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THE FOX IN THE CHICKEN COOP: THE REGULATORY PROGRAM OF THE U.S. ARMY CORPS OF ENGINEERS†

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THE U.S. Army Corps of Engineers is the world's largest civil engineering firm.¹ Not only does the Corps design, dig, and build dams, channels, and jetties, it also has broad regulatory powers. Since 1890, parties desiring to construct or excavate in navigable waterways have been required to obtain the Corps' prior permission.²

In 1975, the Corps was given additional regulatory responsibilities when a court ordered the Corps to expand its program to require anyone affecting the water of the United States by either dredging or filling to obtain a permit.³ The resulting expansion of regulation has thrust familiar actors into unfamiliar roles. Developers and farmers, the Corps' traditional allies, have adamantly opposed expansion of the Corps' jurisdiction. In contrast, environmental groups, accustomed to attacking the Corps as an environmental despoiler, have supported the increase in its powers.⁴ The

¹ Moser, *Dig they must, the Army Engineers, securing allies and acquiring enemies*, SMITHSONIAN, Dec. 1976, at 43.

² See Rivers and Harbors Act of 1890, ch. 907, § 7, 26 Stat. 426, 454 (1890) (codified at 33 U.S.C. §§ 401, 407 (1970)).

³ Natural Resources Defense Council, Inc. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975); see text accompanying note 79 *infra*. For a description of the Corps' Administrative Program, see 33 C.F.R. §§ 209.110-410 (1976).

⁴ See Section 404 of Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Public Works, 94th Cong., 2d Sess. (1976) [hereinafter cited as *Senate Hearings*].

Corps itself, as always, has remained in the midst of the fray, enduring the same amount of heat, albeit from a new direction. Sensitive to accusations that it has usurped too much congressional power,⁵ the Corps initially attempted to shirk its new responsibilities. The 94th Congress was unable to decide how expansive the Corps' powers should be, and the 95th Congress is now considering the same question.

The program administered by the Corps has evolved dramatically in recent years: jurisdiction has expanded considerably; decision criteria and procedures have become more complex; decisions are more likely to be challenged in the courts; and, most importantly, the role of the Corps has changed from that of a benevolent and permissive overseer of private activities to that of a defender of the environment. The purpose of this article is to provide a comprehensive examination of this evolution. Part I reviews the history of the enabling legislation that originally swept coastal development within the oversight authority of the Corps. Part II reviews the evolution of the Corps' regulatory program, and Part III appraises the program's efficacy. Although this discussion may address tangentially whether the Corps' jurisdiction should be expanded, my hope is that the article will suggest what the proper role of the Corps should be in light of both its abilities and its limitations. Because federal, state, and local legislatures increasingly refer each new conflict concerning land use to administrative agencies with directions that such conflicts be resolved in the "public interest,"⁶ the Corps' almost ninety years of experience may provide lessons as to the strengths and weaknesses of such "public interest" regulations.

I. HISTORICAL DEVELOPMENT OF THE RIVERS AND HARBORS ACT

Congress created the Army Corps of Engineers in 1802.⁷ Among its original duties were the placement and construction of certain

⁵ The Corps has long been damned by critics. See generally J. LENNEY, *CASTE SYSTEM IN THE AMERICAN ARMY: A STUDY OF THE CORPS OF ENGINEERS AND THEIR WEST POINT SYSTEM* (1949); A. MAASS, *MUDDY WATER* (1951); A. MORGAN, *DAMS AND OTHER DISASTERS* (1971).

⁶ Cf. COUNCIL ON ENVIRONMENTAL QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT, *ENVIRONMENTAL QUALITY — FIFTH ANNUAL REPORT* 54-55 (1974) (current trend in land use regulation toward a case-by-case review to ensure adequate sensitivity to community and environmental impact).

⁷ Act of Mar. 16, 1802, ch. 9, § 26, 2 Stat. 132, 137.

frontier defense structures previously authorized and funded by Congress.⁸ During the War of 1812, the Corps expanded, assuming authority to inspect coastal fortifications at "various important Ports and Harbours between Maine and New Orleans."⁹

Congress continued to authorize the Corps to make improvements in rivers and harbors throughout the nineteenth century, but the purpose of such improvements changed from fortification to promotion of navigation. For example, in 1824, Congress authorized the Corps to deepen the channel to the harbor of Presque Isle (Lake Erie) and to restore Plymouth Harbor.¹⁰ The Corps engaged in such projects until the 1860's, when the Civil War diverted its attention. Thereafter, Congress began appropriating funds annually for the improvement of rivers and harbors, and the Corps returned to civil engineering. These appropriations were the largest federal construction expenditures in that era and were awarded by Congress on a "pork barrel" basis.¹¹

In 1877, the Chief of Engineers initiated a proposal that ultimately led to a significant expansion of the responsibility of the Corps.¹² The proposal was designed especially to protect harbor areas from the congestion caused by random unplanned construction of wharves and piers. This legislation, known as the "Dolph Bill," was introduced in Congress several times over the next decade without success. Then, in 1888, the United States Supreme Court decided *Willamette Iron Bridge Co. v. Hatch*.¹³ The Court held that, in the absence of a statutory enactment by Congress, state legislatures were free to authorize or prohibit the construction of bridges, dams, and other structures in or over waters within the state, regardless of whether such structures obstructed navigation.¹⁴

The *Hatch* decision spurred the enactment of the Dolph Bill. Proponents finally obtained passage by appending the proposed grant of regulatory powers to the annual rivers and harbors ap-

⁸ See, e.g., Act of May 10, 1800, ch. 48, § 1, 2 Stat. 66, 67.

⁹ F. HILL, *ROADS, RAILS AND WATERWAYS* 6 (1957) (quoting miscellaneous letters of Engineer Dep't).

¹⁰ Act of May 26, 1824, ch. 153, 4 Stat. 38, 39.

¹¹ See generally Moser, *supra* note 1, at 43.

¹² See S. REP. NO. 224, 50th Cong., 1st Sess. 1-3 (1888).

¹³ 125 U.S. 1 (1888).

¹⁴ *Id.* at 8-13.

propriations bill, which was to become known as the Rivers and Harbors Act of 1890.¹⁵ In its final form, the Act established two distinct regulatory procedures. Section 6 outlawed depositing refuse into navigable waters in the absence of permission from the Secretary of War.¹⁶ Section 7 not only reversed *Hatch* by requiring the approval of the Secretary of War for construction of all bridges over navigable waters, but also required such approval for *all* construction activities in navigable waters.¹⁷

In 1896, Congress directed the Secretary of War to compile all general laws relating to navigable waters and to propose such "revision, emendation, or enlargement" as he thought advantageous "to the public interest."¹⁸ The Secretary delegated this task to the Chief of Engineers, who responded with a draft of what became the Rivers and Harbors Act of 1899.¹⁹

This act, although represented to Congress as merely a compilation of existing law,²⁰ effected some significant substantive changes. Section 9 outlawed construction of bridges, dams, or causeways in the absence of congressional consent, thereby substituting Congress for the Secretary of War as the licensing authority. Apparently, the change was responsive to an 1891 lower federal court decision that had indicated that Congress could not constitutionally delegate its authority to approve the construction of bridges.²¹ Under section 10, however, the Secretary of War retained the authority to license dredging, filling, and construction activities in navigable waters. Similarly, section 13 continued the prohibition against discharges of refuse in waters in the absence of a permit from the Secretary of War. These three key sections of the Rivers and Harbors Act of 1899 have remained in effect since their enactment,²²

¹⁵ Act of Sept. 19, 1890, ch. 907, 26 Stat. 426.

¹⁶ *Id.* at 453-54.

¹⁷ *Id.* at 454.

¹⁸ Act of June 3, 1896, ch. 314, § 2, 29 Stat. 202, 234.

¹⁹ Act of Mar. 3, 1899, ch. 425, 30 Stat. 1121.

²⁰ See 32 CONG. REC. 2296 (1899).

²¹ See *United States v. Koekuk & H. Bridge Co.*, 45 F. 178, 183-84 (S.D. Iowa 1891).

²² The sections, codified at 33 U.S.C.A. §§ 401, 403, & 407 (1970), provide:

§ 401. *Construction of bridges, causeways, dams or dikes generally*

It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers

subject only to minor changes in language made necessary by governmental reorganization (changing the title "Secretary of

and by the Secretary of the Army: *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided further*, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army.

§ 403. *Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in*

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence 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, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

§ 407. *Deposit of refuse in navigable waters generally*

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided*, That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further*, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

War" to "Secretary of the Army") and by an interdepartmental transfer of functions (shifting oversight of the location and clearances of bridges and causeways to the Secretary of Transportation).²³

II. THE REGULATORY PROGRAM OF THE U.S. ARMY CORPS OF ENGINEERS

Although the text of the Rivers and Harbors Act of 1899 has remained generally unaltered, the regulatory program of the Corps has changed significantly since passage of the statute. Changes have resulted from administrative and judicial interpretation of the Act, as well as from enactment of other statutes.

A. Jurisdiction

1. The Rivers and Harbors Act

Many of the traditional limitations on the Corps' jurisdiction under the Rivers and Harbors Act were self-imposed. Some related to subject matter and others to territory.

a. Subject Matter Jurisdiction

The Rivers and Harbors Act theoretically subjected a sweeping range and number of activities to federal regulation. Section 9 of the Act made unlawful the construction of *any* bridge, dam, dike, or causeway over navigable waters without the consent of Congress and the approval of the Secretary of the Army.²⁴ Section 10 prohibited the creation of *any* obstruction without the affirmative authorization of Congress and made unlawful any excavations or construction without the authorization of the Secretary of the Army. Finally, section 13 prohibited the deposit of *any* refuse material of *any* kind into *any* navigable waters.²⁵ This broad language created the potential for active and widespread supervision by the Corps of all activities on navigable waters.

Rather than seizing this opportunity fully, however, the Corps severely restricted the scope of its monitoring. In harbor areas, District Engineers drew expansive "harbor lines" within which landfills or construction were permitted without the authorization

²³ Department of Transportation Act, § 6(g)(6)(A), 49 U.S.C. § 1655(g)(6)(A) (1970).

²⁴ *But see* text accompanying note 23 *supra*.

²⁵ As noted above, all three sections remain in effect.

seemingly required by section 10; the Corps tacitly agreed that in non-harbor areas, section 10 permits were not necessary.²⁶ Section 13 (the "Refuse Act") was used only occasionally to impose civil or criminal responsibility on those who discharged waste matter that impeded navigation.²⁷

Beginning in the late 1960's, increased public and legislative concern with water quality and wetlands preservation resulted in a series of events that has affected significantly both the nature and scope of the Corps' regulatory program. The Corps had long assumed that congressional approval under section 9 of the Rivers and Harbors Act was necessary only for large projects (bridges, dams, and dikes, for example) that would cause some dislocation of established shipping patterns. Accordingly, the Corps itself licensed marginal works, that is, works on the boundary between land and water, under section 10.²⁸ This procedure, however, was challenged successfully in a federal district court in 1969. In *Citizen's Committee for the Hudson Valley v. Volpe*, opponents of an expressway bordering the Hudson River convinced the court that the specifications for the project included the building of "dikes" and "causeways" that required the consent of Congress under section 9.²⁹ In deciding that the Corps had breached its duty by failing to secure the consent of Congress before issuing the permit, the court cited a dictionary definition of dike as "[a]n embankment for controlling or holding back the waters of the sea or a river,"³⁰ and thereby found the proposed project within the ambit of section 9.

In *Petterson v. Resor*, the federal district court in Oregon reached a contrary result under a similar fact situation.³¹ The *Petterson*

²⁶ See HOUSE COMM. ON GOVERNMENT OPERATIONS, 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. 6-10 (1970) [hereinafter cited as HOUSE REPORT]. Harbor lines separate navigable channels and harbor areas from water areas not essential to navigation. Hoyer, *Corps of Engineers Dredge and Fill Jurisdiction: Buttressing a Citadel Under Siege*, 26 U. FLA. L. REV. 19, 24 (1973). See also note 123 *infra* and accompanying text.

²⁷ See, e.g., *The President Coolidge*, 101 F.2d 638 (9th Cir. 1939); *The Pile Driver No. 2*, 239 F. 489 (2d Cir. 1916).

²⁸ See *Petterson v. Resor*, 331 F. Supp. 1302, 1306 (D. Ore. 1971) (discussed at text accompanying notes 31-34 *infra*).

²⁹ 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 97 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970).

³⁰ 302 F. Supp. at 1089 (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 403 (1967)).

³¹ 331 F. Supp. 1302 (D. Ore. 1971).

court observed that: "To accept plaintiffs' contention that any structure within the dictionary definition of a dike requires Congressional consent is to ignore the language and purpose of the legislation and its interpretation for almost 70 years."³² Moreover, the court believed that plaintiffs' interpretation of the relevant language of section 9 would render "Section [10] meaningless because 'jetties,' 'breakwaters' and 'fills,' mentioned in Section [10], all come within plaintiffs' dictionary definition of dikes."³³ The court concluded that section 9 requires congressional approval only for those dikes that obstruct navigation, and that the fills authorized by the Corps in this case were not "dikes" within the meaning of section 9.³⁴ Consequently, the fills fell under section 10, which does not require congressional consent. This difference of opinion within the federal judiciary remains unresolved; no amount of reflection on the ambiguous and overlapping language of sections 9 and 10 affords a clear answer. But *Citizens Committee* was the first disruption of the Corps' expectations. It was not to be the last.

In 1970, the House Committee on Government Operations recommended various changes in the Corps' regulatory program.³⁵ The Corps adopted some of these changes by amending its regulations, directing District Engineers, when considering a proposal to dredge, fill, or do other work in navigable waters, to examine not only the effects on navigation, but also a full range of economic, social, and environmental factors.³⁶ Additionally, separate permits were thereafter required for work within harbor lines.³⁷

Another recommendation proved more difficult to implement. In 1960, Justice Douglas observed in dictum in *United States v. Republic Steel Corp.* that the term "refuse" was broad enough to

³² *Id.* at 1306.

³³ *Id.*

³⁴ *Id.*

³⁵ See HOUSE REPORT, *supra* note 26.

³⁶ See 33 C.F.R. § 209.120(f) (1976); text accompanying notes 126-33 *infra*. A public interest review criterion first appeared in the Corps' regulations on Dec. 18, 1968, when the regulations were amended to make "[t]he decision as to whether a permit will be issued . . . rest on an evaluation of all relevant factors, including . . . the general public interest." 33 Fed. Reg. 18,670-71 (1968) (formerly codified at 33 C.F.R. § 209.120(d) (1969)). Initially, the Corps retained a good deal of in-house resistance to and skepticism of the propriety of such a standard. Interview with William Hedeman, Counsel for Regulatory Programs, Office of the General Counsel, Department of the Army, Nov. 7, 1976.

