Bersani v. EPA: Toward a Plausible Interpretation of the 404(b)(1) Guidelines for Evaluating Permit Applications for Wetland Development

BERSANI V. EPA (BERSANI V. ROBICHAUD), 850 F.2d 36 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1556 (1989).

I. INTRODUCTION

The rapid destruction of the wetland wealth of the United States that began with European settlement continues unabated,[1] despite the enactment of federal law[2] to prevent it. Critics have attributed the wetland protection law's ineffectiveness variously to bad drafting,[3] to the choice of the Army Corps of Engineers

1. Until the 1950's there appears to have been little awareness of the costs of draining and filling swamp and marsh areas. Such areas were seen as "wastelands, sources of mosquitos and impediments to development and travel." *See* J. Kusler, OUR NATIONAL WETLAND HERITAGE 1 (1983). In a report on wetlands published in 1956, the U.S. Fish and Wildlife Service reported that nearly forty percent of the nation's wetlands had already been destroyed. U.S. FISH AND WILDLIFE SERVICE, WETLANDS OF THE UNITED STATES 39 (1956). Since that time wetlands have been disappearing at an annual rate of approximately 458,000 acres in the lower 48 states. U.S. FISH AND WILDLIFE SERVICE, WETLANDS OF THE UNITED STATES: CURRENT STATUS AND RECENT TRENDS 31 (1984). By 1984, fifty-four percent of the original wetland area of the United States had been lost. *See* OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, WETLANDS: THEIR USE AND REGULATION 87 (1984). *See also* NATIONAL WILDLIFE FEDERATION, STATUS REPORT ON OUR NATION'S WETLANDS (1987); U.S. FISH AND WILDLIFE SERVICE, AMERICA'S ENDANGERED WETLANDS (1984); COUNCIL ON ENVIRONMENTAL QUALITY, OUR NATION'S WETLANDS: AN INTERAGENCY TASK FORCE (1978).

2. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C.A. §§ 1251-1387 (West 1986 & Supp. 1989)) (also called the Clean Water Act); National Environmental Policy Act, 42 U.S.C. §§ 4321-4347, 4361-4370 (1982 & Supp. V 1987).

3. *See, e.g.*, Steinberg & Dowd, *Economic Considerations in the Section 404 Wetland Permit Process*, 7 VA. J. OF NAT. RESOURCES L. 277, 277, 303 (1988) (describing factors that regulators must take into account in evaluating permits for wetland development as "highly ambiguous" and noting that "[i]t is unclear as a practical matter . . . exactly how [these] factors ought to be determined, weighed and evaluated"); Ray, *Section 404 of the Clean Water Act: An EPA Perspective*, 2 NAT. RESOURCES & ENV'T 20, 20 (1987) (calling the wetland regulations "the most arcane" regulatory program in the water area).

(the "Corps") as the chief enforcer of the law,[4] and to incentives created by other federal laws that counteract those the wetland law sought to establish.[5]

Numerous proposals to reform wetland law have been suggested.[6] Yet considering the pace at which major substantive amendments have been enacted and new regulations promulgated in the water pollution control area,[7] the remaining wetlands might have a better chance of being protected if the current law could instead be salvaged, and simply reinterpreted in a manner that would make it effective. Thus, any application of the law that results in protection of a wetland area should be scrutinized to determine whether it involves a meaningful reinterpretation.

4. *See, e.g.*, Nagle, *Wetlands Protection and the Neglected Child of the Clean Water Act: A Proposal for Shared Custody of Section 404*, 5 VA. J. OF NAT. RESOURCES L. 227, 245-46 (1985).

5. *See* Tripp & Herz, *Wetland Preservation and Restoration: Changing Federal Priorities*, 7 VA. J. OF NAT. RESOURCES L. 221, 222, 251-56 (1988); Nagle, *supra* note 4, at 256-57.

6. *See* Tripp & Herz, *supra* note 5, at 223 (suggesting the creation of " 'market' incentives to forego speculative investments in wetlands," among other reforms); Steinberg & Dowd, *supra* note 3, at 303-5 (suggesting revision of the wetland regulations to clarify the permit evaluation process); Parish & Morgan, *History, Practice and Emerging Problems of Wetland Regulation: Reconsidering Section 404 of the Clean Water Act*, 17 LAND AND WATER L. REV. 43, 77-84 (1982); Nagle, *supra* note 4, at 248-57 (making a number of proposals including legislative action to remove some of the jurisdictional limitations on section 404, more active involvement of EPA, and identification and ranking of wetlands).

7. Major substantive amendment of the Federal Water Pollution Control Act (Clean Water Act) occurred as recently as 1987, with the Water Quality Act, Pub. L. No. 100-4, 101 Stat. 7 (1987) (to be codified at 33 U.S.C. §§ 1251-1387). Previous to the Water Quality Act, the most recent major amendment occurred in 1977. Thus, it is conceivable that major reforms would have to wait another decade.

Furthermore, the promulgation of regulations to implement the Act moves at a very slow pace. The 1972 Act included a one year deadline for issuance of effluent limitation guidelines for major polluters. In NRDC v. Train, 510 F.2d 692 (D.C. Cir. 1974), EPA was ordered to issue guidelines for twenty-seven industries. Years later there were still no final guidelines for a number of these industries, including such major ones as iron and steel, *see, e.g.*, Bethlehem Steel Corp. v. Train, 544 F.2d 657, 658-659 (3d Cir. 1976), *cert. denied*, 430 U.S. 975 (1977); pulp and paper, *see, e.g.*, State of Washington v. EPA, 673 F.2d 583, 588 (9th Cir. 1978); and placer mining, *see, e.g.*, Trustees for Alaska v. EPA, 749 F.2d 549, 558-59 (9th Cir. 1984). Comprehensive guidelines under section 208(a) governing state waste treatment management activities, which lie at the very core of the legislation, had not been issued by 1977. *See* NRDC v. Train, 564 F.2d 573 (D.C. Cir. 1977).

