Wetlands And Private Development

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With recent recognition of the ecological significance of wetlands,[1] private developers are facing increased resistance to proposals to construct facilities in or near wetland areas. While once permitted, and indeed encouraged, to drain or fill wetland areas for construction, private developers are now finding environmental and other groups frequently challenging, both administratively and judicially proposed industrial and commercial facilities in coastal or riparian areas. Environmental groups have resolved to prevent further destruction of valuable wetland areas, which make an important contribution to the ecosystem by purifying contaminated surface waters, protecting ground water supplies, and providing habitat for a wide variety of fish and wildlife.[2]

In defending themselves against legal challenges to proposed facilities which impinge upon wetlands, private developers have a

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1. Wetlands areas are characterized by vegetation growing in soils that are periodically or normally saturated with water. COUNCIL ON ENVIRONMENTAL QUALITY, OUR NATION'S WETLANDS, AN INTERAGENCY TASK FORCE REPORT (1978). (*Our Nation Wetlands*) at 5-7 (1982). Marshes, swamps and bogs are typical types of wetlands. *See generally*, COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL TRENDS (1981); K. BRENNAN AND C. GARRA, WASTEWATER DISCHARGES TO WETLANDS IN SIX MIDWESTERN STATES, SELECTED PROCEEDINGS OF THE MIDWEST CONFERENCE ON WETLANDS VALUES AND MANAGEMENT (1981).

2. The Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water, *see* 33 C.F.R. § 320.4(b)(2)(vii) (1986), and to slow the flow of surface runoff into lakes, rivers, and streams thus preventing flooding and erosion. See 33 C.F.R. §§ 320.4(b)(2)(iv) and (v) (1986). In addition, the Corps maintains that adjacent wetlands may "serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic species. 33 C.F.R. § 320.4(b)(2)(i) (1986).

As noted in National Wildlife Federation v. Hanson, 623 F Supp. 1539, 1543 (E.D.N.C. 1985), "Wetlands are believed to perform important and unique ecological function. For example, wetlands purify water by holding nutrients and recycling pollutants; they provide flood protection retarding surface runoff from rainwater and shielding upland areas from storm damages; and they provide vital food resources and habitat for fish and wildlife. *Id.* at 1809.

difficult burden. Recent case law has given federal agencies broad authority to regulate wetlands. Moreover in view of increased pressure for protection of wetlands, the federal government is exercising this jurisdiction to limit development in wetlands areas. Attempts to overturn agency action under the Administrative Procedure Act are fraught with difficulty In addition, a developer s ability to obtain compensation under a taking theory for restriction on use of property has been limited by the courts.

In view of these developments, private developers must reassess their approach to obtaining permits and approvals from the United States Army Corps of Engineers and avoiding a veto of the permit by the Environmental Protection Agency Given the likelihood that development in wetland areas will meet resistance, private developers should evaluate from the outset the wetlands area, first to determine whether it is functioning, thus entitled to protection, and second, to consider mitigation measures that could help maintain the integrity of the wetlands ecosystem.

In the event the project is disapproved at the agency level, traditional court review of the agency action under the Administrative Procedure Act should be vigorously pursued. Only after the developer has obtained an authoritative determination at the agency level as to the extent of permitted development, and exhausted court review of the agency action, should the developer seek to establish that the regulatory restriction on development constitutes a taking for which compensation is required.

I. REGULATION OF WETLANDS

There are two principal federal statutes that protect wetlands and other water bodies: the Rivers and Harbors Act of 1899 ("RHA")[3] and the Clean Water Act ("CWA").[4] Section 10 of the RHA makes unlawful any excavation or construction in navigable waters without the authorization of the Secretary of the Army [5] Section 404 of the CWA makes unlawful the discharge of dredged or fill material into the waters of the United States without a permit from the Secretary of the Army [6] Responsibility for imple-

3. 33 U.S.C. §§ 401-413 (1982).
4. 33 U.S.C. §§ 1251-1376 (1982).
5. 33 U.S.C. § 403 (1982).
6. 33 U.S.C. § 1344 (1982).

mentation of both statutes has been delegated to the United States Army Corps of Engineers ("the Corps").[7]

A. *Section 10 of the Rivers and Harbors Act of 1899 and Its Reach*

Section 10 of the RHA bars any unauthorized obstruction to the navigable capacity of "any of the waters of the United States," and makes it unlawful to excavate or fill, "or in any manner to alter or modify" any navigable water without the approval of the Army Corps of Engineers.[8] The Corps' jurisdiction under this statute is determined by the extent to which waterbodies constitute navigable "waters of the United States"[9] and the extent to

7 The Corps authority in this area has been viewed as ironic given that the Corps' basic mandate is construction of large projects that may despoil the environment. *See* G. Power, *The Fox in the Chicken Coop: The Regulatory Program on the U.S. Army Corps of Engineers*, 63 VA. L. REV. 504, 505 (1977).

The Clean Water Act authorizes the Secretary of the Army to issue permits required for discharges of dredged and fill material, 33 U.S.C. § 1344 (1982). The Secretary has, in turn, delegated this authority to the U.S. Army Corps of Engineers, 33 C.F.R. § 325.8 (1986). The Corps evaluates permit applications under guidelines developed by the Environmental Protection Agency in conjunction with the Secretary of the Army. 33 U.S.C. § 402(b) (1982). Similarly, the Secretary of the Army has delegated to the Corps the authority to issue or deny RHA Section 10 permits. 33 C.F.R. § 322.5 (1986).

The grant of authority to the Corps to administer the Section 404 program was unsuccessfully challenged in Buttrey v. United States, 690 F.2d 1170 (5th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983). With respect to certain waters, the Corps authority may be transferred to States that have devised federally approved permit programs, 33 U.S.C. § 1344(g) (1982). Absent such an approved program, the Corps retains jurisdiction under Section 404 of the CWA.

8. Section 10 reads in full as follows:

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

33 U.S.C. § 403 (1982).

9. The Corps has developed list of water bodies that fall under Section 10. The Corps list, however, is not conclusive. The Corps regulations specifically provide that "absence from that list should not be taken as an indication that the water body is not navigable. 33 C.F.R. § 329.16(b) (1986). Moreover, as the Corps itself concedes, "conclusive determination of navigability can be made only by federal courts. 33 C.F.R. § 329.14 (1986).

which these activities constitute excavation, fill or alteration of such waterbodies.

1. The Meaning of a "Navigable Water of the United States"

In *The Daniel Ball v. United States*,[10] the Supreme Court set forth what has become the fundamental test for determining federal regulatory power over coastal or inland waters of the United States. Waters subject to federal regulatory jurisdiction, or "navigable waters of the United States," were defined by the Court as follows:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade or travel on water And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradiction from in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries is conducted by water [11]

Although *The Daniel Ball* was a case brought in admiralty the Court did not base its decision on federal maritime or admiralty jurisdiction, but rather on federal power over coastal and inland waterways under the Commerce Clause. As a result, the test for federal jurisdiction over navigable waters set out in *The Daniel Ball* has been consistently applied by the Supreme Court in cases involving federal power under the Commerce Clause.[12]

Since the Rivers and Harbors Act of 1899 was an exercise by Congress of its Commerce Clause powers,[13] courts have followed the guidelines set forth in *The Daniel Ball* to determine whether a waterbody falls within the purview of the RHA.[14] The Corps reg-

10. 77 U.S. (10 Wall.) 557 (1871).

11. *Id.* at 563.

12. *See, e.g.*, Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617 621-22 (8th Cir. 1979) and authorities cited therein.

13. *See* Wyandotte Transp. Co. v. United States, 389 U.S. 191, 201 (1967); United States v. Appalachian Elec. Power Co., 311 U.S. 377, 404-05 (1940).

14. Washington Water Power Co. v. FERC, 775 F.2d 305 (D.C. Cir. 1985).

ulations also follow *The Daniel Ball* guidelines and conform, in most cases, with the judicial definition.[15]

The *Daniel Ball* test consists of two parts: first, the body of water must itself or together with other waters form a highway over which commerce may be carried on with other states; sec ond, the body of water must be navigable in fact.

Because Congress only has power to "regulate Commerce,"[16] interstate commerce along the waterway is a fundamental requisite to its being considered a "navigable water of the United States." As the Supreme Court noted in *United States v. The Montello*:[17]

> If, however, the river is not of itself a highway for commerce with other States or foreign countries, or does not form such highway by its connection with other waters, and is only navigable between different places within the State, then it is not a navigable water of the United States, but only a navigable water of the State.[18]

Other courts have more recently held that bodies of water with no navigable interstate water linkage are not subject to federal regulatory jurisdiction under the RHA.[19]

In some circumstances, a liberal definition of interstate linkage is adopted. For example, the Corps regulations provide:

> A waterbody may be entirely within a state, yet still be capable of carrying interstate commerce. This is especially clear when it physically connects with a generally acknowledged avenue of interstate commerce, such as the ocean or one of the Great Lakes, and is yet wholly within one state. Nor is it necessary that there be a physically navigable connection across a state boundary Where a waterbody extends through one or more states, but substantial portions, which are capable of bearing interstate commerce, are located in only one of the states, the

15. Precise definition of navigability" is ultimately dependent on judicial interpretation and cannot be made conclusively by administrative agencies. However, as the Corps regulations note, the policies and criteria contained in Corps regulations closely conform with tests used by federal courts. *See* 33 C.F.R. § 329.3 (1986).

16. U.S. Const. art. I, § 8.

17 87 U.S. (11 Wall.) 430 (1874).

18. *Id.* at 435. *See also* Cardwell v. American Bridge Co., 113 U.S. 205 (1885); Miller v. Mayor of New York, 109 U.S. 385, 395-396; Escanabe v. Chicago, 107 U.S. 678, 682 (1883).

19. *See, e.g.*, Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617 (8th Cir. 1979); State Water Control Board v. Hoffman, 574 F.2d 191 (4th Cir. 1978); United States v. Underwood, 344 F Supp. 486, 489-91 (M.D. Fla. 1972).

> entirety of the waterway up to the head (upper limit) of navigation is subject to Federal jurisdiction.[20]

The regulations also provide that interstate commerce may exist on an intrastate voyage which occurs only between places within the same state. "It is only necessary that goods may be brought from, or eventually be destined to go to another State."[21]

In *Sierra Pacific Power Co. v. FERC*[22] and *Minnehaha Creek Watershed District v. Hoffman*,[23] rivers with admittedly navigable sections were held not navigable under the federal definition because the crucial interstate sections were not navigable, although upstream sections had been used for commerce. In *Loving v. Alexander*[24] however the Fourth Circuit distinguished these cases finding a similar river navigable because the plaintiff had not introduced affirmative evidence of nonnavigability

Besides an interstate linkage, *The Daniel Ball* test also requires that the stream be "navigable in fact." Although the interstate linkage requirement has remained essentially unchanged, the federal courts have broadened significantly *The Daniel Ball* definition of "navigability "[25] The prevailing doctrine of navigability characterizes a waterway as a navigable water of the United States if, for the purposes of interstate commerce: (1) it presently is being used or is suitable for use; or (2) it has been used or was suitable for use in the past; or (3) it could be made suitable for use in the future by reasonable improvements.[26]

Obviously a stream that is presently used for interstate commerce or suitable for such use will be considered a navigable stream. Provided the waterway can be used for purposes of inter state transportation and commerce, the manner or form of use is immaterial.[27] For example, in *United States v. Appalachian Electric Power Co.*[28] the Supreme Court concluded that sufficient commerce was shown by the historical use of canoes, bateaux and

20. 33 C.F.R. § 329.7 (1986).

