Notre Dame Law Review

Volume 51 | Issue 3 Article 8

2-1-1976

Federal Control of Wetlands: The Effectiveness of Corps' Regulations under 404 of the FWPCA

Joanne M. Frasca

FEDERAL CONTROL OF WETLANDS: THE EFFECTIVENESS OF CORPS' REGULATIONS UNDER § 404 OF THE FWPCA

I. Introduction

Section 404[1] of the Federal Water Pollution Control Act Amendments[2] (FWPCA) vests the United States Army Corps of Engineers with primary authority to regulate dredge-and-fill operations in "navigable waters" of the United States. Historically, the Corps' duties emanated from an interest in preventing navigational obstructions and facilitating interstate commerce.[3] The Corps' recent powers under the FWPCA, however, derive from a broader and overriding concern for environmental protection.[4]

The Corps' § 404 jurisdiction over regulating dredge and fill activities is limited to "navigable waters."[5] Section 502(7) of the FWPCA defines the term "navigable waters" as "waters of the United States, including the territorial seas."[6] This explanatory section enlarges the scope of the Corps' powers under § 404 by excluding traditional considerations of navigability which had formerly limited the Corps' regulation.[7] As late as April 1975, however, the Corps retained navigational considerations in its regulations which defined the scope of the Corps' authority under the FWPCA. The Corps' regulations restricted that agency's powers to regulation of only those waters of the United States except the territorial seas which are subject to inundation by the mean high tidal waters, and those waters susceptible to interstate commerce in the past, present, or future.[8]

Then, in *Natural Resources Defense Council v. Calloway*,[9] the federal District Court for the District of Columbia revoked the Corps' regulations as unlawfully enacted in derogation of the Corps' statutory duties. While *Calloway*, a memorandum opinion, is not of factual importance, its holding is significant

1 33 U.S.C. § 1344 (Supp. II, 1972).
2 33 U.S.C. §§ 1251-376 (Supp. II, 1972).
3 The Corps' powers to regulate dredging and filling originated under the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401-09 (1970). The Corps' powers under the 1899 Act were initially intended to relate only to navigable and commercial considerations. Guthrie v. Alabama By-Products Co., 328 F. Supp. 1140, 1146-48 (N.D. Ala. 1971). *See* United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655, 664-66 (1973); United States v. Standard Oil Co., 384 U.S. 224, 226-27 (1966); United States v. Kennebec Log Driving Co., 491 F.2d 562, 565 (1st Cir. 1973); Potomac River Ass'n v. Seamanship School, Civil No. 73-789-Y (D. Md., filed April 11, 1975); United States v. Holland, 373 F. Supp. 665, 669-70 (M.D. Fla. 1974); Lavagnino v. Porto-Mix Concrete, Inc., 330 F. Supp. 323, 325-26 (D. Colo. 1971); Chambers-Liberty Counties Navig. Dist. v. Parker Bros. & Co., 263 F. Supp. 602, 606-07 (S.D. Tex. 1967); Hoyer, *Corps of Engineers Dredge and Fill Jurisdiction: Buttressing a Citadel Under Siege*, 26 U. FLA. L. REV. 19, 21 (1973).
4 *E.g.*, 33 U.S.C. § 1251(a) (Supp. II, 1972) which provides: "The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters."
5 33 U.S.C. § 1344(a) (Supp. II, 1972).
6 33 U.S.C. § 1362(7) (Supp. II, 1972).
7 Prior to the enactment of the FWPCA, the Corps' powers to regulate dredging and filling were limited to those activities which actually took place in navigable waters or which took place in waters which were susceptible to interstate commerce after reasonable improvements were made. *See* text accompanying notes 31-37 *infra*.
8 33 C.F.R. § 209.260 (1974).
9 392 F. Supp. 685 (D.D.C. 1975).

since it required the Corps to publish new regulations that would better effectuate the full statutory mandate of the FWPCA. The Corps responded by publishing final interim regulations on July 26, 1975.[10] These regulations, a product of intense debate and controversy,[11] implemented a dramatic expansion of the regulatory power of that agency.

It is clear that the motivating force behind the compelled expansion of the Corps' regulations was the decision to use § 404 as a federal mechanism for wetlands control. To assess the effectiveness of this decision, it is necessary to determine the impact of the expanded regulations on the Corps' powers to regulate wetlands. The scope of the Corps' jurisdiction, as expanded by *Calloway,* should be examined and compared with the Corps' prior jurisdiction under the FWPCA, and the Corps' traditional powers under prior statutes. It is also necessary to identify the major problems and deficiencies of the expanded regulations, and to evaluate possible improvements and solutions in order to intelligently evaluate the advisability of using § 404 to achieve a federal wetlands program.

