That Old Man WOTUS: He Just Keeps Flowin', Flowin' Along

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I. INTRODUCTION

This Article evaluates the oddity of a particular set of federal regulations: those rules primary of the U.S. Army Corps of Engineers (Corps), in conjunction with those of the U.S. Environmental Protection Agency (EPA). Both of those rules deal with waters of the United States (bureaucratically referred to as WOTUS), under Section 404 of the Clean Water Act (CWA or Act).[1] The goal of the CWA is to restore and maintain the chemical, physical, and biological integrity of our Nation's waters.[2]

The goal to restore and maintain the Nation's waters is mainly accomplished through the CWA "end of the pipe" discharge system known as the National or State Pollutant Discharge Elimination System (NPDES) permits.[3] This NPDES or Section 402 program requires public and industrial facilities to treat (clean up) their process or sewerage waste water before it enters navigable waters. For instance, a municipality's Publicly Owned Treatment Works (POTWs) that discharges sanitary

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1. 33 U.S.C. § 1344 (2018); 33 C.F.R. § 1320 *et seq*. (2022); 40 C.F.R. § 120 *et seq*. (2022).

2. 33 U.S.C. § 1251.

3. 33 U.S.C. § 1342.

waste water[4] into a stream must clarify (separate heavy ends from liquids), detoxify (e.g., with chlorine), and further treat waste water to remove bacteria, solids, and chemicals before outside water discharges.[5] Private industries that discharge their waste waters through POTWs must similarly pre-treat their waste waters of chemicals (that POTWs do not pretreat), or fully treat their waste waters if they are directly discharged into navigable waters.[6] This NPDES approach, besides the Safe Drinking Water Act,[7] is the principal program aimed at keeping our waters clean for drinking, recreation, and fisheries.[8] The focus of this Article is on the often controversial Section 404 program. That program focuses on wetlands and tributaries, which also naturally help to purify runoff.

The Section 404 program is focused on regulating the discharge of dredged or fill material into waters of the United States.[9] It controls development there. It is based on a permit program jointly administered by the Corps and EPA. The Corps runs the basic permit program,[10] but the EPA's Section 404(b) guidelines, including on alternatives, must be complied with in the permit process too.[11] The EPA can also "veto" certain Section 404 permits through due process.[12] The EPA has final authority to determine the limit of waters of the United States,[13] but it usually defers to the Corps jurisdictional determinations on most routine cases. EPA also has authority to enforce Section 404 cases lacking permits and the Corps enforces permit violations.[14] These enforcements can be administratively, criminally, or civilly.[15] Sanctions under the CWA can include judicial civil or administrative penalties and restoration,

4. *Id.*
5. *Id.*
6. *Id.*; 40 C.F.R. § 403.10 (2022)
7. 42 U.S.C. § 300f *et seq*. (2018).
8. 33 U.S.C. §§1312, 1342, (2018).
9. 33 U.S.C § 1344 (2018).
10. 33 C.F.R. § 320.1(a)(2) (2022).
11. 40 C.F.R. § 230 *et seq*. (2022).
12. 33 U.S.C. § 1344(c); *see* Mingo Logan Coal Co. Inc. v. EPA, 850 F. Supp. 2d 133, 134 (D.D.C. 2012), *rev'd* 714 F.3d 608, 616 (D.C. Cir. 2013), *cert. denied*, 572 U.S. 1015 (2014) (holding that U.S. EPA lacked "veto" authority over a Corps of Engineers Section 404 permit, at least where U.S. EPA failed to object to the permit and waited years to prohibit the discharge of waste rock from a mine into a navigable water; the D.C. Circuit reversed and held that the Clean Water Act was plain that U.S. EPA could issue a veto post-permit).
13. Civiletti Memorandum of 1979, 43 Op. Atty's. Gen. 197 (1979); *Memorandum of Agreement: Determination of Geographic Jurisdiction of the Section 404 Program and Application of Exemptions Under CWA Section 4040(f)*, EPA (Jan. 19, 1989), https://www.epa.gov/sites/default/files/2015-08/documents/civiletti_memo.pdf.
14. 33 U.S.C. § 1344(n), (s) (2018).
15. 33 U.S.C. § 1319 (a)-(g) (2018).

after-the-fact permitting, and criminal sanctions for fines, confinement, and/or alternative fines for gains or losses.[16]

The Section 404 permit application process usually requires the hiring of a private consultant.[17] If there are questions of wetland jurisdiction, a jurisdictional determination is obtained from the Corps.[18] Once the application is deemed complete, a public notice is issued for public comments.[19] The notice must adequately describe the project or else it can lead to reversible error in court.[20] If the work is in the coastal zone, a joint public notice is issued with the State.[21]

The Corps and a private consultant must evaluate the comments received and make appropriate responses or changes to the project.[22] The Corps further coordinates with appropriate agencies.[23] The process usually requires compensatory mitigation if sequencing through wetland avoidance or minimization first is not an option. Compensatory mitigation is for wetland losses caused by impacts such as filling. The mitigation is through the purchase of wetland credits from an approved mitigation bank or through permittee responsible mitigation by the applicant's individual, and Corps approved, wetland project.[24] Once the permit is granted, it can be judicially challenged in Federal Court by project opponents.[25] If the permit is denied, conditioned too harshly by the Corps, or if the applicant disagrees with the agency jurisdictional determination, the applicant can file for an administrative appeal.[26] Besides clarification, new information cannot be added to the appeal unless it was provided to the Corps previous to any appeal.[27] This "newness" call is a key restriction on the administrative record that sounds unfair to the appellant, as Corps practice is to allow the adversary District to make that call. If the Corps District is found to have erred on the permit, the case is remanded back to it by higher headquarter for reconsideration or correction.[28] Basically a "tails you lose,

16. 18 U.S.C. § 3571 (2018).

17. This is a practical consideration as few applicants possess the knowledge of science on wetlands, hydrology, and pollutants themselves to deal with all 404 issues.

18. 33 C.F.R. § 325.9 (2022).

19. 33 C.F.R. §325.3 (2022).

20. *See*, *e.g.*, Sierra Club v. U.S. Army Corps of Eng'rs, 81 F.4th 510, 519 (5th Cir. 2023).

21. 33 C.F.R. § 320 (h) and (j) (2022).

