Clean Water Act of 1977

On December 27, 1977, President Carter signed the Clean Water Act of 1977 into law, culminating years of fiery controversy and hours upon hours of time spent in formulating a workable solution to the nation's water quality problems. Section 404 represents only a small part of a scheme designed "to restore and maintain

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99. *Id.* at S13,619.

100. 123 CONG. REC. H3063 (daily ed. Apr. 5, 1977).

101. Steering Committee: Clean Water Action Project, Environmental Action, Inc., Natural Resources Defense Council, Sierra Club, Clean Water Campaign Position Statement on H.R. 3199 (1977).

102. See Memorandum from Sierra Club Clean Water Task Force to Water Quality Task Force, Update on the Clean Water Act (PL 92-500) Amendments (Sept. 2, 1977).

103. Sierra Club, National News Report (Sept. 9, 1977).

104. H.R. REP. NO. 380, 95th Cong., 1st Sess. (1977), *reprinted in* 123 CONG. REC. H12,690 (daily ed. Dec. 6, 1977).

105. Pub. L. No. 95-217, 91 Stat. 1566 (1977).

the chemical, physical, and biological integrity of the Nation's waters."<sup>106</sup> But the significance and importance of section 404 in achieving that goal must not be underestimated. In adopting the 1977 amendments, Congress made a number of crucial changes in the dredge and fill program as it existed under the FWPCA. Foremost among these was the decision to retain the broad jurisdictional approach in regulating dredge and fill activities. Although the manner of control has been substantially altered, "no wetlands will be removed from [the Corps'] jurisdiction under the 404 amendment."<sup>107</sup> Instead, the amendments provide for state implementation of the permit program for all navigable waters within that state's jurisdiction upon submission and approval of "a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact."<sup>108</sup> The Corps retains jurisdiction over:

[T]hose waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto . . .<sup>109</sup>

In addition to the power to issue permits for dredge and fill activities in the foregoing waterways, the Corps has the power to issue five-year general permits for any category of dredge and fill activities which will have only minimal adverse environmental effects when performed separately and "minimal cumulative adverse effect on the environment."<sup>110</sup>

The new section 404 program also exempts all federal projects specifically authorized by Congress from the provisions of federal and state permit programs, although it is still necessary for an environmental impact statement to be prepared for these projects before authorization or appropriation of funds for construction. Finally, the new program exempts a number of activities associated with normal farming, silviculture, and ranching operations from the permit program.

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106. 33 U.S.C. § 1251(a) (Supp. V 1975).

107. Comments of John Quarles, Environmental Law Seminar, Washington, D.C. (Feb. 9-11, 1978).

108. Pub. L. No. 95-217, § 67(a) (1), 91 Stat. 1601 (1977), (to be codified at 33 U.S.C. § 1344).

109. *Id.*

110. Pub. L. No. 95-217, § 67(c) (1), 91 Stat. 1601 (1977), (to be codified at 33 U.S.C. § 1318).

### C. Outlook for the Future

The success of the new dredge and fill permit program is subject to a number of variables, the most crucial of which is the ability of the states to assume the regulatory responsibilities formerly exercised by the Corps. During the last two years of regulation by the Corps, "the section 404 permit review process resulted in the modification of more than 3,500 projects to protect the aquatic environment."<sup>111</sup> Whether this trend will continue under state regulation depends upon the vigor with which states pursue their responsibilities. Much of the groundwork has already been laid by the delegation of responsibility to the states under section 402 of the FWPCA,<sup>112</sup> which should substantially expedite the transfer of authority for those states which have obtained approval of their NPDES programs. The permit procedure under the FWPCA of 1972 required the state to certify all section 404 permits under section 401, thus resulting in a duplication of effort<sup>113</sup> which will be eliminated by the new provisions.

Another crucial area which will determine the success of the new section 404 program is the provision which exempts congressionally authorized projects from the permit requirements. "Environmental advocates find this provision objectionable on the grounds that dredge and fill operations connected with massive federal dams and navigation or stream channelization projects often have the most destructive impact on wetlands areas."<sup>114</sup> When signing the bill into law, President Carter urged the EPA to develop programs designed to ensure that federally-exempt programs are held to the same environmental standards as those projects subject to section 404 regulation.<sup>115</sup> The requirement that environmental impact statements be prepared for congressionally-authorized projects exempt under section 404 will not, by itself, ensure that such projects do not result in the destruction of valuable wetlands. An additional commitment by Congress and the responsible agencies to an objective consideration of the initial and cumulative effects that such projects will have on wetlands areas is the only guarantee that the federal exemption provision will not have an adverse effect on the environment.

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111. 3 U.S. CODE CONG. & AD. NEWS 4402 (1978).

112. 33 U.S.C. § 1342 (Supp. V 1975).

113. See Letter from Jay D. Ringenberg to James R. Curtiss (March 30, 1978) (on file at Nebraska Law Review).

114. Comment, *The Clean Water Act of 1977: Congress Passes "Mid-Course Correction" Amendments to the FWPCA*, 8 ENVIR. L. REP 10,010, 10,011 (1978).

115. 8 ENVIR. REP. (BNA) 1347 (1978).

Finally, the effect of the decision to exempt activities associated with normal farming, silviculture, and ranching operations from the requirements of the permit program, based on the conclusion that "[these activities] should have no serious adverse impact on water quality if performed in a manner that will not impair the flow and circulation patterns and the chemical and biological characteristics of the affected waterbody,"<sup>116</sup> is unclear. The amendment was no doubt engendered by objections from miners, ranchers, loggers, and farmers who were dissatisfied with the projected scope of the Corps' authority under proposed regulations described in a press release issued by the Corps. Environmentalists and the EPA took the position that section 404 was never intended to apply to these activities and thus an amendment was unnecessary. The conference committee indicated that the amendment was intended to clarify the confusion over whether permits were required for certain "gray area" activities and, in addition, to assign responsibility to the section 208 program<sup>117</sup> for earth-moving activities not involving the discharge of dredge or fill material into navigable waters.<sup>118</sup> It thus appears that the exemptions under this provision, to the extent that they were not regulated before or are now assigned to the section 208 program, will have little overall effect on the success of the section 404 dredge and fill program.

#### IV. CONCLUSION

The amendments to section 404 of the FWPCA can best be characterized as a classic case of compromise legislation. Although no single interest was successful in persuading Congress to adopt its position *in toto*, all positions were thoroughly considered, sacrifices were made, and all involved came away with some measure of success. In particular, the provisions exempting certain activities from the permit program have allayed fears of farmers, ranchers, miners, and loggers that the program would be unduly burdensome and overbroad in scope. Environmentalists can claim victory in persuading Congress to maintain the broad jurisdictional scope as it existed under the FWPCA of 1972, although there is still legitimate apprehension about the delegation of authority to the states to implement the bulk of the section 404 program. Whether the nation's wetlands can claim victory, however, is an issue which would be premature to consider at this point.

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116. 3 U.S. CODE CONG. & AD. NEWS 4402 (1978).

117. 33 U.S.C. § 1288 (Supp. V 1975).

118. 3 U.S. CODE CONG. & AD. NEWS 4401 (1978).

The verdict hinges upon the performance of environmentalists, ranchers, loggers, miners, farmers, administrators, and the courts in carrying out a program designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>119</sup>

*James R. Curtiss '79*

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119. 33 U.S.C. § 1251(a) (Supp V 1975).