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Environmental Law—Nationwide Permits for Categories of Waters Issued by the Corps of Engineers Under FWPCA Section 404: A Legitimate Administrative Interpretation Ratified by Congress?

Wetlands—swamps, bogs, marshes, wet meadows, salt marshes, prairie potholes, hardwood bottomland—are a valuable resource.¹ Salt marshes, for example, comprise some of the most biologically productive ecosystems in the world.² Various types of wetlands are essential as habitat for many species of fish and wildlife.³ In addition, wetlands provide direct benefits to human populations, such as creating a buffer to flood waters.⁴ In the Charles River basin near Boston, wetlands are estimated to reduce yearly flood damage by approximately \$17 million each year.⁵ Reports of the failure of manmade flood control barriers to achieve similar results fill the newspapers each spring. Wetlands are also excellent water purifiers; some communities have used wetlands as natural, and effective, sewage treatment facilities.⁶ Wetlands hold water and allow it to seep slowly back into the land to recharge ground water aquifers stressed by urban or irrigation use.⁷ They also prevent the erosion of shorelines and filter the silt and sediment resulting from upland erosion and run-off.⁸

The recognized importance of wetlands, however, is not sufficient to protect them from destruction. Coastal developers and midland farmers view underwater land as wasteland, and along with many others have been working for decades to fill and convert to "productive use" these valuable ecosystems. One million acres of coastal marsh have been lost since 1954.⁹ An estimated forty to sixty-five percent of the original wetlands in the lower forty-eight states have been destroyed.¹⁰ Californians have spared less than 450,000 acres

1. NATIONAL WILDLIFE FEDERATION, *WETLANDS: A VALUABLE RESOURCE* 1.

2. G. MILLER, *LIVING IN THE ENVIRONMENT* 198 (3d ed. 1982). The average net primary productivity (measured in kcal/m²/yr) of estuarine systems, swamps, and marshes is about three times that of agricultural land and about fifty percent higher than that of temperate forests. *Id.* at 72.

3. NATIONAL WILDLIFE FEDERATION, *supra* note 1, at 1.

4. This is not to say that the biological productivity of wetlands and the importance of wetlands to fish and wildlife is not of importance to humans. The high biological concentrations in marshes make them high producers of oxygen in a world with an atmosphere that is filling up with carbon dioxide. Economically and gastronomically important species, such as shrimp and blue crab, are dependent on wetlands during part of their life cycles. In fact, wetlands support about two-thirds, by volume, of the commercial fish harvest along the eastern coast of the U.S. This catch is worth billions of dollars. G. MILLER, *supra* note 2, at 198.

5. NATIONAL WILDLIFE FEDERATION, *supra* note 1, at 1.

6. For example, in Wildwood, Florida (pop. 2500) a 506 acre gum-cypress swamp removed 98% of the phosphorus and 90% of the nitrogen from the sewage, and reduced fecal coliform bacteria from 16 million to 3 thousand per liter within two miles of the discharge. *Id.* at 1-2. The author reserves judgment as to the ecological wisdom of such use.

7. *Id.* at 2.

8. *Id.*

9. NATIONAL WILDLIFE FEDERATION, *WE ARE LOSING OUR WETLANDS* 1.

10. *Id.*; 123 CONG. REC. 26,717 (1977) (statement of Sen. Chafee), *reprinted in* 4 STAFF OF

of their original 3.5 million acres of wetlands.¹¹ Only 70,000 acres of Iowa's natural 1,196,392 acres of wetlands have escaped "reclamation."¹² North Carolina currently retains only thirty-one percent of its pocosin wetlands.¹³ The destruction has not ended: an additional 300,000 acres of coastal and inland wetlands continue to be lost or damaged each year.¹⁴

Congress has recognized the problem, addressing it preliminarily in 1972 when it added section 404¹⁵ to the Federal Water Pollution Control Act (FWPCA),¹⁶ and addressing it more fully in the 1977 amendments.¹⁷ In 1982, however, the Army Corps of Engineers, which is responsible for implementing section 404, promulgated nationwide regulations that allow holders of permits to fill in wetlands (or undertake other dredge and fill activities) so long as the wetlands are above the headwaters, are associated with isolated lakes, or are isolated.¹⁸ Although these permits do not appear to be authorized by the statute, the Corps asserts that Congress ratified issuance of the permits when it amended the FWPCA in 1977 without acting to declare the Corps' earlier nationwide permits illegal. This note will examine the legality of these permits and the question whether Congress in fact ratified them when it amended the FWPCA.

Section 404 of the FWPCA provides that the Secretary of the Army "may issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into the navigable waters at specified disposal sites."¹⁹ Section 301 of the Act,²⁰ also added in the comprehensive 1972 amendments, provides that "[e]xcept as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 [section 404 of the FWPCA was codified as section 1344] of this title, the discharge of any pollutant by any person shall be unlawful."²¹ Pollutant is defined in the Act to include—in

SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, 95TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, at 918 (Comm. Print 1978) [hereinafter cited as LEGISLATIVE HISTORY 1977 ACT]. This loss, at least in coastal areas, is due primarily to dredging and filling. G. MILLER, *supra* note 2, at 199.

11. NATIONAL WILDLIFE FEDERATION, *supra* note 9, at 1.

12. *Id.* at 2.

13. *Id.* Pocosins are coastal freshwater wetlands with underlying peat deposits. They are an important habitat for black bear, deer, bobcat, otter, mink, muskrat, raccoon, and grey fox, among other species, and also buffer the flow of fresh water into estuaries, assisting in the maintenance of the saltwater balance necessary for juvenile members of species such as shrimp and flounder. *Id.*

14. G. MILLER, *supra* note 2, at 199.

15. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 404, 86 Stat. 816, 884 (codified as amended at 33 U.S.C. § 1344 (Supp. V 1981)).

16. Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948) (codified as amended in scattered sections of 33 U.S.C.).

17. Clean Water Act of 1977, Pub. L. No. 95-217, § 67, 91 Stat. 1566, 1600-08 (codified at 33 U.S.C. § 1344 (Supp. V 1981)).

18. Interim Final Permit Program Rules, 47 Fed. Reg. 31,793-834 (1982) (to be codified at 33 C.F.R. §§ 320-330).

19. 33 U.S.C. § 1344(a) (Supp. V 1981).

20. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 301, 86 Stat. 816, 844-46 (codified at 33 U.S.C. § 1311 (1976 & Supp. V 1981)).

21. 33 U.S.C. § 1311(a) (1976). Section 1312 provides for establishment of effluent limitations on point sources of pollution. Section 1316 provides for establishment of national standards of performance for specific sources of pollutants. Section 1317 mandates establishment of effluent

addition to sewage, chemical wastes, heat, and garbage—dredged spoil, rock, sand, and cellar dirt.²² Sections 301 and 404 thus make it unlawful for a person to discharge dredged or fill material (rock, sand, or dirt) into navigable waters without a permit to do so issued under section 404. This type of discharge occurs on perhaps its largest scale in wetlands, as landowners seek to fill and reclaim swamps, marshes, and other wetlands.²³ Thus, section 404 stands as the primary check in the federal statutory scheme on wetland loss.

Three particular aspects of section 404 are important as starting points. First, the Army Corps of Engineers is responsible for administering section 404.²⁴ By contrast, the EPA is charged with executing the bulk of the Act. Second, limitations imposed by principles of federalism and the commerce clause restrict the applicability of section 404 to "navigable waters."²⁵ Third, although the term "navigable waters" is statutorily defined simply as "waters of the United States,"²⁶ the Corps has tended to construe that term narrowly in other statutory contexts.

Until recently, the Corps regulated wetlands only pursuant to the River and Harbors Appropriation Act of 1899.²⁷ Sections 9,²⁸ 10,²⁹ and 11³⁰ of that Act require permits for certain types of structures or work occurring in or affecting navigable waters, including dredging and stream channelization, excavation, and filling. Section 13³¹ of the 1899 Act prohibited the discharge of refuse into navigable waters, but because the Act was enacted primarily to protect navigation,³² the Corps administered the Act "only to protect navigation and the navigable capacity of the nation's waters."³³ In this connection, the Corps established harbor lines landward of which permits were not required, and the permit requirements "were limited in their application to waters that were presently used as highways for the transportation of interstate or

limitations for toxic pollutants and of pretreatment standards for introduction of pollutants into public treatment works. Section 1328 allows discharges of pollutants from aquacultural facilities. Section 1342 establishes the National Pollutant Discharge Elimination System, the major system for permitting the discharge of conventional pollutants. *Id.* §§ 1312, 1316, 1317, 1328, 1342.

