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Vetoing Wetland Permits Under Section 404(c) of the Clean Water Act: A History of Inter-Federal Agency Controversy and Reform

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ABSTRACT

For most of its four-decade history, section 404(c) of the Clean Water Act could have been considered to be a sleeper provision of environmental law. The provision authorizes the U.S. Environmental Protection Agency (EPA) to overrule permits for discharges of dredged or fill material issued by the U.S. Army Corps of Engineers (Corps) where necessary to ensure protection of fish and wildlife habitat, municipal water supplies, and recreational areas against unacceptable adverse effects. This authority of one federal agency to veto the decisions of another federal agency is quite unusual and perhaps unprecedented in environmental law. The exceptional nature of section 404(c) may explain why EPA has employed it only thirteen times in over four decades and just three times since 1990. When EPA has invoked its 404(c) authority, it has often done so to support the

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positions of federal and state fish and wildlife agencies and, perhaps surprisingly, Corps field-office officials. These agencies managed for eighteen years—between 1990 and 2008—to conduct the 404 permit program, one of the largest federal permit programs, without a single 404(c) veto, helped by the use of an interagency review process authorized by section 404(q) of the Act.

The most recent three 404(c) actions—two involving large-scale mining operations and the other involving a large-scale flood control project—have all generated significant widespread controversy, and the fate of none of them is finally resolved. Their notoriety may disguise what we believe to be a chief lesson of having no 404(c) vetoes during the eighteen year period and just three vetoes in a quarter-century: the evolution of the Corps as an environmental agency, a notable achievement of section 404(c), since it has greatly furthered the statute's goal of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters.

INTRODUCTION

The Clean Water Act's (CWA) section 404 permit program, which regulates the discharge of dredged or fill material into the nation's navigable waters,[1] has been the subject of headline news due to recent controversies involving mountain-top mining in West Virginia[2] and a proposed copper and gold mine in Alaska that would be the world's largest.[3] Fear over restored 404 permitting has been at the root of the virulent opposition to the U.S. Environmental Protection Agency's (EPA) proposed definition of "waters of the United States," which the U.S. House of Representatives voted to oppose in 2014.[4] Congress even voted to overturn federal guidance on farming activities that the statute exempts from regulation.[5]

In truth, the 404 program has been controversial since its inception in 1972.[6] Congress enacted section 404 as an exception to EPA's control of water pollutant discharges to preserve the U.S. Corps of Engineers' (Corps) preexisting regulation of activities affecting navigation under the 1899 Rivers and Harbors Act.[7] The full geographic scope of the 404 program did

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1. *See* 33 U.S.C. § 1344 (2014).
2. *See infra* Part IV.B.
3. *See infra* Part IV.C.
4. *See infra* note 20 and accompanying text.
5. In 2014, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) proposed an interpretive rule regarding section 404(f)(1)(A), which addressed permit exemptions for discharges from normal farming, silviculture, and ranching activities. *See* Envtl. Prot. Agency, Dep't of Def. & Army Corps of Eng'rs, Interpretive Rule Regarding the Applicability of the Exemption from Permitting under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices (2014), *available at* http://www.spl.usace.army.mil/Portals/17/docs/regulatory/JD/404%28f%29/IR_NOA_Final.pdf; Notice of Availability Regarding the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices, 79 Fed. Reg. 22,276 (April 21, 2014). In response to opposition from the agricultural industry, Congress included in the 2015 Appropriations Act a section that withdraws EPA's and the Corps' interpretive rule. *See* H.R. 83, 113th Cong. § 112 (2014).
6. *See infra* notes 51-83 and accompanying text.
7. The Rivers and Harbors Act of 1899 made it a misdemeanor to excavate, fill, or alter the course of any port, harbor, or channel without a Corps' permit. 33 U.S.C. § 407 (1899). Section 10 of the Act prohibits obstructions to the navigational capacity of water not explicitly authorized by Congress unless

not become apparent until 1975, when a federal court ruled that the program included all the waters subject to permit requirements under the companion section 402 program for discharges of water pollution from point sources administered by EPA.[8] The Corps responded to the court's decision by claiming that federal permits would be required for a variety of farming and ranching activities.[9] The ensuing political uproar made the 404 permit program unpopular in agricultural circles (indeed, it still is), but the program survived.[10]

The 404 program remains the subject of controversy because requiring federal permits for discharges of dredged or fill material in all waters of the United States involves the Corps in both regulating developments affecting navigation and also protecting ecologically significant rivers, estuaries, and wetlands.[11] The latter—land-water areas that are inundated at least periodically, and which are some of the most biologically productive areas on earth[12]—have proved especially controversial because wetlands often have high development value.[13] Supporters of the federal program point to the fact that

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approved of by the Corps. *Id.* § 403. Section 13 prohibits discharges into navigable waters of "any refuse matter of any kind of description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state" without a Corps permit. *Id.* § 407.

8. *See* Natural Res. Def. Council v. Callaway, 392 F. Supp. 685 (D.D.C. 1975) (explaining that Congress asserted "federal jurisdiction over the nation's waters to the maximum extent possible under the Commerce Clause" in the definition of "navigable waters," and therefore the Corps' "acted unlawfully" in adopting a limited definition of navigability).

9. *See* Michael C. Blumm, *The Clean Water Act's Section 404 Program Enters Its Adolescence: An Institutional and Programmatic Perspective*, 8 ECOLOGY L. Q. 409, 416-17 (1980).

10. *Id.* at 417-18.

11. *See infra* note 71 and accompanying text.

12. *See* Virginia C. Veltman, *Banking on the Future of Wetlands Using Federal Law*, 89 NW. U. L. REV. 654, 655 (1995) (discussing the essential ecological functions wetlands provide). Wetlands provide an estimated $4.9 trillion worth of services per year. Robert Costanza et. al., *The Value of the World's Ecosystem Services and Natural Capital*, 387 NATURE, May 15, 1997, at 253, 259.

13. *See* Hope Babcock, *Federal Wetlands Regulatory Policy: Up to Its Ears in Alligators*, 8 PACE ENV'TL L. REV. 307, 311 (1991) (discussing the value of converting wetlands for both water-based and non-water-based activities).

state and local control had produced millions of acres of destroyed wetlands, and conserving the remaining wetlands required federal control.[14]

Challenges to the scope of the 404 program have reached the Supreme Court several times. In 1985, the Court held that the program reached wetlands adjacent to traditionally navigable waters[15] but reserved judgment on wetlands that are isolated from navigable waters.[16] Over a decade-and-a-half later, the Court denied 404 jurisdiction over a wetland whose only connection to interstate commerce was due to its use by migratory birds.[17] Then, in 2006, the Court decided that in order to be subject to the 404 program, a wetland must either be connected by waters that contain a relatively permanent surface flow[18] or have a significant nexus with navigable waters, such

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14. From the 1600s until the enactment of § 404, the lower forty-eight states lost an estimated 117 million acres of their original 221 million acres, or fifty-three percent of wetlands. *See* THOMAS E. DAHL, U.S. FISH & WILDLIFE SERV., WETLANDS LOSSES IN THE UNITED STATES: 1780'S TO 1980'S, at 5 (1990), *available at* http://www.fws.gov/wetlands/Documents/Wetlands-Losses-in-the-United-States-1780s-to-1980s.pdf. From the 1950s through 1970s, about 458,000 acres of wetlands were being lost every year, but that number has been steadily decreasing to only around 13,800 acres per year from 2004-2009. *See* THOMAS E. DAHL, U.S. FISH & WILDLIFE SERV., STATUS AND TRENDS OF WETLANDS IN THE CONTERMINOUS UNITED STATES: 2004 TO 2009, at 40 (2011), *available at* http://www.fws.gov/wetlands/Documents/Status-and-Trends-of-Wetlands-in-the-Conterminous-United-States-2004-to-2009.pdf.

15. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126, 139 (1985) (upholding 404 jurisdiction over a wetland adjacent to Lake St. Clair, Michigan).

16. *Id.*

17. *See* Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 167 (2001).

18. *See* Rapanos v. United States, 547 U.S. 715, 739 (2006) (Scalia, J., plurality opinion). The *Rapanos* and *Carabell* decisions caused EPA and the Corps to revise its guidance interpreting its regulatory definition of "waters of the United States." *See* Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188 (proposed Apr. 21, 2014) (to be codified at 33 C.F.R. pt. 328; 40 C.F.R. pts. 110, 112, 116-17, 122, 230, 232, 300, 302, 401). That change created quite a political controversy that is still ongoing. *See* Matthew Daly, *House Votes to Block EPA Water Rules*, YAHOO! NEWS (Sept. 9, 2014), http://news.yahoo.com/house-moves-block-epa-water-rules-204559739—politics.html. Recently, the Court allowed those challenging an EPA administrative compliance order to restore wetlands filled without a 404 permit to obtain pre-enforcement judicial review of the order. *See* Sackett v. EPA, 132

that the "wetlands' [have] significance for the aquatic system."[19] In response, in May 2015, EPA and the Corps responded promulgated a new definition of "waters of the United States" that preserved permit jurisdiction over many of waters that the Court's decisions called into question.[20]

S. Ct. 1367, 1374 (2012); Craig N. Johnston, *Sackett: The Road Forward*, 42 ENVTL. L. 993, 993 (2012).

19. *Rapanos*, 547 U.S. at 786 (Kennedy, J., concurring opinion) (stating that whether a wetland has a "significant nexus to navigable waters" is the proper test to determine the Clean Water Act's (CWA) jurisdictional reach).

20. EPA's efforts to respond to the Court's decisions met with substantial congressional opposition, as the agency's proposed definition of "waters of the United States," 79 Fed. Reg. at 22,188-89, prompted the House of Representatives to pass The Waters of the United States Regulatory Overreach Protection Act of 2014, H.R. 5078, 113th Cong. (2d Sess. 2014), which would have prohibited implementation of the proposed rule (or any similar rule). Although that bill passed the Republican House, it died in the then-Democratic Senate. *See H.R. 5078 (113th): Waters of the United States Regulatory Overreach Protection Act of 2014*, GOVTRACK.US, https://www.govtrack.us/congress/bills/113/hr5078 (last visited Apr. 22, 2015). However, the 113th Congress did block implementation of regulatory guidance issued by EPA and the Corps on 404(f)(1)(A), largely out of fear that the guidance amounted to an increase in federal jurisdiction over farming and ranching operations. *See* Consolidated and Further Continuing Appropriations Act, 2015, H.R. 83, 113th Cong. § 112 (2d. Sess. 2014).

On May 26, 2015, EPA and the Corps promulgated a final rule aimed at clarifying the jurisdictional boundaries of the term "waters of the United States," which continued categorical jurisdiction over traditionally navigable and interstate waters, the territorial seas, any impoundments of them, and wetlands adjacent to each. The rule added categorical jurisdiction of most tributaries and their adjacent wetlands. DEP'T OF DEF. AND ENVTL. PROT. AGENCY, 6560-50-P, CLEAN WATER RULE: DEFINITION OF "WATER OF THE UNITED STATES" at 18-25 (2015), *available at* http://www2.epa.gov/sites/production/files/2015-05/documents/rule_preamble_web_version.pdf [hereinafter WOTUS DEFINITION]. The rule also provided a definition of adjacent waters and criteria to determine if other waters have a significant nexus to jurisdictional waters. *Id.* at 20-21.

Beyond the categorical inclusions, the rule required the use of a case-specific analysis of so-called "isolated waters," including (1) five special categories of waters—prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands—and (2) waters within in a 100-year floodplain of a jurisdictional water or within 4,000 feet of its channel. *Id.* at 22-23. The agencies estimated that the first category of case-specific determinations will result in a nearly 16% increase in jurisdictional wetlands, and the second a 1.7% increase. *See* Annie Snider, *In Major Shift, New Rule Excludes Some Wetlands, Ponds*, GREENWIRE (May 28, 2015), http://www.eenews.net/stories/1060019261. For a useful chart, see Stephen R.

Although Congress granted authority to the Corps to issue 404 permits when it carved out the 404 program from EPA permit jurisdiction in the 1972 law,[21] it gave EPA two important oversight roles concerning the Corps' permit program. First, it authorized EPA to promulgate "guidelines," in conjunction with the Corps, to govern the issuance of 404 permits.[22] Second, Congress authorized EPA to "prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and . . . to deny or restrict the use of any defined area" the discharge or dredged or fill material at defined sites in waters of the United States where the discharge would have "an unacceptable adverse impact on . . . fisheries, municipal water supplies, wildlife, and recreational areas."[23] This so-called EPA

Miller, *What's in the New EPA Clean Water Rule*, LAND USE PROF BLOG (May 28, 2015), http://lawprofessors.typepad.com/land_use/2015/05/whats-in-the-new-epa-clean-water-rule.html.

EPA and the Corps claimed that the new rule "maintain[ed]current statutory exemptions" for normal farming, ranching, and silviculture activities, did not "add any additional permitting requirements on agriculture," and announced additional express exclusions for most ditches and groundwater—which the agencies have never included in the definition of "waters of the United States"—as well as for other water features never included in the definition but which were not previously expressly excluded, such as puddles and erosional features such as gullies, rills, and other ephemeral features. WOTUS DEFINITION, *supra*, at 8, 24-25, 176-77. The agencies claimed that the rule merely clarified when streams and wetlands qualify as waters of the United States—a "confusing, complex, and time-consuming" effort during the past 15 years. Press Release, Envtl. Prot. Agency, Clean Water Rule Protects Streams and Wetlands Critical to Public Health, Communities, and Economy (May 27, 2015), *available at* http://yosemite.
epa.gov/opa/admpress.nsf/0/62295CDDD6C6B45685257E52004FAC97.
Nonetheless, Senator John Barrasso (R-WY) responded by introducing the Federal Water Quality Protection Act, which would provide definitions for a number of terms in the Clean Water Act including "surface hydrologic connection," "stream," "wetlands," "isolated," and "body of water." S. 1140, 114th Cong. (1st Sess. 2015), which would require that the agencies to promulgate a new definition for "waters of the U.S." consistent with the new statutory definitions.

21. *See* 33 U.S.C. § 1344(a) (2014) (giving the Secretary the ability to issue permits for the discharge of dredged or fill material).

22. *See* 40 C.F.R. § 230.1 (2015).

23. 33 U.S.C. § 1344(c). Section 404(c) authorizes EPA to prohibit, restrict, or deny the specification of an area for discharge of dredged or fill material at defined sites in waters of the United States, including wetlands, when it

veto has been used quite infrequently—only thirteen times—over the last forty years.[24] This veto authority by one federal agency over another has always been controversial and was called into question by a least one recent district court decision.[25]

Perhaps 404(c) authority has been so infrequently used over the past four decades because it is quite unusual for Congress to deputize one federal agency to in effect forbid actions authorized by another regulatory agency.[26] True, under the Endangered Species Act (ESA), federal wildlife agencies have authority to prohibit actions approved by other federal agencies that jeopardize the continued existence of listed species,[27] but the

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determines, after notice and opportunity for public hearing, that use of such sites for disposal would have "an unacceptable adverse impact" on fisheries, wildlife, municipal water supplies, or recreational areas. *Id.* Note that Congress added a third role for EPA in the 1977 amendments—approving state 404 permit programs for traditionally non-navigable waters. EPA has granted authority to just two state programs to date. Michigan's s 404 program assumption took effect in 1984. *See* Michigan Department of Natural Resources Section 404 Permit Program Approval, 49 Fed. Reg. 38,947 (Envtl. Prot. Agency Oct. 2, 1984). EPA approved New Jersey's 404 program assumption ten years later in 1994. *See* New Jersey Department of Environmental Protection and Energy Section 404 Permit Program Approval, 59 Fed. Reg. 9933 (Envtl. Prot. Agency Mar. 2, 1994).

24. *See infra* Parts II.B, III, IV.

25. *See* Mingo Logan Coal Co. Inc. v. EPA, 850 F. Supp. 2d 133, 137-38 (D.D.C. 2012), *rev'd*, 714 F.3d 608 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 1540 (2014).

26. It is common for EPA to have oversight for permit programs run by states. *See, e.g.*, Clean Water Act § 402(b)-(c), 33 U.S.C. § 1342(b)-(c) (2014) (allowing the Administrator to approve or withdraw approval of a state National Pollutant Discharge System permit program); 42 U.S.C. § 7410(c) (2014) (empowering the Administrator to review state implementation plans under the Clean Air Act). However, in the environmental context, Congress has not given one agency direct authority to overturn a decision by another agency. Section 309 of the Clean Air Act does require EPA to review and comment on environmental effects of major federal actions, including actions subject to an environmental impact statement under the National Environmental Policy Act. *See* 42 U.S.C. § 7609(a). If the Administrator determines a proposed action to be unsatisfactory, EPA may refer the matter to the Council of Environmental Quality (CEQ). 42 U.S.C. § 7609(b). The CEQ can take specific actions upon the referral of an action, including referring the matter to the President. *See* 40 C.F.R. § 1504.3(d), (f) (1979). But section 309 does not give either EPA or the CEQ a veto over the proposals of other federal agencies.

27. *See* 16 U.S.C. § 1536(a)(2) (2014); Michael C. Blumm & Andrea Lang, *Shared Sovereignty: The Role of Federal Agencies in Environmental Law*, 42

ESA regulations encourage the wildlife agencies to develop "reasonable and prudent alternatives" that allow the acting agency's proposal to proceed without jeopardy.[28] However, this sort of accommodation principle is not evident in the regulations implementing section 404(c).[29] Moreover, the ESA leaves final decision-making authority with the federal action agency, not with the wildlife agencies.[30] Thus, 404(c) exists as an almost singular example of one federal agency overruling another agency.

Although section 404(c) has been infrequently invoked, we believe the provision is central to the successful operation of the 404 program because it has ensured that EPA and ecological concerns predominate over economic factors in 404 permit decision-making. There is some tension in 404 permit criteria, as the Corps' regulations call for evaluating projects on the basis of a "public interest review"[31]—a free-wheeling balancing of economic and environmental matters—while the statutorily prescribed 404(b) guidelines are ecologically oriented.[32] The existence of EPA's section 404(c) veto authority has prevented economic factors from overriding environmental concerns in Corps' permitting and has, we believe, been a material factor in the maturation of the Corps as an environmental regulatory agency. The evidence lies in the fact that during the period from 1981 to 1990, there were eleven 404(c) vetoes, but none at all between 1991 and 2007. This record demonstrates that EPA and the Corps now interpret the goals of the 404 program quite

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Ecology. L.Q. (forthcoming 2015).

28. 16 U.S.C. § 1536(b)(3)(A). Although Justice Scalia said in *Bennett v. Spear* that ESA biological opinions had "virtually determinative" effect, 520 U.S. 154, 170 (1997), in fact the final agency action is from the acting agency, which has discretion to deviate from the consulting agency's reasonable and prudent alternative. *See* Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy, 898 F.2d 1410, 1419 (9th Cir. 1990) (holding that the ESA's requirement to develop "reasonable" alternatives did not necessitate the implementation of the "least burdensome alternative").

29. *See* 40 C.F.R. § 231.3 (2015).

30. *See* 16 U.S.C. § 1536(a)(2).

31. *See infra* notes 94-97 and accompanying text.

32. *See infra* Part II.A.

similarly, an unlikely result three decades ago.[33] This institutional evolution is a significant, if overlooked, development in modern environmental law.

The three recent 404(c) actions do not undermine this assertion, as all involve the following unusual circumstances: (1) a longstanding effort to proceed with a traditional local flood control program; (2) a Corps permit issued several years before; and (3) a proposed project for which the company had not yes applied for a permit.[34] These recent 404(c) controversies illustrate the continuing importance the provision provides for environmental protection but may mask the significant transformation of the Corps that we believe this history of the 404(c) veto authority demonstrates. In short, the twenty years of no 404(c) vetoes may speak louder than the last few years of 404(c) controversies. The metamorphosis of the Corps as an environmental protector is essential for wetlands preservation, since EPA lacks the resources to manage the enormous permitting demands imposed by the 404 program.[35]

This article explains the history, implementation, current controversies, and importance of the 404 veto authority. Section I briefly reviews the history of the enactment of section 404 in the 1972 CWA amendments and the ensuing 404(c) regulations.

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33. *See* Michael B. Blumm & D. Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695, 704-06 (1989). EPA and the Corps entered into three important memorandum or agreements in the early 1990's clarifying important issues of jurisdiction, mitigation, and enforcement. *See infra* notes 78 and accompanying text.

34. *See infra* Part IV.A (explaining the veto of the Yazoo Backwater Area Pumps Project); *infra* Part IV.B (explaining the veto of Spruce No. 1 Surface Mine); *infra* Part IV.C (explaining the Pebble Mine proposed 404(c) action).

35. The Corps reviews approximately the 80,000 permit applications and issues more than 57,000 jurisdictional determinations annually. *See* James R. Hannon Jr., *Stewardship and Success: Civil Works Operations and Sustainability Go Hand-In-Hand*, THE CORPS ENVIRONMENT, July 2013, at 3-4, *available at* http://www.usace.army.mil/Portals/2/docs/Environmental/Corps_Environment/The_Corps_Environment_July_2013.pdf. Additionally, the use of 404(q) elevations during the 18-year hiatus in 404(c) actions may indicate that the effectiveness of the threat of 404(c) action has given EPA bargaining power both with the Corps and the permit applicant to modify proposals to avoid or minimize adverse effects. *See infra* notes 118-23, 341-42 and accompanying text.

Section II describes the functional elements of the 404 program, focusing on 404(b)(1) guidelines and 404(c) procedures. Section III examines the history of 404(c) vetoes during the first four decades of the 404 permit program, a history that reveals thirty-three years of no 404(c) vetoes. Section IV turns to three recent, highly publicized disputes involving 404(c): the Yazoo Backwater flood control project in Mississippi; the Spruce No. 1 Mine, a mountain top mining project in West Virginia, and the proposed Pebble Mine in western Alaska, which would be the world's largest copper and gold mine. The article concludes that, although infrequently invoked, the unique check that section 404(c) imposes on Corps permit decisions is an essential part of wetlands protection, as it has energized an administrative process used with some frequency by EPA and fish and wildlife agencies to appeal Corps district decisions. The authority Congress gave EPA in section 404(c), coupled with the appeal process authorized by section 404(q), has been instrumental in helping reform the Corps into agency which, at least in its regulatory functions, has largely embraced the essential environmental mandate of the 404 program.[36]

36. Not all dredge and fill activities are subject to 404 jurisdiction. The Supreme Court questioned federal jurisdiction over isolated wetlands in Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001), and established a demanding test for non-adjacent wetlands in Rapanos v. United States, 547 U.S. 715 (2006) (requiring either a surface-water connection between navigable waters and wetlands or a significant nexus between the two); *see generally* James Murphy, *Muddying the Waters of the Clean Water Act: Rapanos v. United States and the Future of America's Water Resources*, 31 VT. L. REV. 355 (2007) (discussing the implications of the *Rapanos* decision on employing the CWA). Further, section 404 also includes an exception for normal farming, silviculture, and ranching activities. *See* 33 U.S.C. § 1344(f) (2014); *see also* Larry R. Bianucci & Rew R. Goodenow, *The Impact of Secton 404 of the Clean Water Act on Agricultural Land Use*, 10 UCLA J. ENVTL. L. & POL'Y 41, 51-54 (1991) (discussing the 404(f) exceptions in the CWA); *see also infra* notes 66 and accompanying text.

I.
A BRIEF HISTORY OF SECTION 404

In 1824, Congress authorized the Corps to promote navigation through river and harbor improvements.[37] Although the Corps was not given a regulatory role until 1890, when Congress enacted the Rivers and Harbors Act of 1890, which required the Corps to approve obstructions to navigable rivers.[38] That authority was recodified nine years later in section 10 of the Rivers and Harbors Act of 1899.[39] The Corps and the courts originally interpreted section 10 to regulate only effects that projects would have on navigation.[40] But a half-century later, during the dawn of the environmental movement, courts held that the Corps could—and in fact must—consider factors other

37. An Act to Improve the Navigation of the Ohio and Mississippi Rivers, ch. 139, 4 Stat. 32 (authorizing $75,000 for the President to improve navigation on specific rivers). The President then made the Corps responsible for those actions. *See A Brief History, Improving Transportation*, U.S. ARMY CORPS OF ENG'RS, http://www.usace.army.mil/About/History/BriefHistoryofthe Corps/ImprovingTransportation.aspx (last visited May 19, 2015).

38. River and Harbors Act of 1890, ch. 907, 26 Stat. 426, 453-54 (codified at 33 U.S.C. §§ 401, 403 (2012)).

39. *See* 33 U.S.C. § 403 ("The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established"). The Rivers and Harbors Act also contained section 13, a provision that was called the Refuse Act, which prohibited the discharge of waste into navigable waters. *See* 33 U.S.C. § 407. The Refuse Act was largely ignored until the 1960s when the government started to use it to regulate pollution. *See generally* United States v. Republic Steel Corp., 362 U.S. 482 (1960) (prohibiting the depositing of industrial waste into river channels that created an obstruction under the Rivers and Harbors Act of 1899); United States v. Standard Oil Co., 384 U.S. 224 (1966) (prohibiting the discharge of gasoline into a navigable river violated under the Rivers and Harbors Act of 1899). Congress continued to address water pollution by enacting the Federal Water Pollution Control Act of 1948, Pub. L. 89-234, 79 Stat. 903, and the Water Quality Act in 1965, Pub. L. 80-845, 62 Stat. 1155, 1155-61.

40. *See* Miami Beach Jockey Club, Inc. v. Dern, 86 F.2d 135 (D.C. Cir. 1936) (stating that a section 10 permit decision must exclusively be based on if the project would obstruct navigability of a waterway).

than navigation, including ecological reasons.[41]

In 1972, Congress revised the role of the Corps by enacting the modern CWA, then called the Federal Water Pollution Control Act.[42] Included in the statute was section 404, which required a permit from the U.S. Army Corps of Engineers for discharges of dredged or fill material into navigable waters[43]—defined as "waters of the United States"[44]—which the legislative history instructed meant all waters subject to federal regulation under the Constitution's commerce clause power.[45]

Section 404 required the Corps to authorize permits for the discharge of dredged or fill materials,[46] while giving EPA substantial responsibility for program oversight.[47] Aware of the Corps' role in maintaining and regulating navigable waters, Congress "did not wish to create a burdensome bureaucracy" when a regulatory program already existed, so it decided to continue the Corps' regulation of navigation in section 404.[48]

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41. *See* Citizens Comm. for the Hudson Valley v. Volpe, 302 F. Supp. 1083, 1089 (S.D. N.Y. 1969), *aff'd*, 425 F.2d 97 (2d Cir. 1970) (stating that by specifying "any dike" Congress intended the Corps to regulate all dikes, not merely those that substantially affect navigation); Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970) (stating that the Corps may deny a permit based on "substantial ecological reasons," even if the project would not interfere with navigation).

42. *See* Babcock, *supra* note 13, at 317-19 (explaining the structure of the CWA between the Corps and EPA). The name of the Federal Water Pollution Control Act was changed in the 1977 amendments to the CWA. *See* Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, 1566 (codified at 33 U.S.C. §§ 1251–1287 (2012)).

43. *See* Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92–500, § 404, 86 Stat. 816, 884 (codified at 33 U.S.C. § 1344 (2014)).

44. 33 U.S.C. § 1362(7) (2014).

45. *See* Joseph G. Theis, *Wetlands Loss and Agriculture: The Failed Federal Regulation of Farming Activities under Section 404 of the Clean Water Act*, 9 PACE ENVTL. L. REV. 1, 15 (1991) (discussing the use of the Commerce Clause to "provide the broadest possible federal jurisdiction").

46. Dredged material is defined as "material that is excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(c) (2013). Discharge of fill materials is the "addition of fill material into waters of the United States." 33 C.F.R. § 323.2(f). This definition includes activities associated with building any structure, site-development, artificial islands, intake or outfall pipes, or other infrastructure. *See id.*

47. *See* Federal Water Pollution Control Act Amendments § 404, 86 Stat. at 884 (codified at 33 U.S.C. § 1344).

48. 13 SEN. COMM. ON PUB. WORKS, 93D CONG., LEGISLATIVE HISTORY OF

EPA objected to the Corps' permit authority, maintaining that regulation of discharges into what the agency referred to as "navigable waters of the United States" should either be by EPA or subject to EPA's review and concurrence.[49] Senator Muskie (D-Maine), the chief sponsor of the CWA, spoke out against the Corps' permit authority during the Senate debate on the bill, arguing that the Corps' mission was not to protect the environment but instead to promote navigation.[50] Congress responded by giving EPA a role in establishing 404 permit criteria under section 404(b)(1) and authorizing EPA to veto the Corps permits under section 404(c).

