Preserving Wetlands and Other Waters Through The Regulatory System of The United States*

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I have been given the great honor of sharing reflections on the United States regulatory system and its protection of wetlands as part of a conference dedicated to the legal issues of the Ramsar Convention[1] and conservation of wetlands in Changwon, Republic of Korea. It has been my privilege to have studied, written on and spoken about wetland protections in the United States for many years. This paper serves to summarize and provide citations for that which I will discuss at this special conference on 1 November 2008.

As is true of many nations, in the United States wetlands can be found in every one of our fifty states.[2] As is also true of wetlands worldwide, United

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1) *See infra* notes 19-21 and accompanying text.

2) *See* NatureServe, Biodiversity Values of Geographically Isolated Wetlands in the United States (2005), *available at* http://www.natureserve.org/publications/isolatedwetlands.jsp. For locations of wetlands of international importance throughout the world, see *The Ramsar Convention on Wetlands*, www.ramsar.org and Wetlands International, *Ramsar Sites Information Service*, http://www.wetlands.org/RSDB/default.htm.

States wetlands differ depending on location due to a variety of factors including soil differences, topography, climate, hydrology, water chemistry, vegetation, and human impact.[3] Yet they share a common reality, because their location at the boundaries of land and water allow them to provide many "functions and values."[4] These important "functions and values" include water quality improvement through the trapping and filtering of pollutants, flood water retention and storage, habitat for endangered and other species, recreational and educational activities, and aesthetic values.[5] One increasingly recognized function for many wetlands is carbon sequestration,[6] a vital service as we consider how to mitigate for and adapt to climate change.[7]

3) U.S. Environmental Protection Agency, Wetlands Definitions, http://www.epa.gov/owow/wetlands/what/definitions.html.

4) Donald R. Cahoon, U.S. Geological Services, *Response of Coastal Ecosystems to Sea-Level Rise: Assessing Wetland Elevation Changes, Potential for Submergence, and Management Options* (2004), http://www.nrel.colostate.edu/projects/brd_global_change/proj_43_wetland_elev.html.

5) *See generally* Nat'l Acad. of Sciences, Nat'l Research Council, Wetlands: Characteristics and Boundaries (1995), *available at* http://www.nap.edu/books/0309051347/html/index.html U.S. Army Corps of Engineers, *Technical and Biological Information, available at http://www.usace.army.mil/inet/functions/cw/*cecwo/reg/techbio.htm; U.S. Envtl. Prot. Agency, *Functions and Values, available at* http://www.epa.gov/owow/wetlands/functions.html 07).

6) Jon Kusler, *Climate Change in Wetland Areas Part II: Carbon Cycle Implications From Acclimations* (July-Aug. 1999), *available at* http://www.usgcrp.gov/usgcrp/Library/nationalassessment/newsletter/1999.08/Wet.html ("...there is broad agreement that wetland plants continue to convert atmospheric carbon into biomass and carbon-rich sediments continue to be deposited in wetlands. Net carbonsequestration occurs as long as rates of conversion exceed decomposition and external transport of materials from wetlands. …What is needed to better evaluate generically and in specific settings the roles of wetlands as carbon reservoirs and for carbon sequestering and to guide protection, enhancement, restoration or creation efforts. A combination of literature surveys, scientific consensus-building measures (workshops), field measures and laboratory studies are needed. Some priority topics for such evaluation efforts include: evaluating wetlands as carbon reservoirs; estimating sequestration rates in wetlands; and enhancing, restoring and creating wetlands.").

7) As Wetlands, the leading wetlands science text explains: "[w]etlands have significant yet generally under-appreciated roles in the global carbon cycle. They are also positioned in the landscape where

Under our regulatory structure, wetlands are defined by the United States Environmental Protection Agency and the United States Army Corps of Engineers as: "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas ."[8] Scientists have other definitions as well.[9]

All wetlands (and other waters) throughout the United States are subject to diverse forms of regulation by local,[10] state,[11] and federal authorities.[12] The United States federal government has taken an interest in wetlands for quite some time, but its presence as a regulator of activities in wetlands is a more recent development.[13] Such federal presence is manifested predominantly through the Federal Water Pollution Control Act,[14] commonly known as the Clean Water Ac

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climate change could affect them more than most other ecosystems." William J. Mitsch & James G. Gosselink, Wetlands 313 (4th ed. 2007).

8) 40 C.F.R. 230.3(t) (2008); 33 C.F.R. 328.3 (2008). For additional official definitions of wetlands, *see* Commission on Geosciences, Environment and Resources, National Research Council, Toward A Coordinated Spatial Data Infrastructure For The Nation 77 (Nat'l Academies Press 1993), *available at* http://www.nap.edu/openbook/0309048990/html/77.html.

9) *See generally* Mitsch & Gosselink, *supra* note 7.

10) *See generally* Jon Kusler, Association of State Wetland Managers, A Guide for Local Governments: Wetlands and Watershed Management (2003), *available at* http://www.aswm.org/propub/pubs/aswm/wetlandswatershed.pdf; Kim Diana Connolly, *Looking to Local Law: Can Local Ordinances Help Protect Isolated Wetlands?* 27 National Wetlands Newsletter21 (May-June 2005); John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 Harv. Envtl. L. Rev. 365 (2002).

11) *See* Ass'n of State Wetlands Managers, *State Wetland Programs*, http://aswm.org/swp/statemainpage9.htm.

12) *See generally* Kim Diana Connolly, Stephen M. Johnson and Douglas R. Williams, Wetlands Law and Policy: Understanding Section 404 (American Bar Ass'n, 2005). *See also* William L. Want, Law of Wetlands Regulation (Westlaw 1989 and Supp. 2008); Environmental Law Institute, *Wetlands Program*, http://www2.eli.org/research/wetlands.htm.

13) *See* Connolly et al, *supra* note12, at 2-7.

t,[15] Section 404 program[16] and the Rivers and Harbors Act of 1899 Section 10 program.[17] In addition to the Section 404 and Section 10 regulatory programs, there are a few other federal programs that encourage preservation of wetlands through direct regulation, financial incentives, outright acquisition, or other management techniques.[18] Likewise, international cooperative efforts through the Convention on Wetlands of International Importance Especially as Waterfowl Habitat, often referred to as the Ramsar Convention on Wetlands or the Ramsar Convention,[19] encourage wetland preservation.[20] The United States joins other

14) Pub. L. No. 92-500, 86 Stat. 816 (1972), *as codified in* 33 U.S.C. §§1251-1387 (2000).

15) The Federal Water Pollution Control Act (FWPCA), is commonly referred to as the Clean Water Act following the 1977 amendments to the FWPCA. Pub. L. No. 95-217, 91 Stat. 1566 (1977) ("SEC. 518. This Act may be cited as the 'Federal Water Pollution Control Act' commonly referred to as the Clean Water Act.").

16) *See* U.S. Army Corps of Engineers, *Regulatory Program Overview*, http://www.usace.army.mil/cw/cecwo/reg/oceover.htm U.S. Environmental Protection Agency, *Section 404 of Clean Water Act: Program Questions and Overview*, *at*http://www.epa.gov/owow/wetlands/facts/fact12.html. *See also infra* Section II.B.

