RIPPLING PUDDLES, SMALL HANDLES AND LINKS OF CHAIN: THE SCOPE OF ENVIRONMENTAL REVIEW FOR ARMY CORPS OF ENGINEERS PERMIT DECISIONS

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I. INTRODUCTION

The attempt to define the proper scope of environmental impacts that the Army Corps of Engineers (Corps) must consider pursuant to the

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National Environmental Policy Act (NEPA)[1] in granting permits for discharges of dredged or fill material into waters subject to the Corps' regulatory authority has inspired a surfeit of metaphors, being variously compared to rippling puddles,[2] small handles,[3] and links of chain.[4] Unfortunately, these assorted images have served not so much to clarify the applicable criteria as to reflect the difficulty in expressing a comprehensible legal standard for the scope of review issue.

The issue becomes relevant when the Corps attempts to evaluate the potential environmental impacts of a discharge permit required for the construction of a portion of a private project, such as the construction of an outfall pipeline in wetlands for an industrial facility to be located on uplands. Must the Corps consider the environmental effects of the entire industrial facility, or need it only consider the direct impacts of the discharge required for the construction of the outfall pipe?

The Corps itself has at different times offered different answers.[5] An early Corps regulation indicated that the Corps NEPA analysis should address the entire facility,[6] whereas the current Corps regulation suggests that only the impacts of the construction of the outfall pipe need be addressed because there is insufficient "control and responsibility" over the industrial facility itself to warrant NEPA review.[7] This control and responsibility regulation, although inherently ambiguous, has been widely interpreted as limiting the scope of the Corps' environmental

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1. 42 U.S.C. §§ 4321-4370d (1994).

2. *See* Sylvester v. United States Army Corps of Engineers, 884 F.2d 394, 400 (9th Cir. 1989).

3. *See* DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 8.16 (1984).

4. *See Sylvester*, 884 F.2d at 400.

5. The "outfall pipeline" example used in the Corps regulations is apparently based on *Save the Bay, Inc. v. United States Army Corps of Engineers*, 610 F.2d 322 (5th Cir. 1980). *See infra* notes 50-65 and accompanying text. Pursuant to Section 404(e) of the Clean Water Act (CWA), 33 U.S.C. § 1344(e) (1994), discharges for such outfall structures are now generally exempt from the requirement of an individual permit. *See* 33 C.F.R. pt. 330, App. A, (B)(7) (1995).

Under Section 404(e) of the CWA, the Corps may issue a "general permit" for "any category of activities involving discharges of dredged or fill material if the [Corps] determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." *Id*. One commentator has referred to these general permits as "an exemption by rule in everything but name." 2 WILLIAM H. RODGERS JR., ENVIRONMENTAL LAW: AIR AND WATER § 4.12 at 191 (1986).

6. *See* 45 Fed. Reg. 56760, 56779 (1980) (codified at 33 C.F.R. pt. 230, App. B, § 8(a) (1981)), discussed *infra* note 51 and accompanying text.

7. 53 Fed. Reg. 3120 (1988) (codified at 33 C.F.R. pt. 325, App. B, § 7(b) (1994)), discussed *infra* notes 93-96 and accompanying text.

review for a discharge permit to the area within its regulatory jurisdiction—i.e. the waters of the United States.[8]

This Article suggests, however, that there is little support in the case law, in other regulatory guidance, or in the control and responsibility regulation itself for limiting the Corps' environmental review for discharge permits to the waters within its regulatory jurisdiction. Instead, the Corps should apply the standard, borrowed from tort law, which has been endorsed by the Supreme Court[9] for NEPA analysis and which is explicitly required by the Council on Environmental Quality Regulations implementing NEPA,[10] and examine all "reasonably foreseeable" direct and indirect environmental effects of granting a permit, regardless of whether the impacts would occur in waters subject to the Corps' regulatory jurisdiction.

Section II of this Article outlines the basic statutory and regulatory parameters of NEPA's environmental impact statement (EIS) requirement and of the Corps' authority to issue permits for the discharge of dredge or fill material. Section III reviews the pertinent Corps regulations and the leading case law addressing the scope of the Corps' environmental review prior to the promulgation of the control and responsibility rule, and Section IV examines the control and responsibility rule. Section V discusses the United States Court of Appeals for the Ninth Circuit's decision in *Sylvester v. United States Army Corps of Engineers*,[11] which has arguably been improperly interpreted as construing the control and responsibility regulation to limit the Corps' environmental review to the waters subject to the Corps' regulatory authority. Section VI analyzes the "regulatory jurisdiction" interpretation of the control and responsibility rule and discusses its incompatibility with other relevant regulatory guidance, applicable case law, and the control and responsibility regulation itself. Section VII

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8. *See* MANDELKER, *supra* note 3, § 2.11[6] at 2-49 ("Generally, the Corps will only review the environmental impacts of a project on the wetlands that are subject to the dredge and fill permit process, and will not review the environmental impact of the entire project"); Margaret N. Strand, *Federal Wetlands Law: Part II*, 23 Envtl L. Rep. (Envtl. L. Inst.) 10284, 10294 (1993) ("The Corps' regulations provide that an [environmental impact statement] should evaluate those portions of a project that are in waters of the United States, rather than looking in detail at upland portions of a project."); Parenteau, *Small Handles, Big Impacts: When do Corps Permits Federalize Private Development?*, 20 ENVTL. L. 747, 750 (1990) (the Corps regulations "narrow its NEPA review to those project effects that [are] within its 'control and responsibility,' which essentially mean[s] within the physical limits of its jurisdiction.").

9. *See infra* notes 25-31 and accompanying text (discussing Metropolitan Edison Co. v. People Against Nuclear Energy (PANE), 460 U.S. 766 (1983)).

10. *See infra* notes 14-20 and accompanying text.

11. 884 F.2d 394 (9th Cir. 1989).

examines the "reasonably foreseeable impacts" approach to defining the proper scope of environmental review. The Article concludes that the reasonable foreseeability standard is not only appropriate under the applicable law, but it also provides logical parameters for conducting the Corps' NEPA analysis by focusing on the scope of the probable impacts of a proposed permit rather than promoting irrelevant debates over the extent to which a project requiring a Corps permit is "federalized."

II. NEPA AND CORPS PERMITTING UNDER SECTION 10 AND SECTION 404

A. Environmental Impact Statements Under NEPA

Section 102(2)(C) of NEPA requires federal agencies to evaluate the environmental impacts of each "proposal[] for legislation and other major federal action[] significantly affecting the quality of the human environment . . ."[12] in an EIS. Each EIS must discuss:

> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[13]

The Council on Environmental Quality (CEQ) regulations implementing NEPA[14] include within the definition of "major federal action" decisions by federal agencies approving or granting permits for otherwise private actions.[15] Agencies must consider the cumulative

12. 42 U.S.C. § 4332(2)(C) (1994).

13. *Id.*

14. The CEQ is authorized by Executive Order to promulgate regulations implementing NEPA's procedural provisions. *See* Exec. Order No. 11,514, 3 C.F.R. 104 (1970), as amended by Exec. Order No. 11,991, 3 C.F.R. 123 (1978). The Supreme Court has indicated that the CEQ's Regulations are entitled to "substantial deference" by the courts. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 372 (1989); *see* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 355 (1989); Andrus v. Sierra Club, 442 U.S. 347, 358 (1979); *see also* 40 C.F.R. § 1500.3 (1995) (the CEQ regulations are "applicable to and binding on all Federal agencies for implementing the procedural provisions of [NEPA] . . . except where compliance would be inconsistent with other statutory requirements").

15. *See* 40 C.F.R. § 1508.18(b)(4) (defining major federal action to include "[a]pproval of specific projects, such as construction or management activities located in a defined geographic

impacts of the action,[16] and may not avoid a determination that an action has significant impacts and that an EIS is therefore required by "breaking [an action] down into small component parts."[17]

The regulations further indicate that an agency should consider both the direct effects of an action "which are caused by the action and occur at the same time and place"[18] and the indirect effects of an action. Indirect effects are defined to include effects which are caused by the action and are later in time or further removed in distance, but still are reasonably foreseeable.[19] Indirect effects may include "growth-inducing effects" and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.[20]

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area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities").

16. *See* 40 C.F.R. § 1508.7. "Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and *reasonably foreseeable* future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." *Id.* (emphasis added).

17. *Id.* § 1508.27(b)(7).

18. *Id.* § 1508.8(a).

19. *Id.* § 1508.8(b).

20. *Id. See*, *e.g.*, Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810, 816-17 (9th Cir. 1987), *rev'd on other grounds*, 490 U.S. 332 (1982) (Forest Service consideration of whether to issue permit for proposed ski resort required under NEPA to address development which would be induced by resort); Sierra Club v. Marsh, 769 F.2d 868, 877 (1st Cir. 1985) (Corps' and Federal Highway Administration's finding of no significant impact for proposed construction of cargo port and causeway found inadequate because environmental assessment failed to address probable resulting industrial development); City of Davis v. Coleman, 521 F.2d 661, 679 (9th Cir. 1975) (EIS on proposed highway interchange must address development potential which would result). *See also* 40 C.F.R. § 1502.22(b) ("'reasonably foreseeable' includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason").