³⁷ See 33 C.F.R. § 209.150(b)(2) (1976).

include industrial wastes.³⁸ Ten years later, the Committee "discovered" the Refuse Act (section 13 of the Rivers and Harbors Act) and advocated its use, through the permit program, as an industrial pollution control law.³⁹ The Corps responded by announcing a permit program that would cover all navigable waters and their tributaries and focus on major industrial pollution.⁴⁰ This approach presented two problems: first, the Refuse Act was somewhat inconsistent with the more modern Federal Water Pollution Control Act (FWPCA);⁴¹ and, second, such an interpretation placed thousands of industries in violation of the law.⁴² Later in 1970, to eliminate confusion, President Nixon adopted Executive Order 11,574,⁴³ which created the Refuse Act Permit Program and provided a method both for harmonizing the Act with the FWPCA and for protecting certain industries against prosecution.⁴⁴

The Refuse Act Permit Program proved to be short-lived. Before a significant number of permits were actually issued, a federal district court in *Kalur v. Resor* read the language of section 13 of the Act literally and held the Permit Program invalid insofar as it purported to allow the issuance of permits to discharge refuse matter into non-navigable waterways that eventually lead into navigable waters.⁴⁵ The court concluded that this language allows licensing of discharges into navigable waters but gives the Secretary of the Army (the Corps) no authority to permit discharges into the tributaries of navigable waters. This decision, by interpreting the Refuse Act as an absolute prohibition of discharges

³⁸ 362 U.S. 482, 490-91 (1960).

³⁹ See HOUSE REPORT, *supra* note 26, at 14-18.

⁴⁰ See J. MASHAW & R. MERRILL, *THE AMERICAN PUBLIC LAW SYSTEM* 83 (1975).

⁴¹ 33 U.S.C. §§ 1251-1376 (Supp. V 1975). By establishing its own permit program and thereby ignoring the activities of state pollution control agencies, the Federal Water Quality Administration, and other interested bodies, the Corps would preclude any harmony among various legislative programs and create administrative chaos. J. MASHAW & R. MERRILL, *supra* note 40, at 83.

⁴² 2 ENVIR. REP. (BNA) 666 (Oct. 8, 1971).

⁴³ 3 C.F.R. 986 (1966-70 Compilation) (reprinted in 33 U.S.C.A. § 407 (Supp. 1977)).

⁴⁴ See Corps of Engineers, *Permits for Discharges or Deposits into Navigable Waters*, 35 Fed. Reg. 20,005 (1970).

⁴⁵ 335 F. Supp. 1, 9 (D.D.C. 1971) (focusing, *inter alia*, on the following language from section 13: "It shall not be lawful to . . . discharge . . . refuse . . . into any tributary of any navigable water . . . [P]rovided further, That the Secretary of the Army . . . may permit the deposit of any material above mentioned in navigable waters . . .") (emphasis added by the court).

into non-navigable waters, placed thousands of industries in administratively inalterable violation of the law and contributed to the replacement of the Refuse Act Permit Program through the enactment of the Federal Water Pollution Control Act Amendments of 1972.⁴⁶ These amendments supplant the Refuse Act Permit Program with a comprehensive set of procedures for licensing continuous industrial effluent discharges, but leave section 13 in force for use as a prosecutory tool against occasional discharges.⁴⁷

Hence, while the subject matter with respect to which the Corps has authority has remained largely the same, application of the licensing process to that subject matter has changed. The greatest change, however, has occurred in the attitude of the Corps. In response to pressures from Congress, the courts, and the public, the Corps has changed from an indulgent, laissez-faire regulator into an active, critical overseer of activities at the land-water margin.

b. Territorial Jurisdiction

The Constitution granted Congress the authority to regulate interstate commerce,⁴⁸ but use of that authority to regulate activities in water bodies was at first limited. The United States Supreme Court ruled that, because the basic reason for inclusion of the commerce clause was to prevent the states from obstructing free trade on the nation's waterways,⁴⁹ Congress had authority only over water bodies that were deemed "navigable" and therefore suitable for moving goods to or from markets.⁵⁰ Thus, only navigable waters were originally subject to section 10 of the Rivers and Harbors Act.

This early constitutional history explains in large measure why, despite the dramatic expansion of the Congress's commerce power, the Corps asserted its authority only with respect to operations within the banks of navigable water bodies. Moreover, the Corps was also cautious because of the latent ambiguity of the text

⁴⁶ Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. §§ 1251-1376 (Supp. V 1975)).

⁴⁷ The permit authority of the Secretary of the Army has been superseded by the permit authority provided to the Administrator of the Environmental Protection Agency. See 33 U.S.C. §§ 1342, 1345 (Supp. V 1975).

⁴⁸ U.S. CONST. art. I, § 8.

⁴⁹ See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

⁵⁰ *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870); see *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713 (1865).

of section 10. The licensing power given in the second independent clause of that section does seem to relate only to structures touching navigable waters.⁵¹ But whether the licensing power given in the third independent clause over excavation and fill activities must be causally or spatially linked to navigable waters remains unclear.⁵² Some recent cases have treated the issue of whether the Corps has jurisdiction over dredge or fill activities as a causal, rather than spatial, question—that is, dependent only upon whether the activities would affect the navigable capacity of a water body, not upon whether the activities were within the boundaries of a water body. For example, the Fifth Circuit recently held that the Corps has jurisdiction over inland canals the excavation of which would alter or modify nearby navigable waters.⁵³ The United States Supreme Court, however, traditionally has measured the Corps' jurisdiction under section 10 of the Act in spatial terms.⁵⁴

Real concern with precise delimitation of this boundary developed coincidentally with the Corps' new regulatory emphasis on environmental protection. Developers in marginal areas (areas on the land-water boundary) sought to avoid rigorous review by arguing that their projects were not within the geographical ambit of the Corps' regulatory powers. These efforts triggered administrative, judicial, and legislative responses.

In 1972, to prescribe more precisely the scope of its authority, the Corps amended its regulations to define "navigable waters of the United States" as the term is used in the applicable statutes and regulations.⁵⁵ The regulations, as amended, first synthesized the relevant Supreme Court authority into a brief, albeit obscure, formulation:

Navigable waters of the United States are those waters which are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire

⁵¹ See 33 U.S.C. § 403 (1970).

⁵² See *id.*

⁵³ *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293 (5th Cir. 1976), *rev'g in part* 389 F. Supp. 602 (S.D. Fla. 1975); *cf.* *United States v. Perma Paving Co.*, 332 F.2d 754 (2d Cir. 1964) (overloading of land causing underlying soil to block channel held violative of section 10).

⁵⁴ See, e.g., *Greenleaf Johnson Lumber Co. v. Garrison*, 237 U.S. 251, 261-63 (1915).

⁵⁵ 37 Fed. Reg. 18,289-92 (1972) (codified at 33 C.F.R. § 209.260 (1976)).

surface of the water body, and is not extinguished by later actions or events which impede or destroy navigable capacity.⁵⁶

Another amendment added that “navigable waters of the United States” also include “waters that are subject to ebb and flow of the tide shoreward to their mean high water mark (mean higher high water mark on the Pacific Coast).”⁵⁷

The 1972 regulations also attempted the more difficult task of prescribing how to apply these definitions. The extent of the Corps’ jurisdiction was made dependent upon the suitability of the water body for commercial use; a water body was to be deemed navigable if evidence existed of historical commercial use, present commercial use, or potential commercial use.⁵⁸ For example, “navigability in law” might be established with evidence of nineteenth-century rafting of goods to markets, of current utilization of recreational craft, or of an area’s potential for use as a multi-purpose dam site. Hence, the Corps’ regulatory tentacles can reach far upstream.

Equally important with the presence of commerce in determining navigability are the defined geographic limits of a given water body. In determining the shoreward limit of jurisdiction under section 10 of the Act, the regulations made an important distinction between fresh water rivers and lakes and salt water oceanic and tidal waters. In fresh water zones, the Corps’ jurisdiction extends laterally to all land and waters below the “ordinary high water mark.”⁵⁹ In salt water zones, regulatory jurisdiction extends to the line on the shore reached by the mean high tide, except on the Pacific Coast, where the line of the mean of the higher high tide is used.⁶⁰

⁵⁶ 33 C.F.R. § 209.260(c) (1976). These regulations are supported by a detailed annotation and analysis of all relevant Supreme Court decisions. See OFFICE OF THE CHIEF OF ENGINEERS & OFFICE OF GENERAL COUNSEL, DEPARTMENT OF THE ARMY, ATTORNEY’S SUPPLEMENT: DEFINITION OF NAVIGABLE WATERS OF THE UNITED STATES (1972).

⁵⁷ 33 C.F.R. § 209.120(d)(1) (1976). Most states use the mean high water mark or mean high tide line to separate private ownership and use of land bordering on navigable waters from public ownership and use of the water and submerged land. Hoyer, *supra* note 26, at 23. See also Gay, *The High Water Mark: Boundary Between Public and Private Lands*, 18 U. FLA. L. REV. 553, 553-54 & nn.1-2 (1966).

⁵⁸ 33 C.F.R. § 209.260(d)-(i) (1976).

⁵⁹ *Id.* § 209.260(j). The “ordinary high water mark” is determined by calculating the average of seasonal flow variations.

⁶⁰ *Id.* § 209.260(k). Each day there are two high tides, one of which rises to a relatively higher shoreward plane than the other. The mean high tide line is the average of both tides over 18.6 years; the mean higher high tide line is the average of only the higher

Application of these general principles has proved most troublesome in three areas: first, in defining the limits of marsh areas; second, in applying the principles to canal systems; third, in adjusting the Corps' jurisdiction to the changing boundary of the shoreline.

(i) *Wetlands*

The use of the "ordinary high water" or "mean high tide" line as the lateral limit of the Corps' regulatory authority has geodesic and hydrologic ramifications that make demarcation difficult. Though the lines may be relatively easy to survey at a given point in time on an ocean beach, they are inordinately difficult to draw in a sprawling tidal estuary, with its myriad of rivulets that creep into the marsh at high tide. The line is also difficult to draw through the wetlands that abound in the area between tidal water and fastland (high and dry land), portions of which are regularly inundated by tidal action.

The regulations respond to this problem in a separate subsection dealing with the shoreward limit of jurisdiction over bays and estuaries. In pertinent part, this subsection provides that the entire estuarine water surface is within the Corps' jurisdiction, "even though portions of the water body may be extremely shallow, or obstructed by shoals, vegetation, or other barriers. Marshlands and similar areas are thus considered 'navigable in law,' but only so far as the area is subject to inundation by the mean high waters."⁶¹ Cases in lower federal courts have generally adopted a similar approach. In a 1971 decision, the Southern District of New York enjoined the New York National Guard from filling a tidal marsh upon a finding that "the water within the area is equal in ebb and flow to that of the river which is concededly navigable."⁶² The Southern District of Georgia agreed, observing that, "[t]he lay mind does not readily grasp the concept that marshes adjacent to a navigable stream are themselves deemed to be navigable and subject to federal regulatory jurisdiction."⁶³ Other federal courts

of the two high tides for the same period. Use by the Corps of the higher high tide line on the Pacific was judicially approved in *Leslie Salt Co. v. Froehlke*, 403 F. Supp. 1292 (N.D. Cal. 1974).

⁶¹ 33 C.F.R. § 209.260 (k)(2) (1976).

⁶² *United States v. Baker*, 2 E.R.C. 1849, 1850 (S.D.N.Y. 1971).

⁶³ *United States v. Lewis*, 355 F. Supp. 1132, 1134 (S.D. Ga. 1973).

have similarly enjoined filling or ordered restoration of marshland subject to regular tidal inundation.⁶⁴ In one recent case, however, the Southern District of Mississippi, while recognizing that it had the power to order complete restoration of a partially filled tidal marsh, refused to do so because of the hardship it would place on those who, although negligent, had acted in good faith.⁶⁵

The growing awareness of the high biological value of marshes has resulted in efforts to extend the Corps' section 10 jurisdiction to wetlands that are only occasionally subject to tidal action. The record is mixed. In 1972, the federal district court in Oregon ordered a company to remove a landfill (intended for eventual residential or commercial development) from an estuarine area where a river flowed into tidal flatlands.⁶⁶ The river meandered in northerly and southerly directions, and the area below mean high water depended on the course of the river. There was a conflict in the evidence over whether the site of the company's fill was above mean high water when the filling occurred, but the court apparently felt that this made no difference.⁶⁷ Instead, the court observed:

In effect what defendant did was to catch the river at a time when it was to the north, and fix the sandspit permanently while it was temporarily (and partially) above mean high water. If that were permissible, obviously the owner of the northerly spit could have done the same, waiting for the day when the river was flowing to the south. By taking advantage of temporary variations, the river could be pinned down and perhaps much of the estuary could be filled in and eliminated. In the opinion of the Court, the decision to so alter a water impressed with a public servitude is a decision which must be made by the lawfully authorized public agency, and not by private persons. The sand fill was contrary not only to the letter of the statute but also to its spirit.⁶⁸

But in another case, the Delaware federal district court declined to rule on the government's contention that its jurisdiction under

⁶⁴ See, e.g., *United States v. Diamond*, 512 F.2d 157 (5th Cir.), *cert. denied*, 423 U.S. 928 (1975); *United States v. Smith*, 7 E.R.C. 1937 (E.D. Va. 1975); *United States v. Keegan*, 7 E.R.C. 1527 (S.D. Fla. 1974).

⁶⁵ *United States v. American Capital Land Corp.*, 8 E.R.C. 1654, 1656 (S.D. Miss. 1975).

⁶⁶ *United States v. Sunset Cove, Inc.*, 5 E.R.C. 1023 (D. Ore. 1973), *aff'd in part, modified in part per curiam*, 514 F.2d 1089 (9th Cir.), *cert. denied*, 423 U.S. 865 (1975).

⁶⁷ See 5 E.R.C. at 1026-27.

⁶⁸ *Id.* at 1027.

section 10 extends to all portions of tidal marsh adjacent to navigable waters, including those portions of marsh area not inundated at mean high tide, and to any area beyond the limits of navigable water where such activities as filling, excavation, and bulkheading would affect "navigable water."⁶⁹ Federal district courts in California and Florida adopted an alternative approach to this question, finding that the 1972 amendments to the Federal Water Pollution Control Act gave the Corps jurisdiction over wetlands, notwithstanding any restrictive reading of section 10 of the 1899 Act.⁷⁰

(ii) *Canals*

The Corps' 1972 regulations give but cursory attention to the special jurisdictional problems created by canals and other artificial waterways. An artificial waterway, although shoreward of the mean high tide line,⁷¹ may nonetheless be subject to regulation. These regulations provide that, "[a]n artificial channel may often constitute a navigable water of the United States, even though it has been privately developed and maintained, or passes through private property. The test is generally . . . whether the water body is capable of use for purposes of interstate commerce."⁷² This ambiguous language offers little assistance in determining when the cutting of a canal into fastland shoreward of (above) the mean high tide line requires permission from the Corps under section 10 of the Act. The case law suggests at least three plausible and differing approaches to this question, each approach based on some aspect of section 10 or the 1972 regulations. The first approach treats the problem as one of territorial jurisdiction—granting the Corps jurisdiction over the canal if the canal is itself navigable, that is, subject to the ebb and flow of the tide.⁷³ This was essentially the approach that the federal district court for the Southern District of Florida adopted in two 1975 decisions.⁷⁴ The Fifth Circuit, however, reversed these cases and adopted a second approach that re-

⁶⁹ *United States v. Cannon*, 363 F. Supp. 1045, 1049-51 (D. Del. 1973).