21. *Id.*

22. 681 F.2d 1134, 1139 (9th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983).

23. 597 F.2d 617 623 (8th Cir. 1979).

24. 745 F.2d 861, 867 (4th Cir. 1984).

25. *See* Hardy Salt Co. v. Southern Pacific Transp. Co., 501 F.2d 1156, 1167 (10th Cir. 1974), *cert. denied sub. nom.*, Sanders Brine Shrimp Co. v. Southern Pac. Transp., 419 U.S. 1033 (1974).

26. *See* 33 C.F.R. § 329.9 (1986).

27 The Montello, 87 U.S. (11 Wall.) at 441.

28. 311 U.S. 377 (1940).

other frontier crafts.[29] The transportation of logs in connection with commercial ventures also has been recognized as evidence of a river s legal navigability [30]

The Corps regulations conform with the judicial inter pretation:

> The types of commercial use of a waterway are extremely varied and will depend on the character of the region, its products, and the difficulties or dangers of navigation. [I]t is sufficient to establish the potential for commercial use at any past, present, or future time. Thus, sufficient commerce may be shown by historical use of canoes, bateaux or other frontier craft, as long as the type of boat was common or well-suited to the place and period. Similarly the presence of recreational craft may indicate that a waterbody is capable of bearing some forms of commerce, [31]

Even though a waterway is not presently used for commerce or is presently incapable of such use because of the presence of obstructions or changed conditions, a water which was navigable at some time in the past will retain its character as "navigable in law" This basic principle of "continuing navigability" was established by the Supreme Court in *Economy Light & Power Co. v. United States*[32] and has been subsequently followed by the courts[33] and in the Corps regulations defining navigable waters of the United States.[34] As noted by the Corps, "once having attained the char acter of navigable in law the Federal authority remains in existence, and cannot be abandoned by administrative officers or court action."[35]

Navigability may also be found in a waterbody s potential for supporting interstate commerce in the future.[36] A river or stream which meets this "future use" test falls within the definition of a "navigable water of the United States" even though it has never been used for purposes of interstate commerce. This test can be satisfied in either of two ways. First, if the waterway in its natural condition is capable of supporting interstate commerce, it meets

29. *Id.* at 414-16. *See also*, Economy Light & Power Co. v. United States, 256 U.S. 113, 117 (1921).
30. St. Anthony Falls Water Power Co. v. St. Paul Water Comm rs, 168 U.S. 349 (1897).
31. 33 C.F.R. § 329.6 (1986).
32. 256 U.S. 113 (1921).
33. *See, e.g.*, Appalachian Elec. Power Co., 311 U.S. at 408.
34. 33 C.F.R. § 329.9 (1986).
35. 33 C.F.R. § 329.9(a) (1986).
36. 33 C.F.R. § 329.9(b) (1986).

the future use criterion.[37] Second, if "reasonable improvements" could at some time transform the waterway into a useful avenue of interstate traffic, the waterway is also considered legally navigable for purposes of federal regulation.[38] The improvement need not exist, be planned, nor even authorized; it is sufficient that the improvements could potentially be made.[39]

An artifical waterway even one which is privately developed and maintained, may also be a navigable water of the United States.[40] As with natural waters, an artificial waterway is regarded as navigable in law if it is capable of use for purposes of interstate commerce.[41] This rule has been applied to hold private, artificially created canals, open to navigable waters at one or both ends, subject to federal regulation.[42]

Moreover a stream may be navigable despite the existence of obstructions which render continuous navigation impracticable. As noted in the Corps of Engineers regulations:

> A stream may be navigable despite the existence of falls, rapids, sand bars, bridges, portages, shifting currents, or similar obstructions. Thus, a waterway in its original condition might have had substantial obstructions which were overcome by frontier boats and/or portages, and nevertheless be a "channel" for commerce, even though boats had to be removed from the water in some stretches, or logs being brought around an obstruction by means of artificial chutes. However the question is ultimately a matter of degree, and it must be recognized that there is some point beyond which navigability could not be established.[43]

37 *See* The Montello, 87 U.S. at 441; The Daniel Ball, 77 U.S. at 563. *See also* Appalachian Elec. Power Co., 311 U.S. at 407-08, 416.

38. Appalachian Elec. Power Co., 311 U.S. at 407-08; Rochester Gas & Elec. Corp. v. Federal Power Comm n, 344 F.2d 594, 596 (2d Cir. 1965), *cert. denied*, 382 U.S. 832 (1965); United States v. Cannon, 363 F Supp. 1045, 1050 (D. Del. 1973); United States v. Underwood, 344 F Supp. 486, 492 (M.D. Fla. 1972); United States v. Crow, Pope & Land Enter. Inc., 340 F Supp. 25, 33, 35 (N.D. Ga. 1972).

39. Appalachian Elec. Power Co., 311 U.S. at 408.

40. 33 C.F.R. § 329.8 (1986).

41. Weiszman v. District Eng United States Army Corps of Eng'rs, 526 F.2d 1302, 1305 (5th Cir. 1976).

42. *Id. See also* United States v. Sexton Cove Estates, Inc., 526 F.2d 1293, 1299 (5th Cir. 1976).

43. 33 C.F.R. § 329.10 (1986).

2. Obstructions To Navigable Capacity

After determining whether a particular body of water is a navigable water of the United States, the Corps next determines whether the applicant will engage in the kind of activity requiring a permit under Section 10 of the RHA. Section 10, in addition to requiring authorization for the construction of any wharf, pier breakwater jetty or other structure, speaks in terms of effect, and requires authorization for any "obstruction to navigable capacity" or for any activity that may "alter or modify the course, location, condition, or capacity" of any navigable water [44]

The Supreme Court has consistently interpreted the language "obstruction to navigable capacity" as not requiring an unlawful obstruction "in" a navigable waterway For example, in *United States v. Rio Grande Dam & Irrigation Co.*[45] the Court noted that the "obstruction" language prohibits:

> anything, however done which tends to destroy the navigable capacity of one of the navigable waters of the United States. [I]t would be to improperly ignore the scope of this language to limit it to acts done within the very limits of navigation of a navigable stream.[46]

Although *Rio Grande* interpreted the language of Section 10 of the Rivers and Harbors Act of 1890, subsequent Supreme Court decisions also rendered a broad interpretation to the similar language of Section 10 of the Act of 1899 [47]

More recent cases have confirmed that a project need not be located "in" a navigable waterway to create an unlawful obstruc tion. For example, in *Sierra Club v. Andrus*[48] the Ninth Circuit held that the pumping of water from the Sacramento-San Joaquin Delta into the canals and aqueducts of the California water project falls within the reach of Section 10. The plaintiffs challenged the legality of the construction and operation of three of the pumping facilities. Two of these facilities were located at least two miles from navigable waters and connected thereto by man-made inlets. The third was a proposed 42 mile artificial channel designed to divert fresh water from the Sacramento River to the

44. 33 U.S.C. § 403 (1982).

45. 174 U.S. 690 (1899).

46. *Id.* at 708.

47 *See, e.g.*, United States v. Republic Steel Corp., 362 U.S. 482 (1960); Sanitary Dist. of Chicago v. United States, 266 U.S. 405 (1925).

48. 610 F.2d 581 (9th Cir. 1979), *rev d on other grounds*, 451 U.S. 287 (1981).

two pumping plants. In *United States v. M.C.C. of Florida, Inc.* [49] the court held that dredging and filling caused by the propellers of tugboats fell within Section 10, noting that the Supreme Court has consistently found the Act s coverage to be broad,[50] and because M.C.C. violated the Corps cease and desist order [51]

B. *Section 404 of the Clean Water Act and Its Reach*

As with jurisdiction under Section 10 of the RHA, the principal criteria for determining CWA Section 404 jurisdiction are the types of waters included and the types of activities regulated. While both criteria have been given a broad interpretation, Sec tion 404 covers fewer activities than Section 10 because it is limited to "point sources" or discharges of dredged or fill material.[52] Section 404, however covers many more waterbodies than Sec tion 10,[53] including "freshwater wetlands" that are adjacent to "waters of the United States."[54]

49. 772 F.2d 1501 (11th Cir. 1985).

50. *Id.* at 1504-05, *citing* United States v. Republic Steel Corp., 362 U.S. 482 (1960) and Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967).

51. 772 F.2d at 1505.

52. In United States v. Tull, 769 F.2d 182 (4th Cir. 1985), *cert. granted in part*, 106 S.Ct 2244 (1986), the applicant argued that the regulation of his property under the Clean Water Act went beyond the proper reach of the Commerce Clause. The Court noted that this argument had been rejected in United States v. Byrd, 609 F.2d 1204, 1210 (7th Cir. 1979). Byrd was cited with approval by the Supreme Court in Hodel v. Virginia Surface Mining & Reclamation Ass n, 452 U.S. 264, 282 (1981), where the Court noted that we agree with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution. 452 U.S. at 282. *See* Tull, 769 F.2d at 185.

53. As noted by the United States Court of Claims in Deltona Corp. v. United States, 657 F.2d 1184, 1186 (Ct. Cl. 1981): "It is now well settled that Congress, by adopting this 1972 definition [of navigable waters], asserted federal jurisdiction over the nation waters to the maximum extent permissible under the Commerce Clause of the Constitution. (quoting National Resources Defense Council, Inc. v. Callaway, 392 F Supp. 685, 686 (D.D.C. 1975)); *accord, e.g.*, Conservation Council v. Castanzo, 398 F Supp. 653, 674 (E.D.N.C. 1975), *affirmed*, 528 F.2d 250 (4th Cir. 1975).

54. The Clean Water Act is comprehensive statute designed "to restore and maintain the chemical, physical and biological integrity of the Nation waters. 33 C.F.R. § 1251(a) (1986). Section 301(a) of the CWA contains an absolute prohibition against the discharge of pollutants into the Nation's waters, except those discharges made in compliance with standards promulgated and permits issued under the Act. 33 U.S.C. § 1311(a) (1982). *See* 33 C.F.R. §§ 323.2(a), 323.3(a) (1986).

1 Waters Covered By Section 404

What constitutes "waters of the United States" under Section 404 has been defined broadly [55] Although initially construing the Act to cover only waters navigable in fact, the Corps in 1975, pursuant to the decision of *National Resources Defense Council v. Callaway*,[56] issued interim final regulations redefining "waters of the

55. Under the Clean Water Act, the term "navigable waters" is defined as waters of the United States, including territorial seas. 33 U.S.C. § 1362(7) (1982). Both the Corps and EPA have defined "waters of the United States" to include some water bodies that are purely intrastate. *See*, 33 C.F.R. § 323.2(3) ("All other waters such as intrastate lakes, rivers, streams the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or which are used or could be used for industrial purposes"). *See also*, 40 C.F.R. §§ 122.2 and 233.3 (1986), EPA guidelines adopting similar definition.

Currently in litigation is the issue of whether isolated waters, which serve as habitat for migratory birds or endangered species, constitute waters of the United States under the Clean Water Act. *See*, National Wildlife Federation v. Laubsher, G-86-37 (S.D. Tex. 1986). The court is likely to find that such habitat is covered, given the fact that migratory birds and endangered species may be regulated under the Commerce Clause, and regulation of such species extends to protecting their habitat. *See, e.g.*, Utah v. Marsh, 740 F.2d 799 (10th Cir. 1984); Palila v. Hawaii Dep't of Land and Natural Resources, 471 F Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981).