17) 33 U.S.C. § 403 (2000).

18) *See, e.g.*, Coastal Wetlands Planning, Protection, and Restoration Act, 104 Stat. 4779, Title III of Pub. L. 101-646, 16 U.S.C. §§ 3951-3956 (2000), which established the National Coastal Wetlands Conservation Grant Program to acquire, restore, and enhance wetlands of coastal States and the Trust Territories. *See also* North American Wetlands Conservation Act, 103 Stat. 1968; Pub. L. 101-233, 16 U.S.C. §§ 4401-4412 (2000), which provides funding and administrative direction for implementation of the North American Waterfowl Management Plan and a Tripartite Agreement on wetlands between Canada, U.S. and Mexico.

19) Convention on Wetlands of International Importance especially as Waterfowl Habitat, *opened for signature* Feb. 2, 1971, T.I.A.S. No. 1084, 996 U.N.T.S. 245 (amended 1982 &1987), *available at* http://www.ramsar.org/key_conv_e.htm.

20) *See generally The Ramsar Convention on Wetlands, www.ramsar.org United States National Ramsar Committee*, http://www.ramsarcommittee.us/index.asp. *See also* Royal C. Gardner and Kim Diana Connolly, *The Ramsar Convention on Wetlands: The Benefits of International Designation within the United States*, 37 Env'l Law Reporter 10089 (Feb. 2007), available at http://www.ramsarcommittee.us/ELR%20Ramsar%20article.pdf.

nations in further efforts on this important instrument this week here in Changwon, Republic of Korea at the tenth Conference of the Parties to the Ramsar Convention.[21]

In recent decades, the United States federal government has embraced a national goal of no overall net loss of the nation's wetland resources since the 1980's,[22] and on Earth Day 2004 reiterated a goal of achieving a net gain in wetland resources throughout the United States.[23] Yet despite its long-term experience and recent renewed commitments, wetlands have been and still remain the subject of considerable controversy in the United States.[24]

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21) *See generally* The Ramsar Convention on Wetlands, 10th Meeting of the Conference of the Contracting Parties, http://www.ramsar.org/index_cop10_e.htm (last visited Oct. 5, 2008).

22) *See* Environmental Protection Agency, the United States Army Corps of Engineers, and the United States Departments of Agriculture, Commerce, Interior, and Transportation, *National Wetlands Mitigation Action Plan,* (Dec. 24, 2002), *available at* http://www.mitigationactionplan.gov/map1226withsign.pdf. *See also* U.S. Army Corps of Engineers, Regulatory Guidance Letter 02-02, Guidance on Compensatory Mitigation Projects for Aquatic ResourceImpacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899, at 1 (Dec. 24, 2002), *available at* http://www.usace.army.mil/inet/functions/cw/cecwo/reg/RGL2-02.pdf.

23) *See* The White House, *Fact Sheet: President Announces Wetlands Initiative on Earth Day* (Apr. 22, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/04/20040422-1.html (setting forth information about President George W. Bush's announcement that his administration was "moving beyond a policy of 'no net loss'of wetlands to have an overall increase of wetlands in America each year.") *See also* Southwest Farm Press, *Norton and Johanns commend gains in U.S. wetlands*, (May 9, 2006), http://southwestfarmpress.com/news/06-05-00-norton-johanns-wetlands ("The net gain was achieved because increases in shallow-pond-type wetlands offset the continued, but smaller, losses in swamp and marshland type wetlands. This report shows a loss of 523,500 acres of swamp and marsh wetlands and a gain of 715,300 acres of shallow-water wetlands. … 'In 2004 President Bush directed that the nation move beyond the 'no net-loss' of wetlands in America to having an overall increase of wetlands over the next five years. We are certainly on the way to meeting that goal.'") *Cf.* Julie Sibbing, Nat'l Wildlife Fed'n, *Nowhere Near No Net Loss*, http://www.nwf.org/wildlife/pdfs/NowhereNearNoNetLoss.pdf.

24) A partial list of theparties who weighed in on the most recent United States Supreme Court decision on wetlands in *Rapanos v. United States*, 547 U.S. 715, 126 S.Ct. 2208 (2006) demonstrates the great

Accordingly, when it comes to wetlands and related resources, the regulatory arena is in a state of semi-constant fluctuation.[25]

The Unites States Army Corps of Engineers serves as the front-line regulator for many wetlands in the United States, and performs its responsibilities primarily through delegation to district engineers at its 38 domestic district offices[26] and more than 1,000 regulatory personnel nationwide.[27] On rare occasions, the decisions of district engineers may be "elevated" for review by Corps headquarters.[28] The United States Environmental Protection Agency also has an important regulatory and oversight role.[29] Furthermore, states have a crucial role

interest in this topic. Dozens of amicus curiae ("friend of the court") briefs were submitted. *See* Endangered Species and Wetlands Report, *Rapanos/Carabell page at http://www.eswr.com/1105/* rapanos/ for copies of various briefs.

25) Ala. L. Rev. 607 (2004); Gregory T. Broderick, *From Migratory Birds to Migratory Molecules: The Continuing Battle Over the Scope of Federal Jurisdiction Under the Clean Water Act*, 2005, 30 Colum. J. Envtl. L. 473 (2005); Bradford C. Mank, *The Murky Future of the Clean Water Act after SWANCC: Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 Ecology L.Q. 811 (2003); Michael J. Gerhardt, *On Revolution and Wetland Regulations*, 90 Geo. L.J.2143 (2002); Anjali Kharod, *Wetlands Regulatory Morass: The Missing Tulloch Rule*, 15 Vill. Envtl. L.J. 67 (2004).

26) *See* COE Division & District Regulatory Boundaries, *available at* http://www.usace.army.mil/cw/cecwo/reg/boundmap.pdf.

27) According to its FY2008 Budget Documentation, the Corps Regulatory Program has approximately 1,200 regulatory staff (including biologists, engineers, archaeologists, sociologists, etc.) in 8 division and 38 district offices nationwide. These staff provide approximately 100,000 written authorizations annually, more than 100,000 jurisdictional determinations (JDs) annually, and are involved annually in approximately 4,000 unauthorized activities (enforcement cases), 7,000 permit compliance inspections, and 60 appeals (involving denied or conditioned permits or JDs). Email from Russell L. Kaiser, U.S. Army Corps of Engineers, "RE: Help with More Data (UNCLASSIFIED)" (Mar. 9, 2007) (on file with author).

28) Elevations are pursuant to 33 U.S.C. §1344(q) (2000). For an example of a Memorandum of Agreement implementing this subsection, see Clean Water Act Section 404(q) Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army (Aug. 11, 1992), *available at* http://www.usace.army.mil/inet/functions/cw/cecwo/reg/epa404q.htm.