The section 404 permit program quickly proved controversial.[51] In 1973, EPA interpreted the statute to establish a broad scope of federal jurisdiction over waters subject to its permit program for point source discharges of pollutants under section 402 of the Act.[52] Initially, the Corps used a different definition than EPA, restricting its jurisdiction to exclude most wetlands until 1975 when environmentalists challenged that definition in court.[53] In *Natural Resource Defense Council v. Callaway*,[54] the D.C. federal district court ruled that the Corps'

THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 177 (1972).

49. *See* Letter from William Ruckelshaus, Administrator of EPA, to John A. Blatnik, Chairman of Comm. on Pub. Works, House of Representatives (Dec. 13, 1971), *in* H.R. Rep. No. 92-911, at 168 (1972).

50. 13 SEN. COMM. ON PUB. WORKS, 93D CONG., LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1389 (1972).

51. *See* Blumm, *supra* note 9, at 411.

52. *See* U.S. ENVTL. PROT. AGENCY OFFICE OF GENERAL COUNSEL, *Meaning of the Term "Navigable Waters"* (Feb. 6, 1973) [hereinafter EPA OFFICE OF GENERAL COUNSEL], *in* A COLLECTION OF LEGAL OPINIONS, VOL. 1: DECEMBER 1970 – DECEMBER 1973, at 295-96 (defining navigable waters broadly to the "waters of the United States" for 402 permit program).

53. Definition of Navigable Waters of the United States, 37 Fed. Reg. 18,289, 18,290 (Army Corps of Eng'rs Sept. 9, 1972) (defining navigable waters as only those waters that have been or could be used for interstate or foreign commerce).

54. *See* Natural Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975). This case was not the first time the 404 program had been in court. The first case was *United States v. Holland*, which held that Congress did not intend to limit CWA jurisdiction to traditionally navigable waters. *See* United States v. Holland, 373 F. Supp. 665, 676 (M.D. Fla. 1974). Other early cases included United States v. Ashland Oil and Transportation Co., 504 F.2d 1317 (6th Cir.

restrictive definition of navigable waters conflicted with the intent of the CWA by narrowly interpreting the statutory definition of navigable waters, which extended to all "waters of the United States."[55] The court ordered the Corps to revise its regulations to reflect the statutory definition consistent with EPA's interpretation.[56]

The Corps responded to the court's decision by issuing a press release warning the public that the court's order may require federal permits from "the rancher who wants to enlarge his stock pond, or the farmer who wants to deepen an irrigation ditch or plow a field, or the mountaineer who wants to protect his land against stream erosion."[57] Newspapers across the country, including the *New York Times*, reported the Corps' press release,[58] resulting in public outcry against expansion of the 404 program.[59] But in ensuing congressional testimony, the Corps

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1974) (holding that discharges of pollutants into navigable waters and into non-navigable tributaries connected to navigable waters are subject to regulation under the Commerce Clause); United States v. P.F.Z. Properties, Inc., 393 F. Supp. 1370, 1381 (D.D.C. 1975) (holding that waters in a mangrove forest were waters of the United States under the Commerce Clause); and Leslie Salt v. Froehlke, 403 F. Supp. 1292, 1296- 97 (N.D. Cal. 1974) (upholding Corps' definition of navigable waters to include the mean higher high-water line under the Commerce Clause).

55. *Callaway*, 392 F. Supp. at 686.

56. *Id.*

57. *See Loring Air Force Base: Hearing Before the Subcomm. on Econ. Dev. of the S. Comm. on Pub. Works*, 94th Cong. 429 (1976) (describing the news release by the Office of the Chief of Engineers on May 6, 1975 that announced proposed regulations implementing section 404).

58. *See, e.g.*, *Army Engineers Seek Control Over All Waters, Down to Ponds*, NEW YORK TIMES, May 7, 1975.

59. *See* Jeffrey K. Stine, *Regulating Wetlands in the 1970s: U.S. Army Corps of Engineers and the Environmental Organizations*, 27 J. OF FOREST HISTORY, April 1983, at 68. EPA responded to the press release by accusing the Corps of misleading the public and called on the Corps to remedy the confusion caused by the press release. *See* Letter from Russell E. Train, EPA Administrator, to Lt. Gen. William C. Gribble, Jr., Chief of Engineers (May 16, 1975), *in* 121 CONG. REC. 17347 (daily ed. June 5, 1975). The Natural Resources Defense Council issued a statement claiming that "with the outrageous threat that [the agencies] are going to strictly police the plowing of fields and construction of farm ponds across the nation, Corps officials are attempting to incite a uninformed backlash from citizens to help the Corps escape the environmental responsibilities Congress has given it." *Wetlands and the Corps of Engineers*, WASHINGTON POST, June 3, 1975. On June 5, 1975, Senator Muskie wrote to the Secretary of

apologized for the press release, and issued regulations complying with the court's directive.[60]

One of the first section 404 controversies concerned the development of the mangrove swamps on Marco Island into a residential community in coastal Florida.[61] The Corps issued a fill permit in 1964, but in 1974, it discovered that the developer had modified the discharge from clean fill to waste, which the permit did not authorize. The Corps issued a stop-work order.[62] The developer applied for state and federal permits, which EPA, the U.S. Fish and Wildlife Service (FWS), the National Marine Fisheries Service (NMFS), and local and national environmental organizations opposed.[63] Ultimately, the Chief of Engineers denied the permits to fill the undeveloped mangroves.[64]

Congress responded to the controversy caused by *NRDC v. Callaway* and the Marco Island permits with the CWA

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the Army demanding that the Corps issue a public retraction of the press release and on the Senate floor on June 5, 1975, calling for the Corps to clarify its position for the record. *See* 121 CONG. REC. 17346-47 (daily ed. June 5, 1975) (statement of Sen. Muskie). *Water Pollution Control: Senate Hearing,* 94th Cong. (June 5, 1975).

60. In 1975, at a House Hearing, Assistant Secretary of the Army for Civil Works, Victor Veysey apologized for the Corps' press release and clarified the Corps' position. *See Development of New Regulations by the Corps of Engineers, Implementing Section 404 of the Federal Water Pollution Control Act Concerning Permits for Disposal of Dredge or Fill Material Before the House Subcomm. on Water Resources of the Comm. on Pub. Works and Transp.*, 94th Cong. 6 (1975); *see also* Stine, *supra* note 59, at 68. The Corps issued interim final regulations on July 25, 1975, *see* Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320 (Army Corps of Eng'rs July 25, 1975), and final regulations in 1977, which defined navigable waters similarly to EPA's earlier interpretation. *Compare* Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,122, 37,127 (July 19, 1977), (defining navigable waters broadly to include adjacent wetlands) *with* EPA OFFICE OF GENERAL COUNSEL, *supra* note 52, at 295-96 (determining that navigable waters have "the broadest possible constitutional interpretation").

61. Stine, *supra* note 59, at 71.

62. *Id.* at 71.

63. *Id.* at 73.

64. *See* ANNE VILEISIS, DISCOVERING THE UNKNOWN LANDSCAPE: A HISTORY OF AMERICA'S WETLANDS 262 (1997). The Corps' recommendation to deny the permits was too contentious to be determined at the district level and the decision was referred to Washington. *See id.* at 262-63.

Amendments of 1977.[65] The amendments affirmed the program's broad jurisdictional scope, but made three major changes. First, the amendments exempted activities presumed to have minor adverse effects from permit requirements: normal farming, forestry, and ranching.[66] Those exemptions did not extend to new uses that would impair the flow or circulation of waters, therefore reducing the reach of the waters.[67] Second, Congress ratified the Corps' authority to issue general (as opposed to individual) permits if the activities were "similar in nature, caus[ing] only minimal adverse environmental effects," independently or cumulatively, and complying with section 404(b)(1) guidelines.[68] Third, Congress authorized state section 404 programs.[69] However, as of 2014, only New Jersey and Michigan operate their own section 404 permit programs.[70] In

65. Stine, *supra* note 59, at 75.

66. 33 U.S.C. § 1344(f)(1) (2014) (stating that "normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices . . . is not prohibited or otherwise subject to regulation under this section"); *see also* Theis, *supra* note 45, at 28-31 (discussing the amendments and their affects on traditional practices).

67. *Id.* § 1344(f)(2) (requiring a permit for "[a]ny discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section").

68. *Id.* § 1344(e) ("the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary 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").

69. *Id.* § 1344(g)(1)("[t]he Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters . . . within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact").

70. *See* Michigan Department of Natural Resources Section 404 Permit Program Approval, 49 Fed. Reg. 38,947 (Envtl. Prot. Agency Oct. 2, 1984); New Jersey Department of Environmental Protection and Energy Section 404 Permit Program Approval, 59 Fed. Reg. 9933 (Envtl. Prot. Agency Mar. 2, 1994); *State or Tribal Assumption of the Section 404 Permit Program* , U.S. ENVTL. PROT.

amending section 404 in 1977, Congress explicitly endorsed jurisdiction beyond the traditionally navigable waters scope in the Rivers and Harbors Act and, for the first time, expressly included wetlands in the jurisdictional definition.[71]

Although the 1977 amendments reaffirmed Congress' intent to assert broad federal jurisdiction, EPA and the Corps continued to clash over the implementation of the program, particularly the scope of the waters subject to regulations.[72] These disagreements led the Corps, through the Secretary of the Army, to request a legal opinion from the Attorney General concerning which agency had final authority to determine whether a discharge was subject to section 404 permit jurisdiction.[73] In 1979, the Attorney General concluded that EPA had final authority over CWA jurisdictional questions.[74]

In response to the 1977 amendments, EPA promulgated new section 404(b)(1) guidelines in 1980, which emphasized protecting wetlands and expanded the regulation to protect ecological functions.[75] The guidelines stressed that they were

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AGENCY, http://water.epa.gov/type/wetlands/outreach/fact23.cfm (last visited Apr. 22, 2015).

71. *See* 33 U.S.C. § 1344(g) (defining "navigable waters" as "including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto").

72. VILEISIS, *supra* note 64, at 264.

73. *See* Blumm & Zaleha, *supra* note 33, at 709.

74. *See* Benjamin R. Civiletti, *Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act*, 43 OP. ATT'Y. GEN. 197, 197-202 (1979), *available at* http://water.epa.gov/lawsregs/lawsguidance/cwa/wetlands/upload/1979-civiletti-memorandum.pdf.

75. *See* Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 45 Fed. Reg. 85,336, 85,336-57 (Envtl. Prot. Agency Dec. 24, 1980) (codified at 40 C.F.R. **§** 230 (1980)). EPA originally proposed 404(b)(1) guidelines on May 6, 1975. *See* Navigable Waters: Discharge of Dredged or Fill Material, 40 Fed. Reg. 19,794, 19,796-98 (proposed May 6, 1975) (codified at 40 C.F.R. § 230 (1976)). The purpose of the new guidelines removed the Corps' consideration of the "economic impact on navigation," *see* 40 C.F.R. § 230.1 (1976), and included that "[t]he guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources." 40 C.F.R. § 230.1 (1980). Special aquatic sites are identified in the regulations as geographic areas with "special ecological characteristics" such as productivity, habitat, or wildlife that contribute to environmental health. 40 C.F.R. § 230.3(q-1) (1980).

regulatory in nature, and therefore binding on the Corps.[76] However, section 404's path has oscillated since the 1980's, as the Corps has interpreted the guidelines in light of the priorities of different presidential administrations. [77] The Corps and EPA reached three agreements in 1989 and 1990, resolving questions relating to jurisdiction, enforcement, and mitigation.[78] However, the tension between the Corps and EPA continued to be strained over the years.[79]

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76. *See* Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 45 Fed. Reg. at 85,336.

77. *See* Alyson C. Flournoy, *Section 404 at Thirty-Something: A Program in Search of a Policy*, 55 ALA. L. REV. 607, 611-13 (2004) (discussing the changes in policies associated with different administrations and their implications on the Corps' and EPA). The effect of the changing administrations through the 1980s was discussed in some detail in Blumm & Zaleha, *supra* note 33, at 711-13.

78. *See Memorandum of Agreement between the Department of the Army and the Environmental Protection Agency Concerning Determination of Mitigation under the Clean Water Act section 404(b)(1)*, 20 Envtl. L. Rep. (Envtl. Law Inst.) 35,223 (Feb. 6, 1990); *Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act*, 19 Envtl. L. Rep. (Envtl. L. Inst.) 35,183 (Jan. 19, 1989); *Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions under Section 404(f) of the Clean Water Act*, 19 Envtl. L. Rep. (Envtl. L. Inst.) 35,181 (Jan. 19, 1989). That jurisdictional agreement is still used by EPA and the Corps. For example since 2009 different groups have argued over the development of salt ponds on the San Francisco Bay. EPA and the Corps have worked together to determine if the land in question falls under the CWA's jurisdiction. EPA is currently investigating the jurisdictional question and will announce an answer next year. *See* Rachel Myrow, *EPA Steps into Redwood City's Salt Pond Development Battle*, KQED NEWS (Mar. 20, 2015), http://ww2.kqed.org/news/2015/03/20/epa-steps-into-redwood-citys-salt-pond-development-battle.). *See also* Babcock, *supra* note 13, at 328-40 (discussing the implications and debate surrounding the February 1990 mitigation memorandum).

79. *See* Flournoy, *supra* note 77, at 612-14. The political tensions surrounding section 404 and wetland protection continued through the 1980s and into the 1990s. *Id.* at 612-13. Congress enacted several programs that continued to promote the protection of wetlands, including the Swampbuster program in 1985, which prohibited subsidies to farmers who filled wetlands. *See* 16 U.S.C. § 3821(d) (2012). Congress also created the Wetlands Reserve Program in 1990 to authorize creation of wetland conservation easements. *See* 7 U.S.C. § 1985(g) (2014). The agencies promulgated delineation manuals to assist people in determining what qualified as a wetland. For example, the Corps'

Despite the continuous controversy over implementation of the section 404 program over the years, and though the Corps continues to approve the vast majority of permit applications it receives,[80] the program has undoubtedly slowed the destruction of wetlands.[81] Similarly, although EPA has the authority to veto any of the permits issued by the Corps,[82] the agency has used its section 404(c) authority sparsely, issuing only thirteen vetoes in over four decades.[83]

1987 delineation manual used vegetation, soil, and hydrology to identify wetlands. *See* ENVTL. LAB., WETLANDS RESEARCH PROGRAM TECHNICAL REPORT Y-87-1: CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL 12-28 (1987), *available at* http://www.cpe.rutgers.edu/ Wetlands/1987-Army-Corps-Wetlands-Delineation-Manual.pdf. In 1989, the concerned agencies published an interagency federal manual calling for a uniform approach to identifying and delineating jurisdictional wetlands. *See* U.S. ARMY CORPS OF ENG'RS, U.S. ENVTL. PROT. AGENCY, U.S. FISH & WILDLIFE SERVICE & U.S. DEP'T OF AGRIC. SOIL CONSERV. SERV., FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS (1989). In 1992, President Bush signed a law prohibiting the Corps from using the 1989 manual and requiring the Corps instead to continue to use the 1987 manual. *See* Theis, *supra* note 45, at 21-22. The 1987 manual allowed the agencies to determine section 404 jurisdiction, in particular, encouraging the Corps to exclude a large amount of wetlands from section 404 jurisdiction. *See id.* at 22-23.

80. *See* Oliver A. Houck, *Hard Choices: The Analysis of Alternatives Under Section 404 of the Clean Water Act and Similar Environmental Laws,* 60 U. COLO. L. REV. 773, 787-88 (1989) (discussing the number of individual permit applications the Corps receives in a fiscal year for 1980 and 1987 and claiming that during those years the Corps approved approximately 92% of permit applications). For example, in fiscal year 2002, the Corps denied only .25% of permit applications—just 128 denials of 81,302 permit applications. *See* Kim Diana Connolly, *Shifting Interests: Rethinking the U.S. Army Corps of Engineers Permitting Process and Public Interest Review in Light of Hurricanes Katrina and Rita*, 32 THURGOOD MARSHALL L. REV. 109, 114, n.33 (2006). Similarly, in 2003, the Corps denied 299 permit applications of the 86,177 submitted—or 0.35%—although that included applications for activities authorized by both general and individual permits. *See id.* In 2013, the Corps considered 3,723 individual permit applications, of which it denied 60 applications, or 1.61% of the total. *See Final Individual Permits,* U.S. ARMY CORPS OF ENG'RS, http://geo.usace.army.mil/egis/f?p=340:2:0::NO:RP:: (last visited Apr. 22, 2015).

81. *See* Babcock, *supra* note 13, at 314.

82. *See infra* Part II.B.

83. *See infra* Part III.

II.

THE SECTION 404 PERMIT PROGRAM

This section discusses section 404's two major components. First, the section 404(b)(1) guidelines, "developed by the Administrator, in conjunction with the Secretary,"[84] provide substantive environmental criteria that the Corps must use to evaluate permit applications.[85] Second, the section 404(c) regulations authorize EPA to "prohibit the specification of any defined site as a disposal site . . . [or] deny or restrict the use of any defined area for specification" if the proposed discharge at that site "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . wildlife, or recreational areas."[86]

The Corps' regulations establish the process for considering section 404 permit applications.[87] Permits may be issued on a case-by-case basis (individual permits) for proposed discharges, or on a nationwide or regional basis (general permits) for authorizing the discharge of certain activities that have only minor individual and cumulative adverse effects.[88] General permits constitute the majority of permitted activities. Only five percent of annual permits issued are individual permits,[89] but all

84. 33 U.S.C. § 1344(b)(1) (2014).

85. For discussion on the substantive requirements of the section 404(b)(1) guidelines, *see infra* Part II.A.

86. 33 U.S.C. § 1344(c).

87. *See* 33 C.F.R. §§ 320-332 (2014).

88. 33 C.F.R. § 323.2(g)-(h); *see also* 33 U.S.C. § 1344. Nationwide permits are required to be reissued every five years. 33 U.S.C. § 1344(e)(2). As of 2012, the Corps had authorized 50 general permits, 48 were reissued and two were new permits. Reissuance of Nationwide Permits, 77 Fed. Reg. 10,184, 10,184 (Army Corps of Eng'rs Feb. 21, 2012). In 2012, the Corps estimated that there were approximately 40,000 reported activities authorized by nationwide permits and an estimated 30,000 activities that the Corps does not require reporting on. *Nationwide Permit Reissuance*, U.S. Army Corps of Eng'rs (Feb. 15, 2012), http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/NWP2012_factsheet_15feb2012.pdf. For a detailed discussion on the criteria for issuing permits, use of nationwide general permits, and state general permits, see Steven G. Davison, *General Permits Under Section 404 of the Clean Water Act*, 26 PACE ENVTL. L. REV. 35 (2009).

89. In fiscal year 2003 86,177 permits were processed and only 4,035 were individual permits, which require a case-by-case analysis. *See* Connolly, *supra*

of EPA's section 404(c) actions have concerned individual permits.

In order to fulfill the CWA's purpose of maintaining the "chemical, physical, and biological integrity of the Nation's waters,"[90] an individual permit applicant must prepare a section 404(b)(1) analysis for the Corps.[91] The Corps analyzes a permit application using two criteria established by its regulations: the section 404(b)(1) guidelines and a public interest review.[92] The Corps must deny a permit if it fails either the public interest review or the section 404(b)(1) guidelines.[93]

The Corps considers the public interest review to be a balancing process in which the agency considers all factors relevant to the proposal, including the project's cumulative effects.[94] In the Corps' consideration of the public interest review, the agency's regulations list the following factors:

> [C]onservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in

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note 80, at 114-15, n.37.

90. 33 U.S.C. § 1251(a).

91. *See* Jon Schutz, *The Steepest Hurdle in Obtaining a Clean Water Act Section 404 Permit: Complying with EPA's 404(b)(1) Guidelines' Least Environmentally Damaging Practicable Alternative Requirement*, 24, UCLA J. ENVT'L L. & POLY. 237 (2006) (discussing the analysis required by a 404(b)(1) permit applicant); U.S. ENVTL. PROT. AGENCY & U.S. ARMY CORPS OF ENG'RS, MEMORANDUM TO THE FIELD: APPROPRIATE LEVEL OF ANALYSIS REQUIRED FOR EVALUATING COMPLIANCE WITH THE SECTION 404(B)(1) GUIDELINES ALTERNATIVES REQUIREMENTS 2-3 (Aug. 23, 1993).

92. *See* 33 C.F.R. § 320.4(a)(1) (requiring a public interest review for all applications for Department of the Army permits and stating that a permit will be denied if it does not comply with the 404(b)(1) guidelines).

93. *Id.* § 320.4(a)(1), (b)(4). Even if a project passes one of the two criteria, the Corps must not issue a permit if a project fails either the section 404(b)(1) guidelines or the public interest review. *See* 40 C.F.R. § 230.10 (2015) (noting that because of the applicability of other laws and regulations, "a discharge complying with the requirement of these Guidelines will not automatically receive a permit.").

94. 33 C.F.R. § 320.4(a)(1).

general, the needs and welfare of the people.[95]

The agency considers the public interest review to be an essential protection of the Corps' regulatory program, because it allows the agency to consider all factors and not just rely on any one specific factor, such as economic benefits.[96] However, the Corps retains a great deal of discretion in evaluating the importance and relevance of the factors when conducting a public interest review.[97] Although the Corps can use the public interest review to deny a permit, the section 404(b)(1) guidelines set forth specific considerations the Corps must follow in evaluating a permit and, under section 404(c), EPA has the authority to review the permit and modify it if the agency so chooses.[98]

A. *The Section 404(b)(1) Guidelines*

The section 404(b)(1) guidelines are the substantive criteria with which a project must comply to qualify for a section 404 permit. The guidelines aim to "restore and maintain the chemical, physical, and biological integrity of waters of the United States through the control of discharges of dredged or fill

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95. *Id.*

96. *See, e.g.*, Connolly, *supra* note 80, at 115-16 (discussing the Corps' characterization of the public interest review as an important safeguard).

97. *See* 33 C.F.R. § 320.4(a)(3) (stating that each factor's weight is "determined by its importance and relevance to the particular proposal. Accordingly, how important a factor is and how much consideration it deserves will vary with each proposal. A specific factor may be given great weight on one proposal, while it may not be present or as important on another."). The agency will have deference in its public interest evaluation unless it is determined to be "arbitrary and capricious," and therefore the ability of EPA to review the validity of a public interest review is questionable. *See* Megan Bierlein, *Minding the Public Interest: How the Not-So-Effective Standard has Led to the Destruction of Wetlands in Louisiana,* 24 PACE ENVTL. L. REV. 211, 234 (2007) (concluding that the Corps' inconsistent application of the public interest standard has led to the destruction of wetlands both in Louisiana and across the United States); *see also* Connolly, *supra* note 80, at 121-24 (discussing the Corps' use of the public interest review in issuing permits that resulted in the loss of wetlands which contributed to the devastation on the Gulf Coast following hurricanes Katrina and Rita and therefore had not protected the public interest).

98. *See infra* Part II.A-B.

material."[99] The agencies established four basic requirements to determine if a proposed discharge would comply with the section 404(b)(1) guidelines. First, there must not be a "practicable alternative to the proposed discharge" that would have less negative effects on the aquatic system without having other adverse environmental consequences.[100] Practicable alternatives may be an activity with no discharge of dredged or fill material or discharge at a different location.[101] Further, when considering whether an alternative is practicable, the Corps must consider the goals of the proposed project as well as the costs, existing technologies, and logistics of achieving those goals using the alternative.[102] Second, the guidelines forbid discharges that violate either state water quality standards or toxic effluent standards, jeopardize endangered or threatened species, or threaten marine sanctuaries.[103] Third, section 404(b)(1) guidelines prohibit section 404 permits that authorize discharges that would "cause or contribute to significant degradation of the waters of the United States."[104] Significant adverse effects include possible impacts on human health, aquatic sites, wildlife, aquatic life, fish and wildlife habitat, and the capability of wetlands to assimilate nutrients, and provide recreational, aesthetic, and economic benefits.[105] Fourth, the guidelines require that a permitted discharge ensures that all "appropriate and practicable steps have been taken to minimize potential adverse impacts."[106]

Often the second requirement—that a project must not have practicable alternatives—often the "steepest hurdle" for an

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99. 40 C.F.R. § 230.1(a). *See also* Rosalie K. Rusinko, Bersani v. EPA*: Wetlands Protection – The EPA Veto Power under the Clean Water Act*, 7 PACE ENVTL. L. REV. 375, 378-80 (1990) (discussing the role of 404(b)(1) guidelines).

100. 40 C.F.R. § 230.10(a).

101. *Id.* § 230.10(a)(1).

102. *Id.* § 230.10(a)(2) (stating that practicable alternatives include activities that do not involve discharge into the waters of the United States, considering costs, technology, and logistics).

103. *Id.* § 230.10(b).

104. *Id.* § 230.10(c).

105. *Id.* §§ 230.10(c)(1)-(4).

106. *Id.* § 230.10(d).

applicant to overcome to receive a section 404 permit.[107] The fact that a permittee does not currently own the property does not preclude it from being a reasonable alternative.[108] The regulations include an express presumption for practicable alternatives that are non-water dependent discharges into wetlands or other special aquatic sites.[109] A good deal of the controversy over section 404(b)(1) guidelines has concerned whether there are available, practicable, less damaging alternatives. The Corps generally receives deference from the courts in the agency's determination[110] so if the Corps determines that there are practicable, less damaging alternatives available, the courts have almost always upheld the agency's authority to deny a permit.[111] On the other hand, courts similarly grant the Corps deference concerning issued permits where a project resulted in loss of wetlands and where, arguably, there were practicable alternatives.[112]

The section 404(b)(1) guidelines require factual determinations of short- and long-term effects a proposed project

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107. *See* Schutz, *supra* note 91, at 235 (explaining the Corps evaluation of the least environmentally damaging practicable alternative requirement standard and suggesting that it is the "steepest hurdle" in obtaining a section 404 permit).

108. *See* 40 C.F.R. § 230.10(a)(2) (specifying that if a property could be reasonably obtained to fulfill the project's purpose, that ownership does not preclude a site as a reasonable alternative).

109. *Id.* § 230.10(a)(3).

110. Blumm & Zaleha, *supra* note 33, at 739-40.

111. *See, e.g.*, Shoreline Assocs. v. Marsh, 555 F. Supp. 169 (D. Md. 1983) *aff'd*, 725 F.2d 677 (4th Cir. 1984) (upholding the Corps' denial of a permit because of alternatives available to the developer); *but see* 1902 Atlantic Ltd. v. Hudson, 574 F. Supp. 1381 (E.D. Va. 1983) (overturning the denial of a permit due to a failure to consider socio-economic concerns).

112. *See, e.g.*, Nat'l Audubon Soc'y v. Hartz Mountain Dev. Co., 14 Envtl. L. Rep. (Envtl. Law Inst.) 20,724 (D.N.J. Oct. 24, 1983) (upholding a permit causing the loss of 127-acres of wetlands for a New Jersey development because alternatives fulfilling the project's purpose were unavailable because they lacked highway access, parking, or had impractical topography); La. Wildlife Fed'n, Inc. v. York, 761 F.2d 1044 (5th Cir. 1985) (upholding six general permit decisions by the Corps without considering alternatives, which would allow the applicant to destroy some 5,200 acres of Louisiana wetlands); Friends of the Earth v. Hintz, 800 F.2d 822 (9th Cir. 1986) (affirming the Corps' decision to permit a 17-acre fill in Washington because alternatives were either too expensive or were infeasible).

will have on the "physical, chemical, and biological components of the aquatic environment."[113] The Corps must make specific findings of compliance with the guidelines before the agency can issue a section 404 permit.[114] Although, the Corps has the sole authority to interpret the section 404(b)(1) guidelines and determine if a proposed project satisfies the 404(b) criteria.[115] EPA and federal fish and wildlife agencies participate in the section 404(b)(1) evaluative process and may raise concerns, which the Corps must "fully consider" in its decision.[116] If EPA has an alternative interpretation of the section 404(b)(1) guidelines, EPA's interpretation does not trump that of the Corps'; however, EPA can ask the Corps to reconsider or elevate a permit under 404(q) appeal procedures or, as a last resort, veto the Corps' permit under section 404(c).[117]

Before invoking 404(c) procedures, EPA can request a 404(q) elevation based on the statutorily required agency cooperation[118] and a Memorandum of Agreement (MOA) between EPA and the Corps.[119] Under the MOA, EPA Regional Administrators may

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113. 40 C.F.R. § 230.11.

114. *Id.* § 230.12.