II. Justification for the Expansion: Protection of Wetlands

The courts have justified the expansion of the Corps' jurisdiction beyond navigational limits on the ground that § 404 both authorizes and requires the Corps to exercise broad regulatory powers. For example, the *Calloway* court ordered expansion of the Corps' jurisdictional regulations to fulfill the full statutory mandate of the FWPCA.[12] Similarly, other courts which extended the Corps' § 404 powers on an ad hoc basis have reasoned that both legislative intent as expressed in statutory language and the legislative history of the FWPCA necessitated the expansion.[13]

Underlying these judicial interpretations of legislative intent is an increasing concern for the preservation of the nation's wetlands. Not surprisingly, the six cases which enlarged the Corps' powers on an ad hoc basis concerned regulation of pollution in wetland areas.[14] Moreover, statements of Congressmen

10 40 Fed. Reg. 31320 (1975).

11 The Corps initially responded to the *Calloway* court order on May 6, 1975, by publishing four proposed alternative regulations, 40 Fed. Reg. 19766 (1975). The Corps received mostly adverse comments on the proposed regulations from environmental groups and governmental agencies. *Current Developments,* 6 BNA ENVIRONMENTAL REP. 449-50 (1975). The Corps and the Environmental Protection Agency (EPA) also sharply disagreed on the meaning and scope of the proposed regulations. *Id.* at 145-46, 203-04. The Water Resources Subcommittee of the House Committee on Public Works and Transportation attempted to resolve the problem by allowing the Corps, the EPA, and other interested parties to testify in hearings held on July 15, 16, and 22, 1975. 121 CONG. REC. 873 (daily ed. July 15, 1975); 121 CONG. REC. 883 (daily ed. July 16, 1975); 121 CONG. REC. 927 (daily ed. July 22, 1975).

12 392 F. Supp. at 686.

13 P.F.Z. Properties, Inc. v. Train, 393 F. Supp. 1370 (D.D.C. 1975); United States v. Smith, Civil No. 74-34-NN (E.D. Va., filed Apr. 21, 1975); Weizmann v. Corps of Engineers, Civil No. 74-469-CIV-WM (S.D. Fla., filed Feb. 12, 1975); United States v. Sexton Cove Estates, Civil No. 74-1067-CIV-WM (S.D. Fla., filed Feb. 6, 1975); Leslie Salt v. Froehlke, Civil No. 73-2294-WTS (N.D. Cal., filed Dec. 19, 1974); United States v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974).

14 *Id.*

advocating the use reflect an intent to use an expanded § 404 as the primary federal mechanism for protecting national wetland resources.[15]

The major impetus for the judicial and legislative involvement in this area is due to the substantial ecological value of the wetlands and similar areas. Wetlands are essential components of estuaries, which are partially enclosed bodies of water which are sensitive biological systems.[16] Estuaries perform vital functions, including purification of water, conversion of pollutants to nutrients and oxygen, and preservation of vital spawning areas for aquatic life.[17] Common construction activities in wetland areas, such as dredging and filling, disrupt the delicate balance of the ecosystem and impede the estuary's performance of its vital and restorative functions.[18] Current statistics show that as a result of such dredge and fill operations, the number of the nation's wetlands has been significantly reduced; this corresponds to an overall trend of rapidly vanishing wetland areas.[19]

An additional reason for the concern for regulation of such dredge and fill activities is to prevent wetlands from becoming a source of pollutant discharge into adjacent or connected bodies of waters. The construction work involved in dredging and filling in wetlands not only destroys the ecological balance of the immediate area, but may also result in a discharge of pollutants which are carried into larger waters and streams, causing substantial pollution to such navigable waters.[20]

Recognition of the vanishing wetlands problem and the need to prevent further destruction of wetlands and connected waters prompted corrective action on the part of state legislatures and Congress in the late 1960's. Wetlands acts designed to preserve and affirmatively improve those vital regions were enacted by the states, beginning with Massachusetts in 1965.[21] Federal efforts, primarily directed through the Rivers and Harbors Act of 1899,[22] consisted of regulation of the dredge and fill activities which polluted and destroyed wetland areas.

The FWPCA, enacted in 1972, provides a new and more environmentally oriented vehicle for federal protection of wetland regions. The advantage of the FWPCA over its predecessor, the Rivers and Harbors Act of 1899, is that the FWPCA was enacted for the primary purpose of controlling environmental

15 121 CONG. REC. 9760 (daily ed. June 5, 1975) (remarks of Senator Muskie); 121 CONG. REC. 4772 (daily ed. June 2, 1975) (remarks of Representative Ottinger). *But see* 121 CONG. REC. 5408 (daily ed. June 12, 1975) (remarks of Representative Bauman).