Additional guidance on the "actions, alternatives, and impacts" which must be addressed under NEPA is provided by Section 1508.25 of the CEQ regulations:

> *Scope* consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:
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> (a) Actions (other than unconnected single actions) which may be:
> (1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:
> (i) Automatically trigger other actions which may require environmental impact statements.

The requirement that all reasonably foreseeable impacts be considered echoes the familiar requirement of proximate cause.[21] In tort law, determining that a defendant's negligent conduct was the factual or "but for" cause of the plaintiff's injury is insufficient to establish liability.[22] The plaintiff must further demonstrate that the defendant's conduct was the "proximate" or "legal" cause of the harm.[23] Prosser and Keeton describe the standard for proximate cause in language strikingly similar to the CEQ regulations: "the scope of liability should ordinarily extend to but not beyond all 'direct' (or 'directly traceable') consequences [of a defendant's negligence] and those indirect consequences that are foreseeable."[24]

The Supreme Court (curiously without reference to the CEQ regulations) has recognized the similarity between proximate cause and the determination of the proper scope of environmental impacts which must be addressed in an EIS.[25] In *Metropolitan Edison Co. v. People Against Nuclear Energy (PANE)*, the Court rejected a claim that the Nuclear Regulatory Commission had improperly failed to consider

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(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include: (1) No action alternative; (b) Other reasonable courses of actions; (c) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) Indirect; (3) Cumulative.

40 C.F.R. § 1508.25.

21. *See* Metropolitan Edison Co. v. People Against Nuclear Energy (PANE), 460 U.S. 766 (1983); *see infra* at notes 25-31 and accompanying text; *see also Methow Valley Citizens Council*, 833 F.2d at 816-17 ("it is well established that NEPA and the [CEQ] guidelines require discussion of *all* significant impacts proximately caused by the proposed action . . . ").

22. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 42, at 272-73 (5th ed. 1984); 3 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 11.1, at 380 (1986).

23. *See generally* KEETON ET AL., *supra* note 22, at §§ 41-45.

24. *Id.* § 42, at 273; *see also* SPEISER ET AL., *supra* note 22, at 388.

25. Metropolitan Edison Co. v. People Against Nuclear Energy (PANE), 460 U.S. 766, 774 (1983).

pursuant to NEPA the psychological harm to members of the community that would result from the risk of a nuclear accident in determining whether to permit the restarting of one of the reactors at the Three Mile Island nuclear power plant.[26]

The Court first reviewed NEPA's language and legislative history and concluded that the EIS requirement was directed primarily at impacts on the physical environment.[27] Accordingly, the Court inferred, "[t]o determine whether [NEPA] Section 102 requires consideration of a particular effect, we must look at the relationship between that effect and the change in the physical environment caused by the major federal action at issue."[28] Mere but for causation alone, the Court concluded, was insufficient to bring an impact within the scope of the EIS requirement, for such a standard would require consideration of some impacts which were "simply too remote" from the direct environmental impacts of a major federal action to justify their evaluation in an EIS.[29] Instead, the Court indicated that the proper standard was analogous to the proximate cause inquiry in tort law: there must be a "reasonably close causal relationship between a change in the physical environment [caused by the federal action] and the effect at issue."[30] The psychological harm resulting from the risk of a nuclear accident, the Court held, was simply too far removed from any direct environmental impact to satisfy this standard.[31]

Even when there is a sufficiently close causal relationship between a proposed major federal action and a significant environmental impact to necessitate the preparation of an EIS, however, the agency is not prohibited from proceeding with the proposed action. The Supreme Court has repeatedly stressed that NEPA's mandate is purely procedural and informational.[32] Once an agency has adequately evaluated the

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26. *Id.* at 779.
27. *Id.* at 772-73.
28. *Id.* at 773.
29. *PANE*, 460 U.S. at 774.
30. *Id.*: *see also id.* at n.7 (noting that proximate cause and NEPA causation are analogous but distinct inquiries).
31. *Id.* at 775-79.
32. *See, e.g.*, Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989):

> [preparation of an EIS] ensures that the agency, in reaching its decision [on the proposed action], will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

Id.; *see also* Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989).

environmental impacts of a proposed action and its alternatives in an EIS, it is free to determine that "other values outweigh the environmental costs"[33] and proceed with the proposed action.[34] An agency may, however, base a statutorily authorized decision—e.g. whether or not to issue a permit—on environmental factors identified through the preparation of an EIS even if such factors are not specified in the agency's organic statute.[35]

B. The Corps' Jurisdiction over the Discharge of Dredge or Fill Materials into the Waters of the United States

Among the environmentally significant permitting decisions which may require the preparation of an EIS are the issuance of permits by the Army Corps of Engineers for the discharge of dredge or fill material into waters of the United States pursuant to Section 10 of the Rivers and Harbors Act of 1899[36] and Section 404 of the Clean Water Act (CWA).[37]

Section 301 of the CWA generally prohibits the discharge of "any pollutant by any person"[38] into the waters of the United States[39] without a permit. Section 404 authorizes the Corps to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites."[40] Similarly, Section 10 of the Rivers and Harbors Act makes it unlawful to "excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of . . . any navigable water of

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33. *Robertson*, 490 U.S. at 349.

34. *See Oregon Natural Resources Council*, 490 U.S. at 371 ("NEPA does not work by mandating that agencies achieve particular substantive environmental results"); *Methow Valley Citizens Council*, 490 U.S. at 349-50; Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227-28 (1980) (per curiam); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558 (1978); Kleppe v. Sierra Club, 427 U.S. 390, 410 & n.21 (1976).

35. *See* 42 U.S.C. § 4335 (1994) ("The policies and goals set forth in [NEPA] are supplementary to those set forth in existing authorizations of Federal agencies."). *See also* Natural Resources Defense Council v. United States Environmental Protection Agency, 859 F.2d 156, 169 (D.C. Cir. 1988) ("NEPA authorizes the agency to make decisions based on environmental factors not expressly identified in the agency's underlying statute.").

36. 33 U.S.C. § 403 (1994).

37. 33 U.S.C. § 1344 (1994).

38. *Id.* § 1311(a).

39. *See* Section 502(12) of the CWA, 33 U.S.C. § 1362(12) (defining "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source . . . ."); *see also* 33 U.S.C. § 1362(7) (defining "navigable waters" as "waters of the United States, including territorial seas").

40. 33 U.S.C. § 1344(a).

the United States"[41] without a permit from the Corps. Although both Section 10 of the Rivers and Harbors Act and Section 404 of the CWA refer to navigable waters, Section 404's permit requirement has been construed by the Corps to extend to wetlands.[42]

In determining whether to grant a permit under Section 404, the Corps applies environmental guidelines promulgated by the Environmental Protection Agency (EPA) pursuant to Section 404(b)(1)[43] that are intended to "restore and maintain the chemical, physical and biological integrity of the waters of the United States through the control of discharges of dredged or fill material."[44] The Section 404(b)(1) guidelines indicate that the Corps should consider "both individual and cumulative impacts."[45] The guidelines generally prohibit a discharge "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem,"[46] or if the discharge would "cause or contribute to significant degradation of the waters of the United States."[47] In addition to the EPA's Section 404(b)(1) guidelines,

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41. 33 U.S.C. § 403.

42. *See* RODGERS, *supra* note 5, § 4.12, at 181 ("[t]he principal difference is that Section 404 reaches wetlands not traditionally considered navigable waters while Section 10 is thought to require some impairment of navigable capacity without regard to whether there has been a discharge"). The Supreme Court approved the Corps' assertion of jurisdiction over wetlands in United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 135 (1985). For a discussion of the history of the Corps' treatment of its jurisdiction under Section 404 of the CWA; *see* Margaret N. Strand, *Federal Wetlands Law: Part I*, 23 Envtl L. Rep. (Envtl. L. Inst.) 10185, 10191-94 (1993); RODGERS, *supra* note 5, § 4.12 at 194-200.

The Corps' current regulations expansively define wetlands to include those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. 33 C.F.R. § 328.3(b) (1995). The same definition of wetlands is contained in the Environmental Protection Agency's (EPA) Section 404(b)(1) Guidelines. *See* 40 C.F.R. § 230.3(t) (1995).

43. *See* "Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material," 40 C.F.R. pt. 230.

44. 40 C.F.R. § 230.1(a).

45. *Id.* § 230.6(c). *See also id.* § 230.11(a) (Corps required to evaluate cumulative impacts on the substrate); *id.* § 230.11(b) (Corps required to evaluate cumulative impact on downstream flows); *Id.* § 230.11(c) (Corps required to evaluate cumulative effects on turbidity); *id.* § 230.11(e) (Corps required to evaluate cumulative effects on "the structure and function of the aquatic ecosystem and organisms").