115. Memorandum of Agreement Between the Envtl Prot. Agency and the Dep't of the Army, at 1-3 (Aug. 11, 1992) [hereinafter EPA and Army MOA Aug. 1992] (agreeing that under Section 10, Section 404(a), and Section 103 the Corps has the authority to "act as the project manager for the evaluation of all permit applications.").

116. *See* Schutz, *supra* note 91, at 238-39 (discussing Memorandum of Agreements between the Corps and other federal agencies regarding section 404(b)(1) guidelines and suggesting that EPA should be involved throughout the permit process to resolve issues before the Corps issues the permit).

117. *See* 33 U.S.C. § 1344(r) (2014) (allowing federal agencies to request the elevation of permits within the Corps); EPA and Army MOA Aug. 1992, *supra* note 115; 33 C.F.R. § 325.8 (2015) (explaining the authority of the Secretary of the Army to authorize permits under section 404); Memorandum of Agreement Between the Dep't of the Army and the Envtl. Prot. Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act (Jan. 19, 1989) [hereinafter Jurisdiction MOA]; Blumm & Zaleha, *supra* note 33, at 738 (discussing the jurisdiction memorandum of agreement).

118. 33 U.S.C. § 1344(q) (requiring the Administrator of EPA and the heads of other appropriate federal agencies to enter into agreements to "minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section.").

119. *See* EPA and Army MOA Aug. 1992, *supra* note 115, EPA and the

request reviews of individual permit decisions by Corps District Engineers.[120] If the Regional Administrator and District Engineer cannot reach resolution, the Regional Administrator can "elevate" the review to EPA and Corps headquarters'.[121] FWS has a similar Memorandum of Agreement with the Corps, establishing methods by which FWS can elevate permits involving projects to the Corps headquarters that may have "substantial and unacceptable impact on aquatic resources of national importance."[122] The Corps can deny elevation of a request by either the FWS or EPA if the Corps determines that it is not an aquatic resource of national importance, or that there will not be unacceptable adverse environmental effects.[123]

B. *The Section 404(c) "Veto" Regulations*

Section 404(c) authorizes EPA to veto permits when the authorized activity would have "unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife or recreational areas."[124] Before invoking 404(c) procedures, section 404(c)

Corps terminated a previous MOA from November 1985 that originally created the 404(q) elevation process and established the methods other agencies could use to request reconsideration by the Secretary. *Id.* at 3. The 1992 MOA contained new procedures concerning the administrative elevation of both policy issues and individual permit decisions. *Id.* at 5-10.

120. *Id.* at 8.

121. *Id.* at 9. Specifically, the elevated permit would go to the Assistant Administrator in charge of water. *Id.* The Assistant Administrator can request that the Assistant Secretary of the Army for Civil Works review the permit decision, but the latter may ultimately determine if the District Engineer's decision was proper. *Id.* In situations where EPA and the Corps cannot resolve a permit decision at the field level, the Corps must notify EPA and consider any EPA comments. *Id.* at 5-6. The Corps must provide EPA with the Statement of Findings/Record of Decision after a determination is complete to allow EPA to deciding if pursuing a 404(c) veto is appropriate. *Id.* at 9.

122. *See* Memorandum of Agreement Between the Dep't of the Interior and the Dep't of the Army, at 7-10 (Dec. 21, 1992). The MOA established the use of interagency actions including consultations with prospective applicants, site visits, meetings with applicants, and site surveys to " 'minimize, to the maximum extent practicable, duplication, needless paperwork and delays in the insurances of permits.' " *Id.* at 1 (citing 33 U.S.C. 1344(q)).

123. *Id.*; EPA and Army MOA Aug. 1992, *supra* note 115.

124. 33 U.S.C. § 1344(c) (2012) (granting EPA the authority to "prohibit the

requires EPA to consult with the Corps and publicly explain its reasoning for invoking the veto.[125] EPA must publish 404(c) decisions in the Federal Register.[126]

III.
THE INITIAL ELEVEN SECTION 404(C) VETOES: 1981-1990

EPA has used its section 404(c) authority only thirteen times since Congress created it over forty years ago. The agency issued eleven vetoes between 1981 and 1990, and then did not issue

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specification (including the withdrawal of specification) of any defined area as a disposal site, and . . . to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site").

125. *Id.* Section 404(c)'s regulations require EPA to notify the Corps, the site owner, and the applicant of the intent to invoke 404(c) procedures, by issuing a public notice of a proposal to withdraw, prohibit, or restrict a permit, which is followed by a public comment period. *See* 40 C.F.R. § 231.3(a)(1) (2012). Within fifteen days of party notification, if no one has successfully demonstrated that no adverse effects would occur, EPA must publish notice of a proposed veto. *Id.* § 231.3(a)(2). Next, EPA must publish notice of proposed determination in the Federal Register, which serves as public notice and allows for public comment. *Id.* § 231.3(b). A public comment period follows, lasting between thirty and sixty days, with the possibility of a public hearing. *Id.* § 231.4(a). The public notice must include EPA's proposal, the facts, the location of the site and its characteristics, the nature of the discharge, the permit applicant's identity, the public hearing procedures, EPA's contact information, and other information that EPA considers necessary. *Id.* § 231.3(b)(1)-(7). After the comment period, the Regional Administrator must withdraw the proposed modification or prepare a recommended determination on action, including a summary of the adverse effects from discharge at the proposed site. *Id.* § 231.5(a)-(c). EPA must complete the proposed determination within fifteen days of the close of the comment period and send the recommended determination and the record to EPA's Assistant Administrator for Water and Waste Management. *Id.* § 231.5(a)-(b). The Assistant Administrator must then contact the Corps and the applicant, who have fifteen days to respond with any intent to take corrective action to prevent the unacceptable adverse effects. *Id.* § 231.6. Within sixty days of receiving the recommendation, the Administrator must make a final determination on the recommendation. *Id.* The Administrator then must review the proposed determination and any corrective action proposed either by the Corps or the applicant and issue a final determination. *Id.* § 231.6. The Administrator's final determination must be made within 60 days of receiving the proposed determination. *Id.* Within 30 days of receiving the proposed determination, the Administrator must consult with the Corps and the applicant who then have 15 days to notify the Administrator of "their intent to take corrective action to prevent an unacceptable adverse effect." *Id.*

126. 40 C.F.R. § 231.6.

another veto until 2008.[127] The two vetoes since 2008 are still embroiled in controversy, and a third EPA proposed veto—concerning the proposed Pebble Mine in Alaska—looms in 2015.[128] This section examines the first eleven vetoes, all issued in the decade between 1981 and 1990, focusing on the ecological significance of the sites, the Corps' decision to issue the section 404 permits, EPA's reasoning for issuing the permit vetoes, and any ensuing litigation.

EPA issued all eleven vetoes on grounds that the permitted project would have unacceptable adverse effects on the environment. EPA also based four of the vetoes on the grounds that practicable alternatives existed that would have fulfilled the project's goals.[129] The proposed projects were located in ten different states, ranged in size from thirty-two to 7,600 acres of land, and proposed to destroy or otherwise adversely affect between thirty-two and 3,000 acres of wetlands.[130] EPA exercised one veto after the Corps issued the permit, the North Miami Landfill, and only after the company had applied for a revised permit.[131] One permit was an after-the-fact permit (meaning that the discharge had already occurred),[132] and in one the agency took action before the landowner even applied for a permit.[133] A court remanded one permit which, on reconsideration, EPA vetoed,[134] and one EPA vetoed one permit after the landowner withdrew its permit application.[135]

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127. *See infra* Parts III.A-K, IV.

128. *See infra* Parts IV.A-C.

129. EPA initially vetoed a fifth permit—Ware Creek—on the grounds that practicable alternatives were available, but the courts did not agree that the record supported that determination. *See infra* notes 300-04 and accompanying text. However EPA successfully perused that veto based on solely unacceptable adverse environmental affects. *See infra* notes 306-13 and accompanying text.

130. The Norden Paper Company modified its permit application to propose filling only twenty-five acres. *See infra* note 166 and accompanying text.

131. *See infra* notes 147-55 and accompanying text.

132. *See infra* notes 241, 250 and accompanying text.

133. *See infra* notes 262-64 and accompanying text. The Henry Rem action included three separate permits only one of which the Corps had proposed issuing a 404 permit. The landowner at one site had not applied for a permit yet when EPA stepped in with the 404(c) action.

134. *See infra* notes 305-07 and accompanying text.

135. *See infra* notes 329-30 and accompanying text. In nine of the projects,

EPA requested section 404(q) elevation in seven of these controversies, and the Corps considered a permit elevation independent from a request from EPA for an eighth permit. The Corps denied elevation in all but one situation, which the Corps only partially accepted.[136] Notably, in two of the section 404(c) actions, the Corps' division engineer recommended permit denial, but the division overruled the district engineer.[137] In one case, the Corps initially denied the permit, but a court forced the Corps to issue the permit; however, EPA's subsequent 404(c) prohibited the permit's issuance.[138] Unsurprisingly, given the controversy surrounding EPA's oversight authority, applicants litigated six of the proposed permits: two in state court, three in federal court, and one in both.[139] In all of the cases, the courts upheld EPA's veto.

A. *The North Miami Landfill: Protecting Mobile River and Bay (1981)*

The first section 404(c) veto issued by EPA concerned a permit that authorized the filling of 103 acres of wetlands at a 291-acre site in southern Florida.[140] The site is separated by 2,000 feet of mangroves from Biscayne Bay,[141] a frequently used recreational area and important habitat for many species of fish and wildlife—including two endangered species, the eastern brown

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the Corps issued notice that it intended to issue the permit before EPA instituted the section 404(c) action. *See infra* notes 168, 190, 206, 227, 244, 260, 286, 297, 342 and accompanying text.

136. *See infra* note 261 and accompanying text.

137. *See infra* notes 168, 226-27 and accompanying text.

138. *See infra* notes 207-12 and accompanying text.

139. *See infra* notes 208-12, 233-36, 249-51, 288-89, 301-13, 346-48 and accompanying text.

140. US. ENVTL. PROT. AGENCY, FINAL DETERMINATION OF THE ADMINISTRATOR CONCERNING THE NORTH MIAMI LANDFILL SITE PURSUANT TO SECTION 404(C) OF THE CLEAN WATER ACT 1-2 (Jan. 19, 1981) [hereinafter MIAMI EPA FINAL DETERMINATION], *summarized in* 46 Fed. Reg. 10,203 (Envtl. Prot. Agency Feb. 2, 1981).

141. *See Munisport Landfill*, FLA. DEP'T OF ENVTL. PROT., at 1, http://www.dep.state.fl.us/waste/quick_topics/publications/wc/sites/summary/019.pdf (last visited Apr. 22, 2015) [hereinafter FLA. DEP'T OF ENVTL. PROT.].

pelican and West Indian manatee.[142] The land is also located above the Biscayne Aquifer, and the groundwater typically flows towards the Biscayne Bay.[143]

In 1970, the city of North Miami leased 291 acres to Munisport Inc. for the construction of a recreational facility, including a golf course, tennis courts, and a clubhouse.[144] Munisport amended the lease in 1974 to instead operate a landfill on the property,[145] began accepting solid waste, and applied for a 404 permit.[146] In 1976, the Corps issued a joint section 404 and section 10 permit that authorized the discharge of clean fill on the property,[147] which EPA did not oppose.[148] That permit required the preservation of 8.2 acres of mangroves on the site and the creation of three tidal ponds.[149] In 1977, Munisport requested a revised permit to allow discharge of solid waste for fill, authorize the destruction of the 8.2 acres mangrove preserve, and eliminate the three tidal pools.[150]

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142. MIAMI EPA FINAL DETERMINATION, *supra* note 140, at 10.

143. FLA. DEP'T OF ENVTL. PROT., *supra* note 141, at 1-2.

144. Blasland, Bouck & Lee, Inc. v. City of N. Miami, 283 F.3d 1286, 1289 (11th Cir. 2002); Dep't of the Army, Permit No. 75B-0869 (Mar. 15, 1976) [hereinafter Permit 75B-0869] (on file with authors).

145. *See Blasland*, 283 F.3d at 1289.

146. *See* FLA. DEP'T OF ENVTL. PROT., *supra* note 141, at 1; *see also* City of N. Miami v. Berger, 828 F. Supp. 401, 405 (E.D. Va. 1993). Munisport also applied for other permits—including state environmental permits—necessary to operate a landfill. *Id.*

147. MIAMI EPA FINAL DETERMINATION, *supra* note 140, at 2. The Corps' permit did not reference the use of solid waste as a fill material. *Id.* The permit only authorized the "fill [of] 291 acres . . . for the development of a public recreational facility." Permit 75B-0869, *supra* note 144,at 1.

148. MIAMI EPA FINAL DETERMINATION, *supra* note 140, at 2.

149. *Id.*

150. *Id.* at 2-3. *See also* Letter from Thomas Checca, Post, Buckley, Schuh & Jerigan, Inc., to Bertil Heimer, Regulatory Branch, Jacksonville District, Dep't of the Army, Corps of Eng'rs (Mar. 9, 1977) (on file with authors) (purporting on behalf of the development company that the loss of the mangrove acres was necessary to protect the remaining land from contamination from the landfill and that the use of clean fill made the project economically feasible while the use of purchased fill material was untenable); Application by City of N. Miami for a Permit from the Dep't of the Army, No. 77B-0376 (Mar. 3, 1977) (on file with authors).

EPA opposed the revised permit for filling the wetlands with solid waste,[151] but the Corps notified EPA of its intent to issue an amended permit.[152] In part, the Assistant Secretary of the Army asserted that the permit would protect the environment because it would require bonding, which would provide funding for site cleanup if that became necessary in the future.[153] EPA responded by initiating action under section 404(c), and issued its first veto in 1981,[154] concluding that the proposed discharge would have "unacceptable adverse effects on shellfish and fishery areas, wildlife, and recreational areas of Biscayne Bay, adjacent wetlands and lakes within the site."[155] Before EPA issued the

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151. *See* MIAMI EPA FINAL DETERMINATION, supra note 140, at 3. After, the Corps issued a public notice of the permit modification, EPA responded with four letters to the District Engineer objecting to the permit. *See* North Miami Landfill, 45 Fed. Reg. 51,275, 51,276 (Envtl. Prot. Agency Aug. 1, 1980) (proposed determination). EPA and the Corps could not resolve the permit at the district level, and EPA sent a letter to the South Atlantic Division Engineer of the Corps objecting to issuance of the permit and a letter to Deputy Director of Civil Works and to the Assistant Secretary of the Army. *Id.*

152. *See* Letter from Michael Blomenfeld, Assistant Secretary, Dep't of the Army, to Barbara Blum, Deputy Administrator, Envtl. Prot. Agency (June 18, 1990) [hereinafter Miami Assistant Secretary Letter] (on file with authors). The Assistant Secretary carefully differentiated this decision from a general policy decision to use wetlands as garbage disposal sites. *Id.* He concluded that "wetlands should generally not be used as sanitary landfill sites." *Id.*

153. *Id.* The Assistant Secretary was concerned that without the permit nothing prevented the company from abandoning the site without cleaning up the waste. *Id.*

154. *See* MIAMI EPA FINAL DETERMINATION, supra note 140.

155. *Id.* at 1. EPA expressed concern about adverse effects from present and future leaching of toxic chemicals—specifically ammonia—into lakes, adjacent wetlands, the water table, and Biscayne Bay. *Id.* at 5-10. At the time the agencies were reviewing the permit, Munisport had already filled 60 acres of wetlands with solid waste, and the landfill had neither a liner nor a leachate-control mechanism. *See Florida NPL/NPL Caliber Cleanup Site Summaries: Munisport Landfill*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/superfund/sites/nplfs/fs0400769.pdf (last visited Apr. 22, 2015) [hereinafter *Florida NPL Munisport Site Summary*].

In deciding to issue the permit, the Assistant Secretary reasoned that the Corps' test wells had detected no leachate in the landfill's four years of operation. Miami Assistant Secretary Letter, *supra* note 152. However, state officials had conducted a water quality assessment of one of the lakes on the property and found five leachate streams—precipitation that is contaminated before seeping from the landfill—with ammonia contamination entering the lake. *Florida NPL Munisport Site Summary*, *supra* note 155. The Corps

veto, Munisport had dumped six million cubic yards of solid waste in the landfill.[156]

In 1983, two years after the section 404(c) veto effectively shut down the landfill, EPA placed the site on the National Priority List (NPL) under the Comprehensive Environmental Response, Compensation, and Liability Act as a significant threat to the environment.[157] In 1999, sixteen years later, EPA completed the cleanup process—including restoration of the wetlands—and removed the site from the NPL.[158] After changing the site name, the city began developing residential condominiums and, as of 2014, development was still underway, with several buildings complete.[159]

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maintained that the contamination in the lake was an isolated incident, and the permit would be contingent on adherence to state environmental standards and a bond that would protect both the state's concerns interest and provide funds if corrective work became necessary. *See* Miami Assistant Secretary Letter, *supra* note 152. EPA concluded that continued discharge would increase the ammonia contamination and would have significant adverse effects on freshwater and saltwater fish and invertebrates. MIAMI EPA FINAL DETERMINATION, *supra* note 140, at 8.

156. *Florida NPL Munisport Site Summary*, *supra* note 155. It seems likely that the agencies considered the past discharge to be legal discharge under the original permit.

157. *See* Amendment to National Oil and Hazardous Substance Contingency Plan; National Priorities List, 48 Fed. Reg. 40,658, 40,673 (Envtl. Prot. Agency Sept. 8, 1983) (listing the Munisport Landfill as having a response status of "D" for "actions to be determined"). In 1976, EPA discovered at least 12 drums of hazardous waste at the site. *See* Fla. Dep't of Health and Human Servs., *Public Health Assessment of Munisport Landfill: Environmental Contaminations and Other Hazards*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY (Jan. 28, 1993), http://www.atsdr.cdc.gov/hac/pha/PHA.asp?docid=204&pg=2 (last visited Apr. 22, 2015).

158. Throughout the 1990s, EPA tested the North Miami Landfill to determine the extent of pollutants and implemented a four-phase cleanup process, including tidal restoration, construction of hydraulic barrier recovery wells, monitoring of water and toxicity after restoration. *Florida NPL Munisport Site Summary*, *supra* note 155. Miami-Dade County gave the City of North Miami funding to complete the closure and underlying groundwater contamination at the landfill. *See* U.S. Envtl. Prot. Agency, *Munisport Landfill*, REGION 4: SUPERFUND SITES, http://www.epa.gov/region4/superfund/sites/npl/florida/munptlffl.html#location (last visited Apr. 22, 2015).

159. *See* Curtis Morgan & Amy Driscoll, *Condo Tries to Bury Its Past Life as a Dump*, MIAMI HERALD (June 16, 2007), *available at* http://www.redorbit.com/news/science/969822/condo_tries_to_bury_its_past_life_as_a_dump/; *see also One Fifty One at Biscayne*, BISCAYNE LANDING, http://www.biscayne

B. *The Norden Waste Storage and Recycling Site: Protecting the Mobile River and Bay (1984)*

In 1984, EPA issued its second section 404(c) veto at a recycling and storage site near Mobile, Alabama.[160] Three Mile Creek and One Mile Creek border the site and are tributaries of the Mobile River, which flows into Mobile Bay.[161] The site had diverse vegetation, which EPA described as a "forested swamp/shrub swamp/marsh wetland complex."[162] It was also a productive wetland, contributing to the fish and shellfish communities of the Mobile Bay estuary, providing valuable habitat for wildlife, and filtering pollutants from storm water runoff from nearby industrial and residential development and discharges from a near municipal treatment plant.[163]

In August 1980, Norden Paper Company applied to the Corps for a section 404 permit to fill sixty-five acres, including fifty-five acres of wetlands, to build the recycling facility.[164] EPA, FWS,

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landingmiami.com/index.html (last visited Apr. 22, 2015).

160. *See* M. A. Norden Site, 49 Fed. Reg. 29,142, 29,143 (Envtl. Prot. Agency July 18, 1984) (final determination) [hereinafter Norden Final Determination].

161. ,M. A. Norden Site, 48 Fed. Reg. 51,732 (Envtl. Prot. Agency Nov. 10, 1983) (proposed determination) [hereinafter Norden Proposed Determination]

162. ENVTL. PROT. AGENCY, FINAL DETERMINATION OF THE ADMINISTRATOR CONCERNING M. A. NORDEN SITE PURSUANT TO SECTION 404(C) OF THE CLEAN WATER ACT 5 (June 15, 1984) [hereinafter NORDEN EPA FINAL DETERMINATION].

163. *Id.* Studies conducted by EPA revealed important nutrients from the decomposition of biomass entering the Mobile River and Bay through the flooding of high tides. *Id.* at 6. FWS wildlife habitat surveys indicated that the site provided excellent habitat conditions for a diverse array of species, including waterfowl, songbirds, small mammals, and reptiles and amphibians, and notably the endangered American alligator. *Id.* at 7. EPA determined that the water quality conditions in One Mile Creek and Three Mile Creek had been degraded through storm water runoff from development and inadequately treated wastewater. *Id.* at 8. The agency considered the proposed site to be important site for water filtration and the absorption and storage of heavy metals and pesticides. *Id.* The Corps noted of that Three Mile Creek system was a nursery area for euryhaline fish and shellfish. *Id.* at 9.

164. Norden Proposed Determination, *supra* note 161, at 51,732. The Corps had tried to use Three Mile Creek swampland for disposal of dredged materials as early as 1974. *Id.* That plan was unsuccessful because the wetland substrate was unstable, and there was frequent and severe flooding by Three Mile Creek. *Id.*

and NMFS all objected to the permit, claiming that there were less damaging alternatives that did not involve loss of functioning wetlands, adverse environmental effects on fish and wildlife, or loss of water filtration and storm water storage benefits.[165] Norden responded by reducing the proposed fill area to twenty-five acres of wetlands and claiming that the company considered and rejected alternatives because they were too expensive.[166]

EPA remained opposed to the permit[167] and, although the Mobile District of the Corps initially recommended permit denial, the Corps division informed EPA of its intent to issue the permit.[168] The Corps' section 404(b)(1) analysis concluded that Three Mile Creek was not of high value to fish or shellfish because of poor water quality.[169] EPA requested review of the proposed permit by the Assistant Secretary, which he refused.[170] Consequently, EPA began section 404(c) procedures in 1983.[171] In 1984, EPA issued a section 404(c) veto prohibiting the discharge of dredged or fill materials at the site due to "unacceptable adverse effects on wildlife at the site and on

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165. *Id.* at 51,732-33.

166. *Id.* at 51,733.

167. *Id.* EPA decided that the modified proposal still did not comply with section 404(b)(1) guidelines, as Norden offered no ecological justification in response to EPA's position that development would have adverse environmental effects on fish and wildlife. *Id.*

168. *Id.* After completing the section 404(b)(1) evaluation, the Mobile District of the Corps determined that the "destruction of twenty-five acres of wetlands for a non-water dependent use was unwarranted" and recommended permit denial. *See* NORDEN EPA FINAL DETERMINATION, *supra* note 162, at 2. But Alabama Governor Fob James contacted the Corps, asking that the agency reconsider the application, and the District Engineer referred the decision to the South Atlantic Division, which directed the district to issue the permit. Memorandum from Charles R. Jeter, Region IV Reg'l Adm'r, Envtl. Prot. Agency, to William D. Ruckleshaus, Adm'r, Envtl. Prot. Agency, at 2 (Jan. 13, 1984) (on file with authors).

169. NORDEN EPA FINAL DETERMINATION, *supra* note 162, at 9-10.

170. Norden Proposed Determination, *supra* note 161, at 51,733. The Assistant Secretary suggested that a section 404(c) veto was more appropriate than a review of the division's decision by a higher authority in the Corps because the interagency disagreement was technical, not an issue of national importance. *Id.*

171. *Id.*

shellfish beds and fishery areas in Mobile River and Mobile Bay."[172]

EPA reasoned that the permit application failed to comply with the section 404(b)(1) guidelines because of anticipated unacceptable adverse effects on wildlife habitat and downstream fisheries, and because there were available alternative upland sites that would not cause those adverse effects.[173] The agency determined that the loss of twenty-five acres of ecologically valuable habitat would have unacceptable adverse effects on local wildlife population and on fish and shellfish in the Mobile River and Bay.[174]

Norden petitioned EPA for reconsideration in 1992 and again in 1993,[175] requesting a modification of the 404(c) determination to allow filling of an acre-and-a-half of wetlands within the original site for the construction of a road to access an existing adjacent upland site.[176] After considering the comments on the

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172. Norden Final Determination, *supra* note 160, at 29,142.

173. *Id.* at 29,143. EPA convened a special task force to consider the feasibility of alternative sites for the recycling and storage facility because of a significant minority unemployment problem in the area. *Id.* Although the Regional Administrator concluded that alternative sites were likely available, Norden had disagreed. *See* NORDEN EPA FINAL DETERMINATION, *supra* note 162, at 10. The special task force, including federal, state, and local representatives, evaluated all factors, including the purchase price and environmental mitigation. *See* Norden Final Determination, *supra* note 160, at 29,143; *see also* NORDEN EPA FINAL DETERMINATION, *supra* note 162, at 11. The EPA task force identified seven potential sites with comparable costs to the Norden site that were suitable for the project. *Id.* at 11-12. Norden objected to the task force's conclusion regarding the alternative sites, but the Administrator decided that the task force's conclusions were sound. *Id.* at 14.

174. NORDEN EPA FINAL DETERMINATION, *supra* note 162, at 15. The Norden site had high value for wildlife, and therefore the loss of habitat would kill or displace the animals and result in lower animal populations. *Id.* The loss in plant biomass would reduce the nutrients that were entering the Mobile River and Bay and would negatively affect estuarine food webs. *Id.* The loss of the pollution filtering would also increase the pollutants entering the creek, river, and bay. *Id.* The Administrator concluded that conditioning the permit was not adequate to avoid the adverse effects, and consequently prohibiting the permit was necessary. *Id.* at 17.

175. *See* U.S. ENVTL. PROT. AGENCY, MODIFICATION OF THE JUNE 15, 1984 M.A. NORDEN COMPANY, INC. SECTION 404(C) FINAL DETERMINATION (Aug. 29, 1994).

176. *Id.*

proposal, EPA concluded the new proposed plan would have less environmentally damaging impacts than the original project.[177] But EPA also decided that the proposed road would neither cause unacceptable adverse effects nor had less damaging, practicable alternatives available.[178] Consequently, the agency modified its section 404(c) determination in 1994 allowing the company to proceed with applying for a 404 permit.[179] The Corps subsequently issued Norden a fill permit for the road construction to the existing upland facility.

C. *The Jack Maybank Site: Saving Jehossee Island and Associated Fisheries (1985)*

In 1985, EPA issued its third 404(c) veto on a permit for the construction of two earthen dikes that would create duck hunting impoundments on 900 acres of wetlands on Jehossee Island, South Carolina, located in the Ashepoo, Combahee, and South Edisto (ACE) Basin.[180] The island, which was the antebellum South's largest rice plantation, was left mostly undeveloped following the Civil War.[181] In fact, the ACE Basin remains one of the largest undeveloped estuaries on the East Coast, furnishing important habitat for a vast array of wildlife species, including bald eagles, wood storks, ospreys, loggerhead sea turtles, and shortnose sturgeon.[182] The basin also offers numerous recreational opportunities, such as birdwatching,

177. *Id.*

178. *Id.* In reaching its decision, EPA emphasized that the project affected only 1.5 acres, and the road would maintain connectivity between the site and the Mobile Bay estuary. The agency concluded that the project would have only limited adverse environmental effects, Norden had demonstrated there were no less damaging, practicable alternatives available, and therefore the project modification was acceptable. *Id.*

179. *See* M.A. Norden Site, 59 Fed. Reg. 46,246 (Envtl. Prot. Agency Sept. 7, 1994) (modification of final determination).

180. *See* Jack Maybank Site, 50 Fed. Reg. 20,291 (Envtl. Prot. Agency May 15, 1985) (final determination) [hereinafter Maybank Final Determination].

181. ANTOINETTE T. JACKSON, SPEAKING FOR THE ENSLAVED: HERITAGE INTERPRETATION AT ANTEBELLUM PLANTATION SITES 69 (2012).

182. *See* S.C. DEP'T OF NATURAL RES., THE ACE BASIN PROJECT (2014), *available at* https://www.dnr.sc.gov/ml_images/docs/drivingace.pdf.

hunting, and kayaking.[183] The island is less than 40 miles from downtown Charleston.