In 1987 there were approximately 95 million acres of wetlands left in the continental United States. *See supra* note 1, U.S. FISH AND WILDLIFE SERVICE, WETLANDS OF THE UNITED STATES, at 29. That number will be reduced by more than half if reform of the law and promulgation of new, effective regulations occurs in ten years and wetlands continue to be destroyed at the current rate. *See supra* note 1.

One recent case, heralded as a victory for the environment,[8] is *Bersani v. EPA*, a Second Circuit decision that spared from development a red maple swamp in Massachussetts well-known for its beauty.[9] *Bersani* involved the Environmental Protection Agency's ("EPA") veto of a permit to fill a wetland area on the ground that an alternative was available when the developer entered the market for a site.[10] The Second Circuit held that EPA's decision was based on a reasonable interpretation of regulations promulgated pursuant to section 404, the part of the Clean Water Act governing wetland development.[11] EPA rejected the developer's claim that the relevant time for consideration of whether alternative sites were available to him was when he applied for a permit rather than when he entered the market in search of a site.[12]

This comment asks whether EPA's market entry theory, upheld in *Bersani*, correctly interprets section 404, the part of the Clean Water Act regulating development of wetlands.[13] It concludes that the market entry theory is illusory because it is irrelevant whether the availability of alternatives is viewed from a market entry or a time-of-application perspective. Yet this comment also finds that *Bersani* moves closer to a plausible interpretation of the wetland permit regulations than did preceding cases.

The so-called "timing issue" is a product of the notoriously loose definition of availiability.[14] Fleshing out the terms of this definition requires interpretation of section 404 and of the regulations as a whole. Part II identifies conflicting interpretations of the wetland regulations in general. Part III compares these interpretations by examining the purposes of section 404 and of the regulations. Part IV critiques the market entry theory of *Bersani*.

8. *See* Sierra Club Legal Defense Fund, Quarterly Newsletter on Environmental Law, Autumn 1988, at 4, col. 1.

9. 850 F.2d at 40.

10. *Id.* at 38.

11. 40 C.F.R. pt. 230 (1988). For an overview of the controversies surrounding section 404 and its development, *see* Blumm, *The Clean Water Act's Section 404 Permit Program Enters its Adolescence: An Institutional and Programmatic Perspective*, 8 ECOLOGY L. Q. 409 (1980). *See also* Want, *Federal Wetlands Law: The Cases and the Problems*, 8 HARV. ENVTL. L. REV. 2 (1984).

12. 850 F.2d at 41.

13. 33 U.S.C.A. § 1344 (West 1986 & Supp. 1989).

14. *See, e.g.*, Tripp & Herz, *supra* note 5, at 226; Steinberg & Dowd, *supra* note 3, at 277, 281.

II. APPROACHES TO THE 404(b)(1) GUIDELINES

A. *The Timing Issue in Context*

Section 404 of the Clean Water Act governs the development of wetland areas. It places responsiblity for implementation on both the Corps and the EPA. As part of its share of this responsibility, EPA promulgated regulations, called the 404(b)(1) Guidelines (the "Guidelines"), which the Corps must follow in considering applications for permits to fill wetland areas.[15] *Bersani* involves a provision of the Guidelines requiring that in the case of proposed non-water-dependent development "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem. . . ."[16]

A practicable alternative 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."[17] The Guidelines state that a practicable alternative is presumed to be available unless the applicant shows otherwise.[18]

Bersani was distinguished from prior cases involving wetland permit determinations on the ground that the particular issue - that of how timing should affect a decision on availability of an alternative site - was one of first impression.[19] The court argued that *Bersani* was unique in that a practicable alternative existed when the developer entered the market for a site but had "evaporated" at the time of application for a permit.[20]

The conflict over when availability should be determined results from the looseness of the definition of availability in the Guidelines.[21] An alternative is available if it is "capable of being

15. 40 C.F.R. pt. 230 (1988).

Section 404(b)(1), 33 U.S.C. § 1344(b) (Supp. V 1987), authorizes the Secretary of the Army to specify disposal sites "through the application of guidelines developed by the Administrator" of the EPA "in conjunction with" the Corps.

In addition, a permit to fill a wetland often requires an Environmental Impact Statement under the National Environmental Policy Act. *See* 42 U.S.C. § 4332(2)(c) (Supp. V 1987). *See, e.g.*, Friends of the Earth v. Hall, 693 F. Supp. 904 (W.D. Wash. 1988).

16. 40 C.F.R. § 230.10(a) (1988).

This restriction applies only on condition that the alternative "does not have other significant adverse environmental consequences. . . ." *Id.*

17. *Id.*

18. 40 C.F.R. § 230.10(a)(3) (1988).

19. 850 F.2d at 44.

20. *Id.* at 43.

21. *See supra* note 14.

done after taking into consideration cost, existing technology, and logistics in light of overall project purposes" and it could "reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity."[22] This definition gives no indication of how the crucial factors of cost and project purposes should be taken into account in reaching a decision on availability.

There are many clues in the Guidelines as to how this definition should be fleshed out. Proper interpretation of these clues depends, in turn, on interpreting the balance struck in section 404 and the Guidelines between the developer's interests and the interests of society in preserving wetland values. How these conflicting interests should be balanced is the fundamental issue in all cases involving wetland permit determinations.

After ascertaining what balance of these interests was incorporated in the Act and the Guidelines, the task of fleshing out the definition of availability can be approached by stages. The balance of interests determines the role played by the analysis of alternatives' practicability ("alternatives analysis"), including the question of availability, in the permit evaluation scheme established by the Guidelines. The role of the alternatives analysis in this scheme then determines how the definition of availability should be understood.

In reaching its decision on the *Bersani* permit application, the Corps took the view that availability should be determined at the time of application.[23] This position is grounded in the particular approach the Corps takes toward weighing the conflicting private and social interests involved in wetland development in the permit consideration process.

Cases invloving permit decisions show that the Corps treats the alternatives provision of the Guidelines as the key element of the permit determination process.[24] In addition, the Corps interprets the Guidelines as requiring that alternatives are not "practicable"

22. 40 C.F.R. § 230.10(a)(2) (1988).

23. 850 F.2d at 42.