22. 33 C.F.R. § 325.2 at para. 2 (2022).

23. *Id.*

24. 33 C.F.R. § 332 (2022).

25. 5 U.S.C.§ 706 (2018).

26. 33 C.F.R. § 331 (2022).

27. *Id.* at § 331.7(f), (c).

28. 33 C.F.R. § 331.10(b).

and heads the Corps wins" approach. Otherwise, the permitted project can be undertaken.

The Corps 404 permit program is complex and expensive, requiring compliance with many environmental statutes besides having EPA oversight.[29] The rub of the Section 404 program is that it also covers wetlands (swamps, pine savannahs, wet bottomland hardwoods, etc.) as well as navigable waters or non-navigable tributaries, and the former wetlands are usually subject to private ownership.[30] Then we have landowners and developers facing off against the public or preservationists, as these wetlands also have natural resource values, for habitat, recreation, flood protection, and so forth.

The complexities of the 404 program odyssey have led to many jurisdictional quandaries and cost impacts over covered wetlands, land clearing, farming, fill, mitigation, and the National Environmental Policy Act (NEPA). It is the writer's impression that federal agencies move here at three speeds: glacial, standstill, and reversal, which hamper project schedules. This Article explores many of those issues in more detail for background.

The EPA is in charge of administering many statutes besides on waters, such as air, waste, pesticides, Superfund, and toxic chemicals.[31] It has regional offices throughout the United States.[32] The Corps has many programs too, such as flood control, reservoirs, rivers and harbors, military and civil works, but its main environmental program is on wetlands in this writer's opinion. The Corps also has offices in most states.[33] The Corps appears more decentralized to this writer than the EPA is. Although the scope of CWA covered waters and their jurisdictional expansion and shrinkage are crucial, we begin with some more basic jurisdictional battles.

II. LAND CLEARING

The 404 program deals with discharges into or additions to waters, but does it deal with unpermitted removal of wetlands surfaces? Yes,

29. *See*, *e.g.*, 33 C.F.R. § 325.2(b) (2022).

30. It is axiomatic that federal, state, and local governments own lands, but private property covers much if not most of the United States dry lands and wetlands too.

31. *See generally Laws and Regulations*, EPA, www.epa.gov/laws-regulations (last updated Sept. 20, 2023).

32. *See Regional and Geographic Offices*, EPA, https://www.epa.gov/aboutepa/regional-and-geographic-offices (last updated Jan. 17, 2023).

33. *Where We Are*, U.S. ARMY CORPS OF ENG'RS, https://www.usace.army.mil/Missions/Locations/ (last visited Dec. 2, 2023).

it does. The answer came in the *Avoyelles Sportsmen's League, Inc. v. Marsh* case.[34] There the court affirmed that bulldozing wetland soil and trees, ditching, shearing trees, raking debris, plowing them into windrows, burning, and discing them into the ground, resulted in the regulated discharges or redeposits of "pollutants" (dredged or fill material) that were bound to wash into other or navigable waters.[35]

This was an important decision, as otherwise a loophole would have existed in the CWA that allowed destruction of entire wetland ecologies without regulation. As a result of the case, the Corps regulates most mechanized wetland clearing, except by use of chainsaws or part of minor incidental fallback *infra,* and from normal farming, silviculture, or ranching.[36]

III. NORMAL FARMING

Of course somewhat related to land clearing is certain exempted activities, like farming. Farming involves plowing, seeding, minor drainage, harvesting, and water conservation practices.[37] The key here, per part C of the *Avoyelles Sportsmen's League* case, is that to be exempt the farming must be occurring on a *continuing* basis or ongoing on a tract of land, and not be a new land use on the cleared land.[38] Additionally, even if farmed, the land cannot be transformed into a new use (such as a shopping center) that affects the hydrologic character of the area wetlands without a 404 permit. That is in the subsection 404(f)(2) "recapture" clause of the statute.[39] There are other exemptions (e.g., maintenance, emergencies) in the statute that we will not elaborate on here.

There is also a Swampbuster program that allows crop subsidies to farmers who do not convert wetlands to crop use.[40] And more relevant is a "prior converted (PC) cropland" exemption from Section 404 for lands, since late 1985, that have been drained and farmed at least once in the

34. 715 F.2d 897, 912 (5th Cir. 1983).

35. *Id.* at 929-30.

36. *See* Regulatory Guidance Letter 90-05: Landclearing Activities Subject to 404 Jurisdiction, U.S. ARMY CORPS OF ENG'RS (July 18, 1990), https://www.nap.usace.army.mil/Portals/39/docs/regulatory/rgls/rgl90- 05.pdf; *see also* 40 C.F.R. § 232.2(1)-(4) (2022) (covering discharge of dredged material and incidental fallback).

37. 40 C.F.R. § 232.3(c) (2022).

38. *Avoyelles Sportsmen's League*, 715 F.2d at 925; 33 U.S.C. § 1344(f)(2) (2018); 40 C.F.R. § 232.3(c)(ii)(A) (2022).

39. 33 U.S.C. § 1344(f)(2)

40. 16 U.S.C. § 3821; Food Security Act of 1985, Pub. L. No. 99-198, § 1221, 99 Stat. 1506, 1535 (1985).

preceding five years.[41] Abandonment allows the land, if it succeeded to a wetland, to lose the exemption.[42] The landowner must logically, of course, have evidence, including documents from the U.S Department of Agriculture, to demonstrate the farming history to secure an exemption.

IV. DREDGED OR FILL MATERIAL

Section 404(a) regulates discharges of dredged or fill material.[43] Dredged material is simply material excavated from a water of the U.S., such as shell, sediment, etc.[44] Fill material is anything that has the effect of replacing water with dry land or of changing the bottom elevation of a water of the U.S., such as with rock, sand, dirt, roads, dirt, riprap, infrastructure, wood chips, or sometimes pilings.[45] However, fill does not include trash or garbage.[46] The last proviso addresses a regulatory concern between the EPA and Corps. That is, Section 404 does not cover waste disposal; however, all waste is not universally excluded as fill because some mining overburden once removed can be used for fill, as discussed below.