16 United States v. Holland, 373 F. Supp. 665, 675 (M.D. Fla. 1974). *See generally* Kingham, *State and Local Wetlands Regulation: The Problem of Taking Without Just Compensation,* 58 VA. L. REV. 876 (1973); Teclaff, *The Coastal Zone—Control Over Encroachments Into the Tidelands,* 2 ENVIRONMENT L. REV. 618 (1971).

17 *Id. See also Statement of Alvin Alm, Asst. Admin. for Planning & Management of the EPA Before the Subcomm. on Water Resources of the House Comm. on Public Works & Transp.,* 93d Cong., 2d Sess. (1975); *Statement of Natural Resources Defense Council Before Subcomm. on Public Works & Transp.,* 93d Cong., 2d Sess. (1975) [hereinafter cited as *NRDC Statement*].

18 *Id.*

19 *Id.*

20 Zabel v. Tabb, 430 F.2d 199, 204 (5th Cir. 1970), *cert. denied,* 401 U.S. 910 (1971); Hoyer, *supra* note 5, at 34; 2 *A Legislative History of the Water Pollution Control Act Amendments,* 93d Cong., 1st Sess. 1495 (1973) [hereinafter cited as *Legislative History*].

21 MASS. ANN. LAWS ch. 130, §§ 27A, 105 (1972).

22 33 U.S.C. §§ 401-09 (1970).

problems of pollution.[23] In contrast, the 1899 Act was enacted primarily to prevent obstructions of navigation and to enhance the flow of interstate commerce.[24] Consideration of environmental impact was permitted in assessing permit applications under the 1899 Act,[25] while similar evaluations are mandatory under the FWPCA.[26] Although the Corps' initial limitation of its jurisdiction under § 404 to navigability considerations did restrict federal regulation to wetlands located above the mean high waters, this restriction was removed by the *Calloway* court and the corrected Corps' regulations. This expanded jurisdiction under § 404 of the FWPCA can only be seen as a means chosen by courts and legislatures for the protection of wetlands.

III. Background of the Corps' Jurisdiction

A. *Navigability and the 1899 Act*

A consideration of the historical background of the Corps' powers to regulate dredging and filling is necessary to understand the reasons for choosing § 404 as the primary vehicle for wetlands control. Section 404, as expanded by *Calloway,* defines the scope of the Corps' jurisdiction more broadly than did prior statutory definitions. An examination of previous historical limitations on the Corps' powers illustrates the significance of the expansion by § 404, and reveals the advantages of using this broader definition of the Corps' jurisdiction to achieve effective wetlands control.

The Corps' authority to regulate dredging and filling in navigable waters originated under the Rivers and Harbors Act of 1899.[27] The 1899 Act was enacted under Congress' commerce clause powers,[28] and was strengthened when the Supreme Court held in *Gibbons v. Ogden*[29] that powers under the commerce clause include the authority to regulate navigation.[30]

The Corps' regulatory jurisdiction under the 1899 Act was limited to activities which took place in "navigable waters."[31] The Corps' statutory responsibilities were initially defined by the Supreme Court in *The Daniel Ball,*[32] where the navigability of waters was determined by a "navigability-in-fact" test. Waters were deemed navigable under this test when they were actually used or were susceptible to use, in their ordinary condition, as highways for inter-

23 33 U.S.C. § 1251(a) (Supp. II, 1972).
24 *See* cases cited in note 3 *supra.*
25 Zabel v. Tabb, 430 F.2d 199, 211 (5th Cir. 1970), *cert. denied,* 401 U.S. 910 (1971). *See* United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655 (1973); United States v. Standard Oil Co., 384 U.S. 224 (1966); United States v. Republican Steel Corp., 362 U.S. 482 (1960).
26 33 U.S.C. § 1344(b) (Supp. II, 1972).
27 33 U.S.C. §§ 401-09 (1970).
28 U.S. CONST. art. I, § 8, cl. 3.
29 22 U.S. (9 Wheat.) 1 (1824). *See* Hall v. DeCuir, 95 U.S. 485 (1877); Veazie v. Moor, 55 U.S. (14 How.) 597 (1852); Norris v. Boston, 48 U.S. (7 How.) 282 (1849).
30 The Court has further held that under the commerce clause Congress has the power to keep navigable waters free and open, and to provide sanctions against obstructions. *E.g.,* Wickard v. Filburn, 317 U.S. 111 (1942); Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1865).
31 *See* cases cited in note 3 *supra.*
32 77 U.S. (10 Wall.) 557 (1870).

state or foreign commerce.[33] The test of navigability was gradually expanded by judicial decision to include waters which had sustained navigation in the past but which were no longer capable of navigation in their ordinary condition,[34] and waters which could be capable of sustaining navigation in the future if reasonable improvements were made.[35] The Corps revised its regulations for the issuance of permits under the 1899 Act[36] to correspond to these changes; by September 1972, the Corps' regulations defined navigable waters as those waters which have been in the past, or may be in the present or future, susceptible to interstate or foreign commerce.[37]