24. *See Bersani*, 850 F.2d at 41-43; Friends of the Earth v. Hintz, 800 F.2d 822, 828-36 (9th Cir. 1986); Lousiana Wildlife Federation v. York, 761 F.2d 1044, 1046-48 (5th Cir. 1985); Friends of the Earth v. Hall, 693 F. Supp. 904, 945-48 (W.D. Wash. 1988); National Audubon Society v. Hartz Mountain Development Corp., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20724, 20730-31 (D.N.J. 1983); Hough v. Marsh, 557 F. Supp. 74, 80-86 (D. Mass. 1982). *See also* Tripp & Herz, *supra* note 5, at 241 ("the heart of Corps permit review under the guidelines has been the 'alternatives test' ").

if they entail any substantial loss of prospective profits to the applicant-developer.[25] The substantiality of the loss of prospective profits is judged in absolute terms, not relative to the prospective loss to society from the damage to the wetland that would result from the development.[26] If no practicable alternative is found to exist, the Corps inevitably determines that denial of the permit would impose excessive costs on the applicant.[27]

25. *See Hintz*, 800 F.2d at 833 (Corps found that "no practicable alternative site locations exist which would satisfy [the developer's] logistical needs and are not prohibitively expensive"); *Hough*, 557 F. Supp. at 83 (Corps rejected a suggested alternative site "because acquiring it would subject the defendants to 'extraordinary expense' ").

26. *See Hartz Mountain*, 14 Envtl. L. Rep. at 20724 (D.N.J. 1983). *Hartz Mountain* involved a suit by a national environmental organization claiming that the developer had failed to rebut the presumption that alternatives to the proposed wetland site were available for the developer's non-water-dependent project. *Id.*

The Corps had rejected a number of proposed alternatives on the ground that they were not "cost effective." *Id.* at 20731. One involved breaking the applicant's project, which included office buildings, warehouses, and retail stores, into separate parts that could be located on several upland sites. Another alternative was found to provide less access to highways, and thus less business, than would be achievable at the wetland site. Reducing the size of the project to lessen impact on the wetland area was similarly rejected because "the project would no longer be viable from a marketing and economic standpoint."

In rejecting proposed alternatives because they are not "cost-effective" or because they are not viable from an "economic standpoint," the Corps is addressing the requirement of the alternatives analysis that "costs" be considered in determining whether or not a proposed alternative is practicable. *See* 40 C.F.R. § 230.10(a)(2) (1988) ("An alternative is practicable and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes."). However, the Corps does not clarify its standard for cost-effectiveness. Would reduction in the size of the project have reduced prospective profits below normal profits? Or would prospective profits have been substantially diminished but still maintained at an above-normal level?

In addition, since the Corps focuses its permit evaluation process on the alternatives analysis provision of the Guidelines, a meaningful approach to consideration of "costs" would have to compare the loss of prospective profits to the gain in preserved wetland values that would have resulted from reducing the size of the project. Yet the Corps took only the loss of prospective profits into account in rejecting alternatives as not being cost-effective.

A developer-applicant thus evidently has only to show that proposed alternatives would entail a substantial absolute loss of profits for the Corps to reject those alternatives as not being practicable on "cost" grounds.

27. *See, e.g.*, Hough, 557 F. Supp. at 83 (D. Mass 1982).

The Corps is not required to reach this conclusion by the Guidelines. The alternatives analysis outlined in the Guidelines is not symmetrical. Though a permit must be denied if a practicable alternative exists, there is no requirement that a permit be granted if no alternative exists. *See* 40 C.F.R. § 230.10 (1988).

However, the Corps has also promulgated its own set of guidelines for review of permit applications, codified at 33 C.F.R. §§ 320.1-320.4, 323.1-323.6, 325.1-325.10, 326.1-326.5, 327.1-327.11, 328.1-328.5 (1988), and these regulations could be seen to make the analysis symmetrical in that they require that a permit "be granted unless its issuance is found to be contrary to the public interest." *See* 33 C.F.R. § 320.4(b) (1988).

B. *Three Approaches to the Conflict of Interests*

The Corps' approach to the balance embodied in the Guidelines between the developer's interests and the social interests in wetland values can be described as a private interest approach. This approach is characterized by three elements: treatment of the alternatives analysis as the central provision of the Guidelines, characterization of alternatives as practicable or not practicable based on the absolute size of the loss of prospective profits entailed by the alternative, and approval of a permit to develop when no practicable alternative is deemed to exist.

In the approach to the Guidelines taken by the Corps, the developer's interests - the private party interests - are weighted more heavily than the social interests implicated in decisions on whether to allow a wetland to be developed. There are two other ways in which these conflicting interests can be balanced, both involving rejection of the three elements of the Corps' approach. A position opposite to the Corps' weights society's interests more heavily than the private interest involved in the permit decision. This could be called a social interest approach. It is the approach usually taken implicitly by environmental groups in challenges to Corps decisions. The third position is a mediate approach in which both interests are weighted equally.

A social interest approach focuses on the provision of the Guidelines specifying that filling of wetlands is prohibited unless the developer can show that the fill will not have an "unacceptable adverse impact" on the wetland ecosystem.[28] "Unacceptable" is not defined in the Guidelines, but filling a substantial part of a healthy wetland or damaging or destroying a significant number of its uses would arguably have to be considered an "unacceptable adverse impact."

In a social interest approach, permits to fill wetlands would be rejected, without consideration of other factors, when the development proposed for the wetland site requires fill that would substantially impact the wetland. Thus, the threshold consideration in the permit application process would be the degree of impact on the site and the existence of alternative sites for the proposed project would become important only if this threshold test were passed.

28. 40 C.F.R. § 230.1(c) (1988).