29) *See generally* U.S. Environmental Protection Agency, *Wetlands Regulatory Authority,*

in certifying water quality pursuant to Section 401 of the Clean Water Act,[30] and for coastal areas making a consistency determination[31] with the Coastal Zone Management Act (CZMA).[32] Likewise, other federal agencies with particular experience play important roles in permit review.[33]

The Clean Water Act[34] Section 404[35] program was one of a number of new laws evolving in the Unites States during the late 1960s through the early 1980s.[36]

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http://www.epa.gov/owow/wetlands/pdf/reg_authority_pr.pdf

30) 33 U.S.C. § 1341 (2000). *See generally* U.S. Environmental Protection Agency, *Water Quality and 401 Certification*, http://www.epa.gov/owow/wetlands/waterquality/.

31) *See* U.S. Department of Commerce, National Oceanic and Atmospheric Administration, Ocean and Coastal Resource Management, *Federal Consistency Resources, at* http://coastalmanagement.noaa.gov/consistency/resources.html.

32) 16 U.S.C. §§1451-1465 (2000). For general information on coastal regulation, see U.S. Department of Commerce, National Oceanic and Atmospheric Administration, Ocean and Coastal Resource Management, *Who We Are*, http://coastalmanagement.noaa.gov/.

33) 33 C.F.R. § 325.3 (2008) (Directing public notices be sent "to the U.S. Senators and Representatives for the area where the work is to be performed, the field representative of the Secretary of the Interior, the Regional Director of the Fish and Wildlife Service, the Regional Director of the National Park Service, the Regional Administrator of the Environmental Protection Agency (EPA), the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (NOAA), the head of the state agency responsible for fish and wildlife resources, the State Historic Preservation Officer, and the District Commander, [and the] U.S. Coast Guard.").

34) Pub. L. No. 92-500, 86 Stat. 816 (1972), *as codified in* 33 U.S.C. §§1251-1387 (2000), further amended in Pub. L. No. 95-217, 91 Stat. 1567 (1977); Pub. L. No. 100-4, 101 Stat. 45 (1987).

35) 33 U.S.C. § 1344 (2000).

36) *See generally* Richard J. Lazarus, The Making of Environmental Law (Univ. Chicago 2004). *See also* Natural Res. Def. Council, *E-law: What Started It All? available at http://www.nrdc.org/*legislation/helaw.asp; William Andreen, *The Evolving Law of Environmental Protection in the United States: 1970-1991*, 9 Envtl. and Planning L.J. 96 (1992). For information on the first Earth Day, see Senator Gaylord Nelson, *How the First Earth Day Came About*, http://earthday.envirolink.org/history.html (noting that during the early and mid-1960's in nationwide speeches, he determined that "[a]ll across the country, evidence of environmental degradation was appearing everywhere, and everyone noticed except the political establishment. The environmental issue simply was not to be found on the nation's political agenda. The people were concerned, but the politicians were not.");

Through that new law, Congress sought to "restore and maintain the chemical, physical and biological integrity of our nation's waters."[37] Section 404 of that new law was entitled "Permits for dredged or fill material."[38]

Under Section 404, "[t]he Secretary [of the Army] may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites."[39] Without a Section 404 permit, someone discharging dredged or fill materials would, in most cases, be in violation of Clean Water Act Section 301, which directs that "[e]xcept as in compliance with this section and [various sections including 404] of this Act, the discharge of any pollutant by any person shall be unlawful."[40]

Unfortunately, Section 404's language by itself is not entirely clear as to the breadth of intended federal regulatory jurisdiction. Consequently, understanding various implementing regulations and other guidance documents issued by the Corps and EPA, as well as myriad judicial decisions, is required for appropriate application of Section 404's requirements.[41] Yet even these sources often fail to provide clear answers in all cases, because, through the years, there has been considerable discord among all stakeholders – including the agencies, the permitted community, the conservation community, and the courts – with respect to the program's coverage.[42]

U.S. Environmental Protection Agency, *History – Earth Day*, http://epa.gov/history/topics/earthday/index.htm. *See also* Robert W. Adler, Jessica C. Landman and Diane M. Cameron, The Clean Water Act 20 Years Later (1993).

37) 33 U.S.C. §1251(a) (2000). To achieve this objective, Congress listed seven goals, each of which indicates concern for values other than navigability. *Id.* § 1251(a)(1)–(6). These broad goals of the law include "protection and propagation of fish, shellfish, and wildlife," "recreation in and on the water," elimination of "the discharge of toxic pollutants in toxic amounts," and "programs for the control of nonpoint source pollution." *Id.*

38) *Id.* § 1344 (2000).

39) *Id.*

40) 33 U.S.C. §1311(a) (2000).

41) For a detailed overview of these requirements, see Connolly et. al, *supra* note 12.

Section 404 only applies when the federal government has jurisdiction over both the property proposed for development and the activity proposed to be undertaken. Determining whether requisite jurisdiction over the property exists necessitates that the property properly can be delineated as a water of the United States, such as a jurisdictional wetland and that it can be considered "navigable waters" for purposes of the CWA.[43]

There have been many court decisions about the jurisdictional reach. Recently, in *Rapanos v. United States*,[44] the United States Supreme Court issued a fractured opinion of a plurality, two concurrences, and two dissents,that has lead to even less certainty.[45] As Chief Justice Roberts noted in a separate concurring opinion

42) One scholar recently summarized the tensions related to Section 404 regulation as follows: "These tensions can be traced in large measure to four structural flaws in section 404's design: the lack of a clear goal, the conflicts inherent in the Corps-EPA-section 404 relationship, reliance on a water statute to protect wetlands, and the regulation of activities in wetlands under a pollution control approach." Flournoy, *supra* note 25, at 608. *See also* Michael C. Blumm, *The Clean Water Act's Section 404 Permit Program Enters Its Adolescence: An Institutional and Programmatic Perspective*, 8 Ecology L.Q. 409 (1980); Michael C. Blumm & D. Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. Colo. L. Rev. 695 (1989); Oliver A. Houck, *Hard Choices: The Analysis of Alternatives Under Section 404 of the Clean Water Act and Similar Environmental Laws*, 60 U. Colo. L. Rev. 773 (1989); and Sam Kalen, *Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction Over Wetlands*, 69 N.D. L. Rev. 873 (1993).

43) *See* U.S. Environmental Protection Agency, *Clean Water Act Definition of "Waters of the United State,"* http://www.epa.gov/wetlands/guidance/CWAwaters.html. See also Kim Diana Connolly, *Any Hope for Happily Ever After? Reflections on Rapanos and the Future of the Clean Water Act Section 404 Program*, in The Supreme Court and the Clean Water Act: Five Essays (Vt. J. Envtl. L. 2006), *available at* http://it.vermontlaw.edu/VJEL/Rapanos/7-Connolly.pdf.

44) 126 S.Ct. 2208 (2006).

45) See Stephen M. Johnson, Kim Diana Connolly, & Mark A. Ryan, Supplements to The Clean Water Handbook, Second Edition and Wetlands: Law and Policy: Understanding Section 404 (Jan. 2007), 2006 Developments in the Corps Nationwide Permit Program, *available at* http://www.abanet.org/abastore/front_end/static/nosearch/watersuppp001-017.pdf.

in *Rapanos*, "no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis."[46]

Even if a wetland can be delineated as a water of the United States such that there is geographic jurisdiction, the Corps must also have jurisdiction over the activity, which necessitates that there be no applicable exemption. Congress exempted certain activities from regulation by CWA Section 404(f).[47] The section exempts the following activities:

(A) 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;

(B) maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

(C) construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(D) construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;

(E) construction or maintenance of farm roads or forest roads, or temporary roads for mining equipment, where such roads are constructed in accordance with best management practices, to

46) 126 S.Ct. at 2236.