The Corps has recently issued final rule for its regulatory program, which provides more specific definition of "waters of the United States. 51 Fed. Reg. 41,206 (1986). While incorporating certain existing definitions of the terms, the Corps has noted other waters that are included within the definition:

a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

b. Which are or would be used as habitat by other migratory birds which cross state lines; or

c. Which are or would be used as habitat for endangered species; or

d. Used to irrigate crops sold in interstate commerce.

The Corps has further indicated that the following waters are not considered "waters of the United States

a. Non-tidal drainage and irrigation ditches excavated on dry land.

b. Artificially irrigated areas which would revert to upland if the irrigation ceased.

c. Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.

d. Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.

e. Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States.

33 C.F.R. § 328.3(a) (1986).

56. 392 F Supp. 685 (D.D.C. 1975).

United States" to include not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and nonnavigable intrastate waters whose use or misuse could affect interstate commerce.[57] Moreover the Corps has construed the CWA to cover all "freshwater wetlands" that are adjacent to other covered water [58]

In *United States v. Riverside Bayview Homes, Inc.* [59] the Supreme Court held that the Corps definition of waters for purposes of Section 404 as including wetlands adjacent to navigable waters, even if not inundated or frequently flooded by navigable waters, was a reasonable interpretation of the statute.[60] Riverside Bayview Homes, Inc. owned 80 acres of low-lying marsh land near the shores of Lake St. Clair in Michigan. In 1976, the company began placing fill material on the property as part of its preparation for construction of a housing development. The Corps of Engineers, believing the property to be an adjacent wetland, filed suit seeking to enjoin the company from filling the property without the Corps permission. The district court held that the property was a wetland subject to the Corps permit authority [61] The Sixth Circuit reversed, construing the Corps regulations to exclude from the category of adjacent wetlands those that were not subject to flooding by an adjacent navigable water at a frequency sufficient to support the growth of aquatic vegetation.[62] The court adopted this construction of the regulation be cause a broader definition might result in the taking of private property [63] The court also expressed doubt that Congress intended to allow regulations of wetlands that were not the result of flooding by navigable waters.[64]

57 40 Fed. Reg. 31,320 (1975).

58. *Id.* In 1977, the Corps' definition of wetland was modified to contain this language, and in 1982, the 1977 regulations were replaced by substantively identical regulations that remain in force today. 33 C.F.R. § 323.2 (1986). Before 1977 the definition of wetland required that the area be "periodically inundated. 33 C.F.R. 120(d)(2)(h) (1976).

59. 106 S. Ct. 455 (1985).

60. The Corps' regulation also covered certain wetlands not necessarily adjacent to other waters, 33 C.F.R. §§ 323.2(a)(2) and 323.2(a)(3) (1986), but the Court did not consider these provisions. Riverside Bayview, 106 S. Ct. at 458 n. 2.

61. Riverside Bayview, 106 S. Ct. at 458.

62. 729 F.2d 391 (6th Cir. 1984).

63. *Id.* at 400.

64. *Id.* at 402.

The Supreme Court overruled the Sixth Circuit's restrictive definition of waters covered by Section 404. At the outset, the Court noted that neither the imposition of a permit requirement, nor the denial of a permit, necessarily constitutes a taking and thus a narrow reading of the Corps regulatory jurisdiction over wetlands to avoid a "serious taking problem" was inappropriate.[65] "Purged of its spurious constitutional overtones," the Court viewed as quite simple the question of the Corps' assertion of broad jurisdiction to regulate under Section 404.[66] The Court observed that the Corps regulations clearly extend its authority to all wetlands adjacent to navigable or interstate waters and their tributaries, and that saturation by either surface or ground water is sufficient to bring an area within the category of wetlands, provided that the saturation is sufficient to and does support wetland vegetation.[67] The Court held that the Corps interpretation of its authority is reasonable in view of the language, policies, and legislative history of Section 404. The Court observed that Congress chose to define waters covered by the CWA broadly and noted that Congress intended to allow regulation of waters that might not satisfy the traditional test of navigability by defining "navigable waters" as "waters of the United States."[68] The Court further noted that the breadth of congressional concern with protection of water quality and aquatic ecosystems suggests that the Corps interpretation of "waters" to encompass wetlands adjacent to waters of the United States is a reasonable interpretation of the CWA.[69]

The Court maintained that attempts were made during the enactment of 1977 amendments of the Clean Water Act to restrict the Corps Section 404 jurisdiction to waters navigable in fact and to wetlands periodically inundated by these waters, but Congress rejected these measures to curb the Corps jurisdiction because of its concern for protection of wetlands.[70] The Court concluded that Congress failure to overrule an agency s construction of legislation, which the agency is charged with implementing, is some

65. 106 S. Ct. at 459.

66. *Id.* at 460.

67 *Id.*

68. *Id.* at 461.

69. *Id.*

70. H.R. 3199, 95th Cong., 1st Sess., 123 CONG. REC. 26710-711, 38950, 38994, 39196, 39209-10 (1977).

evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress attention through legislation designed to supplant it.[71]

Before the Supreme Court decision in *Riverside Bayview* lower federal courts had given broad definition to the regulatory requirement that wetlands be "adjacent" to waters of the United States. For example, in *United States v. Lee Wood Contracting, Inc.*[72] the court held that, notwithstanding the fact that several large parcels of land and farms were located between the wetlands and river in question, the wetlands were adjacent because they were "neighboring."[73] Similarly in *United States v. Tilton*,[74] a district court found "adjacency" despite the fact that the swamp was separated from the river by a road or a berm.[75]

In addition to the question of whether the wetland is adjacent to a water of the United States, the question also arises whether the waterbody meets the definition of a "wetland" as defined by the Corps. Wetlands are defined by the Corps regulation as an area that is "inundated or saturated by surface or ground water at a frequency and duration sufficient to support a prevalence of vegetation typically adapted for life in saturated soil conditions."[76] The principal case interpreting this regulatory definition is *Avoyelles Sportsmen s League, Inc. v. Alexander* [77] in which the court noted there are three areas of analysis necessary to deter mine whether a tract of land is or is not a wetland under the Corps definition: (1) the type of soils; (2) the degree and fre quency of inundation and saturation; and (3) the type of vegetation.[78] Interpreting key terms in this definition, the court held that "typically adapted for life" does not mean that vegetation must spend all of its life in inundated or saturated soils. Rather the definition will be satisfied if the species has the ability to live, to exist, and to tolerate those soils.[79] Moreover the court inter preted the phrase "prevalence of vegetation" to mean "the domi-

71. Riverside Bayview, 106 S. Ct. at 464.
72. 529 F Supp. 119, 120 (E.D. Mich. 1981).
73. *Id.* at 121.
74. 705 F.2d 429 (11th Cir. 1983).
75. *Id.* at 431.
76. 33 C.F.R. § 323.2(c) (1986).
77 511 F Supp. 278, 289 (W.D. La. 1981), *aff'd in part*, 715 F.2d 897 (5th Cir. 1983).
78. *Id.* at 289, *aff'd*, 715 F.2d at 912-13.
79. *Id.* at 290, *aff'd*, 715 F.2d at 913.

nance of tolerant or aquatic species to the virtual exclusion of purely upland, intolerant or nonaquatic species."[80]

Submerged grasslands were determined by the court in *Bayou St. John Improvement Assoc. v. Sands*[81] not to constitute wetlands. Plaintiff had contended they were wetlands because they performed certain biological functions that are attributed by the Corps' regulations to wetlands. The court rejected this argument, finding that the actual definition of wetlands requires intermittent or temporary inundation, not constant inundation as here. Additionally the court noted that plaintiff presented no evidence as to the other components of the definition: soil type and vegetation.

2. Activities Covered by Section 404

Along with the issue of whether the developer has undertaken an activity affecting a water within the Corps Section 404 jurisdiction is the issue of whether the activity itself is covered by Section 404. Section 404 requires that there be a discharge of dredged or fill material into a water of the United States. Although dredging alone is sufficient to provide jurisdiction under Section 10 of the RHA, mere dredging of one area (subject to Section 404 jurisdiction) and discharge in another (not subject to Section 404) is arguably not within the Corps Section 404 jurisdiction.

For example, in *United States v. Lambert*[82] the District Court of Florida held that it did not consider back-spill from a dragline to constitute the discharge of pollutant under Section 404 when the dredged soil simply falls back into the area from which it has just been taken.[83] Moreover the Corps revised regulation states that "the term discharge of dredged material' does not include *de minimus*, incidental soil movement occurring during normal dredging operations."[84]

Whether courts will support this interpretation remains to be seen. In *Weisman v. District Engineer U.S. Army Corps of Engineers*,[85] the Fifth Circuit held that discharge of "sediment" from the dredging amounted to a violation of the statutory prohibition

80. *Id.* at 291, *aff'd*, 715 F.2d at 913.
81. 13 Envtl. L. Rep. 20011, 20013 (E.D. La. June 17 1982).
82. 589 F Supp. 366 (M.D. Fla. 1984).
83. *Id.* at 373.
84. C.F.R. § 323.2(d) (1986).
85. 526 F.2d 1302 (5th Cir. 1976).

against the discharge of a pollutant.[86] Moreover in *United States v. M.C.C. of Florida, Inc.* [87] the Eleventh Circuit concluded that the redepositing of the soil dredged by the propellers of the company s tugboats constituted a "discharge of a pollutant" within the meaning of the CWA, even though the redepositing did not add any further substances to the water The court noted that "given the broad objectives of the Clean Water Act, we are in agreement with the Fifth Circuit that the word addition as used in the definition of the term discharge, may reasonably be understood to include redeposit. "[88]

A number of activities are exempt from the permit requirements of Section 404. The Clean Water Act specifically allows discharge of dredged or fill material "from normal farming, silviculture, and ranching activities,"[89] "for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches,"[90] and "for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment."[91] These exemptions, however have been construed narrowly [92] To be exempt from the permit requirement, the applicant must demonstrate that the proposed activities both satisfy the requirements of Section 404(f)(1) and avoid what is known as the "recapture provision" in 404(f)(2), which provides that even discharges resulting from exempt activities require permits where an area is converted to a new use or where "the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced."[93]

In two recent appellate court decisions, the Corps assertion of regulatory jurisdiction over attempts to farm wetland areas was upheld. In *United States v. Akers*,[94] the Ninth Circuit held that a

86. *Id.* at 1306.

87 772 F.2d 1501 (11th Cir. 1985).

88. *Id.* at 1506, *citing* Avoyelles Sportsmen League Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983).

89. 33 U.S.C. § 1344(f)(A) (1982).

90. *Id.* at § 1344(f)(C).

91. *Id.* at § 1344(f)(E).

92. *See, e.g.*, United States v. Akers, 785 F.2d 814, 819 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 107 (1986); Conant v. United States, 786 F.2d 1008, 1010 (11th Cir. 1986); United States v. Huebner, 752 F.2d 1235, 1240-41 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 62 (1985); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 925-26 (5th Cir. 1983).

93. 33 U.S.C. § 1344(f)(2) (1982).

94. 785 F.2d 814 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 107 (1986).

farm owner was properly enjoined from constructing a dike and filling wetland areas without a Corps permit because the farm owner failed to demonstrate that the farming activity was part of an established and ongoing farming operation, and that the dike and fill activities would not change the hydrological structure of the wetlands. In *Conant v. United States*,[95] the Eleventh Circuit held that the Corps had jurisdiction to order an individual to cease construction of a fish pond in a wetland area, because the action was not a "farming, silviculture or ranching operation" and did not fall within the statutory exemption from the Section 404 permit requirements.

