

AN AFFIRMATION OF SECTION 404
JURISDICTION OVER WETLANDS: *UNITED
STATES v. RIVERSIDE BAYVIEW
HOMES, INC.*

The preservation of wetlands is critical to the ecological maintenance and stability of the nation's aquatic system.¹ Federal initiatives to prevent the destruction of wetlands have generally focused on both Section 404 of the Clean Water Act (the Act)² and the Army Corps of

1. Wetlands are defined as "lands where saturation with water is the dominant factor determining the nature of soil development and the types of plant and animal communities living in the soil and on its surface." FISH AND WILDLIFE SERVICE, U.S. DEPT. OF THE INTERIOR, CLASSIFICATION OF WETLANDS AND DEEPWATER HABITATS OF THE UNITED STATES 3 (1979). Wetlands include areas such as salt marshes, freshwater marshes, swamps, bogs and similar lands. See generally COUNCIL ON ENVIRONMENTAL QUALITY, OUR NATION'S WETLANDS: AN INTERAGENCY TASK FORCE REPORT 7-14 (1978) (general discussion of current wetland policies and concerns) [hereinafter cited as COUNCIL ON ENVIRONMENTAL QUALITY].

Wetlands are important to the environment because of the valuable ecological services they provide. These services include food chain production (providing general habitat for aquatic and land species), water purification (providing natural water filtration by removing sediment and silt), groundwater recharge (primarily where surface and ground water are interconnected), flood control (providing storage areas for precipitation runoff), and land conservation (shielding areas from wave actions, erosion, or storm damage). *Id.* at 19-28. See also 42 Fed. Reg. 37,136-37 (1977) (codified at 33 C.F.R. § 320.4 (1985)). The monetary worth of the water purification and flood control services alone is estimated at over \$140 billion. 123 CONG. REC. 38,994 (1977) (remarks of Rep. Lehman). For further discussion concerning the value of wetlands, see generally 123 CONG. REC. 26,710-29 (1977), reprinted in CONGRESSIONAL RESEARCH SERVICE, 95TH CONG., 1ST SESS., 4 LEGISLATIVE HISTORY OF THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1977 at 869 (Comm. Print 1977) [hereinafter cited as LEGISLATIVE HISTORY]; COUNCIL ON ENVIRONMENTAL QUALITY at 28-29.

2. 33 U.S.C. § 1344 (1982). This section empowers the Secretary of the Army to issue permits for the discharge of dredged or fill material into navigable waters at sites over which the Army Corps of Engineers has regulatory jurisdiction.

If an area falls within the Corps of Engineers' regulatory jurisdiction, the landowner must apply for a permit before proceeding with the disposal of fill material. *Id.* The Corps of Engineers will not issue a permit if it determines that the discharge of landfill will have an unacceptable adverse effect on the ecological and recreational functions of the area. *Id.*

Engineers' regulations implementing Section 404.³ Federal district and appellate courts have interpreted Section 404 to include a variety of waters, including those denominated as wetlands.⁴ In *United States v. Riverside Bayview Homes, Inc.*,⁵ the United States Supreme Court held that the Corps of Engineers' Section 404 program, regulating the discharge of material into "navigable waters," is valid because it protects wetlands in accordance with the standards of the Clean Water Act.⁶

In *Riverside*, Riverside Corporation sought to develop an eighty acre tract of undeveloped suburban land.⁷ Before receiving approval of their Section 404 landfill permit application by the Corps of Engineers, Riverside commenced the landfill operation. Subsequently, the Corps of Engineers refused to approve the application and issued Riverside a cease and desist order enjoining further deposit of landfill.⁸ In addition, the Corps of Engineers requested the United States Attorney's office to bring enforcement proceedings against Riverside to insure

3. 33 C.F.R. §§ 320, 323, 325 (1985). These regulations, by definition, prescribe "policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of application for . . . permits to authorize the discharge of dredge or fill material into waters of the United States pursuant to Section 404 of the Clean Water Act." 33 C.F.R. § 323.1 (1985).

The Environmental Protection Agency (EPA) has concurrent regulatory jurisdiction with the Corps of Engineers to administrate dredge and fill permits. 40 C.F.R. § 230.1 (1985). The EPA's primary responsibilities include making official wetlands determinations and overseeing the permit programs of states. *Id.* See *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 911 (5th Cir. 1983). See *infra* notes 28-53 and accompanying text for a historical discussion of the current wetlands definition in § 323.

4. See, e.g., *United States v. Tilton*, 705 F.2d 429 (11th Cir. 1983) (swamps); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978) (tidal marshlands); *Weiszmann v. District Engineer*, 526 F.2d 1302 (5th Cir. 1976) (man-made canals); *Buttrey v. United States*, 573 F. Supp. 283 (E.D. La. 1983) (bayous); *Conservation Council v. Constanzo*, 398 F. Supp. 653 (E.D.N.C.), *aff'd*, 528 F.2d 250 (4th Cir. 1975) (salt meadows); *P.F.Z. Properties, Inc. v. Train*, 393 F. Supp. 1370 (D.C. 1975) (mangrove wetlands); *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181 (D. Ariz. 1975) (normally dry arroyos); *United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974) (mangrove wetlands and man-made canals).

5. 106 S. Ct. 455 (1985).

6. *Id.* at 463. The Court found that a narrow reading of the Corps of Engineers' regulatory jurisdiction over wetlands was not necessary to avoid a taking without just compensation in violation of the fifth amendment. *Id.* at 458-60. See *infra* notes 65-70, 73-78 and accompanying text for a discussion of the taking issue.

7. See *United States v. Riverside Bayview Homes, Inc.*, 729 F.2d 391, 392 (6th Cir. 1984), *rev'd*, 106 S. Ct. 455 (1985).