46. *Id.* § 230.10(a). Practical, environmentally preferable alternatives are presumed to exist for discharges into wetlands and other waters considered "special aquatic sites" (*See* 40 C.F.R. § 230.3(q-1)), if the project for which the discharge is proposed is not "water dependent," i.e. "does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose." 40 C.F.R. 230.10(a)(3).

47. *Id.* § 230.10(c). *See also* 40 C.F.R. § 230.1(c) ("Fundamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it

the Corps' own regulations governing the issuance of permits require the consideration of environmental factors in determining whether the issuance of a permit is in the public interest.[48]

The Corps generally must also prepare a brief environmental assessment (EA) to determine whether the proposed permit activity would have a significant environmental impact necessitating the preparation of an EIS.[49] This determination inevitably depends to a large degree upon the scope of environmental impacts which the Corps examines in determining whether a permit's environmental impacts are significant. As discussed below, however, the proper scope of environmental review for a Corps permitting decision is far from a settled issue.

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can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.").

When application of the Section 404(b)(1) Guidelines alone would result in the denial of a permit, the Corps may also consider "the economic impact of the [disposal] site on navigation and anchorage." *See* 33 U.S.C. § 1344(b)(2) (1988). The EPA, however, has the authority to veto on environmental grounds the issuance of a dredge and fill discharge permit by the Corps. *See* 33 U.S.C. § 1344(c); "Section 404(c) Procedures," 40 C.F.R. Part 231 (1995).

48. *See* 33 C.F.R. § 320.4(a)(1) (1995).

> The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, flood-plain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, consideration of property ownership and, in general, the needs and welfare of the people. For activities involving 404 discharges, a permit will be denied if the discharge that would be authorized by such permit would not comply with the Environmental Protection Agency's 404(b)(1) guidelines. Subject to the preceding sentence and any other applicable guidelines and criteria . . . a permit will be granted unless the district engineer determines that it would be contrary to the public interest.

49. *See* 33 C.F.R. pt. 325, App. B, § 7a (preparation of an EA may not be required if the proposed permit activity falls within a specified "categorical exclusion"). *See id*., App. A., § 6. *See also* 40 C.F.R. §§ 1501.3, 1508.9, and 1508.13.

III. THE SCOPE OF ENVIRONMENTAL REVIEW FOR CORPS PERMITTING DECISIONS BEFORE THE 1988 "CONTROL AND RESPONSIBILITY" REGULATION

In the years after NEPA was first enacted, the Corps' practice was generally to evaluate the full range of impacts resulting from the grant of a permit, including indirect impacts which resulted from nonfederal portions of a project which were made possible by the permit.[50] The Corps incorporated this approach into the NEPA regulations it promulgated in 1980, which stated that EAs prepared on permit applications should

> primarily [focus] on whether or not the entire project subject to the permit requirement could have significant effects on the environment. . . . (For example, where a utility company is applying for a permit to construct an outfall pipe from a proposed power plant, the EA must assess the direct and indirect environmental effects and alternatives of the entire plant).[51]

That same year, two federal courts of appeal issued opinions which have been interpreted as permitting the Corps to limit its NEPA review to only the specific areas of a project within waters subject to the Corps' regulatory jurisdiction:[52] *Save the Bay, Inc., v. United States Army Corps of Engineers*[53] and *Winnebago Tribe of Nebraska v. Ray*.[54] Fairly read, however, these cases provide little support for a "regulatory jurisdiction" approach to defining the scope of the Corps' environmental review responsibilities.

In *Save the Bay*, the Court of Appeals for the Fifth Circuit upheld a federal magistrate's decision that the Corps was not required to consider all the environmental implications of a proposed titanium dioxide

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50. *See*, *e.g.*, Citizens for Clean Air, Inc. v. United States Army Corps of Engineers, 349 F. Supp. 696, 700-01 (S.D.N.Y. 1972) (Corps noting that relevant scope of review for a Section 10 permit application to build cooling system in navigable waters for a proposed power plant includes the impacts of the entire power plant). *See also* Parenteau, *supra* note 8, at 749.

51. 45 Fed. Reg. 56760, 56779 (August 25, 1980), codified at 33 C.F.R. pt. 230, App. B, § 8(a) (1981). These regulations were consistent with the CEQ NEPA Regulations issued the same year. *See supra* notes 14-20 and accompanying text.

52. *See*, e.g., Margaret N. Strand, *Federal Wetlands Law: Part II*, 23 Envtl L. Rep. (Envtl. L. Inst.) 10284, 10294 & n.161 (1993); Parenteau, *supra* note 8, at 749 & n.15; William B. Ellis & Turner T. Smith, *The Limits of Federal Environmental Responsibility and Control under the National Environmental Policy Act*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10055, 10057 & n.28, 10061 (1988).

53. 610 F.2d 322 (5th Cir. 1980).

54. 621 F.2d 269, 272 (8th Cir. 1980).

manufacturing facility in determining whether to grant a permit for the construction of an outfall pipeline from the facility through nearby wetlands.[55] The Corps limited its environmental review to the construction of the pipeline itself, and concluded that the construction would not cause significant environmental impacts necessitating the preparation of an environmental impact statement.[56]

The court of appeals noted that the EPA had already issued the applicant a National Pollution Discharge Elimination System (NPDES) permit for the actual discharge of wastewater which would occur from the outfall pipe,[57] and that the issuance and conditions of such permits were generally exempt under the Clean Water Act from compliance with NEPA's EIS requirement.[58] Accordingly, the court of appeals concluded, the Corps properly excluded the environmental implications of the discharges from the outfall pipe from its analysis and instead considered only the construction and maintenance of the pipeline itself in determining that the issuance of the permit did not constitute a major federal action.[59]

The *Save the Bay* court, however, did not suggest that the Corps' environmental review responsibilities were limited to its regulatory jurisdiction. In contrast, the court explicitly endorsed the plaintiff environmental group's assertion that an EIS is required when a major federal action would not occur but for the granting of a federal permit; it simply found that no such causation existed with the permit at issue because of the existence of alternative methods of discharge.[60] The court noted that "the pipeline itself was not a necessity for operation of the plant. At least one alternative method of discharge, not requiring any Corps permit, was available to [the applicant]."[61]

Significantly, the court of appeals went on to suggest that but for causation, which the court of appeals described as the "Enablement" theory, was not the only means by which the environmental review for a federal permit might be extended to a private project.[62] The court stated

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55. 610 F.2d at 322-23.
56. *Id.* at 326-27.
57. *Id.* at 324.
58. *Id.* at 326 & n.2 (citing 33 U.S.C. 1371(c)(1) and (2)).
59. *Save the Bay*, 610 F.2d at 326. The court of appeals acknowledged that the construction of the manufacturing facility would have an appreciable impact upon the residents of the area, but indicated that any such impacts would be private rather than federal in character, and thus beyond the purview of NEPA. *Id.*
60. *Id.* at 327.
61. *Id.*
62. *Id.*

that it was "not saying that the requisite Federal action must be a condition precedent to private action in order for preparation of an EIS to be required."[63] Thus, the court of appeals not only acknowledged simple but for causation as sufficient to federalize a private project for purposes of NEPA review,[64] but also apparently accepted that some lower level of federal involvement, even if not a necessary condition of a private project, could nonetheless federalize the project if the federal involvement was sufficiently significant.[65]

In *Winnebago Tribe of Nebraska*, the Court of Appeals for the Eighth Circuit affirmed a federal district court's decision refusing to grant the Winnebago Tribe's request for a permanent injunction against the construction of a sixty-seven mile power line through parts of Nebraska and Iowa.[66] The Winnebago Tribe argued, inter alia,[67] that in awarding a Section 10 permit for a 1.25 mile portion of the power line to cross the Missouri River, the Corps had improperly considered only the environmental effects of the 1.25 miles rather than the effects of the entire power line.[68]

The court of appeals found that there are two ways a private project might become sufficiently "federalized" to require consideration

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63. *Save the Bay*, 610 F.2d at 327.

64. *Id.* For a discussion of the misapplication of but for causation under NEPA in *Save the Bay*, see *infra* note 84.

65. *Id.* Unfortunately, the court of appeals did not indicate what would constitute such sufficient federal involvement, other than to suggest that it would have to be more than "incidental," and "greater . . . than is present in the case at hand . . . ." *Id.* at 327. Possibly the court of appeals was contemplating something analogous to the "substantial factor" alternative to the requirement of "but for" causation for cause in fact in tort law. Under the substantial factor test, a party will be held to be the cause of harm caused by his negligent conduct if that conduct was "a substantial factor in bringing about the harm . . . ." RESTATEMENT (SECOND) OF TORTS § 431 (1977); *see* PROSSER & KEETON, *supra* note 22, § 41, at 265-68; SPEISER ET AL., *supra* note 22, § 11:2, at 378.

