

University of Colorado Law School

Colorado Law Scholarly Commons

Water as a Public Resource: Emerging Rights
and Obligations (Summer Conference, June
1-3)

1987

6-3-1987

Wetlands Protection: The 404 Program

Patrick A. Parenteau

Follow this and additional works at: <https://scholar.law.colorado.edu/water-as-public-resource-emerging-rights-and-obligations>



Part of the Administrative Law Commons, Agriculture Law Commons, Animal Law Commons, Aquaculture and Fisheries Commons, Biodiversity Commons, Constitutional Law Commons, Courts Commons, Energy and Utilities Law Commons, Environmental Health and Protection Commons, Environmental Law Commons, Environmental Policy Commons, European Law Commons, Hydraulic Engineering Commons, Judges Commons, Jurisdiction Commons, Land Use Law Commons, Legislation Commons, Natural Resources Law Commons, Natural Resources Management and Policy Commons, Property Law and Real Estate Commons, Public Policy Commons, Recreation, Parks and Tourism Administration Commons, State and Local Government Law Commons, Urban Studies and Planning Commons, Water Law Commons, and the Water Resource Management Commons

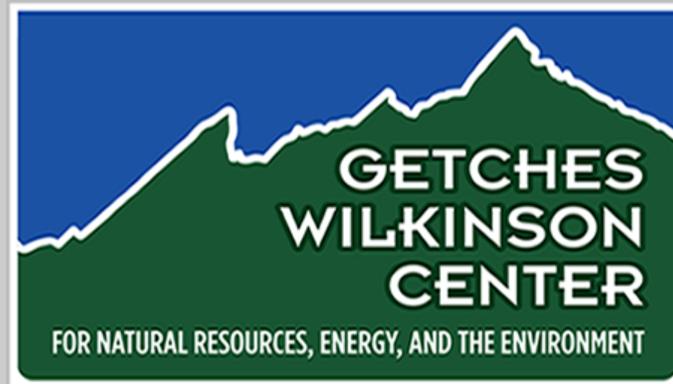
Citation Information

Parenteau, Patrick A., "Wetlands Protection: The 404 Program" (1987). *Water as a Public Resource: Emerging Rights and Obligations (Summer Conference, June 1-3)*.
<https://scholar.law.colorado.edu/water-as-public-resource-emerging-rights-and-obligations/21>

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.



William A. Wise Law Library
COLORADO **LAW**
UNIVERSITY OF COLORADO **BOULDER**



Getches-Wilkinson Center Collection

Patrick A. Parenteau, *Wetlands Protection: The 404 Program*, in *WATER AS A PUBLIC RESOURCE: EMERGING RIGHTS AND OBLIGATIONS* (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1987).

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.