8. *Id.* at 393. The Corps of Engineers concluded that "the existing fill has had an adverse impact on the wetland and its function as a flood-water storage area, water quality enhancement basin and fish and wildlife habitat." Brief for the United States at

compliance with the order.⁹ At the hearing, Riverside contended that the property at issue did not constitute wetlands under the Corps of Engineers' regulations,¹⁰ and thus did not fall under the Corps' Section 404 jurisdiction.¹¹ The District Court for the Eastern District of Michigan rejected Riverside's argument, holding that the land did in fact constitute a wetlands, and issued a permanent injunction prohibiting Riverside from further discharge of landfill.¹² On appeal, the Court of Appeals for the Sixth Circuit remanded the case for further proceedings in accordance with the Corps of Engineers' 1977 promulgation of the final wetlands regulations.¹³ On remand, the district court reaffirmed its issuance of the permanent injunction.¹⁴ Riverside again appealed the decision to the Sixth Circuit,¹⁵ where the court concluded

10-11 n.8, *United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 455 (1985) (No. 84-701) [hereinafter referred to as *Brief for the United States*].

Upon discovery of unauthorized filling activity, the Corps of Engineers may issue an order prohibiting further work. 33 C.F.R. § 326.2(a) (1985).

9. 729 F.2d at 393. The Corps of Engineers is authorized to refer cases involving the unauthorized discharge of fill material into navigable waters to the United States Attorney's office for enforcement. 33 C.F.R. § 326.4(c) (1985).

10. See *infra* note 46 and accompanying text for pertinent text and discussion of the regulation.

11. *United States v. Riverside Bayview Homes, Inc.*, 7 ENVTL. L. REP. (ENVTL. L. INST.) 20,445 (E.D. Mich. 1977). Riverside presented testimony in the district court alleging that the contiguous navigable waters did not contribute to the presence of wetland vegetation. *Id.* The district court, applying the relevant wetlands regulation, found that the land in question was rarely if ever inundated, but exhibited a history of periodic inundation sufficient to invoke a wetland classification. *Id.* at 20,446-47. See *infra* note 46 for pertinent text of the regulation applied by the district court.

12. 7 ENVTL. L. REP. (ENVTL. L. INST.) at 20,445. Judge Kennedy stated that, in fact, "there have been periods in only 14 of the 80 years of recorded lake levels in which the monthly mean inundated the property,—or, 17 percent of the time. Some of the higher elevations have been inundated only during the last recent unprecedented high water or have never been inundated." *Id.* at 20,446.

The district court then held that "periodic inundation," for the purposes of the definition, was at least five times in the past eighty years. This left approximately 80% of the land protected as a wetland. *Id.* For a general discussion of the district court decision, see Jackson & Armitage, *United States v. Riverside Bayview Homes: A Questionable Interpretation of § 404*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 10,336, 10,367 (1984).

13. 615 F.2d 1363 (6th Cir. 1980). These regulations came into effect while the district court was reviewing the case. For pertinent text of the regulations and discussion, see *infra* notes 48-52 and accompanying text.

14. 729 F.2d at 394, 396. Judge Gilmore found the new regulation "broader than its predecessor," therefore including all wetlands so classified under the prior regulations. *Id.*

15. *Id.* at 392.

that the district court had improperly applied the new regulations. The appellate court, therefore, vacated the injunction and dismissed the government's claim.¹⁶ On writ of certiorari from Riverside,¹⁷ the Supreme Court reversed, holding that the district court had properly concluded that the property was within the Army Corps of Engineers' jurisdiction and therefore subject to the protection of the wetlands regulations.¹⁸

By passing the Clean Water Act, Congress intended "to restore and maintain the chemical, physical and biological integrity of the nation's waters."¹⁹ The Act provides a detailed program for the control and eventual elimination of water pollution.²⁰ The relevant legislative history reveals that Congress intended the Act's provisions to be interpreted as broadly as possible under the Constitution.²¹

16. *Id.* at 391. The court of appeals excluded from the Corps of Engineers' regulatory program wetlands that were not flooded by adjacent navigable waters at a frequency sufficient to support the growth of aquatic vegetation. *Id.* at 398. The court stated first that it is "certainly not clear from the statute" that the Corps of Engineers' jurisdiction should extend beyond navigable-in-fact waters to inland properties such as freshwater wetlands that are rarely inundated. *Id.* at 397. In addition, the court asserted that a narrow interpretation of the wetlands regulations was necessary to avoid an unconstitutional taking of private property under the fifth amendment. *Id.* at 398.

17. 105 S. Ct. 1166 (1985).

18. 106 S. Ct. 455 (1985).

19. 33 U.S.C. § 1251(a) (1982). In 1972, Congress passed amendments to the Federal Water Pollution Control Act (FWPCA). These amendments established the first federal program for water pollution control. Brief for the United States at 3 n.1. Congress changed the title of the FWPCA to the Clean Water Act in 1977. 33 U.S.C. § 1251 (endnote entitled "Short Title of 1977 Amendment").

20. *See Train v. City of New York*, 420 U.S. 35, 37 (1975) (Clean Water Act provides "a comprehensive program for controlling and abating water pollution"); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 372-73 (10th Cir. 1979).

21. The Report of the Senate Subcommittee on Public Works submitted with S.2770 (the 1972 Clean Water Act Amendments) stated: "Through a narrow interpretation of the definition of interstate waters the implementation (of the) 1965 (FWPCA) was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 414, 92nd Cong., 2d Sess. 77 (1972); 2 LEGISLATIVE HISTORY at 1495.

The Joint Explanatory Statement of the Committee of Conference noted: "[T]he conferees fully intend 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." Conference Report, S. Rep. No. 1236, 92nd Cong., 2d Sess. 144, reprinted in 118 CONG. REC. 33,756-57 (1972); 1 LEGISLATIVE HISTORY at 327.