The Court in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council* issued a significant ruling on the overlap of Section 404 of the CWA, dealing with the discharge of dredged or fill material into waters of the United States, and Section 402 of the Act, dealing with the discharge of "pollutants" into those waters.[47] If a Section 402 strict "no discharge" performance standards applied in addition or in lieu of a Section 404 permit as addressed below, there could be no permitted discharge (or project) in this case. Therefore, a CWA permit could be validly issued in this case only if Section 404 were applied exclusively.

The main issue in the case centered on which agency, the Corps, under Section 404, or EPA, under Section 402, issues permits for mining waste (slurry) discharged into waters of Alaska.[48] As part of the re-opening of the Kensington Gold Mine in Juneau, Alaska, the applicant sought a Section 404 permit for discharging a mixture of crushed rock and water

41. L. GATZ & M. STUBBS, CONG. RSCH. SERV., IF11136, PRIOR CONVERTED CROPLAND UNDER THE CLEAN WATER ACT 1 (2023).
42. *Id.*
43. 33 U.S.C § 1344 (2018).
44. 33 C.F.R. § 323.2 (2022).
45. *Id.* at § 323.3(c) (2022).
46. *Id.* at § 323.2(e)(3) (2022).
47. 557 U.S. 261, 266 (2009).
48. *Id.* at 265-66.

left behind in tanks.[49] Rather than build a tailings pond for the slurry, Coeur Alaska proposed to use lower Slate Lake for the discharge.[50] Over the life of the mine, Coeur Alaska intended to put 4.5 million tons of slurry into the lake.[51] This would raise the lake bed fifty feet and would increase the lake area from twenty-three to approximately sixty acres.[52]

Following a determination that the environmental damage caused by placing the slurry in the lake would be temporary unlike placing the slurry in nearby wetlands, the Corps issued a section 404 permit for the discharges.[53] EPA also issued a section 402 permit, but only for discharges from the lake into downstream creeks.[54] The legal issue was the applicability of new source performance standards (NSPS) under Section 402 requiring "zero discharges" from new froth-flotation gold mines to Coeur Alaska.[55]

The Court reconciled Sections 402 and 404 finding that the Corps has authority under dual regulations issued by EPA and the Corps material that has the effect of a change in the bottom elevation of water and expressly includes slurry or tailings or similar mining-related materials.[56] The Court found that Section 404, not Section 402, governs the discharge of fill material, because Section 402(a) of the Act excepts Section 404 from EPA's issuance of NPDES permits for the discharge of any pollutants. The Court also noted that even though Section 402 is not involved in the discharge of fill material, the Act gives EPA authority over 404 discharges, including the issuance of regulatory guidelines for such discharges and the right to veto certain Section 404 permitted discharges.[57]

The Court found that the definition of fill material expressly excludes "trash or garbage," but the Court found that the mining waste discharges in this instance did not present any difficulties as to the scope of other solids that are covered by the regulatory definition of fill material.[58]

Again, using principles of statutory construction, the Court found that the no or "zero discharge" prohibition under new source performance

49. *Id.* at 267-272.
50. *Id.* at 267.
51. *Id.*
52. *Id.*at 267-68.
53. *Id.*at 268.
54. *Id.*at 271.
55. *Id.*
56. *Id.*at 282-91.
57. *Id.*at 276-77; 33 U.S.C. § 1344(c).
58. *Coeur Alaska*, 557 U.S. at 275-76.

standards (NSPS) did not apply to Section 404 discharges of "fill material."[59] The Court agreed that it would be unworkable to require both Section 402 and 404 permits in cases such as this, and such a strained interpretation would present complexities to the regulated community.[60]

The Court relied on internal U.S. EPA memoranda that clarified the interpretation of the Clean Water Act, including that "fill material" including mining waste was covered under 404, and that Section 402 NSPS did not apply to Section 404 discharges.[61]

In his concurring opinion, Justice Scalia opined that the Court overreached in apparently applying the *Chevron* agency deferential doctrine to low level agency memoranda that did not go through formal rule-making.[62] He stated his belief that a new era of judicial deference to agency actions was involved.[63] Justice Ginsburg dissented.[64]

The discharge of solid waste technically fit the definition of the 404 program at one point; as it could be for filling an unpermitted wetland. The solution was to clarify that Section 404 does not cover landfills.[65] Rather, the NPDES program or some other solid waste permitting regime would be applicable to that.

The Corps at one time regulated the simple minor spillage or relocation of excavated (dredged) material in wetlands during ditching, draining, or clearing. The use of mechanized earth clearing equipment for land clearing, ditching, channelization, in stream mining, or other earth moving in waters was regulated under the "Tulloch" rule.[66] However, "incidental fallback" is now exempted.[67] Incidental fallback is a redeposit of small amounts of dredged material in substantially the same location where it was removed from.[68] Otherwise, more mining activity would be regulated.

59. *Id.* at 289.
60. *Id.* at 276.
61. *Id.* at 283-88.
62. *Id.* at 295 (Scalia, J., concurring).
63. *Id.*
64. *Id.* at 297-304 (Ginsburg, J., dissenting).
65. *See* Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material", 67 Fed. Reg. 31129 (June 10, 2002) (to be codified at 33 C.F.R. pt. 323, 40 C.F.R. pt. 232).
66. Am. Mining Cong. v. U.S. Army Corps of Eng'rs, 951 F. Supp. 267 (D.D.C. 1997), *aff'd*, Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399 (D.C. Cir. 1998).
67. 40 C.F.R. § 232.2(3) (2022).
68. *Id.*

V. OTHER ENVIRONMENTAL STATUTES

As previously noted, the Corps permit program involves compliance with many other statutes. Some of them are discussed herein to demonstrate the gauntlets permit applicants face and the public has to confront in the Corps public interest review.[69]

The Endangered Species Act (ESA) lists protected species by rule-making and requires federal agencies to consult on federal projects and permits, with certain wildlife agencies to ensure those species and their critical habitat remain protected.[70]

In *Northern Plains Resource Council. v. U.S. Army Corps of Engineers*, the Court enjoined the Corps processing nationwide (quicker general or blanket) permit No. 12 for an oil and gas pipeline.[71] The Corps lacked proper consultation with other agencies under the Endangered Species Act (ESA) for the protection of threatened and endangered species.[72] Action agencies must ensure that no protected species' existences are jeopardized nor their critical habitats destroyed or modified due to a project.[73] However, the Court found that the Corps did not do a programmatic study beforehand.[74] The Corps would just determine piecemeal effects on a permit or regional basis and not on a cumulative basis for migratory birds.[75] As a result of the case, the Corps spliced that nationwide permit into three permits; one for pipelines, one for electric and telecommunications, and one for other utilities such as potable water.[76] This shows potential ESA impacts that must be studied on individual permit basis too. Substantial project delays would have resulted from the voiding of nationwide permits.