22. 33 U.S.C. § 1362(6) (1976). "Dredged spoil" simply means material excavated or dredged from underwater. *See* 47 Fed. Reg. 31,811 (1982) (to be codified at 33 C.F.R. § 323.2(i)). The meaning of "cellar dirt," as opposed to ordinary dirt, is unclear.

23. Indeed, "fill material" is administratively defined as "any material used for the primary purpose of replacing an aquatic area with dry land." 47 Fed. Reg. 31,811 (1982) (to be codified at 33 C.F.R. § 323.2(k)).

24. *See* 33 U.S.C. § 1344 (Supp. V 1981).

25. As stated in the congressional declaration of goals and policy, "it is the national goal that the discharge of pollutants into the *navigable waters* be eliminated by 1985." *Id.* § 1251(a)(1) (1976) (emphasis added). Permits under § 404 may be issued only for discharges into navigable waters. *Id.* § 1344(a).

26. *Id.* § 1362(7) (1976).

27. *See* 42 Fed. Reg. 37,122 (1977).

28. River and Harbors Appropriation Act of 1899, § 9, ch. 425, 30 Stat. 1121, 1151 (codified at 33 U.S.C. § 401 (1976)).

29. *Id.* § 10, ch. 425, 30 Stat. 1121, 1151 (codified at 33 U.S.C. § 403 (1976)).

30. *Id.* § 11, ch. 425, 30 Stat. 1121, 1151 (codified at 33 U.S.C. § 404 (1976)).

31. *Id.* § 13, ch. 425, 30 Stat. 1121, 1152 (codified at 33 U.S.C. § 407 (1976)) (popularly known as the Refuse Act of 1899).

32. *See* 42 Fed. Reg. 37,122 (1977).

33. *Id.*

foreign commerce."³⁴ In 1968 the Corps expanded the scope of its review of permit applications under the 1899 Act.³⁵ The new review was "a public interest review," and included a host of additional factors besides navigation.³⁶

In 1972, while the FWPCA was being considered in Congress, the Corps perceived a "growing concern" in the federal government over water quality.³⁷ In response to this concern, the Corps published on September 9, 1972 a new, expanded administrative definition of "navigable waters."³⁸ In addition to waters presently used to transport interstate or foreign commerce, the new definition included: all waters used in the past for such transport, all waters susceptible to such use in their ordinary condition or by reasonable improvement, and all waters subject to the ebb and flow of the tide.³⁹ The Corps also broadened the landward limits of its jurisdiction. For freshwater the limit was the ordinary high water mark, and for tidal water the limit was the mean high water mark.⁴⁰

Section 404, as part of the comprehensive 1972 amendments, was added to the FWPCA on October 18, 1972.⁴¹ Over the objections of the EPA⁴² and Senator Muskie,⁴³ the dredge and fill program (section 404) was separated from the permit programs for other pollutants and the Corps was given primary jurisdiction over it.⁴⁴ The Corps published regulations to implement its new authority on April 3, 1974.⁴⁵ These revisions to its permit regulations incorporated the section 404 permit program and sought "to adopt a wetlands policy that would protect wetlands within the Corps jurisdiction from unnecessary destruction."⁴⁶ The regulations, however, limited the scope of the section 404 permit program to the same waters that were being regulated under

34. *Id.*

35. *Id.*

36. *Id.* The Corps stated: "The decision as to whether a permit will be issued must rest on an evaluation of all relevant factors, including the effect of the proposed work on navigation, fish and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest." 33 Fed. Reg. 18,671 (1968).

37. 42 Fed. Reg. 37,122 (1977).

38. Definition of Navigable Waters of the United States, 37 Fed. Reg. 18,290 (1972). The present definition of "navigable waters" for determining the jurisdiction of the Corps is codified at 33 C.F.R. § 329 (1982), and was first published in 42 Fed. Reg. 37,161 (1977).

39. 37 Fed. Reg. 18,290-91 (1972); 42 Fed. Reg. 37,122 (1977).

40. 37 Fed. Reg. 18,291 (1972).

41. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 404, 86 Stat. 816, 884 (codified at 33 U.S.C. § 1344 (Supp. V 1981)).

42. HOUSE COMM. ON PUBLIC WORKS, FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, H.R. REP. NO. 911, 92d Cong., 2d Sess. 168-69 (1972) (comments of Environmental Protection Agency on H.R. 11895 and H.R. 11896), *reprinted in* 1 STAFF OF SENATE COMM. ON PUBLIC WORKS, 93D CONG., 1ST SESS., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 753, 855-56 (Comm. Print 1973) [hereinafter cited as LEGISLATIVE HISTORY 1972 ACT].

43. 117 CONG. REC. 38,855 (1971) (statements of Sen. Muskie), *reprinted in* 2 LEGISLATIVE HISTORY 1972 ACT, *supra* note 42, at 1387-88, 1389. Senator Muskie was the prime mover of the bill.

44. 33 U.S.C. § 1344 (1976 & Supp. V 1981).

45. 39 Fed. Reg. 12,115-17 (1974). For the present regulations, see 33 C.F.R. § 323 (1982).

46. *See* 42 Fed. Reg. 37,123 (1977).

the River and Harbors Appropriation Act of 1899.⁴⁷ The National Wildlife Federation and the National Resources Defense Council challenged this limitation in *Natural Resources Defense Council v. Callaway*.⁴⁸ The environmental groups expressed concern over the need to regulate the entire aquatic system, including wetlands,⁴⁹ tributaries to tidal and commercially navigable waters, and isolated lakes and prairie potholes.⁵⁰

On March 27, 1975, the District Court for the District of Columbia granted plaintiffs' motion for summary judgment in *Callaway* and declared:

Congress by defining the term "navigable waters" in [the FWPCA] to mean "the waters of the United States, including the territorial seas,"⁵¹ asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act, the term is not limited to the traditional tests of navigability.⁵²

Congress had expressed such an intent when it passed the 1972 amendments.⁵³ The court ordered the rescission of all the 1974 regulations that limited "the permit jurisdiction of the Corps of Engineers by definition or otherwise to other than 'the waters of the United States,'"⁵⁴ and instructed the Corps to publish regulations "recognizing the full regulatory mandate of the Water Act."⁵⁵

The Corps published interim final regulations in response to the court order on July 25, 1975.⁵⁶ Those regulations contained a new, much broader

47. *Id.*

48. 392 F. Supp. 685 (D.D.C. 1975).

49. Wetlands often lie above the arbitrary lines the Corps has set on its jurisdiction—namely, mean high water marks and ordinary high water marks. See 42 Fed. Reg. 37,123 (1977); 123 CONG. REC. 26,716 (1977) (statement of Sen. Chafee), reprinted in 4 LEGISLATIVE HISTORY 1977 ACT, *supra* note 10, at 917.

50. See 42 Fed. Reg. 37,123-24 (1977). Prairie potholes are small, natural lakes of puzzling origin that dot the northern prairie states. They are prime breeding grounds for various waterfowl, but tend to be too widely dispersed for inclusion of significant numbers of them in parkland or other state-protected lands.

51. 33 U.S.C. § 1362 (7) (1976).

52. 392 F. Supp. at 686.

53. The House Report expressed a reluctance "to define . . . the term 'navigable waters' . . . based on the fear that any interpretation would be read narrowly. However, this is not the Committee's intent." HOUSE COMM. ON PUBLIC WORKS, FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, H.R. REP. NO. 911, 92d Cong., 2d Sess. 131 (1972), reprinted in 1 LEGISLATIVE HISTORY 1972 ACT, *supra* note 42, at 753, 818. The Conference report and the House report used identical language to further express congressional intent: "The conferees [Committee] fully intend[s] that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. CONF. REP. NO. 1236, 92d Cong., 2d Sess. 144 (1972), reprinted in 1972 U.S. CODE CONG. & AD. NEWS 3776, 3822, and in 1 LEGISLATIVE HISTORY 1972 ACT, *supra* note 42, at 281, 327; HOUSE COMM. ON PUBLIC WORKS, FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, H.R. REP. NO. 911, 92d Cong., 2d Sess. 131 (1972), reprinted in 1 LEGISLATIVE HISTORY 1972 ACT, *supra* note 42, at 753, 818.

54. 392 F. Supp. at 686.