In 1982, Jack Maybank, the owner of the almost 4,000-acre island,[184] applied to the Corps for two permits to construct earthen embankments to prevent tidal flooding and to create an area for waterfowl hunting and shrimp farming.[185] The dikes would destroy between twenty-two and thirty-two acres of wetlands and affect another 900 acres.[186] EPA, FWS, and NMFS all determined there would be significant adverse effects on fish and wildlife because of the alteration of the tidal wetlands.[187] FWS suggested limiting the impoundment to 160 acres to prevent the most significant adverse effects,[188] but Maybank rejected that proposed alternative.[189]

Despite the federal agency opposition, in 1984 the District Engineer notified EPA of his intent to issue the permit.[190] In

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183. *Id.*

184. *See* JACKSON, *supra* note 181, at 71 (discussing the future sale of the island by Jack Maybank's descendent David Maybank).

185. U.S. ENVTL. PROT. AGENCY, FINAL DETERMINATION OF THE ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS CONCERNING THE JACK MAYBANK SITE ON JEHOSSEE ISLAND, SOUTH CAROLINA PURSUANT TO SECTION 404(C) OF THE CLEAN WATER ACT 1-2 (Apr. 5, 1985) [hereinafter MAYBANK EPA FINAL DETERMINATION], *summarized in* 50 Fed. Reg. 20,291. Originally, the project would have encompassed 2,000 acres of wetlands, but the state refused to issue a permit because the project would block navigable streams on the island. *See* Letter from Duncan C. Newkirk, Permit Administrator, S.C. Coastal Council, to Jack Maybank (Mar. 25, 1983) (on file with authors). The Corps denied the permit application because of the denial of the state permit, in accordance with 33 C.F.R. 320.4(j), which requires the Corps to consider the denial of state permits. *See* Letter from Bernard Stalmann, District Eng'r, Corps of Eng'rs, to Jack Maybank (April 1, 1983) (on file with authors). The state issued a permit after the applicant modified the project to 900 acres and 8.9 miles of earthen dikes. MAYBANK EPA FINAL DETERMINATION, *supra* note 185, at 2.

186. MAYBANK EPA FINAL DETERMINATION, *supra* note 185, at 2-3. The exact amount of wetland destroyed would vary depending on the height of the dikes. *Id.* The proposed plan had the dikes at 3.3 feet above mean high water, although South Carolina Wildlife and Marine Resources Department determined that the dikes would have to be 4.5 feet above mean high water to protect the impoundment during storms. *Id.*

187. *Id.*

188. *Id.* at 3.

189. *Id.*

190. *Id.*

response, EPA requested section 404(q) permit elevation and initiated section 404(c) procedures.[191] The Corps rejected the request to elevate the administrative review, claiming that the dispute over the proposed permit involved a technical disagreement, not an issue of national importance.[192] After considering the ecological implications of the proposed fill, EPA issued the section 404(c) veto in 1984, denying the permit because of unacceptable adverse effects on the South Edisto River fishery and associated recreational activities.[193]

The earthen dikes were never constructed, and the Maybank family sold Jehossee Island to FWS in 1993.[194] The island is now part of the ACE Basin National Wildlife Refuge, visited by 25,000 people annually.[195] The Nature Conservancy has

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191. *Id.*

192. *Id.*

193. *See* Maybank Final Determination, *supra* note 180, at 20,291. In deciding to veto the permit, EPA determined that Maybank's report of the expected adverse environmental effects from the project was incomplete, contained incorrect assumptions concerning water exchange rates, and used an inappropriate study design; therefore, the Corps' conclusion of no significant adverse effects on the environment was unsubstantiated. *See* MAYBANK EPA FINAL DETERMINATION, *supra* note 185, at 15. EPA concluded that the project would produce seven unacceptable adverse effects: 1) impairment of nursery value, 2) diminishment of tidal exchange, 3) loss of export of marsh production, 4) negative water quality impacts, 5) loss of public recreational activities, 6) the loss of wetlands, and 7) adverse cumulative impacts associated with an additional impoundment along the South Carolina Coast. *Id.* at 16-19. Similar permits concerning 3,000 nearby acres had been denied, withdrawn, or were pending and EPA expressed concern that if the Corps granted the Maybank permit, project proponents would resubmit many of these similar permits. *Id.* at 19.

The two agencies also considered alternatives to the proposed action but could not reach a conclusion on the practicability of those alternatives. *Id.* at 11-12. EPA proposed an alternative to Maybank, but he rejected it because of its higher costs, logistical problems, and adverse environmental effects. *Id.* at 11. EPA's veto prohibited the use of dredged or fill material for dikes or other structures that would create an impoundment of the marsh. Maybank Final Determination, *supra* note 180, at 20,292. EPA Assistant Administrator for External Affairs did not find that a total prohibition was necessary, concluding that small fills could be placed without incurring significant adverse effects with appropriate permit conditions. *See* MAYBANK EPA FINAL DETERMINATION, *supra* note 185, at 20.

194. JACKSON, *supra* note 181, at 71.

195. *Id.* at 70.

designated the ACE Basin as a world-class ecosystem, and the basin is now included in the FWS North American Waterfowl Management Plan.[196]

D. *The Bayou aux Carpes Site: Protecting Barataria Bay (1985)*

EPA also issued its fourth section 404(c) veto in 1985 at a 3,200-acre flood control project ten miles south of New Orleans, Louisiana—of which 3,000 acres were wetland.[197] The site was bordered by canals to the north and to the west, by Bayou Barataria—an intracoastal waterway connecting the site to Barataria Bay—to the east and south, and by Bayou des Familles to the south.[198] A natural gas pipeline bisected the site,[199] which also included deteriorating levees that allowed water movement to connected waterways, including to the adjacent Jean Lafitte National Historical Park and Preserve.[200] Bayou aux Carpes contributes nutrients to the adjacent estuary, helps filters pollutants, provides important habitat for species of fish and wildlife, and offers public recreation opportunities that include hunting, fishing, trapping, and boating.[201]

In 1961, in coordination with the local parish, the Corps began a flood control project—the Harvey Canal–Bayou Barataria Levee Project—to construct levees, dams, and dikes at the Bayou

196. *See* S.C. DEP'T OF NATURAL RES., *supra* note 182.

197. *See* Bayou Aux Carpes Site, 50 Fed. Reg. 47,267, 47,267 (Envtl. Prot. Agency Nov. 15, 1985) (final determination) [hereinafter Carpes Final Determination]; U.S. ENVTL. PROT. AGENCY, FINAL DETERMINATION OF THE ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS CONCERNING THE BAYOU AUX CARPES SITE IN JEFFERSON PARISH, LOUISIANA PURSUANT TO SECTION 404(C) OF THE CLEAN WATER ACT 1 (1985) [hereinafter CARPES EPA FINAL DETERMINATION], *summarized in* 50 Fed. Reg. 47,267.

198. CARPES EPA FINAL DETERMINATION, *supra* note 197, at 9.

199. *Id.* at 1.

200. *Id.* at 10. The Jean Lafitte National Historical Park and Preserve includes the 23,000 acre Barataria Preserve, which provides important habitat for over 200 species of birds, alligators, mammals, and reptiles and amphibians. *Jean Lafitte National Park: Barataria Preserve*, NAT'L PARK SERV., http://www.nps.gov/jela/barataria-preserve.htm (last visited Apr. 22, 2015).

201. CARPES EPA FINAL DETERMINATION, *supra* note 197, at 11.

aux Carpes site.[202] The Corps approved the plan in 1964, completed an environmental impact statement (EIS) in 1970, and constructed the levees by 1973, before halting construction in 1974 due to a section 404 review.[203] In 1975, the district engineer advised that the agency complete construction and install the pumping station, but EPA objected, citing unacceptable adverse effects on wildlife and recreational areas.[204] The district engineer reassessed the project in light of a field study by EPA scientists but still recommended permit approval. [205] The Deputy Director of Civil Works agreed and notified EPA that the project would proceed unless EPA invoked its section 404(c) authority.[206] However, shortly thereafter the Deputy Director reversed his position and ordered the Corps to remove the dams, use the installed floodgates only during floods, and abandon the pumping station.[207]

The Corps' decision prompted three lawsuits: the contractor filed suit against the parish for breach of contract in state court,[208] and the landowners sought to enjoin the Corps' decision

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202. U.S. ENVTL. PROT. AGENCY, CLEAN WATER ACT SECTION 404(C) EVALUATION: BAYOU AUX CARPES, LOUISIANA, pt. II, at 1 (July 1986) [hereinafter CARPES EVALUATION DETERMINATION]. A bond issue passed by voters of the local parish provided three-quarters of the funding, some $3.6 million. *See* Creppel v. Parish of Jefferson, 352 So. 2d 297, 299 (La. Ct. App. 1977).

203. CARPES EVALUATION DETERMINATION, *supra* note 202, pt. II, at 2.

204. *Id.*

205. *Id.* The study determined that, if not drained, the swamp and marshes would remain viable and continue to contribute nutrients to the estuary. *Id.* Additionally, the study emphasized the importance of maintaining the site's connection to the estuary. *Id.*, pt. II, at 3.

206. *Id.*

207. *Id.* The Deputy Director's decision may have been an attempt to prevent the adverse environmental effects without losing the flood control benefits of the project. *Id.* Although the change in the Deputy Director's decision occurred only days after the 1976 elections when President Carter (D) was elected over incumbent President Ford (R), it is impossible to say with any certainty if decision was influenced by the upcoming change in the administration. *See James Carter*, THE WHITE HOUSE, http://www.whitehouse.gov/about/presidents/jimmycarter (last visited Apr. 22, 2015).

208. CARPES EVALUATION DETERMINATION, *supra* note 202, pt. II, at 3-4. The contractor and the Parish reached a settlement agreement in 1977. *Id.*, pt. II, at 3.

in both state and federal courts.[209] The state court of appeals remanded to the lower court directing to the landowners the issuance of a preliminary injunction prohibiting the parish from using funds set aside by the bond issue election for any other purpose than the original project.[210] The federal district court upheld the Corps' decision, but the Fifth Circuit reversed and remanded to the district court to determine (1) whether the assurances of local cooperation were sufficient to complete the modified project, and (2) whether section 404 would prohibit completion of the project.[211] The district court proceeded to rule that the original project had to be completed.[212] In 1984, EPA initiated section 404(c) procedures and, in 1985, published notice of a proposed section 404(c) determination.[213] The Regional Administrator determined that the proposed discharge would

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209. *Id.*, pt. II, at 4; *see also* Creppel v. Parish of Jefferson, 352 So. 2d 297, 298 (La. Ct. App. 1977).

210. *Creppel v. Jefferson,* 352 So. 2d at 303. The court found a "clear inference" that the parish officials' decision to not pursue the pumping station resulted in the Corps' decision to modify the plan for the pumping station. *Id.* at 301, 303. The state court also issued an order that permanently enjoined the Parish from abandoning the original project. See Creppel v. U.S. Army Corps of Eng'rs, 670 F.2d 564, 571 n.10 (5th Cir. 1982) (citing Creppel v. Parish of Jefferson, No. 199-345 (La. Dist. Ct. Jan. 12, 1979), *aff'd*, 384 So. 2d 853 (La. Ct. App. 1980), *writ denied*, 392 So. 2d 689 (La. Sup. Ct. 1980)).

211. Creppel v. U.S. Army Corps of Eng'rs, 500 F. Supp. 1108, 1119 (E.D. La. 1980), *rev'd in part*, 670 F.2d 564 (5th Cir. 1982); *Creppel v. Corps of Eng'rs*, 670 F.2d at 574-75.

212. The district court subsequently determined that 1) the parish could not provide local assurances because of the state court order, and 2) EPA would not use its section 404(c) authority to stop the modified project but would veto the original project. *See* Creppel v. United States Army Corps of Eng'rs, No. 77-25, 1988 U.S. Dist. LEXIS 6361, at *7 (E.D. La. June 29, 1988). Consequently, the court ruled that the original project must be completed because it was the only project with local assurances. *Id.* at *8. But the Department of Justice filed a motion to reconsider, and the court held its ruling in abeyance for ninety days to give EPA the opportunity to determine if section 404(c) action was warranted. *See* CARPES EPA FINAL DETERMINATION, *supra* note 197, at 6. The judge required that EPA complete any section 404(c) action within nine months. *Id*

213. *See* CARPES EPA FINAL DETERMINATION, *supra* note 197, at 6-7; Both FWS and NMFS supported EPA's proposed section 404(c) action. CARPES EPA FINAL DETERMINATION, *supra* note 197, at 7. EPA extended the public comment period due to the public interest the proposal had generated. *Id.* EPA also asked for an extension of the nine-month deadline imposed by the judge, and the court extended the deadline an additional thirty days. *Id.*

have unacceptable adverse effects and recommended a veto, which EPA Headquarters issued in November 1985, due to unacceptable adverse effects from the loss of existing wetlands.[214] Although EPA prohibited the project, and the Corps abandoned it, EPA later permitted two modifications its 404(c) action, allowing fills for maintenance of the pipeline and for construction of a floodwall [215]

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214. Carpes Final Determination, *supra* note 197, at 47,267. EPA found six unacceptable adverse effects: 1) negative effects on shellfish beds and fisheries, 2) loss of wildlife habitat—specifically, for the American alligator, osprey, and the wood duck, 3) loss of water retention and pollution filtering, 4) loss of public recreational opportunities, 5) negative effects on the Jean Laffitte National Historical Park, and 6) the cumulative effect of the loss of the wetlands. CARPES EPA FINAL DETERMINATION, *supra* note 197, at 15-18. Although EPA prohibited the discharge of dredged or fill material at the site, the agency established three exceptions for: 1) discharges for the modified Harvey Canal-Bayou Barataria project, 2) discharges for the normal operation and maintenance of the pipeline, and 3) discharges for habitat enhancement. Carpes Final Determination, *supra* note 197, at 47,268. EPA clarified that any discharges for those activities would have to conform to existing Corps and EPA regulations. *Id.*

215. *See* U.S. ENVTL. PROT. AGENCY, AMENDMENT TO THE OCTOBER 16, 1985 BAYOU AUX CARPES FINAL DETERMINATION 3 (Feb. 28, 1992). In early 1992, Shell Pipe Line Corporation had petitioned EPA to allow 1) temporary discharges within the site to relocate the existing pipeline, and 2) future discharges associated with the repair and maintenance of that pipeline. *Id.* at 1. EPA concluded that the new permit would not have unacceptable adverse effects since the modification affected only 0.43 acres, the affected area would be restored upon project completion, the project was necessary for an adjacent federal hurricane protection levee, and alternative methods of pipeline relocation had failed. *Id.* at 2. Thus, in 1992, EPA amended the 1985 final determination to allow for the relocation of the pipeline and its maintenance and operation. *Id.* at 3; *see also* Bayou Aux Carpes Site, 57 Fed. Reg. 13,745 (Envtl. Prot. Agency Apr. 17, 1992) (amendment to final determination).

In 2008, EPA issued a second modification to the Corps to construct a floodwall and earthen burn to provide increased flood protection. *See* Letter from Alvin B. Lee, Dist. Commander, U.S. Army to Lawrence E. Starfield, Deputy Reg'l Adm'r, U.S. Envtl. Prot. Agency (Nov. 4, 2008) (on file with authors). The second modification resulted from the Corps proposal to construct a floodwall and earthen berm on the eastern boundary of the site as part of increased hurricane protection efforts after the damage caused by Hurricanes Katrina and Rita in 2005. Bayou Aux Carpes Site, 74 Fed. Reg. 37,219, 37,220 (Envtl. Prot. Agency July 28, 2009) (modification of final determination). EPA worked closely with the Corps to balance the need for increased flood protection with protecting ecological resources of the site, and the agencies agreed that there were no other available less environmentally damaging practicable alternatives that would achieve increased hurricane protection. *Id.* at 37,220-21.

E. *The Attleboro Mall: Upholding the Presumption Against Non-Water Dependent Uses in Sweedens Swamp (1986)*

In 1986, EPA issued its fifth section 404(c) veto, prohibiting the fill of thirty-two acres of wetlands to build a mall in Attleboro Massachusetts, the agency's first use of 404(c) outside of the South.[216] The proposed site was part of Sweedens Swamp, a 49.5-acre inland, forested wetland with seasonal flooding.[217] The surrounding land had been extensively developed for commercial and residential purposes. Consequently, Sweedens Swamp provided much of the area's last remaining habitat for bird, small mammal, and amphibian species,[218] and the Corps, EPA, and FWS all defined the swamp as excellent wildlife habitat.[219] Sweedens Swamp also provided natural flood storage,

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Consequently, EPA issued the modification to the section 404(c) final determination because it "achieve[d] a balance between the national interest in reducing overwhelming flood risks . . . while minimizing any damage" to the site. *Id.* at 37,221. The Corps agreed to develop, fund, and implement a mitigation plan—contingent on EPA's approval of the plan—to compensate for unavoidable adverse effects and develop a long-term monitoring plan. *See* U.S. ENVTL. PROT. AGENCY, MODIFICATION TO THE 1985 CLEAN WATER ACT SECTION 404(C) FINAL DETERMINATION FOR BAYOU AUX CARPES 14-15 (May 28, 2009).

216. Sweedens Swamp Site, 51 Fed. Reg. 22,977 (Envtl. Prot. Agency June 24, 1986) (final determination) [hereinafter Sweedens Final Determination]; *see also* Christine A. Klein, Bersani v. EPA*: EPA's Authority Under the Clean Water Act to Veto Section 404 Wetland-Filling Permits*, 19 ENVTL. L. 389 (1988); Rusinko, *supra* note 99 (providing a more detailed discussion of the Sweedens Swamp veto).

217. *See* Bersani v. Robichaud, 850 F.2d 36, 40 (2d Cir. 1988); U.S. ENVTL. PROT. AGENCY, FINAL DETERMINATION OF THE ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS CONCERNING THE SWEEDENS SWAMP SITE IN ATTLEBORO, MASSACHUSETTS PURSUANT TO SECTION 404(C) OF THE CLEAN WATER ACT 11 (May 13, 1986) [hereinafter SWEEDENS EPA FINAL DETERMINATION].

218. U.S. ENVTL. PROT. AGENCY, RECOMMENDATION OF THE REGIONAL ADMINISTRATOR (REGION I) CONCERNING THE SWEEDENS SWAMP SITE IN ATTLEBORO, MASSACHUSETTS PURSUANT TO SECTION 404(C) OF THE CLEAN WATER ACT 13, 18 (Mar. 4, 1986) [hereinafter SWEEDENS RECOMMENDATION].

219. *Id.* at 13. The developer, Pyramid, contended that the wetland did not function as a "true" wetland because of site degradation, but EPA determined that the hydrology, soil, and vegetation made the site a typical wetland. SWEEDENS EPA FINAL DETERMINATION, *supra* note 217, at 8. People had disturbed Sweedens Swamp through the disposal of scattered trash and debris, which affected roughly ten percent of the swamp. *Id.* at 7. But the Corps concluded that large segments of Sweedens Swamp remained isolated from those disturbances, and EPA determined that the site's habitat values had not

groundwater discharge, water quality renovation, and food-chain production.[220] EPA concluded that although the swamp was not "a unique wetland [or] habitat for endangered species," it warranted protection because of its value as a healthy functioning wetland.[221]

Pyramid, the mall developer, applied for a 404 permit to fill 32 acres with the onsite mitigation from creating onsite artificial wetlands on twenty-two acres by excavating thirteen acres of preexisting wetlands and nine upland acres.[222] In 1984, EPA and the Corps both assessed the value of the site's wildlife habitat. EPA emphasized that the section 404(b)(1) guidelines presumed the existence of a practicable alternative for a non-water

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been "significantly altered by [that] disturbance." *Id.* at 8.

220. SWEEDENS EPA FINAL DETERMINATION, *supra* note 217, at 8.

221. *Id.*

222. *Id.* at 5. EPA and FWS requested that the Corps require an individual permit, the Corps agreed, and Pyramid submitted an individual permit application. *Id.* Although the company applied for a section 404 permit in 1984, the plan to develop Sweedens Swamp as a mall was contentious before that. Two different development companies had attempted to obtain state environmental permits before a third, Pyramid Companies, finally acquired the state permit, after including mitigation in its application. *Id.* The first developer, Mugar Group, Inc., filed notice with the state and city. *See* Citizens for Responsible Envtl. Mgmt. v. Attleboro Mall, Inc., 400 Mass. 658, 661 (1987). The city of Attleboro authorized construction in 1979. *Id.* Ten citizens filed an administrative appeal to have the construction authorization reviewed by the state Department of Environmental Quality Engineering (DEQE). *Id.*

In 1982, after Attleboro Mall, Inc. acquired the property, the DEQE denied a fill permit as contrary to the state Wetlands Protection Act, MASS. GEN. LAWS ch. 131, § 40 (2012), because it would cause irreparable harm. *See Attleboro Mall*, 400 Mass. at 661. Two years later, Attleboro Mall, Inc. transferred the property to Pyramid Companies. *Id.* at 663. Pyramid also requested an adjudicatory hearing over the fill permit and submitted revised plans with increased mitigation. *Id.* In 1984, the DEQE approved the revised project, and in 1985, the hearing officer determined that the mitigation—creating 26.3 acres of artificial wetlands off-site—would compensate for the pollution filtration the project would destroy. *See id.* at 664. The citizens appealed to superior court, which held that the DEQE should not have issued the permit under the Wetlands Protection Act because the interests of the Act could only be protected by leaving the existing wetlands intact. *Id.* at 667. The DEQE appealed to the Supreme Judicial Court of Massachusetts, which reversed and instructed the lower court to affirm the agency's permit decision because the DEQE's decision was supported by substantial evidence as required by state law. *Id.* at 668.

dependent use like a shopping mall.[223] The Corps also considered practicable alternatives and identified a second site as feasible.[224]

In 1985, Pyramid changed its permit application to include offsite mitigation by creating 36 acres of offsite artificial wetlands,[225] but the Division Engineer recommended permit denial because of the loss of the wildlife habitat.[226] However, the Corps headquarters in Washington reviewed the Division Engineer's recommendation, determined that the proposed mitigation was adequate and that the project would have the "least adverse effect on the aquatic environment," and instructed the District Engineer to prepare a notice of intent to issue the permit.[227] The division conditioned the proposed permit—which characterized the site as excellent habitat for wildlife—on the success of onsite and offsite mitigation.[228] EPA responded by issuing a section 404(c) action based on (1) unacceptable environmental effects, (2) the availability of a feasible alternative site, and (3) an inadequate mitigation plan.[229]

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223. SWEEDENS EPA FINAL DETERMINATION, *supra* note 217, at 5.

224. *Id.* EPA recommended that the Corps prepare an EIS to assist the agency in its 404(b)(1) analysis, suggesting that an EIS would help to inform the Corps of available alternatives to the proposal. SWEEDENS RECOMMENDATION, *supra* note 218, at 32-33. However, the Corps declined to prepare an EIS. *Id.*

225. SWEEDENS EPA FINAL DETERMINATION, *supra* note 217, at 2.

226. SWEEDENS RECOMMENDATION, *supra* note 218, at 6.

227. *Id.*

228. *Id.*

229. Sweedens Final Determination, *supra* note 216, at 22,977-78. EPA initiated the action in 1985 and opened a public comment period. SWEEDENS EPA FINAL DETERMINATION, *supra* note 217, at 6. The agency received over 1,200 comments, which it considered before issuing a proposed determination to prohibit the permit. *Id.* EPA, Corps, and FWS held several meetings with community interest groups, development groups, state and local representatives, and members of Congress. *Id.* In its veto, EPA stated that the permit would have unacceptable adverse effects on wildlife through loss of habitat. Sweedens Final Determination, *supra* note 216, at 22,977. EPA also determined that at least one practicable alternative site was available. *Id.* at 22,977-78. Pyramid contended that the alternative site was infeasible, and therefore not a practicable alternative for the project. SWEEDENS EPA FINAL DETERMINATION, *supra* note 217, at 17. EPA rejected that argument, concluding that the site was accessible to customers, as it was only six minutes by car from Sweedens Swamp and near highways. *Id.* at 17-18.

EPA concluded that although mitigation can reduce adverse environmental effects, the 404(b)(1) guidelines do not allow the Corps to issue fill permits conditioned on mitigation in the form of artificially created wetlands to compensate for the loss of natural wetlands when available practicable, less damaging alternatives exist.[230] The agency cited risks associated with replacing a natural wetland with man-made wetlands, and the possibility that the artificial wetland would not serve the same ecological functions.[231] Consequently, EPA vetoed the Corps permit, blocking construction of Attleboro Mall in Sweedens Swamp.[232]

Pyramid challenged EPA's veto in the District Court of Massachusetts, claiming that the Regional Administrator failed to make a determination within the 30 days established by EPA regulations.[233] The court dismissed the complaint on the ground that the statute did not establish rigid deadlines.[234] Pyramid appealed to the Second Circuit, arguing that EPA should have considered alternative sites that were available when the developer applied for the permit, instead of sites available when the developer entered the market for a mall site.[235] The court upheld EPA's interpretation as reasonable, concluding that it was consistent with the regulatory language and supported by

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Pyramid challenged the legality of EPA's section 404(c) action, arguing that EPA's section 404(c) authority was restricted to extraordinary circumstances, but the court disagreed. See Newport Galleria Grp. v. Deland, 618 F. Supp. 1179, 1181-82 (D.D.C. 1985). Pyramid contended that EPA could not challenge the Corps' conclusion that there were no practicable alternatives and no unacceptable adverse effects, but the court disagreed, ruling that the section 404(c) veto would not have any meaning if EPA were not permitted to disagree with the Corps' conclusions on a project's possible effects. *Id.* at 1183-84. The court dismissed the case, concluding that the initiation of the section 404(c) action was not a final agency action, and therefore not subject to judicial challenge. *See id.* at 1185-96.

230. Sweedens Final Determination, *supra* note 216, at 22,978.

231. *Id.*

232. *Id.*

233. Bersani v. Deland, 640 F. Supp. 716, 717 (D. Mass. 1986); *see* 40 C.F.R. § 231.5(a) (1979).

234. *Bersani v. Deland*, 640 F. Supp. at 719.

235. Bersani v. Robichaud, 850 F.2d 36, 38 (2d Cir. 1988).

the administrative record.[236] The mall was never built on Sweedens Swamp.

F. *The Russo Development Corporation Site: Mitigating for Lost Wildlife Habitat in the Meadowlands (1988)*

In 1988, EPA issued its sixth, seventh, and eighth section 404(c) vetoes, starting with a veto of a permit to authorize an existing and unlawful fill of 52.5 acres wetlands, along with five additional acres of wetlands in the Hackensack Meadowlands in order to construct warehouses in Carlstadt, New Jersey.[237] The site had undergone extensive changes since the mid-1920s, including installation of tide gates and dikes, excavation of ditches, and construction of a sanitary sewer pipeline and boulevard.[238] Although previously disturbed, the Corps determined that the Meadowlands site had been freshwater wetland within the priority habitat range for waterfowl along the Atlantic Flyway, especially the black duck, prior to the unauthorized fill.[239] The remaining five acres of wetlands continued to provide valuable and rare habitat for a variety of species of birds, mammals, reptiles, and amphibians.[240]

From 1981 to 1985, without a section 404 permit, the Russo Development Corporation discharged fill material in 44 acres of

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236. *Id.*

237. *See* Russo Development Corporation Site, 53 Fed. Reg. 16,469, 16,469 (Envtl. Prot. Agency May 9, 1988) (final determination) [hereinafter Russo Final Determination].

238. U.S. ENVTL. PROT. AGENCY, FINAL DETERMINATION OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S ASSISTANT ADMINISTRATOR FOR WATER, CONCERNING WETLANDS OWNED BY THE RUSSO DEVELOPMENT CORPORATION IN CARLSTADT, NEW JERSEY PURSUANT TO SECTION 404(C) OF THE CLEAN WATER ACT 8 (Mar. 21, 1988) [hereinafter RUSSO EPA FINAL DETERMINATION].

239. *Id.* at 8, 13 (citing FWS's 1986 North American Waterfowl Management Plan). EPA characterized the site as a "palustrine emergent marsh, dominated by common reed (*Phragmites australis*) and blue joint grass (*Calamagrostis canadensis*)." Russo Development Corporation Site, 52 Fed. Reg. 29,431, 29,431 (Envtl. Prot. Agency Aug. 7, 1987) (proposed determination) [hereinafter Russo Proposed Determination].