It should be further noted that the Corps has authority under Section 404(e) of the CWA to issue general permits with a nationwide, statewide, or regional application. The general permits effectively eliminate individual permit requirements. In July 1982, the Corps issued regulations establishing nation-wide permits.[96] These regulations provide, for example, a general authorization for "repair rehabilitation or replacement of any previously authorized, currently serviceable structure or of any currently ser viceable structure constructed prior to the requirement for authorization," if certain conditions are met.[97]

II. Permit Determination Under RHA Section 10 and CWA Section 404

The Army Corps of Engineers has been delegated the authority for issuing permits under Section 10 of the RHA and Section 404 of the CWA. Enforcement of these provisions and even approval of permits, however do not remain exclusively in the domain of the Corps. Environmental groups can bring enforcement actions under Section 404,[98] even though comparable actions under Sec tion 10 are not permissible.[99] Moreover Section 404(c) of the CWA gives the Environmental Protection Agency ("EPA") the authority to prohibit the discharge of dredged and fill materials into

95. 786 F.2d 1008, 1010 (11th Cir. 1986).

96. 33 C.F.R. § 325.5 (c)(2) (1982).

97 *See* Orleans Audubon Soc. v. Lee, 742 F.2d 901 (5th Cir. 1984).

98. The citizens suit provision of the CWA is Section 505(a), 33 U.S.C. § 1365(a) (1982), which permits any citizen to commence civil action against any person alleged to be in violation of an effluent standard and/or limitation under the Act, in order to enforce the limitation and/or to assess civil penalties for its violation.

99. In California v. Sierra Club, 451 U.S. 287 292-98 (1981), the Court held that the RHA did not authorize private actions to be brought for violations of its provision. *See*

wetlands (and other waters of the United States) when there would be unacceptable adverse effects from the proposed development on wildlife, municipal water supplies, fisheries, shellfish, and/or recreation.[100] It is the Corps, however that makes the initial determination of whether to grant or deny the permit.

A. *The Corps Determination Under Section 10 and Section 404*

In determining whether to issue a permit, the Corps evaluates a number of factors. Originally the Corps placed primary if not exclusive emphasis on how a proposed project would affect navigation; however consistent with subsequent judicial[101] and legis-

Louisiana v. M/V Testbank, 752 F.2d 1019, 1031 (1985), *cert. denied*, 106 S. Ct. 3271 (1986).

Prior to *California v. Sierra Club*, many courts had held that private litigant could bring an enforcement action under Section 10, finding the private right of action implicit in the RHA. *E.g.*, Potomac River Ass'n v. Lundeberg Maryland Seamanship School, Inc., 402 F Supp. 344, 357 (D. Md. 1975); River v. Richmond Metropolitan Auth. 359 F Supp. 611, 639 (E.D. Va. 1973), *aff'd*, 481 F.2d 1280 (4th Cir. 1973); Alameda Conservation Ass v. California, 437 F.2d 1087 1092-93 (9th Cir. 1971), *cert. denied*, 402 U.S. 908 (1972), as interpreted by Sierra Club v. Leslie Salt Co., 354 F Supp. 1099, 1104 (N.D. Cal. 1972). *See also* Lavagnino v. Porto-Mix Concrete, Inc., 330 F Supp. 323, 325-26 (D. Colo. 1971). *But see* Red Star Towing & Transp. Co. v. Dep't of Transp., 423 F.2d 104, 105 (3d Cir. 1970) ("An unconsenting State is immune from suits brought by individuals under the admiralty jurisdiction of the federal courts."); Hooper v. United States, 331 F Supp. 1056, 1058 (D. Conn. 1971) (Section 404 does not create new civil remedy).

100. 33 U.S.C. § 1344(c) (1982).

101. In *Appalachian Electric*, the Supreme Court explicitly rejected the view that Congress may regulate navigable waters only for purposes of navigation. The Court noted:

> In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. In truth the authority of the United States is the regulation of commerce on its waters. Navigability, in the sense just stated, is but part of this whole. The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government. The license conditions to which objection is made have an obvious relationship to the exercise of the commerce power. Even if there were no such relationship, the plenary power of Congress over navigable waters would empower it to deny the privilege of constructing an obstruction in those waters. It may likewise grant the privilege on terms.

311 U.S. at 426-27

Although *Appalachian Electric* involved the Federal Power Commission authority to license the construction of dams and did not squarely decide whether the Corps of Engineers has authority to deny RHA permit on the basis of nonnavigational factors, other courts have explicitly held that the permit can be denied based on nonnavigational factors. For example, in Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971), the court held that the Secretary of the Army may deny permit on nonnavigational grounds provided he acts within the rule of reason against arbitrary action. *Id.* at 207-09. The court noted that the Secretary not only may reject permit on ecological

lative [102] actions, the Corps began considering factors besides protecting navigation.

The Corps has on several occasions set forth the criteria for evaluating whether to issue or deny a Section 10 permit.[103] Its initial regulations were first significantly revised in 1974, in part because of court decisions allowing the Corps to deny a permit solely on the basis of ecological factors[104] and because of its statutory responsibility to consider environmental factors under the National Environmental Policy Act of 1969 [105] Compared to ear lier regulations, the 1974 regulations reflected a more aggressive commitment to the consideration of nonnavigational factors in determining whether to grant or deny a permit.

In 1982 the Corps issued new regulations for evaluating whether to grant Section 10 permits.[106] These regulations significantly expanded the criteria controlling the Corps determination of whether to issue a permit by requiring that a "public interest balance process" consider the favorable and detrimental impacts of a particular project.[107] The EPA also has issued guidelines

grounds, but he must weigh the effect project will have on conservation before he issues permit. Judge Brown summed up the court' holding that

> nothing in the statutory structure compels the Secretary to close his eyes to all that others see or think they see. The establishment was entitled, if not persuaded by them, to deny that which might have been granted routinely five, ten or fifteen years ago before man explosive increase made all, including Congress, aware of civilization potential destruction from breathing its own polluted air and drinking its own infected water and the immeasurable loss from silent spring like disturbance of nature' economy.

Id. at 201.

102. Consideration of nonnavigational factors was spurred when Congress enacted the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-664 (1970). This statute generally provides that "wildlife conservation shall receive equal consideration in federal decisionmaking. *Id.* § 661. The Act specifically directs each federal agency such as the Corps of Engineers to consult with the Fish and Wildlife Service before it grants permit for modification of any waterbody. Thus, before the Corps can grant permit, it must consult with the Fish and Wildlife Service with view toward conservation of wildlife resources. Later enactments also encouraged or required consideration of other nonnavigational factors. For example, the National Environmental Policy Act of 1969 specifically mandates that every federal agency shall consider ecological factors when dealing with activities which may have an impact on the human environment. As federal agency, the Corps had no choice once NEPA became law but to take environmental factors into account when reviewing permit applications.

103. *See*, Zabel, 430 F.2d at 211.

104. *Id.* at 214.

105. 42 U.S.C. §§ 4321 and 4332 (1982).

106. *See* 45 Fed. Reg. 62,739-43 (1980).

107 *Id.* at 62,736.

which simultaneously govern the Section 404 permit process.[108] Both the Corps regulations and EPA guidelines must be observed by the permit applicant.[109]

The Corps regulations prescribe twelve "general policies" for evaluating permit applications, five of which are particularly critical. First, the Corps must conduct a "public interest review" balancing the "benefits which reasonably may be expected to accrue from the proposal" against "its reasonably foreseeable detriments."[110] The provision recites an exhaustive list of sixteen factors that are germane to this inquiry and then states that no permit will be granted unless it is found to be not "contrary to the public interest."[111] Second, the Corps is instructed to consult with the Fish and Wildlife Service and the National Marine Fisheries Service, and to accord "full consideration" to their views.[112] A third provision mandates that "due consideration" be given the proposal's effect on the enhancement, preservation, or development of "historic, cultural, scenic, conservation, recreational or similar values."[113] Fourth, the Corps regulations require a denial of a permit where certification or authorization of the proposed work is required by Federal, State and/or local law and that certification or authorization has been denied.[114] Finally the Corps regulations declare that wetlands serve seven functions that are "important to the public interest"[115] and that "no permit will be granted which involves the alteration of wetlands identified as important" under these seven criteria unless the Corps makes a finding that under the public interest review analysis "the benefits of the proposed alteration outweigh the damage to the wetlands resources."[116] In making this latter determination, the District Engineer has to consider whether the proposed activity "requires access or proximity to or siting within the special aquatic environment" and whether "practicable alternative sites" are available.[117] The applicant has the burden of providing infor

108. 40 C.F.R. § 231.1(b) (1986).
109. *See* 33 C.F.R. § 323.6(a) (1986); 40 C.F.R. § 230.2(a) (1986).
110. 33 C.F.R. § 320.4(a) (1986).
111. *Id.*
112. 33 C.F.R. § 320.4(c) (1986).
113. 33 C.F.R. § 320.4(e) (1986).
114. 33 C.F.R. § 320.4(j)(1) (1986).
115. 33 C.F.R. § 320.4(b)(2) (1986).
116. 33 C.F.R. § 320.4(b)(4) (1986).
117 *Id.*, citing 40 C.F.R. § 230.10(a)(3).

mation as to the project's water-dependency and data on practicable alternative sites.

The EPA guidelines, like the Corps' regulations, recognize wetlands as requiring special protection. The guidelines state that:

> From a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.[118]

Accordingly for all proposed projects, the guidelines prohibit issuance of a permit if there is a "practicable alternative,"[119] which is defined as one that "is available and capable of being done after taking into consideration cost, existing technology and logistics in light of overall project purposes"[120] that would have "less adverse impact on the aquatic ecosystem."[121] The guidelines further provide:

> Where the activity associated with a discharge which is proposed does not require access or proximity to or siting within the special aquatic site (*i.e.*, is not water dependent'), practicable alternatives that do not involve special aquatic sites are *presumed* to be available, unless clearly demonstrated other wise. (emphasis added).[122]

B. *EPA Veto Authority Under CWA Section 404(c)*

While primary responsibility for issuance of permits rests with the Corps, the Corps decision is expressly made subject to the EPA Administrator's veto power [123] Section 404(c) provides, in pertinent part, that the EPA Administrator·

> is authorized to prohibit the specification (including the withdrawal of specification) of any defined area 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

118. 40 C.F.R. § 230.1(d) (1986).
119. 40 C.F.R. § 230.10(a) (1986).
120. 40 C.F.R. § 230.10(a)(2) (1986).
121. 40 C.F.R. § 230.10(a) (1986).
122. 40 C.F.R. § 230.10(a)(3) (1986).
123. While the Corps has general responsibility for the permit program, EPA continues to carry ultimate responsibility for overall concerns of the CWA, including determinations of what constitutes navigable waters" for purposes of Section 404. Avoyolles Sportsmen League, 715 F.2d at 903 n. 12.

> supplies, shellfish beds and fishery areas ., wildlife, or recreational areas.[124]

Regulations issued under Section 404(c) set forth broad standards in determining when to apply this statutory veto power They provide that "when the Regional Administrator has reason to believe after evaluating the information available to him that an unacceptable adverse effect' could result he may initiate [404(c) proceedings]."[125]

In *Newport Galleria Group v. Deland*,[126] plaintiff developer sought to enjoin the EPA from conducting public hearings pursuant to Section 404(c) on plaintiff's proposed construction of a regional shopping mall on certain wetlands located in Attleboro, Massachusetts. Plaintiff argued that EPA s Section 404(c) powers are extraordinary and highly restricted, and can be exercised only if the Regional Administrator has "reason to believe" that an unac ceptable adverse effect could result from the proposed project.[127] The United States District Court for the District of Columbia re jected this argument. The court observed that Section 404(c) sets out no threshold requirements for initiation of Section 404(c) proceedings and that the only specific limitation — the finding of an unacceptable adverse effect on any of the five designated re source areas — applies only to actions that the Regional Administrator may take after the notice and hearing process.[128] The limitations on the Regional Administrator's initiations of Section 404(c) are found only in regulations which require that he have "reason to believe that an 'unacceptable adverse effect could result."[129]

Although the EPA has commenced proceedings under Section 404(c) on only seven or eight occasions since passage of the CWA,[130] it is expected that it will more frequently invoke this provision to review Corps decisions and ensure protection of wetlands. Moreover the EPA can be expected to continue to use its authority to determine what constitutes "waters of the United States" for purposes of Section 404 to maintain a broad definition of waters subject to the CWA.