55. *Id.*

56. Revisions to Permit Regulations, 40 Fed. Reg. 31,319-44 (1975) (proposed to be codified at 33 C.F.R. § 209.120). The court originally ordered that *final* regulations be published within 30 days of the order, dated March 27, 1975. 392 F. Supp. at 686.

definition of the term "navigable waters,"⁵⁷ which included wetlands, tributaries, and certain intrastate lakes,⁵⁸ but excluded the headwaters of all of the included waters.⁵⁹ The term "headwaters" was defined to mean the point above which the normal flow is less than five cubic feet per second.⁶⁰ The definition also excluded small lakes from the Corps' jurisdiction by defining "lakes" as "natural bodies of water greater than five acres in surface area and all bodies of standing water created by the impounding of navigable waters."⁶¹

These 1975 regulations adopted a three part phase-in schedule.⁶² Phase I began immediately and encompassed all waters already regulated, plus the wetlands of those waters. Primary tributaries and lakes larger than five acres and the wetlands of these waters did not become subject to regulation until over a year later when Phase II took effect. Finally, on July 1, 1977 all navigable waters of the United States gained the Corps' protection under Phase III.⁶³

Shortly afterwards, on July 19, 1977, the Corps finalized these regulations.⁶⁴ Significantly, a major difference between the 1975 interim final regulations and the 1977 final regulations was the definition of navigable waters. The Corps dropped its definitional method of excluding headwaters from its jurisdiction.⁶⁵ In its explanation of its new final regulations, the Corps stated that it was making the definitional change in response to comments concerning "the legality of excluding waters in rivers and streams above the headwaters from the definition of waters of the United States."⁶⁶ The Corps also dropped its definitional exclusion of lakes of less than five acres in surface area.⁶⁷ The Corps noted that commenters had questioned the legality of that size limitation, "since a lake less than five acres in size is just as much a 'water of the United States' as one that is more than five acres in size."⁶⁸ Nevertheless, the final regulations, while divested of the potentially illegal definitional

57. 40 Fed. Reg. 31,324-25 (1975).

58. *Id.*

59. *Id.* For example, proposed § 209.120(d)(2)(i)(e) of 33 C.F.R. included in the definition of navigable waters "all tributaries of navigable waters of the United States up to their headwaters." 40 Fed. Reg. 31,324 (1975).

60. 40 Fed. Reg. 31,325 (1975) (proposed to be codified at 33 C.F.R. § 209.120(d)(2)(ii)(d)).

61. 40 Fed. Reg. 31,325 (1975) (proposed to be codified at 33 C.F.R. § 209.120(d)(2)(ii)(c)).

62. 40 Fed. Reg. 31,326 (1975).

63. *Id.*; see 42 Fed. Reg. 37,124 (1977).

64. Final Permit Program Rules, 42 Fed. Reg. 37,121-64 (1977) (codified at 33 C.F.R. §§ 320-329 (1982)).

65. 42 Fed. Reg. 37,144 (codified at 33 C.F.R. § 323.2(a) (1982)). The Corps phrased the regulation in terms of "waters of the United States" instead of "navigable waters" to avoid confusion with the Corps' other regulatory programs. *Id.*

66. 42 Fed. Reg. 37,129 (codified at 33 C.F.R. § 323.2(i) (1982)). The Corps also made a clarifying change in the definition of headwaters. In place of specifying a water flow that is normally less than five cubic feet per second, the new regulation specified an average annual flow of less than five cubic feet per second. In addition, the new regulation specified a method for estimating that point on a given body of water. *Id.*

67. 42 Fed. Reg. 37,144 (codified at 33 C.F.R. § 323.2(e) (1982)). The new definition separated natural lakes and impoundments. A natural lake was defined as "a standing body of open water that occurs in a natural depression fed by one or more streams and from which a stream may flow, that occurs due to the widening or natural blockage of a river or stream, or that occurs in an isolated natural depression that is not part of a surface river or stream." *Id.*

68. 42 Fed. Reg. 37,129 (codified at 33 C.F.R. § 323.2(i) (1982)).

exclusions, retained the exclusionary effect of the 1974 regulations, which were held to be unduly restrictive in *Callaway*. The Corps accomplished this abrogation of its jurisdiction by issuing blanket nationwide permits for discharges into essentially the same waters it had previously excluded from its jurisdiction by definition.⁶⁹ Although the waters subject to the permits were technically under the protective jurisdiction of the Corps, the issuance of nationwide permits effectively excluded the waters from Corps control. Two years after the *Callaway* order, the Corps had settled on a regulatory scheme that avoided a substantial part of the burdens created by that order.

Technically, the nationwide permits do not limit the Corps' jurisdiction. The Corps is asserting its jurisdiction over the waters covered by the statute by issuing the nationwide permits. The effect, however, is that the nationwide permits, for all practical purposes, exclude wetlands from the Corps' jurisdiction. Nationwide permits eliminate the need for individual permits for a given category of activity, or for all activities in a given category of waters. Thus, the Corps makes no independent evaluation of the environmental aspects of such activities and does not have the opportunity to prohibit an activity or to put special conditions on the permit in order to protect the environment. If a nationwide permit is issued for discharges of dredge and fill material into all headwaters, for example, a person may discharge as much material as he wishes into any headwater without even notifying the Corps.⁷⁰

The advantage of the nationwide permits is an easing of the regulatory burden on both the Corps and potential permittees.⁷¹ The position of the Corps is that the environment will be sufficiently protected by the management practices specified in its regulations⁷² and by the discretionary authority given the division engineer to require individual or regional permits when he feels the environment is not adequately protected.⁷³ Requiring applications for individual permits under section 404, however, is not necessarily an unrea-

69. *Id.* at 37,128. The Corps issued permits for four categories of waters: headwaters, lakes under ten acres fed by headwaters, isolated lakes, and other isolated waters. The first three categories include the adjacent wetlands. 33 C.F.R. § 323.4 (1982).

70. While certain conditions must be met, those conditions mainly ensure that the discharges do not violate other statutes or regulations (e.g., the Endangered Species Act). 47 Fed. Reg. 31,832 (1982) (to be codified at 33 C.F.R. § 330.4(b)). Additionally, there is no evidence that the Corps intends to police these conditions. See *infra* note 73.

71. *Oversight Hearing on Section 404: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 97th Cong., 2nd Sess. 392, 418-20 (statement of Robert K. Dawson, Deputy Assistant Secretary of the Army for Civil Works) (1982) (responses by Corps of Engineers representatives to questions) [hereinafter cited as *Oversight Hearing*].

72. 42 Fed. Reg. 37,131 (1977). The latest management practices are promulgated at Interim Final Rule for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. 31,834 (1982) (to be codified at 33 C.F.R. § 330.6).

73. 47 Fed. Reg. 31,834 (1982) (to be codified at 33 C.F.R. § 330.7). Unfortunately, however, neither the management practices, *supra* note 72, nor the division engineers' authority to issue individual permits is mandatory. "Failure to comply with [the management] practices may be cause for the district engineer to recommend or the division engineer to take discretionary authority to regulate the activity on an individual or regional basis pursuant to § 330.7." 47 Fed. Reg. 31,834 (1982) (to be codified at 33 C.F.R. § 330.6 (emphasis added)). Additionally, the majority of the management practices are worded in terms of "avoiding" or "minimizing" the harmful practices, not in terms of eliminating them. See 33 C.F.R. § 323.4(b) (1982). Not only the efficacy, but

sonable burden on permit applicants.⁷⁴ Certainly those who are denied permits or whose permit applications propose significant enough action to require review under the National Environmental Policy Act are burdened, but this is the precise purpose of the statute. The law is not designed to ensure quick approval of plans to destroy wetlands, but to protect those wetlands from unnecessary destruction.⁷⁵

On September 19, 1980, the Corps of Engineers published proposed rules⁷⁶ to accommodate "legislative changes in the Clean Water Act, Executive Orders, judicial decisions and policy changes" occurring since the July 19, 1977, regulations were published.⁷⁷ These rules, with some changes, were republished on July 22, 1982, as interim final rules.⁷⁸ By 1982 it had become necessary to promulgate new nationwide permits anyway, because the statute limits nationwide permits to a term of not more than five years.⁷⁹ The new nationwide permits with which this note is concerned⁸⁰ provide:

Discharges of dredge or fill material into the following waters of the United States are hereby permitted provided the conditions listed in paragraph (b) of this section below are met:

- (1) Non-tidal rivers, streams and their lakes and impoundments, including adjacent wetlands, that are located above the headwaters.
- (2) Other non-tidal waters of the United States (see 33 C.F.R. & 323.2(a) (3)) that are not part of a surface tributary system to interstate waters or navigable waters of the United States.⁸¹

the very legality, of these and similar permissive provisions might be questioned, given the language of § 404(e). See *infra* text accompanying notes 88-92.