⁷⁰ *See 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); notes 90-105 *infra* and accompanying text.

⁷¹ *See* text accompanying note 57 *supra*.

⁷² 33 C.F.R. § 209.260 (g)(1)(i) (1976).

⁷³ *See* text accompanying note 57 *supra*.

⁷⁴ *See United States v. Sexton Cove Estates, Inc.*, 389 F. Supp. 602 (S.D. Fla. 1975), *rev'd in part*, 526 F.2d 1293 (5th Cir. 1976); *Weizmann v. Corps of Eng'rs*, 7 E.R.C. 1523 (S.D. Fla. 1975), *rev'd in part*, 526 F.2d 1302 (5th Cir. 1976).

quired an inquiry into whether the activity "altered" or "modified" existing waters under section 10 of the Act.⁷⁵ In *United States v. Sexton Cove Estates, Inc.*, which involved a mobile home development interspersed with a network of canals, the Fifth Circuit employed this test and held that a Corps permit was required for construction of those canals that directly connected with a tidal sound because the canals changed the shoreline, thereby affecting the navigable capacity of the area.⁷⁶ On the other hand, the court held that the Corps had no jurisdiction over construction of landlocked canals shoreward of the mean high tide because their construction did not affect navigable waters, and that mere tidal fluctuation after excavation is not proof of such an effect.⁷⁷

Yet a third approach was suggested by the Hawaii federal district court in 1976.⁷⁸ There the question was whether the Corps had regulatory jurisdiction over a private channel cut two miles inland from the barrier bay to a "fish pond" that the developer had converted into a marina. The court determined that the Corps had section 10 jurisdiction because the channel, having been used in conjunction with a commercial recreational development, was in fact supporting interstate commerce.⁷⁹

Regardless of the approach used, practical problems remain with respect to whether the Corps will be able effectively to assert jurisdiction over creation of canals. Developers of extensive canal systems designed to provide pleasure boat access to residential subdivisions have sometimes tried to avoid regulation of their projects by completing the excavation of the canal before connecting it to navigable water. The Corps responded to this practice in a 1974 amendment to its regulations, providing that (1) the proponent of canal work that is intended to be connected to navigable water should submit his application before performing any work; and (2) the existence of a partially completed excavation will not weigh favorably in evaluation of the permit application.⁸⁰

⁷⁵ See note 22 *supra*.

⁷⁶ 526 F.2d 1293 (5th Cir. 1976), *rev'g in part* 389 F. Supp. 602 (S.D. Fla. 1975).

⁷⁷ 526 F.2d at 1298-99.

⁷⁸ *United States v. Kaiser Aetna*, 408 F. Supp. 42 (D. Hawaii 1976).

⁷⁹ *Id.* at 52-54.

⁸⁰ 33 C.F.R. § 209.120(g)(11)(i) & (ii) (1976); see 526 F.2d at 1299 n.15. See also 33 C.F.R. § 209.260(g)(1) (1976).

(iii) *Changing Boundaries*

The United States Supreme Court, in the leading case of *United States v. Appalachian Electric Power Co.*, asserted: "When once found to be navigable, a waterway remains so."⁸¹ This rule of "indelible navigability" was developed in the context of a dispute over the upstream limits of federal jurisdiction. In this context, the question is whether this rule should likewise apply to the changing shorelines of tidal water.

Some authority exists for application of federal jurisdiction to such shorelines. In a 1949 action to quiet title, the Court of Appeals for the District of Columbia Circuit held that private landowners, part of whose property was under water, had an unqualified ownership in fee simple only down to the high water mark of the river in 1794, when their predecessors first acquired title. Beyond that point, the United States could exercise, without compensating the owners, its power over navigation.⁸²

The "once tidal, forever navigable" rule suggested by this case would be overwhelmed by its own impracticability if used to measure the present lateral margins of the Corps' jurisdiction; 200-year-old geodesic and hydrologic data are difficult to find. Other federal courts have rejected this rule. The Third Circuit, for example, has held expressly that the Corps no longer has regulatory authority over tidal wetlands that became fastland prior to the Corps' assertion of regulatory power in the area.⁸³ This decision was consistent with the Corps' own position, set out in its 1972 regulations, that its jurisdiction changes with the shoreline:

Permanent changes of the shoreline configuration result in similar alterations of the boundaries of the navigable water. Thus, gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a water body which also change the shoreline boundaries of navigable waters. However, an area will remain "navigable in law," even though no longer covered with water, whenever the change has occurred suddenly, or was caused by artificial forces intended to produce that change. For example, shifting sand bars within a river or estuary

⁸¹ 311 U.S. 377, 408 (1940) (footnote omitted).

⁸² *United States v. Martin*, 177 F.2d 733, 734 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 957 (1950).

⁸³ *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 610-11 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975).

remain part of the navigable water, regardless that they may be dry at a particular point in time.⁸⁴

Subsequent cases have supported the Corps' position. In 1973, the federal district court for the Eastern District of Virginia rejected a claim that the Corps' jurisdiction extended to a downtown parking lot that had been the site of a canal prior to 1880.⁸⁵ Notwithstanding *Appalachian Electric*, the court said that it could not "overlook the simple fact that the geographic entity in question in this case is a parking lot, and a parking lot, despite the most sophisticated legal arguments, buttressed by the most vivid of imaginations, is not a navigable water of the United States."⁸⁶ Similarly, the Supreme Court recognized in another context that the grantee of land bounded by a body of navigable water acquires a right to any natural and gradual accretion formed along the shore.⁸⁷ On the other hand, as previously detailed, the Corps continues to have jurisdiction over an area where a private party artificially stabilizes a moving sand dune while it is temporarily above mean high water,⁸⁸ or where evaporation ponds have been diked off for salt production.⁸⁹

The territorial limits on the Corps' section 10 jurisdiction remain undefined. Certainly the Corps' regulatory authority encompasses "navigable" water bodies. Yet, the notion of "navigability" has proved too illusory, and the boundaries of bodies of water too subject to change, to permit clear delineation.

2. Statutory and Judicial Expansion of the Corps' Jurisdiction Under Section 404 of the Federal Water Pollution Control Act Amendments

Enactment of the Federal Water Pollution Control Act Amendments of 1972⁹⁰ has significantly affected the Corps' regulatory jurisdiction. The amendments established as a national goal the

⁸⁴ 33 C.F.R. § 209.260(l) (1976).

⁸⁵ *James River & Kanawha Canal Parks, Inc. v. Richmond Metropolitan Auth.*, 359 F. Supp. 611 (E.D. Va.), *aff'd*, 481 F.2d 1280 (4th Cir. 1973).

⁸⁶ 359 F. Supp. at 640.

⁸⁷ *Hughes v. Washington*, 389 U.S. 290 (1967).

⁸⁸ *See United States v. Sunset Cove, Inc.*, 5 E.R.C. 1023 (D. Ore. 1973), *aff'd in part, modified in part per curiam*, 514 F.2d 1089 (9th Cir.), *cert. denied*, 423 U.S. 865 (1975); text accompanying notes 66-68 *supra*.

⁸⁹ *See Sierra Cub v. Leslie Salt Co.*, 412 F. Supp. 1096 (N.D. Cal. 1976).

⁹⁰ Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. §§ 1251-1376 (Supp. V 1975)).

elimination of the discharge of pollutants into navigable waters by 1985.⁹¹ The principal mechanism established by the amendments for achieving this goal was the National Pollutant Discharge Elimination System (NPDES),⁹² under which the Environmental Protection Agency (EPA) regulates the discharge of pollutants into waters by means of a permit system that can be transferred to the states.

By including dredged spoil, rock, sand, and cellar dirt within the definition of pollutants,⁹³ the amendments created a potential overlap between the new NPDES and the Corps' traditional jurisdiction under the Rivers and Harbors Act. Filling in navigable waters would have constituted both the discharge of pollutants requiring an NPDES permit and construction activity requiring a Corps permit. To avoid this overlap, Congress included section 404, which authorizes the Secretary of the Army, acting through the Corps of Engineers, to regulate discharges of dredged or fill material into waters of the United States.⁹⁴

While, at first glance, section 404 appears effectively to anticipate and avoid confusion and redundancy, it has created a brouhaha that continues today. In 1974, a Florida federal district court agreed with the position of the EPA that federal jurisdiction under the 1972 Amendments to the FWPCA extends to all water capable of affecting commerce, regardless of whether they are deemed "navigable" under traditional legal tests.⁹⁵ Although the Corps readily acceded to the proposition that its permission was necessary in order to fill a wetland under the terms of the FWPCA (it was already licensing many such activities under section 10 of the Rivers and Harbors Act), it vigorously resisted the proposition that its licensing authority extended beyond the boundaries of navigable water as traditionally defined.⁹⁶ Accordingly, the Corps' 1974 revised regulations maintained the preexisting territorial limitations on its jurisdiction.⁹⁷

⁹¹ *Id.* § 101(a)(1), 86 Stat. 816 (codified at 33 U.S.C. § 1251(a)(1) (Supp. V 1975)).

⁹² *Id.* § 402, 86 Stat. 880 (codified at 33 U.S.C. § 1342 (Supp. V 1975)).

⁹³ *See id.* § 502(6), 86 Stat. 886 (codified at 33 U.S.C. § 1362(6) (Supp. V 1975)).

⁹⁴ *See id.* § 404, 86 Stat. 884 (codified at 33 U.S.C. § 1344 (Supp. V 1975)). EPA, however, is authorized to adopt guidelines for the specification of disposal sites. *Id.* No statutory provision in the Act delegates the Corps' regulatory powers under section 404 to the states.

⁹⁵ *United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974). *See also United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974).

⁹⁶ *See* 39 Fed. Reg. 12,115 (1974).

⁹⁷ *See* 39 Fed. Reg. 12,119 (1974).

This resistance to expansion of territorial jurisdiction was successfully challenged in *Natural Resources Defense Council, Inc. v. Callaway* when the federal district court for the District of Columbia ordered the Corps to amend its regulations so as to extend its territorial jurisdiction under section 404 of the FWPCA to "all waters of the United States," not merely to the traditional "navigable" waters.⁹⁸ This decree triggered an ongoing and acrimonious debate among the Corps, EPA, various interest groups, and the Congress.

The Corps' first step in complying with *Callaway* was to publish for public comment and review alternative redefinitions of its powers with respect to dredge and fill operations.⁹⁹ Interim final regulations were published on July 25, 1975, and became effective on that date.¹⁰⁰ The regulations provided for a three phase expansion of the areas within which the Corps was to license the discharge of dredged or fill material.¹⁰¹ During Phase I (July 25, 1975 through July 1, 1976), the Corps was to regulate disposal of dredge or fill material not only within the traditional area of its jurisdiction, but also within "wetlands contiguous and adjacent thereto."¹⁰² To the extent that the regulations apply to wetlands above mean high tide or mean high water, Phase I constitutes only a modest lateral extension of the Corps' authority.¹⁰³ This phase, moreover, was in accordance with previous federal district court decisions that approved lateral extension of federal authority to contiguous wetlands under the FWPCA.¹⁰⁴

The next two phases have proved more controversial. Phase II

⁹⁸ 392 F. Supp. 685, 686 (D.D.C. 1975). Ironically, according to Senator Muskie, Senate floor manager for the 1972 amendments to the FWPCA, the overall impact of section 404 on the Corps' territorial jurisdiction was largely inadvertent. Section 404 was intended only to avoid redundancy of permit programs with respect to the disposal of dredge spoil. See 122 CONG. REC. S14,909-11 (daily ed. Aug. 30, 1976).

⁹⁹ See 40 Fed. Reg. 19,766 (1975).

¹⁰⁰ 40 Fed. Reg. 31,320, 31,324-26 (1975) (codified in 33 C.F.R. § 209.120(d)-(e) (1976)).

¹⁰¹ 33 C.F.R. § 209.120(e)(2) (1976).

¹⁰² *Id.* § 209.120(e)(2)(i)(a).

¹⁰³ See text accompanying notes 61-70 *supra*. Compare 33 C.F.R. § 209.120(e)(2)(i)(a) (1976) with 33 C.F.R. § 209.260(j)-(k) (1973).

¹⁰⁴ See, e.g., *P.F.Z. Properties, Inc. v. Train*, 393 F. Supp. 1370 (D.D.C. 1975); *United States v. Smith*, 7 E.R.C. 1937 (E.D. Va. 1975); *Weizmann v. Corps of Eng'rs*, 7 E.R.C. 1523 (S.D. Fla. 1975), *rev'd in part*, 526 F.2d 1302 (5th Cir. 1976); *United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974); cf. *Leslie Salt Co. v. Froehlke*, 403 F. Supp. 1292, 1297 (N.D. Cal. 1974) (mean high higher waters is reasonable interpretation of "waters of the United States").

(July 1, 1976 through July 1, 1977) extends the Corps' jurisdiction over the disposal of dredged or fill material upstream into primary tributaries, freshwater wetlands contiguous or adjacent thereto, and lakes.¹⁰⁵ Phase III (after July 1, 1977) extends the Corps' jurisdiction over discharges of dredged or fill material to virtually all waters that Congress may regulate under the commerce clause.¹⁰⁶ These waters include territorial seas, coastal tidewater, rivers, lakes, and streams that are navigable in fact¹⁰⁷ and, more significantly, those tributaries, rivers, lakes, and streams that, although not navigable in fact, are utilized for interstate commercial or recreational purposes.¹⁰⁸ Also subject to regulation are the wetlands adjacent or contiguous to these water bodies.¹⁰⁹

During Phase I, the entire set of regulations was subject to further review and comment. Public response was almost evenly divided between favorable and unfavorable comments.¹¹⁰ The response of certain groups was predictable. Environmentalists almost unanimously supported expanding the Corps' jurisdiction, viewing it as a mechanism for making the filling (and obliteration) of wetlands more difficult. Officials of the Department of the Interior (DOI) and EPA joined in this support.¹¹¹

Opponents of the proposed expansion of the Corps' jurisdiction included state bureaucrats, farmers, home builders, and highway builders. They viewed the Corps' expanded jurisdiction as federal intrusion into the field of land use control without the approval of Congress. Furthermore, they characterized the new procedures as "cumbersome, time-consuming and expensive," asserting that farmers would be required to obtain a permit every time they wished to plow a field, dig a ditch, or build a pond.¹¹²

¹⁰⁵ 33 C.F.R. § 209.120(e)(2)(i)(b) (1976).

¹⁰⁶ *Id.* § 209.120(e)(2)(i)(c).

¹⁰⁷ See text accompanying notes 56-57 *supra*.

¹⁰⁸ For the administrative definition of the Corps' territorial jurisdiction under section 404 of the FWPCA, see 33 C.F.R. § 209.120(d)(2) (1976).