47) 33 U.S.C. § 1344(f) (2000). The Corps's implementing regulations are found at 33 C.F.R. § 323.4 (2008), and EPA's implementing regulations are found at 40 C.F.R. § 232.3(2008). *See* United States v. CumberlandFarms of Connecticut, Inc., 647 F. Supp. 1166 (D. Mass. 1986) (discussing the addition of the exemptions to Section 404 in 1977. *Id.* at 1175.).

> assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;
>
> (F) activities where a State has an approved nonpoint source management program.[48]

Various statutory and regulatory conditions limit these exemptions,[49] which have been interpreted narrowly by the courts.[50] These exemptions are also restricted by Section 404(f)(2)'s "recapture" provision, which directs that

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing 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, shall be required to have a permit under this section.[51]

CWA Section 404 by its terms is only authorized to regulate "the discharge of dredged or fill material ···."[52] Thus, the draining of wetlands is not explicitly

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48) 33 U.S.C. §1344(f)(1)(A)-(F) (2000). Listed exempt activities are not subject to regulation under Section 404, Section 301, *Id.* §1311 (governing effluent limitations), or Section 402, *Id.* § 1342 (governing the National Pollutant Discharge Elimination System), but are subject to the effluent standards and prohibitions of Section 1317 governing toxic and pretreatment standards. *Id.* §1344(f)(1).

49) 33 C.F.R. § 323.4 (2008).

50) *See e.g.,* Greenfield Mills, Inc. v. Macklin, 361 F.3d 934, 949 (7th Cir. 2004); Borden Ranch Partnership v. U.S.Army Corps of Engineers, 261 F.3d 810, 815-16 (9th Cir. 2001), *aff'd by an equally divided court*, 537 U.S. 99 (2002); United States v. Larkins, 852 F.2d 189, 192 (6th Cir. 1988).

51) 33 U.S.C. § 1344(f)(2) (2000). To be "recaptured" an activity must meet both a "purpose" and an "effects" test. *See Greenfield Mills, Inc.,* at 955, *citing Borden Ranch Partnership,* 261 F.3d at 815; *Avoyelles Sportsmen's League*, 715 F.2d at 926.

listed as a regulated activity under Section 404,[53] although many drainage activities, such as constructing a ditch in a wetland, may well involve discharges of dredged or fill material requiring a Section 404 permit. Excavation and/or clearing wetlands of vegetation may or may not be regulated, depending on the particular situation.[54] The extent to which specific activities in jurisdictional waters are regulated is, in fact, a tumultuous subject.[55]

Another controversy is the statutory requirement that the United States federal government only regulate "dredged" material. CWA Section 404 by its terms is only authorized to regulate "the discharge of dredged or fill material ···."[56] One very difficult aspect of regulating in this manner is that regulators must analyze whether and the extent to which the redeposit of materials into the same waters from which they were removed, excavated, cleared, or otherwise disturbed can properly be regarded as a regulated "addition" of a pollutant.[57] The formal definition of "dredged material" is straightforward: it is material "excavated or dredged from waters of the United States."[58] The United States Court of Appeals

52) 33 U.S.C. § 1344(a).

53) Save Our Cmty. v. United States EPA, 971 F.2d 1155 (5th Cir. 1992). Several states that have their own wetland regulatory programs do regulate beyond discharge. *See, e.g.,* Protected Waters and Wetlands Permit Program, Minn. Stat. Ann. § 103G, Minnesota, *available at* http://www.bwsr.state.mn.us/wetlands/wca/chapter8420.pdf ("8420.0105 SCOPE. Wetlands must not be drained, excavated, or filled wholly or partially unless replaced by restoring or creating wetland areas of at least equal public value."); Fill and Dredge in Wetlands, N.H Rev. Stat. Ann. §§ 482-A:1-482-A:27, *available at* http://www.des.state.nh.us/wetlands/pdf/482a.pdf ("No person shall excavate, remove, fill, dredge or construct any structures in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state without a permit from the department." *Id.* at § 482-A3).

54) Excavation is an activity that is specifically regulated under the more limited jurisdictional reach of Section 10 of the Rivers and Harbors Act of 1899. 33 U.S.C. § 403.

55) *See generally* H. Michael Keller, *Regulated Activities, in* Kim Diana Connolly, Stephen M. Johnson and Douglas R. Williams, Wetlands Law and Policy: Understanding Section 404 (American Bar Ass'n, 2005).

56) 33 U.S.C. § 1344(a).

57) *Id.* § 1362(12).

58) 33 C.F.R. 323.2(c) (2008). *See* United States v. Hummel, 2003 U.S. Dist. LEXIS 5656 (2003).

for the Fourth Circuit recently explained the redeposit phenomenon as follows:

> [T]he statute does not prohibit the addition of material; it prohibits "the addition of any pollutant." The idea that there could be an addition of a pollutant without an addition of material seems to us entirely unremarkable, at least when an activity transforms some material from a nonpollutant into a pollutant, as occurred here. In the course of digging a ditch across the [particular] property, the contractor removed earth and vegetable matter from the wetland. Once it was removed, that material became "dredged spoil," a statutory pollutant and a type of material that up until then was not present on the [] property. It is of no consequence that what is now dredged spoil was previously present on the same property in the less threatening form of dirt and vegetation in an undisturbed state. What is important is that once that material was excavated from the wetland, its redeposit in that same wetland added a pollutant where none had been before.[59]

59) United States v. Deaton, 209 F.3d 331 (4th Cir. 2000), *cert. denied,* 541 U.S. 972 (2004).*Accord* Avoyelles Sportsmen's League v. Marsh. 715 F.2d 897 (5th Cir. 1983) ("[t]he word 'addition,' as used in the definition of 'discharge,' may reasonably be understood to include 'redeposit,'" where such "redepositing activities would significantly alter the character of the wetlands and limit the ecological functions served by the tract." Furthermore, because "'dredged' material is by definition material that comes from the water itself," construing the term "addition" to impose a requirement that the pollutant come from outside sources "would effectively remove the dredge-and-fill provisions from the statute." *Id.* at 923-4); United States v. M.C.C. of Florida, Inc., 772 F.2d 1501, 1506 (11th Cir. 1985), *vacated and remanded on other grounds*, 481 U.S. 1034 (1987), *readopted in part and remanded on other grounds*, 848 F.2d 1133 (11th Cir. 1988), *reh'g granted in other part*, 863 F.2d 802 (11thCir. 1989) (redepositing sediment and vegetation dredged by tugboat propellers onto adjacent sea grass beds was an "addition" of a pollutant that impacted the physical and biological integrity of the waters in question). *Cf.* United States v. Wilson, 133 F.3d 251 (4th Cir. 1997) (a divided Fourth Circuit reached no conclusion as to whether sidecasting was subject to regulation).