Finally, in presenting the conference version of S.2770 to the House of Representatives, Representative Dingell voiced the Committee's intention in defining the scope of Section 404: "[T]he conference bill defines the term 'navigable waters' broadly for

Congress enacted the Act in exercise of its commerce clause power.²² Section 301(a)²³ curtails the discharge of pollutants into the nation's waters by allowing only those discharges complying with Section 404 permit procedures.²⁴ Because Congress did not explicitly in-

water quality purposes. It means all 'waters of the United States' in a geographical sense. It does not mean 'navigable waters of the United States' in the technical sense as we sometimes see in some laws." 118 CONG. REC. 33,756 (1972); 1 LEGISLATIVE HISTORY at 250. *See also* Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 914-16 (5th Cir. 1983); Leslie Salt Co. v. Froehlke, 578 F.2d 742, 754-55 & n.15 (9th Cir. 1978); United States v. Ashland Oil and Transp. Co., 504 F.2d 1317, 1325-29 (6th Cir. 1974); United States v. Holland, 373 F. Supp. 665, 671-73 (M.D. Fla. 1974); *see generally* Blumm, *The Clean Water Act's Section 404 Permit Program Enters Its Adolescence: An Institutional and Programmatic Perspective*, 8 ECOLOGY L.Q. 409 (1980) (historical scope of Section 404 jurisdiction).

22. "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states. . . ." U.S. CONST. art. I, § 8, cl. 3. *See* Gibbons v. Odgen, 22 U.S. 1 (1824) (judicial affirmation of the scope of Congress' power under the commerce clause). Congress is empowered to regulate water pollution under the commerce clause because pollution affects the health and welfare of the nation. *See* Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 282 (1981); Wickard v. Filburn, 317 U.S. 111 (1942).

When Congress passed the Clean Water Act, Representative Dingell of the Committee of Conference asserted that "there is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the states. . . ." 118 CONG. REC. 33,756 (1972); 1 LEGISLATIVE HISTORY at 250. *See generally* United States v. Ashland Oil and Transp. Co., 504 F.2d 1317, 1323-29 (6th Cir. 1974) (tracing the development of Congress' constitutional power to regulate the nation's waterways under the commerce clause).

Cases decided under the authority of § 404 of the Clean Water Act affirm this constitutional grant of power. *See, e.g.,* Utah v. Marsh, 740 F.2d 799, 804 (10th Cir. 1984) (CWA jurisdiction reaches intrastate lake that supports no interstate navigation); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 916 (5th Cir. 1983) (CWA grant of jurisdiction not an unlawful delegation of legislative power); United States v. Byrd, 609 F.2d 1204, 1209-10 (7th Cir. 1979) (CWA grants the Corps of Engineers authority to regulate activities on an inland lake used by interstate travellers for recreation); Leslie Salt Co. v. Froehlke, 578 F.2d 742, 755 (9th Cir. 1978) (CWA jurisdiction under the commerce clause broad enough to reach diked evaporation ponds); Buttrey v. United States, 573 F. Supp. 283, 295 (E.D. La. 1983) (proper interpretation of "navigability" under the commerce clause); United States v. Phelps Dodge Corp., 391 F. Supp. 1181, 1187 (D. Ariz. 1975) (rejects the argument that CWA's definition of "navigable waters" is void for vagueness under the fifth amendment); United States v. Holland, 373 F. Supp. 665, 671-73 (M.D. Fla. 1974) (CWA jurisdiction over wetland "reasonably related to" interstate commerce).

23. 33 U.S.C. § 1311(a) (1982).

24. Section 402 of the Act also curtails the discharge of pollutants into the nation's waters. 33 U.S.C. § 1342 (1982). This section regulates industrial and municipal point source discharges of pollutants into the nation's waters. 42 Fed. Reg. 37,123 (1977).

clude wetlands within the Act's language,²⁵ enforcement of the Act over wetlands is left to the Corps of Engineers' regulatory jurisdiction over "navigable waters" as defined in Section 404.²⁶

The first regulations that defined "navigable waters" under Section 404²⁷ included those waters regulated by the Corps of Engineers in accordance with Section 10 of the Rivers and Harbors Act of 1899.²⁸ In addition, the Corps of Engineers exerted jurisdiction over all waters

25. Section 404 protects against the discharge of pollutants into "navigable waters." 33 U.S.C. § 1344(a) (1982). The Clean Water Act defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (1982).

26. See *infra* notes 48-51 and accompanying text for the Corps of Engineers' current regulatory definition of "waters of the United States."

In 1977, Congress rejected an amendment to § 404 that would have limited the scope of the Corps of Engineers' statutory jurisdiction over "navigable waters" to that of the Rivers and Harbors Act, thereby including waters that were in fact navigable, plus adjacent or contiguous wetlands. See H.R. 3199, 95th Cong., 1st Sess. § 16 (1977). The defeat of this amendment evidenced Congress' intent to include wetlands within § 404 jurisdiction. See, e.g., *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 914-16 (5th Cir. 1983); *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 626 (8th Cir. 1979); 123 CONG. REC. 10,426-32, 26,710-29 (1977), (congressional debates over proposed 1977 amendments). See also Jackson & Armitage, *supra* note 12, at 10,368-69 (short discussion of the 1977 debates to amend § 404); Caplin, *Is Congress Protecting Our Waters? The Controversy Over Section 404, Federal Water Pollution Control Act Amendments of 1972*, 31 MIAMI L. REV. 445 (1977) (attempts to amend § 404 inconsistent with congressional objective to maintain broad jurisdiction to control pollution at its source).

Proposed amendments to the Clean Water Act would restrict federal jurisdiction under § 404 to navigable-in-fact waters such as those currently protected by § 10 of the Rivers and Harbors Act of 1899. See *infra* note 28. Opposition to these amendments expressed concerns similar to those voiced in 1977: "The restrictive definition of navigable waters in S.777 would remove from federal protection 85 percent of the nation's wetlands, or 126 million of the 148 million acres currently covered. . . ." *Clean Water Act Amendments of 1982: Hearings on S. 777 and S. 2652 Before the Subcomm. on Environmental Pollution of the Comm. on Environment and Public Works*, 97th Cong., 2d Sess. 1045-46 (1982) (statement of Jay D. Hair, National Wildlife Federation).