124. 33 U.S.C. § 1344(c) (1982).
125. 40 C.F.R. § 231.3(a) (1982).
126. Newport Galleria Group v. Deland, 618 F Supp. 1179, 1180 (D.D.C. 1985).
127 *Id.* at 1181-82.
128. *Id.* at 1182.
129. *Id. See* 40 C.F.R. § 231.3(a) (1986).
130. 618 F Supp. at 1182.

C. *Judicial Review of Corps Determinations*

The Corps determination of whether to grant or deny a permit under Section 10 and Section 404, and EPA s exercise of its veto authority under Section 404, constitute final agency action reviewable under the Administrative Procedure Act ("APA").[131] The agency action is reviewed under the arbitrary and capricious standard,[132] and judicial review is limited to the contents of the administrative record.[133] Courts are typically reluctant to conduct *de novo* review on the Corps wetland determination,[134] and normally proceed by way of summary judgment.[135] Some courts, however have allowed trial testimony in reviewing the Corps wetlands determinations.[136] Courts are usually more willing to allow some trial testimony in cases where the Corps has granted a permit.[137]

Regardless of whether the court takes testimony or decides the case on summary judgment, the party challenging the Corps de

131. *See* 5 U.S.C. § 701. Typically, courts will hold that the question of whether the proposal is subject to permit requirements is matter that should first be decided at the agency level and such cases are dismissed on ripeness grounds. *See, e.g.*, USI Properties v. EPA, 517 F Supp. 1235 (D.P.R. 1981); Signal v. Alexandria, 17 Env't Rep. Cas. (BNA) 1852, 1853-54 (C.D. Cal. 1980). Some courts, however, have rejected ripeness arguments. *See, e.g*, Puerto Rico v. Alexander, 438 F Supp. 90, 94 (D.D.C. 1977).

132. Taylor v. District Eng'r, United States Army Corps of Eng rs, 567 F.2d 1332, 1336 (5th Cir. 1978); Deltona Corp. v. Alexander, 504 F Supp. 1280, 1284 (M.D. Fla. 1981), *aff'd*, 682 F.2d 888 (11th Cir. 1982); Hart and Miller Islands Area Envtl. Group, Inc. v. United States Army Corps of Eng rs, 621 F.2d 1281 (4th Cir. 1980), *cert. denied*, 449 U.S. 1003 (1980).

133. Buttrey v. United States, 690 F.2d 1170 (5th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983); Joseph G. Morretti, Inc. v. Hoffman, 526 F.2d 1311, 1312 (5th Cir. 1976).

134. Smithwick v. Alexander, 17 Env't Rep. Cas. (BNA) 2131, 2132 (4th Cir. 1981).

135. Parkview Corp. v. Department of Army Corps of Eng'rs, 469 F Supp 217 (E.D. Wis. 1979).

136. Bayou des Familles Dev. Corp. v. United States Army Corps of Eng rs, 541 F Supp. 1025, 1034 (E.D. La. 1982). Courts have rejected the argument that an applicant has right to jury trial when the government seeks civil penalties under the Clean Water Act. United States v. Tull, 769 F.2d 182, 186 (4th Cir. 1985), *cert. granted in part*, 106 U.S. 2244 (1986).

137 *See, e.g.*, Action for Rational Transit v. West Side Highway Project, 536 F Supp. 1225 (S.D.N.Y. 1982), *aff'd*, 699 F.2d 614 (2d Cir. 1983). Although courts may be reluc tant to take testimony, the Corps is usually required to give petitioner an administrative hearing if it so requests, although not trial-type hearing. Buttrey v. United States, 690 F.2d 1170, 1174 (5th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983). In AJA Associates v. Army Corps of Eng rs, slip op. C.A. No. 85-5151 (E.D. Penn. April 18, 1986), district court held that the Corps had not met the minimal hearing requirements, by failing even to provide the applicant with "paper hearing. The court noted that the CWA authorizes the Secretary of the Army, acting through the Chief of Engineers to "issue permits, after notice and opportunity for public hearings. 33 U.S.C. § 1344(a), (e) (1982).

termination has a difficult burden.[138] Courts typically uphold the Corps determination.[139] In those few cases in which the courts find an arbitrary action by the Corps, the usual remedy is a remand.[140] The courts, however have issued several recent opinions which bear directly on the decisionmaking process of the Corps as well as the EPA. In reviewing the issuance of a Section 404 permit, the question arises as to whether the activity impinging on the wetland should be permitted to go forward in view of alternative sites for development. The courts have confirmed that alternative sites must be available to the applicant and consistent with project purposes to warrant denial of a permit.

In *Hough v. Marsh*,[141] residents of Edgartown, Massachusetts filed suit challenging a Corps permit authorizing the filling of a coastal tract to construct two private residences. The District Engineer found that project was not "water dependent," but concluded that the applicant had overcome the presumptions set forth in the Corps regulation because the project was "nonethe less necessary because of the absence of feasible alternatives."[142] The court rejected plaintiffs argument that water dependency was a prerequisite for issuance of a permit. The court, however noted that a "more persuasive showing than otherwise concerning lack of alternatives" is necessary for projects not considered water dependent.[143] The court further noted that a review of

138. In Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971), the Supreme Court made clear that court review under the APA is highly deferential and that final agency action is entitled to presumption of regularity. The reviewing court is not empowered to substitute its judgment for that of the agency. *Id.* at 416. Rather, reviewing court' duty is to hold the agency to certain minimal standards of rationality, and not to "inject its opinion in place of that of the agency who, because of its particular expertise, has been entrusted with the decisionmaking power. Ethyl Corp. v. EPA, 541 F.2d 1, 36 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976). *See also* National Wildlife Federation v. Hanson, 623 F Supp 1539, 1544 (E.D.N.C. 1985).

139. *See, e.g.*, United States v. DeVriendt, 791 F.2d 935 (6th Cir. 1986) (affirmed without opinion); Loving v. Alexander, 745 F.2d 861 (4th Cir. 1984); Orleans Audubon Soc. v. Lee, 742 F.2d 901, 907 (5th Cir. 1984).

140. Taylor, 567 F.2d at 1338-40 (5th Cir. 1978).

141. 557 F Supp. 74 (D. Mass. 1982).

142. *Id.* at 83.

143. *Id. See* 1902 Atlantic, Ltd. v. Hudson, 574 F Supp. 1381, 1398 (E.D. Va. 1983) (court agrees with *Hough* that the so-called water dependency requirement is not prerequisite, but rather one more factor to be considered by the defendant in the general balancing process when issuing permit).

practicable alternatives must be constrained by the applicant s primary project.[144]

More recent court decisions have confirmed the conclusions reached by the District Court in *Hough*. For example, in *Louisiana Wildlife Federation, Inc. v. York*,[145] plaintiff brought suit asserting that the Corps had improperly conducted its alternative analysis in approving six Section 404 permits for clearing hundreds of acres of wetlands for cultivation of soybeans. Plaintiff argued that alternatives could not be viewed in terms of the applicant s objec tive of increasing soybean production. The court, however found that the Corps was not only permitted to consider the applicant s objective, but indeed required to consider that objec tive.[146] Because there was no alternative that could fulfill the applicant s objective, the court approved the Corps finding of no "practicable alternatives."[147]

The Fifth Circuit reversed on grounds unrelated to the lower court s alternative analysis. The Fifth Circuit, however rejected plaintiff's argument that it was inappropriate for the Corps to view alternatives with the applicants purpose and objectives in mind.[148] The Fifth Circuit observed:

> not only is it permissible for the Corps to consider the applicant's objective; the Corps has a duty to take into account the objectives of the applicant's project.[149]

144. Hough, 557 F Supp. at 83. *See* Roosevelt Campobello Int'l Park Comm v. EPA, 684 F.2d 1041, 1047 (1st Cir. 1982) (EPA properly focused on applicant' economic needs for deep water port site).

145. 603 F Supp. 518 (W.D. La. 1984), *aff'd in part and vacated in part*, 761 F.2d 1044 (5th Cir. 1985).

146. 603 F Supp at 528.

147 *Id.* at 529.

148. York, 761 F.2d at 1048.

149. *Id.* In National Audubon Soc. v. Hartz Mountain Dev. Corp., No. 83-1534D (D.N.J. October 24, 1983), 14 Envtl. L. Rep. 20724, 20730-31, an applicant proposed construction of retail/office building on site which would require that 127 acres of wetlands be filled. The court denied plaintiff' request for injunctive relief, finding no practicable alternative from plaintiff' perspective. Even though numerous other sites were being de veloped by other parties for the same purposes, these sites were not practicable alternatives for the applicant because they were being developed and thus were unavailable to the defendant.

Based on this case law, the Corps has recently taken the position that it generally ac cepts an applicant's determination that proposed activity is needed and will be economically viable. 51 Fed. Reg. 41,209 (1986). However, the Corps recently promulgated regulation gives it authority to look at the economic impacts and need for project, and make an independent review of the need for the project. The new Corps regulations provide:

It should be noted, however that even though courts have ruled in the applicant s favor in allowing the Corps to consider only practicable alternatives that are consistent with the developer's objectives, the courts generally uphold the Corps determination. Accordingly in those cases where the Corps and EPA apply the alternatives analysis to find a practicable alternative requiring that the permit be denied,[150] the developer will face a difficult challenge in order to overturn the government's permit decision. It is thus essential that the developer make every effort to obtain a favorable ruling at the agency level.

III. THE REGULATORY TAKING OPTION

In those instances when private developers have been unable to reverse an agency determination to deny a permit, the private developers may seek to obtain damages from the government based on a "regulatory taking" theory Since Justice Holmes decision in *Pennsylvania Coal Co. v. Mahon*,[151] where the Supreme Court first recognized that a restrictive zoning and land-use regulation that "goes too far" can constitute a taking,[152] private developers who have been denied an environmental permit have had the option to seek just compensation for the government's restriction of the use of their property [153] While the Supreme Court has held that governmental land-use regulations may amount to a taking of

> The district engineer may determine that the impacts proposed project on the public interest may require more than cursory evaluation of the need for the project. The depth of the evaluation would depend on the significance of the impacts and in unusual circumstances could include an independent economic analysis.

Id. at 41,208.

150. *See* Bersani v. E.P.A., CA No. 86-CV-722 (N.D.N.Y. filed July 1, 1986).

151. 260 U.S. 393 (1922).

152. *Id.* at 415.

