PRIMER ON SOURCES OF FEDERAL WETLANDS LAW

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I. THE BACKGROUND OF THE § 404 PERMIT PROGRAM

A. THE RIVERS & HARBORS ACT OF 1899

This Act prohibited the placement of "structures," other "obstructions," including dredged spoil, in the navigable waters of the United States except with a permit issued by the U.S. Army Corps of Engineers.

33 U.S.C. §§ 401 et seq.

Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert. denied,* 401 U.S. 910 (1971) (passage of Fish & Wildlife Coordination Act makes clear that Corps may deny permit for environmental reasons)

B. THE CLEAN WATER ACT OF 1972
1. Congress established a broad federal interest "to restore and maintain the chemical,physical, and biological integrity of the Nation's waters."

33 U.S.C. § 1251 et seq.

2. Congress created a new program regulating the discharge of drege and fill material that retained the Corps of Engineers' permit authority but delegated additional authority to the Environmental Protection Agency (EPA) to adopt regulations for disposal sites and to veto Corps permits.

33 U.S.C. § 1344 (the § 404 program)

3. Jurisdiction under the Clean Water Act is based on the Commerce Clause of the U.S. Constitution and is determined on a case-by-case basis.

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

4. Jurisdiction is no longer confined to the navigable waters of the United States but includes the "waters of the United States" as subject to regulation under the Clean Water Act.

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

But see United States v. Wilson, 133 F.3d 251 (4th Cir. Md. Dec. 23, 1997) (invalidating regulation extending coverage of Act to a variety of waters that are intrastate, nonnavigable, or both, solely on basis that use, degradation, or destruction of such waters could affect interstate commerce where no direct or indirect connection to other waters of the United States)

II. THE STRUCTURE OF THE § 404 PERMIT PROGRAM

A. WHAT IS COVERED

1. *Discharge.* Section 404 regulates the "discharge" of dredged or fill material. The Corps and EPA have expanded the definition of "discharge" to include a wide variety of activities.

But see National Mining Congress v. United States Army Corps of Eng'rs, 1998 U.S. App. LEXIS 13009 (D.C.Cir. 1998) (invalidating as unauthorized by the statute the "Tulloch" rule requiring a § 404 permit for mechanized landclearing, ditching, channelization, or other excavation; appeal pending)

See also 33 C.F.R. 323.2(d) (permit may be avoided by showing that activity will not degrade or destroy wetland or other waters of the United states)

2. *Wetlands.* A "wetland" is defined as:

areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. [33 C.F.R. § 328.3(b)]

See Riverside Bayview Homes, supra (upholding extension of jurisdiction to adjacent saturated wetlands)

But see Hoffman Homes, Inc. v. EPA, 999 F.2d 256 (7th Cir. 1993) (no showing of jurisdiction over isolated wetlands not adjacent to waters because no proof that migratory birds used area)

3. *Non-wetland waters.* These include dry arryos/washes and intermittent streams. There is no definition.

B. THE CORPS OF ENGINEERS PUBLIC INTEREST REVIEW

Corps of Engineers regulations call for a "public interest" review of § 404 permit applications that requires an ad hoc balancing process in which the Corps considers relative extent of the public and private need for the project, the existence of alternatives, and the extent and permanence of the project's benefits and detriments.

33 C.F.R. § 320.4

See Slagle v. United States By and Through Baldwin, 809 F. Supp. 704 (D. Minn. 1992)

C. THE WATER-DEPENDENCY RULE AND CONSIDERATION OF ALTERNATIVES

1. The duty to consider alternatives is an important element in the review of applications for § 404 permits in wetlands.

2. *Alternatives.* The Corps may not issue a permit if there is a practicable alternative that would have less adverse impact on the aquatic ecosystem and not have other adverse environmental effects. [40 C.F.R. 230.10(a)(1)]

3. *Water-dependency rule.* EPA guidelines also require the consideration of alternatives. If the project seeking an activity is not water-dependent, there is a presumption there are practicable alternatives to the wetlands site and that the alternatives will have less adverse impact on the aquatic ecosystem. [40 C.F.R. 230.10(a)(3)]

4. *Project purpose.* To conduct an alternatives analysis, the Corps must first determine the project's purpose and then consider alternatives that will satisfy that purpose.

E.g., National Wildlife Federation v. Whistler, 27 F.3d 1341 (8th Cir. 1994) (purpose of project held water-dependent marina because residential portion located on uplands)

5. *Market entry test.* The availability of an alternative is determined at the time a project applicant enters the relevant market to find a project site.

Bersani v. Robichaud, 850 F.2d 36 (2d Cir. 1988), *cert. denied,* 489 U.S. 1089 (1989)

D. THE SEQUENCING REQUIREMENT

"In the context of existing wetland regulation, mitigation generally refers to avoidance, minimization, and compensation. These steps are frequently applied in a sequential manner. First, a party seeking a permit for a project that affects wetlands must demonstrate that the least environmentally damaging alternative will be used. Second, the permit applicant must develop a plan to minimize the environmental harm from any unavoidable impacts. For example, the applicant might minimize the impact of a project by scheduling construction in a manner that would reduce interference with spawning or nesting seasons. Finally, the applicant must compensate for or offset any harm done to wetland functions and values which is not avoided or minimized. The applicant satisfies the compensation requirement by enhancing, restoring, creating, or preserving other wetlands that may be located on or off the project site."