NEPA is another statute the Corps must comply with in permitting and its projects. Recent amendments on the Council of Environmental Quality's (CEQ) NEPA rules require the Corps (and other agencies) to

69. 33 C.F.R. § 320.4(a) (2022).

70. 16 U.S.C. 1536(a)(2) (2018); *see Section 7: Types of Endangered Species Act Consultations in the Greater Atlantic Region,* NOAA FISHERIES, https://www.fisheries.noaa.gov/insight/section-7-types-endangered-species-act-consultations-greater-atlantic-region (last visited Sept. 9, 2023); *see also* Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 366 (2018).

71. 460 F. Supp. 3d 1030, 1049 (D. Mont. 2020), *granting stay in part*, U.S. Army Corps of Eng'rs v. N. Plains Res. Council, 141 S. Ct. 190 (2020).

72. *Id.* at 1042.

73. 16 U.S.C.§ 1536 (a)(1).

74. *N. Plains Res. Council*, 460 F. Supp. 3d at 1037.

75. *Id.* at 1035.

76. Proposal to Reissue and Modify Nationwide Programs, 85 Fed. Reg. 57298 (proposed Sept. 15, 2020) (to be codified at 33 C.F.R. ch. II).

consider project purposes from a viewpoint beyond the applicant's goals, which opens up the door for the agency to look for more alternatives for a project's footprint and location.[77] The amendments, among other things, restore agencies' obligation to examine direct, indirect, and cumulative impacts from a project, including climate change.[78] More White House guidance on considering climate change in NEPA decision-making was issued on January 9, 2023.[79] A greenhouse gas assessment of all direct and secondary (vendor, customer, etc.) effects of a project will need to be estimated. This will be difficult for applicants to estimate in the oil and gas sector.

NEPA requires agencies to assess a project's impacts and develop reasonable alternatives.[80] As we will see below in this section, the Corps is frequently involved in NEPA cases on Corps permits. The process involves determining if the project is exempt.[81] If the project under review is not exempt, but the impacts are insignificant, a shorter environmental assessment (EA) is prepared with a finding of no significant impacts.[82] If the impacts are significant, a longer environmental impact statement (EIS) is prepared and circulated.[83] These NEPA documents may be challenged in Federal court under the Administrative Procedure Act (APA).[84] NEPA cases may allow for judicial discovery, which is often an exception to the more narrow review under the administrative "record rule."[85] Bewilderment ensues as the government does not always vigorously defend those cases but seeks a voluntary judicial remand to undertake reconsideration.

Of course, an applicant may also challenge a permit denial under the APA but rarely for a land taking claim under the Tucker Act.[86] In *Sierra Club v. U.S. Army Corps of Engineers*, the Corps permitted

77. National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23453 (Apr. 20, 2022) (to be codified at 40 C.F.R. pts. 1502, 1507, 1508); *see* Fiscal Responsibility Act of 2023, Pub. L. 118-5, §321, H.R. 3746, 118th Cong. (2023).

78. National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23453 (Apr. 20, 2022) (to be codified at 40 C.F.R. pts. 1502, 1507, 1508).

79. National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (Jan. 9, 2023).

80. 42 U.S.C. § 4332(c) (2018).

81. 40 C.F.R § 1508.4 (2022).

82. *Id.* at § 1501.3.

83. 42 U.S.C. § 4332.

84. 5 U.S.C. § 706 (2018).

85. Save Our Wetlands, Inc. v. Colonel Conner, No. CIV.A. 98-3625, 1999 WL 508365, at *2 (E.D. La. July 15, 1999).

86. *See* Fla. Rock Indus. v. United States, 18 F.3d 1560, 1571 (Fed. Cir. 1994).

construction of part of electrical transmission lines and facilities.[87] This fulfilled a clean energy contract to carry electricity generated by hydropower from Quebec to Massachusetts.[88] Plaintiffs sued under NEPA arguing that the project overstated greenhouse gas reductions for the overall project.[89] The Court found that the Corps only permitted a small part (1.9%) of or a link in the project that crossed waters and that the overall scope of the project was not a major federal action, a trigger for an EIS.[90] This is often called the "small handle" problem.[91] The Corps' NEPA jurisdictional scope was therefore narrow on what the major federal action was and it prevailed in the action.[92]

Other NEPA issues involve stale data, alternatives, supplementation, purpose and need, segmentation, and so forth. The use of mitigation to reduce project impacts from significant to insignificant is a compelling one we will cover.

The Corps mitigation rules require an applicant's mitigation plan at the inception of permit applications.[93] The plans are to be on a watershed approach (lands that drains into a common waterway), considering watershed scale, conditions, and impacts.[94] The mitigation scope may be multiple (e.g., 3:1).[95] The amount of impacted waters and can be expensive.[96] The mitigation required (e.g., restoration of nearby wetlands, purchase of mitigation credits) will be part of permit conditions.

In *O'Reilly v. U.S. Army Corps of Engineers*, the Court ruled that the Corps inadequately evaluated cumulative impacts associated with forty acres of wetland development and inadequately explained how the proposed mitigation (acquisition of 47.5 acres in a mitigation bank)

87. 997 F.3d 395, 403 (1st Cir. 2021).

88. *Id.* at 399.

89. *Id.* at 407.

90. *Id.* at 406-07.

91. *See* Macht v. Skinner, 916 F.2d 13, 13 (D.C. Cir. 1990).

92. *Sierra Club*, 997 F.3d at 407.

93. 33 C.F.R. § 332.3(k)(1), (2)(ii) (2022).

94. *Id.*

95. The ratios of wetlands created or credits purchased from mitigation banks for wetlands to be impacted by a project is not a rule per se, but based on applying the application of the mitigation method's evaluation factors on as case by case basis.