240. RUSSO EPA FINAL DETERMINATION, supra note 238, at 13. Four of the species on the site are species of special concern in the region. *Id.* Two species are on New Jersey's state list of threatened species. *Id.* at 14.

wetlands for the construction of six warehouses.[241] Russo then proceeded to fill eight-and-a-half more acres to build additional warehouses before the Corps issued a cease-and-desist order in 1985.[242] Russo then applied for a permit for the two sites: (1) the 44-acre parcel that it had previously filled, and (2) the 13.5-acre parcel comprised of eight-and-a-half filled acres and five acres of existing wetlands.[243]

The Corps proposed to issue the permit, approving Russo's mitigation proposal, which included enhancement of existing wetlands to compensate for lost wetlands and the permanent preservation of twenty-three acres of wetlands in a neighboring river basin.[244] But EPA objected, requesting increased mitigation, even though the agency did not propose restoration of the filled wetlands due to uncertainties concerning effective restoration.[245] EPA also sought a section 404(q) permit elevation, but the Assistant Secretary denied the request.[246] As a result, EPA initiated 404(c) proceedings and, in 1988, issued a 404(c) veto based on unacceptable adverse effects on wildlife that had occurred from past fills and would occur with the new fills. In doing so, EPA emphasized the adverse cumulative effects of wetlands loss in the area and its relationship to declines in wildlife populations.[247] The agency also determined that Russo's

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241. *Id.* at 3.

242. U.S. ENVTL. PROT. AGENCY, RECOMMENDATION OF THE REGIONAL ADMINISTRATOR REGION II CONCERNING WETLANDS OWNED BY THE RUSSO DEVELOPMENT CORPORATION IN CARLSTADT, NEW JERSEY PURSUANT TO SECTION 404(C) OF THE CLEAN WATER ACT 3 (Jan. 19, 1988).

243. *Id.* The Corps recommended issuance of an after-the-fact permit for the filled wetlands. *See* Russo Proposed Determination, *supra* note 239, at 29,432.

244. Russo Proposed Determination, *supra* note 239, at 29,432.

245. *Id.*

246. *Id.* at 29,432-33. The Corps and EPA had several meetings before the Assistant Secretary ultimately denied the permit elevation request. *Id.*

247. *See* Russo Final Determination, *supra* note 237, at 16,470. EPA based its section 404(c) action on the previous loss of the 52.5 acres of wetlands, which produced an unacceptable adverse effect on valuable wildlife habitat, sediment, and pollution retention capabilities, and that additional wetland losses would compound those adverse effects. RUSSO EPA FINAL DETERMINATION, *supra* note 238, at 16. The agency pointed out that the loss of the filled wetlands destroyed eight percent of the "remaining non-common reed [wetland] vegetation." *Id.*

mitigation plan was inadequate and too vague.[248]

Russo challenged the permit denial in federal district court, which decided that the Corps' decision to combine the two sites into a single application was arbitrary and capricious and limited the permit application to only the 13.5-acre site.[249] Consequently, EPA's veto was limited to the 13.5-acre plot, which effectively vacated the veto for the previously filed 44-acre site.[250] EPA, the Corps, and Russo proceeded to reach a settlement agreement "resolving all issues related to both the 44- and 13.5-acre parcels."[251] Ultimately, EPA issued a modification of its 404(c) decision, which removed the prohibition for disposal at the 13.5-acre plot and allowed Russo to seek a permit from the Corps to discharge at that site contingent on agreed upon mitigation.[252]

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248. RUSSO EPA FINAL DETERMINATION, *supra* note 248, at 17. EPA concluded that 1) Russo failed to identify a site for artificial enhancement of wetlands, 2) Russo's plan for wetland preservation did not result in a gain of wildlife habitat, 3) the Corps' assessment of per-acre value was inadequate because it inaccurately identified the site vegetation type, and 4) the monetary compensation rate for lost wetlands was too low. *Id.* at 17-18.

249. Russo Dev. Corp. v. Thomas, 735 F. Supp. 631, 637 (D.N.J. 1989). The court dismissed Russo's claim of due process violations. *Id.* at 636. Russo filed further claims against the agencies in a second suit in 1991. *See* Russo Dev. Corp. v. Reilly, No. 87-3916, 1991 U.S. Dist. LEXIS 20965, at *5 (D.N.J. May 17, 1991). The court held that EPA and the Corps' assertion of jurisdiction over the 13.5-acre site was not arbitrary and capricious and remanded the case for the agency to determine if all 13.5 acres contained wetlands under 404 and to reevaluate appropriate mitigation. *Id.* at *35-*36. The court dismissed Russo's claims of bad faith. *Id.* at 35; *see also* Russo Development Corporation Site, 60 Fed. Reg. 15,913, 15,915-16 (Envtl. Prot. Agency Mar. 28, 1995) (proposed amendment to final determination) [hereinafter Russo Proposed Amendment] (summarizing the legal actions surrounding EPA's 404(c) determination).

250. Russo Proposed Amendment, *supra* note 249, at 15,916.

251. *Id.* Russo agreed to additional mitigation, including deeding a 16.3-acre parcel of wetlands for preservation and enhancement, and providing $700,000 for enhancing existing wetlands in Hackensack Meadowlands. *See* Russo Development Corporation, 60 Fed. Reg. 47,568, 47,570 (Envtl. Prot. Agency Sept. 13, 1995) (modification of final determination). In exchange, EPA agreed to remove its fill prohibition and allow Russo to seek both after-the-fact and future permits from the Corps for the Russo site. *Id.*

252. Russo Proposed Amendment, *supra* note 249, at 15,916; U.S. ENVTL. PROT. AGENCY, MODIFICATION OF THE MARCH 21, 1988, RUSSO DEVELOPMENT CORPORATION SECTION 404(C) FINAL DETERMINATION 15 (Sept. 7, 1995).

G. *The Henry Rem: Preserving East Everglades Wetlands from Agricultural Development (1988)*

The second 1988 veto—and seventh overall—concerned three permit applications from different landowners to rock plow 432 acres of wetlands on their property in the East Everglades area of southern Florida.[253] The land in the East Everglades has an extremely porous limestone layer and is hydrologically connected to Everglades National Park.[254] EPA classified the area as prairie wetlands, providing several significant ecological services including habitat for fish and wildlife, food chain production, water storage, groundwater recharge, and geochemical, biological nutrient, and pollutant uptake.[255] The National Park Service observed two endangered species, the Florida panther and cape sable sparrow, at the proposed sites and throughout the East Everglades.[256] The East Everglades also offers recreational activities, including bird watching.[257]

In 1986, the owner of a 60-acre site applied for a permit to rock plow the area before farming.[258] FWS and EPA opposed the permit due to potential adverse environmental effects, and both

253. U.S. ENVTL. PROT. AGENCY, FINAL DETERMINATION OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S ASSISTANT ADMINISTRATOR FOR WATER, CONCERNING THREE WETLAND PROPERTIES (SITES OWNED BY HENRY REM ESTATE, MARION BECKER, ET AL. AND SENIOR CORPORATION) FOR WHICH ROCK PLOWING IS PROPOSED IN EAST EVERGLADES, DADE COUNTY, FLORIDA 1 (June 15, 1988) [hereinafter HENRY EPA FINAL DETERMINATION]. Rock plowing is a process used prior to break up surface rock using a bulldozer to make an area suitable for agriculture, destroying the irregular surface of the land, eliminating holes of deeper water, and also destroying wetland vegetation. *Id.* at 3.

254. *Id.* at 8-9.

255. Henry Rem Estate, Marion Becker, et al. and Senior Corporation, 52 Fed. Reg. 38,519, 38,521 (Envtl. Prot. Agency Oct. 16, 1987) (proposed determination) [hereinafter Henry Proposed Determination].

256. HENRY EPA FINAL DETERMINATION, *supra* note 253, at 14. EPA thought that the wood stork, an endangered species, and four threatened species—the Eastern indigo snake, American alligator, American kestrel and white-crowned pigeon—probably also used the sites at issue. *Id.* EPA determined that an additional 153 species relied on the wetlands in the East Everglades, and that 105 of those species had been observed on or adjacent to the sites at issue. *Id.* at 13.

257. *Id.* at 11.

258. Henry Proposed Determination, *supra* note 255, at 38,520.

the Dade County Department of Environmental Resources Management and South Florida Regional Planning Council thought that the permit was inconsistent with local zoning.[259] Nevertheless, the Corps proposed issuing the permit, noting that it also expected a permit application for rock plowing on a second, independently owned 60-acre site and suggesting that it would likely issue a permit for that project.[260] EPA requested a section 404(q) permit elevation, arguing that the Corps had inadequately considered cumulative effects and the amount of degradation the project would cause to the nation's waters. The Assistant Secretary of the Army for Civil Works reviewed and referred EPA's concerns to the District Engineer but declined to elevate the permit to Corps headquarters.[261] Owners of a third property—some 312 acres of wetlands on three parcels—were also actively pursuing a section 404 permit to rock plow.[262]

EPA evaluated all three sites and concluded that the sites were ecologically similar, and that the proposed rock plowing would have similar environmental effects at all three sites.[263] As

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259. U.S. ENVTL. PROT. AGENCY, RECOMMENDED DETERMINATIONS CONCERNING THE HENRY REM ESTATE, SENIOR CORPORATION, AND MARION BECKER, ET AL. SITES PURSUANT TO SECTION 404(C) OF THE CLEAN WATER ACT 4 (Feb. 9, 1988) [hereinafter HENRY RECOMMENDATION]. In 1984, the state changed its policies to slow rock plowing in the East Everglades because of the associated pollution. *See* Jeffery Kahn, *Rock Plowing in Everglades Limited*, PALM BEACH POST, Sept. 28, 1984, at B4, *available at* http://news.google.com/newspapers?nid=1964&dat=19840928&id=Kv8iAAAAIBAJ&sjid=TswFAAAAIBAJ&pg=872,5841795.

260. Henry Proposed Determination, *supra* note 255, at 38,520. The Corps considered the second site to be substantially similar to the first site. HENRY RECOMMENDATION, *supra* note 259, at 6.

261. HENRY RECOMMENDATION, *supra* note 259, at 5. For an explanation on section 404(q) elevation procedures, see *supra* notes 118-23 and accompanying text.

262. Henry Proposed Determination, *supra* note 255, at 38,520. The owner of the site, Senior Corporation, had four outstanding permit applications originally to rock plow 1,028-acres. HENRY RECOMMENDATION, *supra* note 259, at 6. The Corps consolidated those four permits, and EPA and FWS opposed issuing the permit for 716 of the proposed acres. *Id.* Senior Corporation voluntarily modified its project to include only filling the 312 acres of wetlands to which EPA and FWS had not objected. *Id.* The Corps proceeded to issue a permit for the rock plowing of acres that the FWS and EPA did not oppose, and EPA did not include those 312 acres in its section 404(c) action. *Id.* at 6-7.

263. Henry Proposed Determination, *supra* note 255, at 38,520.

a result, in 1987, EPA proposed a section 404(c) action that encompassed parts of all three sites.[264] In 1988, EPA issued the section 404(c) veto due to unacceptable adverse effects on wildlife.[265] EPA pointed out that of the original 25,000 acres of prairie wetlands in the East Everglades, 8,000 acres—roughly one-third—had already been lost through agriculture or other development.[266] The agency concluded that the cumulative effects of additional lost prairie wetland habitat would produce unacceptable adverse effects.[267] Therefore, the agency's section 404(c) action prohibited rock plowing on all three sites.[268]

H. *The Lake Alma Impoundment: Conserving the Hurricane Creek Watershed (1988)*

The final 1988 veto—EPA's eighth section 404(c) action—involved a permit for a dam, which would create a 1,400-acre recreational lake that would destroy, stress, or inundate 1,200-acres of floodplain wetlands in the Hurricane Creek watershed in Georgia.[269] Hurricane Creek drains a 228 square-mile area,

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264. *Id.* EPA noted that it would make individual decisions for the three properties. *Id.*; *see also* HENRY RECOMMENDATION, *supra* note 259, at 7-12 (providing a detailed list of the meetings and discussion following the proposed section 404(c) action).

265. Henry Rem Estate, Marion Becker, et al. and Senior Corporation, 53 Fed. Reg. 30,093, 30,093 (Envtl. Prot. Agency Aug. 10, 1988) (final determination). EPA's section 404(c) action did not prohibit other filling activities with less adverse effects at those sites, as EPA was primarily concerned about the loss of 432 acres of prairie wetlands, which would result in lost fish and wildlife habitat, food chain production, and pollution filtration systems. *Id.* at 30,094. Finally, the agency was concerned about the cumulative effects concerning future applications to rock plow in the East Everglades. HENRY EPA FINAL DETERMINATION, *supra* note 253, at 21.

266. HENRY EPA FINAL DETERMINATION, *supra* note 253, at 21.

267. *Id.*

268. *See Everglades Deserve Better from EPA*, SUN SENTINEL (Nov. 23, 1987), http://articles.sun-sentinel.com/1987-11-23/news/8702070248_1_east-everglades-everglades-national-park-east-side (demonstrating the public's desire that the government slow the development of the wetlands through rock plowing). It is unclear if EPA's veto changed the Corps determination of other permits regarding rock plowing of wetlands in the East Everglades because the Corps does not appear to have a database of permits issued before and after the section 404(c) veto.

269. U.S. ENVTL. PROT. AGENCY, FINAL DETERMINATION OF THE U.S.

including the 1,350-acre floodplain at issue,[270] comprised of a patchwork of forested wetlands, stream channels with high sediment loads, remnant pools, hummocks, and uplands.[271] Hurricane Creek creates an important vegetated riparian zone that provides a wetland corridor for disposal, movement, and migration of fish and wildlife.[272] Those diverse habitats support a variety of wildlife, including fifteen species of mammals, thirty-one species of fish, sixteen species of reptiles, sixteen species of amphibians, and eighty-four species of birds.[273] Significantly, the creek supports wildlife dispersal and movement between the creek and the Atlantic Ocean.[274]

ENVIRONMENTAL PROTECTION AGENCY'S ASSISTANT ADMINISTRATOR FOR WATER PURSUANT TO SECTION 404(C) OF THE CLEAN WATER ACT CONCERNING THE PROPOSED LAKE ALMA IMPOUNDMENT AND PROPOSED MITIGATION OF ASSOCIATED ENVIRONMENTAL IMPACTS ALMA, BACON COUNTY, GEORGIA 5 (Dec. 16, 1988) [hereinafter ALMA EPA FINAL DETERMINATION], *summarized in* 54 Fed. Reg. 6749 (Envtl. Prot. Agency Fed. 14, 1989); U.S. ENVTL. PROT. AGENCY, RECOMMENDED 404(C) DETERMINATION TO WITHDRAW AND RESTRICT THE SPECIFICATION OR USE OF PORTIONS OF HURRICANE CREEK FLOODPLAIN AND PORTIONS OF UNNAMED TRIBUTARIES OF HURRICANE CREEK 3 (Oct. 5, 1988) [hereinafter ALMA RECOMMENDATION]. The exact number of acres of affected wetland was unclear. *See* ALMA EPA FINAL DETERMINATION, *supra* note 272, at 12. The Corps estimated that the project would lead to the loss of 957 acres of wetlands, FWS thought the loss would be 1,136 acres, and EPA assessed the wetlands loss at 1,155 acres. *Id.* at 12-13.

270. Lake Alma Impoundment, 50 Fed. Reg. 26,859, 26,861 (Envtl. Prot. Agency July 15, 1988) (proposed determination).

271. *Id.*

272. ALMA EPA FINAL DETERMINATION, *supra* note 269, at 15.

273. *Id.* at 17-28. EPA's study of the area also determined an additional thirty-five species of mammals, seventy-five species of fish, forty-one species of reptiles, twenty-two species of reptiles, and seventy-five species of birds used the site, including two federally listed endangered species—the shortnose sturgeon and Florida panther—and two threatened species—the American alligator and the eastern indigo snake. *Id.*

274. *Id.* at 20. The Atlantic Ocean is only seventy-five miles from the site. *Id.* at 13. EPA detected the presence of American eel, a catadromous species, and determined that the American shad and blueback herring—both anadromous species—are capable of using Hurricane Creek. *Id.* at 20. Catadromous and anadromous fish spend part of their lifecycle in freshwater and part in the ocean. *See* John Warren Kindt, *The Law of the Sea: Anadromous and Catadromous Fish Stocks, Sedentary Species and the Highly Migratory Species*, 11 SYRACUSE J. INT'L L. & COM. 9, 39-40 (1984).

In 1976, the city of Alma, Georgia proposed constructing an impoundment that would flood the site in order to create a recreational lake and applied for a section 404 permit.[275] The project relied, in part, on funds from the U.S. Department of Housing and Urban Development, which wrote an EIS on the funding of the project.[276] The Corps, EPA, and FWS all opposed the 404 permit.[277] FWS proceeded to conduct studies on potential mitigation and prepared a mitigation plan, the implementation of which would allow the agency to withdraw its opposition to the permit.[278] In 1981, after the city agreed to enhance 714 acres of upland habitat through the creation of reservoirs, tree plantings, and improved water management,[279] the Corps issued a section 404 permit for the construction of the impoundment conditioned on the agreed mitigation plan.[280] But the Corps issued the permit before finishing its evaluation of the approvals

275. ALMA RECOMMENDATION, *supra* note 269, at 8.

276. Nat'l Wildlife Fed'n v. Marsh, 721 F.2d 767, 769 (11th Cir. 1983). The Corps relied on the EIS completed by the U.S. Department of Housing and Urban Development, rather then preparing a separate EIS before the issuance of the section 404 permit. *See* Environmental Impact Statements and Regulations; Availability of EPA Comments, 51 Fed. Reg. 43,971, 43,972 (Envtl. Prot. Agency Dec. 5, 1986).

277. *Nat'l Wildlife Fed'n*, 721 F.2d at 772.

278. ALMA RECOMMENDATION, *supra* note 269, at 9. FWS's study concluded that "7,426 acres of wooded swamp would have to be managed intensively to compensate for [the] losses." *Id.* The available documentation did not specify how the wooded swamp would have to be managed or suggest who would be responsible for that management, except to state that the mitigated land would have to be managed "to the same degree as proposed or presently owned project lands." ALMA EPA FINAL DETERMINATION, *supra* note 269, at 40. FWS determined that the necessary mitigation was impractical and instead prepared a mitigation plan that compensated for some of the losses from the proposed project. ALMA RECOMMENDATION, *supra* note 269, at 9.

279. ALMA RECOMMENDATION, *supra* note 269, at 7-8. Green tree reservoirs are small impoundments that provide habitat for waterfowl and other species of wildlife. *Nat'l Wildlife Fed'n*, 721 F.2d at 772 n.6.

280. ALMA RECOMMENDATION, *supra* note 269, at 10. Prior to the issuance of the Corps' permit, EPA requested a section 404(q) permit elevation, although EPA then withdrew its objections. *Id.* Other opponents of the Corps' permit included the Council on Environmental Quality, Bureau of Outdoor Recreation, the Sierra Club, the National Wildlife Federation, the Georgia Wildlife Federation, the Georgia Conservancy, the Atlanta Audubon Society, the Georgia Ornithological Society, and the Hurricane Creek Protective Society. *See Nat'l Wildlife Fed'n*, 721 F.2d at 772.

necessary to implement the mitigation plan for lost wildlife habitat by constructing reservoirs.[281]

Environmental groups[282] filed suit in district court challenging the Corps' decision to issue the permit without a supplemental EIS on the mitigation plan. The court denied an injunction on the grounds that the Corps' decision to not complete a supplemental EIS on the mitigation plan was reasonable because the change in the proposed project to include the mitigation plan was "insignificant quantitatively and non-existent qualitatively."[283] The groups appealed to the Eleventh Circuit, which reversed and remanded the case to allow the Corps to 1) evaluate—and issue if warranted—the permits necessary for the construction of reservoirs to mitigate lost wildlife habitat, and 2) to prepare a supplemental EIS.[284]

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281. *Nat'l Wildlife Fed'n*, 721 F.2d at 773. EPA objected to the proposed mitigation plan and had informed the Corps that the creation of the green tree reservoirs would also require section 404 permits. *Id.* The Corps had finished a site inspection and determined that it was possible that constructing green tree reservoirs was an activity that would qualify for a nationwide permit, although individual permits may be required depending on the proposed location of the reservoirs. *Id.*

282. Those groups were the National Wildlife Federation, the Georgia Wildlife Federation, and the Hurricane Creek Protective Society. *See id.* at 769 n.1.

283. *Id.* at 770. The environmental groups also challenged the release of the funds from the U.S. Department of Housing and Urban Development for the project under the Housing and Community Development Act of 1974, 42 U.S.C. §§ 5301-5320 (2014), because the statute required the funds must "principally benefit persons of low and moderate income." *Nat'l Wildlife Fed'n*, 721 F.2d at 769; *see also* 42 U.S.C. § 5304(b)(3). The district court ruled—and the Eleventh Circuit agreed—that the statute did not require an over fifty percent benefit to people of low and moderate income, but was only regulatory under 24 C.F.R. § 570.302(b)(1), (d)(2) (1983), and therefore the Deputy Assistant Secretary of the agency could waive that requirement. *Nat'l Wildlife Fed'n*, 721 F.2d at 769.

284. *Nat'l Wildlife Fed'n*, 721 F.2d at 786; *see* Environmental Impact Statement, Alma and Bacon Co., 51 Fed. Reg. 10,566 (Army Corps of Eng'rs Mar. 27, 1986). The district court enjoined construction pending the supplemental EIS and the Corps' decision on the mitigation permits. *See* City of Alma v. United States, 744 F. Supp. 1546, 1553 (S.D. Ga. 1990). The Corps completed the supplemental EIS by 1987. *See* ALMA RECOMMENDATION, *supra* note 269, at 9. Although EPA did not specify how that EIS differed from the original final EIS, the Regional Administrator again recommended denial based on the "unacceptability of the overall project." *Id.*

In 1986, during the remand, and consistent with its objection to the Lake Alma project, EPA recommended that the Corps deny the permit necessary for the mitigation project.[285] But in 1988, the Corps proposed to issue those necessary permits, and in 1989 EPA responded by initiating 404(c) proceedings for the entire project.[286] EPA's 404(c) veto, based on both the direct and cumulative adverse environmental effects of the project on wildlife and hydrology, blocked the creation of the Hurricane Creek impoundment.[287]

The city of Alma and the county of Bacon then challenged EPA's 404(c) action, arguing that the agency's decision was arbitrary and capricious. Nevertheless, the federal court upheld EPA's decision, reasoning that the agency had acted within its scope of authority under the CWA.[288] The court decided that

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285. ALMA RECOMMENDATION, *supra* note 269, at 9.

286. *Id.* at 9-10.

287. ALMA EPA FINAL DETERMINATION, *supra* note 269, at 34, 38, 43. EPA concluded that the project would destroy 957 acres of productive wetland habitat and that the mitigation plan would destroy another 35 acres, while creating only 23 acres of wetlands through the construction of the six green tree reservoirs. *Id.* at 34. The agency was concerned about the loss of the Hurricane Creek floodplain and the habitat and the travel corridor it provides for fish and wildlife. ALMA RECOMMENDATION, *supra* note 269, at 6. EPA determined that the project would destroy habitat for most of the mammals occurring at the site and substantially reduce habitat for the remaining mammals. ALMA EPA FINAL DETERMINATION, *supra* note 269, at 36. Similarly, the agency thought the project would significantly alter the composition of fish species and destroy the aquatic pathway to the Atlantic Ocean. *Id.* Finally, EPA stated that the project would reduce habitat for birds, amphibians, and reptiles, including the American alligator and the eastern indigo snake. *Id.* at 36-38. Concerning cumulative effects, EPA determined that the project would negatively affect wildlife on adjacent land and decrease water and nutrient movement. *Id.* at 39. Finally, EPA decided that the mitigation plan failed to account for the adverse environmental effects by benefiting only certain duck species and not accounting for changed hydrology or lost nutrients downstream. *Id.* at 40-41. The agency noted that its action did not prohibit other types of filling activities in the project area, and the Corps would have to evaluate those proposals on their merits. *Id.* at 43.

288. *See City of Alma*, 744 F. Supp. at 1549, 1567. The plaintiffs argued that EPA's decision was arbitrary and capricious because it was contrary to EPA's policy, inconsistent with determinations for similar permits, and was not supported by substantial evidence in the administrative record. *Id.* at 1558. Additionally, the plaintiffs contended that under the doctrine of judicial estoppel that EPA could not veto the action because the county had relied upon the

although EPA and the state Department of Natural Resources disagreed on the degree of unacceptable adverse effects, EPA's decision was not arbitrary because it relied on standardized scientific studies, was supported by substantial evidence, and considered factors within the scope of the section 404(b)(1) guidelines.[289] Lake Alma was never created.

I. *James City County Water Supply Dam: Protecting the Ware Creek Watershed (1989)*

In 1989, EPA issued the agency's ninth section 404(c) veto to block construction of a local water supply impoundment on Ware Creek in James City County, Virginia that would have flooded 1,217 acres, including 425 acres of wetlands.[290] The Ware Creek watershed is eighteen square miles of largely undisturbed Virginia hardwood and mixed pine-hardwood forest.[291] The creek, a tributary of the York River, drains into the Chesapeake Bay—the largest estuary in North America—which supports more than 3,600 species of fish, plants, and animals.[292] The impoundment site was a complex mix of forested and scrub-shrub wetlands, that supply valuable wildlife habitat, nutrient cycling and transport, and sediment stabilization.[293]

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agency's previous support. *Id.* Therefore, plaintiffs argued that the court should lift the order prohibiting the construction of the lake. *Id.* at 1554.

289. *Id.* at 1566. The court held that the plaintiffs had failed to show that EPA had acted beyond the scope of its statutory power or had attempted to manipulate the judicial process, and dismissed the case. *Id.* at 1567.

290. Ware Creek, 54 Fed. Reg. 33,608, 33,608 (Envtl. Prot. Agency Aug. 15, 1989) (final determination) [hereinafter Ware Final Determination]; U.S. ENVTL. PROT. AGENCY, FINAL DETERMINATION OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S ASSISTANT ADMINISTRATOR FOR WATER PURSUANT TO SECTION 404(C) OF THE CLEAN WATER ACT CONCERNING THE PROPOSED WARE CREEK WATER SUPPLY IMPOUNDMENT 6 (July 10, 1989) [hereinafter WARE EPA FINAL DETERMINATION].

291. WARE EPA FINAL DETERMINATION, *supra* note 290, at 14.

292. *Id.*; *see also Chesapeake Bay*, Nat'l Park Serv., http://www.nps.gov/chba/index.htm (last visited Apr. 22, 2015).

293. WARE EPA FINAL DETERMINATION, *supra* note 290, at 17-18. FWS documented 83 species of fish, reptiles, amphibians, and mammals using the site including the American eel, black ducks, and river otters. *Id.* at 21-28. The Ware Creek ecosystem supports a great blue heron rookery—a FWS species of special concern—of between 45 and 88 nesting pairs annually. U.S. ENVTL.

In 1981, James City County, the Corps, and EPA began to discuss the county's proposal to impound Ware Creek to create a water supply reservoir.[294] The Corps—with assistance from EPA, NMFS, and FWS—issued a final EIS on the project in 1987.[295] EPA recommended that the Corps deny the permit because of concerns that the project would have unacceptable environmental effects and suggested that the agencies should work together to find acceptable environmental alternatives.[296] Nevertheless, in 1988, the Corps proposed to issue the permit, and EPA began a 404(c) action.[297]

During the 404(c) proceedings, James City County claimed that it had no reasonable alternatives meeting the project's purpose of providing water supply to the county.[298] The county proposed extensive mitigation efforts with a $1.15 million fund to purchase and preserve so-called "top priority wetlands," the creation of 103 acres of new wetlands by constructing new impoundments, enhancement of nearby degraded wetlands through restoration, and enhancement of buffer zones around the reservoir and tributary streams.[299] Nevertheless, EPA issued a 404(c) veto in 1989, due largely to the unacceptable adverse effects that the proposed impoundment would have on the Ware Creek ecosystem and the Chesapeake Bay, and also due to the availability of practicable alternatives such as using

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PROT. AGENCY, RECOMMENDED 404(C) DETERMINATION TO PROHIBIT, OR DENY THE SPECIFICATION, OR THE USE FOR SPECIFICATION, OF AN AREA AS A DISPOSAL SITE: WARE CREEK, JAMES CITY COUNTY, VIRGINIA 5 (Feb. 17, 1989) [hereinafter WARE RECOMMENDATION].