A mediate position on the balancing of interests interprets the Guidelines as outlining a social cost-benefit analysis. This approach would focus on both the unacceptable adverse impacts provision and the alternatives analysis provision of the Guidelines. The adverse impacts provision would not be viewed as a threshold inquiry as in a social interest approach. Nor would the alternatives analysis be given the determinative role it has in the Corps' private cost-benefit analysis. Instead, a mediate approach would incorporate these provisions into a cost-benefit analysis to reach a socially efficient level of wetland development, taking the negative externalities[29] resulting from the polluting byproduct of development into account.[30] The condition for efficiency would be that a permit for filling the wetland should be granted when the sum of all the negative externalities that would result from development is less than the benefit to the developer of developing the wetland as opposed to an alternative upland site.[31]

29. An externality results when the production or consumption of a commodity produces costs or benefits which are not reflected in the price of that commodity. Wetland development produces negative production externalities in that the cost of the project to the developer does not include the costs to society of damage or destruction of the wetland site.

30. *See, e.g.*, Ray, *supra* note 3, at 51 (noting that "wetlands have certain values which are not present in other real estate . . . [that are] more social or public than private . . . [and] are not reflected in the marketplace"); J. Kusler, *supra* note 1, at 1-8; Blumm, *Wetlands Preservation, Fish and Wildlife Protection, and 404 Regulation: A Response*, LAND AND WATER L. REV. 469, 474-76 (1983).

31. Many commentators on wetland regulation discuss the importance of taking the alleged social benefits of developing a wetland into account in the permit review process. *See, e.g.*, Steinberg & Dowd, *supra* note 3, at 285. These commentators might object to the absence of "beneficial externalities," such as job-creation and an enlarged tax base, in the social cost-benefit analysis described above.

The Corps has in the past considered benefits to a community like job creation and an enlarged tax base as part of the public interest review process set forth in its own regulations on evaluation of permit applications. *See* 33 C.F.R. § 320.4(q) (1988). It may have to stop doing so explicitly after Mall Properties, Inc. v. Marsh, 672 F. Supp. 561 (D. Mass. 1987), *appeal dismissed*, 841 F.2d 440 (1st Cir. 1988), *cert. denied*, 109 S.Ct. 128 (1988). *Mall Properties* held that the Corps was not authorized under section 404 and the Guidelines to take into account economic factors not directly related to the effect a proposed project would have on the physical environment.

"Beneficial externalities" are properly left out of a social cost-benefit analysis carried out under the aegis of the Guidelines because they are not externalities. The damage to the social values of a wetland that result from development is an externality because no market for those wetland values exists. Social benefits in terms of job creation and enlargement of the tax base that would result from development of the wetland, on the other hand are reflected in market price changes. They are what are known to economists as "pecuniary externalities," which are not really externalities at all.

Section 404 of the Act requires the Administrator of EPA to include in the Guidelines measurement of the impacts of the fill on the values of the wetland site.[32] The Act includes "aesthetic, recreation, and economic values" among benefits of the wetland that could be damaged or destroyed by fill activity.[33] The Guidelines require determination of the adverse impacts of fill on uses of the wetland as a spawning ground for fish and other marketable marine life, as wildlife habitat, as a water purifier, as a water supply for humans, and as a resource with aesthetic value.[34] The expected total damage or destruction to these uses that would result from a permit applicant's proposed project is the measure of the negative externalities that would result from that project.

Obviously some of the uses of a wetland are not easily valued.[35] This should not pose a problem since the Act stipulates that in cases "where insufficient information exists on any proposed discharge to make a reasonable judgment on any of the guidelines established pursuant to this subsection no permit shall be issued. . . ."[36] Considering this provision of the Act, a mediate approach would require permit applicants to accept a reasonably-determined upper bound measure of the adverse impact of their proposed fill project on social values.

On the benefit side of the cost-benefit analysis would be the potential gain to the applicant of developing the wetland site as opposed to any alternative site. This is where the alternatives analysis would come into play. The factors to be considered in determining the benefit to the applicant of being granted a permit to develop the wetland site are found in the definition of practicability: these include "cost, existing technology, and logistics," examined in light of "overall project purposes."

III. Plausible Approaches to the Guidelines

Whether the market entry theory is the proper interpretation of the Guidelines is thus a two-part question. The first part asks

32. 33 U.S.C. § 1343(c) (1982).

33. 33 U.S.C. § 1343(c)(1)(C) (1982).

34. 40 C.F.R. §§ 230.31(a) and (b), 230.51 (fish and other marketable marine life); §§ 230.30, 230.32(a) and (b), 230.40 (wildlife); § 230.41(b) (water purification); §§ 230.22(b), 230.25, 230.50 (water supply); § 230.53 (aesthetics) (1988).

35. *But see* Farber & Costanza, *The Economic Value of Wetlands Systems*, 24 J. of Envtl. Mgmt. 41 (1987).

36. 33 U.S.C. § 1343(c)(2) (1982).

which of the three approaches to balancing the conflicting social and private interests is a reasonable interpretation of the Act and the Guidelines. The second part looks at which of these three approaches is represented by the market entry theory.

Analysis of the Act and the Guidelines shows that the private interest approach taken by the Corps is insupportable. Therefore, the Corps' time-of-application test for when an alternative to a wetland site should be termed available was properly rejected, as it derives its validity from the private interest approach. In fact, not only the time-of-application test but the whole tradition of the Corps' permit evaluation process should be rejected on the ground that the private interest approach which underlies it deforms the permit determination process from a social to a private cost-benefit analysis.[37]

The Corps' interpretation of availability and the alternatives analysis mandated by the Guidelines has the effect of elevating protection of the applicant-developer's potential profits over the other social objectives of the regulations. Even more fundamentally, it destroys the very mechanism by which the alternatives provision functions.

A. *Distortion of the Alternatives Analysis*

Though the language of the alternatives analysis is ambiguous, the overall purpose of section 404 and the Guidelines is quite clear. The section is intended as a wetland protection law and the Guidelines are meant to implement that intent.[38] Even the Corps' own set of regulations for evaluating applications, not mandated

37. A private cost-benefit analysis considers only the costs and benefits of a particular action for the private actors involved. In conducting a private cost-benefit analysis, the government agency is in effect standing in the shoes of the private, profit-maximizing actor and judging the desireability of the action from his or her point of view.