¹⁰⁹ "Wetlands" are defined to include bordering lands that support aquatic vegetation. See 33 C.F.R. § 209.120(d)(2)(b) & (h) (1976).

¹¹⁰ See 6 ENVIR. REP. (BNA) 1963 (1976) (50% of comments were favorable, 43% unfavorable, 7% no clear preference).

¹¹¹ See 122 CONG. REC. H5275 (daily ed. June 3, 1976) (remarks of Nathaniel Reed, Ass't Sec'y of the Interior); 6 ENVIR. REP. (BNA) 2172 (1976) (remarks of Russell Train, EPA Administrator).

¹¹² See, e.g., 6 ENVIR. REP. (BNA) 643 (1975) (comment of Robert W. Long, Ass't Sec'y of Agric.).

As opposition mounted in Congress, the Corps responded to the attacks.¹¹³ Opponents of broader jurisdiction estimated that, while under its traditional jurisdiction, the Corps would have processed 9,000 permits during fiscal year 1976, under expanded jurisdiction, the Corps might have to process as many as 50,000; therefore, the program was deemed too costly and the issuance of permits too slow. In response, the Corps estimated a more modest increase, from 10,500 to 20,773 permits (only 1,149 of which were attributed to section 404 alone).¹¹⁴ In addition, the Corps pointed out that the new regulations provided for a "general permitting" mechanism that would allow expedited processing of permits relating to ecologically insignificant activities.¹¹⁵ Arguments that the section 404 program would cause wasteful duplication of effort ignored the availability of joint processing and the possibility of future amendments to FWPCA providing for delegation of section 404 programs to the states (similar to the NPDES delegation now permitted).¹¹⁶ The Corps asserted that the section 404 program would not interfere with ordinary farming operations, noting that the regulations, by not considering material from normal farming operations as "fill material" subject to regulation, therefore provide an agricultural definition of sorts.¹¹⁷

In 1976, the 94th Congress responded belatedly to the controversy by considering various changes in section 404 of the Federal Water Pollution Control Act. Among the proposals suggested were contraction of the Corps' territorial jurisdiction, exemption of farming and other small scale operations, delegation of Phases II and III to the states, and outright repeal of section 404.¹¹⁸ In order to give Congress more time to make up its mind, President Ford ordered a suspension of implementation of Phase II, which had been scheduled to take effect on July 1, for sixty days.¹¹⁹ Congress, however, adjourned on September 30 without reaching agreement.

¹¹³ See generally 122 CONG. REC. H5221-80 (daily ed. June 3, 1976); *Senate Hearings*, *supra* note 4.

¹¹⁴ See *Senate Hearings*, *supra* note 4, at 56; Interview with William Hedeman, Counsel for Regulatory Programs, Office of General Counsel, Department of the Army, Nov. 7, 1976.

¹¹⁵ See 33 C.F.R. § 209.120(i)(2)(ix) (1976).

¹¹⁶ 6 ENVIR. REP. (BNA) 1963 (1976); see text accompanying note 92 *supra*.

¹¹⁷ See 33 C.F.R. § 209.120(d)(6)(i) (1976).

¹¹⁸ See *Senate Hearings*, *supra* note 4.

¹¹⁹ 7 ENVIR. REP. (BNA) 435 (1976).

The Corps is now implementing Phase II of its section 404 program,¹²⁰ and the 95th Congress is only beginning to address the issue left unresolved by the 94th. Congress may find it desirable to preserve the program for two reasons. First, despite the heated debate, the expanded jurisdiction that the section 404 program establishes relates only to dredge and fill activities, not to other construction activities. Consequently, the licensing of other coastal alterations will be limited to traditional Corps' territory. Second, amending section 404 so as to change the definition of navigability would destroy the predictability created by many years of adjudication and require extensive relitigation to redefine navigability for purposes of section 404.

B. Decision Criteria and Procedures

1. Evolution

Section 10 of the Rivers and Harbors Act traditionally was viewed as presenting the Corps of Engineers with a modest and manageable job. Permit applications were reviewed only to determine whether the proposed structure or activity would impede the free flow of maritime traffic. The Justice Department and the courts shared this limited view of the Act's concerns.¹²¹ Licensing criteria, when adopted at all, were little more than loose rules of thumb. For example, the Baltimore District Office applied a four-part test:

1. The structure must not exceed one-third the width of the waterway.
2. The applicant must stay away from the deepest portion of the waterway.
3. The applicant must not build within 15 feet of a dredged channelway.
4. The applicant in general must avoid any hazards to navigation.¹²²

¹²⁰ In *United States v. Byrd*, 9 E.R.C. 1275 (N.D. Ind. 1976), the court upheld the Corps assertion of jurisdiction over a "phase II" wetland.

¹²¹ See, e.g., *Miami Beach Jockey Club, Inc. v. Dern*, 86 F.2d 135, 136 (D.C. Cir. 1936) (permit applicant entitled to decision based "exclusively on evidence directed to the question whether . . . [the project] will obstruct the navigable capacity of the waterway"); 27 OP. ATT'Y GEN. 284 (1909) (Corps need not consider detrimental effects of proposed structure on nearby bathing beach).

¹²² Information obtained through interviews with personnel of the Baltimore District Office of the Corps, fall, 1976.

Section 11 of the Rivers and Harbors Act further reduced the workload by authorizing the Corps to draw harbor lines in congested areas within which work could be done without specific permission.¹²³

In recent years, however, the criteria that the Act requires the Corps to consider in processing applications have increased dramatically. A 1958 amendment to the Fish and Wildlife Coordination Act began the change by providing that "wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development."¹²⁴ Consequently, in a somewhat belated 1967 memorandum of understanding, the Corps agreed to consult with the Fish and Wildlife Service of the Department of the Interior before issuing permits.¹²⁵

The Corps amended its regulations in 1968 to allow consideration of the "general public interest" when considering permit application.¹²⁶ This action proved to be foresighted because a 1970 report of the House Committee on Government Operations advocated that the Corps "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."¹²⁷ The report also pointed

¹²³ This section, presently codified at 33 U.S.C.A. § 404 (1970), provides:

§ 404. *Establishment of harbor lines; conditions to grants for extension of piers, etc.*

Where it is made manifest to the Secretary of the Army that the establishment of harbor lines is essential to the preservation and protection of harbors he may, and is, authorized to cause such lines to be established, beyond which no piers, wharves, bulkheads, or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him: *Provided*, That whenever the Secretary of the Army grants to any person or persons permission to extend piers, wharves, bulkheads, or other works, or to make deposits in any tidal harbor or river of the United States beyond any harbor lines established under authority of the United States, he shall cause to be ascertained the amount of tidewater displaced by any such structure or by any such deposits, and he shall, if he deem it necessary, require the parties to whom the permission is given to make compensation for such displacement either by excavating in some part of the harbor, including tidewater channels between high and low water mark, to such an extent as to create a basin for as much tidewater as may be displaced by such structure or by such deposits, or in any other mode that may be satisfactory to him.

¹²⁴ See Pub. L. No. 85-624, § 2, 72 Stat. 563 (1958) (codified at 16 U.S.C. § 661 (1970)).

¹²⁵ See 33 C.F.R. § 209.120, Appendix B (1976).

¹²⁶ See note 36 *supra*.

¹²⁷ See HOUSE REPORT, *supra* note 26, at 2 (emphasis added).

out that the Corps was then using significantly different review procedures in areas of navigable waters where "harbor lines" had been established than in areas where they had not.¹²⁸ Under then-existing Corps regulations, when large areas of submerged lands were shoreward of harbor lines, submerged land within the lines could be filled without a permit while submerged land outside harbor lines could be altered only upon issuance of a permit.¹²⁹

The Corps immediately responded to this congressional criticism with regulations requiring permits for work performed within harbor lines,¹³⁰ but awaited the outcome of a test case before taking further action. Then, in 1970, the Fifth Circuit held in *Zabel v. Tabb*¹³¹ that, when the 1970 House Committee report, the 1958 amendment to the Fish and Wildlife Conservation Act, and the National Environmental Policy Act¹³² are considered together, "there is no doubt that the Secretary can refuse on conservation grounds to grant a permit under the Rivers and Harbors Act."¹³³ The Corps, therefore, was free to consider a full range of environmental concerns in the processing of permit applications.

2. *Criteria for Evaluating Applications: The 1974 Regulations*

In 1974, the Corps promulgated new regulations that completely revised the criteria and procedures involved in evaluation of permit applications.¹³⁴ Review is now a general balancing process that weighs the benefits that reasonably may be expected to accrue from a proposed project against its reasonably foreseeable detriments:

All factors that may be relevant to the proposal must be considered; among 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

¹²⁸ See *id.* at 11-13.

¹²⁹ See *id.* at 7.

¹³⁰ See 35 Fed. Reg. 8280 (1970) (codified in 33 C.F.R. § 209.150 (1976)).

¹³¹ 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

¹³² 42 U.S.C. §§ 4321-4347 (1970).

¹³³ 430 F.2d at 214.

¹³⁴ 39 Fed. Reg. 12,115 (1974) (codified in 33 C.F.R. § 209.120(f) (1976)).

welfare of the people. *No permit will be granted unless its issuance is found to be in the public interest.*¹³⁵

In its "public interest" review, according to the regulations, the Corps must consider four general criteria in the evaluation of every application: (1) the relative extent of the public and private need for the proposed activity; (2) the desirability of using appropriate alternative locations and methods; (3) the extent and permanence of the proposed activity's effects, both beneficial and detrimental, on the public and private uses to which the area is suited; and (4) the probable impact of each proposal in relation to the cumulative effect created by other existing and proposed activities within the general area.¹³⁶

To facilitate the application of these very general criteria, the regulations state specific policies that must be considered in the balancing process. The following projects generally will be permitted: shore erosion control structures; piers, docks, or moorings for small boats; and fixed and floating aids to navigation.¹³⁷ The following projects generally will not be permitted: projects that unduly interfere with access or use of navigable water from nearby property; projects that fail to mitigate damage to fish and wildlife resources; projects that will not comply with effluent limitations or water quality standards; and projects that have a deleterious impact on wild and scenic rivers, national historic preservation sites, sites in the National Registry of Natural Landmarks, and other areas of special national interest as designated by Congress.¹³⁸ Because wetlands are "environmentally vital areas,"¹³⁹ the regulations prohibit the granting of permits for work in wetlands identified as important unless the public interest requires otherwise and unless the District Engineer concludes, on the basis of the general criteria, not only that the benefits of the proposed activity outweigh the damage to the wetlands resource, but also that the proposed alteration is necessary to realize those benefits.¹⁴⁰ For a permit to be approved, the proposed activity must be dependent on proximity

¹³⁵ 33 C.F.R. § 209.120(f)(1) (1976) (emphasis added).

¹³⁶ *Id.* § 209.120(f)(2)(i)-(iv).

¹³⁷ *See id.* § 209.120(g)(1)(i)(a), (7), (8).

¹³⁸ *See id.* § 209.120(g)(1)(i)(b), (4)(i), (5)(i), (6).

¹³⁹ *See id.* § 209.120(g)(3).

¹⁴⁰ *See id.* § 209.120(g)(3)(iv).

to *important* wetlands and there must be no feasible alternative sites available.¹⁴¹

3. The Problems of Statutory Criteria: Requirements of the National Environmental Policy Act of 1969

The general and specific criteria imposed by the 1974 regulations offer only limited assistance to the Corps in the evaluation of permit applications. Determining what factors are "relevant to the proposal" and "in the public interest" is difficult. The requirements and criteria specified by the National Environmental Policy Act of 1969 (NEPA)¹⁴² to be observed in the preparation of Environmental Impact Statements (EIS) are similarly ambiguous. NEPA requires preparation of an EIS with respect to "major Federal actions significantly affecting the quality of the human environment."¹⁴³

Before the passage of NEPA, regulations required that the Corps evaluate applications on the basis of broad "general public interest" criteria.¹⁴⁴ In response to the new statute, new regulations were promulgated. The Corps addresses the relationship of NEPA's requirements to its regulatory program by providing for a two-step process. First, the District Engineer is to make an "environmental assessment" (a miniature EIS) of the likely impact of the proposed activity. Then, if "the District Engineer believes that granting the permit may be warranted but that the proposed activity would significantly affect the quality of the human environment," an EIS will be prepared.¹⁴⁵

Although NEPA appears to leave federal agencies with much discretion in determining what "major" federal actions "significantly" affect the quality of life, the federal courts have translated NEPA's seemingly hortatory language into "action-forcing" procedures. The Corps had originally taken the position that NEPA's EIS requirement had no application to the program for licensing the discharge of refuse under section 13 of the 1899 Act when the question was solely one of water quality. This position was rejected

¹⁴¹ See *id.* § 209.120(g)(3)(iv)(a).

¹⁴² 42 U.S.C. §§ 4331-4347 (1970).

¹⁴³ *Id.* § 4332(2) (c).

¹⁴⁴ See text accompanying note 126 *supra*.

¹⁴⁵ 33 C.F.R. § 209.410(e)(7)(iii) (1976).

by a federal district court in 1971.¹⁴⁶ And in *Sierra Club v. Morton*,¹⁴⁷ a California federal district court held that the EIS requirement applied to permits granted under sections 9 and 10 of the Act as well. The court asserted that, "[t]he issuance of . . . a permit pursuant to the Rivers and Harbors Act of 1899 *always* constitutes major federal action and unless the Corps of Engineers . . . makes the negative determination that issuance has no significant effect on the environment, an EIS is required."¹⁴⁸

Not only the type of permits subject to the NEPA, but also the procedures by which the Corps makes a "negative determination" have been issues of contention. Clearly, the Corps has the authority to make its own threshold determination of whether an EIS is required,¹⁴⁹ but the propriety of the procedure by which such a determination is reached is subject to review. For instance, the Fourth Circuit has held that a District Engineer had not abused his discretion in determining, on the basis of a desk review of generally favorable comments of various federal, state, and local agencies, that an EIS was not a prerequisite to issuance of a permit for construction of fishing piers and a boat basin.¹⁵⁰ On the other hand, the Southern District of New York has enjoined landfilling and construction on the Hudson River because the Corps failed to hold a public hearing and otherwise to build an "environmental record" of the reasons for its decision that an EIS was unnecessary.¹⁵¹

Finally, the substantive standard of decisionmaking that the District Engineer is to employ in determining whether an EIS is necessary has also been the subject of litigation. The Corps' guidelines are complemented by guidelines promulgated by the Council on Environmental Quality.¹⁵² Among the criteria provided for identifying major actions significant in affecting the environment

¹⁴⁶ See *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971).

¹⁴⁷ 400 F. Supp. 610 (N.D. Cal. 1975).

¹⁴⁸ *Id.* at 644 (emphasis added).

¹⁴⁹ See *Citizens for Clean Air, Inc. v. Corps of Eng'rs*, 349 F. Supp. 696, 706-07 (S.D.N.Y. 1972).

