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Foreword, Focus: Clean Water Act's Section 404

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FOREWORD

DAVID H. GETCHES

In 1972, when the United States Congress amended the Federal Water Pollution Control Act, it breathed life into an ineffectual water quality program. The amendments incidentally included as one of the Act's nearly eighty sections a section entitled "Permits for dredged or fill material." This provision, § 404 of what is now known as the Clean Water Act,¹ has become a symbol of hope for conservationists who contend that the law is versatile enough to reach a panoply of insults to the environment and a symbol of federal overreaching to developers caught in its widening regulatory compass.

Section 404 of the Clean Water Act has proved to be remarkably expansive, exceeding nearly everyone's expectations. Its modest origin as a tool to implement federal power under the commerce clause to facilitate navigation belies its vitally important role in protecting the nation's rapidly diminishing wetlands. Furthermore, it has a greater potential than any other law in the nation for reaching and regulating public and private development activities. That potential goes well beyond preventing obstructions to navigation, or dredge and fill operations, or destruction of wetlands, or water pollution.

Did Congress suspect when it included § 404—a rather obscure, unassuming provision—in the Clean Water Act that it was enabling federal agencies to second-guess a decision by Denver officials that the enormous Two Forks Dam was the best way to provide water for the city's future growth? Or that it would result in overruling entrepreneurs' and local land use officials' choice of a shopping center site in Massachusetts? Did Congress have any idea that the federal bureaucracy would insinuate itself into essentially private, local decisions that

1. The provision was enacted as § 404 of Public Law No. 92-500, 86 Stat. 884, on October 18, 1972. It is codified at 33 U.S.C. § 1344 (1982).

have virtually nothing to do with protecting "clean water"? Probably not, but the permitting program now involves the federal government in deciding where and how to build a bicycle path in a resort, how to operate a tiny offstream reservoir holding water for cooling a coal-fired power plant, and whether a farmer can expand cultivation of his own land.

Originally conceived as a way of strengthening an old program of the U.S. Army Corps of Engineers dating to the 19th century that requires permits for traditional "dredge and fill" activities in navigable waters,² § 404 has grown into a national program for protecting nearly all rivers, streams, lakes, ponds, tributaries, and wetlands throughout the United States. Congress departed from earlier law and defined "navigable waters" subject to the Clean Water Act as all "waters of the United States."³ After a court found that the Corps was applying § 404 too restrictively,⁴ the agency adopted regulations that extend to any body of water that conceivably could be used in a way that would affect commerce and the wetlands adjacent to those waters.⁵ Under the definition, "wetlands" include any lands that support "vegetation typically adapted for life in saturated soil conditions." It is amazing how few major projects fall outside the regulatory ambit of these definitions—and how many small projects fall within it.

Section 404 subjects projects that are within its extensive reach to a federal permitting requirement. Moreover, this provision is a reagent that brings a wide range of nonfederal projects under intensive federal regulatory scrutiny. Once § 404 "federalizes" activities by subjecting them to the requirement of a permit, they are subject to the substantive and procedural provisions of laws that target federal actions—tough, important laws like the National Environmental Policy Act,⁶ the Endangered Species Act,⁷ and the Fish and Wildlife Coordination Act.⁸ An activity requiring a § 404 permit not only must com-

2. The program described in § 404 essentially replicates an earlier program under sections 10 and 13 of the 1899 Rivers and Harbors Act, which subject dredging and filling navigable waters to the control of the Secretary of War. 33 U.S.C. §§ 403, 407 (1982). The history of § 404 is related in Blumm and Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Intergovernmental Tension, Regulatory Ambivalence and a Call for Reform*, 60 U. COLO. L. REV. 695, 699-713 (1989).

3. 33 U.S.C. § 1362(7) (1982). Case law and Corps regulations have always tied the definition of the term for purposes of the Rivers and Harbors Act to actual or potential use of waters for interstate or foreign commercial transportation. See 33 C.F.R. § 323.2(b) (1988).

4. *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

5. 33 C.F.R. § 323.2(a). The Corps' definition of adjacent wetlands was upheld in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

6. 42 U.S.C. §§ 4321-4361 (1982).

7. 16 U.S.C. §§ 1531-1543 (1982).