153. In addition to the fact that regulatory takings have been difficult to prove, the court has held that "just compensation" is the fair market value of the property on the date it is appropriated and allows the owner to receive what willing buyer would pay in cash to willing seller at the time of the taking. Kirby Forest Indus. Inc. v. United States, 467 U.S. 1, 10 (1984). "Considerations that may not reasonably be held to affect market value are excluded. United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984), *quoting*, Olson v. United States, 292 U.S. 246, 255 (1934). "Deviation from this measure of just compensation has been required only 'when the market value has been too difficult to find or when its application would result in manifest injustice to the owner or the public. 50 Acres of Land, 469 U.S. at 29, *quoting*, United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950).

property [154] several recent cases make clear that a taking will only be found where the developer has exhausted all options for its land and when the permit denial has the effect of preventing all economically viable uses.[155]

A. *Background*

The Just Compensation Clause of the Fifth Amendment states in unequivocal terms: "Nor shall private property be taken for public use, without just compensation."[156] When a governmental entity exercises its powers of eminent domain to condemn private property for a public use, there is no question that the Fifth Amendment requires that compensation be paid.[157] More difficult is the issue whether a governmental entity must pay just compensation when a police power regulation may be said to have effected a taking by restricting use of private property

For many years, the Court held that an exercise of police powers, however arbitrary or excessive, cannot as a matter of federal constitutional law constitute a taking within the meaning of the Fifth Amendment.[158] As long as a police power regulation had a proper purpose, and means rationally related to that purpose, the

154. *See, e.g.*, Connolly v. Pension Benefit Guaranty Corp., 106 S. Ct. 1018 (1986); Riverside Bayview Homes, Inc. v. United States, 106 S. Ct. 455 (1985); Williamson County Regional Planning Comm v. Hamilton Bank of Johnson City, 105 S. Ct. 3108 (1985); San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621 (1981).

155. MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986); Florida Rock Indus., Inc. v. United States, 791 F.2d 893 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 926 (1987).

156. U.S. CONST., amend. V The Just Compensation Clause was made applicable to the states through the Fourteenth Amendment. San Diego Gas & Elec. v. San Diego, 450 U.S. 621 (1981); Webb' Fabulous Pharmacies Inc. v. Beckwith, 449 U.S. 155, 160 (1980); Chicago B. & Q. R. Co. v. Chicago, 166 U.S. 226, 239 (1897).

157 When the government action involves physical intrusion on the land, such "physical seizure may operate as de facto exercise of the power of eminent domain so as to require compensation. United States v. Dow, 357 U.S. 17 21 (1958) (pipeline right-of-way); United States v. Cress, 243 U.S. 316 (1917) (flooding); United States v. Clarke, 445 U.S. 253 (1980); United States v. Dickinson, 331 U.S. 745, 747-48 (1947). The closer particular government regulation is to actual physical seizure the more likely it is that the regulation will be found to interfere so unreasonably with the property that it is characterized as "taking. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Similarly, if the restriction on the land furthers governmental enterprise, it may be considered taking since the government has used the property to its own benefit. *See, e.g.*, Armstrong v. United States, 364 U.S. 40, 49 (1960); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

158. Mulger v. Kansas, 123 U.S. 623 (1887). *See also* Hadacheck v. Sebastian, 239 U.S. 394 (1915); Reitman v. City of Little Rock, 237 U.S. 171 (1915).

Court refused to find a taking no matter how much financial loss it caused.[159]

In *Pennsylvania Coal Co. v. Mahon*,[160] Justice Holmes overruled this precedent, stating "[T]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[161] Since this decision, and particularly in recent years, the Court has frequently recognized the vitality of the general principle that a regulation can effect a Fifth Amendment taking.[162] The Court, however has yet to hold that a land-use regulation constitutes a taking. While enunciating several criteria to determine whether a regulation constitutes a taking, the Court has infrequently applied these factors because in cases before the Court there has not been a final decision as to how the allegedly confiscatory regulation applied to the property [163] Accordingly when a regulation that goes too far should be recognized as a taking remains, as one distinguished commentator has observed, "the most haunting jurisprudential problem in the field of contemporary land use law one that may be the lawyer's equivalent of the physicist s hunt for the quark."[164]

B. *Determining Whether A Regulation Has Effected A Taking*

"The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner should bear the burden of an exercise of state power in the public interest."[165] As Justice Holmes noted in *Pennsylvania Coal*, the determination of a taking is "a question of degree—and therefore cannot be disposed of by general proposition."[166] To this day there is no set formula to determine where

159. Mulger, 123 U.S. at 667-68.

160. 260 U.S. 393 (1922).

161. *Id.* at 415. *Pennsylvania Coal* has been interpreted as constitutional challenge to the regulatory measure that was invalid as an exercise of the public power. San Diego Gas & Elec. v. City of San Diego, 450 U.S. 621, 649 n. 14 (1981).

162. *See* note 147 *supra*.

163. *See* notes 171-207, *infra*.

164. C. HAAR, LAND-USE PLANNING 766 (3rd ed. 1976). *See generally*, Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165 (1974); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power* 74 YALE L.J. 36 (1964).

165. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

166. 260 U.S. 393, 413 (1922).

regulation ends and taking begins.[167] Instead, the Court relies as much on "the exercise of judgment as the application of logic."[168] Courts engage essentially in an *ad hoc* factual inquiry allowing the resolution of the issue to turn upon the particular circumstances of each case.[169]

While the Court has eschewed the development of any set formula for identifying a "taking forbidden" by the Fifth Amendment, the Court has identified several factors which have particular significance. The Supreme Court recently restated these factors in *Connolly v. Pension Benefit Guaranty Corp.* [170] where it observed:

> To aid in this determination, we have identified three factors which have particular significance: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action.[171]

C. *Application of the Regulatory Taking Test*

1. Supreme Court Avoidance of the Regulatory Taking Issue

The issue of whether a particular regulation can be said to effect a taking of property has been presented frequently to the Supreme Court in recent years. The Supreme Court, however has consistently resisted any determination on the regulatory taking issue, refusing to adjudicate the constitutionality of the regulation that purports to limit development until the developer has exhausted all options that might permit development. The Court

167 MacDonald, Sommer & Frates, 106 S. Ct. at 2566 (1986); Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962).

168. Andrus v. Allard, 444 U.S. 51, 65 (1979).

169. United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958).

170. 106 S. Ct. 1018 (1986).

171. *Id.* at 1026. The genesis of these criteria was Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), in which the Court analyzed whether the restrictions imposed by New York City Landmark Preservation law upon construction proposal for Grand Central Station effected "taking within the meaning of the Fifth Amendment. After canvassing the appropriate inquiries necessary to determine whether land use restriction effected taking, the Court identified the economic impact of the regulation on the claimant and the character of the governmental action as particularly relevant considerations. 438 U.S. at 124. The Court then announced three-part inquiry which is still in effect, although the test was modified in Pruneyard Shopping Center v. Robins, 447 U.S. 74, 83 (1980), where the Court redefined the second prong of the test to provide that the claimant invest-backed expectation must be reasonable.

has stated that "it cannot determine whether a regulation has gone too far until it knows how far the regulation goes."[172]

In *Agins v. City of Tiburon*,[173] the Court held that a zoning ordinance which authorized the development of single-family residences on the developers 5-acre tract did not effect a taking of property on its face because the developer had not made application for any improvements to the property Similarly in *San Diego Gas & Electric Co. v. San Diego*,[174] the Court dismissed an appeal because the City's rezoning and adoption of an open space plan had deprived the utility of all beneficial use of the property The Court noted that "further proceedings were necessary to resolve the federal question whether there had been a taking at all."[175] The Court also found the regulatory taking claim premature in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* [176] in which the developer failed either to seek a variance that would have allowed it to develop the property in accordance with the proposed plan or to avail itself of state procedures which might obtain "just compensation." As explained by the Court in *Williamson*:

> [T]he difficult problem [is] how to define 'too far, that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of property through eminent domain or physical possession. [R]esolution of that question depends, in significant part, upon an analysis of the effect the Commission s application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent s property [177]

Most recently the Court addressed the ripeness issue in *MacDonald, Sommer & Frates v. Yolo County* [178] In this case, the land developer submitted a proposal to the Yolo County Planning Commission to subdivide certain agricultural property into resi-

172. MacDonald, Sommer & Frates, 106 S. Ct. at 2566.

173. 447 U.S. 255 (1980).

174. 450 U.S. 621 (1981).

175. *Id.* at 633.

176. 105 S. Ct. 3108 (1985).

177 *Id.* at 3124. The Court has also found the regulatory taking claim premature in Penn Central Transportation Co., 430 U.S. 104 (1970), and Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264 (1981).

178. 106 S. Ct. 2561 (1986).

dential lots. The Commission rejected the proposal because the proposal failed to provide adequate public street access, sewer services, water supplies and police protection. Based on a line of California Supreme Court precedent,[179] the California Court of Appeals determined that a landowner cannot recover in inverse condemnation based upon land-use regulation, and that even if an inverse condemnation action was available, plaintiff had failed to state a claim because the denial of plaintiff's proposal cannot be equated with a refusal to permit less intensive but still valuable development.[180] While rejecting the view that a developer cannot recover under a taking theory for land use regulations, the Supreme Court affirmed, citing precedent establishing that it must know the "nature and extent of permitted development before adjudicating the constitutionality of the regulations that purports to limit it."[181] The Court stated:

> Here, in comparison to the situations of the property owners in the three preceding cases, appellant has submitted one subdivision proposal and has received the Board's response thereto. Nevertheless, appellant still has yet to receive the Board's "final, definitive position regarding how it will apply the regulations at issue to the particular land in question." In *Agins, San Diego Gas & Electric*, and *Williamson Planning Comm n*, we declined to reach the question whether the Constitution requires a monetary remedy to redress some regulatory takings because the records in those cases left us uncertain whether the property at issue had in fact been taken. Likewise, in this case, the holdings of both courts below leave open the possibility that some development will be permitted, and thus again leave us in doubt re garding the antecedent question whether appellant's property has been taken.[182]

2. Regulatory Taking Decisions

Although the Supreme Court has often been able to avoid de termining whether a particular regulation constitutes a taking, the Court has on occasion applied its "regulatory taking" test. A number of lower courts have also applied the test.

179. Agins v. City of Tiburon, 24 Cal. 3d 266, 274-77 598 P.2d 25, 29-31 (1979), aff'd, 447 U.S. 255 (1980). *See generally*, Cunningham, *Inverse Condemnation as Remedy for "Regulatory Takings* 8 HASTING CONSTITUTIONAL L. Q. 517 (1981).

180. 106 S. Ct. at 2564-2565. The California Supreme Court denied appellant' petition for hearing, and the appellant perfected an appeal to the Supreme Court. *Id.*

181. *Id.* at 2567

182. *Id.*

The Supreme Court has most recently applied a taking analysis in *Keystone Bituminous Coal Ass'n v. DeBenedictis.*[183] In a five-four decision, written by Justice Stevens, the Court held that a Pennsylvania statute, designed to minimize subsidence from coal mining and requiring 50% of coal beneath certain structures be kept in place for surface support, does not affect a taking of property. While noting that Justice Holmes in *Pennsylvania Coal* had found a taking when a statute had prohibited the mining of coal in a manner that would cause subsidence of land, the Court in *Keystone* distinguished *Pennsylvania Coal* on the facts of the case.[184]

First, the Court distinguished the particular government action involved. The Court maintained that unlike the statute in *Pennsylvania Coal*, the present statute did "not merely involve a balancing of the private economic interests of coal companies against the private interests of surface owners,"[185] but rather sought "to protect the public interest in health, the environment, and the fiscal integrity of the area."[186] Second, the Court distinguished the present statute from that in *Pennsylvania Coal* by finding that the present statute neither makes it impossible for petitioner to profitably engage in business nor involves undue interference with petitioners' investment-backed expectation. The Court stated that only a narrowly defined segment of property could not be mined, and petitioners failed to show that their entire bundle of rights in the property had been impaired.[187]

In his dissent, Chief Justice Rehnquist found the majority's attempt to distinguish *Pennsylvania Coal* unpersuasive. Rehnquist maintains that the statute in *Pennsylvania Coal* did, in fact, serve the public interest and was enacted to avoid unsafe conditions and environmental damage.[188] Moreover Rehnquist argues that the fact that a statute may have a valid public purpose does not resolve the issue of whether a taking has occurred. "A broad exception to the operation of the Just Compensation Clause based on exercise of multifaceted health, welfare, and safety regulations would surely allow government much greater authority than we

183. 107 S. Ct. 1232 (1987).
184. *Id.* at 1236.
185. *Id.* at 1242.
186. *Id.* at 1243.
187 *Id.* at 1246-1248.
188. *Id.* at 1255.

have recognized to impose societal burdens on individual landowners."[189]

The dissent observed that while the majority recognized a nuisance exception to the taking analysis, it did not accept the proposition that the state may completely extinguish a property interest or prohibit all use without providing compensation. Rehnquist points out that the majority apparently had refused to consider the 27 million tons of coal in the ground as a separate segment because the alleged taking was regulation of property rather than of physical intrusion. Rehnquist states that this disc tinction is irrelevant to the consideration of the impact of government action on property rights.[190] Based on the scope of the loss to petitioners and the complete extinguishment of the petitioners property right, the dissent would find that a taking has occurred and that compensation must be paid.