294. Ware Creek, 53 Fed. Reg. 46,656, 46,657 (Envtl. Prot. Agency Nov. 18, 1988) (proposed determination).

295. *Id.* at 46,658. The District Office of the Corps completed a draft EIS in 1985, but EPA considered the draft EIS environmentally unsatisfactory because of the project's potential for severe environmental effects, and that the Corps had not investigated the "full range of feasible water supply alternatives." *Id.*

296. *Id.* EPA stated that the agency was considering a 404(c) action due to those concerns. *Id.*

297. *Id.* EPA did not formally request a 404(q) elevation, although the Corps considered and rejected higher review under 404(q) on its own motion. WARE EPA FINAL DETERMINATION, *supra* note 290, at 9. The Corps stated only that there was no basis for review. *Id.*

298. WARE EPA FINAL DETERMINATION, *supra* note 290, at 9-10.

299. *Id.* at 44-46.

groundwater, constructing three smaller dams, or implementing water conservation measures.[300]

James City County challenged the veto in federal court, contending that the veto was improper because EPA had not identified feasible alternatives for the project.[301] The district court decided that the record failed to support EPA's conclusion that practicable, less environmentally damaging project alternatives existed because EPA relied only on the regulatory presumption contained in the 404(b)(1) guidelines that alternatives may exist.[302] But because the record failed to demonstrate the actual availability of practicable alternatives, the court ordered the Corps to issue the permit.[303]

EPA appealed to the Fourth Circuit, which affirmed the district court's decision to overturn the 404(c) veto because the

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300. *See* Ware Final Determination, *supra* note 290, at 33,608. EPA was concerned about the project's adverse effects of the construction of the impoundment creating a physical barrier that would block fish migration and water flow, and the loss of vegetation, nutrients the area produces, and wildlife habitat categorized as "unique and irreplaceable" by FWS. WARE RECOMMENDATION, *supra* note 293, at 30-31. EPA determined that the available alternatives would have less adverse environmental effects and also fulfill the county's water needs. WARE EPA FINAL DETERMINATION, *supra* note 290, at 61-62. Additionally, EPA concluded that the proposed mitigation was inadequate and inappropriate because of available practicable, less damaging alternatives to the project. *Id.* at 52. FWS supported the permit veto because of the project's unacceptable loss of wildlife habitat and inadequate mitigation to compensate for the lost wildlife habitat. *See* U.S. ENVTL. PROT. AGENCY, FINAL DETERMINATION ON REMAND OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S ASSISTANT ADMINISTRATOR FOR WATER PURSUANT TO SECTION 404(C) OF THE CLEAN WATER ACT CONCERNING THE PROPOSED WARE CREEK WATER SUPPLY IMPOUNDMENT 2 (Mar. 27, 1992) [hereinafter WARE EPA REMAND DETERMINATION].

301. James City Cnty. v. EPA, 758 F. Supp. 348, 353 (E.D. Va. 1990). Wildlife groups—the Southern Environmental Law Center, National Wildlife Federation, and Virginia Wildlife Federation—sought to intervene as defendants in the case, but the court denied their request. *See* James City Cnty. v. EPA, 131 F.R.D. 472, 475 (E.D. Va. 1990). The wildlife groups participated as *amici curiae*. *See James City Cnty.*, 758 F. Supp. at 349.

302. *James City Cnty.*, 758 F. Supp. at 351-52. EPA argued that under the 404(b)(1) guidelines the presumption of the availability of alternative sites was permissible. *Id.* at 351. The court reasoned that the record failed to show that alternatives were available, or the project would have unacceptable adverse effects. *Id.* at 352-53.

303. *Id.* at 353.

court concluded that "despite uncontroverted evidence to the contrary," EPA had determined that there were practicable alternatives, which was not supported by the record.[304] The court remanded the case to allow EPA to consider whether the expected adverse environmental effects alone justified the 404(c) action, regardless of the availability of possible alternatives.[305] EPA decided that they did and vetoed the permit on the ground that the project's unacceptable adverse effects on wildlife alone justified the action.[306] While EPA was considering the 404(c) action, the Corps had—in accordance with the court's instructions—issued the permit, which EPA proceeded to veto in 1991.[307]

The county challenged EPA's second veto in federal district court.[308] The court overturned the veto on the grounds the 404(c) action was not supported by substantial evidence because the court thought that EPA had not considered all aspects of the project—particularly the county's water requirements and other future development—and ordered the Corps to issue the permit.[309]

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304. James City Cnty. v. EPA, 955 F.2d 254, 259-60 (4th Cir. 1992) (holding that EPA's conclusion concerning practicable alternatives was not supported by substantial evidence); *see* Heather Caison, *Fourth Circuit Overturns EPA's Veto of Army Corps of Engineers' Permit Decisions*, 2 S.C. ENVTL. L.J. 79 (1992) (discussing the Fourth Circuit's decision).

305. *James City Cnty.*, 955 F.2d at 259-60. The county unsuccessfully argued that because EPA had failed to properly veto the permit originally EPA had waived its veto rights. *Id.* at 260. The court gave EPA only 60 days to complete the 404(c) action on remand. *Id.* at 261.

306. WARE EPA REMAND DETERMINATION, *supra* note 300, at 48. The County declined to either correct or contribute to the record. *Id.* at 4-5.

307. *Id.* at 48-49.

308. *See* James City Cnty. v. EPA, No. 89-156-NN, 1992 U.S. Dist. LEXIS 17675, at *1-*2 (E.D. Va. Aug. 5, 1992).

309. *Id.* at *12-*13. In determining that EPA's decision was not supported by substantial evidence, the court pointed to the fact EPA had not expressly considered the county's water requirements. *Id.* at *3. The court disputed EPA's calculation of the net loss of acreage of wetlands, stating that "the net loss is almost zero," which the court had calculated by subtracting the created and enhanced wetland acres from the total acres lost. *Id.* at *7-9. The court also decided that EPA's assessment of the severity of the adverse effects was not based on substantial evidence because the county was in fact taking measures, such as buffer zones, to protect wildlife. *Id.* at *9. Finally, the court stated that

EPA appealed to the Fourth Circuit,[310] which reversed the district court's decision, upholding the agency's view that the CWA authorizes a section 404(c) action based solely on a project's unacceptable adverse environmental effects.[311] The court also affirmed EPA's determination that the Ware impoundment would in fact produce unacceptable adverse environmental effects on the ecosystem, fish and wildlife species, and existing wetlands without adequate mitigation,[312] The Fourth Circuit therefore reversed the district court for failing to

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even if EPA prohibited the reservoir under section 404(c), the site would be developed in another project, and therefore development and "its destructive impact on the area . . . is the more likely occurrence." *Id.* at *10-*11.

310. The Fourth Circuit considered whether the district court erred in applying the substantial evidence standard of review and decided that EPA's reasoning satisfied both the substantial evidence and arbitrary and capricious standards of review. *See* James City Cnty. v. EPA, 12 F.3d 1330, 1337 n.4 (4th Cir. 1993). The court noted that other courts commonly applied the arbitrary and capricious standard of review when reviewing 404 actions—both for Corps permit decisions and EPA actions under 404(c)—but explained that it is "widely held that there is now little difference in the application of the two standards." *Id.* Ultimately, the Fourth Circuit held that EPA's "findings . . . are not arbitrary and capricious, and, for that matter, are supported by substantial evidence." *Id.* at 1339. Other courts have cited *James City County* for the proposition that judicial review of 404(c) actions is governed by the arbitrary and capricious standard and also for the idea that there is little difference between the two standards of review. *See, e.g.*, Mingo Logan Coal Co. v. EPA, No. 10-0541, 2014 U.S. Dist. LEXIS 138026, at *21 (D.D.C. Sept. 30, 2014) (applying the arbitrary and capricious standard to review of EPA's 404(c) determination); Bragg v. Robertson, 54 F. Supp. 2d 635, 641 (S.D. W. Va. 1999) (relying on *James City County* to state that the arbitrary and capricious standard is appropriate for review of section 404(c)); Alameda Water & Sanitation Dist. v. Reilly, 930 F. Supp. 486, 491 (D. Colo. 1996) (applying the arbitrary and capricious standard to a 404(c) action but also noting that there is little difference between the two standards).

311. *James City Cnty.*, 12 F.3d at 1335. The court discussed the fact that EPA failed to address the county's need for water but held that the statute limited EPA's function to determining the purity of the water not the quantities of water available, which was an issue for state and local agencies. *Id.* at 1336.

312. *Id.* at 1339. The Fourth Circuit decided that the district court failed to properly calculate projected lost wetlands because it had used a straight acre-for-acre calculation, which was not accurate because artificially created wetlands did not have the same value as the existing wetlands. *Id.* at 1338. The court also determined that the record supported EPA's conclusion that the project posed significant unacceptable harm to fish and wildlife, regardless of mitigation efforts. *Id.* at 1339.

give proper deference to EPA's determination, declaring that it was supported by substantial evidence."[313] Thus, after over a decade of controversy, judicial affirmation of EPA's veto authority ended James City County's efforts to build the Ware Creek Reservoir.[314]

J. *The Big River Dam: Preserving the Watershed (1990)*

In 1990, EPA issued its tenth section 404(c) veto, prohibiting the discharge of fill to create a 3,200-acre water supply impoundment in Rhode Island that would destroy some 550 acres of wetlands and adversely affect an additional 500-600 acres of adjacent wetlands.[315] The site, located within the pristine Big River Watershed—which drains into the Narragansett Bay—supports a variety of wildlife habitat types.[316] The wetlands fulfill important hydrological roles,

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313. *Id.* The court thus failed to expressly decide which standard governed judicial review of EPA's 404(c) actions, although other courts have interpreted the decision to apply the arbitrary and capricious standard of review. *See supra* note 310. Courts clearly review the Corps' 404 permit decisions under the generic arbitrary and capricious standard for review of informal administrative decisionmaking. 5 U.S.C. § 706(2)(A) (2014); *see, e.g.*, Town of Norfolk v. U.S. Army Corps of Eng'rs, 968 F.2d 1438, 1445 (1st Cir. 1992); Holy Cross Wilderness Fund v. Madigan, 960 F.2d 1515, 1521 (10th Cir. 1992); Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 198 (4th Cir. 2009). Subjecting 404(c) decisions to substantial review would arguably require more of EPA than the Corps, at least in terms of record evidence. As the Fourth Circuit advised, in most cases the distinction does not matter. *See supra* note 310. However, it would be an overstatement to suggest that the distinction might never decide a 404(c) case, although EPA lawyers will no doubt attempt to ensure that the Fourth Circuit's interpretation becomes the law of the land.

314. *James City Cnty.*, 12 F.3d at 1339.

315. Big River Water Supply Impoundment, 55 Fed. Reg. 10,666 (Envtl. Prot. Agency Mar. 22, 1990) (final determination); Big River, Mishnock River, Their Tributaries and Adjacent Wetlands, 54 Fed. Reg. 5133 (Envtl. Prot. Agency Feb. 1, 1989) (proposed determination) [hereinafter Big Water Proposed Determination].

316. Big Water Proposed Determination, *supra* note 319, at 5135. According to EPA, the watershed provides "outstanding fish and wildlife habitat" for at least 39 species of amphibians and reptiles, 55 species of mammals, and 221 species of birds—including federally listed species the bald eagle and peregrine falcon and state threatened species bobcats, fisher, osprey, five species of snakes, and two species of amphibians. *Id.*; U.S. ENVTL. PROT. AGENCY, RECOMMENDATION TO PROHIBIT CONSTRUCTION OF THE BIG RIVER RESERVOIR

including groundwater discharge and recharge, flood storage, and pollution filtration.[317] The watershed also provides substantial recreational opportunities, including hunting, fishing, hiking, and swimming.[318]

The state of Rhode Island purchased the site in the 1960s to build the Big River dam[319] and, in 1978, asked the Corps to assist in funding and constructing the project.[320] In the Omnibus Water Resources Development Act of 1986, Congress authorized the Big River Reservoir, conditioned on the Corps completing additional wildlife mitigation studies.[321] However, that same year Rhode Island decided to pursue the reservoir as a state project and applied for a 404 permit.[322] In 1988, relying on an EIS prepared by the Corps, EPA advised the Corps that the project did not meet the 404(b)(1) guidelines and recommended permit denial.[323] The Corps agreed and informed the governor that the project would not likely receive a 404 permit, but suggested that the project could avoid requiring a 404 permit if it became a federal project under 404(r) of the CWA. This provision exempts federal projects from 404 permit if they have an EIS incorporating 404(b) considerations submitted to Congress, and then are "specifically authorized Congress."[324]

PURSUANT TO SECTION 404(C) OF THE CLEAN WATER ACT 17, 19, 20 (Oct. 6, 1989) [hereinafter BIG WATER RECOMMENDATION].

317. BIG WATER RECOMMENDATION, *supra* note 316, at 25.

318. *Id.* at 26.

319. *Id.* at 7.

320. *Id.*

321. *Id.* Congress set a deadline for those additional studies, but the Corps missed the deadline in 1987. *Id.*

322. *Id.* In 1987, the Corps informed the state that the project required a supplemental EIS focused on unresolved issues, including possible alternatives, availability and efficacy of mitigation measures, and potential downstream water quality impacts. *Id.* EPA renewed its objections to the project, based on adverse environmental effects, asked the state to abandon the project or considered alternatives, and informed the state that it would consider a 404(c) veto if the state continued to pursue the project. *Id.* EPA also asked the Corps to deny the permit because of significant adverse environmental effects on the aquatic environment. *Id.*

323. *Id.*

324. *Id.*; *see* 33 U.S.C. § 1344(r) (2014).

Before the Corps or the state could take further action, EPA initiated a 404(c) action based on the project's unacceptable adverse effects on fish and wildlife.[325] The state responded by attempting to invoke the 404(r) exception, requesting that the Corps construct the reservoir, and withdrawing its 404 permit application.[326] Although the Corps agreed to construct the reservoir, EPA determined that the project did not qualify for a 404(r) exemption because the exemption requires that an EIS, including analysis of the 404(b)(1) considerations, be submitted to Congress, which had not occurred.[327] The Corps then agreed that the project required a 404 permit.[328]

Rhode Island withdrew its permit application after the initiation of 404(c) action, but in 1990 EPA nevertheless issued a section 404(c) veto, based on the agency's decision that the project would have unacceptable adverse effects on wildlife and recreational areas—as well as the availability of practicable non-structural alternatives, such as water conservation and groundwater pumping.[329] Following the section 404(c) action, the

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325. BIG WATER RECOMMENDATION, *supra* note 316, at 7-8.

326. *Id.* at 8.

327. Big Water Proposed Determination, *supra* note 315, at 5134. EPA also concluded that the project's NEPA was incomplete, and the 404(b)(1) analysis was inadequate. *Id.*

328. BIG WATER RECOMMENDATION, *supra* note 316, at 8 n.1. The Assistant Secretary considered the 404(r) exemption and agreed that the project did not qualify for the exemption. *Id.*

329. U.S. ENVTL. PROT. AGENCY, FINAL DETERMINATION OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S ASSISTANT ADMINISTRATOR FOR WATER PURSUANT TO SECTION 404(C) OF THE CLEAN WATER ACT CONCERNING THE PROPOSED BIG RIVER WATER SUPPLY IMPOUNDMENT 3-4 (Mar. 1, 1990). EPA decided to proceed with the 404(c) action despite the lack of a pending permit application because there was a pending application when the 404(c) action was initiated and a completed 404(c) action would resolve questions on the appropriateness of possible adverse effects. *Id.* at 11. EPA's final decision to prohibit the discharge did not determine whether the adverse effects alone would warrant a veto, only that the adverse effects, in combination with practicable alternatives, warranted the 404(c) action. *Id.* at 10-11. The adverse effects EPA identified included the direct loss habitat and travel corridors due to the project, additional habitat lost due to ancillary facilities, disruption of ground and surface water hydrology, lost recreational opportunities, and diminished water pollution filtration systems. BIG WATER RECOMMENDATION, *supra* note 316, at 29, 40, 44, 46. EPA determined that the adverse effects could not be adequately mitigated because the project would cause severe adverse

state placed the Big Water Reservoir on indefinite hold, and the Rhode Island General Assembly declared the watershed as a state "open space" in 1993.[330] The reservoir was never built and remains open space today.[331]

K. *The Two Forks Dam: Protecting the South Platte Basin and Changing Water Supply Thinking (1990)*

In 1990, EPA issued its eleventh veto on a permit to construct a water-supply dam on the South Platte River in Colorado that would have inundated 300 acres of wetlands and 7,300 acres of upland areas, while destroying thirty miles of a cold-water stream fishery.[332] The South Platte Basin supports a variety of habitat types, with uplands dominated by coniferous forests and wetlands providing twenty-five different community types.[333] The river and associated wetlands and pools include a highly productive fishery, which the Colorado Wildlife Commission designated a gold medal trout fishery.[334] The project area

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effects, and the science was unclear on the ability of artificial wetlands to replace lost natural wetland functions. *Id.* at 47. The agency identified numerous less damaging practicable alternatives than the proposed project. *Id.* at 64. EPA concluded that the state overestimated the size of projected water supply needs, the project's costs were unaffordable, and the state failed to account for water conservation and other available alternative supplies, such as use of groundwater and increased water from existing impoundments. *Id.* at 50, 53-54, 59.

330. R.I. WATER RES. BD., BIG RIVER MANAGEMENT AREA POLICIES 2 (July 1997), *available at* http://www.wrb.ri.gov/policy_guidelines_brmalanduse/BRMA_Policies.pdf.

331. R.I. DEP'T OF ENVTL. MGMT., BIG RIVER – SOUTHWEST MANAGEMENT AREA MAP (2013), *available at* http://www.dem.ri.gov/maps/mapfile/huntingatlas/15.pdf.

332. *See* Two Forks Water Supply Impoundments, 56 Fed. Reg. 76, 76 (Envtl. Prot. Agency Jan. 2, 1991) (final determination) [hereinafter Two Forks Final Determination]; South Platte River, 54 Fed. Reg. 36,862, 36,862 (Envtl. Prot. Agency Sept. 5, 1989) (proposed determination) [hereinafter Two Forks Proposed Determination].

333. Two Forks Proposed Determination, *supra* note 332, at 36,864.

334. U.S. ENVTL. PROT. AGENCY, RECOMMENDED DETERMINATION TO PROHIBIT CONSTRUCTION OF TWO FORKS DAM AND RESERVOIR PURSUANT TO SECTION 404(C) OF THE CLEAN WATER ACT 21 (Mar. 26, 1990) [hereinafter TWO FORKS RECOMMENDED DETERMINATION]. FWS designated stretches of the South Platte as Resource Category 1, which indicates that it is "unique and

included valuable upland wildlife habitat, including "essential" habitat for a federally threatened butterfly species—the Pawnee montane skipper.[335] Historically, the dam site provided nest sites for the endangered peregrine falcon, the endangered bald eagle, and a variety of other species.[336] The South Platte Basin also supports a large variety of recreational opportunities, including camping, fishing, boating, hiking, and white-water rafting.[337]

In 1981, the state of Colorado began pursuing the Two Forks Dam project by requesting that the Corps undertake an EIS under a consent decree in connection with the city of Denver's construction of a nearby dam.[338] In 1987, the Denver Water Board applied for a section 404 permit to build the dam, and the Corps released a draft EIS on the project, which EPA determined was environmentally unsatisfactory because it failed to properly address mitigation, available alternatives, or the project's significant adverse environmental effects.[339] The Corps issued a final EIS in 1988, which EPA decided was inadequate because

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irreplaceable." *Id.* at 1. The National Park Service similarly determined that the area "possesses outstanding remarkable recreational, fish, historic and other (endangered species) values." *Id.*

335. *Id.* at 26.

336. *Id.*

337. *Id.* at 35.

338. *Id.* at 6-7. Colorado initially investigated other projects to provide municipal water to Denver, including the Foothills project downriver of the proposed Two Forks site. *Id.* at 5-6. The Foothills project was also controversial, and EPA elevated the EIS on that project to the Council of Environmental Quality because EPA thought it would cause significant adverse environmental effects to aquatic, wildlife and recreational resources and not comply with national ambient air quality standards under the Clean Air Act. *See id.* at B-1. Groups on both sides challenged the Foothills project in court. *See id.* at 6. Ultimately, all involved parties signed a consent decree in 1979, which stipulated that (1) future projects would be subject to an EIS, (2) the Denver Water Board (DWB) would institute a water conservation program, and
(3) EPA would review the board's water conservation efforts and set water conservation goals. *Id.*

339. *Id.* at 7. EPA maintained that the draft EIS did not adequately address potential water quality standard violations or the degradation of the existing high quality water from the project. *See* Environmental Impact Statements and Regulations; Availability of EPA Comments, 52 Fed. Reg. 17,461, 17,461 (May 8, 1987). EPA also noted that the Corps' analysis of the available alternatives was incomplete and biased. *Id.* Finally, EPA decided that the mitigation plan included in the EIS was inadequate to address the project's adverse effects. *Id.*

the Corps had no definitive mitigation plan, and the project remained the most environmentally damaging alternative in the EIS.[340]

EPA responded to the EIS by announcing that it was considering a section 404(c) action and requested a 404(q) elevation.[341] The Corps refused the 404(q) appeal and proposed to issue the permit.[342] EPA then initiated a 404(c) action.[343] After the Corps and the Denver Water Board failed to find a solution that responded to EPA's concerns, EPA vetoed the permit due to unacceptable adverse effects on wildlife, fishery, and recreational opportunities in the Platte River Basin.[344] The agency decided that the project was unacceptable because of the availability of

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340. TWO FORKS RECOMMENDED DETERMINATION, *supra* note 334, at 7 (stating that of all the alternatives that the Corps' draft or final EIS identified, the Two Forks dam and reservoir was the "most environmentally damaging").

341. *Id.* at 8

342. *Id.* at 8. Although EPA requested a 404(q) elevation, which resulted in a meeting between the Regional Administrator and the Division Engineer, the permit process continued. *Id.*

343. *Id.* at 9. The Region 8 Regional Administrator recused himself from the 404(c) review because he had been heavily involved in the process up to that point. *Id.* Instead, the Deputy Regional Administrator for Region 4 conducted the review. *Id.* EPA, the DWB, and other interested parties had several meetings to resolve EPA's concerns about the project. *Id.*

344. Two Forks Final Determination, *supra* note 332, at 77. EPA expressed concern about adverse environmental effects, including the direct loss of what it described as a "phenomenal" fishery, wildlife habitat, and recreational opportunities as well as indirect effects like the transfer of recreation and wildlife to nearby areas. *See* TWO FORKS RECOMMENDED DETERMINATION, *supra* note 334, at 21-32. EPA stated—and the Corps agreed—that the DWB's stated purpose was too narrow because it included too many specific elements to define the project's proposed purpose, and therefore erroneously precluded reasonable alternatives. *Id.* at 40. EPA considered three practicable alternatives with less adverse effects on special aquatic sites. U.S. ENVTL. PROT. AGENCY, FINAL DETERMINATION OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S ASSISTANT ADMINISTRATOR FOR WATER PURSUANT TO SECTION 404(C) OF THE CLEAN WATER ACT CONCERNING THE TWO FORKS WATER SUPPLY IMPOUNDMENTS 29 (Nov. 23, 1990). The agency also rejected the proposed mitigation plan—restoration of 310 acres of wetlands, treatment of an additional 700 acres using livestock exclosures, creation of a 55-mile long recreation corridor, and creation of fisheries by the dam—as inadequate because of the uncertainty inherent in achieving mitigation objectives to compensate for the lost high quality fisheries and recreational area, and that the mitigation plan could not completely compensate for the lost fisheries and recreational areas. *See id.* at 32-39.

practicable, less environmentally damaging alternatives. Even if there were no such alternatives available, the adverse environmental effects of the dam were so significant—even with proposed mitigation—that they alone justified a section 404(c) action.[345]

Eight municipal water supply companies challenged EPA's 404(c) action in federal district court, claiming that EPA acted arbitrarily and capriciously in issuing the 404(c) veto.[346] The companies claimed that EPA improperly compared the adverse effects of alternatives without crediting the project's mitigation measures. However, the court rejected their arguments and affirmed EPA's mitigation policy of avoiding unacceptable adverse environmental effects first, then mitigating remaining unavoidable effects.[347] The court concluded that, based on the record, EPA had acted within its statutory authority, amply supporting its conclusions concerning the availability of practicable alternatives and the project's significant unacceptable adverse environmental effects.[348]

The Two Forks Dam was never constructed.[349] In 2000, the former head of EPA, William K Reilly, recounted his decision to veto the project and the politics of doing so, including his consideration of a possible override of the 404(c) action by President George H.W. Bush.[350] One important result of the Two

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345. Two Forks Final Determination, *supra* note 332, at 77. EPA's decision did not prohibit other filling activities in the area, but specified that the Corps would have to evaluate other proposed activities on each proposed project's merits. *Id.*

346. Alameda Water & Sanitation Dist. v. Reilly, 930 F. Supp. 486, 488, 491 (D. Colo. 1996). EPA and the Corps claimed that the plaintiffs lacked standing because of a lack of redressability, since the project depended on the city of Denver's participation, and there was no evidence that the city wanted to pursue the project. *Id.* at 490. The court agreed and dismissed the case. *Id.* at 493.

347. *Id.* at 492.

348. *Id.* at 493.

349. *But see* Ed Marston, *Water Pressure: A Valiant Veto Defeated Two Forks Dam; Will Denver's Sprawl Bring It Back?*, HIGH COUNTRY NEWS (Nov. 20, 2000), http://www.hcn.org/issues/191/10100 (suggesting that Two Forks Dam and other projects may become desirable in the future as a result of sprawling urban growth).

350. *Id.*

Forks veto was that it fostered change within the Denver Water Board, which began cooperating with both rural western Colorado citizens and environmentalists and became interested in water conservation.[351] Although the rejection of the dam caused no water shortages in the years following the veto, the continued population increase in Denver could reopen these issues in the future.

IV.
RECENT DISPUTES INVOLVING SECTION 404(C) VETOES

After the veto of the Two Forks project in 1990, EPA did not invoke its 404(c) authority for 18 years, although during the same period the agency pursued over twenty 404(q) permit elevations.[352] FWS also sought sixteen 404(q) elevations between 1993 and 2001.[353]

EPA's reassertion of 404(c) authority in 2008 concerned the largest project the agency ever vetoed: the Yazoo Backwater.[354] Two ensuing section 404(c) actions, the Spruce No. 1 Mine in West Virginia and the Pebble Mine in Alaska, also involved extremely prominent projects, with potentially large economic

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351. *Id.* Through this support, the DWB constructed a small reservoir in western Colorado. *Id.* Additionally, DWB is also considering alternatives, such as using reclaimed water for construction, to meet their water needs. *Id.*

352. *See Chronology of 404(q) Actions*, U.S. ENVTL. PROT. AGENCY, http://water.epa.gov/lawsregs/guidance/wetlands/404q.cfm (last visited Apr. 22, 2015) (providing the chronology of twenty-one 404(q) actions and related documentation). Notably, in 1992, the Corps and EPA signed a new Memorandum of Agreement on 404(q) elevations. *See* Memorandum of Agreement Between the Envtl. Prot. Agency and the Dep't of the Army (Dec. 18, 1992), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/1992_MOA_404q.pdf.

353. *404(q) MOA Elevation Requests*, U.S. FISH & WILDLIFE SERV., http://www.fws.gov/habitatconservation/elevations.html (last visited Apr. 22, 2015). Although the FWS has requested sixteen 404(q) elevations, the Corps has only reconsidered two projects, and it is unclear if those projects proceeded ultimately. *Id.* The Corps usually declines to elevate a permit request either because the Corps considers a site not to be an aquatic resource of national importance, or that the project's adverse effects are not substantial and unacceptable. *Id.*

354. *See infra* Part IV.A.

and ecological effects.[355] Although the agency's vetoes in the Yazoo Backwater and Spruce No. 1 Mine cases survived judicial review, both decisions face potential reversals by Congress.[356] The most recent 404(c) action—Pebble Mine—awaits a final determination from EPA as of this writing, but the agency's initiation of 404(c) procedure has already generated a number of political and judicial challenges.[357] This section explores these recent and ongoing disputes.

A. *Yazoo Pumps Project: Protecting the Yazoo Backwater (2008)*

After the 18-year hiatus, in 2008, EPA issued its twelfth veto on a flood control project that would significantly degrade 67,000 acres of Mississippi wetlands.[358] The Yazoo Backwater Area encompasses highly productive floodplain and bottomland hardwood forests, which provide important foraging grounds for migratory birds and valuable fish and wildlife habitat, including the Louisiana black bear, a federally threatened species, as well as habitat for a federal endangered shrub, the pondberry.[359] The wetlands serve important ecological functions, including pollution removal and retention, management of water movement, and nutrient cycling for aquatic food webs.[360] Yazoo also offers valuable recreational opportunities to hunt, fish, and watch wildlife for local residents and visitors from around the country.[361]

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355. *See infra* notes 388-92, 412-13, 416-18 and accompanying text.