96. The cost of wetland creation or credits purchased are not set by the Corps but are market driven on a region by region basis. The cost and fees are usually considered confidential. But $20,000 to $40,000 per wetland credit (sometimes acre) is a range for non-coastal wetlands. Coastal wetlands cost much more. So even a small project of less than ten acres for a wetland permit can become expensive compared to the actual project construction costs. *See Wetland Mitigation in Louisiana: Everything You Should Know*, C.H. FENSTERMAKER & ASSOCS. BLOG (Oct. 18, 2022), https://blog.fenstermaker.com/wetland-mitigation-in-louisiana/.

reduced those impacts to less than significant. [97] The Corps only performed an EA on the allegedly insignificant impact project and not the full EIS associated with significant impacts.[98] However, the Court did find that future phases of the project were independent from the forty acres, and their detailed evaluation could be deferred.[99] The Court remanded the permit to the agency for reconsideration.[100] The Corps had discussed past and future projects within a three mile radius of the above project, and their mitigation, but apparently did not provide adequate rationale for bank mitigation for the Court's review.[101]

That *O'Reilly* case was subsequently limited in *Atchafalaya Basinkeeper v. U.S. Army Corps of Engineers*.[102] It held there that the Corps' use of a new mitigation model called the Louisiana Rapid Assessment Method (LRAM) was sufficient for the Court to understand how the mitigation justified out of kind acquisition of bank hardwoods for the temporary loss of site cypress-tupelo wetland acres.[103] Thus, with LRAM's basic calculations, the Court understood the agency rationale for no EIS and approved the permit.[104]

Historic sites are also in the Corps repertoire. Their regulations appear to be outdated in this regard.[105] Section 106 of the National Historic Preservation Act requires an agency head to take into account the effect of a "federal undertaking" before the issuance of a permit by that agency.[106] This often requires applicant investigation, study, and consultation between the Corps and the Advisory Council on Historic Preservation, State Historic Protection Officer, and Indian Tribes.[107] This effort may result in a memorandum of agreement on permit conditions

97. 477 F.3d 225, 235 (5th Cir. 2007). The facts discussed herein are from Part II of the case. *See also* O'Reilly v. *All State Fin. Co*. No. 22-30608, 2023 WL 6635070 (5th Cir. Oct. 12, 2023) for a repeat of the Corps' errors on NEPA cumulative impacts in a rejuvenated wetland project at the same site.

98. *O'Reilly*, 477 F.2d at 227.

99. *Id.* at 237-238.

100. *Id.* at 240.

101. *Id.* at 235.

102. 894 F.3d 692, 700-04 (5th Cir. 2018).

103. *Id.* at 703-04.

104. *Id.* at 704.

105. 33 C.F.R. § 325, app. C. (2022). Apparently, conformity with the Advisory Council on Historic Preservation rules are being sought. *See* 87 Fed. Reg. 33,758, 33,759 (June 3, 2022); *see also* 36 C.F.R. § 800 (2022).

106. 54 U.S.C. § 306108 (2014).

107. *See* Procedures for the Protection of Historic Properties, General Policy, 33 C.F.R. § 325, app. C (2022).

(e.g., to preserve sites, to remove and record them, or to inventory them).[108]

This process breeds concerns for applicants and the public on the location of projects. In *National Parks Conservation Ass'n v. Semonite*, the Court ruled that the Corps inadequately assessed historic impacts of electronic transmission towers along the Historic James River (with Carter's Grove plantation and fifty-seven other historic sites).[109] It ruled the Corps' finding of no significant impacts was arbitrary and capricious and an EIS was required.[110] The permit was vacated.[111] In *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, the Court found that the Corps did not adequately analyze environmental justice, cultural resources, and hunting practices of a tribe by using too narrow of a buffer zone for potential oil spills from a pipeline project.[112] Although it is more of a NEPA case, it does show the duty of the government to take a hard look at cultural resources.

The Corps is faced with reversed preemption under *state laws* on water quality and coastal zone issues in its permitting. It cannot issue its Section 404 permits unless a required state water quality certificate (WQC) and/or a required coastal use permit or certification (and conditions) is issued first.[113] The states have reasonable time periods for their reviews.[114] This procedure could delay Corps permits or entice applicants to jump the gun before federal permitting once state approvals are issued, and face enforcement.

There is a proposal to expand the WQC rule to transcend the 2020 "discharge only" scope to include a broader "activity as a whole" scope.[115]

108. Procedures for the Protection of Historic Properties, Consultation, 33 C.F.R. § 325, app. C (2022).

109. 916 F.3d 1075, 1077 (D.C. Cir. 2019), *amended on reh'g in part*, 923 F.3d 500 (D.C. Cir. 2019).

110. *Id.*

111. *Id.*

112. 255 F. Supp. 3d 101, 139-40 (D.D.C. 2017).

113. 33 C.F.R. § 320.3(a), (b), 330.4 (2022).

114. 33 U.S.C. § 1341 (2018) (one year); 16 U.S.C. § 1456.(2018) (six months).

115. 87 Fed. Reg. 35,318, 35,319 (June 9, 2022).

VI. WETLANDS: FEDERAL OR STATE?

Wetland identification methods are defined in the Corps published *Wetlands Delineation Manual*.[116] The Corps uses a hierarchal approach. Certain vegetation, soil, and inundation are wetland indicators.[117] The presence of mostly hydrophytic (aquatic and semi-aquatic) vegetation, hydric soils (e.g., clays), and periodic inundation (observed flooding, drift lines, water marks on trees, etc.), administratively make an area a wetland.[118] However, there are still issues as to how far the Corps may go in regulating wetlands, as some wetlands are "isolated," and federal regulation under the Commerce Clause of the United States Constitution is tested on them. In the 1970s, the Corps' concern was not so much on flow as much on wetland vegetative communities.[119] Things were simple in those days, at least to a botanist.

The first Supreme Court wetland case of significance was *United States v. Riverside Bayview Homes*.[120] It sanctioned Corps regulation of wetlands under the CWA if they were tidal or adjacent to navigable rivers, lakes, and streams.[121] Here the Court said a surface elevation (e.g., +575 MSL) does not cut off jurisdiction, as the wetlands both low and marshy by Lake St. Clair and higher were inundated by surface water and groundwater sufficiently to constitute a regulated water, virtually *abutting* the lake.[122] That was an early use of the phrase of a "significant nexus" by the Court.[123]

The Supreme Court later in the *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, held that a series of scattered ponds that formed a wetland complex suitable as habitat for hundreds of birds, including migratory waterfowl, was not a "water of the

116. *Wetlands Delineation Manual*, U.S. ARMY CORPS OF ENG'RS (Jan. 1987), https://www.lrh.usace.army.mil/Portals/38/docs/USACE%2087%20Wetland%20Delineation%20Manual.pdf.