8. 16 U.S.C. §§ 661-667 (1982).

ply with a panoply of federal laws, it must satisfy the judgment of federal officials that it will be in the "public interest."⁹

Congress and the courts have spurred on federal officials charged with administering the § 404 program. They have consistently extended its jurisdictional reach, interpreted its application broadly and upheld its rigorous application. Political and judicial challenges have resulted almost universally in ratification of administrative actions. The courts typically find that Congress gave the Corps (and the Environmental Protection Agency with whom responsibility is shared under § 404) a long enough leash to do virtually anything it has attempted to do. Occasionally, members of Congress have alerted their colleagues that agency practice under § 404 is overreaching its original intent. Generally, Congress has responded by validating the extremely broad exercises of discretion expressly or by silent acquiescence.¹⁰

It is unsurprising that the § 404 program has sparked political and legal controversy. Its inadequacies and its applications are assailed by nearly everyone. All stripes of environmentalists, from duck hunters to biologists, say that it provides incomplete protection for habitats. Developers argue that it freights projects with enormous, often unnecessary delays and costs. Legal scholars and experts in public policy are troubled by issues of federalism, intrusion on property rights, disparities between the law's original purpose and its execution, and the almost unbounded administrative discretion apparently permitted under the law. And almost everyone agrees that the statute is clumsy and anomalous in practice.

Though § 404 is widely criticized, it is remarkably versatile in addressing deeply felt needs for environmental protection. Like aspirin, it palliates far more ills than it was ever expected to treat, but it is not a cure. It has been drawn into a policy and regulatory vacuum. There is a strong national consensus supporting protection for wetland habitat and other important environmental values. Nevertheless, people would prefer environmental protection efforts to originate at the state or local level. When nonfederal entities do not act, however, § 404 is amorphous enough in its scope and forceful enough in its authority to occupy the void with federal controls.

9. 33 C.F.R. § 320.4(a) (1988).

10. Congress has curtailed the scope of the § 404 program only by exempting certain agricultural activities, 33 U.S.C. § 1344(f)(1), and certain federal projects specifically authorized by Congress after a consideration of an environmental impact statement (pursuant to the National Environmental Policy Act) that includes factors under the § 404 guidelines, 33 U.S.C. § 1344(r).

THE SPECIAL FOCUS

Much has been written about § 404. Some four dozen law review articles have been published about the section (more than the number of reported federal cases construing or applying it). Although one symposium has treated § 404 heavily in the context of wetlands protection,¹¹ this is the first law review symposium to deal solely with § 404.

This special focus probes some of the most troublesome issues arising under § 404. The issue begins with a critical assessment of the program by Michael Blumm and Bernard Zaleha, *Federal Wetlands Protection After Seventeen Years: Intergovernmental Tension, Regulatory Ambivalence and a Call for Reform*. The authors trace the statute's history to an inauspicious predecessor program under the 1899 Rivers and Harbors Act that took on broader environmental importance with the awakening of the nation's environmental consciousness in the 1960s. The program's incidental incorporation into the nation's first comprehensive water pollution control law in 1972 allowed it to blossom into a major separate regulatory system in its own right. Now it covers a greater range (though not number) of activities than the National Pollutant Discharge Elimination System¹² that comprised the major thrust of the 1972 legislation. Nevertheless, it is encumbered with far less legislative direction and fewer specific procedures than the pollutant discharge permit program.

In the second article in this Symposium, Oliver Houck focuses on a pivotal requirement that must be satisfied by § 404 permit applicants. A permit will be denied "if there is a practicable alternative . . . which would have less adverse impact on the aquatic ecosystem."¹³ Professor Houck describes the potency of the restriction of § 404 permits to projects that are the least environmentally destructive in his piece entitled *Hard Choices: The Analysis of Alternatives Under Section 404 of the Clean Water Act*. But he recognizes that the requirement's force is limited in practice by its own ambiguity and the Corps' lack of commitment to its purposes. Often a vigorous alternatives analysis occurs only after permit issuance when EPA is considering a veto. Even then it takes considerable expertise and courage. For a government agency to substitute its judgment for that of private property owners and local governments is, after all, unusual and unpopular work.

Gregory Hobbs and Bennett Raley question the propriety of federal intrusions into private and state decisionmaking, especially where

11. *Wetland Law and Policy*, 7 VA. J. NAT. RESOURCES L. 217 (1988).

12. 33 U.S.C. §§ 1342, 1345 (1982).