Following a tumultuous series of court decisions,[60] a new final rule re-defining "discharge of dredged material" was issued in 2001.[61] That new rule provided, in part: "(d)(1) Except as provided below in paragraph (d)(3), the term discharge of dredged material means any addition of dredged material into, including any redeposit of dredged material other than incidental fallback within, the waters of the United States."[62] Yet that rule was recently found invalid by a district court[63] leaving more confusion for the regulators and other stakeholders.

Assuming that the federal government has jurisdiction under the parameters set forth above, a permit application is required before any discharge into a wetland or other water may occur.[64] The vast majority of Corps regulatory permit actions involve authorization by general permits.[65] In fact, in FY2005, of the 89,516 federal permit authorizations made by the Corps, 78,336[66] were authorized by the general permitting program, most under CWA Section 404(e).[67] Of those general permit authorizations, 34,114, or 38%, were made by nationwide general permits (NWPs).[68] By statue, the Corps' general permits are limited to categories

60) *See, e.g.,* National Mining Association v. U.S. Army Corps of Engineers, 145 F.3d 1399 (D.C. Cir. 1998).

61) 66 Fed. Reg. 4550 (Jan. 17, 2001).

62) 33 C.F.R. § 323.3(d)(2).

63) National Association of Home Builders v. U.S. Army Corps of Engineers, 2007 U.S. Dist. LEXIS 6366 (Jan. 30, 2007).

64) *See generally* 33 CFR pt. 320 (2008), General Regulatory Policies.

65) *See generally* 33 C.F.R. Part 330 (2008), 40 C.F.R. § 230.7 (2008); *see also* U.S. Army Corps of Engineers, *Nationwide Permit Program,* http://www.usace.army.mil/cw/cecwo/reg/nationwide_permits.htm. *See also* William E. Taylor & Kate L. Geoffroy, *General and Nationwide Permits in* Kim Diana Connolly, Stephen M. Johnson and Douglas R. Williams, Wetlands Law and Policy: Understanding Section 404 (American Bar Ass'n, 2005) for a detailed overview of general permits, particularly the nationwide permit process.

66) U.S. Army Corps of Engineers, *U.S.Army Corps of Engineers Regulatory Program, ALL PERMIT DECISIONS FY 2004 & 2005* (on file with author).

67) 33 U.S.C. § 1344(e).

68) *See ALL PERMIT DECISIONS, supra* note 66.

of activities involving discharges of dredged or fill material into waters of the United States that are similar in nature and cause only minimal adverse environmental effects when performed separately and considered cumulatively.[69]

General permits involve a programmatic review when they are issued, meaning that practicable alternatives analyses,[70] public interest review,[71] compliance with the National Environmental Policy Act,[72] and other matters are not undertaken on a permit-by-permit basis.[73] This means that the processing time for such permits is significantly reduced.[74] These reviews are required for individual

69) 33 U.S.C. § 1344(e). *See* Alaska Ctr. for the Env't v. West, 157 F.3d 680 (9th Cir. 1998).

70) 40 C.F.R. § 230.10(a) (2008). "The NWPs authorize only those activities that result in minimal individual and cumulative adverse effects on the aquatic environment, and thus do not include a formal process for consideration of less damaging alternatives." 72 Fed. Reg. at 11093.

71) 33 C.F.R. § 320.4(a) (2008).

72) "In order to address the requirements of the National Environmental Policy Act, the Corps prepares a decision document for each NWP along with a 404(b)(1) Guidelines analysis." 72 Fed. Reg. at 11,117. (The Corps asserts that it believes "the data in the draft decision documents comply with the requirements of NEPA. The estimates of the projected use of the NWPs, the acres impacted, and the amount of compensatory mitigation are based on available data from Corps district offices, and other sources of data, such as surveys. Those data are based on preconstruction notifications and other requests for NWP verifications for activities that do not require preconstruction notification. For those NWP activities that do not require notification, it is necessary to derive estimates. For the decision documents, we must use predictive data, since the future use of an NWP is speculative. Likewise, we cannot provide site specific information for these environmental assessments, because there are no specific sites or projects associated with the proposed issuance of an NWP." *Id.* at 11095.).

73) *See* U.S. Army Corps of Engineers, *Final Documents for 2007 Nationwide Permits, http://www.usace.army.mil/cw/cecwo/reg*/nwp/nwp_final.htm. The decision documents each include a discussion of compliance with applicable laws, consideration of public comments, an alternatives analysis, and a general assessment of individual and cumulative impacts, including the general potential effects on public interest factors. *Id.*

74) In 1997, it was reported that the average time to evaluate projects under general permits was fifteen days as compared to 104 days for individual permits. *Wetlands Protection and Mitigation Banking: Hearing Before the H. Comm. on Transportation and Infrastructure Subcomm. on Water Resources and Environment*, 105th Cong. (1997) (statement of Michael L. Davis, Deputy Assistant Secretary of the

permits on an individual basis.

On average, approximately five percent of permit actions undertaken annually by the Corps proceed through an individual permit process.[75] If an individual permit is required, the Corps encourages, but does not mandate, a pre-application consultation.[76] The application itself[77] requires a variety of relevant information, including: a complete description of the proposed activity (including necessary drawings, sketches, or plans sufficient for public notice);[78] location, purpose, and need for the proposed activity; scheduling information regarding the proposed activity; the names and addresses of adjoining property owners and the location and dimensions of adjacent structures; and a list of authorizations required by other federal, interstate, or local agencies for the work, including all approvals or denials already made.[79] Section 404 permit applications must also describe the purpose of the discharge, explain the type, composition, and quantity of the material and the method of transportation and disposal of the material, and provide details about the location of the disposal site.[80] Permit applications may be completed on-line.[81]

The receiving Corps District office has fifteen days to review a submitted application and determine whether it is complete.[82] Once an application is

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Army for Civil Works and Robert H. Wayland, III, Director, Office of Wetlands, Oceans and Watersheds, Environmental Protection Agency), *available at http://www.usace.army.mil/cw/cecw-p/pcomp/*davis120997.pdf. These numbers are similar to those reported recently. *See also ALL PERMIT DECISIONS, supra* note 66.

75) *See ALL PERMIT DECISIONS, supra* note 66.

76) 33 C.F.R. § 325.1(b) (2008).

77) A copy of the current application can be found at U.S. Army Corps of Engineers, *Application for a Department of the Army Permit*, http://www.usace.army.mil/cw/cecwo/reg/eng4345a.pdf.

78) Detailed engineering plans and specifications are not required at this stage. 33 C.F.R. § 325.1(d)(1).

79) *Id.*

80) 33 C.F.R. § 325.1(d)(4) (2008).

81) U.S. Army Corps of Engineers, *Online Permit Application Center, Guide for Permit Applicants*, https://epermit.usace.army.mil/forms_need.html#apply-genper.

deemed complete, a public notice including specifics about the applicant and the activity must be issued.[83] Appropriate opportunities to comment on the proposed action must be provided to other federal agencies, including EPA,[84] the U.S. Fish and Wildlife Service (FWS),[85] the National Marine Fisheries Service (NMFS),[86] state wildlife, historic preservation,[87] and environmental agencies,[88] and other federal and state agencies.[89] The Corps must inform the applicant about

82) 33 C.F.R. § 325.2(a) (2008). An application is complete when the Corps receives sufficient information to issue a public notice. *Id.* §325.1(d)(9). The Corps can request additional information after it has determined that an application is complete if it is essential to make a public interest determination. *Id.* §§ 325.1(d)(9); 325.1(e).