B. *The FWPCA*

The FWPCA, enacted in October 1972, supplemented Corps regulation under the 1899 Act, reflecting a new consideration of environmental impact to federal regulatory powers.[38] While courts had recognized that the Corps could and should properly consider ecological factors in evaluating permit applications under the 1899 Act,[39] § 404 of the FWPCA makes environmental considerations mandatory.[40] The section also requires the Corps to defer to the environmental recommendations of appropriate federal and state agencies, such as the United States Fish and Wildlife Service.[41]

Moreover, § 404 further broadens the jurisdiction of the Corps over navigable waters. Significantly, FWPCA § 502(7) omits the word "navigable" from its definition of the term "navigable waters."[42] Legislative history reveals that Congress intended to expand the Corps' regulatory jurisdiction beyond traditional limitations.[43] However, when *Calloway* was decided the Corps' regulations did not comply with the new legislative definition, but continued to operate under the same jurisdictional limits of navigability as defined by the courts construing the 1899 Act.[44]

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33 *Id.* at 563.

34 *See, e.g.*, United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940); United States v. Utah, 283 U.S. 64 (1931); Economy Power & Light Co. v. United States, 256 U.S. 113 (1921); United States v. Rio-Grande Dam & Irrig. Co., 174 U.S. 690, 698 (1899); The Montello, 87 U.S. (20 Wall.) 430 (1874).

35 United States v. Appalachian Elec. Power Co., 311 U.S. 377, 408 (1940); Rochester Gas & Elec. Corp. v. FPC, 344 F.2d 594 (2d Cir. 1965).

36 The Corps' permit program under § 13 of the 1899 Act which regulated the dumping of refuse into navigable waters was established on December 26, 1970, pursuant to Exec. Order No. 11574, 3 C.F.R. 188 (1971).

37 33 C.F.R. § 209.260 (1972).

38 33 U.S.C. §§ 1251(a) (Supp. II, 1972).

39 *See* cases cited in note 25 *supra.*

40 33 U.S.C. § 1344(b) (Supp. II, 1972).

41 *See* Memorandum of Understanding Between the Secretary of the Interior and the Secretary of the Army of July 13, 1867, Appendix B, Corps' Regulation 290.260, 40 Fed. Reg. 31341 (1975).

42 33 U.S.C. § 1362(7) (Supp. II, 1972).

43 *See* 1 *Legislative History, supra* note 20, at 250. The Joint Explanatory Statement of the Committee of Conference stated the reason for the deletion of the term "navigable" in § 404:

> The conferees fully intend that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which may have been made or may be made for administrative purposes.

S. REP. No. 92-1236, 92d Cong., 1st Sess. 327 (1972).

44 33 C.F.R. § 209.260 (1974).

IV. The Expansion of the Corps' Powers Under the FWPCA

A. *Extent of the Change*

The new regulations promulgated by the Corps pursuant to *Calloway* encompass some bodies of water that have never before been brought under federal control,[45] and others that have been federally regulated only pursuant to other recent judicial decisions.[46] This crucial change reflects a broader interpretation of those bodies of water covered by the FWPCA definition of "waters of the United States."[47]

1. Problems with Traditional Limitations of Navigability: Controlling the Source of Pollution

Under the Corps' revoked regulations, navigable waters did not include waters in nontidal rivers which were above the "ordinary high water mark,"[48] nor waters in tidal areas which were located above the mean high water line.[49] The practical effect of this administrative definition was to exclude many fresh- and saltwater wetlands, as well as most nonprimary tributaries of navigable waters, from Corps' control; thus the Corps' overall effort to prevent degradation of the aquatic environment was frequently crippled.[50] For example, dredge and fill work may result in the discharge of pollutants in remote tributaries or wetlands which could set off a chain of destruction resulting in substantial pollution to waters which are navigable and regulable.[51] Consequently, it became evident that if the Corps was to fulfill its statutory responsibilities, it was "essential that discharge of pollutants be controlled at the source."[52] However, under the old definition if the tributary or marsh area was nonnavigable, it was nonregulable.

The courts which construed the FWPCA prior to the *Calloway* decision recognized this weakness, and in a few cases rejected the navigational limits in

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45 The Corps stated in its explanatory notes which accompanied the July 25, 1975 publication of its new regulations:

> We recognize that this program, in its effort to protect water quality to the full extent of the commerce clause, will extend Federal regulation over discharges of dredged or fill material to many areas that have never before been subject to Federal permits or to this form of water quality protection.

40 Fed. Reg. 31320 (1975). The Corps added that it intended to cope with the expanded areas of regulation through an intensive public information campaign to make the public aware of the requirements of § 404 of the FWPCA. *Id.*

46 *See* cases cited in note 13 *supra.*

47 33 U.S.C. § 1362(7) (Supp. II, 1972).