Keystone represents a significant split in the Court on application of regulatory taking criteria.[191] Under Stevens analysis, an applicant for a wetlands permit would virtually never be able to establish a taking, because the police power interest in protecting the environment, that serves as the basis of a government denial of a wetlands permit, would apparently preclude recovery regardless of the degree of damage suffered by the permit applicant. Under a Rehnquist analysis, focus on public purpose would be limited to the determination whether the government may exercise its tak ing power [192] The main analysis would be whether the government action extinguished the property owners bundle of rights and deprived the owner of all or most of his interest in the property The holding in *Keystone* creates great uncertainty on whether it would be possible to prove a taking because of a denied wetlands permit, and if such were shown, how a petitioner would prove the severity of the economic impact.

189. *Id.* at 1256.

190. *Id.* at 1258.

191. The Court did not evince such disagreement in its taking analysis in *Rucklehouse v. Monsanto Co.*, 467 U.S. 986 (1984), in which an applicant for pesticide registration under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") brought suit, alleging that the data consideration and data disclosure provisions of FIFRA effected taking of property without just compensation. The Court determined that the regulation was rationally related to legitimate government interest, and that Monsanto, knowing the conditions under which it provided data to EPA, did not have reasonable, investment-backed expectation that the data submitted after the effective date of the FIFRA Amendment would be kept confidential beyond that which the statute itself protected.

192. Keystone, 107 S. Ct. at 1256.

The Supreme Court has "uniformly rejected the proposition that diminution in property value, standing alone can establish a taking."[193] The Court has branded as fallacious the "contention that a 'taking must be found to have occurred whenever the land-use restriction may be characterized as imposing a servitude on the claimant s parcel."[194] Instead, the taking issue is resolved by focusing on the uses the regulation permits, and courts typically reject regulatory taking claims because the property has residual value.[195]

193. Penn Central Transp. Co., 438 U.S. at 131; Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (75% diminution in value caused by zoning law); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (87.5% diminution in value).

194. Penn Central Transp. Co., 438 U.S. at 130 n. 26. In Kirby Forest Indus., the Court noted that at least in the absence of an interference with an owner legal right to dispose of his land, even substantial reduction of the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the Fifth Amendment. 467 U.S. at 7

195. The Supreme Court has not as yet provided definitive interpretation of the regulatory taking issue. The Court has refused to adjudicate the constitutionality of particular regulation that purports to limit development until the developer has exhausted all options that might permit development. *See, e.g.*, McDonald, Sommer & Frates, 106 S. Ct. 2561; Williamson County Regional Planning Comm'n, 473 U.S. 172 (1985); Hodel, 452 U.S. 264 (1981).

The Supreme Court this Term, however, will have several occasions to address the issue of what constitutes regulatory taking. In First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, No. 85-1199 (October Term, 1986), the Solicitor General, in an amicus curiae brief has presented radical argument to the Court on the regulatory taking issue. The government argues that the Fifth Amendment does not, of its own force, furnish basis for court to award money damages against the government. Brief of the United States as Amicus Curiae Supporting Appellee, First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, No. 85-1199 (October Term, 1986). The government finds support for this argument in the text of the Fifth Amendment and other indicia of the drafters intent. However, the Court has frequently asserted in dicta, that the Fifth Amendment is not limited to an actual physical appropriation or invasion of owner property and that taking may result from regulatory restrictions, even temporary restrictions, on the owner use of its property. In view of this well established proposition, the Government may be unable to muster a majority of Justices to adopt its argument that the Fifth Amendment does not require monetary remedy be available against the government where regulation is found to result in an unconstitutional taking. It must be noted, however, that the Court has only accepted the "regulatory taking damage claim in dicta. Even in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1932), the case where the Supreme Court first recognized regulation which goes too far can constitute taking, the action was for injunctive relief and thus the Court did not need to decide whether landowner may obtain damages on taking theory.

The Court, however, will likely find the claim in *First English* premature. The owner of the land, upon which development had been restricted, had not submitted concrete proposal to the responsible county agency in order to obtain final decision on the extent of permitted development. Although it may be argued that applellee never contended that

The Court of Claims, in *Deltona Corp. v. United States*[196] and *Jentgen v. United States*,[197] laid down the basic principle that while a government regulation can effect a taking of property the taking issue is to be resolved by focusing on the uses the regulation permits. In *Deltona*, the court noted that while the Corps' denial of the RHA and CWA permits "substantially frustrated Deltona s reasonable investment-backed expectation [it] neither extinguish[es] a fundamental attribute of ownership, [cite omitted], nor prevents Deltona from deriving many other economically viable uses of its parcel."[198] In *Jentgen*, the court found that the post-denial market value of plaintiff's land was close to the original purchase price value. Furthermore, plaintiff had rejected permits to develop part of the parcel. The court, following the Supreme Court's standard, stated that "some diminution in the value of the property rather than the complete destruction of all economically viable uses" did not constitute a taking.[199]

The Federal Circuit Court, in *Florida Rock Industries, Inc. v. United States*,[200] set forth a standard for evaluating residual value of property affected by a denial of a development permit. Florida Rock Industries sought compensation for an alleged taking of property that occurred by reason of the Corps denial of a permit to discharge pollutants into a navigable water pursuant to Sec tion 404 of the CWA. Florida Rock had applied for a Section 404 permit for its limerock extraction activites but the permit application was denied because of the environmental impact on the wetlands. Florida Rock did not challenge the validity of the Corps determination, but chose instead to bring a taking action in the Claims Court.

all uses of the property were not denied to the landowner, and thus that ripeness argument is inappropriate, the Court may again dismiss this case on ripeness/finality grounds.

The regulatory taking issue has also been presented for Supreme Court review in two other cases. In Keystone Bituminous Coal Association v. Duncan, No. 85-1092, the Court will face the question whether the Third Circuit (771 F.2d 707) properly distinguished *Pennsylvania Coal* in holding that state can compel mine operator to abandon their coal, in order to serve the state interest in economic development, without violating the Takings Clause of the Fifth Amendment. In Nollan v. California Coastal Comm n, No. 86-133, the Supreme Court will decide whether state court, having determined that the state had authority under its police power to allow physical invasion of property for public use, must evaluate whether compensation is owing to the landowner.

196. 657 F.2d 1184 (Ct. Cl. 1981).

197 657 F.2d 1210 (Ct. Cl. 1981).

198. 657 F.2d at 1192.

199. 657 F.2d at 1213.

200. 791 F.2d 893 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 926 (1987).

The Claims Court found that the Corps denial of the permit constituted a taking because it left the plaintiff no reasonable economic uses for the property.[201] The court rejected the government's uncontroverted evidence that the property could be sold for a higher price per acre than when it was purchased. The court also found that the proposed mining operation would not have polluted the water supply even though the developer did not challenge the Corps denial of the permit.[202]

An en banc panel of the Federal Circuit Court found the Claims Court decision in error.[203] First, the court held the Claims Court erred in finding that rock mining would not pollute, noting that the Claims Court may not usurp the authority of the Corps to make its public interest analysis, and that a challenge to the Corps analysis is only appropriate in federal district court.[204] As far as whether the Corps action constituted a taking, the court noted that a regulation under the Clean Water Act can be a taking if its effect on a landowner s ability to put his property to productive use is sufficiently severe.[205] The court noted, however that a taking does not occur by a mere denial of the "highest and best use" or the most profitable use that would be available in the absence of regulation.[206] The Federal Circuit further held that the Claims Court erred in assessing the severity of economic impact exclusively on the basis of the value of the property for mining purposes and in refusing to consider any fair market value remaining in the land and reliable on its sale.[207]

On remand, the Federal Circuit observed that:

> The court should consider along with other relevant matters, the relationship of the owner's basis or investment, and the fair market value before the alleged taking, to the firm market value after the alleged taking. In determining the severity of eco-

201. 8 Cl. Ct. 160, 165 (1985).

202. *Id.* at 172.

203. 791 F.2d 893 (D.C. Cir. 1986).

204. *Id.* at 898. Florida Rock did not sue in the United States District Court under the Administrative Procedures Act for review of the permit denial, but rather chose only to file in the United States Court of Claims under the Tucker Act, 28 U.S.C. § 1491 (1982).

205. 791 F.2d at 901. *Citing* Deltona Corp. v. United States, 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982); Jentgen v. United States, 657 F.2d 1210 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982). The court noted that regulation may have an adverse effect on market value if the most profitable use is prohibited. *Id.*, *citing* Andrus v. Arllard, 444 U.S. 51, 66 (1979); Penn Central, 438 U.S. at 131.

206. 791 F.2d at 901.

207 *Id.* at 901-903.

> nomic impact, the owner s opportunity to recoup its investment or better, subject to the regulation, cannot be ignored.[208]

The court noted that in applying this legal standard, there is a "substantial possibility that a taking should be held to have occurred."[209]

Most recent federal cases have uniformly rejected taking claims,[210] and only a few state court cases have found a taking in such instances. However in *1902 Atlantic Ltd. v. Hudson*,[211] a federal district court for the first time ruled that the Corps denial of a permit to develop an area containing wetlands would constitute a taking if allowed to stand. The Corps had denied plaintiff permission to fill a partially inudated borrow pit, consisting of approximately eleven acres of sand and mudflat bottom and less than three-fourth acres of vegetated wetland. Originally the property was entirely highland and not subject to Corps regulation. The site was then excavated to provide fill for construction of a highway Subsequently unknown persons constructed a ditch connecting the pit to a tributary of navigable water The court ruled that the denial of a permit to plaintiff was arbitrary and capricious, and would constitute a taking if allowed to stand.[212] The court held that the permit denial would render the pit commercially worthless, that it precluded any reasonable beneficial use, and that it denied plaintiff all viable economic use of the site.[213]

In *Annicelli v. South Kingstown*,[214] the Supreme Court of Rhode Island held that a town ordinance prohibiting single family residences in "high flood danger areas" was a taking because it deprived plaintiff of all reasonable use of the property The court reasoned that the regulation was a taking for the public good rather than the prevention of public harm, and that the police power may not be used properly to regulate property for the pub-

208. *Id.* at 905.