83) 33 C.F.R. §§ 325.3(a), 325(c) (2008).

84) The Clean Water Act anticipates that EPA, FWS, NMFS, and other federal agencies will comment on wetland permit applications. *See* 33 U.S.C. § 1344(q). The Act also explicitly authorizes EPA to veto the Corps's issuance of a wetland permit. *Id.* § 1344(c).

85) The Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666(c), requires the Corps to consult with the FWS or the NMFS, and with the head of the appropriate state agency exercising administration over the wildlife resources of the state when the Corps reviews a wetland permit application. 33 C.F.R. §§ 320.3(e); 320.4(c). In addition, the Endangered Species Act, 16 U.S.C. § 1531-1544 (2000) may also require the Corps to consult with the FWS and the NMFS when it issues certain permits.

86) In addition to the laws cited in the previous footnote, the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1855(b)(2), requires the Corps to consult with NMFS when a proposed federal activity may adversely affect identified Essential Fish Habitat (EFH). *See* 50 C.F.R. pt. 600. For general information about EFH, *see* National Oceanic and Atmospheric Administration Fisheries, *Essential Fish Habitat*, http://www.nmfs.noaa.gov/habitat/habitatprotection/efh/index.htm. *See also* Kim Diana Connolly, *An Introduction to the Essential Fish Habitat (EFH) Consultation Process for the South Atlantic Area*, 11 Southeastern Envtl L.J. 1 (2003).

87) The National Historic Preservation Act of 1966, 16 U.S.C. § 470, requires the Corps to consult with state/tribal historic preservation officers and the federal Advisory Council on Historic Preservationwhen it issues certain permits. *See also* 33 C.F.R. 33 CFR pt. 325, App. C (2008).

88) The Corps cannot issue a wetland permit unless the state in which the discharge will occur certifies that the discharge will not affect the quality of the water in the state in violation of any effluent limitations, water quality standards or water quality requirements of that state. 33 U.S.C. § 1341; 33 C.F.R. §§ 320.3(a); 325.1(d)(4); 325.2(b)(1) (2008).

89) Federal agencies have entered into various memoranda of agreement pursuant to Section 404(q) of the

substantive comments that the agency received and provide an opportunity to supply additional information or supplement the application.[90] The Corps may also require the applicant to submit additional information to address specific issues raised during the public comment period.[91] The applicant must respond to the Corps' request for information within thirty days, unless the applicant requests additional time to respond and the Corps grants the request.[92] The Corps may also hold a public hearing on any permit application prior to review unless the agency determines "that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing."[93] Public hearings are rare.[94]

Permits are reviewed pursuant to particular criteria. The CWA requires the Corps to evaluate every wetland permit application under Section 404(b)(1) guidelines that EPA promulgated in consultation with the Corps.[95] These

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Clean Water Act, 33 U.S.C. §1344(q) that governs the manner in which they will comment on proposed applications and resolve any disputes regarding applications. Copies of the MOAs may be found at http://www.usace.army.mil/cw/cecwo/reg/mou/moumoas.htm.

90) 33 C.F.R. § 325.1(e) (2008). (The regulations specify that "[a] summary of the comments, the actual letters or portions thereof, or representative comment letters may be furnished to the applicant." *Id.* § 325.2(a)(3)). *See also* Mall Properties, Inc. v. Marsh, 672 F. Supp. 561, 574-75 (D. Mass. 1988) (holding that the Corps violated its regulations when it failed to inform the permit applicant that the state governor had objected to the proposed permit), *appeal dismissed on finding that remand order was nonappealable*, 881 F.2d 440 (1st Cir. 1988).

91) 33 C.F.R. § 325.2(a)(3) (2008).

92) *Id.* § 325.2(d)(5). When an applicant requests additional time to respond to the Corps's request for information, the agency may grant the request, make a final decision on the permit, or consider the application withdrawn. *Id.*

93) *Id.* § 327.4(b). A hearing request must state with particularity the reasons for the hearing. *Id.* Before the Corps grants a request for a hearing, it may attempt to resolve the issues raised by the requester informally. *Id.* Any hearing must comply with certain requirements. *Id.* § 327.11 (2008).

94) See U.S. Army Corps of Engineers, Baltimore District, *Regulatory Program General Information,* http://www.nab.usace.army.mil/Regulatory/gen_info.htm ("Very few applications involve a public hearing.")

95) 33 U.S.C. § 1344(b)(1). *See also* 33 C.F.R. §§ 320.4(a)(1) ("[A] permit will be denied if the discharge

guidelines prohibit the Corps from issuing a wetland permit if there is a "practicable alternative" to the proposed activity that would have a less adverse impact on the aquatic ecosystem.[96] In addition, the guidelines create a presumption that there are practicable alternatives to discharges of dredged or fill material into wetlands when the proposed activity is not water-dependent.[97]

The 404(b)(1) guidelines also prohibit the issuance of a permit when the activity authorized by the permit causes or contributes to significant degradation of waters of the United States,[98] causes or contributes to a violation of state water quality standards, violates federal toxic pollution standards, jeopardizes endangered species or destroys or adversely modifies their critical habitat, or violates federal marine sanctuary protection requirements.[99] Further, the 404(b)(1) Guidelines form the basis for the mitigation requirements, which have been recently updated.[100]

The Corps also undertakes a "public interest" review of the proposed activity[101]

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authorized by such permit would not comply with the ... 404(b)(1) guidelines."); *Id.* § 323.6(a). Although they are referred to as guidelines, the 404(b)(1) guidelines are binding regulations. The 404(b)(1) guidelines do not, of course, apply to permits that are issued solely under Section 10 of the Rivers and Harbors Act.

96) 40 C.F.R. § 230.10(a). *See generally* Oliver Houck, *Hard Choices: The Analysis of Alternatives Under Section 404 of the Clean Water Act and Similar Environmental Laws*, 60 U. Colo. L. Rev. 773 (1989).

97) 40 C.F.R. § 230.10(a)(3).

98) *Id.* § 230.10(c). The guidelines identify effects deemed to be "significant," and establish tests to be used in determining significance. *Id.* In addition, the Corps has clarified that the term "significant" under the 404(b)(1) guidelines does not have exactly the same meaning as the term "significant" under NEPA. RGL 87-02, *Use of the Word "Significant" in Permit Documentation* (Mar. 30, 1987).

99) 33 C.F.R. § 230.10(b).

100) United States Army Corps of Engineers et al., *Compensatory Mitigation for Losses of Aquatic Resources*, 73 Fed. Reg. 19594 (Apr. 10, 2008), *available at http://www.epa.gov/owow/wetlands/pdf/* wetlands_mitigation_final_rule_4_10_08.pdf.