48 33 C.F.R. § 209.260 (1974) provided:

> The "ordinary high water mark" on nontidal rivers must be determined by the ordinary flows of the river; neither peak nor flood stages can be included, nor the lowest stages of flow.

See text accompanying note 62 *infra.*

49 33 C.F.R. § 209.260(k)(1974).

50 United States v. Holland, 373 F. Supp. 665, 670 (M.D. Fla. 1974). The defendants argued unsuccessfully that navigable waters under the FWPCA did not include a tributary of a tributary of a navigable stream in United States v. Ashland Oil & Transp. Co., 364 F. Supp. 349 (W.D. Ky. 1973), *aff'd,* 504 F.2d 1317 (6th Cir. 1974).

51 Zabel v. Tabb, 430 F.2d 199, 204 (5th Cir. 1970); Hoyer, *supra* note 3, at 34.

52 Legislative History, *supra* note 20, at 1495.

favor of regulation and abatement of pollution at its source.[53] The most notable of these cases is *United States v. Holland,*[54] where Judge Krentzman of the United States District Court for the Middle District of Florida held that the artificial mangrove canals and mosquito ditches which were located one inch above the mean high waters were within the Corps' regulatory jurisdiction. The court rejected the mean high water boundary in favor of an ad hoc approach; each case, it stated, must be examined on its own facts to determine whether Congress intended to regulate the area in dispute.[55]

In *Holland,* the court concluded that statutory language and legislative history of the FWPCA evidenced an intent on the part of Congress to control the quality of all the nation's waters by using the broadest possible definitions of "waters of the United States."[56] The court also cited environmental authority which designated the areas in question—mangrove wetlands and canals—as a critically valuable zone.[57] Relying on the broad purpose of the FWPCA to regulate in all waters of the United States and the ecological importance of the dredged and filled area, the *Holland* court concluded that the Corps had jurisdiction under the FWPCA.

2. Procedural Problems with the Ad Hoc Approach: Administrative Efficiency and Due Process

The ad hoc approach of the *Holland* court formulates no general guidelines which delineate the scope of the Corps' enlarged jurisdiction. Congressional intent as expressed in statutory language and legislative history also provides no suggestion as to the outer limits on the expansion.[58] Although each ad hoc determination may expand the Corps' authority in a specific area, no clear-cut parameters are established.

This indefinite scope of Corps jurisdiction is a serious problem for two reasons. First, specific boundaries of the Corps' expanded jurisdiction are necessary for the Corps to effectively implement the § 404 program. The Corps requires an easily discernible scope of authority to facilitate permit processing. The initial determination of jurisdiction should be accomplished quickly so that

53 *See* cases cited in note 13 *supra. See generally* Sun Enterprises, Ltd. v. Train, 394 F. Supp. 211 (S.D.N.Y. 1975); United States v. Ashland Oil & Transp. Co., 364 F. Supp. 349 (W.D. Ky. 1973), *aff'd,* 504 F.2d 1317 (6th Cir. 1974).

54 373 F. Supp. 665 (M.D. Fla. 1974).

55 *Id.* at 673.

56 *Id.* at 671-74.

57 Estuaries are not only highly productive in organic matter, but are also valuable in replenishing oxygen for the atmosphere [citations omitted]. . . . The FWPCA embodies the realization that pollution of these areas may be ecologically fatal.

Id. at 675.

58 The *Holland* court recognized this lack of guidelines in the statutory language and legislative history of the FWPCA: "Even though it seems certain that Congress sought to broaden federal jurisdiction under the Act, it did so in a manner that appears calculated to force courts to engage in verbal acrobatics." 373 F. Supp. at 671. Another author concluded:

> The omission of "navigability" from the definition of "navigable waters" bears all the earmarks of deliberate ambiguity designed to paper over unreconciled disagreements among the conferees over the desired scope of federal jurisdiction. In this situation, any attempt to divine a congressional intent is an unrealistic venture.

Zener, *The Federal Law of Water Pollution Control,* in FEDERAL ENVIRONMENTAL LAW 690-91 (E. Dolgin & T. Guilbert eds. 1974).

the Corps can devote the majority of its time and resources to assessing the merits of individual permit applications. Thus, the ad hoc approach which may work well in an individual judicial proceeding is too cumbersome and indefinite for administrative purposes.

