Section 404: The Nasty Business of the Clean Water Act

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SECTION 404; THE NASTY BUSINESS
OF THE CLEAN WATER ACT

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WATER QUALITY CONTROL: INTEGRATING BENEFICIAL USE
AND ENVIRONMENTAL PROTECTION

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Selected references:

Section 404, Clean Water Act, 33 USC Sec. 1344

U.S. Army Corps of Engineers implementing regulations, 33 C.F.R. Sec. 320 (general policies), 323 (dredge and fill), 329 (waters of the United States)

Environmental Protection Agency implementing regulations, 40 C.F.R. Secs. 230 (Section 404(b)(1) guidelines), 231 (404(c) guidelines)


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Outline of remarks

Of all the environmental laws on America's horizon, Section 404 of the Clean Water Act is, day in and day out, the most agonizing and the least susceptible to--in the words of this conference--"integrating beneficial use and environmental protection." Every aspect of this statute is polarized, from its goals to its requirements to its administration. The result is conflict, on ever-shifting grounds.

I. The Statutory Program

The Corps of Engineers permits "dredge and fill" activities in "waters of the United States." Section 404(a). Under EPA guidelines, Section 404(b). And under the shadow of an EPA veto, Section 404(c). The U.S. Fish and Wildlife Service and the National Marine Fisheries Service join in, Section 404(m) and 16 U.S.C. Sec. 661 et seq. (Fish and Wildlife Coordination Act). The states join in, and may indeed opt to run the program, Section 404(h), but under EPA's eye, Section 404(i),(j).

Simple, no?

II. Round One: The Scope of the Program

A. "Waters of the United States." The courts expand jurisdiction beyond traditionally navigable waters, to all "waters of the United

Unresolved conflict: the extent of isolated waters and their adjacent wetlands.


Unresolved conflict: how water-dependent need the vegetation be?

C. And, what do you have to be doing? Dredge and fill involves any significant movement of soil. Avoyelles Sportsmen's League v. Marsh,
473 F Supp. 525 (W.D.La. 1979). Recent Corps regulations exempt the "incidental fallback" from dredging operations. 51 Fed. Reg. 41210 (Nov. 13, 1986). The exemptions Congress provided in 1977 for normal sylvicultural and agricultural activities will be narrowly construed. E.g., United States v. Akers, 785 F2d. 814 (9th Cir. 1986); United States v. Huebner, 752 F2d. 1235 (7th Cir.). Corps "nationwide" permits exempting categories of activities, 30 C.F.R. 330, will also be narrowly construed. Riverside Irrigation District v. Andrews, 758 F.2d 508 (10th Cir. 1985).

Unresolved conflict: What is "normal," and what is the role of "intent" in the incidental filling of wetlands?

III. Round Two: The Permit Decision

A. Scope, again: the NEPA connection.

A threshold problem arises in defining exactly what is being permitted, and what effects are included, in the Section 404 decision. The Corps has recently restricted its National Environmental Policy Act review of permitted activities. See 53 Fed. Reg. 3120 (Feb. 3, 1988); see also Save the Bay, Inc. v. Corps of Engineers, 610 F2d. 322 (5th Cir. 1980).
Unresolved conflict: Will the NEPA regulations limit 404?

b. Alternatives: the heart of the decision. EPA's 404(b)(1) guidelines forbid discharges if an alternative is "practicable" and would be less harmful to aquatic life. 40 C.F.R. 230(a). They, further, create a presumption against dredge and fill permits in wetlands ("special aquatic areas") for activities that are not "water dependent." 40 CFR 230.10(a)(3). This presumption can be overcome by an applicant upon a showing that alternatives are not reasonably available. Id. Under Louisiana Wildlife Federation v. York, 761 F.2d. 1044 (5th Cir. 1985), the applicant's objectives in the project are at least a limitation on the scope of alternatives considered. In Bersani v. EPA, 26 E.R.C. 1678 (N.D.N.Y. 1987), however, the fact that an applicant does not own an alternative (non-wetland) location does not make that location "impracticable." All of which guidance makes the Section 404 decision exquisitely difficult: if the decision hinges on alternatives--as it does--how far does this inquiry go?

Unresolved conflict: When is a project "water-dependent," when is an alternative to it "practicable"? and...says who?
C. The balancing factors: harm and mitigation. Regulations of both the Corps and EPA are discretionary as to the amount of harm needed to deny a permit under Sections 404(a), or 404(c). This vagueness encourages an applicant to offer "mitigation" measures in its proposal, to facilitate permit approval. According to Bersani v. EPA, supra, however, EPA may ignore a mitigation proposal in evaluating the impacts of a project for purposes of exercising its Section 404(c) review. Whatever the legal status of mitigation proposals, they remain a major feature of the 404 process.

Unresolved conflict: the role of mitigation.

IV. Rounds Three, Four.... Looking ahead, new conflicts over Section 404 are inevitable, and will include:

A. "Takings." Under what circumstances does permit denial constitute a taking of private property without due process, i.e. requires compensation. Courts have generally found against "taking" claims. Deltona Corp. v. United States 657 F2d. 1184 (Ct. Cl. 1984); 791 F.2d 893 (Cir. 1986). Florida Rock Industries, Inc. v. United States, 791 F.2d 893 (Cir. 1986). But see United
States v. Riverside Bayview Homes, supra, ftnt.

4,6.

B. Alternatives, again. If alternative locations are controlling, what about alternative technologies? See 404(b)(1) guidelines; c.f. 33 U.S.C. Sec. 1314 (best available technology standards for pollution discharges).

C. Enforcement and penalties. Fines, injunctions and restoration orders are available. Although civil penalties now require a jury trial, United States v. Tull, 107 S.Ct. 1831 (1987), the 1987 Amendments provide for administrative penalties that may finesse the question.

D. Section 404(c), the sleeping giant. At some point, in some fashion, Section 404(c) will awaken. See Bersani, supra. Then again, it may go back to sleep.

V. Conclusion. There can be no conclusion to Section 404, so long as there is a strong public interest in protecting wetlands and a strong private interest in developing them...i.e., ever.