¹⁵⁰ *Rucker v. Willis*, 484 F.2d 158 (4th Cir. 1973).

¹⁵¹ *River Defense Comm. v. Thiermano*, 380 F. Supp. 91, 95 (S.D.N.Y. 1974). The court relied heavily on *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972), which made it clear that federal agencies must establish reviewable environmental records.

¹⁵² 40 C.F.R. § 1500 (1976).

is expected public reaction: "Proposed major actions, the environmental impact of which is likely to be highly controversial, should be covered in all cases."¹⁵³ Hence, in a recent Fourth Circuit case,¹⁵⁴ the plaintiff argued that, regardless of the reasonableness of the District Engineer's "negative determination," an EIS was required because there was widespread opposition to the project. The court rejected this position, saying:

We reject, however, the suggestion that "controversial" must necessarily be equated with opposition. The term should properly refer to cases where a substantial dispute exists as to the size, nature or effect of the major federal action rather than to the existence of opposition to a use. Otherwise, to require an impact statement whenever a threshold determination dispensing with one is likely to face a court challenge would surrender the determination to opponents of a federal action, no matter whether major or not, nor how insignificant its environmental effect might be.¹⁵⁵

While the concern of the court is understandable, its conclusion that there is no "controversy" because the arguments made by numerous and vocal opponents of a project happen to be ill-founded is rather sophistic.

In contrast to the Fourth Circuit's faith in a District Engineer, some courts have been willing to review the merits of a District Engineer's decision with respect to whether an EIS is legally required. In *Sierra Club v. Morton*,¹⁵⁶ conservation groups brought suit to contest construction of three major facilities of the California Water Project. Because the court found that the Corps' issuance of permits would constitute "major federal action," and all concerned admitted that the projects would have "significant effects on the environment," the court ordered preparation of Environmental Impact Statements prior to any issuance of permits.¹⁵⁷

The sufficiency of Environmental Impact Statements may be challenged judicially. For example, in a recent Florida case, the plaintiff attempted a scatter-gun assault on the adequacy of the EIS that supported issuance of a permit for construction of a staging

¹⁵³ *Id.* § 1500.6(a).

¹⁵⁴ *Rucker v. Willis*, 484 F.2d 158 (4th Cir. 1973).

¹⁵⁵ *Id.* at 162.

¹⁵⁶ 400 F. Supp. 610 (N.D. Cal. 1975).

¹⁵⁷ *Id.* at 644-48.

area for the manufacture of floating nuclear power plants.¹⁵⁸ Despite the plaintiff's assertions that the EIS was inaccurate, lacked objectivity, and failed to consider all relevant factors, the federal district court found the EIS acceptable.¹⁵⁹ Generally, however, courts have been quite aggressive in challenging the adequacy of Environmental Impact Statements prepared in support of the Corps' public works projects.¹⁶⁰ While more specific criteria and procedures might facilitate reduction of the foregoing types of litigation and problems that NEPA has presented the Corps, the differing degrees of complexity among projects and the high costs of conducting an EIS make the continued use of general standards understandable.

Environmental assessments vary dramatically in nature from pro forma disclaimers to studies contracted out at costs in excess of \$100,000.¹⁶¹ In the vast preponderance of cases, a negative determination is made; for example, during fiscal 1976, the Baltimore District of the Corps prepared Environmental Impact Statements for only two of 1,476 applications.¹⁶² When an EIS is prepared, the expenses in time and money are enormous. During fiscal year 1975, the Corps took an average of nine months to prepare a draft EIS; during calendar year 1974, an average of ten and one-half months elapsed between filing of the draft and the final EIS.¹⁶³ During fiscal year 1974, the Corps spent 22 million dollars on the EIS process—1.2% of its budget.¹⁶⁴ For several reasons, however, these figures are somewhat misleading: most of the Environmental Impact Statements are prepared for civil works projects, not permit applications under the Rivers and Harbors Act; the cost figures do not include environmental assessment costs; and the Corps has established procedures for charging fees for federal EIS preparation to project applicants.¹⁶⁵ Nevertheless, NEPA's general standards

¹⁵⁸ *Florida Audubon Soc'y v. Callaway*, 6 E.R.C. 1320 (M.D. Fla. 1974).

¹⁵⁹ *Id.* at 1325-27.

¹⁶⁰ *See, e.g., Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973).

¹⁶¹ Telephone conversation with James Durkay, Regulatory Functions Branch, Baltimore District Corps of Engineers, Aug. 3, 1976.

¹⁶² *Id.*

¹⁶³ REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL IMPACT STATEMENTS 29-30 (1976).

¹⁶⁴ *Id.* at 46.

¹⁶⁵ 33 C.F.R. § 209.120 (h) (2)(vi) (1976). The statutory authorization for this procedure is 31 U.S.C. § 483 (a) (1970). The Supreme Court has ruled, however, that fees charged

have increased significantly the workload of the Corps by the regulations' requirement of an environmental assessment of each proposed activity. The ambiguity of NEPA also has caused new challenges in the courts to the issuance of permits—challenges that will only increase in the future.

4. *Procedures for Processing Applications*

The general and specific criteria described above give little practical guidance to the Corps in the evaluation of the many permit applications received. In fiscal year 1976, the Corps received over 20,000 applications for permits under the Rivers and Harbors Act and the FWPCA.¹⁶⁶ Hence, each of the Corps' district offices annually must evaluate thousands of applications without clear standards with respect to whether an application should be approved. In such uncertainty it is not surprising that permit review may prove more procedural than substantive—and there is no shortage of procedures with which to comply.

In large measure, the Corps' lengthy regulations are designed merely to lay out the course that permits must follow en route to issuance.¹⁶⁷ These procedures, partially self-imposed and partially a response to various overlapping congressional mandates, apply to applications arising under both section 10 of the Rivers and Harbors Act and section 404 of the FWPCA.

Each district office of the Corps routinely circulates applications to other concerned federal, regional, state, or local agencies having jurisdiction over or interest in the proposed activity. Permits will not be issued where certification or authorization of the proposed work is required by federal, state, or local law and such certification or authorization has been denied.¹⁶⁸ Among the federal statutes that may require separate certification or authorization are: the Federal Water Pollution Control Act;¹⁶⁹ the Coastal Zone Management Act;¹⁷⁰ and the Marine Protection, Research and

must approximate "value to the recipient." *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342-43 (1974).

¹⁶⁶ Interview with William Hedeman, Counsel for Regulatory Programs, Office of General Counsel, Department of the Army, Nov. 7, 1976.

¹⁶⁷ See 33 C.F.R. §§ 209.110-.410 (1976).

¹⁶⁸ *Id.* § 209.120 (f) (3).

¹⁶⁹ 33 U.S.C. § 1341 (Supp. V 1975).

¹⁷⁰ 16 U.S.C. § 1456(c)(3) (Supp. V 1975).

Sanctuaries Act.¹⁷¹ State laws requiring approval may include pollution, wetlands, and industrial siting statutes; local laws requiring approval may include zoning and harbor regulations.

The District Engineer also must consider the views of interested governmental agencies that do not have regulatory powers. He must consult, *inter alia*, officials from the Department of Interior (DOI), the National Oceanic and Atmospheric Agency, the Environmental Protection Agency (EPA), the Department of Agriculture, and appropriate state agencies.¹⁷² Lower echelons of the Corps defer to the judgment of DOI officials regarding the impact of a project on fish and wildlife.¹⁷³ If the proposed project may affect water quality, section 401 of the FWPCA requires a certificate of compliance with applicable quality standards and effluent limitations. If EPA objects, notwithstanding issuance of the certificate, the permit must be forwarded to Washington for final action at higher levels.¹⁷⁴

At the state level, various state agencies submit comments to the District Engineer. If there is disagreement among the agencies, the District Engineer will solicit the views of the Governor. Regional, state, and local plans are viewed as reflecting local factors of the public interest. When there is a favorable state determination, the District Engineer ordinarily will issue the permit, provided the project complies with federal statutory criteria and the Corps' regulations.¹⁷⁵ The regulations also provide that in states with ongoing permit programs for work in navigable waters, the Corps may enter into agreements for joint processing and evaluation of both the Corps and the state permit applications.¹⁷⁶

The District Engineer must also notify the public of the application. He uses responses to such notification to gauge community sentiment. If response to a notice indicates a need for further public discussion, the District Engineer may hold a public hearing.¹⁷⁷ In

¹⁷¹ 16 U.S.C. § 1432(f) (Supp. V 1975).

¹⁷² See 33 C.F.R. § 209.120 (f) (4) (1976).

¹⁷³ See *id.* §§ 209.120(g) (4), .120 Appendix B.

¹⁷⁴ 33 C.F.R. § 209.120(g)(5) (1976).

¹⁷⁵ *Id.* § 209.120(f)(3)(i), (iii).

¹⁷⁶ *Id.* § 209.120(f)(3)(v).

¹⁷⁷ See 41 Fed. Reg. 28,952 (1976), *superseding* 33 C.F.R. §§ 209.120 (k), .405 (1976) (to be codified at 33 C.F.R. § 209.133).

addition, he must determine whether he must prepare a formal Environmental Impact Statement.¹⁷⁸

Finally, assuming that he has fulfilled all these requirements, the District Engineer must decide whether to authorize the project or activity; and, if he grants permission, whether it will take the form of a letter of permission, a separate permit, or a general permit. He issues letters of permission in a summary manner upon a finding that, subject to section 10 of the Rivers and Harbors Act, the proposed work is minor, noncontroversial, and without significant impact on environmental values.¹⁷⁹ Separate permits are standardized forms.¹⁸⁰ General permits are a recent innovation designed to help relieve the load created by the Corps' new responsibilities under section 404 of FWPCA.¹⁸¹ The District Engineer may issue a general permit for certain categories of structures, and, thereafter, activities within the category need not be individually licensed.¹⁸²

Information from the Baltimore District Corps of Engineers illustrates how these procedures may be working. During the 1976 fiscal year, 1,476 applications were received, 335 letters of permission were given, 673 permits were granted, and 279 activities were allowed under general permit.¹⁸³

C. Private Rights

In form, the Rivers and Harbors Act of 1899 is a criminal statute. Sections 10 and 13 make certain activities unlawful if done without specified permission; sections 12 and 16 prescribe fines and prison sentences that may be imposed on violators.¹⁸⁴ The question arises, therefore, whether the Act serves as a basis for other public and private rights and remedies. In *Wyandotte Transportation Co. v. United States*, the Supreme Court recognized that the federal government may recover civil damages occasioned by violations of the Act,¹⁸⁵ and in *Cort v. Ash*, the Court intimated

¹⁷⁸ See text accompanying notes 142-43 *supra*.

¹⁷⁹ 33 C.F.R. § 209.120(m) (3) (1976).

¹⁸⁰ See *id.* § 209.120 Appendix C.

¹⁸¹ See text accompanying notes 90-105 *supra*.

¹⁸² See 33 C.F.R. § 209.120 (i) (2) (ix) (1976).

¹⁸³ Telephone conversation with James Durkay, Regulatory Functions Branch, Baltimore District Corps of Engineers, Aug. 3, 1976.

¹⁸⁴ See 33 U.S.C. §§ 403, 406, 407, 411 (1970).

¹⁸⁵ 389 U.S. 191 (1967).

that the Act created private rights as well.¹⁸⁶ Some lower federal courts have allowed plaintiffs to use the Act as a basis for private civil suits challenging both the issuance and non-issuance of permits.¹⁸⁷

1. Challenges to Permit Issuance

The recent case of *Potomac River Association v. Lundeberg Maryland Seamanship School, Inc.*¹⁸⁸ illustrates the form that challenges to permit issuance may take. Two citizens' organizations brought suit against both federal and private defendants. The Baltimore District of the Corps (the federal defendant) had issued five permits, four of them before passage of NEPA, to Lundeberg Maryland Seamanship School (the private defendant) for dredging and filling in St. George's Creek.

The plaintiff sought, under NEPA, to require the Corps to complete an EIS for the one existing permit issued after NEPA's effective date, and for the still pending application for extension of one of the pre-NEPA permits. The plaintiff also sought, under the Rivers and Harbors Act, as complemented by NEPA and the Federal Water Pollution Control Act (FWPCA), to prevent the Corps from issuing the private defendants any further dredging or filling permits.¹⁸⁹ The federal district court for the District of Maryland, while recognizing that private plaintiffs may challenge the procedures of the Corps, dismissed all claims against the federal defendants. The plaintiffs' complaint regarding the preexisting permits was held moot as all work under the permits was completed and the permits had expired; the complaint concerning the pending permit extension was held within the primary jurisdiction of the Corps and hence premature, because the Corps had not made a final decision.¹⁹⁰

The plaintiffs also asserted a cause of action under section 10 of the Rivers and Harbors Act both for damages against the private

¹⁸⁶ 422 U.S. 66, 78-79 (1975).

¹⁸⁷ See, e.g., *Sierra Club v. Leslie Salt Co.*, 354 F. Supp. 1099 (N.D. Cal. 1972). But see, e.g., *Bass Angler Sportsman Soc'y v. United States Steel Corp.*, 324 F. Supp. 412 (M.D. Ala.), *aff'd per curiam sub nom.*, *Bass Anglers Sportsman Soc'y v. Koppers Co.*, 447 F.2d 1304 (5th Cir. 1971); *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 330 F. Supp. 695 (D. Conn. 1971), *aff'd*, 457 F.2d 81 (2d Cir. 1972).

¹⁸⁸ 402 F. Supp. 344 (D. Md. 1975).

¹⁸⁹ *Id.* at 349-50.

¹⁹⁰ *Id.* at 351.

defendant for harm to the creek that had resulted in injury to the plaintiffs and their members and for injunctive relief in the form of restoration of the creek. The court denied the private defendant's motion to dismiss, finding that the Rivers and Harbors Act supported a cause of action by one private party against another and that the plaintiffs' allegations of a maritime tort would serve to provide admiralty jurisdiction.¹⁹¹ But the court went on to hold that, under the Act, only activities that occurred outside the permit and caused obstructions to navigation were actionable; thus, the permit issued by the Corps was deemed to shield the private defendant from liability for damages resulting from activities within the ambit of that permit.¹⁹²

The *Potomac River Association* decision reflects the clear majority view that private plaintiffs have standing to bring civil suit in federal courts when they allege violations of a federal regulatory statute.¹⁹³ The substantive rulings of the court, however, are puzzling. By limiting damages under the Rivers and Harbors Act to losses occasioned by obstructions to navigation (and not, for example, by damage to the environment) the court reimposed the "navigational blinders" that the Fifth Circuit had attempted to remove in *Zabel v. Tabb*.¹⁹⁴ Allowing a Corps permit to immunize otherwise tortious activity is the consequence of viewing a generally pro forma procedure¹⁹⁵ as a decision based on "cost/benefit analysis of economic, historical and environmental and aesthetic factors."¹⁹⁶ It would seem better to view the permit for what it is rather than for what it aspires to be.