27. 33 C.F.R. § 209.120(d)(1) (1974). See *infra* notes 29-30 and accompanying text for the scope of the Corps of Engineers' regulatory jurisdiction under this regulation.

28. 33 U.S.C. § 403 (1982). Section 10 of the Rivers and Harbors Act requires authorization of the Secretary of the Army before any excavation or construction can take place in "navigable waters." *Id.* The Corps of Engineers initially used the same definition of "navigable waters" in administering both § 404 and the Rivers and Harbors Act. Brief for the United States, *supra* note 8, at 4. The current definition of "navigable waters" for purposes of the Rivers and Harbors Act, however, had remained nearly identical to the initial definition. See 33 C.F.R. § 329.4 (1984). The present dichotomy between the § 404 and the § 10 regulatory definitions of "navigable waters" exists because the Clean Water Act focuses primarily on water pollution control, thereby necessitating federal jurisdiction over point sources of pollution. The Rivers and Harbors Act, however, focuses on the protection and development of navigation.

subject to past, present, or future use in interstate or foreign commerce,²⁹ and all waters subject to the ebb and flow of the tide.³⁰ Freshwater and coastal wetlands protected under this definition included only those lying below the ordinary and mean high water mark, respectively.³¹ These regulations, however, proved insufficient to effectively implement the Clean Water Act.

In *United States v. Holland*,³² the District Court for the Middle District of Florida made the first judicial determination that Section 404 protected wetlands above the high water mark. Relying on both the purpose and the legislative history of the Clean Water Act,³³ the district court held that land periodically inundated by tidal waters constituted "navigable waters."³⁴ The court noted that for the Act to be effective, it must reach estuarine and adjacent bodies of water³⁵ vital to the coastal environment, without regard to the traditional high water mark limit.³⁶

In *United States v. Ashland Oil and Transportation Co.*,³⁷ the Sixth Circuit Court of Appeals relied on *Holland* to determine the scope of

Want, *Federal Wetlands Law: The Cases and the Problems*, 8 HARV. ENVTL. L. REV. 1, 13 (1984).

29. See *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940) (waters susceptible to use in their ordinary condition or by reasonable improvement to transport interstate or foreign commerce); *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921) (waters used in the past to transport interstate or foreign commerce); *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871) (waters presently used to transport interstate or foreign commerce).

30. See *United States v. Moretti*, 478 F.2d 418 (5th Cir. 1973).

31. 33 C.F.R. § 209.260(j)(freshwater wetlands) and (k)(tidal wetlands) (1974). See also 42 Fed. Reg. 37,122, 37,128 (1977).

32. 373 F. Supp. 665 (M.D. Fla. 1974).

33. *Id.* at 674-76. See *supra* notes 19-21 and accompanying text.

34. 373 F. Supp. at 676.

35. The court defined estuaries as "[p]artially enclosed bodies of water within which there is a measurable dilution of sea water by fresh-water run off." *Id.* at 675. Estuaries are valuable resources because they provide breeding zones for organic matter and replenish oxygen for the atmosphere. *Id.*

36. *Id.* The court rendered its decision less than a month before the Corps of Engineers published regulations including wetlands in their regulatory jurisdiction. The court stated that "the mean high water line is no limit to federal authority under the [Clean Water Act]." 373 F. Supp. at 676.

37. 504 F.2d 1317 (6th Cir. 1974). The defendant, Ashland Oil, inadvertently discharged oil into a nonnavigable stream. The government brought suit against Ashland, alleging a violation of the Clean Water Act for failing to notify the Environmental Protection Agency after the discharge. *Id.* at 1319.

the Clean Water Act.³⁸ The court initially stated that because water pollution is subject to congressional restraint,³⁹ pollution control of navigable waters may be effected only by controlling pollution of their tributaries.⁴⁰ Thus, the court held that Congress must have intended the Act to protect both traditionally navigable waters and nonnavigable tributaries of such waters.⁴¹

In *Natural Resources Defense Council, Inc. v. Callaway*,⁴² the District Court for the District of Columbia applied the Corps of Engineers' original regulations for the last time. In *Callaway*, the district court, relying on the *Ashland Oil* rationale, held that under the Clean Water Act the federal government retained jurisdiction over "navigable waters" to the maximum extent permissible under the commerce clause.⁴³ The court then ordered the Corps of Engineers to publish new regulations consistent with this broad assertion of jurisdiction.⁴⁴

In response to the court order in *Callaway*, the Corps of Engineers published interim final regulations in order to implement a new Section 404 program.⁴⁵ These regulations extended Section 404 jurisdiction over freshwater wetlands beyond the high water mark to adjacent wetlands periodically inundated by water and characterized by the prevalence of aquatic vegetation.⁴⁶ In 1977, the Corps of Engineers

38. As in *Holland*, the court found it significant that Congress' intent in passing the Clean Water Act was to regulate both navigable waters and their nonnavigable tributaries. *Id.* at 1323-25. See *supra* note 21 for congressional documentation of this intent.

39. 504 F.2d at 1328.

40. *Id.* at 1327.

41. *Id.* at 1318. Although not decided under § 404, *Ashland Oil* provides a guide for subsequent courts concerning the interpretation and constitutionality of § 404 jurisdiction. Jackson & Armitage, *supra* note 12, at 10,369. See, e.g., Utah v. Marsh, 740 F.2d 799, 804 (10th Cir. 1984); Avoyelles Sportsmen's League v. Marsh, 715 F.2d 897, 916 n.33 (5th Cir. 1983); United States v. Lambert, 695 F.2d 536, 538 (11th Cir. 1983); United States v. Byrd, 609 F.2d 1204, 1209 (7th Cir. 1979); United States v. Ciampitti, 583 F. Supp. 483, 491 (D.N.J. 1984).

42. 392 F. Supp. 685 (D.D.C. 1975). For a discussion of the *Callaway* decision and its legal impact, see Currin, *Clean Water Act Section 404 Jurisdiction: Mandate for Reform*, DET. C.L. REV. 825 (1982); Note, *Wetlands Protection Under the Corps of Engineers New Dredge and Fill Jurisdiction*, 28 HASTINGS L.J. 223 (1976).