A substantial factor test for factual causation under NEPA is arguably more appropriate than a but for standard, given the requirement under the CEQ regulations that agencies consider the cumulative impacts of their actions with other "past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. 1508.7 (1995).

The cumulative impacts requirement acknowledges that some of the impacts which should be addressed in an EIS may occur to some degree regardless of the proposed major federal action. Similarly, the substantial factor standard for factual causation recognizes that a tortfeasor should not "be absolved from liability merely because other causes have contributed to the result, since such causes, innumerable, are always present." KEETON ET AL., *supra* note 22, § 41, at 268.

66. 621 F.2d 269, 270 (8th Cir. 1980).

67. The Tribe also argued (unsuccessfully) that the Corps had failed to consider certain alternatives to the proposed power line and had not adequately addressed the potential impact of the power line on the bald eagle population in the area. *See id.* at 271, 273-74.

68. *Id.* at 270.

of its environmental impacts under NEPA.[69] First, a project may become federalized when a federal agency exercises "legal control" over the entire project, which occurs when "federal action is a legal condition precedent to accomplishment of an entire nonfederal project."[70] The court of appeals found that the proposed power line had not become federalized in this manner because Section 10 only granted the Corps jurisdiction over the portion of the power line affecting navigable waters.[71]

Second, the court of appeals noted that even when the federal agency does not have legal authority over an entire private project, the project may nonetheless become federalized when the agency exercises factual or but for control over the project.[72] The *Winnebago* court identified three factors to be considered in determining whether but for control of a project existed, necessitating review of the entire project under NEPA: (1) the extent of the agency's discretion in addressing the federal portion of the project, (2) whether there is any federal funding of the private portion of the project, and (3) whether the degree of federal involvement in the project is "sufficient to turn essentially private action into federal action."[73]

With regard to the first factor, the court of appeals acknowledged that the Corps had broad discretion in considering the environmental implications of granting the permit, but indicated that this discretion could not extend beyond the navigable waters over which the Corps had jurisdiction under Section 10.[74] Turning to the remaining two factors, the court of appeals also noted that there was no federal funding involved in the proposed power line,[75] and that there was no federal involvement in the project other than the granting of the requested permit.[76] Accordingly, the court of appeals concluded that the Corps did not have sufficient "control and responsibility" over the entire project to require it

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69. *Id.* at 272.

70. *Winnebago Tribe*, 621 F.2d at 272. The court of appeals in *Winnebago* referred to legal control of a project as "enablement," whereas the court of appeals in *Save the Bay* treated "enablement" as a matter of factual or but for control over a project. *See supra* note 60-61 and accompanying text.

71. *Id.* at 272.

72. *Id.*

73. *Id.* (*quoting* NAACP v. Medical Center, Inc., 584 F.2d 619, 629 (3d Cir. 1978)).

74. *Winnebago Tribe*, 621 F.2d at 272.

75. *Id.* at 273.

76. *Id.*

to evaluate the environmental impacts of all sixty-seven miles of the power line.[77]

Significantly, however, in reaching its decision the court of appeals paid scant attention to the Corps' and CEQ's regulatory guidance on the proper scope of NEPA analysis. The court of appeals dismissed in a footnote the new CEQ regulations implementing NEPA and the Corps' proposed 1980 revision of its regulations.[78] The court found that the regulations postdated the EA at issue and were thus not applicable.[79] The *Winnebago* court similarly rejected the Tribe's assertion that the completion of the nonfederal portion of the power line constituted a "secondary" or "indirect" impact of the permitting decision which the Corps was required to consider under the CEQ Guidelines then in effect,[80] although it purported to accept the premise that secondary and indirect impacts did need to be addressed under NEPA.[81]

Thus, although the courts in both *Save the Bay* and *Winnebago* adopted a somewhat restrictive standard for determining the scope of environmental impacts to be considered under NEPA (or at least reach results which reflect a restrictive view of the EIS process without articulating a clear standard), neither case supports the conclusion that in granting dredge and fill permits the Corps need only examine environmental impacts within its regulatory jurisdiction. In *Save the Bay*, in fact, the court of appeals actually purported to endorse the premise that

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77. *Id.*

78. *See Winnebago Tribe*, 621 F.2d at 273 n.4.

79. *Id.*

80. *Id.* at 273. The CEQ's NEPA Guidelines, first promulgated in 1971, were replaced by the binding regulations in 1978. *See* 40 C.F.R. §§ 1500-1508 (1995); *see also* MANDELKER, *supra* note 3, § 2.10.

81. *Id.* (citing 40 C.F.R. 1500.6(b) (1978)). As with the regulations which replaced them (*See*, e.g., 40 C.F.R. § 1508.18(b)(4) (1995) and 40 C.F.R. § 1508.8), the CEQ Guidelines clearly indicated that secondary and indirect environmental impacts should be addressed under NEPA:

> Secondary or indirect, as well as primary or direct, consequences for the environment should be included in the analysis. Many major Federal actions, in particular those that involve the construction or licensing of infrastructure investments (e.g., highways, airports, sewer systems, water resource projects, etc.), stimulate or induce secondary effects in the form of associated investments and changed patterns of social and economical activities. Such secondary effects, . . . through inducing new facilities and activities, or through changes in natural conditions, may often be even more substantial than the primary effects of the original action itself. For example, the effects of the proposed action on population and growth may be among the more significant secondary impacts.

40 C.F.R. § 1500.8(a)(3)(ii) (1978) (quoted in *Winnebago Tribe*, 621 F.2d at 273 n.6). *See also* 40 C.F.R. § 1500.6(b) (1978) ("[s]ignificant effects also include secondary effects. . . .", cited in *Winnebago Tribe*, 621 F.2d at 273).

simple but for causation or even some lower level of federal participation would be sufficient to trigger environmental review of the impacts of an entire project.[82] This standard is ostensibly even more expansive than the consideration of all "reasonably foreseeable" impacts called for in the CEQ Regulations.[83] The court of appeals in *Save the Bay* seemed to suggest that under NEPA all the environmental impacts of which a federal action is the cause in fact must be addressed, without any need to demonstrate that the impacts were reasonably foreseeable.[84]

In *Winnebago*, the court of appeals purported to apply a but for standard, but in fact distorted the relatively simple issue of factual causation with a three-pronged test which focuses more on the overall level of federal involvement in the project than on the causal relationship between the federal action and the resulting environmental impacts.[85] In reaching this result, however, the court stated that it was not considering the CEQ's NEPA Regulations because they postdated the EA issued by the Corps on the power line.[86] Thus, nothing in *Winnebago* precludes the conclusion that the requirement under the CEQ Regulations that agencies address all reasonably foreseeable environmental impacts (including

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82. Save the Bay, Inc. v. United States Army Corps of Engineers, 610 F.2d 322, 327 (5th Cir. 1980).

83. *See* 40 C.F.R. § 1508.25(a)(3) (1995).

84. Although the court of appeals in *Save the Bay* purported to endorse but for causation of a significant environmental impact by a federal action as sufficient to require the evaluation of the impact in an EIS, the court interpreted but for causation in a manner inconsistent with NEPA's requirement that reasonable alternatives to a proposed major federal action be considered. The court of appeals concluded that there was no but for causation because alternative methods of discharge existed for the plant, which unlike the pipeline would not require a Corps permit. *Save the Bay*, 610 F.2d at 327. But for causation in the NEPA context, however, does not mean that no alternative for achieving the project purpose exists, but rather that without the proposed action, or some alternative approach, the project purpose could not be achieved. Thus alternative methods of discharge are precisely the types of alternatives which should be evaluated in an EIS (and which would be grounds for denying a permit under the Section 404(b)(1) guidelines) if the alternative discharges would have less severe impact on the aquatic ecosystem. *See supra* note 46 and accompanying text. Were the courts to adopt *Save the Bay*'s version of but for causation, it would not only conflict with the alternatives analysis requirement, it would also effectively preclude the preparation of an EIS in every instance in which a nonfederal alternative to a proposed federal action exists.

Thus, although the court of appeals in *Save the Bay* seemingly applied an extremely liberal rule for determining the scope of impacts to be considered in a project with both federal and private components (i.e. but for causation or even some lower level of federal involvement), it interpreted the but for rule in a way which precluded the preparation of an EIS even though the private portion of the project and its attendant significant environmental impacts would not have occurred but for the issuance of the federal permit (or the construction of some alternative means of discharging waste water from the plant).

85. *Winnebago Tribe*, 621 F.2d at 272.

86. *Id.* at 273 n.4.

impacts from nonfederal activity) of their major federal actions currently governs the scope of review issue.