Secondly, due process may require definite limitations on the expansion of the Corps' jurisdiction. In *United States v. Pennsylvania Industrial Chemical Corp.*,[59] the Supreme Court held that the defendant corporation could rely upon Corps regulations which defined the scope of its regulatory powers. The Court found that citizens are entitled to fair warning in the regulations as to the kind of conduct that is made criminal by the Rivers and Harbors Act of 1899.[60] The requirements of due process, as formulated by the Court in *Pennsylvania Industrial Chemical Corp.*, are applicable to § 404 of the FWPCA since a violation of § 404 may result in criminal sanctions under § 308.[61] The ad hoc approach of the *Holland* court establishes no specific delineation of the Corps' powers and thereby fails to give fair warning as to what conduct constitutes a violation of § 404. Such an approach provides the citizen with no guidelines for distinguishing between legal and illegal conduct, because it suggests no outer limit to the Corps' § 404 authority. Therefore, specific limitations on the Corps' § 404 power may be necessary to satisfy the notice requirements of the due process clause that were articulated by the Supreme Court in *Pennsylvania Industrial Chemical Corp.*

3. Corps' Regulatory Changes Resulting from the *Calloway* Decision

The Corps' new regulations, mandated by *Calloway*, implement the judicial trend of expanding the Corps' § 404 jurisdiction represented by the *Holland* case. These changes in the new regulations avoid the problem of controlling the source of pollutants which plagued the earlier regulations. Control of formerly unregulable sources of pollution is achieved in several ways in the new regulations. First, the Corps is authorized to regulate all tributaries up to their "headwaters"[62] (up to the point at which the water flow is less than five cubic feet per second), and landward to the "ordinary high water mark"[63] (landward to the point on the shore that is inundated by water 25 percent of the time). As a result of these definitions, the Corps may regulate many smaller feeder streams which carry pollutants into navigable waters, and more effectively control discharge at its direct source.

Secondly, the new regulations confront the source control problem in another necessary area. Definitional subsection (d) provides for the regulation of artificially created canals that are used for recreational or other water-related purposes.[64] This is an important change, since the Corps had previously refused

59 411 U.S. 655 (1973).
60 33 U.S.C. §§ 401-09 (1970).
61 33 U.S.C. § 1319 (Supp. II, 1972).
62 *See* Corps' Regulation 209.260(d)(2)(ii)(a), 40 Fed. Reg. 31325 (1975).
63 *Id.*
64 *See* Corps' Regulation 209.260(d)(2)(d), 40 Fed. Reg. 31325 (1975).

to regulate artificial canals which often act as repositories for coliform bacteria, oil, grease, pesticides, and organic debris.[65]

The Corps' new regulations also overcame the indefiniteness problem that was inherent in the ad hoc approach as endorsed by the *Holland* court; there are specific limitations on the Corps' § 404 authority. In tidal areas, the traditional demarcation of the mean high water line is replaced by a "vegetable indicator."[66] This change is intended to expand the Corps' regulatory powers to include many wetlands and marshy areas that had not been subject to federal control because of their location above the mean high waters.

While the use of a vegetation line in delimiting the scope of the Corps' expanded authority eliminates most of the indefiniteness problems, it is still not sufficiently specific. The general vegetation line as a boundary is "vastly too vague . . . reflecting surprisingly small understanding of the biota of the wetlands."[67] The Corps' regulations, by using the vegetation index, expand the Corps' jurisdiction over areas periodically inundated by saline or brackish waters and normally characterized by the presence of salt or brackish water vegetation capable of growth and reproduction.[68] However, many species of wetlands vegetation do not require periodic inundation for growth and survival, so it is unclear whether the new regulations actually encompass these species.[69] Furthermore, if the vegetation index is strictly construed, it would rarely extend the Corps' jurisdiction far beyond the mean high water line.[70] This interpretation would clearly conflict with the *Calloway* decision, which mandated the expansion of the Corps' jurisdiction beyond the mean high water line.[71]

The uncertainty of the vegetation index can be solved by supplementing the Corps' regulations with a list of specific vegetation that falls within the category of an indicator specie for the purposes of regulation.[72] The adoption of such a definitive list of dominant plant species would eliminate the uncertainty, and ensure that the Corps' jurisdiction does extend beyond the mean high water line to reach identified species of vegetation.

The subsections which expand the Corps' jurisdiction over all tributaries of navigable waters are also sufficiently definite in terms of delimiting the scope of the Corps' powers. Areas which do not meet minimal flow standards as defined by the terms "headwaters" and "ordinary high water mark" are excluded from

65 HOUSE COMM. ON GOV'T OPERATIONS, OUR THREATENED ENVIRONMENT: FLORIDA AND THE GULF OF MEXICO, H.R. REP. No. 1396, 93d Cong., 2d Sess. 16-23 (1974).

66 40 Fed. Reg. 31324-25 (1975).

67 *Statement of Hon. Richard Ottinger Before the Subcomm. on Water Resources of the House Comm. on Public Works & Transp.*, 93d Cong., 2d Sess. (1975).

68 Corps' Regulation 209.260(d)(2)(b), 40 Fed. Reg. 31324-25 (1975). Corps Regulation 209.260(d)(2)(n) also provides: "'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." 40 Fed. Reg. 31324-25 (1975).