117. *Id.* at

118. *Id.* at 12-28.

119. *Regional Supplements to Corps Delineation Manual*, U.S. ARMY CORPS OF ENG'RS, www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/reg_supp/ (last visited Sept. 10, 2023) (providing supplements to Corps delineation manuals on vegetation, soils, and hydrology).

120. 474 U.S. 121, 135 (1985).

121. *Id.* at 138-39.

122. *Id.* at 135.

123. *See* Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 167 (2001) ("It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*.").

United States" subject to the CWA.[124] The Corps of Engineers had denied a Section 404 permit to state counties for a proposed landfill site, which required filling of some seventeen acres of these shallow ponds, ranging from a fraction of an acre to a few acres in area.[125] The Court held that the balefield site did not *abut* open, navigable waters, and that the Clean Water Act does not create regulatory jurisdiction over isolated waters or wetlands, regardless of the effect of their loss or destruction on interstate commerce.[126]

Here, the government had argued that the cumulative loss of local waters, like those involved in the case, would substantially affect the billion-dollar migratory bird business nationwide, involving hunting, and traveling.[127] The Court left open the questions of how "adjacent" an alleged "water of the United States" must be to open, navigable waters, to be regulated under the Act, and what types of "open waters" qualify for the adjacency test, e.g., non-navigable streams and tributaries. In a joint January 10, 2003 memorandum, the Corps and U.S. EPA at that time proposed a narrow reading of the case, and they would use their broad notion of what "adjacent" means, e.g., neighboring, separation by dikes, etc. to make determinations on a case-by-case basis.[128]

The writer recalls in the early 2000's an EPA enforcement attorney told him that the *SWANCC* case only exempts areas like "cattle wallows" (where the animals rolled in land to rid themselves of bugs and cool down, creating a depression for water to puddle and allow vegetation). However, the Fifth Circuit in *Rice v. Harken Exploration Co.* held that even intermittent streams are not sufficiently linked to open bodies of water to be regulated under Oil Pollution Act, which defines "navigable waters" the same as the CWA.[129] Also, in *In re Needham*,[130] the Court held that the CWA covers navigable-in-fact waterways or waterways adjacent to navigable-in-fact waterways, but not all ditches.[131]

124. *Id.* at 170-71.

125. *Id.* at 165.

126. *Id.* .at 170-71.

127. *Id.* at 166.

128. 33 C.F.R. § 328.3(c) (2022); *see* Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States", 68 Fed. Reg. 1991, 1991 (Jan. 15, 2003).

129. 250 F.3d 264, 271 (5th Cir. 2001).

130. 354 F.3d 340, 345-46 (5th Cir. 2003).

131. *See* Stan Millan, *Clean Water Act Waters Have a Beginning, But Do They Have an End?*, 35 Env't Rep. (BNA), 964 (2004) (out of print, but a PDF is available from Bloomberg upon request).

The U.S. Supreme Court later had done more to confuse this issue of what isolated wetlands are regulated. On June 19, 2006, the Court took a step closer to limiting federal regulatory jurisdiction in *Rapanos v. United States*.[132] Both Rapanos's and Carabell's lands were wetlands miles from navigable waterways.[133] The only connections to navigable rivers and lakes were through possibly dry ditches (which the agency called tributaries).[134] Carabell's wetlands were also separated from a ditch by a little levee (berm) that was only overtopped in a ten-year storm event.[135] Rapanos's case arose from enforcement.[136] Carabell's arose from administratively and judicially challenging wetland regulatory jurisdiction in the 404 permit program.[137] The Corps and lower courts considered the proximity of the wetlands to the ditches as sufficient for regulatory jurisdiction.[138] By a five to four vote, the high Court said the agencies cannot regulate isolated wetlands near ditches and drainways only.[139] However, there was no majority opinion on what regulatory test the agencies must use in the future. These two court cases were remanded.[140]

Justice Scalia's plurality court used a simple *two-fold test* for regulatory jurisdiction: 1) is the wetland "continuously connected" to a water (e.g. canal), and 2) is the adjacent water "relatively permanent, standing or flowing bodies of water . . . [including some seasonal rivers]."[141] This approach eliminated the Corps' categorical "ditch as tributary" approach and would negate wetland jurisdiction in many cases, especially in states like Louisiana.

Justice Kennedy, in a concurring opinion, rejected this two-fold approach as the *only* test and proposed the Corps establish regulatory jurisdiction "on a case-by-case basis . . . [that wetlands adjacent to non-navigable waters] significantly affect the chemical, physical, and biological integrity of . . . [navigable waters]."[142] His broad "*significant nexus*" test includes quantity, volume, and regularity of flow of non-navigable tributaries; proximity of tributary to navigable waters; and site

132. 547 U.S. 715, 757 (2006) (plurality opinion).
133. *Id.* at 720, 730.
134. *Id.* at 739.
135. *Id.* at 730, 764.
136. *Id.* at 729.
137. *Id.* at 730.
138. *Id.* at 742.
139. *Id.* at 739.
140. *Id.* at 757.
141. *Id.* at 742.
142. *Id.* at 779-80 (Kennedy, J., concurring).

functions such as pollutant trapping, flood control, and run-off storage.[143] He rejected speculative Corps findings of "potential [or] possible" site effects for his "significant nexus" test in the two cases and insisted on Corps substantial evidence (which does not normally apply to informal Corps administrative decision-making).[144] He also said a "mere hydrologic connection" should not suffice for jurisdiction in all cases.[145]

The dissent viewed *Riverside Bayview Homes* as controlling and favored a categorical test as then used by the Corps ("all ditches are tributaries"), but nonetheless applauded Kennedy's case-by-case alternative test.[146] They believed that it would not have much negative effect on wetland regulations. This may have been their spin to the agencies that make regulatory choices, to have it appear that five votes were for the "significant nexus" or apparently broader Kennedy approach, and only four votes were for the Scalia narrow two-fold test. However, Kennedy may have been adding to Scalia's approach, i.e., nearby wetness is not enough, but substantial evidence of the quality of wetland functions is also needed to justify regulation.