13. 40 C.F.R. § 230.10 (a) (1988).

the effect would be to interfere with one's ability to make full use of a water right. Their article *Water Rights Protection in Water Quality Law* argues that when Congress accepted language expressing respect for state water rights it amounted to a commitment not to curtail such rights in the name of § 404 regulation.¹⁴ They artfully demonstrate that the expansion and strengthening of the § 404 program in the 1977 amendments might not have been accepted if a compromise proposal recognizing state water rights had not been included. That compromise was necessary, indeed, to fulfill a precept of the Clean Water Act: that the ideal of federalism should be honored. This history, they argue, imbues the provision with special significance. Furthermore, the provision should have substantive impact, according water projects a presumption that they are in the public interest that does not apply to other types of projects. This presumption, in turn, should inform the Corps' public interest review.

The final article of the special focus is *Water Rights, Clean Water Act Section 404 Permitting, and the Takings Clause*. Jan Laitos looks at the inevitable conflict between western water rights and § 404's requirement that nearly every water diversion or onstream storage reservoir obtain a permit. At what point does the exercise of federal regulatory power impinge so extensively on the private property right to use water that it constitutes a "taking" subject to compensation under the fifth amendment of the United States Constitution? Because there is no clearcut precedent in the water rights context, Professor Laitos explores several lines of constitutional cases dealing with other property rights to analyze the takings question.

AGENCY PRACTICE AND REGULATIONS

Professor Blumm and Mr. Zaleha nicely explain the importance of agency regulations in the § 404 program. Congress distributed authority for the program vaguely to the Corps of Engineers and the Environmental Protection Agency (EPA). Each has viewed program purposes and requirements through a lens shaped by its particular mission. The Corps has primary authority to issue permits, and thus its regulations set the basic procedures and criteria for the program. EPA's regulations establish guidelines that confine Corps discretion in issuing permits, implement EPA's authority to veto Corps permits and define the jurisdictional sweep of the Act. Dual control of the program by very different agencies has created interagency tensions and sometimes sends conflicting messages to those seeking permits and to

14. 33 U.S.C. § 1251(g) (1982).

the public beneficiaries of the program. The authors describe how the courts generally have sided with EPA's position.

The dichotomy between the Corps' and EPA's approaches is illustrated by the way each treats the alternatives analysis. As Professor Houck explains, the alternatives analysis is the threshold issue for EPA's consideration but is just another factor for the Corps. Another example of the agencies' divergence is the Corps' willingness to weigh the effect of all mitigation measures proposed for a project when balancing it against alternative projects. By contrast, EPA insists that the project's unmitigated effects be considered in the analysis of whether it has less adverse impact than other alternatives.

A significant illustration of the difference in agency approaches is the Corps' tendency to accept an applicant's proclaimed purpose for a project when determining whether there are practical alternatives. How liberally one interprets "purpose" is crucial because a purpose to be near the water may leave few alternatives, but a purpose to build housing ordinarily would not. Professor Houck shows that EPA and the courts gravitate to a rather strict view of a project's purpose rather than uncritically accepting the applicant's characterization.¹⁵ Indeed, EPA's regulations include a presumption that there are available alternatives to the development of wetlands and other special aquatic sites unless the project's purpose is water-dependent.¹⁶

Houck proposes that alternatives be viewed functionally: The purpose of a water supply reservoir is not to dam a river, but to meet water supply needs; the purpose of a beach front condominium is to provide housing with nearby access to water, not to build a structure on the beach. Similarly, he would broaden the range of "practicably available" alternatives to be considered. Houck would make the presumption against nonwater-dependent projects a conclusive one, leaving water-dependent projects as the only ones in which an alternatives analysis is necessary. Water-dependent projects such as dams, marinas, clamming operations, or boat docks would not necessarily be treated with more deference than other projects. They still must endure the tests Houck proposes for evaluating alternatives, including a showing that projects intruding on wetlands be of national or regional

15. Illustrative is the well-known Pyramid Shopping Center case in which the Corps accepted the applicant's position that there was no alternative site because the only other site studied was controlled by a competitor. The Corps further said that even if it were available the positive effects of a mitigation plan would make it equivalent to the other site. The court upheld an EPA veto based on the availability of the alternative site at the time of the developer's decision. *Bersani v. United States Environmental Protection Agency*, 850 F.2d 36 (2d Cir. 1988), *cert. denied*, 109 S.Ct. 1556 (1989).