43. 392 F. Supp. at 686. The court expressly stated that the term "waters of the United States" was not limited to waters that were navigable in fact. *Id.* See *supra* note 22 (discussing the applicability of the commerce clause to § 404 cases).

44. 392 F. Supp. at 686.

45. 33 C.F.R. § 209.120(d)(2)(h)(freshwater wetlands) and (i)(coastal wetlands) (1976).

46. 33 C.F.R. § 209.120(d)(2)(h). The freshwater definition is relevant to the *River-*

published final regulations, revising the Section 404 program to clarify its policies and procedures.⁴⁷

The 1977 regulations, presently in effect, extend the Corps of Engineers' Section 404 jurisdiction over "navigable waters" to include navigable waters protected in the original regulations,⁴⁸ tributaries of these navigable waters,⁴⁹ interstate wetlands and their tributaries⁵⁰ and wetlands whose use or destruction could affect interstate commerce.⁵¹ In addition, the Corps of Engineers amended the wetlands definition to protect lands sufficiently inundated or saturated to support a prevalence of aquatic vegetation.⁵²

Subsequent case law eliminated any doubt that Section 404 provided the Corps of Engineers with jurisdiction over wetlands.⁵³ For example,

side facts because the disputed land lies inland and is not adjacent to a body of tidal water. The pertinent definition states: "Freshwater wetlands' means those areas that are periodically inundated and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." Id.

47. By revising the definition, the Corps of Engineers intended to: (1) identify wetlands as they presently exist, not according to status over a period of time; and (2) allow for wetland classification where either surface water, ground water, or both cause inundation or saturation sufficient to support aquatic vegetation. 42 Fed. Reg. 37,128 (1977).

The Corps of Engineers recently declined to amend the current wetlands definition. The proposed amendments, the Corps noted, "did not provide any improvement on a technical basis." 47 Fed. Reg. 31,794, 31,795 (1982).

48. 33 C.F.R. § 323.2(a)(1) (1985). This and subsequent regulations noted under § 323.2(a) were first implemented in 1975 in accordance with the *Callaway* decision.

49. *Id.* at § 323.2(a)(5).

50. *Id.* at § 323.2(a)(2), (7).

51. *Id.* at § 323.2(a)(3).

52. *Id.* at § 323.2(c). This definition, currently in effect, states in pertinent part: "The term 'wetlands' means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." *Id.* See *supra* note 47 and accompanying text (discussing the Corps of Engineers' rationale for amending this definition).

53. United States federal courts uniformly construe § 404 to specifically include wetlands. See, e.g., *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 914-16 (5th Cir. 1983); *United States v. Tilton*, 705 F.2d 429, 431 (11th Cir. 1983); *United States v. Lambert*, 695 F.2d 536, 538 (11th Cir. 1983); *United States v. Byrd*, 609 F.2d 1204, 1209-11 (7th Cir. 1979); *Leslie Salt Co. v. Froehle*, 578 F.2d 742, 753-56 (9th Cir. 1978); *United States v. Saint Bernard Parish*, 589 F. Supp. 617, 619-21 (E.D. La. 1984); *United States v. Lambert*, 589 F. Supp. 366, 370-71 (M.D. Fla. 1984); *United States v. Ciampitti*, 583 F. Supp. 483, 491-97 (D.N.J. 1984); *Buttrey v. United States*, 573 F. Supp. 283, 286-87 (E.D. La. 1983); *United States v. Robinson*, 570 F. Supp. 1157, 1163 (M.D. Fla. 1983); *Bayou Des Familles Dev. Corp. v. United States Corps of*

in *Avoyelles Sportsmen's League, Inc. v. Marsh*,⁵⁴ the Court of Appeals for the Fifth Circuit, after reviewing the legislative history of the Clean Water Act,⁵⁵ held the 1977 wetlands definition promulgated by the Corps of Engineers consistent with congressional intent in passing the Act.⁵⁶ The court adopted a three-pronged test to determine whether wetlands fall within the jurisdiction of the Corps of Engineers' regulations.⁵⁷ The three parts of the test include consideration of the type of vegetation on the land, the degree to which the land is inundated by water, and the type of soil and its degree of saturation.⁵⁸

Engineers, 541 F. Supp. 1025, 1035-36 (E.D. La. 1982); *United States v. Lee Wood Contracting, Inc.*, 529 F. Supp. 119, 122-23 (E.D. Mich. 1981); *United States v. Bradshaw*, 541 F. Supp. 880, 882-83 (D. Md. 1981); *Florida Wildlife Federation v. Goldschmidt*, 506 F. Supp. 350, 364-65 (S.D. Fla. 1981), *United States v. Weisman*, 489 F. Supp. 1331, 1336-39 (M.D. Fla.), *aff'd*, 632 F.2d 891 (5th Cir. 1980); *American Dredging Co. v. Dutchyshyn*, 480 F. Supp. 957, 960 (E.D. Pa.), *aff'd mem.*, 614 F.2d 769 (3rd Cir. 1979); *Conservation Council v. Constanzo*, 398 F. Supp. 653, 673-74 (E.D.N.C.), *aff'd*, 528 F.2d 250 (4th Cir. 1975); *United States v. Holland*, 373 F. Supp. 665, 670-76 (M.D. Fla. 1974); *Deltona Corp. v. United States*, 657 F.2d 1184, 1186-88 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982).

54. 715 F.2d 897 (5th Cir. 1983).

55. *Id.* at 914-16.