Both Chief Justice Roberts (concurring)[147] and Justice Breyer (dissenting)[148] favored rule-making by the Corps and EPA to resolve the proper regulatory test. The agencies apparently could elect to use either test—Scalia's or Kennedy's—or some hybrid. This void left the regulatory standard uncertain.

As a result, the Corps and EPA developed broad guidance in 2007-2008, on both adjacency and significant nexus tests.[149] Then the Obama Administration developed the first WOTUS rule in 2015, following the guidance.[150] However, the Trump Administration narrowed the WOTUS rule in the 2020 Navigable Water Protection Rule (NWPR), eliminating the significant nexus test among other things.[151] Currently the Biden

143. *Id.* at 786 (Kennedy, J., concurring).

144. *Id*. 785-86 (Kennedy, J., concurring).

145. *Id.* at 784 (Kennedy, J., concurring).

146. *Id.* at 787-88 (Stevens, J., dissenting).

147. *Id.* at 757-58 (Roberts, C.J., dissenting).

148. *Id.* at 811-812 (Breyer, J., dissenting).

149. *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*, EPA (Dec. 2, 2008), https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

150. The pre-2015 regulatory regime did not discuss these tests but defined adjacency broadly. *See*, *e.g.*, Permit for Discharges of Dredged or Fill Material into Waters of the United States, 42 Fed. Reg. 37122, 37144 (July 19, 1977).

151. The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250 (Apr. 21, 2020).

Administration revoked the NWPR and has issued revised and amended WOTUS rules in 2023,[152] initially substantially restoring the 2015 rules and then handing them a surgical amendment in light of *Sackett v. EPA*. All of these never ending, looping rules were/are subject to litigation and create, in the author's opinion, a "yellow brick road" for the public. These different regimes are discussed in *Sackett*, again.

Hiding in the background is the conservative but innovative "Major Questions Doctrine." That is, unless Congress speaks clearly on its delegated authorizations, courts will not allow overly broad agency interpretations of vague statutes having economic and political significance.[153] Or, "Congress does not hide elephants in mouse holes."[154]

This doctrine does not appear to have a guiding, consistent framework for judicial application, other than *West Virginia v. EPA*'s elements of 1) an unheralded agency action and 2) a transformative change in agency authority, e.g., to shift electricity generation from coal power to gas or shutdown.[155] The majority there did not adopt the simple "clear statement rule" framework of the Gorsuch concurring opinion, by failing to use his non-exclusive factors such as a rule of great political significance, affecting a great portion of the American economy or intruding on the domain of states.[156] *Biden v. Nebraska* gave some more insight into the doctrine.[157] It held, absent clear congressional authorization, that a student loan forgiveness of approximately $500 billion dollars was significant economically or politically and unauthorized, because it equaled to one-third of the government's annual discretionary spending.[158] Next, the *Sackett* case affecting the Nation's remaining wetlands (and possibly much drier lands) or state land use sovereignty, did not attempt to elaborate on the doctrine. The doctrine's

152. Revised Definition of "Waters of the United States"; Conforming, 88 Fed. Reg. 61964 (Sept. 8, 2023); Revised Definition of "Waters of the United States," 88 Fed. Reg. 3044 (Jan. 18, 2023); *Definition of "Waters of the United States": Rule Status and Litigation Update*, EPA, www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update (last visited Sept. 28, 2023) (this rule and its amendment are still in litigation. Meanwhile, the Nation is split on what rules to use, the amended 2023 rule or pre-2015 regulatory regime).

153. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2605 (2022).

154. *See* Sackett v. EPA, 598 U.S. 651, 677 (2023) (quoting Whitman v. Am. Trucking Ass'ns., 531 U.S 457, 468 (2001)). Justice Kagan only cited the majority's judicially manufactured "clear-statement" rule as a "major question doctrine" in her concurring opinion. *Id*. at 713-15 (Kagan, J., concurring).

155. *West Virginia*, 142 S. Ct. at 2610.

156. *Id.* at 2620-22 (Gorsuch, J., concurring).

157. 143 S. Ct. 2355, 2373 (2023).

158. *Id.* at 2375.

underpinnings are evident in the above "elephant" analogy that *Sackett* used.

Along comes *Sackett*. The facts in the case show the following: in 2004, landowners started to develop a residential lot in an Idaho subdivision, 300 feet from an intrastate lake in one direction and a creek that feeds into that and a wetland Fen and the lake almost a mile away in another.[159] Sackett's small lot is separated from these waters by developed homes, a thirty-inch wide shell road, and a ditch (tributary).[160] Yet EPA called the lot a regulated wetland, enforced CWA Section 404, and stopped the development in 2007.[161] Many years of litigation ensued over the proper wetland test under Section 404.[162]

Whether waters are wetlands has long been determined by physical science elements: water, vegetation, and soil.[163] But whether all wetlands are federally regulated is a question mostly of law.

On May 25, 2023, the majority in *Sackett* held that Justice Scalia was correct in *Rapanos*. That is, Justice Alito, writing for the majority, determined that the term "waters" under the CWA includes only relatively permanent, standing, or continuously flowing bodies of water, such as streams, oceans, rivers, and lakes.[164] Moreover, the Court held that the CWA covers wetlands adjacent to those waters if they have a continuous surface connection to those waters such that there is *no clear demarcation* between them, notwithstanding temporary dry spells or low tides, e.g., like a marsh.[165] In other words, the two bodies must be indistinguishable, and, even if located nearby other water, wetlands cannot be considered a part of traditional navigable waters unless there is that continuous surface connection (adjoining). Barriers such as some levees would break that connection.

The holding requires a two-part determination for asserting jurisdiction over adjacent wetlands. First, the adjacent body of water must constitute "waters of the United States."[166] Second, the wetland must have "a *continuous surface connection* with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."[167]

159. Sackett v. EPA, 8 F.4th 1075, 1080-81 (9th Cir. 2021), *rev'd*, 598 U.S. 651 (2023).
160. *Sackett*, 598 U.S. at 662-63.
161. *Id.*
162. *Id.* at 663.
163. *See Wetlands Delineation Manual*, *supra* note 116.
164. *Sackett*, 598 U.S. at 671.
165. *Id.* at 678-79.
166. *Id.* at 678.
167. *Id.* at 678-79 (emphasis added).