38. Federal courts have recognized the wetland protection purposes of section 404 in a number of recent cases. *See, e.g.*, Riverside Bayview Homes v. United States, 474 U.S. 121 (1985); Deltona Corp. v. United States, 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982); Avoyelles Sportsmen's League, Inc. v. Alexander, 473 F.Supp. 525, 532 (W.D. La. 1979), *aff'd*, 715 F.2d 897 (5th Cir. 1983); Loveladies Harbor, Inc. v. United States, 19 Envtl. L. Rep. (Envtl. L. Inst.) 20092 (Ct. Cl. 1988).

Legislative debate on section 404 of the Clean Water Act of 1977 also focused on its wetland protection purposes. Senator Bentsen had proposed an amendment to restrict the scope of section 404. In rejecting this amendment, the legislators pointed out the strong public interest in preserving wetland areas. *See* 123 CONG. REC. S26710-S26729 (1977), *reprinted in* 4 SENATE COMMITTEE ON ENVIRONMENTAL AND PUBLIC WORKS, A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977: A CONTINUATION OF THE LEGISLATIVE HISTORY OF THE FEDERAL WATER POLLUTION CONTROL ACT, at 901-50 (1978).

by section 404, express an intention to promote wetland protection.[39] Further, wetland development is intended to be approached as a problem of controlling pollutants. The Corps' private interest approach is incompatible with these clear purposes.

The Guidelines state that "[f]rom a national perspective, the degredation or destruction of special aquatic sites, such as filling operations in wetland, is considered to be among the most severe environmental impacts covered by these Guidelines."[40] Similarly, the Corps' regulations recognize that "[m]ost wetlands constitute a productive and valuable resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest."[41] Even more expressive of concern for wetland protection is the prohibition in the Guidelines on fill that would have an "unacceptable adverse impact."[42]

The Corps' approach to the Guidelines treats such statements as expressive of a mere sentiment rather than an objective of the statute. Yet more fundamental to the Corps' mistaken interpretation of the Act is its refusal to treat the problem of the optimal level of wetland development as a problem of pollution control.[43] This refusal ignores glaring evidence of the legislative view of wetland development.

Federal regulation of the filling of wetlands is embedded in the Clean Water Act ("CWA"),[44] which is the major federal legislation controlling the discharge of pollution into the nation's waters.[45] Section 201(a) of the CWA prohibits discharge of any pollutant into a water body except in accordance with other sec-

39. 33 C.F.R. §§ 320.1-320.4, 323.1-323.6, 325.1-325.10, 326.1-326.5, 327.1-327.11, 328.1-328.5 (1988).

40. 40 C.F.R. § 230.1(d) (1988).

41. 33 C.F.R. § 320.4(b)(1) (1988).

42. 40 C.F.R. § 230.1(c) (1988).

43. A recurrent theme in the literature criticizing the laxity of wetland protection is the choice of the Corps as the agency with primary responsibility for wetland protection. The Corps is considered, in such criticism, to be a particularly unsuitable choice as wetland protector because it is the nation's largest dredger and filler. *See, e.g.*, Tripp & Herz, *supra* note 5, at 226-30.

44. 33 U.S.C.A. §§ 1251-1387 (West 1986 & Supp. 1989).

45. Section 101(a), 33 U.S.C. § 1251 (1982 & Supp. V 1987), the "Congressional declaration of goals and policy" section of the Act, expresses the Act's scope: "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

tions of the Act.[46] Fill material used to develop a wetland area is included as a pollutant under section 502.[47]

This treatment of the development of wetlands is continued in the Guidelines, which are entitled "Guidelines for Specification of Disposal Sites for Dredged or Fill Material."[48] "Pollution" is defined as "the man-made or man-induced alteration of the chemical, physical, biological or radiological integrity of an aquatic ecosystem."[49]

While the clear legislative purpose in the Act necessitates rejection of the Corps' private interest approach, it supports both a social interest approach and a mediate approach to balancing the conflicting interests involved in wetland development. Both of these latter approaches are compatible with the protective purposes of the law and with treatment of the optimal level of wetland development as a pollution problem.

Structural analysis of the Guidelines also leads to rejection of the private interest approach while offering support for the other two approaches. It shows that an interpretation of the Guidelines focusing solely on the alternatives analysis is insupportable.

The alternatives analysis is included in Subpart B, entitled "Compliance with the Guidelines," which is the operational part of the Guidelines. Subpart B is divided into two parts: "Restrictions on discharge"[50] and "Factual Determinations."[51] The subpart entitled "Restrictions on discharge" outlines the evaluation process that must be followed by the Corps and is further divided into four sections. Two of these, sections (a) and (c), are substantive. Section (a) is the alternatives analysis. Section (c) is the unacceptable adverse impacts provision. Thus, the alternatives analysis was conceived as one part of a two-part analysis, the other part being the measurement of the extent of potential loss of wetland values to the society. This lends support to a mediate approach to the Guidelines.

Even more striking than the structure of Subpart B is the glaring presence in that section of the prohibition on development

46. 33 U.S.C. § 1311(a) (1982).

47. 33 U.S.C. § 1362(6) (1982). *See, e.g.*, United States v. Bradshaw, 541 F.Supp. 880 (D.C. Md. 1981).

48. 40 C.F.R. pt. 230 (1988).

49. 40 C.F.R. § 230.3(o) (1988).

50. 40 C.F.R. § 230.10 (1988).

51. 40 C.F.R. § 230.11 (1988).

that would lead to unacceptable impacts, first encountered in the earlier "Purpose and Policy" section of the Guidelines.[52] The presence of the adverse impacts provision in the operational part of the Guidelines provides support for a social interest approach. In treating the adverse impacts provision as a mere sentiment rather than an integral part of the permit evaluation process, the Corps ignores its position in the Guidelines.[53]

B. *Destruction of the Mechanism of the Alternatives Analysis*

The Corps' private interest approach is clearly at odds with the purpose and structure of the Guidelines. In addition, it destroys the very mechanism by which the alternatives provision functions.