56. *Id.*

57. *Id.* at 931. The court followed the same methodology employed by the Environmental Protection Agency in making the initial wetlands determination. *Id.* at 930. The court noted that, under the Administrative Procedure Act, such determinations are entitled to a presumption of regularity and may be set aside only when found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," or when they fail to meet constitutional, statutory, or procedural requirements. *Id.* at 904. See 5 U.S.C. § 706(2)(A),(B),(C),(D) (1982) (outlining the rules for review of informal government agency decisions under the Administrative Procedure Act); *Buttrey v. United States*, 690 F.2d 1170, 1183-86 (5th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983) (upholding Corps' wetland determination after review under the Administrative Procedure Act); *Deltona Corp. v. Alexander*, 682 F.2d 888, 893-94 (11th Cir. 1982) (holding that a plaintiff must exhaust administrative remedies before questioning Corps' jurisdiction); *Buttrey v. United States*, 573 F. Supp. 283, 292-97 (E.D. La. 1983) (court rejected as arbitrary and capricious Corps' determination that a bayou was a wetland).

58. Applying the first prong, the court held that the wetlands definition included vegetation living in saturated soil even though such a species could not survive its entire life cycle in saturated soils. 715 F.2d at 913. See also *United States v. Lambert*, 589 F. Supp. 366, 371 (M.D. Fla. 1984). Previous cases relied on the separate elements of the *Avoyelles* test to uphold the wetland determination by the Corps of Engineers. See, e.g., *United States v. Ciampitti*, 583 F. Supp. 483, 489-90 (D.N.J. 1984) (vegetation, soil and animal life); *United States v. Robinson*, 570 F. Supp. 1157, 1163-64 (M.D. Fla. 1983) (vegetation); *Bayou Des Familles Dev. Corp. v. United States Corps of Engineers*, 541 F. Supp. 1025, 1036 n.5 (E.D. La. 1982) (vegetation and soil); *United States v. Lee Wood Contracting, Inc.*, 529 F. Supp. 119, 122-23 (E.D. Mich. 1981) (soil and vegeta-

In *United States v. City of Fort Pierre*,⁵⁹ the Eighth Circuit Court of Appeals deviated from the judicial interpretation of the wetlands definition employed in *Avoyelles*.⁶⁰ The court in *Fort Pierre* found that the characteristics of a slough⁶¹ brought it within the scope of the wetlands definition.⁶² The court, however, noted that these characteristics were the unintended result of nearby dredging activity and not the result of natural evolution.⁶³ In holding that the Corps of Engineers could not assert jurisdiction in such a situation, the court stated that allowing the slough to be characterized as a wetland would contradict the congressional goals of conservation and public utility in passing the Clean Water Act.⁶⁴

Although the preceding cases do not directly address the Corps of Engineers' regulatory power under Section 404, landowners denied a Section 404 permit have challenged the government regulations under the fifth amendment in actions alleging the uncompensated taking of

tion); *United States v. Weisman*, 489 F. Supp. 1331, 1338-39 (M.D. Fla. 1980) (inundation and vegetation).

59. 747 F.2d 464 (8th Cir. 1984).

60. See *supra* notes 53-58 and accompanying text.

61. The court characterized the Fort Pierre Slough as a river bottom where wetland-type vegetation thrives in stagnant and often polluted water. 747 F.2d at 466.

62. *Id.* Initially, the court affirmed the Corps of Engineers' jurisdiction over the nation's wetlands as constitutional. *Id.* at 465. The court cited *United States v. Tilton*, 705 F.2d 429 (11th Cir. 1983), to support its contention that regulatory jurisdiction should be exercised to the full extent permissible under the Constitution. 747 F.2d at 465.

63. The court deemed the result "unintended" because the Corps of Engineers filled approximately 14 acres of the slough with sand drawn from the Missouri River in conjunction with routine river maintenance. *Id.* at 466. This filling activity effectively prevented the further drainage of surface water from the slough.

64. *Id.* at 467. The court stated: "Not only is the water in the Slough stagnant and polluted, but the Slough . . . is now devoid of wildlife, supports no fish or fowl, and is not conducive to recreation or other significant use by the public." *Id.* Because the court had no jurisdictional precedent for its decision, it limited the holding to situations when a wetland system is inadvertently created on private property. *Id.*

But see *United States v. Ciampitti*, 583 F. Supp. 483, 494 (D.N.J. 1984) ("This court finds that federal jurisdiction is determined by whether the site is presently wetlands and not by how it came to be wetlands."); *United States v. Bradshaw*, 541 F. Supp. 880, 883 (D. Md. 1981) (wetlands determination upheld although land in question became marshlands after construction of mosquito ditches by the government); *United States v. Holland*, 373 F. Supp. 665, 673 (M.D. Fla. 1974) ("The fact that these canals were man-made makes no difference. They were constructed long before the development scheme was conceived.")

private property.⁶⁵ In *Deltona Corp. v. United States*,⁶⁶ a land developer claimed the Corps' actions constituted a taking under the fifth amendment through inverse condemnation, therefore entitling him to just compensation.⁶⁷ The United States Court of Claims, applying the Supreme Court's taking clause analysis,⁶⁸ rejected the developer's contention that the denial of his ability to exploit a property interest—the property's "highest and best use"—established a taking.⁶⁹ The court upheld the Corps' denial of the application, concluding that no taking had occurred because of the property's many remaining economically viable uses and because the public benefits resulting from the Section 404 regulations outweighed the value of the property's intended use.⁷⁰

65. The taking clause of the fifth amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. art. V, cl. 4.

Taking clause analysis indicates that government administrative regulations may effect a taking of private property without just compensation when such regulations "destroy all or substantially all of the property's beneficial use." *Smithwick v. Alexander*, 17 Env't Rep. Cas. (BNA) 2131 (4th Cir. 1981). These regulations, however, must actually deprive an owner of existing property rights or place a permanent servitude on the property before a taking is found. *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-28 (1977); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

66. 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982).

67. 657 F.2d at 1189.

68. *Id.* at 1191. This test provides: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies a[n] owner economically viable use of his land . . ." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). *See also Smithwick*, 17 Env't Rep. Cas. (BNA) at 2131 ("The test generally applied . . . is whether the governmental interference is so substantial as to deprive an owner of all or most of his interest in the property."); *American Dredging Co. v. Dutchyshyn*, 480 F. Supp. 957, 960 (E.D. Pa. 1979), *aff'd mem.*, 614 F.2d 769 (3rd Cir. 1979) (zoning cases generally "uphold land use restrictions, if based on some sound public good, even where individually affected landowners suffer substantial financial disadvantage").