Gardner, *Banking on Entrepreneurs: Wetlands, Mitigation Banking, and Takings,* 81 Iowa Law Review 527, 535 (1996)*

III. RELATED FEDERAL PROGRAMS THAT AFFECT DEVELOPMENT IN WETLANDS

A. NATIONAL ENVIRONMENTAL POLICY ACT

1. *What it requires.* The National Environmental Policy Act (NEPA) requires federal agencies to prepare an environmental impact statement on all major federal actions that have a significant effect on the quality of the human environment. Impact statements must consider the direct, indirect and cumulative effects of federal agency actions.

42 U.S.C. § 4332(2)(A)

See D. Mandelker, NEPA Law and Litigation § 2.11[6] (2d ed. 1992)

2. *Exemptions.* The Clean Water Act exempts a number of actions from NEPA's impact statement requirement, but the exemptions do not include new sources of water pollution. Dredge and fill material is a new source of water pollution so § 404 permits require a NEPA review. [33 U.S.C. § 1371(c)(1)]

3. *Sierra Club v. Sigler,* 695 F.2d 597 (5th Cir. 1983), indicates the close connection between NEPA and decisions granting § 404 permits. The court held an impact statement for a deepwater port facility was inadequate. The court added that the inadequate impact statement "tainted" the decision making process for the dredge and fill permit and prevented the careful weighing of factors required by the Corps' public interest review.

4. *Scope of the NEPA review.* Problems arise in the environmental review of projects including land that is not wetlands because the Corps has jurisdiction under § 404 only over the wetlands portion of the project. Corps regulations require it to review the environmental impacts project land beyond its jurisdiction only if it has "control and responsibility" over this land.

The Corps is to consider several factors in making this determination, such as whether the uplands part of a project affects the "location and configuration of the regulated activity."

53 Fed. Reg. 3120 (1988), codified at 33 C.F.R. Part 325, App. GB, § 7(b)

5. *Sylvester v. United States Army Corps of Engineers,* 884 F.2d 394 (9th Cir. 1989). The Corps granted a § 404 permit to fill 11 acres of wetlands for a golf course which was to be part of a resort that did not include wetlands. The court held the Corps control and responsibility regulation correctly interpreted NEPA. The court also held the resort and golf course could each exist independently and were not "two links of a single chain." Therefore, the Corps did not have to consider the environmental impacts of the resort in its decision to grant the § 404 permit for the golf course.

See Porterfield, Rippling Puddles, Small Handles and Links of Chain: The Scope of Environmental Review for Army Corps of Engineers Permit Decisions, 10 Tul. Envtl. L.J. 31 (1996)*

B. THE WETLANDS EXECUTIVE ORDER

1. The Order provides that federal agencies:

shall avoid undertaking or providing assistance for new construction located in wetlands unless the head of the agency finds: (1) that there is no practicable alternative to such construction, and (2) that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use. In making this finding, the head of the agency may take into account economic, environmental and other pertinent factors.

Executive Order 11,990, 42 Fed. Reg. 26,961 (1977)

2. The Executive Order goes beyond NEPA and requires substantive findings before federal or federally-assisted development can be allowed in wetlands.

Ashwood Manor Civic Ass'n v. Dole, 619 F. Supp. 52 (E.D. Pa.), *aff'd mem.,* 779 F.2d 41 (3d Cir. 1985), *cert. denied,* 475 U.S. 1082 (1986)

C. SWAMPBUSTER AND OTHER PROGRAMS IN THE FOOD SECURITY ACT

1. A Natural Resources Conservation Service ("NRCS") in the Department of Agriculture administers the programs authorized by the Food Security Act.

The agency protects about 92.6 million acres of wetlands located on "agricultural lands."

2. *The Wetlands Reserve Program.* This is a voluntary program that provides payments to landowners for restoring and protecting wetlands on their property. Participating landowners must give conservation easements, and they receive cost-share payments for wetland restoration.

16 U.S.C. § 3837

3. *The Water Bank Program.* This program gives the Secretary of Agriculture the authority to "enter into agreements with landowners and operators in important migratory waterfowl nesting and breeding areas for the conservation of water on specified farm, ranch, or other wetlands." Payment rates are based on local rental rates.

16 U.S.C. §§ 1301-1311

4. *Swampbuster.* The Wetland Conservation (Swampbuster) Provision of the Food Security Act makes agricultural producers ineligible for farm program benefits if they plant an agricultural commodity in wetlands that were converted by drainage, leveling or any other means after December 23, 1985, the date of the Act. They are also ineligible if they convert a wetland for agricultural production after November 28, 1990.

16 U.S.C. §§ 3821-3823

Amendments adopted to the Act in 1996 allow more flexibility in the program, particularly through expansion of opportunities for mitigation. In addition, the statutory requirement of Fish & Wildlife Service concurrence on mitigation plans and wetlands delineation was dropped.

See McBeth, *Wetlands Conservation and Federal Regulation: Analysis of the Food Security Act's "Swampbuster" Provisions as Amended by the Federal Agriculture Improvement and Reform Act of 1996,* 21 Harv. Envtl. L. Rev. 201 (1997)[*]

[*] These articles are available in the Lexis/Nexis LAWREV Library.

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