69 *Statement of the Florida Departmental Regulation Before the Subcomm. on Water Resources of the House Comm. on Public Works & Transp.*, 93d Cong., 2d Sess. (1975).

70 *Id.*

71 *See* text accompanying notes 9-10 *supra.*

72 The Corps stated in its explanatory comments to the new regulations that it intended to publish a list of fresh, brackish, and saltwater vegetation that can be used as one of the indicators for determining the extent of the Corps' jurisdiction in wetland areas. 40 Fed. Reg. 31320 (1975).

regulation.[73] This is a practical policy from an administrative and ecological perspective, since these areas do not have any significant impact on the water quality of larger areas.[74]

Thus, the Corps' regulations achieve an expansion of the power to regulate critical areas and the sources of pollution, and are of sufficient definiteness to meet administrative and procedural requirements. Finally, as a further assurance that all ecologically valuable areas are protected by the regulations, there is a provision for discretionary regulation by the Corps. Where an unregulated area is determined to be ecologically valuable, or an unregulated activity is considered to be harmful and environmentally unsound, the Corps' district engineer may impose controls on an ad hoc basis.[75]

V. Major Criticisms and Deficiencies of the Expansion of § 404 and Proposed Improvements

A. *Agricultural Objections to the Expansion of the Corps' Jurisdiction*

The most substantial criticism of the expansion of the Corps' § 404 jurisdiction as mandated by *Calloway* is based on its anticipated adverse impact in the agricultural area. Opponents of the Corps' new regulations fear that the increase in the Corps' control of pollutants and discharge sources is so extensive that § 404 will regulate many ordinary agricultural activities. Specifically, the concern is that § 404 permits will be required for such common practices as deepening an irrigation ditch, enlarging a stock pond, or plowing.[76]

The anticipated delay, expense, and burden on farmers resulting from such permit requirements have prompted numerous bills which would amend the FWPCA to restore former limitations on § 404 regulatory powers.[77] Since the majority of agricultural practices take place in nonnavigable areas, these bills propose to eliminate control of agricultural activities under § 404 by restoring the navigational limitation to the Corps' jurisdiction.[78]

The proposed legislation, however, is not necessary to correct agricultural objections to the Corps' expanded jurisdiction. The new regulations promulgated by the Corps do increase the Corps' power to regulate pollutant discharge under

73 *See* text accompanying note 61 *supra.*

74 *See* text accompanying note 62 *supra.*

75 *See* Corps' Regulation 209.260(d)(2)(i), 40 Fed. Reg. 31325 (1975).

76 The Corps released a controversial press statement on May 6, 1975, which indicated that such common agricultural activities as plowing could require a § 404 permit under the expanded regulations. This press release was attacked as unfounded by various Congressmen. 121 CONG. REC. 3294 (daily ed. June 18, 1975) (extended remarks of Representative Moorhead); 121 CONG. REC. 9761 (daily ed. June 5, 1975) (remarks of Senator Muskie); 121 CONG. REC. 4772 (daily ed. June 2, 1975) (remarks of Representative Ottinger). *But see* 121 CONG. REC. 5408 (daily ed. June 12, 1975) (remarks of Representative Bauman); 121 CONG. REC. 9328 (daily ed. June 3, 1975) (remarks of Senator Dole).

77 *See, e.g.*, S. 1843, 94th Cong., 1st Sess. (1975), introduced by Senator Dole, 121 CONG. REC. 9328 (daily ed. June 3, 1975); H.R. 7441, 94th Cong., 1st Sess. (1975), introduced by Representative Long, 121 CONG. REC. 4698 (daily ed. May 22, 1975); H.R. 7690, 94th Cong., 1st Sess. (1975), introduced by Representative Cochran, 121 CONG. REC. 5066 (daily ed. June 12, 1975); H. R. 7859, 94th Cong., 1st Sess. (1975), introduced by Representative Bauman, 21 CONG. REC. 5408 (daily ed. June 12, 1975).

78 *Id.*

§ 404, but they also exempt most agricultural activities from such control. The regulations contain two specific provisions which define regulable dredge and fill materials in a manner which specifically excludes materials resulting from normal farming, silvaculture, and ranching activities.[79] In another provision, the regulations exclude stock watering pools and basins from § 404 regulation by the Corps.[80] Thus, the regulations themselves preclude the Corps' control over most agricultural areas.