356. *See* infra Part IV.A-B.

357. *See infra* notes 432-42 and accompanying text.

358. *See* Yazoo Backwater Area Pumps Project, 73 Fed. Reg. 54,398, 54,398 (Sept. 19, 2008) (final determination) [hereinafter Yazoo Final Determination]. The project would assist in flood control for 630,000 acres, including 150,000 to 229,000 acres of wetlands. *Id.*

359. *Id.*

360. *Id.*

361. U.S. ENVTL. PROT. AGENCY, FINAL DETERMINATION OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S ASSISTANT ADMINISTRATOR FOR WATER PURSUANT TO SECTION 404(C) OF THE CLEAN WATER ACT CONCERNING THE PROPOSED YAZOO BACKWATER AREA PUMPS PROJECT, ISSAQUENA COUNTY, MISSISSIPPI 43 (Aug. 31, 2008) [hereinafter YAZOO EPA FINAL DETERMINATION].

Congress initially approved the Yazoo Area Pump Project in the Flood Control Act of 1941, which authorized the use of levees, drainage structures, and pumping stations to reduce backwater flooding.[362] In 1962, after a series long of delays and modifications,[363] the Corps began construction of key levees, flood control gates, and channels, and completed that construction by 1981.[364] In 1983, the Corps issued an EIS on the remaining elements of the project.[365] Although both EPA and FWS expressed concerns that completing the project would cause significant adverse effects on water quality as well as fish and wildlife habitat,[366] the Corps initiated construction to finish the project.[367] Congress caused a ten-year break in construction in 1986, passing a bill that essentially removed the project's funding before reauthorizing the funding in 1996 and allowing the project to continue.[368] In 1997, the agencies began investigating finishing the project, the possible adverse environmental effects of doing so, and any potentially less environmentally damaging alternatives.[369] In 2000, after reducing the scale of the project, the Corps completed a draft supplemental EIS.[370] EPA worked with the Corps in evaluating the effects the project would have on affected wetlands, concluding that the Corps had underestimated the project's

362. Flood Control Act of 1941, Pub. L. No. 77-228, § 3, 55 Stat. 638, 642-44; YAZOO EPA FINAL DETERMINATION, *supra* note 361, at 7.

363. Although Congress authorized the project in 1941, World War II and the Korean War prevented the Corps from pursuing it. YAZOO EPA FINAL DETERMINATION, *supra* note 361, at 8. In 1954, Congress ordered the Corps to review the project and modify it as necessary. *Id.* The Corps modified the authorized plan in 1962. *Id.*

364. *Id.* at 9.

365. *Id.* at 10.

366. *Id.*

367. *Id.* at 11.

368. *Id.* The Water Resources Development Act of 1986 required a local cost-share, and therefore removed funding from the project. *See* Water Resources Development Act of 1986, Pub. L. No. 99-662, § 103(e)(1), 100 Stat. 4082. The 1996 Water Resources Development Act by reauthorized the project without requiring the local cost-share. YAZOO EPA FINAL DETERMINATION, *supra* note 361, at 11.

369. YAZOO EPA FINAL DETERMINATION, *supra* note 361, at 11.

370. *Id.* at 12.

adverse effects on fish and wildlife and overestimated its environmental benefits.[371] In 2007, the Corps issued a final supplemental EIS, on which EPA again submitted opposition comments based on the magnitude of the adverse effects on the environment.[372] In 2008, EPA initiated a section 404(c) action because of the potential unacceptable adverse environmental effects on fish and wildlife.[373] Although a contentious public comment period followed,[374] EPA proceeded to issue a 404(c) in 2008.[375]

The Mississippi Board of Levee Commissioners met with EPA's Assistant Administrator for Water after the veto. The Board challenged EPA's authority to issue a 404(c) action

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371. *Id.* EPA objected to the Corps' evaluation approaches because EPA believed that the Corps underestimated project's potential adverse environmental effects and overestimated potential benefits from proposed reforestation. *Id.*

372. *Id.* at 12-13. EPA was concerned about the possibility that the project would not comply with section 404(b)(1) guidelines, that the proposed reforestation plan was uncertain, future changes in use of the land surrounding the project, and environmental justice concerns involving potential disproportionate effects of the project on low income or minority communities. *Id.* at 12-13, 66-67. The agency also expressed doubts that the economic analysis was uncertain, and that the potential project alternatives needed further analysis. *Id.* at 13. FWS expressed similar concerns on the adverse environmental effects of the project. *Id.*

373. *Id.*

374. EPA received some 47,600 comment letters—1,500 individual letters and 46,100 mass mailers. *Id.* at 15. Over 97 percent of the individual mailers—and all the mass mailers—asked EPA to prohibit the discharge. *Id.* However, thirty-one residents of the Yazoo Backwater Area commented at the public hearing and most—twenty-six of them—supported completion of the project. *Id.*

375. Yazoo Final Determination, *supra* note 358, at 54,398. EPA emphasized that the project would damage significant wildlife resources and fisheries. YAZOO EPA FINAL DETERMINATION, *supra* note 361, at 72 (stating that "[e]xtensive information collected on the Yazoo Backwater Area demonstrates that it includes some of the richest wetland and aquatic resources in the Nation. These include a highly productive floodplain fishery, substantial tracts of highly productive bottomland hardwood forests. . .and important migratory bird foraging grounds"). The agency determined that the project would result in the loss of ecological functions, such as pollution filtration and retention, nutrient cycling, and storage of surface water. *Id.* EPA's section 404(c) action prohibited the proposed project and two alternative proposals—as well as three other proposals that the Corps had abandoned—because of significant adverse environmental effects. *Id.* at 72-73.

because it believed the project was exempt under section 404(r) of the CWA,[376] which exempts projects from 404 permit requirements that have been "specifically authorized" by Congress after being evaluated in an EIS.[377] EPA responded that the project was not exempt under 404(r) because the EIS was never submitted to Congress, nor had the project received specific congressional approval.[378]

In 2009, the Board pursued its 404(r) claim in federal district court.[379] The court agreed with EPA that there was no evidence that a "report or written review of the Pump Project" was submitted to Congress, and it upheld EPA's decision.[380] The Board appealed the issue to the Fifth Circuit,[381] arguing that letters from the Corps to a congressman and a senator in 1982 were evidence that the EIS had been submitted to Congress.[382] The court decided that, although it was unclear if the letters had included an EIS, it was unlikely because the Corps did not finalize the EIS until after the agency sent the letters.[383] Moreover, the Corps asserted that the letters were not aimed at obtaining an exemption under 404(r), and therefore had not followed standard operating procedures for obtaining a 404(r)

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376. Bd. of Miss. Levee Comm'rs v. EPA, 785 F. Supp. 2d 592, 603 (N.D. Miss. 2011). Similarly, two U.S. Senators contacted EPA and argued that EPA did not have the authority to veto the project because they believed the project to be exempt under section 404(r). *Id.* at 604.

377. *See* 33 U.S.C. § 1344(r) (2014). See discussion of section 404(r), *supra* note 324 and accompanying text.

378. *Bd. of Miss. Levee Comm'rs*, 785 F. Supp. 2d at 604.

379. *Id.* at 593. Several environmental organizations—the National Wildlife Federation, the Mississippi Wildlife Federation, and the Environmental Defense Fund—intervened in the case in support of EPA. *Id.*

380. *Id.* at 609. Executive Order 12322, defines "submitted to Congress" to require that any plan "relating to a Federal or Federally assisted water and related land resources project . . . be submitted to the Director of the Office of Management and Budget." Exec. Order No. 12,322, §1, 46 Fed. Reg. 46,561, 46,561 (Sept. 17, 1981).

381. Bd. of Miss. Levee Comm'rs v. EPA, 674 F.3d 409, 416 (5th Cir. 2012).

382. *See id.*

383. *Id.* at 419-20. The Commissioners argued that the EIS went final prior to the mailing of the letters, even though the public comment period remained open. *Id.* at 419.

exemption.[384] The Fifth Circuit upheld the district court's decision because the record did not reveal submission of a suitable EIS to Congress.[385]

Although Congress authorized the initial elements of the Yazoo Backwater Project over seventy years ago, the project is unlikely to be completed. Administrative and judicial procedures for Yazoo have been exhausted, but the project is not entirely dead. U.S. Senator Thad Cochran (R-Miss.) has continued to pursue the project, and, in 2014, the Senator contacted EPA Administrator and requested an independent peer review of EPA's scientific determinations.[386] Senator Cochran maintained that the project's significant economic benefits warranted further review of the agency's scientific conclusions, and he asked that the agency continue to work to find viable alternatives for the project, although the Senator did not suggest any such alternatives.[387]

B. *The Spruce No. 1 Surface Mine: Curbing Mountaintop Mining (2011)*

In 2011, EPA issued the thirteenth and most recent 404(c) action for a proposed mountaintop-removal coal mine in Logan County, West Virginia, which would alter 2,278 acres and fill 7.48 miles of streams.[388] The site, within the headwaters of the

384. *Id.* at 420. The Corps' standard operating procedure for considering 404 permits for Civil Works projects specifies that the Corps has three options: 1) seek a 404(r) exemption, 2) have the state certify the water quality standard compliance under section 401, or 3) seek a 404(r) exemption after authorization by submitting a qualified EIS to Congress. *Id.*

385. *Id.*

386. Letter from Sen. Thad Cochran, Miss., to Regina McCarthy, Adm'r, Envtl. Prot. Agency (Oct. 27, 2014), *available at* http://www.cochran.senate.gov/public/_cache/files/aea4257f-9018-46da-89a4-8a96b07c32de/EPA-Yazoo-Backwater-Project-LTR.pdf.

387. *Id.*

388. U.S. ENVTL. PROT. AGENCY, FINAL DETERMINATION OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY PURSUANT TO § 404(C) OF THE CLEAN WATER ACT CONCERNING THE SPRUCE NO. 1 MINE, LOGAN COUNTY, WEST VIRGINIA 6 (Jan. 13, 2011) [hereinafter SPRUCE EPA FINAL DETERMINATION]. For further information on Spruce No. 1 Surface Mine, see Amy Oxley, *No Longer Mine: An Extensive Look at the Environmental Protection Agency's Veto*

Spruce Fork of the Little Coal River, contains some of the "last remaining least-disturbed, and high quality stream and riparian resources" in the area.[389] Headwater streams perform important ecological functions, including the processing and transport of nutrients and habitat diversity for a group of amphibians, fish, mollusks, crayfishes, aquatic insects, birds, and bats.[390] FWS has designated six species of birds that are likely to use the area for breeding as "birds of conservation concern."[391] Moreover, seven species of bats, including two endangered species—the Indiana bat and the Virginia big-eared bat—use the project site.[392]

In 1998, Arch Coal Inc. proposed Spruce No. 1 Mine, and, although the Corps initially offered a nationwide permit, the Corps later withdrew the offer.[393] The company then applied for an individual permit, and the Corps began preparing an EIS.[394] In 2002, EPA reviewed the draft EIS and determined that it was inadequate because it had failed to fully consider the effects the project would have on the streams.[395] Thereafter, Arch Coal Inc. transferred its interest in Spruce Mine to a subsidiary—Mingo Logan Coal Company—and revised the project to reduce the adverse effects by preserving one "good quality" stream and reducing the project area.[396] The Corps prepared a revised draft

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of the Section 404 Permit Held by the Spruce No. 1 Mine, 36 S. ILL. U. L.J. 139 (2011).

389. SPRUCE EPA FINAL DETERMINATION, supra note 388, at 6-7; U.S. ENVTL. PROT. AGENCY, RECOMMENDED DETERMINATION OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY REGION III PURSUANT TO SECTION 404(C) OF THE CLEAN WATER ACT CONCERNING THE SPRUCE NO. 1 MINE, LOGAN COUNTY, WEST VIRGINIA 18 (Sept. 24, 2010) [hereinafter SPRUCE EPA RECOMMENDED DETERMINATION].

390. *See* SPRUCE EPA RECOMMENDED DETERMINATION, *supra* note 389, at 19-34.

391. *Id.* at 32.

392. *See id.* at 34.

393. SPRUCE EPA FINAL DETERMINATION, *supra* note 388, at 18. The Corps originally decided to authorize part of the project under the nationwide permit number 21, regarding surface coal mining. *See* Bragg v. Robertson, 54 F. Supp. 2d 635, 638, 651 (S.D. W. Va. 1999). The federal district court enjoined that permit because the company divided the project into separate permits to delay and limit detailed scrutiny of the entire project. *Id.* at 650.

394. SPRUCE EPA FINAL DETERMINATION, *supra* note 388, at 18.

395. *Id.*

396. Spruce No. 1 Surface Mine, 75 Fed. Reg. 16,791, 16,791 (April 2, 2010)

EIS in 2006, and EPA continued to raise concerns about the project, including its adverse effects on water quality, uncertainty with the proposed mitigation, potential environmental justice issues, and inadequate consideration of cumulative effects.[397] The Corps released the final EIS and—despite EPA's concerns—issued a section 404 permit.[398]

In 2007, environmental groups challenged the validity of the Corps' permit, although a settlement agreement allowed Mingo Logan to begin limited operations.[399] By 2009, EPA determined that new scientific literature revealed the importance of headwater streams and the difficulties of mitigating the loss of those streams, and requested the Corps to revoke the 404 permit.[400] The Corps refused and after the parties failed to reach an agreement on the proposed project, EPA proposed a section 404(c) action.[401] After a contentious public comment period,[402] EPA issued a section 404(c) veto in 2011 based on unacceptable adverse effects to fish and wildlife due to the loss of 6.6 miles of headwater streams and the negative effects those losses would

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(proposed determination). The Spruce No. 1 mine would have been the largest mountaintop-removal mining project in West Virginia history. Erich Schwartzel, *Mountain of Issues: Ruling Moves Forward Huge West Virginia Mining Project Amid Tempered Foreign Coal Demand and Need for Local Jobs*, PITTSBURGH POST-GAZETTE, Apr. 1, 2012, at C-1.

397. SPRUCE EPA FINAL DETERMINATION, *supra* note 388, at 18-19. FWS similarly raised concerns that the project's mitigation plan was inadequate because although the plan included erosion control, it did not account for lost ecological services. *Id.* at 19.

398. *Id.* The project received authorization from the West Virginia Department of Environmental Protection under the state's surface mining program and under sections 401 (water quality standard certification) and 402 (point source discharge permit) of the CWA. *Id.*

399. *Id.* Although the district court ruled that the section 404 permit was inadequate to authorize the project because it also needed a section 402 permit to regulate pollutant discharges into stream segments—inadvertently created to move runoff from the fill to sediment ponds—as "waters of the United States," the Fourth Circuit reversed, holding that the Corps had properly issued the permits under section 404 because the agency's interpretation of its 404 authority to regulate those stream segments was reasonable. *See* Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 216-17 (4th Cir. 2009).

400. SPRUCE EPA FINAL DETERMINATION, *supra* note 388, at 21.

401. *Id.*

402. EPA received 121 oral comments during a public hearing and over 50,000 written comments on the proposed determination. *Id.*

cause downstream.[403]

Mingo challenged EPA's veto in district court, arguing that EPA had exceeded its statutory authority under section 404(c) by retroactively vetoing an issued permit.[404] Applying the two-step *Chevron* analysis,[405] the district court determined that Congress had not granted EPA the authority to veto previously issued permits, nor was EPA's interpretation of the statute a reasonable one.[406]

EPA appealed to the D.C. Circuit, which also undertook a *Chevron* analysis, but disagreed with the district court, concluding that the language of the statute unambiguously granted EPA the authority to withdraw permits that were in effect.[407] However, since Mingo had originally challenged EPA's

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403. Spruce No. 1 Mine, 76 Fed. Reg. 3126 (Jan. 19, 2011) (final determination). EPA noted the loss of habitat for "84 taxa of macroinvertebrates, up to 46 species of amphibians and reptiles, 4 species of crayfish, and 5 species of fish, as well as birds, bats, and other mammals." *Id.* at 3127. EPA also spotlighted the important ecosystem functions that would be lost downriver. *Id* at 3127-28.

404. Mingo Logan Coal Co. v. EPA, 850 F. Supp. 2d 133, 137 (D.D.C. 2012). Mingo filed the complaint immediately after EPA issued the proposed determination for the 404(c) action. *See id.* at 133.

405. *See* Chevron, USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) (establishing that for agency interpretations of statutes, a reviewing court must first determine if Congress' intent in the statute was clear, and only if not clear, the court then must consider if the agency's interpretation of the statute is a reasonable one).

406. *Mingo*, 850 F. Supp. 2d at 153.

407. Mingo Logan Coal Co. v. EPA, 714 F.3d 608, 616 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 1540 (2014). The court focused on the statutory language in section 404(c), which states:

> The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, *whenever* he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

33 U.S.C. § 1344(c) (2014) (emphasis added); *see Mingo*, 714 F.3d at 612.

A group of twenty-seven states filed an amicus brief in support of Mingo's

action on additional grounds that the district court had not considered, the D.C. Circuit remanded the case to allow the lower court to consider those additional claims.[408] In particular, Mingo argued that EPA's 404(c) determination that the permit would have unacceptable adverse effects was arbitrary and capricious.[409] Nevertheless, the district court subsequently upheld EPA's conclusion concerning unacceptable adverse effects and determined that EPA's decision warranted judicial deference because the language of section 404 does not require the agency to have substantial new information to veto an existing permit.[410] In December 2014, Mingo Logan appealed the district court's ruling.[411]

Spruce No. 1 Mine was the first time EPA used a section 404(c) veto to prohibit a permit for mountaintop-removal mining project.[412] The decision has remained controversial, with

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appeal to the Supreme Court, arguing that EPA's ability to retroactively veto active permits placed state economies in jeopardy by creating additional risk for a company. *See* Beth Ryan, *Attorney General Morrissey Leads Bipartisan Group of 27 States in Brief Urging U.S. Supreme Court to Weigh in on Spruce Mine Permit*, OFFICE OF W. VA. ATT'Y GEN. (Dec. 17, 2013), http://www.ago.wv.gov/pressroom/ 2013/Pages/Attorney-General-Morrisey-Leads-Bipartisan-Group-Of-27-States-In-Brief-Urging-U.S.-Supreme-Court-To-Weigh-In-On-Spruce-Mine.aspx (providing a hyperlink to the amicus brief).

408. *Mingo*, 714 F.3d at 609.

409. Mingo Logan Coal Co. v. EPA, No. 10-0541, 2014 U.S. Dist. LEXIS 138026, at *18 (D.D.C. Sept. 30, 2014).

410. *Id.* at *86.

411. *Id.*, *appeal docketed*, No. 14-5305 (D.C. Cir. Dec. 9, 2014).

412. Although Spruce No. 1 Mine was the first veto of a mountaintop-mining permit, the issuance of 404 permits for mountaintop mining projects was contentious throughout the early 2000's. *See* CLAUDIA COPELAND, CONG. RESEARCH SERV., MOUNTAINTOP MINING: BACKGROUND ON CURRENT CONTROVERSIES 7 (July 16, 2014), *available at* https://fas.org/sgp/crs/misc/RS21421.pdf. In 2002, a district court held that waste from mountaintop mining could not be discarded into U.S. waters under section 404 and enjoined the Corps from issuing 404 permits for that purpose. *See* Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 204 F. Supp. 2d 927 (S.D. W. Va. 2002). In 2003, the Fourth Circuit overturned that decision, ruling that the injunction was overbroad, and the Corps had not acted arbitrarily or capriciously in issuing in the permit. *See* Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425, 448 (4th Cir. 2003).

In 2009, EPA initiated a 404(c) review of a permit issued for another surface mining project, the Big Branch mine in Kentucky. *See* Letter from A. Stanley Meiburg, Acting Reg'l Adm'r, U.S. Envtl. Prot. Agency to Col. Dana R. Hurst,

industries and local politicians warning about the possible loss of jobs and harm to the local West Virginia economy.[413] Members of Congress have introduced multiple bills in the House or the Senate to limit EPA's authority to issue 404(c) actions; however, no measure passed in the 113th Congress.[414] Whether the veto of Mingo's existing permit indicates the beginning of federal opposition to mountaintop mining and its adverse environmental effects, or whether the veto serves as a catalyst to legislatively reduce EPA's 404(c) authority, remains uncertain.

Dist. Eng'r, U.S. Army Corps of Eng'rs, Huntington District (Apr. 28, 2009) (on file with authors). Over the next two years, extensive negotiations occurred and eventually the Big Branch mining permit was sold to a new company. *See* Letter from Ronald G. Hull, Gen. Manager, Eng'g and Planning to Jim Giattina, Dir., Water Prot. Div., U.S. Envtl. Prot. Agency & Ginger Mullins, Chief, Regulatory Branch, U.S. Army Corps of Eng'rs, Huntington Dist. (Sept. 12, 2011). In 2012, EPA reached an agreement with the mining company and a modified plan that reduced 41 percent of the project's negative effects on streams. *See* Letter from Gwendolyn Keyes Fleming, Reg'l Adm'r, U.S. Envtl. Prot. Agency, to Col. Robert D. Peterson, Dist. Commander, U.S. Army Corps of Eng'rs, Huntington Dist. (May 31, 2012). The last correspondence indicated EPA's intention to review a revised permit application when the company submitted it to the Corps. *See* Letter from A. Stanley Meiburg, Acting Reg'l Adm'r, U.S. Envtl. Prot. Agency to Lt. Col. William Redding, Dist. Commander, U.S. Army Corps of Eng'rs, Huntington Dist. (Sept. 5, 2013).

413. *See* Schwartzel, *supra* note 396, at C-1. West Virginia has a long history focused on coal mining. *See generally* SHIRLEY STEWART BURNS, BRINGING DOWN THE MOUNTAINS: THE IMPACT OF MOUNTAINTOP REMOVAL SURFACE COAL MINING ON SOUTHERN WEST VIRGINIA COMMUNITIES (2007) (providing a detailed account of both the positive and negative effects of West Virginia coal mining industry on its citizens).

414. House Bill 457, EPA Fair Play Act, Mining Jobs Protection Act, and House Bill 1 would have restricted EPA from vetoing permits after the permit had been issued. *See* H.R. 457, 112th Cong. (1st. Sess. 2011), *available at* https://www.congress.gov/112/bills/hr457/BILLS-112hr457ih.pdf; S. 272, 112th Cong. (1st Sess. 2011), *available at* https://www.congress.gov/112/bills/s272/BILLS-112s272is.pdf; S. 468, 112th Cong. (1st Sess. 2011), *available at* https://www.congress.gov/112/bills/s468/BILLS-112s468is.pdf;H.R. 960, 112th Cong. (1st Sess. 2011), *available at* https://www.congress.gov/112/bills/hr960/BILLS-112hr960ih.pdf; H.R. 1, 112th Cong. (as passed by Senate, Dec. 28, 2012), *available at* https://www.congress.gov/112/bills/hr1/BILLS-112hr1ih.pdf. The Clean Water Cooperative Federalism Act of 2011 and the Coal Jobs Protection Act of 2014 would have prevented EPA from vetoing permits when the state did not oppose the permit. *See* H.R. 2018, 112th Cong. (1st Sess. 2011), *available at* https://www.congress.gov/112/bills/hr2018/BILLS-112hr2018ih.pdf; H.R. 5077, 113th Cong. (2d Sess. 2014), *available at* https://www.congress.gov/113/bills/hr5077/BILLS-113hr5077ih.pdf.

C. *The Pebble Mine: Preserving Bristol Bay Salmon Fishery (ongoing)*

In July 2014, EPA initiated a 404(c) action at the site of a proposed copper and gold mine that would destroy at least 1,100 acres of wetlands, lakes, and ponds, as well as five miles of streams in the Bristol Bay watershed of southwest Alaska.[415] The fsite is located at the headwaters of the Kvichak and Nushagak River watersheds and supports the most productive salmon fisheries in Alaska.[416] According to EPA, the Bristol Bay watershed is a "largely pristine, intact ecosystem with outstanding ecological resources," providing habitat for at least 29 species of fish, 40 species of mammals, and 190 species of birds.[417] The watershed provides a variety of recreational opportunities, including commercial, sport, and subsistence fishing; sport and subsistence hunting; wildlife viewing; and tourism. In 2009, the watershed produced an estimated $480 million in economic benefits and roughly 14,000 jobs.[418]

The project's proponents had studied the Pebble deposit for over twenty years when the predecessor of Pebble Limited Partnership (PLP) signaled an intent to apply for a 404 permit. Federal and state agencies held technical working groups between 2007 and 2010 to consider the project's possible effects on water quality, fisheries, wildlife, and hydrology, and geochemistry.[419] In 2010, six tribal governments in the Bristol

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415. U.S. ENVTL. PROT. AGENCY, PROPOSED DETERMINATION OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY REGION 10 PURSUANT TO SECTION 404(C) OF THE CLEAN WATER ACT: PEBBLE DEPOSIT AREA, SOUTHWEST ALASKA, at ES-6 (July 2014) [hereinafter PEBBLE EPA PROPOSED DETERMINATION].

416. Geoffrey Y. Parker et al., *Pebble Mine: Fish, Minerals and Testing the Limits of Alaska's "Large Mine Permitting Process,"* 25 ALASKA L. REV. 1, 3 (2008). Bristol Bay has the largest commercial sockeye salmon in the world, five to ten times larger than other sockeye fisheries in Alaska each year. *Id.* at 7.

417. PEBBLE EPA PROPOSED DETERMINATION, *supra* note 415, at 3-1. The site is valuable habitat for both grizzle bears and the Mulchatna caribou herd, one of Alaska's largest. Parker et al., *supra* note 416, at 9.

418. Pebble Deposit Area, 79 Fed. Reg. 42,314, 42,315 (Envtl. Prot. Agency July 21, 2014) (proposed determination) [hereinafter Pebble Proposed Determination].

419. PEBBLE EPA PROPOSED DETERMINATION, *supra* note 415, at 2-3. Comico America, Inc. began exploring and conducted preliminary studies on the

Bay area petitioned EPA to undertake a section 404(c) action due to their concerns that the project would have significant adverse effects on fish, wildlife, and wetlands.[420] PLP continued staking claims, conducting surveys, completing investigatory drilling, and holding meetings with tribal leaders in Bristol Bay until 2011.[421] That year, PLP submitted an environmental baseline document to EPA.[422]

Also in 2011, EPA initiated a scientific assessment—the Bristol Bay Assessment—to assess the effects a large-scale mining operation would have on fisheries, wildlife, and Native cultures in Bristol Bay.[423] After completing the assessment in

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Pebble deposit between 1988 and 1997. *Id.* at 2-1. In 2001, Northern Dynasty Minerals Ltd. (NDM) purchased the rights to the deposit and continued to investigate the project. *Id.* In 2004, the Corps informed NDM that the project would require a section 404 permit, and NDM began the necessary environmental studies, stating it would apply for permits by the end of 2005. *Id.* at 2-3; *see* Letter from Sen. Lisa Murkowski, Alaska, to John Shively, Chief Exec. Officer, Pebble Ltd. P'ship, Mark Cutifani, Chief Exec. Officer, AngloAmerican, and Ron Thiessen, Chief Exec. Officer, N. Dynasty Minerals (July 1, 2013) (on file with authors). However, NDM did not apply for permits, and in 2007 NDM formed the Pebble Limited Partnership (PLP) with Anglo American PLC. PEBBLE EPA PROPOSED DETERMINATION, *supra* note 415, at 2-3. In 2013, Anglo American PLC withdrew from the partnership after investing $541 million dollars. Brad Wieners, *Why Miners Walked Away from the Planet's Richest Undeveloped Gold Deposit*, BLOOMBERG BUSINESSWEEK (Sept. 27, 2013), http://www.businessweek.com/articles/2013-09-27/why-anglo-americanwalked-away-from-the-pebble-mine-gold-deposit.

420. PEBBLE EPA PROPOSED DETERMINATION, *supra* note 415, at 2-4. Three additional tribes signed the letter requesting a 404 action shortly after the letter was submitted to EPA. *Id.*

421. *Id.* at 2-1, 2-4.

422. *Id.* at 2-4. PLP also submitted preliminary plans to the U.S. Security and Exchange Commissions. *Id.* The proposed mine would create the "largest open pit ever constructed in North America," destroying an area 18 square kilometers on the surface and 1.25 kilometers of the subsurface and covering 50 square kilometers with waste material. Letter from Dennis J. McLerran, Reg'l Adm'r, Envtl. Prot. Agency, to Thomas Collier, Chief Exec. Officer, Pebble Ltd. P'ship, Joe Balash, Comm'r, Alaska Dep't of Natural Res., and Christopher D. Lestochi, Commander, U.S. Army Corps of Eng'rs (Feb. 28, 2014) (on file with authors).