The Guidelines do not contemplate search by the government for practicable alternatives as a matter of standard procedure in the case of every permit application. A search by the Corps for practicable alternatives to a proposed wetland site precedent to decision on every wetland permit application would be prohibitively expensive.[54] Search by a government agency may also be incapable of accurately estimating the potential benefits to the applicant of the wetland site because the government has limited information about the development options available to the applicant. These problems of cost and information are avoided by the provision in the Guidelines that when proposed projects are not water-dependent there is a presumption that a practicable alternative to the wetland site is available "unless clearly demonstrated otherwise."[55]

The presumption is intended to provide the developer with an incentive to search for alternatives.[56] An externally-provided incentive is necessary because the lower cost of wetland relative to upland sites[57] means that in general the permit applicant has no

52. 40 C.F.R. § 230.1 (1988).

53. *See* Tripp & Herz, *supra* note 5 at 240-41 (noting that in spite of the potential power of the unacceptable adverse impacts provision the Corps has seldom, if ever, denied a section 404 permit on that ground, possibly because some of its own projects would be affected).

54. *See, e.g.*, Steinberg & Dowd, *supra* note 3, at 285 (observing that "[a]s a practical matter, economic analysis prepared by applicants or by state or local agencies are not often questioned by the Corps"); Seltzer & Steinberg, *Wetlands and Private Development*, 12 COLUM. J. ENVTL. L. 159, 178-79 ("The applicant has the burden of providing . . . data on practicable alternative sites.").

55. 40 C.F.R. § 230.10(a)(3) (1988).

56. *See Bersani*, 850 F.2d at 44.

57. *See* Ray, *supra* note 3, at 51.

market-derived incentive to analyze upland sites as alternatives. By essentially reading the presumption of existence of practicable alternatives out of the Guidelines through its interpretation of the defintion of practicable, the Corps undercuts the incentive-compatibility mechanism provided in the Guidelines.

The permit decision in *Hough v. Marsh*[58] illustrates the effect of the Corps' approach on the applicant's incentive to search. In *Hough* an applicant sought a permit to fill a small wetland area in order to build two houses and a tennis court. The Corps concluded that there were no practicable alternatives on the basis of a single letter from a real estate broker stating that the only other prime real estate available in the area was too small for the project and too expensive.[59] This approach to the alternatives analysis defeats the purpose of the wetland protection law.

Although the terms of the alternative analysis, viewed in isolation, are ambiguous, there are clear indications from the purpose and structure of the Act and the Guidelines of how these terms should be interpreted. In addition, the role the alternatives analysis plays in the permit evaluation scheme established by the Guidelines is clear. The Corps' private interest approach involves a role for the alternatives analysis and an interpretation of its terms that is inconsistent with the Act and the Guidelines.[60]

As a consequence, the Corps' approach to the timing issue in *Bersani* was properly rejected. Courts should reject the entire tra-

58. 557 F.Supp. 74 (D. Mass. 1982).

59. *Id.* at 82-83.

60. The Corps' application of the alternatives analysis focuses on the requirement that "costs" and the applicant's "overall basic purpose" be taken into account in determining whether or not a proposed alternative site would be practicable. Yet the Corps interprets "basic purpose" and "costs" in such a way that in many cases it is difficult to imagine how any proposed alternative could be found practicable. This puts the Corps' approach to the alternatives analysis at cross purposes with the Guidelines' *presumption* that alternative sites exist unless the applicant makes a clear showing otherwise.

As described in notes 25-27, and accompanying text, the Corps interprets the requirement that "costs" be taken into account to mean that an alternative is not practicable if it imposes costs of any significant size on the applicant. However, in every case use of an alternative site for the proposed development would entail a reduction in profits for the developer, since a developer-applicant chooses the wetland site because that choice guarantees higher profits than any alternative site. Contributing to this is the fact that wetland sites are cheaper than upland sites.

The Corps' interpretation of "basic purpose" often collapses into its treatment of "costs" in that the agency describes the basic purpose of a project as increasing profits. *See* Friends of the Earth v. Hintz, 800 F. 2d 822, 833 (9th Cir. 1986); Louisiana Wildlife Federation v. York, 761 F. 2d 1044 (5th Cir. 1985); National Audubon Society v. Hartz Moun-

dition of Corps determinations which have been based upon a mistaken approach to the weighing of the private and social interests involved in wetland permit evaluations. The remaining question is whether the market entry theory of *Bersani* reflects a more reasonable approach to the Act and Guidelines.

IV. Bersani's Effect on Wetland Protection Law

Courts reviewing the Corps' permit determinations have in general given the judicial imprimatur to the agency's approach to section 404 and the Guidelines.[61] Fortunately the wetland protection scheme of section 404 does not depend entirely on the Corps and reviewing courts. An additional safeguard was provided by giving EPA a veto power over the grant of a permit. Section 404(c) authorizes the Administrator of EPA to "prohibit the specification . . . of any, defined area as a disposal site . . . whenever he determines, after notice and opportunity for public hearing, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas."[62] This veto power has been exercised

tain Development Corp., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20724, 20731 (D.N.J. 1983); Hough v. Marsh, 557 F. Supp. 74, 83 (D. Mass. 1982).

At the same time, the Corps often describes the applicant's "basic purpose" very specifically. In *Hough*, 557 F. Supp. at 83, it was described as "providing two homes and a tennis court". The applicant wanted to develop raw land on Martha's Vineyard for this purpose. No other appropriate lots on Martha's Vineyard could accomodate the development, so the Corps found that no practicable alternative existed. Similarly, in *York*, 761 F. 2d at 1046-48, an applicant was granted a permit because no nearby site suitable for soybean farming on the scale the applicant desired could be aquired at a price at which farming would be profitable.

In each of these cases, because of the Corps' treatment of "costs" and "basic purpose," it was a foregone conclusion that no practicable alternative would be found. Such a treatment of the definition of practicability clearly does not leave the presumption of practicable alternatives intact.

The Corps' approach to "costs" and practicability was seriously questioned virtually for the first time in Friends of the Earth v. Hall, 693 F.Supp. 904 (W.D. Wash. 1988), in which the court stated that "significant additional cost can prove determinative, in and of itself, only if the competing alternatives can reasonably be viewed as equivalent with respect to other factors." *Id.* at 947.