Several years later, in *Colorado River Indian Tribes v. Marsh*,[87] the United States District Court for the Central District of California rejected the analyses of the scope of review issue in *Winnebago* and *Save the Bay* as improperly suggesting that in order to determine whether a federal action triggered the EIS requirement, there must be a separate inquiry into whether the action was "major," in addition to determining whether the action had significant environmental impacts.[88] In *Colorado River Indian Tribes*, the court rejected an attempt by the Corps to limit its NEPA review of a permit application to the area within the Corps' jurisdiction.[89]

The court held that the Corps was also required to examine the impacts of the private development,[90] noting that NEPA and the CEQ regulations clearly required consideration of both direct and "reasonably foreseeable" indirect environmental effects, including "growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate . . . ."[91] The district court further cautioned against attempts to improperly limit NEPA review by labeling reasonably foreseeable impacts as "too speculative" to merit consideration, observing that "the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA . . . ."[92]

IV. THE "CONTROL AND RESPONSIBILITY" REGULATION

In 1984, approximately one year before the district court issued its opinion in *Colorado River Indian Tribes*, the Corps proposed

87. 605 F. Supp. 1425, 1433 (C.D. Cal. 1985).

88. *Id.* at 1431 (citing City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975), and 40 C.F.R. § 1508.18). "Major reinforces but does not have a meaning independently of significantly . . . ." 40 C.F.R. 1508.18.

89. *Id.* at 1432-33. The project involved the placement of riprap to stabilize a river bank. *Id.* Significantly, the district court indicated that agency decisions regarding the scope of NEPA review should not be subject to a deferential standard of review: "Should a federal agency unduly narrow the scope of inquiry in contravention to the edicts of NEPA, the test of reasonableness would be inapplicable because the factors that a federal agency should have considered and which could have affected the agency's decision, would have been improperly ignored." *Id.* at 1432.

90. *See Colorado River Indian Tribes*, 605 F. Supp. at 1428. The developer who had applied for the permit was planning a 156 acre residential and commercial development which could not proceed without stabilizing the river bank. *Id.*

91. *Id.* at 1433 (quoting 40 C.F.R. § 1508.8).

92. *Id.* at 1434 (quoting City of Davis v. Coleman, 521 F.2d 661, 676 (9th Cir. 1975)).

replacing the requirement under the 1980 regulation that the Corps' environmental review "[focus] on whether or not the entire project subject to the permit requirement could have significant effects on the environment" with a regulation which would require consideration of an entire project only when there was "sufficient Federal *control over or responsibility for* the entire project to 'federalize' it for purposes of NEPA . . . ."[93] The Environmental Protection Agency (EPA) objected to the proposed rule, and the matter was referred to the CEQ.[94] The CEQ proposed some slight modifications to the proposed rule, but accepted the "control and responsibility" standard.[95] The Corps accordingly promulgated the revised rule on February 3, 1988.[96]

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93. 49 Fed. Reg. 1387, 1398 (1984) (emphasis added). For a description of the process which led to the Corps' adoption of the control and responsibility rule, see Sylvester v. United States Army Corps of Engineers, 884 F.2d 394, 398 (9th Cir. 1989); Parenteau, *supra* note 8, at 750-53; Ellis & Smith, *supra* note 52, at 10061.

94. The EPA objected to the proposed rule and referred the issue to the CEQ pursuant to Section 309 of the Clean Air Act, 42 U.S.C. § 7609 (1994), which states that the Administrator of EPA is authorized, inter alia, to

> review and comment in writing on the environmental impact of . . . proposed regulations published by any department or agency of the Federal Government. . . . In the event the Administrator determines that any such legislation, action, or regulation is unsatisfactory from the standpoint of public health or welfare or environmental quality, he shall publish his determination and the matter shall be referred to the Council on Environmental Quality.

See also CEQ Regulations Implementing NEPA, 40 C.F.R. § 1504 (1995).

95. 52 Fed. Reg. 22517 (1987). *See CEQ Accepts Corps' Procedures Under NEPA But Suggests Alterations in June 8 Finding*, 18 Env. Rep. 575 (BNA) (1987). The primary alteration of the proposed regulation suggested by the CEQ was to require consideration of the cumulative involvement of all federal agencies, not just the Corps, in determining whether to prepare an EIS on a project requiring a Corps permit. *See* 52 Fed. Reg. at 22519-22520 (1987).

96. *See* 53 Fed. Reg. 3120 (1988). The control and responsibility rule, codified at 33 C.F.R. pt. 325, App. B, § 7(b) (1995), provides:

> *Scope of Analysis*. (1) In some situations, a permit applicant may propose to conduct a specific activity requiring a Department of the Army (DA) permit (e.g., construction of a pier in a navigable water of the United States) which is merely one component of a larger project (e.g., construction of an oil refinery on an upland area). The engineer should establish the scope of the NEPA document (e.g., the EA or EIS) to address the impacts of the specific activity requiring a DA permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review.
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> (2) The district engineer is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action.
>
> Typical factors to be considered in determining whether sufficient "control and responsibility" exists include:

V. SYLVESTER V. UNITED STATES ARMY CORPS OF ENGINEERS

The following year, the Ninth Circuit issued its opinion in *Sylvester v. United States Army Corps of Engineers*,[97] which has been widely interpreted as construing the control and responsibility rule to limit the scope of the Corps' environmental review to the area of its regulatory jurisdiction.[98] In *Sylvester*, a citizen challenged the Corps' decision to grant a developer a Section 404 permit for the filling of eleven acres of wetlands to accommodate the construction of a golf course as part of a resort in Squaw Valley, California.[99] The district court issued a preliminary injunction against the developer, holding that the Corps had erred in limiting its NEPA review to the golf course rather than evaluating the environmental impacts of the entire resort complex.[100]

The court of appeals reversed, holding both that the new control and responsibility regulation was a permissible interpretation of NEPA,[101] and that under the regulation the Corps' limitation of its environmental review to the wetlands, rather than considering the entire resort, was appropriate.[102] In reaching its decision, the court of appeals rejected the plaintiff's argument that the regulation was inconsistent with the requirement in the CEQ regulations that agencies address the indirect effects of their proposed actions, including "growth inducing effects and

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> (i) Whether or not the regulated activity comprises "merely a link" in a corridor type project (e.g., a transportation or utility transmission project).
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> (ii) Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity.
>
> (iii) The extent to which the entire project will be within Corps jurisdiction.
>
> (iv) The extent of cumulative Federal control and responsibility . . . .
>
> (v) Federal control and responsibility will include the portions of the project beyond the limits of Corps jurisdiction where the cumulative Federal involvement of the Corps and other Federal agencies is sufficient to grant legal control over such additional portions of the project. These are cases in which the environmental consequences of the additional portion of the projects are essential products of Federal financing, assistance, direction, regulation, or approval . . . .

Id.

97. 884 F.2d 394 (9th Cir. 1989), *amending and superseding* 871 F.2d 817 (9th Cir. 1989).

98. *See* Parenteau, *supra* note 8, at 749 & n.15; MANDELKER, *supra* note 3, § 2.11[6], at 2-49 to 2-50.

99. *Sylvester*, 884 F.2d at 396-97.

100. *Id.* at 397 (citing Sylvester v. United States Army Corps of Engineers, No. 88-0536-MLS (E.D. Cal. 1988)).

101. *Id.* at 398-99.

102. *Id.* at 400-01.

other effects relating to induced changes in the pattern of land use, population density, or growth rate."[103]

In reconciling the CEQ regulations with the Corps' new control and responsibility rule, the court of appeals first considered and rejected the metaphor of environmental impacts as "ripples following the casting of a stone in a pool."[104] Such an image, the court of appeals asserted, suggests an impractically broad scope of NEPA review because "it suggests that the entire pool must be considered each time a substance heavier than a hair lands upon its surface."[105] The court of appeals offered instead the image of a broken chain, "some segments of which contain numerous links, while others have only one or two. Each segment stands alone, but each link within each segment does not."[106]

Using this metaphor, the court concluded that the resort complex and the golf course "each could exist without the other," and that therefore the golf course and the remainder of the resort were not "two links of a single chain."[107] Accordingly, the environmental impacts of the remainder of the resort did not have to be considered in determining whether to grant the Section 404 permit for the golf course.[108]

The court of appeals' focus upon whether the golf course and the remainder of the resort could exist absent one another suggests that the court was applying something like a but for causation test, although pure but for causation is more consistent with the "ripples in the puddle" metaphor which the court rejected as impractical.[109] The "links of chain" metaphor, in contrast, suggests that not only must there be a causal relationship between the federal action and the environmental impact(s) at issue, but that some higher level of proximity must also exist. It is unclear from *Sylvester*, however, what in addition to but for causation is required to bring the environmental impacts of the private portion of a partially federal project within the scope of NEPA. In any event, whatever the exact parameters of the court of appeals interpretation in *Sylvester* of the Corps' control and responsibility regulation read in conjunction with the CEQ regulations, the court focused on the causal

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103. *Sylvester*, 884 F.2d at 400 (quoting 40 C.F.R. § 1508.8(b)). The court of appeals in *Sylvester* also noted both the requirement in the CEQ regulations at 40 C.F.R. § 1508.27(b)(7) that agencies not avoid preparing an EIS by dividing an action into its component parts, and the definition of cumulative impacts which must be considered at 40 C.F.R. § 1508.7. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Sylvester*, 884 F.2d at 400.