101) The Corps conducts a "public interest" review for all individual applications under the Rivers and Harbors Act, the Clean Water Act, or the Ocean Dumping Act. 33 C.F.R. § 320.4. The Corps' website declares "Probably the single biggest safeguard of the program is the Corps public interest review,

that evaluates probable impacts, including cumulative impacts, on the public interest of the proposed activity and its use.[102] The required public interest review considers many factors, including conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership, and the needs and welfare of the people.[103] The modern Corps public interest review standard is not whether a proposed activity is in the public interest, but whether granting the permit would be "contrary to" the public interest.[104]

A variety of other laws may come into play in the Corps permit decision process. These laws include the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the National Historic Preservation Act (NHPA), CWA Section 401 and the Coastal Zone Management Act (CZMA), discussed further below.[105]

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which also forms the main framework for overall evaluation of the project. This review requires the careful weighing of all public interest factors relevant to each particular case." U.S. Army Corps of Engineers, Regulatory Program Overview, http://www.usace.army.mil/cw/cecwo/reg/oceover.htm.

102) *Id.* § 320.4(a)(1).

103) *Id.*In every case, the Corps considers (1) the relative extent of the public and private need for the proposed activity; (2) the practicability of using reasonable alternative locations and methods to achieve the objective of the proposed activity (if there are unresolved conflicts regarding resource use); and (3) the extent and permanence of the beneficial and or detrimental effect that the activity is likely to have on the public and private uses to which the area is suited. *Id.* § 320.4(a)(2). Earlier versions of the Corps public interest review involved evaluation of fewer factors. *See* 42 Fed. Reg. 37122 (1977). Earlier versions also involved a test as to whether the issued permit would be in the public interest. *See* 47 Fed. Reg. 31,794 (1982).

104) *Id.* § 320.4(a)(1). *See* Kim Diana Connolly, *Shifting Interests: Rethinking the U.S. Army Corps of Engineers Permitting Process and Public Interest Review in Light of Hurricanes Katrina and Rita*, 32 Thurgood Marshall L.R. 109 (2006).

105) For links to these and other "related laws" see U.S. Army Corps of Engineers, *Statutory, Administrative*

NEPA requires preparation of an environmental impact statement (EIS) for any "major federal action significantly affecting the quality of the human environment,"[106] and consideration of environmental impacts of proposed actions and their alternatives in all cases.[107] Both the Corps and the Council on Environmental Quality (CEQ)[108] have established regulations that set forth the procedures that the Corps must follow to comply with NEPA when it reviews a wetland permit application.[109] Most Corps permit decisions comply with NEPA through completion of an Environmental Assessment (EA).[110]

The ESA requires that issued permits do not jeopardize the continued existence of an endangered or threatened species, or destroy or adversely modify designated critical habitat.[111] When the Corps receives a wetland permit application, it complies with the ESA by reviewing the application to determine whether the proposed activities meet its requirements.[112] The public notice for each individual permit application will indicate whether the Corps has concluded that the proposal will not affect endangered or threatened species or designated critical habitat.[113] A conclusion that the proposed activity may affect an endangered or threatened species or designated critical habitat will trigger formal consultation procedures[114] with either the Fish and Wildlife Service[115] or the

& Policy Materials, http://www.usace.army.mil/cw/cecwo/reg/sadmin3.htm.

106) 42 U.S.C. § 4332(2)(C).

107) *Id.* § 4332(2)(E). As part of the NEPA process, cumulative effects of the proposed activity, including its indirect effects, must be considered. 40 C.F.R. § 1508.8 (2008)

108) The Council on Environmental Quality (CEQ) is a federal agency that was created by NEPA to administer and interpret NEPA. 42 U.S.C. §4342. For more information on CEQ, see its website at http://www.whitehouse.gov/ceq/, as well as NEPANet at http://ceq.eh.doe.gov/nepa/nepanet.htm.

109) *See* 33 C.F.R. Part 230; *Id.* pt. 325, App. B; 40 C.F.R. § 1500-1508 (2008).

110) 33 C.F.R. § 230.7(a)("(a) *Regulatory Actions.* Most permits will normally require only an EA.")

111) 16 U.S.C. §1536(a)(2)(2000). See also 33 C.F.R. § 320.3(i) (2008).

112) 33 C.F.R. § 325.2(b)(5)(2008). *See also* RGL 83-06, Endangered Species Act - Regulatory Program, *available at* http://www.usace.army.mil/cw/cecwo/reg/rgls/rgl83-06.pdf.

113) *Id.*

National Marine Fisheries Service,[116] depending on the species under the ESA and implementing regulations.[117] If this consultation process results in a determination that the activity will jeopardize an endangered or threatened species or destroy or adversely affect designated critical habitat, unless reasonable and prudent alternatives can be developed, the Corps must deny the permit.[118] A separate analysis may be triggered if animals protected under the Marine Mammal Protection Act[119] might be impacted by a project.

The National Historic Preservation Act (NHPA)[120] requires federal agencies undertaking or licensing activities that may affect properties listed on the National Register of Historic Places to consider the effect of the project on those

114) *See* U.S. Fish and Wildlife Service, Section 7 Consultation Handbook, *available at http://www.fws.gov/*endangered/consultations/s7hndbk/s7hndbk.htm.

115) *See* U.S. Fish and Wildlife Service, *Endangered Species Related Laws, Regulations, Policies & Notices*, http://www.fws.gov/endangered/policies/index.html.

116) The NMFS (also known as NOAA Fisheries) has jurisdiction over marine species under the Endangered Species Act. 50 C.F.R. §402.01(b). For more information on NMFS activities with respect to endangered species, see NOAA Fisheries, *Office of Protected Resources*, http://www.nmfs.noaa.gov/pr/.

117) *Id.*The consultation procedures are codified in 50 C.F.R. pt. 402 (2008).

118) The consultation process, involves the FWS or the NMFS preparing a "biological opinion" that evaluates whether the proposed activity will jeopardize the continued existence of a threatened or endangered species. 50 C.F.R. § 402.14 (2008). That opinion may also suggest conditions that the Corps could place on the permit to ensure that the activity will not jeopardize such species. *Id.* Even if the FWS or the NMFS concludes that the proposed activity will jeopardize a threatened or endangered species, the Corps retains the ultimate authority to determine whether the activity will jeopardize such species. Roosevelt Campobello Int'l Park Comm'n v. U.S. Environmental Protection Agency, 684 F.2d 1041, 1049 (1st Cir. 1982); Sierra Club v. Froehlke, 534 F.2d 1289, 1303 (8th Cir. 1976). Note that the Corps is also required to consider the impacts of proposed activities on endangered or threatened species or designated critical habitat as part of the agency's "public interest" review. *See* Town of Norfolk v. U.S. Army Corps of Engineers, 968 F.2d 1438, 1453 (1st Cir. 1992).

119) Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407; Regulations Governing the Taking and Importing of Marine Mammals, 50 C.F.R. pt. 216 (2008). *See also* NOAA Office of Protected Resources, *Marine Mammal Protection Act of 1972*, http://www.nmfs.noaa.gov/pr/laws/mmpa/.