61. *See* Seltzer & Steinberg, *supra* note 54, at 182 ("Courts typically uphold the Corps' determination."); Tripp & Herz, *supra* note 5, at 242, ("[C]ourts have deferred to agency expertise in determining whether an alternative is 'practicable' ".).

62. 33 U.S.C. § 1344(c) (1988). Until Newport Galleria Group v. Deland, 618 F. Supp. 1179 (D.D.C. 1985), there was disagreement about the extent of EPA's veto power. *Newport Galleria* determined that the veto was not limited to extraordinary cases or in any way restricted, except by the regulatory provision that the Regional Administrator have "rea-

with extreme frugality by EPA - only five Corps decisions had been vetoed as of the *Bersani* decision - allegedly out of deference to the Corps' central role in the day-to-day implementation of the Guidelines.[63]

Bersani involved the EPA's veto of the grant of a permit to fill "or alter" most of a wetland area known as Sweeden's Swamp for the purpose of building a mall. The court's review of the veto pertained to disagreement between the two agencies over whether the developer had adequately rebutted the presumption of the existence of practicable alternatives to the Sweeden's Swamp site.[64]

The Corps' Director of Civil Works found that the proposed upland alternative, called "the North Attleboro site," was unavailable to the applicant "because it has been optioned to another developer."[65] In vetoing the grant of the permit, EPA argued that the Corps' finding was inaccurate because the North Attleboro site "could have been available to [the applicant] at the time [the applicant] investigated the area to search for a site,"[66] since the other developer did not buy the options for the site until after the applicant had entered the market.[67]

Review of EPA's veto was sought on the ground that EPA's "market entry theory," as the developer called it, was "inconsistent with both the language of the 404(b)(1) guidelines and the

son to believe . . . that an 'unacceptable adverse effect' could result." 40 C.F.R. § 231.3(a) (1988).

For discussion of the effect of *Bersani* on the scope of EPA's veto power, *see* Note, Bersani v. EPA: *The EPA's Authority Under the Clean Water Act to Veto Section 404 Wetland-Filling Permits*, 19 ENVTL. L. 389 (1989); Comment, *EPA's Evolving Role in Wetlands Protection: Elaboration in* Bersani v. U.S. EPA, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10479 (1988).

63. 850 F.2d at 40.

64. *Id.* at 42. A second point of disagreement, not discussed on appeal, concerned the applicant's mitigation proposal. The Director of Civil Works at the national headquarters of the Corps granted the permit despite the recommendation of the Northeast Regional Corps to deny it. The N.E. Corps had recommended denial becuase it found that the North Attleboro alternative was feasible for mall development. ("[W]ide-spread publicity" may also have contributed to the N.E. Corps' decision. *Id.*)

The Director of Civil Works decided to grant the permit "after finding that [the applicant's] offsite mitigation proposal would reduce the adverse impacts sufficiently to allow the 'practicable alternative' test to be deemed satisfied". However, the Corp's argument about the mitigation proposal was rejected by the EPA because of "scientific uncertainty of success." *Id.* at 43.

65. *Id.* at 42.

66. *Id.*

67. EPA also gave other reasons for the veto, including its finding "that the filling of the Swamp would adversely affect wildlife." *Id.*

past practice of the Corps and the EPA."[68] The developer argued that both the language of the Guidelines and past practice indicated that the availability of an alternative site should be analyzed as of the time at which the applicant applied for a permit.

These arguments were rejected by both the District Court and the Second Circuit. The developer claimed that the "most natural" reading of the alternatives provision required a time-of-application rule because the provision was written in the present tense.[69] Both courts found that no conclusion as to intent on timing could be drawn from the tense of the provision and that intent would have to be discovered from examining the objective of the Guidelines. The Second Circuit stated that "the purpose is to create an incentive for developers to avoid choosing wetlands when they could choose an alternative upland site,"[70] and that "[i]f the practicable alternatives analysis were applied to the time of the application for a permit, the developer would have little incentive to search for alternatives, especially if it were confident that alternatives soon would disappear."[71] Thus, the court concluded that "a common-sense reading of the statute can lead only to the use of the market entry approach used by EPA."[72] Past practices of the agencies in applying the Guidelines were found to inapplicable because the timing issue was one of first impression.[73]

Bersani is not fully consistent with either a social interest approach or a mediate approach to interpreting section 404 and the Guidelines. It diverges from those approaches partly as a result of its characterization of the purpose of the Guidelines and partly because of its focus on the "timing" issue. Nevertheless,the approach taken by EPA and the *Bersani* court does come closer to

68. *Id.* at 43.

The developer also sought review of the veto on procedural grounds. He claimed that EPA's interpretation of the Guidelines was not "entitled to the deference usually accorded an agency with regard to its interpretation of regulations it is charged with administering," *id.* at 45, on the ground that no deference is warranted when two agencies (the Corps and the EPA) are responsible for administering regulations and they disagree on interpretation. The developer also claimed that EPA had less expertise than the Corps in administering the regulations. *Id.*

The court came to no conclusion on this issue. It found that even if EPA's interpretation were not entitled to deference, it would still be upheld as satisfying the reasonability standard of review. *Id.* at 46.

69. *Id.* at 43.

70. *Id.* at 44.

71. *Id.*

72. *Id.*

73. *Id.* at 75.

implementing a social cost-benefit analysis and activating the incentive mechanism necessary to perform that analysis than do prior decisions of the Corps and the courts.

A. *The Threshold Issue Ignored Again*

The *Bersani* court notes, in passing, that the developer-applicant's proposed project included a plan to fill "or alter" 32 of 49.6 acres of the wetland site.[74] Thus the developer planned to destroy or damage sixty-five percent of the site. While the developer had proposed some mitigation of the damage, by altering other parts of the wetland "to improve its environmental quality,"[75] that proposal was rejected by EPA as scientifically uncertain.[76] As one of its reasons for vetoing the Corps' grant of the permit, EPA stated that the project would "adversely affect wildlife." Considering the expressly stated prohibition in the Guidelines on dredging or filling when it would have "unacceptable adverse impacts" on the aquatic ecosystem, the Sweeden's Swamp project raised a question of whether the effects of the proposed development should be considered unacceptable under the Guidelines. Yet the court did nothing more than quote the adverse impacts provision.