Almost an eyeball test, as the majority was concerned about vagueness and landowners' ability to avoid work in wetlands.

The concurring opinion by Justice Thomas used legislative and legal history to help reach the result. He significantly relied on Congress' traditional authority over the "channels of interstate commerce."[168] The Court only used the channels of commerce test (e.g., beds of the navigable rivers) and not the local activity with substantial interstate effects test under the commerce clause from the New Deal era to reach its results. This narrow approach may have been done to avoid the vagueness of other agency interpretations that would confuse landowners.

Justice Thomas, joined by Justice Gorsuch, in his concurring opinion explained that he was disappointed by the agency's refusal to properly interpret (flout) the decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, which narrowed federal jurisdiction under the CWA.[169] Justice Thomas's concurring opinion also emphasized commerce clause precedent and further cast doubt on the expansive federal regulations over occasional floodplains, ditches, and most tributaries.[170]

In his concurring opinion, joined by Justices Sotomayor, Kagan, and Jackson, Justice Kavanaugh disagreed that the wetlands had to have a constant surface *water* connection to another water to be regulated, as that phrase is not in the CWA.[171] Justice Kavanaugh believed that "adjacent" is closer to "neighboring" than to "touching."[172]

This majority decision reduces federal but not state jurisdiction[173] over wetlands under the CWA and basically reverses almost fifty years of rule-making and litigation. What a waste of permit time.[174]

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168. 598 U.S. at 687-88 (Thomas, J., concurring); *see also* majority at 673-74.

169. *Id.* at 703 (Thomas, J., concurring).

170. *Id.* at 696 (Thomas, J., concurring).

171. *Id.* at 719 (Kavanaugh, J., concurring).

172. *Id.* at 718 (Kavanaugh, J., concurring).

173. Clean Water Act Section 404 Tribal and State Program Regulation, 88 Fed. Reg. 55276 (Aug. 14, 2023). EPA is providing clarification on States' assumption of § 404 authority under their own laws plus an EPA delegation. *Id*. at 55277-78. States must apply for that delegation and demonstrate a state program that can mirror § 404 requirements, with a precise delineation of waters to be transferred. *Id*. at 55277. Mitigation, permit terms, judicial reviews, ESA, and enforcement are keys. *Id*. So far only Michigan, New Jersey, and Florida have assumed § 404 jurisdiction. *Id*. at 55278. Congress may also become involved in the future of wetland regulation.

174. *See generally* Lewis v. United States, No. 21-30163, 2023 WL 8711318, at *1-4 (5th Cir. Dec. 18, 2023) for a perhaps troublesome, decade long application of pre and post *Sackett* rules on Louisiana wetlands.

VII. THE ELEPHANT HIDDEN IN THE MOUSE HOLE

On September 8, 2023, the Corps and EPA appeared to accept *Sackett* by amending parts of the January 18, 2023 WOTUS rule.[175] The agencies struck the insignificant nexus test and interstate tributaries and wetlands from WOTUS and narrowed "adjacent" by substituting "continuous surface connection" between a wetland and relatively permanent water (RPW), for "neighboring."[176] They did not amend much of the January 2023 rule and its preface. However, the retention of January 18, 2023 EPA/Corps administrative equation of "continuous surface connection" as *not* meaning a constant hydrologic (water) surface connection but a physical connection only, e.g., through a mostly dry ditch, arguably conflicts with *Sackett.*[177] This wayward agency interpretation of "connection," actually citing *Rapanos*, could mean that virtually any evidence (e.g., swale, pipe, culvert, natural berm, but not cliffs, bluffs, canyon walls, or levees, sans gaps) of a physical connection (no matter how lengthy or dry) between a wetland and RPW may still lead to Corps jurisdiction. This "connection" excludes relic barriers or flood plains. This gamesmanship unless revoked apparently slipped everyone's attention and opens the door to selective Section 404 enforcement, despite *Sackett*. That interpretation is mostly consistent, in this writer's opinion, with, right or wrong, the almost freewheeling, pre-2006 Corps and EPA regulation. Back to the future?

VIII. CONCLUSION

The U.S. Government Accountability Office estimates that half of the wetlands that existed during colonial times have been lost.[178] That is over 110 million acres. And with the Corps granting >99% of approximately 9,000 permits a year, it is apparent that federal protection, in this author's opinion, is mostly in red tape.[179] That is because not all permitted mitigation is like-kind or on-site, but is mainly aimed at no

175. Revised Definition of "Waters of the United States"; Conforming, 88 Fed. Reg. 61964 (Sept. 8, 2023).

176. *Id.*

177. Revised Definition of "Waters of the United States," 88 Fed. Reg. 3004, 3095 (Jan. 18, 2023).

178. U.S. GEN. ACCT. OFF., GAO-01-325, WETLANDS PROTECTION: ASSESSMENTS NEEDED TO DETERMINE EFFECTIVENESS OF IN-LIEU-FEE MITIGATION 1 (2001).

179. *Regulatory Program Frequently Asked Questions*, U.S. ARMY CORPS OF ENG'RS, https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Frequently-Asked-Questions/; *See* State 404 Program Applicant's Handbook, FDEP § 4.1 (Dec. 22, 2020).

overall net loss of wetlands on a national basis. So maybe it is time for a sea change in regulatory lead.

More states may join in EPA's proposal to assume proper Section 404 jurisdiction. For instance, Florida's approved program uses a 300-foot buffer from navigable waters in deciding what wetlands are Federal and which outside the buffer are the state's.[180] Wetlands beginning beyond three hundred feet landward of a waterway's ordinary high water mark usually belong to Florida's program. Then the public can deal with one state presumably more responsive to locals and not have to worry as much on the gamesmanship of entrenched bureaucratic "*El Cids*."

180. *See* State 404 Program Applicant's Handbook, FDEP § 4.1 (Dec. 22, 2020) www.swfwmd.state.fl.us./sites/default/files/303_Handbook_FINAL%25%2012.30.20.PDF.