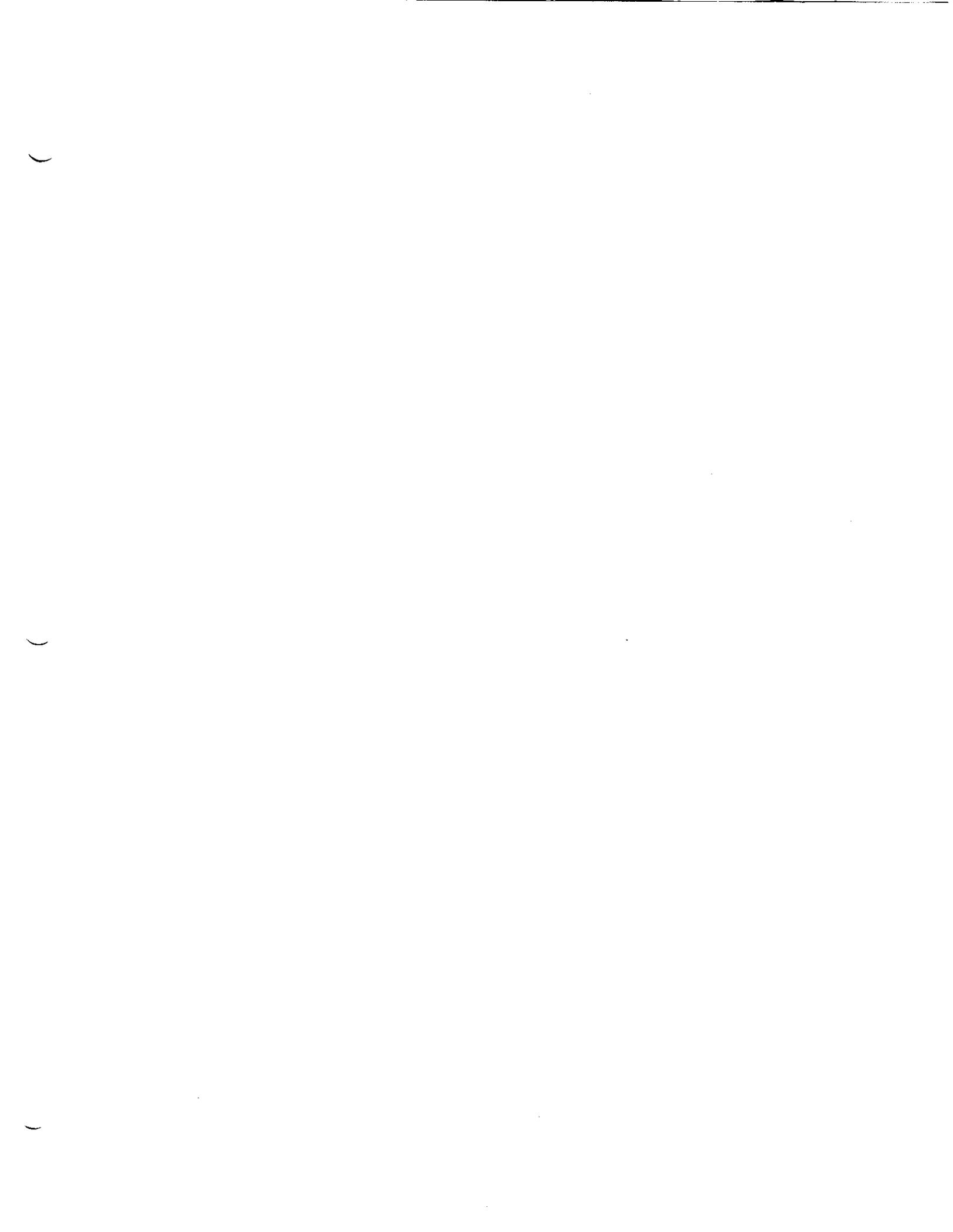
Wetlands Protection: The 404 Program

Patrick A. Parenteau

**Regional Counsel,
U.S. Environmental Protection Agency
Region 1, Boston, Massachusetts**

Water as a Public Resource: Emerging Rights and Obligations

**Natural Resources Law Center
University of Colorado School of Law
June 1-3, 1987**



I. Background: A little biology, a little law.

A. Some ecological principles.

1. Wetlands are among the most productive and diverse ecosystems on earth. Wetlands: Their Use and Regulation, Washington, D.C., U.S. Congress, Office of Technology Assessment, OTA-0-206.
2. Wetlands are essential habitat for fish and wildlife populations and provide other public benefits such as water quality maintenance, flood storage, groundwater recharge, commercial shellfish production and recreation. Id. at 33.
3. Wetlands are especially important to endangered species -- about 20% of all listed species depend upon them. Id. at 6, 56.
4. Wetlands themselves are now endangered: over half have been destroyed and the rest (especially freshwater wetlands) are going at the rate of roughly half a million acres per year. Id. at 18, 87-113, 174.
5. With rare exception, wetlands losses are irreversible.

B. The 404 Program.

1. The U.S. Army Corps of Engineers regulates development in wetlands through the Dredge/Fill Permit Program under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, 33 C.F.R. Parts 320, 330.

(a) The Corps' jurisdiction over wetlands extends to the limits of the Commerce Clause. United States v. Riverside Bayview Homes, 106 S.Ct. 455 (1985), Utah v. Marsh, 740 F.2d 799 (10th Cir. 1984).

(b) Corps regulations define wetlands by soil type, hydrology and vegetation. 33 C.F.R. Part 328, amended by 51 Fed. Reg. 42150-51 (13 Nov. 1986).

(c) On disputed jurisdiction calls, EPA has the final word. Avoyelles Sportsmens League v. Marsh, 715 F.2d 897, 910 (5th Cir. 1983). See also, Opinion of the Attorney General (B5.301, 5 Sept. 1979).