In the five years this discretionary authority has existed under 33 C.F.R. § 323.4-4 (1982), the district engineers' office in North Carolina has apparently never exercised it. Address by Richard Jackson, Chief of Environmental Resources Branch, Wilmington, N.C. District, U.S. Army Corps of Engineers (Dec. 1, 1982). This is despite conversion of 55,000 to 60,000 acres of wetlands for use in corporate farming, peat mining, and other uses that destroy the character of the wetlands. See *infra* note 92.

74. *Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 97th Cong., 2d Sess. — (1982) (statement of T. Tomasello, Counsel for Fisheries & Wildlife Program, National Wildlife Fed'n). Less than 1.3% of the § 10 and § 404 permit applications submitted from 1977 through 1980 were denied. From 1977 through 1981, the average processing time for 70% of the permit applications received was less than 75 days. For all permit applications, except those requiring an environmental impact statement (EIS), the average was 131 days. Only 15 EIS's were prepared for permit applications in fiscal year 1980.

75. *Oversight Hearing*, *supra* note 71, at 391 (remarks of Sen. Chafee).

76. Proposed Permit Program Rules, 45 Fed. Reg. 62,731-77 (1980).

77. 47 Fed. Reg. 62,794 (1982).

78. Interim Final Permit Program Rules, 47 Fed. Reg. 31,793-834 (1982) (to be codified at 33 C.F.R. §§ 320-330).

79. Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1344(e)(2) (Supp. V 1981).

80. A number of other nationwide permits for discharges occurring before certain dates and for certain specific activities were also issued. See 47 Fed. Reg. 31,832-34 (1982) (to be codified at 33 C.F.R. §§ 330.3 to -.5).

81. 47 Fed. Reg. 31,832 (1982) (to be codified at 33 C.F.R. § 330.4(a)). "Navigable waters of the United States" is administratively defined separately from "navigable waters." The former

These permits consolidate the four types of permits issued in 1977.⁸² The most important change is the absence of any acreage restriction on lakes for which the permits are issued. Under the new rules dredging and filling activities on any lake that is located above the headwaters or that is not part of a surface tributary system to interstate waters or navigable waters of the United States may be undertaken without individual permits.

The 1982 nationwide permits were issued under the purported authority of section 404(e) of the FWPCA.⁸³ As will be seen below, the language of the FWPCA indicates that nationwide permits for these categories of waters are an overstepping of authority by the Corps.⁸⁴ Although the statute certainly authorizes the issuance of nationwide permits, the statute contemplates such permits for categories of activities, not for categories of waters. The Corps has issued over a score of these permits for categories of activities ranging from fish harvesting to minor road crossing fills.⁸⁵ The statute does not authorize issuance of *carte blanche* nationwide permits for all activities in broad categories of waters.⁸⁶ The Corps, however, anticipates this objection by asserting that "those permits and others were in effect at the time [1977] Congress adopted section 404(e). The legislative history clearly shows Congress' intent to endorse the program in effect at the time and to encourage its expansion."⁸⁷ This claim of congressional ratification, however, is not supported by the legislative history of section 404.

An analysis of the statute to determine whether it supports the Corps' issuance of nationwide permits for categories of waters must begin with the language of sections 404(e):

In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any *category of activities* involving discharges of dredged or fill material if the Secretary determines that the *activities* in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment

. . . No general permit issued under this subsection shall be for a period of more than five years after the date of its issuance⁸⁸

The language is plain enough. The section consistently speaks of categories of

term is defined to include only waters "subject to the ebb and flow of the tide . . . and/or that are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce." 33 C.F.R. §§ 323.2(b), 329 (1982).

82. 47 Fed. Reg. 31,798-99 (1982). The former regulations permitting four categories of discharges can be found at 33 C.F.R. § 323.4-2(a) (1982). See *supra* note 69.

83. 33 U.S.C. § 1344(e) (Supp. V 1981); see *infra* text accompanying note 88.

84. See *infra* text accompanying notes 88-94.

85. 47 Fed. Reg. 31,832-34 (1982) (to be codified at 33 C.F.R. § 330.5(a)).

86. See *infra* text accompanying notes 88-94.

87. 47 Fed. Reg. 31,798 (1982).

88. 33 U.S.C. § 1344(e) (Supp. V 1981) (emphasis added).

activities, not the vast categories of waters the Corps has described in its permits.⁸⁹

The statutory language provides further guidance beyond intuitive meanings. First, the very nature of the permits—being for categories of waters—precludes the Corps from complying with statutory requirements. The statute mandates that the Secretary determine “that the activities in such category are similar in nature.”⁹⁰ Since permits for categories of waters allow all dredge and fill activities without discriminating between types of activities, this statutory requirement is clearly violated. No one can possibly determine that the activities in all headwaters and isolated lakes are similar in nature without specifying what activities are involved, unless, for example, filling an entire lake or marsh with coal mine spoil is deemed “similar in nature” to putting up a small boat dock. Second, the Secretary cannot determine, as the statute requires, that the cumulative adverse environmental impacts will be minimal,⁹¹ since the permits set no limit on the number of acres of waters and wetlands that may be altered or destroyed. The statutory requirement can be met only if the Corps is prepared to find that total destruction of all headwaters and isolated lakes and wetlands would cause only minimal adverse environmental impact.⁹²

There are other factors that conflict with the Corps’ equation of categories of waters with categories of activities. First, the new regulations themselves support the distinction here asserted by separating the two types of permits. The Corps used the phrase “Nationwide permits for discharges into certain waters” in section 330.4 and “Nationwide permits for specific activities” in section 330.5.⁹³ Second, one of the few acknowledgements of the 1977 nationwide permits in the legislative history of the FWPCA also makes the waters/activities distinction. The House conferees, in describing the existing nationwide permits, did not treat nationwide permits for waters as part of the similar-in-nature/minimal-impact permit program projected by section 404:

Among other things these regulations permitted on a nationwide basis the discharge of a dredged or fill material into nontidal rivers and streams above the headwaters and lakes that are less than 10 acres in surface area, provided that certain specified management practices are followed. . . . Finally, the regulations provide for the issuance of general permits for activities which are substantially similar in nature, that cause only minimal adverse [impact separately and

89. When a government attorney at a legislative oversight hearing asserted that all conceivable activities in headwaters constitute a category of activities under the statute, laughter erupted from the mixed crowd of observers and participants. *Oversight Hearing*, *supra* note 71, at 409-10 (statement of Carol E. Dinkins, Assistant Attorney General for Land and Natural Resources).

90. 33 U.S.C. § 1344(e)(1).

91. *Id.*

92. This is not as farfetched as it may seem. The drawing of lines at headwaters under the nationwide permits has allowed 55,000 to 60,000 acres of conversion of wetlands to agricultural fields in only the past two years in eastern North Carolina alone. Address by Derb Carter, Director of Carolina Wetlands Project, in Chapel Hill, N.C. (Nov. 29, 1982); *see also supra* notes 9-14 and accompanying text.

93. 47 Fed. Reg. 31,832 (1982) (emphasis added).

cumulatively].⁹⁴

The language of section 404(e), then, although it is susceptible to more than one interpretation, is reasonably clear. It says that nationwide permits for categories of *activities* are authorized; nationwide permits for categories of waters, not restricted to specified activities, are beyond the bounds of the authority granted.

Notwithstanding the questions of statutory authority above, the Corps contends that Congress ratified the permit scheme when it amended the FWPCA in 1978. Ratification is a judicial doctrine that holds, in broad terms, that reenactment or amendment of a statute with congressional knowledge or approval of a prior administrative interpretation of parts of that statute evinces congressional approval of that interpretation unless Congress indicates otherwise.⁹⁵ The courts use the doctrine in determining whether an agency's interpretation of a statute comports with the legislative intent.⁹⁶ Because the doctrine of ratification is a doctrine of judicial construction, it is susceptible to a wide range of interpretations and applications.