209. *Id.*

210. *See, e.g.*, Park Avenue Tower Assocs. v. City of New York, 746 F.2d 135 (2d Cir. 1984), *cert. denied sub nom.*, 40 Eastco v. City of New York, 105 S. Ct. 1854 (1985); Sadowsky v. City of New York, 732 F.2d 312 (2d Cir. 1984); Troy v. Renna, 727 F.2d 287 (3rd Cir. 1984); Furey v. City of Sacramento, 592 F Supp. 463 (E.D. Cal. 1984); Tirolerland, Inc. v. Lake Placid 1980 Olympic Games, Inc., 592 F Supp. 304 (N.D.N.Y. 1984).

211. 574 F Supp. 1381 (E.D. Va. 1983).

212. *Id.* at 1404, 1405-1406.

213. *Id.* at 1405.

214. 463 A.2d 133 (R.I. 1983).

lic good.[215] In *Zinn v. State*,[216] the Supreme Court of Wisconsin found a temporary taking when the Department of Natural Resources erroneously ruled that a lake which covered plaintiff's property resulted in title to the land being held in trust. Even though the owner gained full use of the property after the regulation was repealed, the court found that the length of time was only a factor in determining whether the owner was deprived of beneficial use.[217] More typically however the state courts, like the federal courts, find that the property has residual value, and that the fact a regulation has some adverse effect on the fair mar ket value does not result in a taking.[218]

IV THE DEVELOPER S COURSE OF ACTION

The need for a developer to present effectively its case to the agency in the first instance cannot be overemphasized. Given how infrequently a federal court will overturn an agency s deter mination on a wetland's permit, and the problems developers have encountered in attempting to obtain damages on a taking theory when denied a wetlands permit, it is critical that the developer be well prepared to explain and justify its proposal before it files a wetlands application with the Corps.

The Corps, however is only one of several agencies with which a developer must encounter in order to obtain a wetlands permit. While the EPA has long commented on wetlands proposals, EPA is now expected to take a far more active role in reviewing the Corps decisionmaking process. Moreover the United States Fish and Wildlife Service is taking a more comprehansive look at the effect of proposals on wetlands, particularly given the fact that more than one-third of the nation s endangered species depend on these areas for survival.[219]

The developer also cannot ignore other federal and state agencies required authorizations for the project and their comments on the Corps environmental impact statement and decision doc ument. Consequently the developer must have a comprehensive

215. *Id.* at 141.

216. 112 Wis.2d 417 (1983), 334 N.W.2d 67 (1983).

217 112 Wis.2d at 427· 334 N.W.2d at 72.

218. *See, e.g.*, Stilling v. City of Winston-Salem, 311 N.C. 689 (1984), 319 S.E.2d 233 (N.C. 1984); Potomac Sand & Gravel Co. v. Governor of Maryland, 293 A.2d 241 (Md. 1973).

219. J. KUSLER, OUR NATIONAL WETLAND HERITAGE 3 (1983).

strategy in which it can address effectively the issues raised by the various agencies.

Before submitting its application for a wetlands permit to the Corps, the developer should already have factual and scientific support for its position that the permit is in the public interest. After the developer files its application, the Corps ordinarily issues a public notice of receipt within fifteen days. Environmental groups may begin fighting a substantial project soon thereafter The developer has the ability to get a head-start on this opposition and should take advantage of this opportunity

For a project not dependent upon being in or near water the issue of alternatives to the project is critical. Recent case law has made it clear that it is not only permissible for the Corps to consider the applicant s objectives in determining whether there is a practicable alternative, but that the Corps has a duty to take these objectives into account.[220] Proving that no alternatives will meet the applicant s objectives is not an easy task, particularly in view of the presumption that such alternatives exist.[221]

Prior to filing a permit application, the developer should prepare a thorough market study or at least a preliminary study which shows that there are no practicable alternatives. This should be used to persuade the Corps and the EPA at the outset that there is not a praticable alternative.

The market study should not be narrowly focused in scope, but should make a convincing case that impingement on the wetland itself is necessary under the specific circumstances presented. While case law has upheld viewing alternatives based on the de veloper s objective, an alternative s actual ability to achieve the developer's objective is debatable; therefore, a developer should provide the government a market study that shows there is no realistic alternative which will legitimately meet the objective sought by the proposed project.

It is also important that the particular wetlands of concern be studied. In challenging wetlands permits, environmentalists may take the position that all wetlands are deserving of equal protec tion. In reality however some wetlands serve more important ecological functions than others. If an applicant can show that the wetlands upon which the proposed project will impinge are

220. Louisiana Wildlife Fed' v. York, 761 F.2d 1044 (5th Cir. 1985).
221. 40 C.F.R. § 230.10(a)(3) (1986).

not functional, or that mitigation measures suggested will make the wetlands function better than previously such information may help convince the agencies that the development is in the public interest. The functionality of the wetlands can only be determined through scientific analysis, and it will often be cost-effective to conduct a review of the wetlands before a permit application is filed.

The developer must also give consideration to mitigation measures that can be proposed.[222] Because of the strong opposition that may arise to development in or near wetlands, the developer should be prepared to make certain concessions from the outset. Developers should also expect that the government will require much more than just mitigation before a permit is granted. Neither the federal agencies nor the public will ordinarily allow a developer to destroy a wetlands area without requiring the developer to take steps to improve the existing wetlands or develop an artificial wetlands. There is a rising sentiment for a "replace ment" policy in which the developer would be required not only to mitigate the direct effects of the proposal on the wetland on which it impinges, but also to improve an existing wetland or to create an artificial wetland so that the acreage lost to the development is fully replaced. Clearly the developer s proposal on measures to rectify any harm caused by the project is critical, and these measures must be developed with care and under expert supervision to avoid unnecessay cost and inefficiencies.

If the Corps denies a wetlands permit, or the EPA vetoes the Corps approval of a permit, a developer has two basic litigation options. First, the developer can bring an action under the Administrative Procedure Act ("APA"),[223] claiming that the agency determination is arbitrary and capricious. Second, the developer can bring an action for damages under a taking theory [224] These options are not mutually exclusive; a developer may bring both an APA action and a taking claim; however the developer has a difficult burden of proof in either case.

222. The Corps and EPA's policy on the amount of required mitigation remains unclear. Even the Corps' recent regulations do little to clarify this issue, other than to permit both on-site and off-site mitigation and to explain the concept of compensatory mitigation or compensating for the impact by replacing or providing substitute resources or environments. 51 Fed. Reg. 41,208 (1986). The regulations do not clarify when compensatory mitigation will be required or when off-site mitigation would be acceptable.

223. *See* 5 U.S.C. § 703 (1982).

224. *See* MacDonald, Sommer & Frates, 106 S. Ct. 2561 (1986).

In APA actions, the courts have generally paid significant defer ence to an agency s determination that a wetlands permit be denied. In those few cases in which the Corps determination is overturned, the remedy is to remand the case to the Corps for reconsideration. Consequently a developer who has not properly presented his case at the agency level can expect little in way of relief from a court. It is highly unlikely that a court would usurp the Corps function and simply order a permit to be issued.

Some developers have avoided the APA review altogether and sought damages in the Claims Court under a "regulatory taking" theory [225] Such a claim, however cannot be considered by a court until there has been a "final and authoritative determination" by the responsible administrative agency with respect to "the type and intensity of development legally permitted on the subject property "[226] Morever the permit denial must have the effect of preventing all economically viable uses.[227]

In determining whether the government regulation has resulted in a taking for which a developer is entitlted to just compensation, a court must examine: 1) the economic impact of the regulation on the claimant; 2) the extent to which the regulation has interfered with distinct investment-backed expectations; and 3) the character of the governmental action.[228]

Meeting these standards in the context of a wetlands case is often difficult because the developer may have bought the land, knowing that it would need a permit for development. Thus, a reasonable investment-backed expectation would include an awareness of the fact the land might not be available to use for the purposes for which it was obtained. Moreover even when a permit is not granted, the land nevertheless retains residual value as property which may be later resold. Finally the actual economic impact of a failure to grant a permit, in many cases, is minimal because the developer bought at a low price what basically amounted to swampland.

An even greater obstacle which may preclude a developer from obtaining damages under a regulatory taking theory is that the developer must exhaust all options that might permit development before a governmental restriction on use of land will be said

225. *See* Florida Rock, 791 F.2d 893 (D.C. Cir. 1986).
226. MacDonald, Sommer & Frates, 106 S. Ct. at 2566.
227 *Id.*
228. *Id.*

to effect a taking. The Supreme Court has recently decided that it cannot determine whether a regulation has gone so far as to effect a taking until it knows how far the regulation goes.[229] Denial by a government entity of one proposal cannot be equated with a refusal to permit less intensive but still valuable development. Accordingly courts will not decide the issue of whether a developer is entitled to a monetary remedy to redress a regulatory restriction on use of his property unless all possibilities for development of the property have been exhausted.

V CONCLUSION

Recent case law development in the area of wetland law requires that private developers who seek to construct facilities in wetland areas carefully reassess their legal approach to obtaining permits and approval for such projects. The Corps broad jurisdiction to require permits before construction of facilities in wetland areas has now been confirmed by the Supreme Court, and the EPA can be expected more frequently to use its veto power under Section 404(c) of the CWA to the overturn Corps decisions it believes allow unnecessary damage to wetland areas. Given the increased public pressure to protect wetlands, both the Corps and EPA will more carefully scrutinize wetlands proposals.

Developers who seek to challenge agency determinations under the APA have a difficult burden. In rare cases only will courts find the agency to have acted arbitrarily and will typically remand the case to the agency for further development of the record when it finds a decision to be unsupported. Recent case law in the area of regulatory takings holds little promise for developers. The Supreme Court's decision in *Yolo County* places a burden on the developer to seek permits for all possible uses of the property in question before it even considers bringing a regulatory taking claim. After exhaustion of all these avenues, the private developer may be successful in proving a taking claim under the standards set forth in *Florida Rock* if it can show that the property's fair market value after the alleged taking has dropped significantly. In many wetlands cases, this burden will be impossible to meet because the developer bought swamp land at an inexpensive price.

Given these legal standards, it is essential that the private developer approach development in wetland areas with a view to-

229. *See* Connolly, 106 S. Ct. 1018.

ward working closely with federal and state agencies so that the permit is not denied. It is useful for the developer from the outset to propose mitigation measures and to limit interference with wetlands to the maximum extent possible. While such efforts have not always been successful, a close working relationship with the agencies can enable a developer to avoid later problems.

When such efforts fail, a developer can resort to litigation. In view of the difficulty in proving a regulatory taking, the developer is advised to first seek to overturn the agency decisions as arbitrary Only in the event that the APA challenge is unsuccessful, should a developer seek to bring a regulatory taking claim. In bringing this claim, the developer will stand a better chance of success, by focusing on proof that the governmental action is aimed at providing a public benefit rather than preventing a public harm, and showing the severity of the economic impact of the government action and that its reasonable investment-backed expectation cannot be recouped. The private developer must, of course, show that he has sought and been denied permits for all possible uses of the land before bringing the regulatory taking case.

Wetlands serve an important function and their preservation is essential. It is possible, however for private developers to construct facilities on or near wetlands without unnecessarily harming environmental interests. Developers can improve existing wetlands, mitigate damage to wetlands, and perhaps create wetlands that can serve the same function as those now existing. Moreover not all wetlands have the same degree of environmental importance. Accordingly in proposing development in wetlands, developers should take steps to prove that their proposal can move forward without damaging a wetland area and creating ecological imbalance. Litigation should be understood as a last resort in view of recent case law creating difficult barriers in challenging the validity of agency action and in obtaining compensation under a taking theory