120) 16 U.S.C. §§ 470, 470f (2000).

properties, and to provide the Advisory Council on Historic Preservation (ACHP) an opportunity to comment on the project.[121] Corps NHPA regulations[122] set forth additional permit review procedures for a proposed permit seeking to conduct an activity that would involve property listed or eligible for listing on the National Register of Historic Places.[123] If historic properties may be affected by a proposed activity, the Corps must send a notice to the state historic preservation officer (SHPO)[124] or the tribal historic preservation officer (THPO),[125] the ACHP, the regional office of the National Park Service,[126] and other parties for their comments.[127] This is a pure consultation requirement, because the NHPA does not require the Corps to avoid or minimize the effects of a proposed activity on historic properties.[128] The Corps "public interest" review[129] allows the addition of permit conditions to minimize or avoid harm to historic properties if deemed necessary to protect the public interest.[130]

Finally, CWA Section 401 provides a mechanism for state certification that proposed activities will not violate various state water quality laws.[131] The Corps

121) The ACHP has promulgated regulations that authorize state historic preservation officers (SHPOs) to consult with agencies and comment on projects in lieu of, or in addition to, the ACHP. 36 C.F.R. §800.1(c)(ii)(2008).

122) 33 C.F.R. pt. 325, App. C (2008).

123) *Id.* § 325.2(b)(3) (2008).

124) For a list of SHPOs, see Advisory Council on Historic Preservation, *State Historic Preservation Officers*, http://www.achp.gov/shpo.html.

125) For a list of THPOs, see Advisory Council on Historic Preservation, *Tribal Historic Preservation Officers*, http://www.achp.gov/thpo.html.

126) *See* National Park Service, *History and Culture Preservation*, http://www.cr.nps.gov/preservation.htm.

127) 33 C.F.R. pt. 325, App. C, § 4a.

128) Under the NHPA, aslong as the Corps consults with the ACHP and considers the impact of a project on historic properties, the Corps can issue a permit for the project even though it will adversely affect historic properties. 36 C.F.R. § 800.6(c)(2).

129) *See supra* notes 101-104 and accompanying text.

130) 33 C.F.R. pt. 325, App. C., § 10a.

131) 33 U.S.C. § 1341(a)(1). *See also* 33 C.F.R. §§ 320.3(a); 325.1(d)(4), and Regulatory Guidance Letter

cannot issue a permit under Section 404 unless the state issues (or waives its right to issue) a Section 401 certification.[132] Waiver occurs if the state does not act on the Corps' request for certification within sixty days.[133] Likewise, for states with an approved program under the Coastal Zone Management Act,[134] the Corps cannot issue a wetland permit for an activity that affects the coastal zone unless the state certifies that the proposed activity complies with the state's coastal zone management program.[135]

The Corps' review of a wetland permit application generally proceeds concurrently with the review of relevant federal, state, and local agencies.[136] Accordingly, the Corps may establish joint review procedures with expert agencies on a state or local level.[137] The Corps must fully consider the comments of those agencies regarding their areas of expertise on relevant statutes, regulations, and policies.[138] This consideration of expert agency

87-03, Section 401 Water QualityCertification, *available at* http://www.usace.army.mil/inet/functions/cw/cecwo/reg/rgls/rgl87-03.htm. When the Corps receives a permit application, it must notify EPA that it has received the application. 33 U.S.C. § 1341 (a)(2) (2000). If the EPA Administrator determines that the proposed activity may affect the water quality of any other state, the administrator notifies the other state, the Corps, and the permit applicant. *Id.*

132) 33 C.F.R. § 325.2(b)(1)(ii) (2008).

133) *See generally* NOAA, *Federal Consistency Determination Resources*, http://coastalmanagement.noaa.gov/consistency/resources.html.

134) Coastal zone management plans are reviewed and approved by the Secretary of Commerce. 16 U.S.C. § 1454 (2000).

135) *Id.* § 1456(c)(3)(A). The Act places additional constraints on federal agencies when they are the permit applicant. *See id.* § 1456(c); 33 C.F.R. § 325.2(b)(2)(i).

136) *Id.* § 320.4(j)(1).

137) *Id.* §§ 320.4(j)(5); 325.2(e)(3).

138) *See* RGL 92-01, *Federal Agencies Roles and Responsibilities, available at http://www.usace.army.mil/*cw/cecwo/reg/rgls/rgl92-01.pdf. *See also* 33 C.F.R. § 320.4(c); Slagle v. U.S. By and Through Baldwin, 809 F.Supp. 704, 712 (D. Minn. 1992) (Corps must consider the comments of local agencies); Sierra Club v. Alexander, 484 F.Supp. 455 (N.D. N.Y. 1980), *aff'd*, 633 F.2d 206 (2d Cir. 1980).

comments can come into play when the Corps determines whether issuance of the permit is contrary to the public interest.[139] Timing may vary as to whether the Corps or other agencies complete their reviews first.[140] However, the Corps retains full authority to decide whether to issue or deny a permit, or to include specific conditions.[141] Permits are sometimes issued pending final review by other expert agencies.[142]

The district engineer is charged with the final decision on permit applications,[143] which is generally an issuance, often with conditions, or denial supported by a written statement of findings (SOF).[144] To accept a proffered permit, the applicant must sign the permit to indicate understanding of and intent to comply with conditions included in the permit.[145] The issuance of the permit does not convey any property rights or exclusive privileges to the applicant.[146]

As you can see from this brief paper, the regulatory system of the United States has developed a somewhat comprehensive approach to protecting wetlands, but much continuing debate about the program's implementation

139) RGL 92-01, *supra* note 138.

140) 33 C.F.R. §§ 320.4(j)(1); 325.2(d)(4).

141) *Id.*

142) U.S. Army Corps of Engineers, Provisional Permits, Regulatory Guidance Letter 93-1, *available at* http://www.usace.army.mil/cw/cecwo/reg/rgls/rgl93-01.pdf.

143) *Id.* §§ 325.2(a)(6); 325.8. District engineers refer permit applications to the division engineer for decision when (1) a referral is required by a memorandum of agreement with other federal agencies; (2) the recommended decision is contrary to the written position of the Governor of the state in which the permitted activity will take place; (3) there is substantial doubt as to authority, law, regulations, or policies applicable to the proposed activity; (4) a higher authority requests that the application be forwarded for decision; or (5) the district engineer is precluded by law or procedures from taking final action on the application. 33 C.F.R. §325.8(b). The division engineer may refer the application to the Chief of Engineers in similar situations. *Id.* § 325.8(c).

144) 33 C.F.R. § 325.2(a)(6). If an EIS was prepared for the decision, the Corps must prepare a record of decision for the decision instead of a statement of findings. *Id.*

145) *Id.*

146) *Id.* § 320.4(g).

remains. Proposals to amend the system have been offered in recent years, and I believe given the turmoil in some parts of the regulatory system that the United States Congress should consider making legislative amendments. Nevertheless, our existing system does provide some level of protection to many wetland ecosystems and the functions and values they provide. I have appreciated the opportunity to share some of my experiences in this subject area with you here in the Republic of Korea as we come together in conjunction with the Tenth Conference of the Parties to the Ramsar Convention and look forward to learning more about your regulatory system at this conference.