16. 40 C.F.R. § 230.10 (a)(3) (1988).

importance to outweigh the damage done, because wetlands are inherently of national importance.

CONFLICTS WITH WESTERN WATER RIGHTS

The Hobbs and Raley article treats water development as fundamentally different from other proposals to invade wetlands. They believe that water dependence should do more than merely trigger the full alternatives analysis. The authors probe the legislative history of the Clean Water Act to show that its purposes include achieving a balance between federal and state powers. That objective is threatened by giving short shrift to the section of the Act that defers to state water rights.¹⁷ Consequently, they contend that this provision known as the "Wallop Amendment" should have special significance in the administration of the § 404 program.

Messrs. Hobbs and Raley urge caution in applying any regulatory program limiting the right to remove water from a stream for beneficial uses. Such limits affect the essence of the prior appropriation doctrine which is the legal underpinning of most western states' water allocation systems. They argue that insisting that water be left undiverted is more compatible with the riparian doctrine. That doctrine is the origin of many eastern states' water rights systems. It is based on vesting exclusive rights to water in the owners of real estate along a stream, giving each user the right to insist that others make reasonable use of the water. By contrast, they believe that any restriction on the right to appropriate water for a beneficial use is contrary to public policy implicit in a state's embrace of the prior appropriation doctrine. Thus, a regulation of one's right to appropriate implicates the public policy of letting the state apply its own system of water law, not just the water user's property right in using water.

SECTION 404 AND TAKINGS

Whether or not the courts ultimately accept the Hobbs-Raley view that the Clean Water Act's express goal of respecting state water law is at least coequal with the policy of environmental protection, the authors of the article claim that the special nature of water rights raises serious regulatory takings issues. They concede that regulation of *discharges*, as opposed to diversions, can proceed as a proper police power exercise because there is no right to discharge. However, because there is a right to divert, the only proper control of diversions according to Hobbs and Raley, is to restrict them to beneficial uses.

17. 33 U.S.C. § 1251(g) (1982).

Presumably, any such controls should then be incorporated in the definition of property within the state water rights regime and not relegated to a federal regulatory program.

Regulation so pervasive that it destroys one's ability to use private property can amount to a taking for a public purpose which requires just compensation to be constitutionally valid.¹⁸ Thus, if a regulation results in destruction of privately held water rights, compensation must be paid.¹⁹ Blumm and Zaleha survey recent takings law and conclude that most conceivable cases should be invulnerable to charges that they are takings. But Hobbs and Raley say that *any* limit on the quantity of water that can be diverted strikes down an essential element of the right and is therefore a taking. Their position also stands in sharp contrast to that of Professor Laitos. He accepts to some degree the special nature of property in the right to use water, but finds few circumstances in which § 404 regulation of those rights would constitute a taking. Laitos rejects the Hobbs-Raley position that § 404 regulation must not affect the quantity of water that may be used under a state water right. Instead, he says that the only essential features of the right—those which must not be destroyed by regulation—are an appropriator's priority relative to other users and the appropriator's ability to apply water to a particular beneficial use.

REFORM PROPOSALS

Pointing to the continuing loss of wetlands to development, Blumm and Zaleha blame the Corps and Congress for failing to make more of § 404 as a wetlands protection program. They offer several recommendations on how the Corps, EPA, and Congress can improve the law and its administration. Ultimately, they argue, the responsibility for better wetlands protection lies with Congress. It should make a genuine commitment to protecting those resources and remove permitting authority from the Corps, shifting it to state agencies. Houck agrees that the Corps is not doing an acceptable job with the program but uneasily recommends that the solution is to transfer responsibility to EPA. Houck would have Congress legislate EPA's

18. *E.g.*, *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

19. This restraint would not, of course, apply to water rights held by a public entity which lacks the protection of the fifth amendment to the Constitution.

It has been argued elsewhere that water, unlike land or other forms of tangible property, is property of the sovereign held in trust for all the people of the state and therefore its reallocation or regulation for public benefit consistent with that trust cannot violate private rights to use the water which necessarily remain subject to the public's overriding right in the water. *E.g.*, Note, *The Public Trust Doctrine as a Source of State Reserved Water Rights*, 63 DEN. U.L. REV. 585 (1986). See also Note, *The Fifth Amendment as a Limitation on the Public Trust Doctrine in Water Law*, 15 PAC. L.J. 1291 (1984).

guideline regulations. He also believes that EPA should resort more often to use of its permit veto authority.