2. Challenges to Permit Non-Issuance and Problems that Attend Failure to Obtain a Permit

Recent complaints of disgruntled developers reflect a common frustration. As the previous discussion illustrates, the program of the Corps in administering section 10 of the Rivers and Harbors Act has been in flux during the last five years. Many aspects of the

¹⁹¹ *Id.* at 353-59.

¹⁹² *Id.* at 359.

¹⁹³ See, e.g., Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963).

¹⁹⁴ 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971); see text accompanying notes 131-32 *supra*.

¹⁹⁵ See text accompanying note 261 *infra*.

¹⁹⁶ 402 F. Supp. at 355.

program have undergone fundamental changes that present particular problems to those intending to engage in activities along the coast. Investments are made, design specifications selected, and costs calculated on the basis of what are thought to be existing public regulations. Changes in either the regulations or the application thereof often undermine expectations.

To the extent that changes in the Corps' regulatory program have been brought about through the enactment of new statutes or the promulgation of new regulations, well developed procedures exist for moderating the impact of the change on private expectations. Transitional provisions may phase in the new legislative mandates; "grandfather clauses" may proscribe the application of new rules to already accomplished projects. For example, some new regulations have stipulated that a permit would not be necessary for certain type of work commenced or completed before the regulations' effective date.¹⁹⁷ Other regulations have "phased in" new constraints over a specified period.¹⁹⁸

Many of the changes, however, have occurred in a less formal fashion. In the exercise of their discretionary powers, District Engineers are refusing to issue permits that they would have perfunctorily granted several years ago;¹⁹⁹ and courts have read new meaning into pre-existing laws.²⁰⁰ Furthermore, the extent to which a developer is protected in relying on an administrator's rule of thumb or a judicial interpretation is problematic.²⁰¹

¹⁹⁷ See, e.g., 33 C.F.R. § 209.150(b)(2) (1976) (work within established harbor lines).

¹⁹⁸ See, e.g., *id.* § 209.120(e) (2) (dredge and fill activities).

¹⁹⁹ See, e.g., *United States v. Stoeco Homes, Inc.*, 498 F.2d 597 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975).

²⁰⁰ See, e.g., *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

²⁰¹ Of course, a developer may ignore the permit procedure altogether and proceed with his activity—at the risk of discovery by the Corps and subsequent prosecution under the Rivers and Harbors Act or the FWPCA. Should he be prosecuted, a developer may argue that the Corps' authority is barred by equitable estoppel, laches, or waiver. The Supreme Court has ruled that, in some circumstances, an administrative agency may be precluded from changing precipitously the official administrative construction of a statute. In *United States v. Pennsylvania Indus. Chemical Corp.*, 411 U.S. 655. (1973), the Court held that, in a criminal prosecution under section 13 of the Rivers and Harbors Act for the discharge of refuse, the trial court erred in excluding evidence that the defendant discharger was affirmatively misled by the Corps' past administrative practices. Such evidence could create a defense if it deprived the accused of fair warning of what conduct the government intended to make criminal. *Id.* at 670-76. This defense, however, has thus far proved unsuccessful in prosecutions under the Act. See, e.g., *Weizmann v.*

Under the Administrative Procedure Act, an unsuccessful applicant has standing to challenge a final agency decision.²⁰² But to prevail the applicant must show that the administrative decision was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."²⁰³ Because the applicant is ordinarily unable to show that there was no rational basis for denial of the permit, he will instead try to establish that the procedure used was not in "accordance with law." In recent cases, disappointed developers have unsuccessfully attacked permit denials as unlawful on the following grounds: that the Secretary of the Army unlawfully delegated his statutory responsibility to the Chief of the Corps of Engineers;²⁰⁴ that the applicant received treatment unequal to that accorded other applicants;²⁰⁵ that the Corps lacked jurisdiction;²⁰⁶ and that the Corps failed to prepare an EIS before taking administrative action.²⁰⁷

Permit denials may also be challenged on constitutional grounds. The fifth amendment imposes a fundamental limitation on the power of the federal government by providing that private property shall not be taken for public use without just compensation.²⁰⁸ The question is whether a regulatory decision by the Corps to

District Eng'r, 526 F.2d 1302 (5th Cir. 1976); *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293 (5th Cir. 1976); *United States v. Kaiser Aetna*, 408 F. Supp. 42 (D. Hawaii 1976); *United States v. Lewis*, 355 F. Supp. 1132 (S.D. Ga. 1973); *United States v. Sunset Cove, Inc.*, 5 E.R.C. 1023 (D. Ore. 1973), *aff'd in part, modified in part per curiam*, 514 F.2d 1089 (9th Cir.), *cert. denied*, 423 U.S. 865 (1975). Despite their dubious value as shields to prosecution, the doctrines of equitable estoppel, laches, and waiver might conceivably serve as a sword. In other words, a developer who either proceeded without a permit or was denied a permit might bring suit seeking injunctive relief and assert that the Corps, because it misled him, is barred or estopped from exercising jurisdiction over his activity. The Fifth Circuit, however, has apparently rejected this type of attack. *See Weizmann v. District Eng'r*, 526 F.2d 1302, 1305-06 (5th Cir. 1976).

²⁰² 5 U.S.C. § 702 (1970).

²⁰³ *Id.* § 706(2)(A) (1970); *see, e.g., Joseph G. Moretti, Inc. v. Hoffman*, 526 F.2d 1311 (5th Cir. 1976); *DiVosta Rentals, Inc. v. Lee*, 488 F.2d 674 (5th Cir. 1973), *cert. denied*, 416 U.S. 984 (1974); *Gables by the Sea, Inc. v. Lee*, 365 F. Supp. 826 (S.D. Fla. 1973), *aff'd per curiam*, 498 F.2d 1340 (5th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

²⁰⁴ *Joseph G. Moretti, Inc. v. Hoffman*, 526 F.2d 1311 (5th Cir. 1976).

²⁰⁵ *Id.*

²⁰⁶ *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293 (5th Cir. 1976). *But see Weizmann v. District Eng'r*, 526 F.2d 1302 (5th Cir. 1976).

²⁰⁷ *United States v. Kaiser Aetna*, 408 F. Supp. 42 (D. Hawaii 1976).

²⁰⁸ U.S. CONST. amend. V.

deny a permit so interferes with the economic expectations of the private landowner as to constitute a "taking." The answer has almost uniformly been in the negative, largely because of the operation of the commerce clause.²⁰⁹

The commerce clause was placed in the Constitution to nationalize interstate waterways and thereby assure the unimpeded flow of maritime commerce.²¹⁰ Accordingly, the Supreme Court, by holding that the power to regulate navigation conferred on Congress by the commerce clause gives the federal government a "dominant servitude" or a "navigation servitude" to which the property rights of riparian owners are subordinate, has given the Corps a free hand in its efforts to improve navigation. Consequently, the federal government is not constitutionally required to pay compensation when it alters the course of navigable streams or otherwise impairs a riparian owner's access to navigable waters, even if the market value of the land is substantially diminished. In short, the riparian owner cannot sue to enjoin the Corps from undertaking a civil project even if no provisions for compensation have been made.²¹¹

²⁰⁹ State constitutions, however, have proved to be more helpful to private land owners challenging state statutes or agencies that restrict wetlands activities by riparian owners. The results of judicial challenges to such statutes and administrative actions have been mixed. Some have been held constitutional. *See, e.g.,* Candlestick Prop., Inc. v. San Francisco Bay Conserv. & Dev. Comm'n, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970); Potomac Sand & Gravel Co. v. Governor, 266 Md. 358, 293 A.2d 241, *cert. denied*, 409 U.S. 1040 (1972); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972); *cf.* Turnpike Realty Co. v. Town of Dedham, 362 Mass. 221, 284 N.E.2d 891 (1972) (flood zoning bylaw upheld as within town's general zoning authority, therefore regulation not confiscatory), *cert. denied*, 409 U.S. 1108 (1973). Others have been held unconstitutional. *See, e.g.,* Dooley v. Town Plan & Zoning Comm'n, 151 Conn. 304, 197 A.2d 770 (1964); State v. Johnson, 265 A.2d 711 (Me. 1970); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963); *cf.* MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635, 255 N.E.2d 347 (1970) (preserving private land in natural state for public benefit by preventing owner from using land for any practical purpose held not within authority of zoning enabling act); Commissioner of Natural Resources v. S. Volpe & Co., 349 Mass. 104, 206 N.E.2d 666 (1965) (whether there was taking without compensation depends upon uses to which marshland can be put without violating prohibition against filling); Sibson v. State, 110 N.H. 8, 259 A.2d 397 (1969) (marshland on landward side of salt meadow held not within purview of regulatory statute).

²¹⁰ *See* text accompanying notes 48-50 *supra*.

²¹¹ *See, e.g.,* United States v. Rands, 389 U.S. 121 (1967); Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82 (1913); Scranton v. Wheeler, 179 U.S. 141 (1900); Gibson v. United States, 166 U.S. 269 (1897). A number of commentators have examined in detail the navigation servitude and the rule of no compensation discussed in these cases. *See* Baldwin, *The Impact of the Commerce Clause on the Riparian Rights Doctrine*,

When the Court made these decisions giving such broad powers to the Corps, the Corps' single regulatory concern was the promotion of navigation. Recently, however, as noted above, the Corps has been redirected to consider the full range of social, economic, and environmental effects in pursuit of its programs. No longer may the Corps focus solely on navigational problems.²¹² This change in the emphasis of its coastal programs suggests new questions concerning the navigation servitude: for what purposes may the navigation servitude be advanced, and to what geographical area does the navigation servitude extend?

Because civil works projects of the Corps continue to be, at least in part, for the purpose of maintaining and protecting navigation, Supreme Court authority would seem to imply that the federal government, in condemning land or impairing riparian rights, may still avail itself of the protection afforded by the navigation servitude.²¹³ Today, however, because a permit may validly be denied for ecological reasons (even though the project would not impair navigation), the question arises whether the navigation servitude protects such an exercise of power from constitutional challenge as a "taking" of property. In *Zabel v. Tabb*, the Fifth Circuit dismissed the landowner's "taking" argument with passing reference to navigation servitude, and the Supreme Court denied certiorari.²¹⁴ Hence, this constitutional question remains open.

Closely akin to the question of the effect of increased Corps regulation unrelated to navigation is the question regarding the geographical boundaries of the navigation servitude. As long as the Corps exercised its regulatory powers with a view only towards navigation, few questions arose as to the shoreward boundaries of

16 U. FLA. L. REV. 370 (1963); Bartke, *The Navigation Servitude and Just Compensation — Struggle for a Doctrine*, 48 ORE. L. REV. 1 (1968); Harnsberger, *Eminent Domain and Water Law*, 48 NEB. L. REV. 325 (1969); Moirreale, *Federal Power in Western Waters: The Navigation Power and The Rule of No Compensation*, 3 NAT. RESOURCES J. 1 (1963); Morris, *The Federal Navigation Servitude: Impediment to the Development of the Waterfront*, 45 ST. JOHN'S L. REV. 189 (1970); Stoebuck, *Condemnation of Riparian Rights, A Species of Taking Without Touching*, 30 LA. L. REV. 394 (1970); Comment, *Navigational Servitude as a Method of Ecological Protection*, 75 DICK. L. REV. 256 (1971).

²¹² See text accompanying notes 124-41 *supra*.

²¹³ See *Greathouse v. Dern*, 289 U.S. 352 (1933).

²¹⁴ 430 F.2d at 215 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971). The Fifth Circuit held that the waters and underlying land at issue were subject to the paramount servitude in the federal government that the Submerged Lands Act, 43 U.S.C. §§ 1301-1343 (1970), expressly reserved. The court declined to discuss the constitutional issue.

federal jurisdiction. Now that the Corps is concerned with environmental protection of coastlands as well as with navigable waters, however, the shoreward boundaries have assumed added significance. Supreme Court cases make clear that the boundaries of the navigation servitude are not coextensive with the overall area that the Corps may legitimately affect in the execution of its delegated powers under the commerce clause. For example, in *United States v. Kansas City Life Insurance Co.*,²¹⁵ a Corps' dam on a navigable river backed water up a non-navigable tributary, thereby destroying the agricultural value of plaintiff's land. The Court found the project a permissible exercise of commerce powers, but required payment of compensation because the private property damaged was above the ordinary high water mark.²¹⁶ Likewise, in *United States v. Rands*,²¹⁷ the Court observed that the navigation servitude does not extend beyond the ordinary high water mark, although, of course, the servitude's existence did reduce the value of riparian land above that line.²¹⁸

Citing *Rands* and *Kansas City*, therefore, a developer of coastal activities to whom the Corps has denied a permit might argue that the Corps' assertion of power over such activities is, in effect, a confiscatory taking of property. However, in two recent cases, this argument was rejected without rigorous analysis of either the substantive limits or the geographic perimeters of the navigation servitude.²¹⁹

²¹⁵ 339 U.S. 799 (1950).

²¹⁶ *Id.* at 800-01.

²¹⁷ 389 U.S. 121 (1967). This case provoked a response from Congress in the form of section 111 of the Rivers and Harbors and Flood Control Act of 1970. Pub. L. No. 91-611, 84 Stat. 1821 (codified in 33 U.S.C. § 595 (a) (1970)). Section 111 makes no effort to change the geographical boundaries of the navigation servitude, but does change the measure of compensation to the abutting landowner. The significant portion reads as follows:

In all cases where real property shall be taken by the United States for the public use in connection with any improvement of rivers, harbors, canals, or waterways of the United States, and in all condemnation proceedings by the United States to acquire lands or easements for such improvements, the compensation to be paid for real property taken by the United States above the normal high water mark of navigable waters of the United States shall be the fair market value of such real property based upon all uses to which such real property may reasonably be put, including its highest and best use, any of which uses may be dependent upon access to or utilization of such navigable waters.

²¹⁸ 389 U.S. at 123.

²¹⁹ *United States v. Stoeco Homes, Inc.*, 498 F.2d 597 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); *United States v. Lewis*, 355 F. Supp. 1132 (S.D. Ga. 1973). *But see* *United*

One final problem with respect to private rights occurs when a developer who has failed either to seek or obtain a permit from the Corps goes ahead with the proposed project. In such situations, the Corps will sometimes attempt to assert its jurisdiction over what may be a completed capital improvement. The problem is a by-product of the Supreme Court dogma: "When once found to be navigable, a waterway remains so."²²⁰ If literally applied to the Corps' regulatory program, this dictum would produce anomalous results—Corps jurisdiction would extend to thousands of acres of streets, home sites, factory sites, and railyards that were once rivers, canals, and tidal marsh. Instead, several federal courts, in the interests of fairness, have refused to permit after-the-fact application of the Corps regulatory program to sites that were developed on the reasonable supposition that permission was not required.²²¹ In several cases where the developer had completed a fill without a permit, courts, rather than requiring total restoration, have ordered development of less costly compromise solutions that consider financial feasibility and environmental advisability.²²² Similarly, courts have also refrained from making officers of corporate developers personally liable for the cost of restoration.²²³ In short, courts have exercised discretion in these situations to "temper . . . the law with a touch of equity."²²⁴

The foregoing discussion describes the various challenges that private parties can institute to the Corps' regulation program. Obstacles to attack on the issuance of permits are primarily jurisdictional, but the consensus seems to be that private parties may

States v. Kaiser Aetna, 408 F. Supp. 42 (D. Hawaii 1976), which created a "special exception" for Hawaii because of the special manner in which Hawaii became a U.S. territory.