2. Corps permits must comply with the so-called 404(b) Guidelines, which are regulations issued by EPA but jointly developed with the Corps. 40 C.F.R. Part 230.

(a) The cornerstone of the 404(b) Guidelines is the "practicable alternatives" test which directs that: "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 environment."

40 C.F.R. 230.10(a).

(b) For "non-water dependent projects" the Guidelines create a presumption that "practicable alternatives" exist. 40 C.F.R. 230.10(a)(3).

(c) Although EPA publishes the Guidelines and the Corps applies them, disagreements arise over their precise meaning and effect in specific cases.

3. EPA also has authority to "veto" Corps permits under Section 404(c). 33 U.S.C. § 1344(c), 33 C.F.R. Part 231.

(a) This authority is triggered by EPA finding that the discharge will have "an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." 33 U.S.C. § 1344(c).

- (b) Under this authority, EPA can either restrict disposal activities in wetlands or prohibit them altogether.
- (c) EPA also has "preemptive strike" capability; it can designate areas as off-limits for disposal before permits are sought.
- (d) The 404(c) process consists of a number of steps (40 C.F.R. Part 231), viz:
 - (i) EPA Regional Administrators (R.A.) send notice to the Corps when they have "reason to believe" that a proposed permit may have "unacceptable effects".
 - (ii) The R.A. then consults with the Corps District Engineer and the applicant, as appropriate.
 - (iii) If the matter is not resolved, the Region publishes a public Notice of Intent to prohibit or restrict the discharge in local newspapers and the Federal Register; this is followed by a 30-60 day comment period and a public hearing if requested.
 - (iv) The R.A. then prepares a recommended determination and supporting record and forwards it to EPA headquarters.

(v) The final determination is made by the EPA Administrator or delegatee (the current delegatee is the Assistant Administrator for Water).

4. Enforcement is also a shared responsibility between EPA and the Corps.

(a) The Corps takes the lead in enforcement of permit conditions; EPA is becoming more active in the enforcement against unpermitted discharges.

(b) The Clean Water Act provides for administrative penalties, civil judicial penalties, injunctive relief, and criminal prosecution for 404 violations. See, Water Quality Act of 1987, Pub. L. 100-4, §§ 312, 313, 314.

II. The Attleboro Decision: EPA drops the hammer.

A. Factual Setting.

1. Sweedens Swamp is an 80-acre wetland located within the town of Attleboro, Massachusetts near the burgeoning metropolis of Providence, Rhode Island. Wetlands experts characterize Sweedens Swamp as a "typical New England red maple swamp" providing good to excellent wildlife habitat and also functioning to some extent as a flood retention and water purification area.

2. Located alongside Interstate 95, a major North-South thoroughfare, Sweedens Swamp has long been eyed as a site for commercial development. Through the 70's and early 80's several shopping mall developers tried unsuccessfully to build on the site.
3. In 1983 the Pyramid Companies of New York arrived on the scene, bought out the latest unsuccessful developer and proposed construction of an "upscale" shopping mall.
4. At about the same time, a second developer, New England Development, proposed construction of a similar mall 3 miles away in the town of North Attleborough. This site, although roughly the same size as Sweedens Swamp, contained scattered pockets of artificially-created wetlands amounting to less than an acre in the aggregate.
5. Market surveys showed that the target area could support only one of the malls being proposed by the two developers.

B. Procedural history.

1. After buying out the DeBartolo Corp. in 1983, Pyramid scaled the project back to reduce wetland loss from 50 to 32 acres and offered some additional on-site mitigation. These changes

apparently persuaded the state regulatory agency to reverse its earlier decision and issue Pyramid a wetlands permit. Pyramid dodged another bullet when its project was grandfathered out from under new state regulations which would have prohibited its project.