108. *Id.*

109. *Id.*

relationship between the proposed major federal action and resulting environmental impacts, not on the scope of the Corps' regulatory jurisdiction.[110]

VI. THE "JURISDICTIONAL" STANDARD FOR THE SCOPE OF THE CORPS' ENVIRONMENTAL REVIEW RESPONSIBILITIES FOR PERMITTING DECISIONS

The court of appeals decision in *Sylvester* has been interpreted to construe the Corps' control and responsibility regulation as limiting the scope of the Corps' environmental review for permitting decisions to the waters subject to the Corps' regulatory jurisdiction.[111] Yet as discussed above, neither *Sylvester* nor the two cases preceding the Corps' rule endorsed a "jurisdictional" rule.

Similarly, the few reported opinions which have cited *Sylvester* have generally interpreted it to require the Corps to consider the secondary impacts of Section 404 permits—such as resulting development—which are beyond the waters and wetlands directly regulated by the Corps.[112] In addition, a rule limiting the Corps' environmental review to the area of its regulatory jurisdiction is contrary to other relevant regulatory guidance by EPA, the CEQ and the Corps. Moreover, the examples given by the Corps in the "control and responsibility" regulation itself demonstrate that a jurisdictional rule, or any rule which attempts to define the proper scope of environmental review by focusing on the federal action at issue rather than on the reasonably foreseeable environmental impacts of the action, is ultimately unworkable.[113]

A. Opinions Construing Sylvester

Shortly after *Sylvester* was decided, the Federal District Court for the District of Idaho in *Morgan v. Walter* relied on the court of appeals' "links of chain" analogy in holding that the Corps improperly failed to consider a proposed private fish propagation facility in an EA.[114] The

110. *Id.*

111. *See* Parenteau, *supra* note 8, at 749; MANDELKER, *supra* note 3, § 2.11[6], at 2-49 to 2-50.

112. *See* National Wildlife Federation v. Whistler, 27 F.3d 1341 (8th Cir. 1994); Alpine Lakes Protection Soc. v. United States Forest Service, 838 F. Supp. 478 (W.D. Wash. 1993); Morgan v. Walter, 728 F. Supp. 1483 (D. Idaho 1989). *See infra* notes 114-128 and accompanying text.

113. *See* 33 C.F.R. pt. 325 App. B § 76(2) (1995).

114. Morgan v. Walter, 728 F. Supp. 1483, 1493 (D. Idaho 1989).

EA was prepared for a Section 404 permit on a creek diversion facility which was required for the fish propagation project.[115] The district court noted that "[u]nlike the golf course and resort in *Sylvester* . . . the fish propagation facility could not exist absent a diversion."[116] Thus, in the district court's view the primary issue under *Sylvester* was not whether the private fish propagation facility had somehow become "federalized," but rather whether it was reasonably foreseeable that the admittedly federalized creek diversion would result in the construction of the fish propagation facility with all its concomitant environmental impacts.[117]

In *Alpine Lakes Protection Society v. United States Forest Service*,[118] the Federal District Court for the Western District of Washington reached a similar conclusion concerning the implications of *Sylvester*. In *Alpine Lakes*, an environmental organization challenged the Forest Service's determination that it was not required to prepare an EIS on its grant of a permit for the construction of a road across National Forest lands.[119] The organization argued that the Forest Service, in determining whether the road would have significant environmental effects, had improperly failed to consider the impacts of the private timber management activities which the road was intended to facilitate.[120]

The district court agreed, rejecting the Forest Service's contention that it only need evaluate the impacts of actions it directly controlled: "the question whether the environmental impact of the related action must be considered does not turn on whether that action is federal or non-federal in nature."[121] Instead, the court held, the issue is the "functional interdependence" of the actions in question.[122] Thus, because the only purpose of the road was to make possible the planned timber management activities, the Forest Service was required to consider those activities in determining whether granting the permit for the road would have significant environmental effects.[123]

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115. *Id.*

116. *Id.*

117. *Id.* The court in *Morgan* declined to consider the impacts from a hydroelectric plant contemplated for construction in the area on the grounds that it was not "reasonably foreseeable." *Id.*

118. 838 F. Supp. 478 (W.D. Wash. 1993).

119. *Id.* at 482.

120. *Id.*

121. *Id.*

122. *Alpine Lakes*, 838 F. Supp. at 482.

123. *Id.*

Even in a case in which *Sylvester* was cited in support of the Corps' decision to narrowly define the scope of review for a proposed dredge and fill permit to exclude a related housing development, the court emphasized that it was not addressing a situation in which the related development was dependent upon the permit. In *National Wildlife Federation v. Whistler*, the Court of Appeals for the Eighth Circuit cited *Sylvester* in upholding the Corps' decision to grant a permit pursuant to Section 10 and Section 404 for the reopening of a river channel to provide water access to a housing development that the permit applicant was building.[124] The National Wildlife Federation (NWF) had challenged the Corps' failure to define the proposed project as the housing development for the purpose of determining whether practicable alternatives existed.[125] The court of appeals rejected the NWF's argument and affirmed the Corps' decision to limit its analysis to alternatives to the water access area.[126]

The court of appeals repeatedly stressed, however, that the Corps' decision not to address the housing development was based upon a finding that the development would proceed regardless of whether the Corps granted the dredge and fill permit.[127] Thus, although the court

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124. National Wildlife Federation v. Whistler, 27 F.3d 1341 (8th Cir. 1994).

125. *Id*. at 1345. The analysis of environmentally preferable alternatives is of more significance in the context of Corps permitting decisions than it is for NEPA review of other federal actions. Whereas under NEPA federal agencies are not required to adopt an environmentally preferable alternative, the EPA's Section 404(b)(1) Guidelines generally prohibit the discharge of dredged or fill material if there is a practical, environmentally preferable alternative. In addition, there is a presumption that such alternatives exist for a discharge if the project for which the permit is requested is not "water-dependent." *See supra* notes 46 and accompanying text.

The scope of alternatives issue typically involves situations where, as in *Whistler*, a developer seeks a dredge and fill permit to construct facilities intended to provide water access to a contiguous housing development. As in *Whistler*, the developer frequently will attempt to have the project purpose defined as the construction of the water access facilities, rather than the entire development, in order to bring the project within the definition of "water-dependent" and thus avoid the presumption that practical and environmentally preferable alternatives exist. The courts have generally rejected attempts to define housing projects with water access as water-dependent for the purposes of Section 404 permit analysis. *See*, *e.g.*, Korteweg v. Corps of Engineers of the United States Army, 650 F. Supp. 603, 605 (D. Conn. 1986) (noting that access to the water may increase the value of residential property, but it is "neither essential to the [residential] units nor . . . integral to their residential uses . . . . At best, [water access] provide[s] an incidental accommodation to the potential wishes of a portion of the real estate market"); Shoreline Associates v. Marsh, 555 F. Supp. 169, 179-80 (D. Md. 1983), *aff'd*, 725 F.2d 677 (4th Cir. 1984) ("The primary aspect of the proposed project is the construction of a townhouse community, not the construction of a boat storage facility and launch which are incidental to it. [The applicant] has failed to show . . . why it is necessary for the townhouses to be located on the wetlands rather than the uplands, except for its preference to build on the wetlands") (footnote omitted).

126. *Whistler*, 27 F.3d at 1345.

127. *See id*. ("[h]ere, the Corps found that [the] development would proceed even if the Corps denied the permit"); *Id*. at 1346 ("[m]oreover, the Corps found that [the] uplands housing

viewed *Sylvester* as permitting the Corps to exclude consideration of a related but independent private project from its environmental review of a permit application, it also apparently recognized that this limitation would not apply if a private project would not proceed if the permit were not granted.[128]

B. The Regulatory Jurisdiction Standard's Inconsistency with Other Corps, EPA and CEQ Regulations

In addition to being contrary to the weight of the case law which has construed the Corps' Section 7(b) regulation, the interpretation of the regulation to limit the scope of the Corps' environmental review for permits to the area of the Corps' regulatory jurisdiction also conflicts with the CEQ's regulations implementing NEPA, the EPA's Section 404(b)(1) Guidelines, and the Corps' own regulations. As noted above, the CEQ regulations explicitly require agencies to address not only the direct environmental effects of their actions, but also all reasonably foreseeable indirect environmental effects of their actions, including "growth inducing effects and other effects related to induced changes in the pattern of land use . . . ."[129] Thus, for example, in an EIS on a proposed Section 404 permit for the construction of an access road through a wetland which is required for a private housing development on uplands, the Corps should address not only the direct impacts on the wetlands, but also the related impacts from the construction of the housing development which the Section 404 permit would make possible.