There are several variables that affect the application of the doctrine. Some courts seem satisfied with congressional knowledge of the administrative interpretations, but others require explicit approval.⁹⁷ Courts vary in the amount and type of evidence necessary to indicate that Congress did approve or had knowledge.⁹⁸ Moreover, because ratification is in large measure a matter of deference to agency interpretation,⁹⁹ courts may also scrutinize the circumstances surrounding the interpretation. More deference is given to a contemporaneous construction of an enabling statute,¹⁰⁰ and to an agency interpretation that comports with the apparent meaning of the statute.¹⁰¹

The Supreme Court enunciation of the doctrine that most nearly justifies the Corps' position is contained in *United States v. Rutherford*,¹⁰² in which terminally ill cancer patients sued to enjoin the FDA from prohibiting interstate sale of Laetrile, a drug the FDA believed to be unsafe or ineffective. Addressing the agency's interpretation that the statutory "safe and effective" requirement applied with equal force to drugs for terminally ill and nonterminally ill patients, the Court stated: "But once an agency's statutory construction has been 'fully brought to the attention of the public and Congress,' and the latter has not sought to alter that interpretation although it has

94. 123 CONG. REC. 38,968 (1977) (statement of Rep. Roberts), *reprinted in* 3 LEGISLATIVE HISTORY 1977 ACT, *supra* note 10, at 348.

95. *United States v. Board of Comm'rs*, 435 U.S. 110, 134-35 (1978); *see also* Agustí, *The Effect of Prior Judicial and Administrative Constructions on Codification of Pre-existing Federal Statutes: The Case of the Federal Securities Code*, 15 HARV. J. ON LEGIS. 367, 368-69, 384 (1978).

96. *See United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979).

97. *See infra* notes 169-75 and accompanying text.

98. *See infra* text accompanying notes 102-40.

99. *See Zuber v. Allen*, 396 U.S. 168, 192 (1969); *Wilderness Soc'y v. Morton*, 479 F.2d 842, 864-70 (D.C. Cir.) (en banc), *cert. denied*, 411 U.S. 917 (1973).

100. *Zuber*, 396 U.S. at 192; *see SEC v. Sloan*, 436 U.S. 103, 120 (1978).

101. *See infra* text accompanying notes 105 & 113.

102. 442 U.S. 544 (1979).

amended the statute in other respects, then presumably the legislative intent has been correctly discerned."¹⁰³

Two special factors in *Rutherford* were important to the result. First, evidence of congressional awareness of the agency's interpretation was not confined to the legislative history. The extreme public notoriety of the Laetrile controversy, including consideration by thirty-one states of laws allowing production and sale of Laetrile within their borders, convinced the Court that Congress surely would have directed a change in the administrative interpretation if it had so desired.¹⁰⁴ Second, the Court found that the administrative policy in question "comports with the plain language, history, and prophylactic purpose of the Act."¹⁰⁵

Another case in which the Supreme Court found the doctrine of congressional ratification dispositive was *United States v. Board of Commissioners*.¹⁰⁶ The Court there found more than mere knowledge of the issue by Congress; it held that Congress had actually approved the result in dispute. This was a case brought under the Voting Rights Act in which the Court found that the preclearance provisions of section five applied to all political subdivisions, regardless of whether the subdivision registers voters. This had been the Attorney General's longstanding interpretation.¹⁰⁷ The Court stated, "When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby."¹⁰⁸ The approval the Court found was largely implicit. It consisted of legislative history in which members of Congress made statements that assumed the interpretations in question. For example, one Congressman had stated that section five applies to Texas school districts and cities, both of which are political subdivisions that do not register voters.¹⁰⁹ The Court listed several similar statements, the cumulative result of which was a clear showing of approval.¹¹⁰

In a third case, however, the Supreme Court refused to find ratification, despite some evidence of congressional approval. In *SEC v. Sloan*¹¹¹ the Court held that even a committee report's recognition and approval of the Commission's interpretation, followed by amendment and reenactment of the statute, was not enough to indicate general congressional awareness or approval.¹¹² As in *Rutherford* and *Sheffield*, the particular circumstances of the approval were important to the Court's conclusion. The Court found the Commission's practice to be contrary to the overall structure and intent of the

103. *Id.* at 554 n.10.

104. *Id.*

105. *Id.* at 554.

106. 435 U.S. 110, 134 (1978).

107. *Id.* at 131.

108. *Id.* at 134.

109. *Id.*

110. *Id.* at 134-35.

111. 436 U.S. 103 (1978).

112. *Id.* at 119-20.

statute.¹¹³ Justice Brennan's concurrence pointed out that the SEC had been severely abusing the practice of "tacking" ten-day summary suspension periods, without apparent justification.¹¹⁴ Justice Rehnquist's opinion for the Court also pointed out that the interpretation of the SEC was not made contemporaneously with the statute's passage.¹¹⁵

The District of Columbia Circuit Court of Appeals has been more consistently reluctant to find congressional ratification.¹¹⁶ *Thompson v. Clifford*¹¹⁷ involved the question whether Army regulations denying national cemetery interment to felons comported with the Cemetery Act. Congress had passed amendments to the Cemetery Act twice during the twenty years the Secretary had been denying cemetery interment to felons. In addition, the felon exclusion rule had appeared in the Federal Register.¹¹⁸ Noting that the government "rel[ie]d on the canon of statutory construction that reenactment without change after a course of administrative interpretation is tantamount to legislative ratification of the interpretation,"¹¹⁹ the court stated that "[t]he rationale of that canon must be either that those in charge of the amendment are familiar with existing rulings, or that they mean to incorporate them."¹²⁰ The court refused to apply the canon because it found no evidence that the felon exclusion rule had come to the attention of Congress.¹²¹

In *Association of American Railroads v. ICC*¹²² the D.C. Circuit stated the rule as follows: "[T]o bring this 'doctrine of re-enactment' into play, Congress must not only have been made aware of the administrative interpretation, but must also have given some 'affirmative indication' of such intent [to ratify the administrative interpretation]."¹²³ The Interstate Commerce Commission had for thirty-five years interpreted the custom-of-the-trade provision of section 903(b) of the Interstate Commerce Act¹²⁴ to exempt from ICC regulation only the carriage by water of those commodities actually carried in bulk as of June 1, 1939.¹²⁵ The ICC vigorously supported elimination of the custom-of-the-trade provision before Congress in 1967 and 1973, and clearly made Congress aware of its consistent interpretation of the provision.¹²⁶ The court held that the refusal of Congress to change the provision expressed its satisfaction with

113. *Id.* at 118, 121.

114. *Id.* at 123-25 (Brennan, J., concurring).

115. *Id.* at 120; see also *Zuber*, 396 U.S. 168, 192 (1969).

116. Any action challenging the Corps' permits will most likely be brought in the District Court for the District of Columbia, simply because the environmental groups concerned are based there.

117. 408 F.2d 154 (D.C. Cir. 1968).

118. *Id.* at 164.

119. *Id.*

120. *Id.* (quoting *Fishgold v. Sullivan Drydock & Repair Corp.*, 154 F.2d 785, 790 (2d Cir.), *aff'd*, 328 U.S. 275 (1946)).

121. *Thompson*, 408 F.2d at 164.

122. 564 F.2d 486 (D.C. Cir. 1977).

123. *Id.* at 493.

124. 49 U.S.C. § 903(b) (1976) (repealed 1978). A nearly identical provision appears in the replacement statute. 49 U.S.C. § 10,542(a)(1) (Supp. V 1981).

125. 564 F.2d at 489.

126. *Id.* at 490-92.

the interpretation of the ICC.¹²⁷ Therefore, the ICC was precluded by the doctrine of reenactment or ratification from radically changing its interpretation in 1975.¹²⁸

The case most damaging to the Corps' position is *National Petroleum Refiners Association v. FTC*.¹²⁹ The question in that case was whether the FTC, under its governing statute, was empowered to promulgate substantive rules of business conduct. The FTC had long taken the position that it did not have such a power.¹³⁰ Congress was made fully aware of this interpretation, and passed a series of laws granting the FTC substantive rulemaking powers in limited, discrete areas, apparently on the premise that the earlier law withheld such authority.¹³¹ Nevertheless, the court refused to find a legislative intent to approve the FTC's construction. It took a dim view of the doctrine of implied congressional ratification:

Where there has been evidence of congressional knowledge of and acquiescence in a long-standing agency construction of its own powers, courts have occasionally concluded that the agency construction had received a *de facto* ratification by Congress. . . .

But *de facto* ratification through acquiescence in an administrative construction is not lightly attributed.¹³²

The Court raised some very practical and sensible concerns about quick application of the doctrine:

[I]t can be argued quite plausibly that imputing ratification in this fashion fails to take into account significant practical aspects of the legislative process: those legislators actually aware of the construction in question may not have been so concerned as to raise it to the attention of most members, and even in the event some legislators were deeply troubled by the construction, the press of other business was such as to keep the question on the "back burner."¹³³

Presumably, any challenge to the nationwide permit regulations would be brought in the District of Columbia Circuit.¹³⁴ Two recent cases from other circuits, however, are also relevant on the issue. *Moore v. Harris*¹³⁵ concerned the restrictive interpretation by the Secretary of Health, Education, and Welfare of the word "employed" under the black lung statute. Although one Senator mentioned the Secretary's interpretation during committee hearings prior to the 1972 amendments, the Fourth Circuit Court of Appeals was not convinced that Congress knew about the interpretation.¹³⁶ The 1972 amendments

127. *Id.* at 493-94.