2. Pyramid next applied for a 404 permit from the New England Division of the Army Corps (NED). EPA and the U.S. Fish and Wildlife Service objected, as did a number of environmental groups and a local citizens organization. Local officials and the business community of Attleboro were generally in favor the project. To answer the objections, Pyramid offered to construct an artificial wetland to "replace" Sweedens Swamp.
3. The NED had prepared a draft decision denying the permit, but at the last minute Corps headquarters stepped in and ordered the Division to issue the permit upon condition that Pyramid mitigate the destruction of Sweedens Swamp through creation of artificial wetlands.
4. EPA Region I then invoked the rarely used veto authority of Section 404(c) and proposed to prohibit the filling of Sweedens Swamp. After a lengthy administrative process, featuring a

lively public hearing on the eve of Hurricane Gloria, an unsuccessful attempt by Pyramid to enjoin EPA from exercising its veto power (Newport Galleria Group v. Deland, 618 F.Supp. 1179 (D.D.C. 1985)), and heavy lobbying from all sides, the Regional Administrator issued a tentative determination to prohibit the fill and veto the permit. This decision held that Pyramid had failed to overcome the regulatory presumption (40 C.F.R. 230.10) that alternatives exist to filling wetlands for non-water dependent projects. The fact that another mall developer had located an upland site three miles away weighed heavily in the decision. The decision also rejected Pyramid's artificial wetland proposal on the ground that the purpose of 404 is to conserve natural wetlands and avoid their unnecessary destruction.

5. The Regional Administrator's determination was then reviewed by EPA headquarters -- more meetings, more comments, more political fireworks -- and a final decision was issued upholding the Region's recommended prohibition but narrowing the grounds somewhat.

6. Having exhausted its administrative avenues, Pyramid sued to overturn the decision, alleging that EPA acted arbitrarily and exceeded its statutory authority, not to mention its own regulations. Having failed to convince courts in Washington and Boston to interdict the administrative process, Pyramid chose Binghamton, New York as the forum for its last stand. Oral argument on Cross Motions for Summary Judgment was held on April 3, 1987 and the District Court has taken the matter under advisement.

C. The Legal and Policy Issues.

1. What is a "practicable alternative" under the 404(b)(1) Guidelines?

(a) The feasibility test;

(b) The availability test;

(c) The environmentally preferable test.

Some relevant cases are:

Louisiana Wildlife Federation v. York, 761 F.2d 1044 (5th Cir 1985).

Hough v. Marsh, 557 F.Supp. 74 (D.Ma. 1982).

Nat'l Audubon Soc. v. Hartz Mtn. Dev. Co., ___

F.Supp. ___, 14 Env't. Law Rep. 20724 (D.N.J. 1983).

Friends of the Earth v. Hintz, 800 F.2d 872 (9th Cir. 1986).

inability, types of stores
urban dev. did enter with - - -
in time to select alternative site?
"unacceptable" can
mean avoidable in
some situations.

Sierra Club v. U.S. Army Corps of Engineers,
772 F.2d 1043 (2d Cir. 1985).

2. What is an "unacceptable adverse effect" under Section 404(c)?
 - (a) Does avoidable equal unacceptable;
 - (b) Can 404(c) be used to "police" the 404(b)(1) Guidelines?
3. To what extent is/should EPA be bound by Corps
 - (a) Factual findings;
 - (b) Legal interpretations;
 - (c) Policy positions?
4. From a public policy perspective:
 - (a) How "routinely" should EPA exercise the veto power?
 - (b) Is the "alternatives" approach workable?
 - (c) Should EPA simply prohibit all fills associated with non-water dependent projects?

III. What's Next?

- A. More education.
 1. New EPA Office of Wetlands.
 2. Advance identification of "critical wetlands".
 3. "Outreach".

- B. More enforcement.
 - 1. Increased activity by EPA regional offices ("bean counting").
 - 2. Greater use of criminal prosecution.
- C. More vetoes ?
 - 1. Advance 404(c) actions.
 - 2. Vetoes of individual permits will remain messy and controversial.
- D. Major conflicts ahead over dams.
 - 1. The Monongahela Decision (Monongahela Power Co. v. Marsh, F.2d _____ No. 81-1201 *EPA can step in w/ 404(c) veto & block out FERC applic.* (D.C.Cir. Jan. 13, 1987).
 - 2. The Big A Project (the "Two Forks of the East").
- E. The "takings" question still lurks in the background.
 - 1. Florida Rock Industries v. United States, 791 F.2d 893 (Fed. Cir. 1986).
 - 2. The Supreme Court's latest word. Bituminous Coal Assn v. DeBenedictus, No. 85-1092, S.Ct., March 9, 1987.
- F. Conclusion: Leave wetlands alone.