Blumm and Zaleha also recommend stronger, more coherent enforcement practices. Spotty enforcement of § 404 under provisions that could impose a variety of hefty criminal and civil remedies has created inequities among developers. Some dutifully comply with burdensome regulatory requirements, some violate the law with impunity, and others are punished severely for violations. Blumm and Zaleha urge that the Corps regularize agency practice and vigorously enforce the law.

CONCLUSION

The issues dealt with by the authors of the four articles in this special focus include most of those identified by people knowledgeable about § 404. The emphasis on water allocation conflicts gives the issue a western perspective. And the questions of national policy raised in the articles are bound to be debated intensely for the next several years.

As the National Wetlands Policy Forum found, the United States suffers from "inadequate wetlands protection, its unacceptable delays and confusion, its costs and frustrations."²⁰ Section 404 is the heart of the nation's wetlands protection program, but the Forum concluded that it is not enough. A much more comprehensive program is needed. Indeed, federal activities—water development, agricultural subsidies, highways—have, on balance, led to extensive destruction of wetlands.²¹ Addressing the problems that have destroyed half of all the nation's original wetlands requires determination to remove contradictions in federal programs and commitments of sufficient funds to acquire and repair wetland areas.

Even as § 404 falls short of a full wetlands protection program, it continues to involve the federal government in environmental and land use issues that traditionally have been left to local and private decisionmaking. These issues may or may not have anything to do with wetlands as most people know them. The public interest concerns elevated to federal scrutiny by § 404's technical definition of "waters of the United States" extend to an incredibly large number of development projects. Having cloaked these projects with federal control almost inadvertently—under agencies lacking sufficient budgets or staff

20. NATIONAL WETLANDS POLICY FORUM, *PROTECTING AMERICA'S WETLANDS: AN ACTION AGENDA 1* (1988).

21. See U.S. DEPARTMENT OF THE INTERIOR, *THE IMPACT OF FEDERAL PROGRAMS ON WETLANDS* (1988).

or will to exercise that control—will Congress curtail the scope of the regulatory program?

In a time of intense environmental concern it may be difficult to relax or remove any environmental controls, even programs incapable of full enforcement and programs that would not be passed today if the full reach of federal control were understood. Perhaps this sweeping federal program will be eased only when the public is confident that state and local regulation is adequate. Until that happens, aggressive federal regulation may tempt challenges as a taking of property, an assault on federalism, an invasion of state-created water rights, and an unlawful exercise of congressional powers.

Challenges to § 404 and its application, however, have been largely unsuccessful.²² Except for the hotly debated question of whether § 404's inhibitions on use of water rights could constitute a taking, the authors in this special focus do not suggest that the § 404 program is vulnerable to legal attack. With virtually no chance of political or legal limits being imposed on § 404, it appears to be here to stay. The most pressing question is whether it can be effectively, coherently, and equitably applied. Hope for the law's successful application may depend on administrative changes, perhaps utilizing the states to a greater extent.²³ Section 404 should be flexible enough to incorporate an enlightened federal policy of aggressive protection of important ecological resources while maintaining sensitivity to variations in local values and approaches to regulation.

22. The courts have disagreed with the government's determination in § 404 cases in fewer than 20% of the reported cases. Half of these reversals were in cases brought by environmental groups challenging the grant of a permit.

23. Indeed, states may be able to supplant the need for federal action to protect wetlands and other environmental assets covered by § 404. There is a largely unused provision for states to take primacy in operating the § 404 program, 33 U.S.C. § 1344(g)-(h), and the National Wetlands Policy Forum recommended that states take over administration of the program. Furthermore, the statute leaves the federal agencies with enough discretion to incorporate state standards and defer to state determinations. Indeed, the Corps' policy is to defer to state judgments on factors involved in its "public interest" criteria whenever there are no "overriding national factors of public interest." 33 C.F.R. § 320.4(j)(4) (1988). States also have an effective veto over a § 404 permit under § 401 and Corps regulations. See 33 U.S.C. § 1341 (1982); 33 C.F.R. §§ 320.3(a), 325.2(b)(i).