128. *Id.* at 494.

129. 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

130. *Id.* at 693.

131. *Id.* at 695-96.

132. *Id.* at 695 (citations omitted).

133. *Id.* (footnotes omitted).

134. *See supra* note 116.

135. 623 F.2d 908 (4th Cir. 1980).

136. *Id.* at 920. A possibly misleading letter from the Secretary to Congress also weighed in the court's decision. *Id.* at 917, 920-21.

remedied some of the Secretary's misinterpretations, but "[w]hen Congress remedies some administrative misinterpretations of an existing statute, it does not act at the risk of barring courts from correcting other misinterpretations on which Congress does not then focus its attention."¹³⁷

In the second case, *United States v. Colahan*,¹³⁸ the Sixth Circuit Court of Appeals evinced less reluctance to find ratification, quoting from the Supreme Court's language in *United States v. Rutherford*.¹³⁹ In *Colahan*, however, the FDA had been interpreting the statute in question consistently for over forty years. In addition, Congress had been aware of the interpretation for the entire period and had revised the statute in 1951 and 1962.¹⁴⁰

To ascertain whether the Corps' nationwide permit program should be deemed to have been ratified by Congress, it is first necessary to gauge the extent to which the legislative history of the Clean Water Act of 1977 reflects the knowledge, approval, or intent to ratify that the cases require. The Senate history is most important because the version of section 404 eventually passed is substantially the same as the Senate version.¹⁴¹ In fact, Senator Muskie said in his floor statement on the provisions of the conference report dealing with permits for discharges of dredged or fill material that "the Senate Report and floor statements at the time of Senate passage are still adequate reflections of legislative intent with respect to this program."¹⁴²

Evidence that the Senate was unaware that permits were being issued for categories of waters is provided by the absence of reference to such permits when one would have expected reference to them. This occurs in several instances when various Senators or reports describe the Corps' program and mention permits for categories of activities, but not for categories of waters. The fifteen-member Senate Committee on Environment and Public Works, and Senator Baker individually, both mentioned the Corps' issuance of nationwide permits and listed a string of examples.¹⁴³ In these comments, however, mention of nationwide permits for categories of waters was

137. *Id.* at 921.

138. 635 F.2d 564 (6th Cir. 1980), *cert. denied*, 454 U.S. 831 (1981).

139. *Id.* at 568 (quoting *Rutherford*, 442 U.S. at 554 n.10); see *supra* note 102 and accompanying text.

140. 653 F.2d at 568.

141. See H.R. CONF. REP. NO. 830, 95th Cong., 1st Sess. 97-105 (1977) (comparing provisions in House bill, Senate amendment, and Conference substitute concerning permits for discharges of dredged or fill material), reprinted in 1977 U.S. CODE CONG. & AD. NEWS 4424, 4472-80, and in 3 LEGISLATIVE HISTORY 1977 ACT, *supra* note 10, at 185, 281-89. Compare Clean Water Act of 1977, Pub. L. No. 95-217, § 67, 91 Stat. 1566, 1600-06 (1977) (codified at 33 U.S.C. § 1344 (Supp. V 1981)) with H.R. 3199 (as reported), 95th Cong., 1st Sess. § 16, 123 CONG. REC. 10,420-21 (1977), reprinted in 4 LEGISLATIVE HISTORY 1977 ACT, *supra* note 10, at 1167, 1182-87 and S. 1952, 95th Cong., 1st Sess. § 49(a)-(b), reprinted in 4 LEGISLATIVE HISTORY 1977 ACT, *supra* note 10, at 555, 619-27.

142. 123 CONG. REC. 39,187 (1977) (statement of Sen. Muskie), reprinted in 3 LEGISLATIVE HISTORY 1977 ACT, *supra* note 10, at 470.

143. The following is contained in the Senate report submitted to accompany S. 1952:

The Corps during the last 2 years of administering the section 404 program has issued general permits on a regional and nationwide basis to eliminate the need for individual permits for a number of activities involving the discharge of dredged or fill material. These include streambank protection, stream alteration, backfill for bridges, erosion

conspicuously absent. The statements were directed at assuaging the fears of opponents who felt that the section 404 program would be too burdensome and who wanted the Corps' jurisdiction restricted to literally navigable waters.¹⁴⁴ Failure to mention nationwide permits for categories of waters, which would alleviate regulatory burdens and restrict the Corps' jurisdiction, must indicate either a lack of knowledge of the existence of such permits or an intent that such permits should not be authorized under the new bill.¹⁴⁵

There are two incidental instances in the Senate history when recognition of the Corps' regulations would have been expected. A letter from Stuart Eizenstat to Senator Dole mentioned the May 16, 1977 proposed regulations; it also stated that these regulations will "resolve many of the fears raised over unnecessary regulation in Phase III waters," without specifically mentioning the permits for categories of waters.¹⁴⁶ Second, Senator Bartlett, speaking in support of an amendment by Senator Bentsen, stated that rejecting the amendment would have the effect of ratifying "the court decision to expand the jurisdiction of the corps to all bodies of water, both public and private, in excess of 5 acres."¹⁴⁷

control, and, in at least one instance, a general permit for road fill and culverting on a statewide basis.

SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, CLEAN WATER ACT OF 1977, S. REP. NO. 370, 95th Cong., 1st Sess. 80, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 4326, 4405, and *in* 4 LEGISLATIVE HISTORY 1977 ACT, *supra* note 10, at 633, 713.

In the Senate debate on S. 952, Senator Baker, one of the prime proponents of the bill, said that the need to apply for "individual permits is eliminated except in those instances involving environmentally significant activities. General permits to authorize erosion control bulkhead and fill and for fills associated with highways and long roads have already been issued and the committee amendment allows this practice to continue." 123 CONG. REC. 26,718 (1977) (statement of Sen. Baker), *reprinted in* 4 LEGISLATIVE HISTORY 1977 ACT, *supra* note 10, at 922.

144. For example, the Senate report addressed regulatory burdens with respect to specific activities: "For general construction activities, general permits issued on a statewide or regionwide basis will greatly reduce administrative paperwork and delay." SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, CLEAN WATER ACT OF 1977, *supra* note 143.

Senator Bentsen spoke of a "quagmire of disruption," "bureaucratic entanglement," and how "[s]ection 404 . . . has become synonymous with Federal overregulation, overcontrol, [and] cumbersome bureaucratic procedures." 123 CONG. REC. 26,711 (1977) (statement of Sen. Bentsen), *reprinted in* 4 LEGISLATIVE HISTORY 1977 ACT, *supra* note 10, at 902-03.

145. See *infra* text accompanying note 148-49.

146. Letter from Stuart E. Eizenstat, Assistant to the President for Domestic Affairs & Policy, to Sen. Bob Dole (June 27, 1977), 123 CONG. REC. 26,723 (1977) (statement of Sen. Dole), *reprinted in* 4 LEGISLATIVE HISTORY 1977 ACT, *supra* note 10, at 934.

147. 123 CONG. REC. 26,726 (1977) (statement of Sen. Bartlett), *reprinted in* 4 LEGISLATIVE HISTORY 1977 ACT, *supra* note 10, at 943. Senator Tower, an ardent opponent of the committee bill, made this statement:

Those favoring the committee provision assume that the definition presently used by the corps will remain constant, and that, as a result, streams with a discharge of less than 5 cubic feet per second and standing bodies of water less than 10 acres will be exempt forever from permit requirements.

123 CONG. REC. 26,722 (1977) (statement of Sen. Tower), *reprinted in* 4 LEGISLATIVE HISTORY 1977 ACT, *supra* note 10, at 931. At first glance, this seems to be evidence that Senator Tower knew about the permits, but on close examination the statement is evidence of just the opposite. He speaks of the "definition" the Corps is using. Those definitions were dropped by the Corps in 1977 when it adopted the nationwide permits. Senator Tower's further statement that passage of the committee bill without the Bentsen amendment, see *infra* note 163, will mean regulation of "every . . . damp spot" in the nation, *id.*, shows apparent knowledge of Natural Resources Defense Council v. Callaway, 392 F. Supp. 685 (D.D.C. 1975), see *supra* notes 48-55 and accompany-

An interesting piece of legislative history is a brief exchange between Senators Muskie and Nunn during a Senate debate. Senator Muskie refused to give direct approval to the Corps' 1977 nationwide permits, but then seemingly reversed himself in his final sentence:

Mr. NUNN. . . .