²²⁰ United States v. Appalachian Elec. Power Co., 311 U.S. 377, 408 (1940) (footnote omitted). See generally text accompanying notes 81-89 *supra*.

²²¹ See, e.g., United States v. Stoeco Homes, Inc., 498 F.2d 597 (3d Cir. 1974) (solid upland that had been marsh prior to 1927), *cert. denied*, 420 U.S. 927 (1975); Sierra Club v. Leslie Salt Co., 412 F. Supp. 1096 (N.D. Cal. 1976) (diked evaporation ponds used for salt production); James River & Kanawha Canal Parks, Inc. v. Richmond Metropolitan Auth., 359 F. Supp. 611 (E.D. Va.) (parking lot that had been site of a canal prior to 1880), *aff'd*, 481 F.2d 1280 (4th Cir. 1973).

²²² See, e.g., United States v. Sexton Cove Estates, Inc., 526 F.2d 1293 (5th Cir. 1976); United States v. Joseph G. Moretti, Inc., 526 F.2d 1306 (5th Cir. 1976); United States v. Sunset Cove, Inc., 514 F.2d 1089 (9th Cir.), *cert. denied*, 423 U.S. 865 (1975); United States v. American Capital Land, 8 E.R.C. 1654 (S.D. Miss. 1975).

²²³ United States v. Joseph G. Moretti, Inc., 526 F.2d 1306 (5th Cir. 1976).

²²⁴ United States v. Sunset Cove Inc., 514 F.2d 1089, 1090 (9th Cir.), *cert. denied*, 423 U.S. 865 (1975).

use the courts to question the legality of issued permits. The extent to which private parties may recover civil damages in tort from permit holders is more uncertain, however, especially in view of the *Potomac River Association* holding that a permit ordinarily shields its holder from tort liability. Attacking a permit denial has proved more difficult because of the procedural protection given administrative decisions, but the courts have shown some concern for the special difficulties applicants have had in anticipating the Corps' increasingly stringent constraints.

III. APPRAISAL OF THE CORPS' REGULATORY PROGRAM

The regulatory program of the U.S. Army Corps of Engineers is in a state of flux. Historically, the Corps has served as a permissive port warden. Today, however, it resolves disputes concerning development along the margins of major and minor waterways. This section will appraise the success with which the Corps is handling its present regulatory responsibilities and venture some opinions regarding its capacity to assume a broader role.

A. Jurisdiction

Concern with the extent of the Corps' regulatory authority is a recent, but active, topic of legal concern. Traditionally, the question answered itself. Because the Corps' concern was with keeping maritime channels open, its subject matter jurisdiction extended to obstructions thereto. Likewise, because the Corps' concern had a geographic situs, its territorial jurisdiction was defined in terms of locality—within “navigable waters.”

Only since the Corps first evidenced concern for a broader array of values in the late 1960's has precise delineation of the boundaries of “navigable waters” become significant. Developers in marginal areas have sought to avoid rigorous environmental review by establishing that their projects are not within the ambit of the Corps' regulatory powers. This argument is particularly attractive for use in court, because there is no procedural presumption that the Corps' determination of its jurisdiction—over changing sidelines of tidal water, for example—is correct.

As a result, determining the geographical boundaries of navigable waters has been the most litigated issue under the Rivers and Harbors Act. This development is unfortunate for two reasons.

First, it sometimes renders application of the Corps' regulatory powers dependent upon esoteric and quixotic factors such as 200-year-old tidal data, the routes used by nineteenth century traders, or the identity of the actor (Mother Nature or Brother Developer) who unplugged the canal. Second, and perhaps more importantly, the inquiry generally has little to do with the goals of the Corps' regulatory program—moderation of water-related activities and projects so as to promote the public interest.

Congress is now again faced with the question of determining the extent of the Corps' dredge and fill authority under section 404 of the Federal Water Pollution Control Act. Several alternative systems are available: the maritime transport system (as indicated by commercial utilization), major waterways (as indicated by flowage), or all surface waters (as measured hydrologically).²²⁵ But when it chooses among these alternatives, Congress should not define the Corps' area of concern in terms of locality or territory. To do so would make major policy decisions turn on legalistically attributed differences in extensional meaning between terms such as "navigable waters," "navigable waters of the United States," and "water of the United States."²²⁶ Not only are such distinctions mind-boggling, they may also have perverse consequences.

The Supreme Court faced analogous problems in *Executive Jet Aviation Inc. v. City of Cleveland*.²²⁷ There the question was whether federal admiralty jurisdiction existed over aviation tort claims arising from the crash of a charter flight in Lake Erie. Rejecting the traditional "locality" test of admiralty jurisdiction, the Court instead considered whether the accident in question had a significant relationship to maritime activity and determined that there was no such relationship.²²⁸

Congress should adopt the approach of *Executive Jet Aviation* in specifying the Corps' jurisdiction. First, Congress should choose the "system" that it desires the Corps to regulate; the Corps' licen-

²²⁵ Several bills were introduced in the 95th Congress during January, 1977, that would amend the Corps' authority under section 404. See 7 ENVIR. REP. (BNA) 1445 (Jan. 28, 1977).

²²⁶ For a discussion of the definition of "navigable waters," see *Environmental Protection Agency Memorandum to Regional Offices on the Meaning of the Term "Navigable Waters"*, reprinted in ENVIR. L. REP. (ELI) 46316 (STATUTES AND REGULATIONS) (June 7, 1973).

²²⁷ 409 U.S. 249 (1972).

²²⁸ *Id.* at 268-71.

sing authority should then extend to projects and activities that relate significantly to that system. Such an approach to defining the Corps' jurisdiction has several advantages. It would both avoid the semantic confusion and possible perversity of results in a locality definition of jurisdiction and rationalize the Corps' jurisdictional inquiry. Under this proposed system, the Corps would determine whether it has jurisdiction over a particular activity according to the purpose of the permit program and the likely impact of the project or activity.

B. Decision Criteria and Procedures

In the past, a broad consensus supported the Corps in its pursuit of one narrow objective, the promotion of navigation. Shipping interests, cities, unions, and taxpayers supported port development and considered side effects unimportant. Today's laws and regulations, however, call upon the Corps to receive, one by one, proposals for waterfront development; to evaluate the environmental, economic, and social ramifications of each; and then to authorize, reject, or modify each proposal, depending upon whether it is in the "public interest." Because of the lack of consensus regarding what constitutes the "public interest," execution by the Corps of its statutory mandates, once fairly simple, has become frightfully difficult.

Assessment of the Corps' response necessarily begins with an inquiry into the concept of the public interest. Political scientist Glendon Schubert divides the contemporary theories of the public interest into three groups: idealist, rationalist, and realist.²²⁹

Under the idealist theory, the true public interest rests in a higher, natural law, a law that obtains regardless of the wishes of the people. Idealists describe the public interest as a thing of substance separate and apart from the administrative process. The job of the administrator is to resist political influence and to impose on the people what is good for them, whether they want it or not.²³⁰

On questions of coastal utilization, disciples of the idealist theory abound. They argue that the natural law is the law of na-

²²⁹ Schubert, *Is There a Public Interest Theory?*, in *THE PUBLIC INTEREST* 162, 164 & n.2 (C. Friedrich ed. 1962). Schubert based his classifications on the system developed by W.A. Leys in *Ethics and Administrative Discretion*, 3 *PUB. AD. REV.* 10, 18-22 (1943).

²³⁰ Schubert, *supra* note 229, at 166-67.

ture; accordingly, any alteration of the coastal ecosystem should be forbidden. Idealists also demand that wetlands be protected because they are ecologically productive. The Corps, however, has resisted these blandishments. Instead, it has listened to congressmen, politicians, other government agencies, special interest groups, and concerned citizens. It has rejected mechanistic rules that would preserve all tidal marshes and require that all coastal facilities be water dependent.²³¹ In short, the District Engineers of the Corps have refused to behave as idealistic social engineers.

Rationalist theory rejects the idealist notion that the public interest is a thing of substance independent of private interests. Accordingly, rationalists postulate a common good that reflects the presumed existence of various common (often majoritarian) interests. This common good finds expression in the will of the people. Hence, rationalist theory charges the decisionmaker with faithfully implementing that popular will.²³²

The complications implicit in this theory as applied to the program of the Corps are illustrated by a permit application considered by the Baltimore District Office of the Corps between 1972 and 1974.²³³ The Maryland Port Administration sought permission to construct a marine terminal complex in Baltimore Harbor. From the state's economic vantage, determination that such a facility would be in the public interest seemed elementary in that the Port of Baltimore generates about twelve percent of the Gross Maryland Product. But from the perspective of the city, the question was less clear; lost real property tax revenues resulting from the Port Administration's ownership might exceed the indirect revenues to the city attributable to the proposed complex.²³⁴ There was no clearly defined "common good" or "popular will" that the Corps could follow. Other examples illustrating the inapplicability of rationalist theory to the Corps are not hard to find. In *Florida Audubon Society v. Callaway*,²³⁵ various "public interest groups" found themselves at cross-purposes. An environmental group found itself pitted against civil rights groups and an energy development

²³¹ See text accompanying notes 137-41 *supra*.

²³² Schubert, *supra* note 229, at 164-65.

²³³ See *Case Study of a Corps of Engineers Permit Application: NABOP-P (Md. Port Administration)*, 20 CHESAPEAKE RESEARCH CONSORTIUM PUBLICATION (Mar. 1976).

²³⁴ *Id.* at 16 & n.1.

²³⁵ 6 E.R.C. 1320 (M.D. Fla. 1974).

firm. Hence, the Corps was faced, not with a popular will to execute, but with an intense conflict of "interests" among its various "publics" with regard to how the coast should be used.

Rationalists respond to this type of problem by asserting that the proper function of the bureaucracy is to carry out the policy norms promulgated by Congress and the President. Administrators, according to rationalist theory, prescribe rules to carry out norms that only representatives of the people, who reflect the popular will, can make. Scientific management, cost-benefit analysis, or most recently, environmental impact assessment are means by which administrators allegedly will be kept subservient to the "will of the people."²³⁶

The success of such rationalist procedures has been criticized widely. For example, political theorist Edwin T. Haefele points out that cost-benefit analyses generally fail to include the full range of technical possibilities and are tempered by what the administrators judge to be political reality. Administrators attempt to assess the public interest and make social choices hidden behind inadequate cost-benefit analyses.²³⁷ Haefele emphasizes that decisions with respect to environmental quality involve "social or collective" choices and he therefore questions the capacity of administrators to gauge the public interest:

For when true social choices are at stake, nothing less than legislatures [using technical and administrative advisory committees] making these choices will suffice in our system of representative government. The spectacle of executive personnel attempting to assess the public interest through public hearings or to divine appropriate actions through committees "representing" all interests from housewives to steel mills is an outrage in the pure sense—it does violence to our system of government.²³⁸

Libertarian economist Richard A. Posner voices a somewhat different criticism of administrative decisionmaking. He observes that one of the original rationales for the creation of administrative agencies was that "by delegation to an appointive agency certain highly charged problems could be taken out of politics and resolved

²³⁶ Schubert, *supra* note 229, at 165-66.

²³⁷ Haefele, *Environmental Quality as a Problem of Social Choice*, in ENVIRONMENTAL QUALITY ANALYSIS 281, 284 (A. Kneese & B. Bower eds. 1972).

²³⁸ *Id.* at 285.

in accordance with neutral criteria, such as efficiency.”²³⁹ He decides, however, that in terms of actual effect, resources are more likely to be allocated efficiently without regulation.²⁴⁰

Applying either Haefele’s or Posner’s criticisms, the Corps’ regulatory program fails to measure up to the goal of rationalist decisionmaking. Haefele seems correct in his charge that District Engineers are required to make social choices unrelated to their expertise and without quantification of the values involved. Choices regarding the preferred level of population density and environmental quality, the cost and allocation of tax burden for public services, and who enjoys the benefits of coastal resources, inhere in the Corps’ decisions—yet the rationalist theory assumes that Congress or the President will make many of these decisions. The Corps’ regulatory scheme also is vulnerable to Posner’s criticism. By allowing political and special interests into its decisionmaking process and often acceding to their preferences, the Corps has attempted to accommodate preferences rather than to ensure the most efficient resource use.

Curiously, while Haefele and Posner would agree that the Corps’ regulation “politicizes” decisions as to how coastal resources are to be used, they suggest antithetical responses. Haefele, reflecting the rationalist view, suggests that, faced now with value conflicts that call for social choices, we create new, more representative, legislative bodies for making the choices.²⁴¹ Posner, on the other hand, believes that the route to more efficient use of resources is deregulation because the market is a more efficient mechanism for valuing competing uses than is the law.²⁴² Hence, Haefele would try to force environmental issues into politics while Posner would try to rid environmental issues of politics.

Realist theorists would reject the solutions of Haefele and Posner. Instead, they would lower expectations regarding what the Corps’ procedures are expected to accomplish. Realists, like the rationalists, recognize that the public interest is a collection of

²³⁹ R. POSNER, *ECONOMIC ANALYSIS OF LAW* 387 (1973).

²⁴⁰ *Id.* at 329. In fact, Posner argues that perhaps the *real* reason for delegation of congressional power to administrative agencies, rather than to the courts, was to assure a more sympathetic enforcement of congressional policies *not* motivated by efficiency concerns. *Id.* at 387.

²⁴¹ See Haefele, *supra* note 237, at 285.

²⁴² See R. POSNER, *supra* note 239, at 323.

selfish interests, but reject the notion that the administrative process has the capacity to calculate the best, socially preferred, or most efficient use of resources. Instead, decisionmakers are called upon to mediate conflicts respecting the use of resources.²⁴³ This is precisely the role that the Corps has undertaken.

Rather than attempt to calculate or to represent the public interest, the Corps has set itself up as a mediator. Its regulations direct the District Engineers to consider and weigh conservation, economics, aesthetics, history, navigation, water quality, and environmental values. Because it knows the difficulty of attempting to reflect all of these values, the Corps circulates permit applications among various other concerned federal, state, and local agencies. This procedure, by injecting a healthy eclecticism into the review procedure, is the major strength in the present regulatory process. Various reviewers look at the permit request from different perspectives and, accordingly, with different emphases: local governments—land use; state natural resource agencies—water quality and wetlands preservation; state economic development agencies—port development; U.S. Fish and Wildlife Service—fish and wildlife values; the Environmental Protection Agency—environmental quality. Notice and hearing procedures allow citizens' groups and other special interest groups to espouse their viewpoints. While it supervises this review and considers the input, the Corps also conducts its own appraisal of navigation values, its traditional area of expertise. No single agency has either the expertise or procedures necessary to consider these diffuse and sometimes conflicting interests as effectively as does the Corps.