69. 657 F.2d at 1193. The developer used this rationale to argue that the permit denial deprived him of receiving the highest and best economic use of his property. The court, however, equated this deprivation with a diminution in property value, and cited *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978), for the proposition that mere diminution of value alone is insufficient to establish a taking. 657 F.2d at 1193.

70. *Id.* at 1194. For additional requirements concerning inverse condemnation actions such as that in *Deltona*, see generally *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2880-81 (1984); *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 295-97 (1981); *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932) (each requiring unavailability of just compensation under the Tucker Act before a fifth amendment violation occurs); *United States v. Byrd*, 609 F.2d 1204, 1211 (7th Cir. 1979) (requiring denial of a § 404 permit before a taking claim is ripe for judicial relief); *United States v.*

*United States v. Riverside Bayview Homes, Inc.*⁷¹ represents the Supreme Court's initial attempt to define the scope of the Corps of Engineers' regulatory jurisdiction under the Clean Water Act. In addition, the *Riverside* Court considered issues relating to the proper interpretation of the regulations implementing the Act.⁷² Justice White, writing for a unanimous Court, initially addressed the Sixth Circuit's contention that a narrow interpretation of the Corps' wetlands regulations is necessary to avoid fifth amendment taking problems.⁷³ After recognizing that government regulations may in some circumstances effect a taking of private property,⁷⁴ the Court outlined the conditions necessary to successfully establish a fifth amendment taking claim.⁷⁵ Justice White first found that Riverside's taking claim was not ripe for consideration because the Corps had not denied Riverside's permit request when these proceedings were instituted.⁷⁶ Furthermore, the Court indicated that even if the taking claim was ripe, the Corps' assertion of jurisdiction was constitutional so long as just compensation remained available under the Tucker Act.⁷⁷ The Court concluded that if

Ashland Oil and Transp. Co., 504 F.2d 1317, 1326-28 (6th Cir. 1974) (refutation of "navigational servitude" argument when Congress exercises commerce clause authority); *United States v. Robinson*, 570 F. Supp. 1157, 1166 (M.D. Fla. 1983) (requiring denial of a § 404 permit before a taking claim is ripe for judicial relief); *Want*, *supra* note 28, at 29-33 (discussion of "taking" argument with respect to § 10 of the Rivers and Harbors Act and § 404 of the Clean Water Act).

In sum, a landowner must satisfy four conditions before a court will find a § 404 "taking" occurs: (1) denial of a § 404 permit, (2) loss of economically viable use of property, (3) unavailability of just compensation, and (4) no legitimate state interest is promoted by the regulation.

71. 106 S. Ct. 455 (1986).

72. See *supra* note 52 for pertinent definition of wetlands in the Corps of Engineers' regulations.

73. 106 S. Ct. at 458-60.

74. *Id.* at 459. The Court cited both *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 105 S. Ct. 3108 (1985), and *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), to support this contention with respect to governmental land use regulations.

75. 106 S. Ct. at 459. See *supra* notes 68-70 and accompanying text for discussion of these conditions and relevant authority cited by the Court. The Court further noted that "the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking." 106 S. Ct. at 459.

76. *Id.*

77. *Id.* at 460. The Tucker Act is codified at 28 U.S.C. § 1491 (1982) and provides in pertinent part: "The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress . . ." Courts have interpreted this provision as supplying

such compensation is available, the possibility that a regulation may effect a taking in particular instances does not justify a narrowed construction which would impair application of the regulatory program.⁷⁸

The Court next turned to the proper interpretation of the Corps of Engineers' wetlands regulations.⁷⁹ Justice White first found that the plain language of the regulations⁸⁰ clearly stated that saturation by either surface or ground water, if sufficient to support wetlands vegetation, would categorize an area as a wetlands.⁸¹ Justice White then determined that the history of the regulation specifically indicated the removal of an inundation requirement when the current regulations became effective.⁸² Thus, the Court concluded that Riverside's property

a means of obtaining compensation for any taking that may occur through the operation of a federal statute. *See, e.g.,* *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862 (1984). The *Riverside* Court thus concluded that "equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to a taking." 106 S. Ct. at 459 (quoting *Ruckelshaus*, 104 S. Ct. at 2880).

78. 106 S. Ct. at 460. The Court stated: "Under such circumstances, adoption of a narrowing construction does not constitute avoidance of a constitutional difficulty . . . it merely frustrates permissible applications of a statute or regulation." *Id.*

In a footnote, the Court added that construing a statute narrowly to avoid a fifth amendment taking problem is justified "where it appears that there is an identifiable class of cases in which application of a statute will necessarily constitute a taking." *Id.* at n.5. *Cf. United States v. Security Industrial Bank*, 459 U.S. 70 (1982).

79. 106 S. Ct. at 460-61.

80. *See supra* note 52 for text of the wetlands definition applied by Justice White.

81. 106 S. Ct. at 460. The Court thereby refuted the court of appeals' holding that "frequent flooding" by an adjacent body of navigable water is an essential attribute of a wetlands area. The lower court mandated a two tier test in making a wetlands determination: "Neither inundation nor aquatic vegetation would be sufficient, standing alone, to bring a piece of land within the definition. Both must be present, and the latter must be caused by the former." 729 F.2d 391, 396 (6th Cir. 1984).

Applying this test, the appellate court found that the aquatic vegetation growing on Riverside's land resulted from saturated soil on the land, rather than periodic flooding from an adjacent body of navigable water. *Id.* at 397. The court intimated that the land experienced an abnormal presence of aquatic vegetation, and stated that such presence is insufficient to classify the area as a wetland. *Id.* at 396-97. *See also* 42 Fed. Reg. 37,128 (1977) ("the abnormal presence of aquatic vegetation in a non-aquatic area would not be sufficient to include that area within the Section 404 program").