Last month, the corps issued nationwide permits with respect to certain dredge and fill activities. This amendment contemplated such permits, and I assume that your committee thought the activities now permitted in the corps' nationwide permits are within the powers of the corps by these amendments [the Senate bill's version of eventual section 404(e) of the Clean Water Act].

Mr. MUSKIE. The committee did not specifically endorse the corps' nationwide permit regulations already issued. The content of such general nationwide permits would be a matter of agency interpretation of the language of this amendment. The bill does, however, grant authority for nationwide permits as contemplated in the recent corps regulations.¹⁴⁸

The first and last sentences of Senator Muskie's statement in isolation seem contradictory. The middle sentence may be the key. Taken together, Senator Muskie's first two sentences make it clear that prior practice is of no consequence; the Corps is to interpret the new law and, of course, this interpretation is subject to court review. The last sentence is simply a generic statement that nationwide permits are permitted under the new law. There is no evidence that either Senator Muskie or Senator Nunn knew that any of the 1977 permits were for categories of waters. Senator Nunn's question concerning "permits with respect to certain dredge and fill *activities*" adds to the significance of Senator Muskie's choice of words.

The history in the House of Representatives is relevant insofar as it pertains to the conference bill; the House bill contained a very different version of section 404, and was rejected in conference. The House legislative history shows one instance of knowledge of the permits in question. This is a statement made by Congressman Roberts during the House debate following his submission of the House conference report on H.R. 3199. His statement describes rather accurately, without elaboration, the July 19, 1977, nationwide permits.¹⁴⁹ Although his statement indicates an awareness of the nationwide

ing text, but is further evidence of his ignorance of the nationwide permits (or his assumption that the permits would be illegal after passage of the bill). No one corrected the Senator.

148. 123 CONG. REC. 26,771 (1977) (statements of Sens. Nunn & Muskie), *reprinted in* 4 LEGISLATIVE HISTORY 1977 ACT, *supra* note 10, at 1054. *See also infra* note 151.

149. Congressman Roberts was stating "for the record the understandings and intentions of the House conferees with regard to some of the matters agreed to in the conference with the Senate." 123 CONG. REC. 38,952 (1977) (statement of Rep. Roberts), *reprinted in* 3 LEGISLATIVE HISTORY 1977 ACT, *supra* note 10, at 305. He described the permits in the following way:

On July 19, 1977, the Corps of Engineers promulgated revised regulations implementing section 404. . . . Among other things these regulations permitted on a nationwide basis the discharge of dredged or fill material into nontidal rivers and streams above the headwaters and lakes that are less than 10 acres Finally, the regulations provide for the issuance of general permits for activities which are substantially similar

permits, it evidences no approval of those permits.

To briefly summarize the extent of congressional awareness and approval of the nationwide permit scheme, there is some indication that the House conferees and Congressman Roberts knew about the permits for categories of waters.¹⁵⁰ There is, however, no evidence of general knowledge among other members of either body. These permits were never a topic of discussion in the extensive debate over Corps jurisdiction and burdensome regulations. There is certainly no persuasive evidence of approval of these permits.¹⁵¹

On the other side of the question, there is the clear evidence of congressional intent to protect all the nation's waters, specifically wetlands.¹⁵² As the Senate report on S. 952 said, "[T]he committee amendment intends to assure continued protection of all the Nation's waters"¹⁵³ Senator Baker concluded his remarks in the Senate debate by "emphasiz[ing] that the protection of water quality must encompass the protection of the interior wetlands and smaller streams."¹⁵⁴ Senator Hart challenged the body to pass the conference version with these words:

The Congress can abandon the national interest. The Congress can permit activities of a dredge-and-fill nature to go forward on those small streams, marshes, wetlands, and swamps which will make their way into the bigger waterways of this country and have a tremendous adverse effect Or we can establish a program of the sort the committee has established, which will protect all of those water systems¹⁵⁵

Senators extolled the virtues of wetlands in extensive passages which recognized that destruction has been extensive and must be moderated, and that

in nature, that cause only minimal adverse environmental impact . . . separately, and . . . cumulative[ly].

Id. at 38,968, reprinted in 3 LEGISLATIVE HISTORY 1977 ACT, *supra* note 10, at 348.

150. See *supra* note 149 and accompanying text. More likely, Congressman Murphy's statement concerning the House Conference report shows only that whoever wrote the lengthy statement knew of the permits.

151. The Corps' nationwide permits were promulgated while Congress was considering the FWPCA amendments in the summer of 1977, and after both the House and Senate had published their versions of the amended bill. This fact may be important in assessing what knowledge and intent Congress possessed when passing § 404(e). First, the promulgation of the nationwide permits in the middle of consideration of the amendments is likely to have escaped the notice of most members. The 1977 amendments were far-reaching and complex; section 404 was just one small part and the nationwide permit provision an almost obscure part. A second possibility is that the writers of the bill, when and if they learned of the Corps' new complication, were unwilling to reopen § 404 at such a late stage and risk disturbing the delicate balance of compromise that had been achieved in the bill. See *supra* note 144 and accompanying text. This may explain Senator Muskie's evasive answer to Senator Nunn's question about the Corps' permits. See *supra* text accompanying note 148.

152. Since the doctrine of ratification (reenactment) is just one method a court may use in ascertaining legislative intent, see *Sloan*, 436 U.S. at 120; *Zuber*, 396 U.S. at 192, a look at other indicators of legislative intent is relevant.

153. SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, CLEAN WATER ACT OF 1977, *supra* note 143.

154. 123 CONG. REC. 26,719 (1977) (statement of Sen. Baker), reprinted in 4 LEGISLATIVE HISTORY 1977 ACT, *supra* note 10, at 923.

155. 123 CONG. REC. 26,713 (1977) (statement of Sen. Hart), reprinted in 4 LEGISLATIVE HISTORY 1977 ACT, *supra* note 10, at 908.

section 404 was designed to facilitate the moderation.¹⁵⁶ Senator Muskie ended his remarks by stating, "[T]he unregulated destruction of these areas is a matter which needs to be corrected and which implementation of section 404 has attempted to achieve."¹⁵⁷ In stark contrast to these expressions of concern, the Corps' nationwide permits remove this protection from a substantial portion of the nation's wetlands.

A second important point emerges from the legislative history. In all the cases on the doctrine of ratification abstracted above,¹⁵⁸ Congress had amended the statute in question without changing the section that was the subject of the litigated interpretation. But in the case of section 404(e), Congress has specifically set forth a nationwide permit program, with quite specific requirements, where only the challenged administrative regulations had existed before. As indicated by Senator Muskie,¹⁵⁹ the amendment created new law for the Corps to interpret in granting nationwide permits; what the Corps had done before became irrelevant. Senator Baker said that "[t]he conferees have resolved the long-standing controversy that has engulfed the section 404 permit program."¹⁶⁰ Senator Randolph, also speaking of the eventually adopted conference report, noted the "complex regulatory procedure set up by the corps" in response to *Natural Resources Defense Council v. Callaway*, and announced the perceived need for "a new statement of congressional intent."¹⁶¹ He went on to say, "I believe H.R. 3199, in its present form, provides that clarification and necessary direction. It recognizes that there must be no basic gaps in the program for protection of wetlands and waterways from contamination"¹⁶²

Congress had the opportunity to approve an amendment which would have had an effect similar to that of the Corps' nationwide permits for categories of waters. This was the Bentsen amendment, which would have limited the Corps' jurisdiction to actually navigable waters and their adjacent wetlands.¹⁶³ The Senate defeated the amendment. Similarly, the portion of the

156. 123 CONG. REC. 26,701-02, 26,713, 26,716-17, 26,718-19 (1977) (statements of Sens. Muskie, Stafford, Hart, Chafee & Baker) *reprinted in* 4 LEGISLATIVE HISTORY 1977 ACT, *supra* note 10, at 869, 881-82, 908, 916-20, 920-23.

157. 123 CONG. REC. 26,697 (1977) (statement of Sen. Muskie), *reprinted in* 4 LEGISLATIVE HISTORY 1977 ACT, *supra* note 10, at 869.

158. See *supra* text accompanying notes 102-40.

159. See *supra* text accompanying note 148.

160. 123 CONG. REC. 39,209 (1977) (statement of Sen. Baker), *reprinted in* 3 LEGISLATIVE HISTORY 1977 ACT, *supra* note 10, at 523.