The EPA's Section 404(b)(1) Guidelines similarly indicate that inducement of "inappropriate development" is one potential adverse effect which must be considered in determining whether to grant a Section 404 permit.[130] The Guidelines also require consideration of the

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development would proceed even without the creation of water access"); *id*. at 1346 n.4 ("[w]e need not consider whether the Corps could reach the same result when a developer's interest in an overall residential development hinged on the development of the wetlands portion").

128. More recently, in *California Trout v. Schaeffer*, 58 F.3d 469 (9th Cir. 1995), the Court of Appeals for the Ninth Circuit cited *Sylvester* in holding that, in order to grant a Section 404 permit for the filling of 4.18 acres of wetlands as part of a 41 mile long water diversion project, the Corps was not required to consider the environmental impacts of all 41 miles of the project. The court based its decision on the Bureau of Reclamation's ongoing involvement in the preparation of various EISs concerning the impacts of the project, noting that "[r]equiring the Corps to duplicate these efforts would be nonsensical." *Id.* at 474. Accordingly, the court distinguished *Sylvester* as "lack[ing] the involvement of a second, more involved federal agency." *Id.* at 473. *See also* 40 C.F.R. § 1508.25 (1995) ("[t]he scope of an individual statement may depend on its relationships to other statements . . .").

129. 40 C.F.R. § 1508.8(b).

130. 40 C.F.R. § 230.53(b).

indirect or secondary environmental impacts of a permitting decision.[131] Moreover, the Corps' own regulations defining the scope of its "public interest review" process requires consideration of factors clearly going beyond the immediate aquatic environment, such as "economics, . . . historic properties, . . . land use, . . . recreation, . . . energy needs, safety, . . . mineral needs, consideration of property ownership and, in general, the needs and welfare of the people."[132] Accordingly, a "regulatory jurisdiction" interpretation of the Corps' control and responsibility regulation conflicts with the other applicable regulatory guidance concerning the extent of the Corps' environmental review responsibilities under both NEPA and the CWA.

C. The Regulatory Jurisdiction Standard's Inconsistency with Section 7(b)

Moreover, the jurisdictional interpretation of the control and responsibility standard of Section 7(b) is inconsistent with both the language of the regulation and the examples provided by the Corps of how the regulation should be implemented. The text of Section 7(b) explicitly states that there may be instances in which the area within the Corps control and responsibility will extend beyond the area subject to

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131. *See*, e.g., Fox Bay Partners v. United States Army Corps of Engineers, 831 F. Supp. 605, 608-09 (1993) (citing the EPA Guidelines at 40 C.F.R. 230.11(h) in upholding the Corps' denial of a permit required for the construction of a marina based upon adverse impacts on aquatic environment resulting not from the proposed filling for the marina, but from the increase in boating traffic which will result from the construction of the marina).

132. 33 C.F.R. § 320.4(a) (1995). *See supra* note 48. The Corps' control and responsibility regulation suggests that the scope of environmental review should be no less broad than the public interest review: "[i]n all cases, the scope of analysis used for analyzing both impacts and alternatives should be the same scope of analysis used for analyzing the benefits of a proposal." 33 C.F.R. pt. 325, App. B, § 7b.

Similarly, the Corps' regulations governing the processing of permit applications also suggest that the environmental review for permit applications should extend to the entire project for which the permit is required:

> [a]ll activities which the applicant plans to undertake which are reasonably related to the same project and for which a [Corps] permit would be required should be included in the same permit application. . . . For example, a permit application for a marina will include dredging required for access as well as any fill associated with construction of the marina.

33 C.F.R. § 325.1(d)(2). Although Section 325.1(d)(2) does not address whether upland effects as well as those in waters under the Corps' jurisdiction must be considered, in *Salt Pond Associates v. United States Army Corps of Engineers*, 815 F. Supp. 766 (D. Del. 1993), the court cited this regulation in holding that the relevant scope of inquiry for a Corps permit for a utility crossing necessary for a proposed housing development "is the housing development and all its concomitant and necessary incidental processes." *Id.* at 783. *See also id.* at 770-71 n.14 (Corps concerned that run-off from housing construction might adversely affect wetlands).

the Corps regulatory jurisdiction.[133] Similarly, section 7(b) states that NEPA review of a fifty-mile electrical transmission line should not extend to the entire transmission line if only one and one-fourth miles of the line directly affect waters of the United States, but that the NEPA review should address all fifty miles if thirty miles involve jurisdictional waters.[134] However, under the "jurisdictional" standard, the twenty miles of the transmission line in the second example are just as "nonjurisdictional" as the forty-eight and one-half miles in the first example. Section 7(b) also states that

> [f]or those activities that require a [Corps] permit for a major portion of a shoreside facility, the scope of analysis should extend to the upland portions of the facility. For example, a shipping terminal normally requires dredging, wharves, bulkheads, berthing areas and disposal of dredged material in order to function. Permits for such activities are normally considered sufficient Federal control and responsibility to warrant extending the scope of analysis to include the upland portions of the facility.[135]

Thus, Section 7(b) anticipates the consideration of the upland portions of shoreside facilities which are clearly outside the Corps' regulatory jurisdiction.

As is apparent from these examples (as well as the plain language of the rule), under Section 7(b) the relevant inquiry is not whether an environmental impact occurs within waters subject to the Corps regulatory power, but rather whether the overall level of federal involvement in a given project warrants evaluating the environmental impacts of the entire project, including portions outside the Corps' jurisdiction. Unfortunately, like the regulatory jurisdiction standard, this is a highly subjective standard and of limited value in predicting the outcome of any given case.

Arguably, both of these approaches fail to provide a consistent, useful rule for determining the proper scope of environmental review for a Corps permitting decision because they focus on the scope of the federal action which triggered the environmental review rather than the actual matter at issue: the scope of the environmental impacts of the federal action which must be considered pursuant to NEPA. NEPA

133. *See* 33 C.F.R. pt. 325, App. B, § 7(b)(2); *supra* note 96.
134. 33 C.F.R. pt. 325, App. B, § 7(b).
135. *Id.*

requires an agency undertaking an action with potentially significant environmental impacts to consider environmental factors which might otherwise be irrelevant to its decision making process.[136] Thus, focusing upon the scope of the Corps' regulatory jurisdiction or the overall level of its substantive involvement in a project is unlikely to provide useful analysis regarding the separate issue of what potential environmental impacts must be evaluated under NEPA in determining whether to grant a permit.[137]

VII. THE REASONABLE FORESEEABILITY STANDARD

Instead of focusing upon the scope of the federal action at issue, once it is determined that some federal action is involved indicating that a project might require the preparation of an EIS, the proper scope of environmental review can be determined relatively easily and consistently by borrowing from the law of proximate cause[138] and by focusing on what "reasonably foreseeable" impacts (including indirect impacts) will result from the federal action. There is nothing novel about the "reasonable foreseeability" standard as a guide for NEPA review—it is the standard mandated in the CEQ regulations[139] and is substantially identical to the "reasonably close causal relationship" rule applied by the Supreme Court in *PANE*.[140]

Determining that a proposed permit could be the but for cause of (or a substantial factor in causing) an environmental impact will inevitably be the first step in determining whether a potential impact should be addressed pursuant to NEPA. Yet as both the Supreme Court in *PANE*[141] and the court of appeals in *Sylvester*[142] recognized, requiring

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136. *See* NEPA, 42 U.S.C. § 4335 (1994); Natural Resources Defense Council v. United States Environmental Protection Agency, 859 F.2d 156, 169 (D.C. Cir. 1988).

137. The court of appeals in *Sylvester* actually did note that the scope of a federal action and the scope of the environmental impacts of the action are distinct inquiries. *See* Sylvester v. United States Army Corps of Engineers, 884 F.2d 394, 401 n.3 (9th Cir. 1989). The court of appeals failed, however, to explore the implications of its distinction. *See also* Parenteau, *supra* note 8, at 756-57.

138. *See supra* notes 21-24 and accompanying text.

139. *See* 40 C.F.R. §§ 1508.8(b), 1502.22(b) (1995); *see also supra* note 16. The Corps' public interest review regulations similarly state that "[t]he benefits which reasonably may be expected to accrue from the proposal must be balanced against its *reasonably foreseeable* detriments." 33 C.F.R. 320.4(a)(1) (1995) (emphasis added); *see also* Parenteau, *supra* note 8, at 757 (arguing that foreseeability of environmental consequences should determine scope of Corps' NEPA review).