423. PEBBLE EPA PROPOSED DETERMINATION, *supra* note 415, at 2-5 to 2-6. Between 2011 and 2014, EPA determined the scope of the assessment, invited public comment, and submitted the assessment for internal and external peer review. *Id.* at tbl. 2-1. EPA contracted an independent company to conduct an independent peer review, consisting of 12 experts who reviewed the draft

2014, EPA initiated a 404(c) action,[424] even though PLP had yet to apply for a 404 permit.[425] The agency's assessment found that the Bristol Bay watershed "supports world-class commercial, subsistence, and recreational fisheries," including a Chinook salmon fishery.[426] The assessment concluded that the project would cause "significant degradation of the aquatic ecosystem"[427] and that the proposed compensatory mitigation would not adequately offset that degradation because of the uncertainty over the effectiveness of the mitigation and the severity of the

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assessment and provided written comments. *Id.* at 2-9 to 2-10. EPA used those comments to redraft the assessment and resubmitted it for a second review from the public and the peer review group. *Id.* at 2-10. EPA then released the final assessment in 2014, structuring the assessment into two sections: problem formulation—which considered the purpose and scope of the assessment—and risk analysis and characterization—which determined possible effects from large-scale mining projects as well as limitations and uncertainties of the assessment. *Id.* at 2-6 to 2-7. Without a permit application, and therefore without specific plans for the project, EPA instead evaluated three different scenarios based on proposals submitted by NDM. *Id.* at 2-15 to 2-16. In the three scenarios the amount of ore mined varied from 0.25 billion tons over 20 years to 6.5 billion tons over 78 years. *Id.*

424. *Id.* at 2-11. EPA responded to differences in the agency's assessment and PLP's environmental baseline assessment by asserting that PLP had underestimated the value of the aquatic habitat, the importance of the project area to the region, and the efficacy of its mitigation plan. *See id.* at 2-11 to 2-14.

425. *See* Letter from Lisa Murkowski to John Shively, Mark Cutifani, and Ron Thiessen, *supra* note 424 (requesting that PLP establish a timeline for the submission of permit applications after the company had announced that it would apply for permits numerous times between 2005 and 2013); Letter from Dennis J. McLerran, Reg'l Adm'r, Envtl. Prot. Agency, to Michael C. Geraghty, Alaska Office of the Att'y Gen. (Mar. 13, 2014) (on file with authors). The state of Alaska had asked EPA to stay the section 404(c) action until after PLP submitted 404 permit applications to allow the Corps the opportunity to review the project under 404(b)(1) guidelines and NEPA. *Id.* The Regional Administrator declined to stay the action but clarified that PLP could apply for a 404 permit during EPA's action, and the Corps could began its 404(b)(1) analysis, although the Corps could not issue the 404 permit during the 404(c) review. *Id.*

426. PEBBLE EPA PROPOSED DETERMINATION, *supra* note 415, at 3-53. Chinook salmon are a critical resource for subsistence fishing, the "rarest of the North American Pacific salmon species," and the Bristol Bay population is valuable for the species' genetic diversity. *Id.*

427. *Id.* at 4-56. For an excellent in-depth discussion on the potential negative effects large-scale mining could have on fisheries, see Parker et. al., *supra* note 416, at 17-21.

project's adverse environmental effects.[428] Consequently, in July 2014, EPA proposed invoking its 404(c) authority to "restrict discharge of dredged or fill material related to mining the Pebble deposit into waters of the United States" that would result in loss of streams, wetlands, lakes, and ponds, or produce streamflow alterations.[429]

The proposed determination opened a public comment period, during which EPA held seven public hearings involving over 800 people making some 300 oral comments and more than 155,000 written comments.[430] In 2015, the Regional Administrator must either recommend that the Administrator proceed with a 404(c) action or withdraw the proposed determination.[431]

Although parties on both sides have attempted to influence the administrative action, some have pursued judicial and legislative action. PLP immediately challenged EPA's proposed determination in the Alaska federal district court, claiming that the agency overreached its statutory authority by initiating a 404(c) action before the company submitted a permit application.[432] The judge dismissed the case on the ground that

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428. PEBBLE EPA PROPOSED DETERMINATION, *supra* note 415, at 4-61. EPA considered three different plans with varying degrees of adverse environmental effects but concluded that even the smallest had significant adverse effects. *Id.* at 5-1.

429. *Id.* at 5-1. EPA set the following limits: loss of stream with either five miles of streams with anadromous fish or nineteen miles of streams that are tributaries to streams with anadromous fish, loss 1,100 of wetlands, lakes and ponds connected to streams or tributaries with anadromous fish, or twenty percent alteration of daily streamflow in nine miles of streams with anadromous fish. *Id.* Although EPA's proposed determination was based solely on negative effects on fisheries, the agency also observed that adverse effects to wildlife, recreation, water quality, subsistence use, and environmental justice might also occur. *Id.* at 6-1–6-4, 6-8. *See also* Pebble Proposed Determination, *supra* note 418, at 42,314.

430. *See* Pebble Deposit Area, 79 Fed. Reg. 56,365, 56,365 (Envtl. Prot. Agency Sept. 19, 2014) (extending the public comment period on the proposed 404(c) determination).

431. *Id.* EPA extended the time requirement from the thirty days required by 40 C.F.R. 231.5(a) to four-and-a-half months based on good cause (40 C.F.R. 231.8) because of the extensive administrative record and volume of public comments. *Id.*

432. *See* Order Granting Motion to Dismiss at 8, Pebble Ltd. P'ship v. EPA, No. 3:14-cv-00097-HRH, Doc. 257 (D. Alaska Sept. 26, 2014). PLP also claimed

proposing a 404(c) action was not a final agency action, and therefore the court lacked subject matter jurisdiction.[433] PLP appealed that decision to the Ninth Circuit and requested an expedited appeal because of alleged economic hardship to the company and to local communities from the delay in the permitting process.[434] The Ninth Circuit affirmed the district court's decision.[435]

PLP filed a second case in Alaska federal district court, alleging that EPA violated the Federal Advisory Committee Act (FACA)[436] on three occasions by creating three federal advisory committees to inform EPA's scientific assessment and its ultimate decision on the 404(c) determination.[437] The mining company maintained that those groups failed to comply with the FACA's directive of representing a "fairly balanced" viewpoint because the agency cooperated only with anti-mining individuals and organizations.[438] In November 2014, the federal district

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that EPA's 404(c) action violated the Alaska Statehood Act and The Cook Inlet Exchange Legislation. *Id.* Alaska intervened in the case, also challenging EPA's right to initiate a 404(c) action before PLP applied for a 404 permit, and therefore depriving the state of its opportunity to review the mine proposal. *See* Motion to Intervene at 16, Pebble Ltd. P'ship v. EPA, No. 3:14-cv-00097-HRH, Doc. 17 (D. Alaska May 30, 2014).

433. *See* Order Granting Motion to Dismiss at 14, Pebble Ltd. P'ship v. EPA, No. 3:14-cv-00097-HRH, Doc. 257 (D. Alaska Sept. 26, 2014).

434. *See* Motion for Expedited Appeal at 2-3, Pebble Ltd. P'ship v. EPA, No. 3:14-cv-00097-HRH (D. Alaska Oct. 14, 2014). The court granted the motion to expedite the appeal. *See* Pebble Ltd. P'Ship v. EPA, No. 14-35845 (9th Cir. Oct. 28, 2014).

435. Pebble Ltd. P'Ship v. EPA, No. 14-35845 (9th Cir. May 28, 2015) (issuing a memorandum opinion that affirms the determination of lack of lacking jurisdiction but did not speak on the merits of the claim after the agency finalizes its action).

436. 5 U.S.C. App II § 1 *et seq.,* (2012).

437. Complaint at 3, Pebble Ltd P'ship v. EPA, No. 3:14-cv-00171-HRH, Doc. 1 (D. Alaska Sept. 3, 2014); *see also* 5 U.S.C. app. 2, § 1-16 (2012). Congress created the Federal Advisory Committee Act to ensure that groups that are acting to advise government agencies must be adequately reviewed, only established when essential, terminated when no longer essential, the public and Congress are informed about their purpose and activity, and specify that an advisory committee is only advisory to the agency. *Id.* at § 2.

438. Complaint at 5, Pebble Ltd. P'ship v. EPA, No. 3:14-cv-00171-HRH, Doc. 1 (D. Alaska Sept. 3, 2014). EPA responded arguing that PLP failed to state a claim because EPA had not violated FACA by meeting and exchanging

court of Alaska issued a preliminary injunction prohibiting EPA from taking further 404(c) action until it could rule on the merits of the FACA claim.[439]

Pebble Mine has both supporters and opponents in Congress.[440] Its proponents attempted to pass the Regulatory Certainty Act of 2014, which would have amended section 404 to allow EPA to undertake a 404(c) action only after the Corps has determined whether or not to issue a permit but before issuing a permit.[441] That bill has been reintroduced in the 114th

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information with groups outside of the agency. *See* Memorandum in Support of Defendants' Motion to Dismiss and Opposition to Plaintiff's Motion for a Preliminary Injunction at 6, Pebble Ltd. P'ship v. EPA, Doc. No. 3:14-cv-00171-HRH, Doc. 70 (D. Alaska Nov. 7, 2014).

439. Order Granting Preliminary Injunction at 2-3, Pebble Ltd. P'ship v. EPA, No. 3:14-cv-00171-HRH, Doc. 90 (D. Alaska Nov. 25, 2014). The court was not persuaded by the claims concerning two groups, the "anti-mine coalition" or the "anti-mine scientists," but the court was persuaded that claim that the "anti-mine assessment team" group, which was comprised largely of the Bristol Bay Assessment Team, violated FACA "at least rais[ed] a question serious enough to justify litigation." *Id.* at *2. In June 2015, the court dismissed PLP's claims alleging that EPA had established "an anti-mine coalition" and "anti-mine scientists" to oppose the project. Order at 18, Pebble Ltd. P'ship v. EPA, No. 3:14-cv-00171-HRH, Doc. 128 (D. Alaska June 4, 2015).

Additionally, PLP filed a third claim alleging that EPA violated the Freedom of Information Act, 5 U.S.C. § 552 (2012), by failing to adequately searching for responsive documents, the omission of known responsive documents, improperly redacting produced documents, and improperly withholding whole documents. Complaint at 7, Pebble Ltd P'ship v. EPA, No. 3:14-cv-00199-HRH, Doc. 1 (D. Alaska Oct. 14, 2014). As of May 2015, that case remained in the briefing stage.

440. Although congressional opponents of Pebble Mine have been urging the president to prohibit the Pebble Mine project, those efforts have yet to bear fruit. *See* Sean Cockerham, *Controversial Alaska Mine Project Wins One in Congress*, MCCLATCHYDC (July 17, 2014), http://www.mcclatchydc.com/2014/07/17/233634/controversial-alaska-mine-project.html.

441. *See* H.R. 4854, 113th Cong. (2d Sess. 2014), *available at* https://www.congress.gov/113/bills/hr4854/BILLS-113hr4854rh.pdf. The bill remains in the early stages of congressional consideration—a House subcommittee conducted a hearing on July 15, 2014 to discuss restricting EPA's authority. *See Hearing on "EPA's Expanded Interpretation of its Permit Veto Authority Under the Clean Water Act" Before the Subcomm. on Transport, Transportation & Infrastructure Water Res. and Env't Subcomm of the H. Comm. on Transp. and Infrastructure*, 113th Cong. (2014), *available at* http://transport.house.gov/calendar/eventsingle.aspx?EventID=386882.

The subcommittee considered both that bill and a second bill that would prevent 404(c) action after a permit had been issued. *See* H.R. 524, 113th Cong. (2d

Congress.[442] On the other hand, Pebble Mine's opponents succeeded in passing a 2014 Alaska ballot measure requiring the state legislature's approval for large mining projects within the Bristol Bay watershed.[443]

Sess. 2013), *available at* https://www.congress.gov/113/bills/hr4854/BILLS-113hr4854ih.pdf. However, both of those bills failed to get out of the committee before the term changed.

442. S. 234, 114th Cong. (1st Sess. 2015), *available at* https://www.congress.gov/114/bills/s234/BILLS-114s234is.pdf.

443. *See Initiative Petition List: 12BBAY*, STATE OF ALASKA DIV. OF ELECTIONS, http://www.elections.alaska.gov/pbi_ini_status_list.php#12bbay (last visited Apr. 22, 2015); *Ballot Measure No. 4 – 12BBAY*, STATE OF ALASKA DIV. OF ELECTIONS, http://www.elections.alaska.gov/doc/bml/BM4-12BBay-ballot-language.pdf (last visited Apr. 22, 2015). Ballot Measure Four—commonly known as Bristol Bay Forever—passed with 65.94% of the vote. 2014 General Elections, November 4, 2014: Official Results, STATE OF ALASKA DIV. OF ELECTIONS, http://www.elections.alaska.gov/results/14GENR/data/results.htm (last visited Apr. 22, 2015). The Alaska Miners Association challenged the constitutionality of the initiative before the election in the Alaska Supreme Court. *See* Hughes v. Treadwell, 341 P.3d 1121 (Alaska 2015) (affirming the lower court ruling that the initiative was not unconstitutional because it did not appropriate state assets or enact local or special legislation in violation of the Alaska Constitution). The association has promised to again file suit challenging the constitutionality of the initiative on the grounds that it violates the separation of powers and improperly appropriates state assets under the Alaska Constitution. Lacie Grosvold, *'Bristol Bay Forever' Would Give Lawmakers Say on Mine Permitting*, KTUU-TV (Sept. 7, 2014), http://www.ktuu.com/news/news/bristol-bay-forever-would-give-lawmakers-say-on-mine-permitting/27927992.

On the other hand, an environmental group and a native organization started the Bristol Bay Pledge, which asks jewelers to pledge not to use gold from Pebble Mine because of the environmental harm and damage to the local community. *See The Bristol Bay Pledge*, OURBRISTOLBAY, http://www.ourbristolbay.com/the-bristol-bay-protection-pledge.html (last visit-ed Apr. 22, 2015). Zale Corporation, Jostens, and Tiffany & Co., are just a few of the companies that have signed the pledge. *See Bristol Bay Protection Pledge*, STOPPEBBLEMINE, http://www.stoppebblemine.org/bristol-bay-protection-pledge.html (last visited Apr. 22, 2015). Notably, the CEO of Tiffany & Co., Michael Kowalski, said, "we have reached the conclusion – as have many NGOs and local Alaska residents – that the risk is simply too great. Despite the best of intentions, the location of the mine is so inherently problematic that it is simply not worth the risk of a catastrophic event." Adam Aston, *Tiffany's CEP: How to Keep a Supply Chain Sparkling*, GREENBIZ (Nov. 12, 2011), http://www.greenbiz.com/blog/2011/11/12/tiffanys-ceo-how-keep-supply-chain-sparkling (last visited Apr. 22, 2015). PLP had decried the pledge campaign as "weak, hollow, and entirely insincere." Wieners, *supra* note 419.

The outcome of Pebble Mine will likely not be decided soon. The project faces economic,[444] political,[445] and public[446] challenges that could delay or prohibit the project regardless of EPA's 404(c) action. If EPA decides to prohibit the specification of the area for a 404 permit as a disposal site, that decision will no doubt be subject to judicial review, which could take years. Even if EPA withdraws the 404(c) action, it is not certain that the Corps will proceed to issue the permit, or that Alaska will issue the necessary state permits. Given the size of the mineral deposits, project proponents will not easily give up on the Pebble Mine.

CONCLUSION

Similar to other environmental regulatory programs, the 404 program is an effort to counter projects promising local, often short-term economic benefits but often producing less apparent, long-term ecological costs. But the manner in which the 404 program operates is virtually unique in federal environmental and natural resources law. In section 404, Congress acquiesced in the continuation of the Corps' jurisdiction over navigable waterways but subjected its decision making to EPA oversight.

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444. *See supra* note 419.

445. *See supra* notes 441-43 and accompanying text. Additionally, on December 16, 2014, President Obama issued a Presidential Memorandum that prevented an area of the Outer Continental Shelf including Bristol Bay from being considered for any oil or gas leasing. *Presidential Memorandum—Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition*, THE WHITE HOUSE (Dec. 16, 2014), http://www.whitehouse.gov/the-press-office/2014/12/16/presidential-memorandum-withdrawal-certain-areas-united-states-outer-con. That action does not protect the land at issue in Pebble Mine, but it could signal President Obama's inclination to protect the area.

446. *See supra* notes 443 and accompanying text. For a discussion about the Pebble Mine proposed veto and its legal challenges, see Patrick Parenteau, *Between a Pebble and a Hard Place: Using §404(c) to Protect a National Treasure,* NAT'L WETLANDS NEWSL. (forthcoming 2015). *See also Hearing on "EPA's Expanded Interpretation of its Permit Veto Authority Under the Clean Water Act" Before the Subcomm. on Transport, Transportation & Infrastructure Water Res. and Env't Subcomm of the H. Comm. on Transp. and Infrastructure*, 113th Cong. (2014) (statement of Patrick Parenteau, Professor of Law, Vermont Law School).

The congressional decision to split jurisdiction in this manner may reflect the fact that the Corps' primary mission is not to protect the environment,[447] or that its decision-making litmus—the public interest review—allows economics to outweigh ecological concerns,[448] inconsistent with the CWA's purpose to "restore and maintain chemical, physical, and biological integrity of the Nation's waters."[449] The oversight role that Congress gave EPA—an agency whose mission is to "protect human health and the environment"[450]—in section 404(c) aimed to ensure that the CWA would not countenance short-term economic pressures outweighed by long-term environmental costs.[451]

It is hardly clear whether section 404(c)'s drafters envisioned that EPA would invoke its authority so infrequently—just thirteen times in over forty-two years, or less than once every three years, which represents around 0.0084% of the individual 404 permits the Corps has issued.[452] The thirteen vetoes have been highly variable in terms of their size, the scope of their environmental effects, and the amount of controversy they generated.

One way to view the historical record of 404(c) actions is that EPA has shown remarkable restraint, invoking its authority only to avoid catastrophic wetland losses. However, the record does not actually support that proposition, since some 404(c) actions

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447. The Corps mission is to: "Deliver vital public and military engineering services; partnering in peace and war to strengthen our Nation's security, energize the economy and reduce risks from disasters." *Mission & Vision*, U.S. ARMY CORPS OF ENG'RS, http://www.usace.army.mil/About/MissionandVision.aspx (last visited Apr. 22, 2015). Although the mission statement is not necessarily contrary to protecting the environment it is also not an express goal.

448. *See supra* notes 93-98 and accompanying text.

449. 33 U.S.C. § 1251(a) (2012).

450. *Our Mission and What We Do*, U.S. ENVTL. PROT. AGENCY, http://www2.epa.gov/aboutepa/our-mission-and-what-we-do (last visited Apr. 22, 2015).

451. *See supra* notes 93-98 and accompanying text (explaining that the Corps' "public interest review" allows economic factors to outweigh environmental costs, inconsistent with the goals of the CWA).

452. The percent was calculated based on an estimated 3,700 permits per year from based on the 3,723 individual permit applications applied for in 2013. *See Final Individual Permits,* U.S. ARMY CORPS OF ENG'RS, http://geo.usace.army.mil/egis/f?p=340:2:0::NO:RP:: (last visited Apr. 22, 2015). That number is an estimate, as the permits vary by year.

concerned unlikely candidates such as Norden—affecting only twenty-five acres[453]—or Russo, where the majority of the fifty-seven and a half acre site had already been developed.[454] Those rather small losses are dwarfed by large-scale 404(c) cases, such as those involved in the Spruce No. 1 or Pebble mines.[455] It may be that in the earlier 404(c) vetoes EPA and the Corps were exploring the limits of their respective authorities. Once the courts established the plenary power of EPA,[456] 404(c) actions became limited to large-scale controversies, as all three 404(c) actions in the last 20 years have been.

Examining the history of 404(c) actions does suggest possible triggers of EPA's use of its 404(c) authority. In two—Norden and Sweedens Swamp—EPA's decision to deny a permit application mirrored the Corps division's or District Engineer's decisions.[457] In both, EPA essentially ensured that Corps headquarters could not ignore the 404(b)(1) determinations of field-level Corps officials when political pressures encouraged the Corps headquarters to favor development.

Another noticeable 404(c) trigger concerns EPA's frequent invocation of its authority to support the positions of federal fish and wildlife agencies. In fact, in eight of the 404(c) actions, FWS opposed the project;[458] NMFS and state wildlife agencies each opposed two others.[459] Although fish and wildlife agencies can advise the Corps during the 404 permit process and can request a 404(q) elevation, the Corps can reject their recommendations or requests for elevations. Therefore, EPA's 404(c) authority has

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453. *See supra* note 166 and accompanying text.

454. *See supra* note 237 and accompanying text.

455. *See supra* Part IV.B-C.

456. *See supra* notes 233-36, 249-50, 288-89, 310-13, 346-48 and accompanying text. This includes the use of a 404(c) veto at two sites before the applicant applied for a permit in the East Everglades, quite similar to EPA's proposed 404(c) action at Pebble Mine. *See supra* notes 260-63 and accompanying text.

457. *See supra* notes 168, 226 and accompanying text.

458. *See supra* notes 165, 187, 219, 229, 262, 277, 300, 334 and accompanying text. In an additional action—Bayou aux Carpes—FWS supported the 404(c) action, although it was unclear if the agency opposed the permit prior to EPA's actions. *See supra* note 213.

459. *See supra* notes 165, 185, 213.

at times acted as a venue to allow fish and wildlife agencies to enforce their interpretation of the 404(b)(1) guidelines.

Perhaps because EPA has been judicious in exercising its 404(c) authority, courts have regularly upheld its decisions.[460] Since 1990, EPA has largely turned to its section 404(q) authority to administratively appeal 404 permit decisions, with the FWS also playing an important role in requesting additional 404(q) elevation. In the 18-year hiatus in 404(c) actions between 1990 and 2008, there were twenty-four 404(q) elevations by EPA, and another sixteen by FWS.[461] Although the Corps does deny 404(q) requests, those requests result in an additional review of a project and can result in changes to a project, causing the requesting agency to withdraw its 404(q) request.[462]

After the courts settled EPA's authority in 404(c), the threat of 404(c) actions likely caused the Corps to be more circumspect in evaluating 404(b)(1) guidelines. This evolution in agency perspective has no doubt produced more protective permit conditions, particularly as the Corps has adopted EPA's "sequencing" approach to mitigation, as defined in the 404(b) guidelines: avoiding or minimizing adverse effects before approving substitute resources like artificial wetlands.[463] Whether the Corps' evolution has induced more permit denials is

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460. *See supra* notes 233-36, 249-50, 288-89, 310-13, 346-48, 379-85, 407-10, 432-35 and accompanying text.

461. *404(q) MOA Elevation Requests*, U.S. FISH & WILDLIFE SERV., http://www.fws.gov/habitatconservation/elevations.html (last visited Apr. 22, 2015); *Chronology of 404(q) Actions*, U.S. ENVTL. PROT. AGENCY, http://water.epa.gov/lawsregs/guidance/wetlands/404q.cfm (last visited Apr. 22, 2015). Before 1990, EPA had pursued five 404(q) elevations starting in 1985. *Id.*

462. *See* Memorandum from Benjamin H. Grumbles, Assistant Adm'r for Water, U.S. Envtl. Prot. Agency, to Richard E. Greene, Reg'l Adm'r, U.S. Army Corps of Eng'rs (June 14, 2004), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/LID15-Response.pdf (showing an example of EPA withdrawing a 404(q) elevation request after the request resulted in favorable changes to the proposed project).

463. Memorandum of Agreement Between the Dep't of the Army and the Envtl. Prot. Agency (Feb. 6, 1990), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/mitigate.cfm. In addition to the Memorandum of Agreement on mitigation, the Corps and EPA also entered into agreements on enforcement and jurisdiction, which also could have ensured that the agencies had the same priorities. *See supra* notes 78-79 and accompanying text.

less clear.

The three recent 404(c) actions all concern enormous projects with potentially large economic and ecological ramifications, which all attracted considerable notoriety. Even given the visibility of the Spruce No. 1 and Pebble Mines, EPA proved willing to advance an interpretation of the timing of 404(c) actions not been previously litigated.[464] The D.C. Circuit sustained a 404(c) veto concerning the Spruce No. 1 permit long after the Corps issued it.[465] And the 404(c) action proposed for the Pebble Mine will likely be the first action litigated to determine if EPA has the authority to issue a 404(c) action prior to the submission of a permit application.[466]

These recent large-scale 404(c) actions indicate that EPA and the Corps are not invariably on the same page, and that, on some highly visible projects, they may not agree.[467] EPA-Corps relations can also vary depending on the Corps district, as district engineers enjoy considerable discretion.[468] The recent 404(c) cases may also prompt a political response. In 2014, the House of Representatives voted to restrict 404 jurisdiction,[469]

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464. *See supra* notes 409-10, 432-33 and accompanying text.

465. *See supra* notes 409-10 and accompanying text.

466. *See supra* notes 432-33 and accompanying text. Although Pebble Mine is not the first time EPA has "prohibit[ed] the specification . . . of [a] defined area as a disposal site." *See* 33 U.S.C. § 1344(c) (2014); *see also supra* Part III.G.

467. Several other potential 404 permit controversies are on the horizon. Gogebic Taconite, a resource development company based in Florida, recently proposed $1.5 billon open pit mine in northern Wisconsin. Lee Bergquist, *Gogebic Taconite formally withdraws from northern Wisconsin mining project*, DULUTH NEWS TRIBUNE (Mar. 27, 2015, 8:43 PM), http://www.duluthnewstribune.com/business/mining/3709707-gogebic-taconite-formally-withdraws-northern-wisconsin-mining-project.action against the mine, the agency had received a request from Wisconsin tribes to block the mine. Manuel Quiñones, *After Obama Admin Denies Broad Mining Reviews, Advocates Seek Alternatives*, GREENWIRE (Apr. 13, 2015), http://www.environmentguru.com/pages/elements/element.aspx?id=2037397. Similarly, one of the Twin Metals Minnesota's project is under public scrutiny and currently an environmental group is petitioning for withdraw from agency permits. *Id.* Ultimately, that project is likely to also to be considered by the EPA and the Corps for a 404 permit and will also receive public scrutiny.

468. *See* E-mail from Patrick Parenteau, Professor of Law, Vermont Law School, to author (Feb. 19, 2015, 23:01 EST) (on file with author).

469. *See supra* note 20, 441-42 and accompanying text.

and Congress also rejected EPA apparently innocuous guidance on the extent of 404 jurisdiction over farming operations.[470] The 2014 elections resulted in the Republicans controlling both houses,[471] which may produce both the erosion of EPA's 404(c) authority and the scope of the CWA's jurisdictional authority.

Although EPA's 404(c) authority has prevented significant adverse environmental effects for thousands of acres of wetlands across the county, it is difficult to say how many additional acres have been protected because of the threat of 404(c) actions. However, the evidence of the value of 404(c) lies not solely in the conflict resolution between the Corps and EPA, but also in the provision's encouragement for these agencies to resolve the vast majority of their interagency disagreements over permit applications through negotiation and compromise.[472] This administrative culture may be the chief legacy of 404(c) to environmental law: a statutory provision which encouraged two federal agencies to work together in pursuit of a mission of ecological protection, one of which did not recognize this mission prior to the enactment of section 404(c). Quite apart from the numerous wetland acres it has saved, section 404(c)'s principal legacy is the transformation, over four decades, of the U.S. Army Corps of Engineers into an environmental regulatory agency. This substantial accomplishment of section 404(c)'s drafters has yet to be fully appreciated.

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470. *See supra* note 5 and accompanying text.

471. *See 2014 Senate Election Results*, POLITICO (Dec. 17, 2014), http://www.politico.com/2014-election/results/map/senate/#.VKtMnqZlrI5; *2014 House Election Results*, POLITICO (Dec. 17, 2014), http://www.politico.com/2014-election/results/map/house/#.VKtNI6ZlrI4. A congressman introduced the Regulatory Fairness Act of 2015 in January 2015 for the expressed purpose: "To amend the Federal Water Pollution Control Act to confirm the scope of the authority of the Administrator of the Environmental Protection Agency to deny or restrict the use of defined areas as disposal sites." S. 234, 114th Cong. (1st Sess. 2015), *available at* https://www.congress.gov/114/bills/s234/BILLS-114s234is.pdf.

472. *See* E-mail from Oliver Houck, Professor of Law, Tulane Law School, to author (Feb. 20, 2015, 17:49 EST) (on file with author).