161. 123 CONG. REC. 39,196 (1977) (statement of Sen. Randolph), *reprinted in* 3 LEGISLATIVE HISTORY 1977 ACT, *supra* note 10, at 494.

162. *Id.*

163. 123 CONG. REC. 26,710-11 (1977) (statement of Sen. Bentsen), *reprinted in* 4 LEGISLATIVE HISTORY 1977 ACT, *supra* note 10, at 901-02. The proposed amendment no. 726 provided in pertinent part:

Such section 404 is further amended by adding at the end thereof the following new subsections:

"(d)(1) The term 'navigable waters' as used in this section shall mean all waters which presently are used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce

House bill that would have severely limited the scope of section 404 was replaced in conference committee.¹⁶⁴ The Conference bill passed by both houses provides for complete exemptions for normal farming and agricultural practices,¹⁶⁵ because complaints from farmers about regulation of petty activities has been a primary source of congressional dissatisfaction with the old version of section 404.¹⁶⁶ In short, Congress had opportunities to do what the Corps is trying to do administratively; it rejected them and dealt with the issues as it saw fit.

In conclusion, there is evidence that House conferees may have known of the Corps' nationwide permits for categories of waters.¹⁶⁷ Perhaps knowledge can be imputed to others from this, since the description in the House debate was printed in the *Congressional Record*.¹⁶⁸ Two of the ratification cases¹⁶⁹ surveyed found knowledge, as opposed to approval, sufficient for congressional ratification. But in *Rutherford*, in which the knowledge standard was followed,¹⁷⁰ the Supreme Court stated that the agency's interpretation must be "fully brought to the attention of public and Congress."¹⁷¹ In addition, although the Court found that this condition had been satisfied, it was dealing with the issue of the FDA's treatment of Laetrile, one of the most notorious instances of agency action in recent history. Section 404 of the FWPCA does not approach having the notoriety of Laetrile. The Sixth Circuit followed *Rutherford* in an area involving less publicity, but involving consistent interpretation by the FDA for forty years.¹⁷² In no case has the District of Columbia Circuit found knowledge sufficient.

There is no evidence of congressional approval in the legislative history, but approval is the minimum evidence required in many of the ratification cases.¹⁷³ In fact, in *Sloan*¹⁷⁴ the Supreme Court found evidence of approval

“(e) Except as provided in subsection (f) of this section, the discharge of dredged or fill material in waters other than navigable waters and in wetlands other than adjacent wetlands is not prohibited by or otherwise subject to regulation under this Act”

164. H.R. 3199 (as introduced), 95th Cong., 1st Sess. § 16 (1977), reprinted in 4 LEGISLATIVE HISTORY 1977 ACT, *supra* note 10, at 1143, 1157-61; see *supra* note 141; see also *supra* note 163 (the relevant portions of H.R. 3199 (as introduced) are identical to the quoted portions of the Bentsen amendment).

165. 33 U.S.C. § 1344(f) (Supp. V 1981).

166. 123 CONG. REC. 26,712-13 (1977) (statement of Sen. Hart), reprinted in 4 LEGISLATIVE HISTORY 1977 ACT, *supra* note 10, at 907-08.

167. See *supra* notes 147-50 and accompanying text.

168. See *supra* note 149.

169. *United States v. Rutherford*, 442 U.S. 544 (1979); *United States v. Colahan*, 635 F.2d 564 (6th Cir. 1980).

170. See *supra* note 102 and accompanying text.

171. 442 U.S. at 554 n.10.

172. *United States v. Colahan*, 635 F.2d 564 (6th Cir. 1980); see *supra* text accompanying notes 138-40.

173. See *SEC v. Sloan*, 436 U.S. 103 (1978); *United States v. Board of Comm'rs*, 435 U.S. 110 (1978); *Association of Am. R.R.s. v. ICC*, 564 F.2d 486 (D.C. Cir. 1977); *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). Additionally, intent to ratify was the alternative requirement in *Thompson v. Clifford*, 408 F.2d 154 (D.C. Cir. 1968), see *supra* text accompanying note 120.

and still refused to find ratification. Moreover, the District of Columbia Circuit Court of Appeals has demonstrated its disenchantment with the doctrine itself, going beyond a mere requirement of congressional approval.¹⁷⁵

Various additional facts and circumstances that were so crucial to the ratification decisions discussed in this note are inconsistent with the Corps' interpretation as well. Whereas the courts are more likely to find ratification of longstanding interpretations,¹⁷⁶ the Corps' interpretation was promulgated only a few months before passage of the 1977 amendments.¹⁷⁷ Courts also give more weight to an administrative interpretation when the agency "contemporaneously interpreted the statute upon being charged with its implementation in the first instance."¹⁷⁸ This extra weight is not available to the Corps; the nationwide permits were published before section 404(e) was ever passed. In fact, this timing is consistent with evidence that Congress intended to supplant the Corps' nationwide permits with new policy of its own.¹⁷⁹

Finally, on the most basic level, the Corps' interpretation is contrary to the plain meaning of the statute. The Supreme Court's approval of the agency interpretation in *Rutherford* was based in large part on the interpretation's consistent construction with the statutory language.¹⁸⁰ And a finding that the agency's interpretation was contrary to the overall structure and intent of the statute was an important factor in the Court's disapproval of an interpretation in *Sloan*.¹⁸¹

All these considerations weigh heavily against the Corps' claim of congressional ratification.¹⁸² As the District of Columbia Circuit has stated, a court "has a duty to ignore [an administrative interpretation] should it deter-

174. 436 U.S. 103 (1978). See *supra* text accompanying notes 111-13.

175. See *supra* text accompanying notes 129-33; see also *supra* text accompanying notes 116-28.

176. See, e.g., *United States v. Board of Comm'rs*, 435 U.S. 110 (1978) (longstanding); *United States v. Colahan*, 635 F.2d 564 (6th Cir. 1980) (40 years); *Thompson v. Clifford*, 408 F.2d 154 (D.C. Cir. 1968) (20 years).

177. See *supra* notes 69 & 151 and accompanying text.

178. *Osborn v. American Ass'n of Retired Persons*, 660 F.2d 740, 746 (9th Cir. 1981); *Sloan*, 436 U.S. at 120; see *Zuber*, 396 U.S. at 192.

179. See *supra* text accompanying notes 148 & 152-66.

180. 442 U.S. 544, 554 (1979).

181. 436 U.S. 103, 118, 121 (1978).

182. Another strong factor in the Supreme Court's *Sloan* decision was agency abuse of a statute. 436 U.S. at 109-10; see also *id.* at 123-25 (Brennan, J., concurring). While the Corps may or may not have abused its authority, there is certainly strong evidence of Corps bad faith with regard to § 404. Congressional intent had always been to define navigable waters as broadly as possible. See *supra* note 53. Yet the Corps clung to its narrow definition until forced to relinquish it by court order. Even under court order, the Corps found a way to restrict its effective jurisdiction: nationwide permits for categories of waters. Moreover, the Corps may have evinced an attitude of bad faith when it issued its May 6, 1975 press release containing an unfavorable and inflammatory description of the § 404 program. HOUSE COMM. ON PUBLIC WORKS AND TRANSPORTATION, FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1977, H.R. REP. NO. 139, 95th Cong., 1st Sess. — app. V (1977) (additional views of Reps. Edgar & Myers) ("Federal permits may be required by the rancher who wants to enlarge his stock pond, or the farmer who wants to deepen an irrigation ditch or plow a field, or the mountaineer who wants to protect his land against stream erosion"), reprinted in 4 LEGISLATIVE HISTORY 1977 ACT, *supra* note 10, at 1195, 1263 app. V. The release was described by two Congressmen as "infamous" and as containing "very dubious" descriptions of the § 404 program resulting in a grassroots lobbying effort.

mine that it is 'in conflict with the plain intent of the legislature.'"¹⁸³ Any court asked to uphold the Corps' nationwide permits for categories of waters has just such a duty.

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H.R. REP. NO. 139, 95th Cong., 1st Sess. — (1977) (additional views of Reps. Edgar & Myers), reprinted in 4 LEGISLATIVE HISTORY 1977 ACT, *supra* note 10, at 1195, 1248.

183. *Wilderness Soc'y v. Morton*, 479 F.2d 842, 865 (D.C. Cir.) (en banc) (quoting *Brotherhood of R.R. Trainmen v. Akron & Barberton Belt R.R.*, 385 F.2d 581, 612 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 923 (1968)), *cert. denied*, 411 U.S. 917 (1973).