140. Metropolitan Edison Co. v. People Against Nuclear Energy (PANE), 460 U.S. 766, 777-78 (1983).

141. *See id.* at 774.

evaluation of all impacts of which a proposed federal action would be the but for cause would necessitate consideration of an impractically broad sphere of environmental impacts. Just as limits a tortfeasor's proximate cause liability to those harms which are reasonably foreseeable, limiting the impacts which must be addressed in an EIS to those which are reasonably foreseeable provides a practical boundary on federal agencies' environmental review responsibilities under NEPA.[143]

The logic of the reasonable foreseeability approach is self-evident. The Corps cannot be expected to consider the environmental impacts of its permitting decisions which it cannot reasonably foresee. Conversely, if it is reasonably foreseeable that a significant environmental impact will result from a permitted action, then it is appropriate to address that impact in an EIS on the proposed permit.[144]

In addition, the reasonable foreseeability standard would in most instances yield the same results as those anticipated by the Corps in its Section 7(b) regulation. For example, Section 7(b) states that if a Corps permit is required for the dredging, construction of bulkheads and other related activities constituting a "major" portion of a shipping terminal, the scope of NEPA analysis should also extend to the upland portions of the facility.[145] Similarly, the construction of the uplands portions of the shipping terminal and the resulting environmental impacts are the reasonably foreseeable results of granting permits for the portions of the terminal essential to its operation over which the Corps has jurisdiction. With regard to the 50 mile electrical transmission line hypothetical, it is also indisputably reasonably foreseeable that if thirty miles of the line are to be constructed in jurisdictional waters, granting the permit for that

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142. Sylvester v. United States Army Corps of Engineers, 884 F.2d 394, 401 (9th Cir. 1989).

143. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 356 (1989) (noting that the "CEQ [has] explained that . . . requiring that an EIS focus on reasonably foreseeable impacts . . . will generate information and discussion on those consequences of greatest concern to the public and of greatest relevance to the agency's decision. . . .") (internal quotations omitted). *Cf.* 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 20.6, at 181 (2d ed. 1986) ("reasonable foreseeability" in tort law constitutes an additional limitation on liability for harm of which the defendants conduct is the but for cause); KEETON ET AL., *supra* note 22, § 43, at 280 (negligence "necessarily involves a foreseeable risk . . . [i]f one could not reasonably foresee any injury as the result of one's act, or if one's conduct was reasonable in light of what one could anticipate, there would be no negligence. . . .").

144. *See* Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425, 1434 (C.D. Cal. 1985) ("while effects which are not reasonably foreseeable may be disregarded . . . the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA . . .").

145. *See* 49 Fed. Reg. 1387, 1398 (1984).

portion of the transmission line will lead to the construction of the remaining twenty miles of the line.[146]

The reasonable foreseeability approach is also consistent with the result reached by the court of appeals in *Sylvester*.[147] The court of appeals noted that the private resort complex, although it would benefit from the construction of the federally permitted golf course, could nonetheless exist if the golf course were not built.[148] Thus it was not reasonably foreseeable that the filling of the wetland for the golf course would lead to the environmental impacts associated with the rest of the resort.[149] The "links of chain" metaphor offered by the court of appeals in *Sylvester* is to some extent analogous to the reasonable foreseeability standard in that it also focuses on the probable consequences of the federal action rather than on the federal action itself. Unlike the reasonable foreseeability standard, however, the links of chain approach does not directly address which environmental impacts of a federal action must be covered in an EIS. Instead, it concentrates on the proximity of the functional relationship of the federal action to associated private action in order to determine whether the impacts of the private action should be considered in an EIS on the federal action. Thus, the links of chain test leaves unanswered the question of which impacts of a private action which is functionally interdependent with a federal action must be considered in an EIS on the federal action.[150] The reasonable foreseeability standard, in contrast, simply requires that every reasonably foreseeable (and significant) environmental impact be addressed, regardless of whether or not an intermediate private action is involved.[151]

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146. *See* 33 C.F.R. pt. 325 App. B § 76(b)(3) (1995). The reasonable foreseeability standard, however, would lead to a different result with regard to the 50 mile electrical transmission line of which only 1 and 1/4 miles are to be constructed in jurisdictional waters. The 48 and 3/4 miles of the line to be constructed on uplands, although not in "jurisdictional" waters, are nonetheless the reasonably foreseeable result of granting the permit for the 1 and 1/4 miles in jurisdictional waters, and thus the environmental impacts of the entire line should be subject to NEPA review.

147. *Sylvester*, 884 F.2d at 400.

148. *Id.*

149. *Id.*

150. In addition, the statutory or regulatory source of the "links of chain" analogy is unclear; the court of appeals in *Sylvester* suggests that it is harmonizing the Corps' control and responsibility rule and the CEQ's NEPA regulations, but it fails to indicate how (if at all) the links of chain standard is related to any specific regulatory language. *Id.*

Interestingly, however, the Corps' control and responsibility regulation suggests that the environmental impacts of an entire "corridor type project (e.g., a transportation or utility transmission project)" need not be addressed pursuant to NEPA if the activity requiring the permit constitutes "merely a link" in the project. *See* 33 C.F.R. pt. 325, App. B, § 7(b)(2)(i) (1995).

151. *Cf.* Mary K. Fitzgerald, *Small Handles, Big Impacts: When Should the National Environmental Policy Act Require an Environmental Impact Statement?,* 23 B.C. ENVTL. AFF. L.

Applying the reasonable foreseeability standard does not translate into an expansion of the Corps' regulatory jurisdiction beyond the waters of the United States. Although NEPA does require the Corps (and other federal agencies) to consider environmental factors which would otherwise not necessarily be subject to its regulatory power,[152] the Corps nonetheless has only the authority to refuse to permit the discharge of dredge and fill material into waters of the United States.[153] Although the withholding of such a permit based upon reasonably foreseeable adverse environmental impacts identified pursuant to NEPA could affect the ability of a private developer to proceed with a project located primarily on uplands outside the Corps' regulatory authority, the developer may always escape federal environmental review by reconfiguring the project to avoid any impacts on waters or wetlands subject to the Corps' regulatory power. For example, if the developer of a housing development proposed for construction on uplands has the option of either routing an access road to the development across wetlands or choosing an alternative route which avoids wetlands or other jurisdictional waters, the developer can avoid federal environmental review of the project simply by choosing the latter route.[154]

Similarly, requiring the Corps to consider all reasonably foreseeable impacts of a proposed discharge permit does not impose any significant additional substantive limitation on the Corps' decision regarding a permit application. Application of the reasonable foreseeability standard could possibly result in the identification of some adverse effects on the aquatic environment which might be overlooked under either a significant control and responsibility or a regulatory jurisdiction approach.[155] The identification of all reasonably foreseeable impacts on the aquatic environment, however, will only help effectuate the EPA's Section 404(b)(1) Guidelines prohibition of discharges which

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REV. 437 (1996) (advocating resolving disputes over proper scope of NEPA review by reference to need for consideration of indirect impacts).

152. *See* NEPA, 42 U.S.C. § 4335 (1994); Natural Resources Defense Council v. United States Environmental Protection Agency, 859 F.2d 156, 169 (D.C. Cir. 1988).

153. *See supra* notes 36-49 and accompanying text (generally discussing the Corps' permit program).

154. Moreover, if such an alternative not affecting waters of the United States exists, there is a presumption under the Section 404(b)(1) Guidelines that the permit application should be denied. *See supra* notes 46-47 and accompanying text. Environmentally preferable alternatives are presumed to exist for all projects which are not water-dependent.

155. *See*, e.g., Morgan v. Walter, 728 F. Supp. 1483, 1493 (D. Idaho 1989).

would "cause or contribute to the significant degradation of the waters of the United States."[156]

The identification of reasonably foreseeable impacts outside the aquatic environment subject to the Corps' regulatory authority would not preclude the issuance of a permit.[157] Identification of all such reasonably foreseeable impacts, however, would ensure that rather than improperly truncating its environmental review, the Corps complies with NEPA's mandate that federal agencies only make decisions with potentially significant environmental impacts after adequate consideration of those impacts.[158]

VIII. CONCLUSION

The current uncertainty over the proper scope of the Corps' environmental review for permit decisions results largely from the ambiguous "sufficient control and responsibility" language of the Corps regulation. Both this language and the "regulatory jurisdiction" interpretation of the regulation provide little practical guidance because they focus on the scope of the federal action triggering the environmental review rather than the real issue—the scope of the environmental impacts of the action.

The reasonable foreseeability standard, in contrast, focuses the inquiry on whether a permit would cause any potentially significant environmental impact, and thus provides a practical criterion for determining which impacts should be evaluated. Determining which impacts are reasonably foreseeable in particular instances will inevitably be subject to dispute. Nonetheless, as both the Supreme Court in *PANE* and the CEQ in its NEPA regulations apparently recognized, the reasonable foreseeability standard provides a practical limitation on federal agencies' environmental review without compromising NEPA's objective of informed agency decision-making.

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156. 40 C.F.R. § 230.10(c). *See also* 40 C.F.R. § 230.1(c) ("Fundamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.")

157. Under NEPA, however, the Corps does have the authority to deny a permit based upon a reasonably foreseeable impact upon the non-aquatic environment. *See* 33 C.F.R. § 320.4(a)(1); *see also supra* note 35 and accompanying text.

158. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).