The scant treatment of the unacceptability provision in *Bersani* cannot be excused on the ground that only the timing dimension of determining avaiability was at issue on appeal. In reaching a decision on the timing issue the court had to consider the role played in the Guidelines by the alternatives analysis. This should have brought the acceptability of the adverse impacts of the project into question. If the unacceptability provision is treated as a threshold consideration, then the alternatives analysis plays a secondary rather than a central role in the analysis.

The court failed to discuss the unacceptability provision and it unquestioningly treated the alternatives analysis as the central mechanism of the Guidelines. It stated that the purpose of the Guidelines is "to create an incentive for developers to avoid choosing wetlands" when practicable alternatives exist.[77]

This is a very different assessment of the purposes of the Guidelines both philosophically and practically than is arrived at

74. *Id.* at 41.
75. *Id.*
76. *Id.* at 43.
77. *Id.* at 44.

if the unacceptability provision is considered a threshold determination. In an approach to the Guidelines that gives effect to the unacceptibility provision, the purpose of the Guidelines is aggressive protection of valuable wetland values. In this approach, regardless of whether or not there are any practicable alternatives to a proposed wetland site, it should not be developed if the proposed project would have serious adverse impacts on it.

B. *Moving Toward A Social Cost-Benefit Analysis*

The *Bersani* court claimed that EPA's market entry interpretation of the alternatives analysis was necessary to implement the Guidelines' purpose of providing an incentive for a developer to search for an alternative to the wetland site. It stated that "if the practicable alternatives analysis were applied to the time of the application for a permit, the developer would have little incentive to search for alternatives. . . ."[78]

EPA focused on the issue of timing because in its view after another developer bought options on the North Attleboro site it was no longer available to the applicant.[79] This view of availability is simple-minded. Any site under consideration for its practicability as an alternative to an applicant's proposed wetland site will be owned by someone. At some price virtually any private owner (except perhaps The Nature Conservancy or other private conservator of land) will be willing to sell to the applicant. The validity of this proposition is not affected by the owner's identity as a developer. *Bersani* is illustrative: the opinion notes that after cross-motions for summary judgment had been filed, newspapers reported plans by the applicant to enter into a joint venture to build a mall

78. *Id.*

Ironically, given the Corps' criteria of practicability, (see *supra* notes 25-26, and 60), the timing issue has no effect on whether or not a developer has an incentive to search for an alternative site. None of the factors the Corps takes into account are affected by the lapse of time between entry into the market and application for a permit. The physcial characteristics of the potential alternative site will not change, hence there will be no change in whether or not the applicant's project can be built there, in a physical sense, with no significant modifications. The applicant's projections of the volume and kind of customers the proposal would attract if the alternative site were used will be unaffected by the timing issue. Finally, the prospect of a decline in prospective profits resulting from the higher price of any alternative upland site relative to the discounted wetland site, exists both at the time of entry into the market and at the time of application.

79. *Id.* at 38.

with the developer who had bought the options on the North Attleboro site.[80]

The relevant question in determining whether an alternative site should be judged practicable for purposes of the Guidelines is at what price the site can be bought. Information about price is obviously necessary in order to calculate the loss in profits to the applicant if the permit is denied. It is not obvious *a priori* what will happen to the price of a site between the moment of entry by the developer into the market and the time of application. In fact, purchase of a site by another developer for a purpose similar to that planned by the applicant could be interpreted as an indication that use of the alternative would entail at least normal profits.

Yet, in spite of the mistaken importance attached by the court to the timing issue, *Bersani* does move closer to viewing the Guidelines as implicating a social cost-benefit analysis than do prior cases involving wetland permit determinations. Though the court fails to treat the alternatives analysis as a means for ascertaining the potential loss to the applicant from denial of the permit, it does recognize that a site cannot be labeled impracticable simply because it implies loss of profits to the developer. After noting that the timing issue is "crucial", the court observes that "of course it also is possible that the North Attleboro site remained 'available' after [the other developer's] acquisition of the options, since [the applicant] arguably could have purchased the options from [the other developer]."[81]

C. *An Incentive to Search*

In upholding EPA's veto, *Bersani* also created a real incentive to search for alternative sites.[82] One of the reasons EPA gave for vetoing the grant of the permit was that "considering [the applicant's] failure or unwillingness to provide further materials about its investigation of alternative sites, it was uncontested that, at best, [the applicant] never checked the availability of the North Attleboro site as an alternative."[83] The applicant had claimed summarily that the North Attleboro site was not practicable because "it was not feasible" as a result of "insufficient traffic volume" and "doubts" by potential tenants, and because it was

80. *Id.* at 43.
81. *Id.* at 41.
82. *See* Note, *supra* note 62, at 403; Comment, *supra* note 62, at 10488-89.
83. *Id.* at 42.

"unavailable."[84] In response to its demand for more information, EPA was told by the applicant that "[i]t simply does not exist."[85] EPA's veto sends permit applicants a message that summary assertions of infeasibility are not sufficient to rebut the presumption of availability of alternatives in the Guidelines.

V. Conclusion

The only lasting importance of *Bersani* may be that it temporarily spared a lovely fifty-acre red maple swamp from being replaced by a shopping mall. *Bersani*'s holding will probably not make a difference to the future of wetland permit determinations because the issue it resolved was illusory. The timing issue of the alternatives analysis of the 404(b)(1) Guidelines fails to focus on any of the criteria crucial to determing the availability of practicable alternatives to a developer's proposed wetland site.

Yet, though *Bersani*'s market entry theory clearly does not reflect a new and more effective interpretation of the Guidelines, there is encouraging language in the decision that appears to reject an approach to wetland development that focuses on the developer's interests alone. Hopefully the positive movement taken in *Bersani* toward protecting society's strong interests in wetlands will be continued and accelerated in future court review of wetland permit determinations.

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84. *Id.* at 41.
85. *Id.* at 42.