Special procedures have also been developed to allow partisan political reconciliation of significant issues. By agreement, if a District Engineer and the local representative of the U.S. Fish and Wildlife Service disagree, the dispute is shipped to Washington for political resolution at the Secretarial level. By regulation, if an application proves "controversial," an Environmental Impact Statement must be prepared. Although the EIS may be a post hoc rationalization for a decision already made, its preparation allows opponents of the decision time to organize and provides them with a written record with which to take issue.

The realist view of the Corps' process unabashedly dodges the

²⁴³ See Schubert, *supra* note 229, at 164.

criticisms of Haefele and Posner. Realists do not guarantee Haefele that any particular administrative decision will be "right," but they assert that decisions that are the product of a process of full consideration are more likely to be in the public interest. The essence of the Posner thesis, as applied to the Corps' regulatory program, is that the market would allocate waterfront resources more efficiently without the Corps' licensing requirements. But this proposition, even if correct, fails to prove that "no regulation" is socially preferable to "regulation." The notion of "efficiency" sounds, but really is not, value neutral; efficiency merely expresses the best utilization of resources in terms of the willingness of people to pay. There are many ways of expressing collective preferences regarding the "right" allocation of resources. Congress's perpetuation of the Corps' regulatory program can be viewed as a social choice in favor of a decision process that will take into account the preferences of those unable to advocate their value assertions with money.

Accepting these lowered realist expectations, outstanding weaknesses nevertheless remain in the Corps' regulatory process. One problem is that the Corps' procedures, superimposed on state and local regulations, create a layer cake of sometimes redundant review. Although there are advantages in the review of activities from the special perspectives of various agencies at various levels of government, duplicative procedures and processing waste both money and time. A solution already authorized, but not yet implemented, is to allow the district offices of the Corps to enter into agreements that provide for joint processing and evaluation with state or local governments with overlapping permit programs.²⁴⁴

Another problem is the narrow focus and ad hoc, disjointed nature of the Corps' licensing determinations. This fragmentation of decisionmaking creates both the possibility of overlooking cumulative effects and the tendency to ignore some of the higher order questions.

The problem of cumulative impact is well illustrated by a 1973 permit application considered by the Baltimore District Office of the Corps.²⁴⁵ The application in question was for the construction

²⁴⁴ 33 C.F.R. § 209.120 (f) (3) (v) (1976).

²⁴⁵ See Power, *Watergate Village: A Case Study of a Permit Application for a Marina Submitted to the U.S. Army Corps of Engineers*, 2 COASTAL ZONE MANAGEMENT J. 103 (1975).

of thirty additional boat slips at Watergate Village, an apartment complex on a cove of Back Creek within the city limits of Annapolis, Maryland. By itself, the project seemed virtually harmless. No marsh would undergo dredging or filling, and the resulting structure would neither obstruct navigation, impair the waterscape, nor have a deleterious impact on water quality. Yet, when viewed as one increment to the overall development of Back Creek, the effects of environmental perturbation became significant. First, if the number of boats moored in Back Creek continued to proliferate, the Creek would become overcrowded. Lost time costs would be imposed on the boaters, safety hazards would increase, and, in general, the quality of the recreational experience would diminish. Moreover, an increase in private mooring slips, by effectively foreclosing construction of a planned public facility, would work at cross-purposes to provision of "public access" to Back Creek. Finally, the increase in boat traffic that the proposed facility would cause would contribute to a readily foreseeable degradation of water quality in Back Creek. The Corps' regulations direct the District Engineer to consider cumulative impacts of proposed activities,²⁴⁶ but considering that this application was but one of approximately 1,450 received by the Baltimore District Office during 1973,²⁴⁷ it is not surprising that cumulative effects are sometimes overlooked.

The Corps' ad hoc licensing process also may overlook underlying social choices. The decisionmaker may not see the forest for the trees. For example, in the Watergate Village case, the District Engineer initially focused upon the impact of the project on a fringing marsh and on water quality in the immediate vicinity,²⁴⁸ but not upon the development plan for the watershed. Unless the Corps determines the permissible density of development and the location and construction of public facilities (public marinas and sewers, for example), making rational decisions regarding the watershed's assimilative capacity either for additional wastes or for additional boats is impossible.²⁴⁹

Again, existing Corps procedures provide at least a partial solution. District offices of the Corps have been understandably disin-

²⁴⁶ 33 C.F.R. § 209.120 (f) (2) (iv) (1976).

²⁴⁷ See Power, *supra* note 245, at 120.

²⁴⁸ See *id.* at 105-06.

²⁴⁹ *Id.* at 121.

clined to prepare Environmental Impact Statements for single permit applications because of the high monetary and time costs that preparation of an EIS incurs.²⁵⁰ This approach is well-advised, because the suggested range of environmental impacts is too narrow, the number of applications too great, costs too high, and the delays too long to justify preparation of an EIS for each permit. The EIS format, however, may be helpful in responding to some of the aforementioned problems. Instead of preparing an EIS for a single permit, the Corps could develop one EIS for geographic areas of recurrent problem topics. For example, the Baltimore District of the Corps commissioned an environmental assessment of the cumulative effects of development on the entire Annapolis, Maryland region after the Watergate Village Case Study alerted the District to the crowding and water quality problems that were developing in that area.²⁵¹ Interestingly, in order to avoid the procedural rigmarole necessarily concomitant to preparation of an EIS, the Corps chose to characterize this detailed study as an "assessment" rather than as an Environmental Impact Statement. Similar studies might be commissioned to delve into such generic problems as shore erosion control practices. The Corps' regulations already suggest such "umbrella" uses of the EIS.²⁵² Such practices, however, could be vulnerable to judicial challenge, as many federal courts strictly enforce the EIS requirement.²⁵³

The Corps' regulatory process creates one major problem for which there is no ready or foreseeable solution. The procedures are well designed to allow the Corps to pick out and arrest projects that public agencies or significant private interest groups consider contrary to the public interest; but the procedures are not well designed to approve projects that, on balance, are in the public interest, but involve significant social costs and engender substantial opposition. Although Corps procedures do provide a mechanism through which projects or activities can be approved

²⁵⁰ See text accompanying notes 162-64 *supra*.

²⁵¹ See UNITED STATES ARMY ENGINEER DISTRICT, BALTIMORE, MARYLAND ENVIRONMENTAL ASSESSMENT: PROPOSED PROJECTS ON SPA AND BACK CREEKS, ANNAPOLIS, MARYLAND (1975). At the time of the assessment, 12 permit applications for various projects within the area had been submitted to the District for processing. *Id.* at 1-1.

²⁵² 33 C.F.R. § 209.410 (e) (7) (v) (1976).

²⁵³ See, e.g., Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971). But see Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures, 422 U.S. 289 (1975).

over outstanding opposition, the District Engineer may not issue a permit if any certification required by federal, state, or local law is denied.²⁵⁴ Furthermore, if the District Engineer believes granting the permit may be warranted but that the proposed activity would have a significant environmental impact, he must prepare, coordinate, and file an EIS prior to final action.²⁵⁵ District Engineers may issue permits only where there are no known or unsatisfactorily resolved substantive objections,²⁵⁶ and Division Engineers may sometimes override objections of other federal agencies.²⁵⁷ Applicants have an opportunity to rebut objections,²⁵⁸ but ordinarily, if there is unresolved conflict with a federal agency, the permit may only issue from the Chief of Engineers or the Secretary of the Army.²⁵⁹

The dynamics of this process are illustrated by the Corps' decision to deny the Deltona Corporation permission to develop 1,900 acres of mangrove swamp on Florida's Marco Island. The overall project originated in 1964 and called for development of a "new town" of about 35,000 population. The Corps routinely granted permits in 1964 and 1967, but warned the developer in 1969 that permit procedures were being tightened. In 1975, the developer entered into an agreement with the Governor of Florida whereby, in return for issuance of the various state permits, the developer agreed to give the state various segments of mangrove wetlands. The developer then filed with the Corps applications for three fill permits covering a total of over 2,000 acres. The District Engineer recommended disapproval of two applications and approval of the third, which covered only 113 acres, subject to various special conditions. DOI and EPA concurred with the District Engineer, but the National Oceanographic and Atmospheric Administration (NOAA) held out for disapproval of all three applications. Despite NOAA's opposition, the Chief of Engineers approved the District Engineer's decision.²⁶⁰

²⁵⁴ 33 C.F.R. § 209.120(f)(3) (1976).

²⁵⁵ *Id.* § 209.120(i)(1)(iv).

²⁵⁶ *Id.* § 209.120(p)(1).

²⁵⁷ *Id.* § 209.120(p)(2)(i).

²⁵⁸ *Id.* § 209.120(i)(1)(iii).

²⁵⁹ *Id.* § 209.120(p)(2)(ii).

²⁶⁰ See 6 ENVIR. REP. (BNA) 2141-43 (Apr. 23, 1976).

This decision, assuming it withstands administrative and judicial review, will have dramatic consequences. It demonstrates that the Corps' permit procedures are better designed to veto projects than to expedite them. The basic job of some EPA, DOI, and NOAA administrators is to point out the potential perturbations that coastal projects present to water quality, fish and wildlife, or wetlands. District offices of the Corps serve as clearinghouses for these opinions and encourage compromise of differences. Developers who want to engage in a large scale project may be able to work out a proposal that state and local officials feel, on balance, to be in the public interest. For example, state and local officials may determine that the social benefits of a project (jobs created during the construction stage; resulting increases in the real property tax base; value of sewers, roads, and water systems that the developer provides) outweigh the social costs (incremental community services required; perturbations to natural systems). The Corps, however, may avoid the onus of reviewing the accuracy of this cost-benefit analysis and the wrath of environmental groups by deferring to EPA, DOI, and NOAA officials who, having little interest or stake in the benefits of a project, remain adamant in their objections. The Corps' procedure, in short, has become largely pro forma. With limited staff and funding, the Corps can only process applications, circulate them to other agencies for comments, and approve applications to which no government agency objects.²⁶¹ The Corps is a mediator in the sense that it solicits views from all interested parties, but its "mediation" consists of disapproving any project opposed by government agencies. Thus, it is surprising that Congressman Charles E. Grassley expressed utter amazement, during debates on the Corps' jurisdiction in 1976, that "all the environmental groups are willing to let the Army Corps of Engineers exercise such broad powers under . . . [its regulatory program] and at other times and other places want to restrict the authority of the Army Corps because of the ecological damage the corps does or might do."²⁶² The answer is clear: the Corps' permit program is institutionally designed to block or scale down projects, not to encourage them.

²⁶¹ See Power, *supra* note 245, at 120.

²⁶² 122 CONG. REC. H5276 (daily ed. June 3, 1976).

C. Private Rights

The current land use reform literature focuses on the limitations on governmental power imposed by the fifth and fourteenth amendments to the Constitution.²⁶³ The conventional wisdom is that these anachronistic constitutional constraints present a major impediment to the capacity of government to assure that land is used in the public interest. This indictment seems faulty on all counts.

The "taking" problem is not a product of an obsolete and obscure bit of excess constitutional verbiage, but rather a manifestation of a legitimate concern. In situations where the "taking" clause does not strictly apply, some courts have reinvented it in the form of variations on common law principles of estoppel and laches.²⁶⁴ There are good arguments in terms of both fairness and economics for protecting those who make significant capital investments in reliance on established governmental policy;²⁶⁵ to do so is not to favor the "private" interest or the "public" interest, but to pay deference to one particular public interest: a concern for the responsible economic expectations of private parties. The Marco Island case, discussed above,²⁶⁶ illustrates this point well. As a result of the decision to preserve 1,900 acres of wetlands, building lots having an estimated value of between fifty and eighty million dollars were not created. The conventional view of environmentalists and, apparently, many land use reformers is that this decision results in an unalloyed public benefit. The loss of between fifty and eighty million dollars, suffered either by the developer or purchasers, is considered to be a purely *private* loss. It is more realistic, of course, to view the issue in terms of the trade-offs involved.

Regulators should keep lost opportunity costs in mind when making decisions. Welfare economics literature has emphasized the importance of making firms "internalize" all costs associated with their activities in order to assure that they will consider *all* costs and benefits associated with external effects of a proposed activity and thus make "efficient" decisions regarding the produc-

²⁶³ See e.g., F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* (1973); *THE USE OF LAND: A CITIZENS POLICY GUIDE TO URBAN GROWTH* (W. Reilly, ed. 1973).

²⁶⁴ See note 201 *supra* and accompanying text.

²⁶⁵ See Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

²⁶⁶ See text accompanying note 260 *supra*.

tion of goods and services.²⁶⁷ The standard example is that of a factory discharging smoke. Were the factory required to pay all of the "social costs" associated with the discharge, the market mechanism itself would guarantee the appropriate level of production and the appropriate level of smoke abatement—or, at least, so goes the rudimentary analysis.²⁶⁸ But most economists would admit that, because "transaction costs" often impede the ability of the free market to reach efficient results, some governmental regulation is justified. Similarly, when regulation does occur, it would seem equally important that the governmental entity internalize the cost of its regulations. Otherwise, government will tend to be excessive in imposing constraints.²⁶⁹

Of course, this analysis proves too much. The legal system lacks the sophistication to force cost internalization; firms and governmental entities respond to different incentives, a firm being more motivated by profit maximization. Yet this analysis does go a long way toward legitimizing a governmental concern for lost private value. If the agency ignores some of the costs imposed by the imposition of regulations, its judgment is biased. The Constitution and the quasi-estoppel notions developed by some courts are means to ensure governmental awareness.

CONCLUSION

The U.S. Army Corps of Engineers is no longer a permissive port warden. In response to goads from Congress and the courts, the Corps has constructed a regulatory program well designed to preserve wetlands and other natural systems in the coastal region.

Now pending in Congress is the question of the Corps' jurisdiction upland and upstream. In resolving this issue, Congress must understand the true nature of the Corps' regulatory program. The program *does not* work as a sophisticated moderator of coastal development that makes refined cost-benefit calculations in order to ascertain the "public interest" and then promotes good projects and activities while squelching bad ones. Such a role is far beyond the program's capacity; technical analysis can make the decision-

²⁶⁷ See, e.g., O. HERFINDAHL & A. KNEESE, *QUALITY OF THE ENVIRONMENT* 8-9 (1965).

²⁶⁸ See Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

²⁶⁹ See E. RABIN, *TEACHERS MANUAL FOR FUNDAMENTALS OF MODERN REAL PROPERTY LAW* 264-65 (1974).

maker better informed, but the “public interest” can be calculated only by a politically responsive and representative political body—which the Corps is not.

The Corps’ program discourages coastal development. It provides a forum for the adjustment of minor conflicts concerning coastal use, but in the event of unrelenting opposition to a project by either a governmental agency or a credible environmental group, it tends to block the project. Once the nemesis of the environmentalists, the Corps is now their hero. In the words of Senator Edmund Muskie: “[We] have put the fox in the chicken coop [and it has] become a chicken”²⁷⁰

²⁷⁰ *Senate Hearings, supra* note 4, at 67.