Rather than accepting the appellate court's conclusion that aquatic vegetation resulting from ground water saturation was "abnormal," the Supreme Court interpreted "abnormal presence" to identify the growth of wetlands vegetation in dry, upland areas. 106 S. Ct. at 461 n.7.

82. *Id.* at 461. *See supra* notes 46-47 and accompanying text for pertinent language of the replaced regulation and the Corps of Engineers' rationale for the replacement.

fell within the scope of the Corps' jurisdiction under Section 404.⁸³

Finally, the Court addressed the scope of the Corps of Engineers' regulatory jurisdiction under Section 404.⁸⁴ Justice White confined review to determining whether the Corps' interpretation of Section 404 was reasonable and in accordance with congressional intent.⁸⁵ The Court found that due to the degree of congressional concern for both the integrity of the nation's aquatic system⁸⁶ and the ecological services that this system provides,⁸⁷ the Corps of Engineers' inclusion of wetlands in its regulatory program was not inconsistent with the purpose of the Clean Water Act.⁸⁸

The Court also examined the legislative history of the 1977 proposed amendments to the Clean Water Act to determine the reasonableness of the Corps' assertion of jurisdiction.⁸⁹ The records indicated that Congress explicitly rejected a narrowed construction of Section 404 designed to limit the Corps' regulatory jurisdiction.⁹⁰ Furthermore, the proposed amendments would have limited only the Corps' Section 404 jurisdiction, leaving intact the Section 301 prohibition against the

83. 106 S. Ct. at 461.

84. *Id.* at 461-65.

85. *Id.* The Court relied on the practice of deferring to a governmental agency's construction of a statute if such construction was reasonable and in harmony with the language, policies and legislative history of the statute. *See, e.g.,* Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc., 105 S. Ct. 1102 (1985); Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 104 S. Ct. 2778 (1984).

86. 106 S. Ct. at 462. The Court specifically noted the Act's legislative history to evidence Congress' intent to construe the Act broadly. *See supra* notes 19-21 and accompanying text for relevant discussion.

87. 106 S. Ct. at 463. *See supra* note 1 for a selected list of these services.

88. 106 S. Ct. at 463. In a footnote, the Court emphasized that "if it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand." *Id.* at n.9. This broad regulatory coverage is sanctioned by the Corps' power to issue permits allowing development of wetlands areas that are not critical to the aquatic environment. *Id.* (noting 33 C.F.R. § 320.4(b)(4) (1985)).

89. 106 S. Ct. at 464-65. *See supra* note 26 for a discussion of how these amendments would have curtailed the Corps of Engineers' existing authority under § 404.

90. 106 S. Ct. at 464. The Court therefore concluded that "a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it." *Id.* Justice White cited *Bob Jones University v. United States*, 461 U.S. 574, 599-60 (1983), and *United States v. Rutherford*, 442 U.S. 544, 554 & n.10 (1979), to support this conclusion.

discharge of pollutants into navigable waters.⁹¹ Thus, the Court determined that Congress recognized both the broad scope of the Corps' existing jurisdiction,⁹² and the importance of continuing a program regulating discharges into wetlands adjacent to navigable-in-fact waters under the proposed amendments.⁹³

The *Riverside* decision leaves the broad regulatory jurisdiction of the Army Corps of Engineers intact.⁹⁴ The Court's holding includes in Section 404 those wetlands supporting aquatic vegetation from ground water saturation, thereby eliminating the appellate court's requirement of frequent flooding from adjacent navigable waters.⁹⁵ In addition to affirming the Corps of Engineers' regulatory jurisdiction, *Riverside* upheld the statutory jurisdiction upon which the regulatory jurisdiction is founded. *Riverside* utilized Congress' broad power to regulate the waters of the United States under the commerce clause,⁹⁶ and rejected an attempt to narrow the Corps of Engineers' authority under Section 404.⁹⁷ The Court correctly found that a taking did not occur because Congress' assertion of Section 404 jurisdiction over wetlands is within the exercise of its commerce clause power.⁹⁸ In addition, impairment of a governmental regulatory program to avoid a taking problem is not justified when a remedy exists in law.⁹⁹

Riverside confirms Congress' intent in passing the Clean Water Act. By rejecting the Sixth Circuit's holding that the Act's jurisdiction over "navigable waters" should be construed narrowly, the Court avoided placing a limitation on Section 404 similar to the proposed restrictive amendments to Section 404 that Congress rejected both in 1977 and 1982.¹⁰⁰ The Supreme Court's protection of these environmentally

91. 106 S. Ct. at 465. See 33 U.S.C. § 1311(a) (1982) (§ 301(a) of the Clean Water Act).

92. 106 S. Ct. at 465.

93. *Id.*

94. *But see* Comment, United States v. Riverside Bayview Homes, Inc.: *Mountain or Molehill?*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 10,333 (1984). The author stated that the Sixth Circuit's approach left regulatory jurisdiction over most types of wetlands unimpaired. Furthermore, the court did not purport to apply the Corp's jurisdiction over wetlands saturated by ground water.

95. 729 F.2d 391, 398 (1984).

96. See *supra* note 22.

97. See *supra* notes 73-78 and accompanying text.

98. See Brief for the United States, *supra* note 8, at 32.

99. See *supra* notes 77-78 and accompanying text.

100. In fact, the appellate court's requirement of frequent flooding by waters flow-

critical waters ensures the continued existence and protection of over three-quarters of the nation's wetlands.

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ing from adjacent navigable waters restricts § 404 jurisdiction to exactly those waters sought to be regulated in the 1977 amendments. The appellate court specifically excluded "inland low-lying areas such as the one in question here that sometimes become saturated with water." 729 F.2d at 598. These are the areas Congress sought to protect by defeating the proposed amendments.: "[P]rotection of water quality must encompass the protection of the interior wetlands and smaller streams." 123 CONG. REC. 26,718-19 (1977) (statement of Sen. Baker).