These exemption provisions, however, do not completely eliminate all agricultural regulation; the Corps may still regulate some agricultural activities under § 404. For example, subsections (4) and (6) of the Corps' regulations, which exclude normal farming, silvaculture, and ranching activities, are followed by a sample list of specific activities which are excluded by that provision: "plowing, cultivating, seeding, harvesting for the production of food, fiber, and fiber products."[81] The agricultural uses which are not automatically eliminated by these provisions are uses which the Environmental Protection Agency, in its supervisory capacity over § 404, has included in an interpretive table of uses which are potentially regulable under the expanded definition of the Corps' jurisdiction. These are dredging for irrigation supply, draining wetlands for land reclamation, and filling in farm roads, fords, and bridges.[82] These activities are excludable from § 404 coverage under subsections (4) and (6) of the regulations to the extent that they can be classified as "normal" agricultural activities. They are not included in the sample list of exclusions, however, and no further definition is given of the term "normal agricultural activities" as it is used in the Corps' regulations. It is therefore conceivable that such uses may not be considered "normal," thus requiring a § 404 permit.

Erosion prevention devices constitute a second area that is potentially regulable under § 404. The regulations contain conflicting provisions on whether agricultural techniques for preventing soil erosion are exempted from § 404 control. Subsection (6) expressly excludes from Corps control such filling devices as "ripraps" and "groins" (sustaining walls of stone or soil built on an embankment slope to prevent soil and sand erosion).[83] However, subsection (7) specifically includes "ripraps" and "groins" in its list of fill activities that are regulable by the Corps under § 404.[84] Consequently, the regulations leave unclear whether these two devices or any other agricultural filling technique for preventing soil erosion fall within the Corps' § 404 jurisdiction.

These two examples indicate that the expansion of the Corps' jurisdiction under § 404 could cover some common agricultural practices. The potential regulation of even a minority of agricultural activities should be eliminated from

79 Corps' Regulations 209.260(d)(4), (d)(6)(i), 40 Fed. Reg. 31325 (1975).
80 Corps' Regulation 209.260(d)(2), (ii)(c), 40 Fed. Reg. 31325 (1975).
81 40 Fed. Reg. 31325 (1975).
82 Table 11-1, Environmental Protection Agency's Estimate of Activities That Could Be Included in the § 404 Permit Program Under the Broadest Definitions of Coverage and Jurisdiction, *Statement of William Hartmann, Jr., Vice President of Land Improvement Contractors of America Before the Water Resources Subcomm. of the House Comm. on Public Works & Transp.*, 93d Cong., 2d Sess. (1975).
83 Corps' Regulation 209.260(d)(6)(ii), 40 Fed. Reg. 31325 (1975).
84 Corps' Regulation 209.260(d)(7), 40 Fed. Reg. 31325 (1975).

the regulations; such agricultural areas were not intended to be covered by the FWPCA. Three factors substantiate this assertion. First, the legislative history of the FWPCA indicates that a number of Congressmen feared that undesirable and extensive federal regulation of agriculture would result from the passage of the Act. Legislative debate reveals that while no specific agricultural exemption was added to the FWPCA, the conferees indicated that the statutory language did not and was not intended to regulate normal agricultural practices.[85]

Secondly, most agricultural activities are not regulated by other provisions of the FWPCA. Although § 402 does regulate "point source" discharges[86] (discharges which reach a water body through specific and discoverable routes), most agricultural activities which result in discharges do not fall within this regulation, since many discharges of pollutants from agricultural activities cannot be traced to their specific point of origin.[87] Since these discharges are non-"point source," no § 402 permit is required. Non-"point source" agricultural pollution is unregulated by the remaining sections of the FWPCA.[88] Furthermore, the Environmental Protection Agency, which administers the § 402 permit program, has expressly excluded from regulation most pollutant discharges of ordinary agricultural practices, regardless of whether they are "point source," or non-"point source."[89] Thus, provisions of the FWPCA apart from § 404 do not regulate pollutant discharges from normal agricultural activities,[90] indicating that § 404 is also not intended to regulate these agricultural practices.

A third factor that evidences an intent not to regulate agricultural activities under § 404 is administrative convenience and cost. With its present resources, the Corps could not effectively administer a § 404 program expanded to include agricultural discharges. It has been estimated that the total cost of administering such an expanded § 404 program would be approximately $150 million and would require the services of 7,000 additional employees.[91] This administrative burden would be accompanied by an approximate cost of $2 billion to farmers who must apply for the permits, and an inestimable increase in processing delays.[92] This prohibitive burden, expense, and delay to both the Corps and private individuals clearly indicates that such agricultural activities are not intended to be regulated by an expanded § 404.

85 *See* 1 *Legislative History, supra* note 20, at 427-28, 651-53 (1973).
86 33 U.S.C. § 1342 (Supp. II, 1972).
87 *Hearings on H.R. 15596 and Related Bills Before the Subcomm. on Conservation and Watershed Development of the House Comm. on Public Works & Transp.*, 92d Cong., 2d Sess. 105-08 (1972); *See generally* Hines, *Farmers, Feedlots and Federalism: The Impact of the 1972 Water Pollution and Control Act Amendments on Agriculture*, 19 S. DAK. L. REV. 540 (1974); *NRDC Statement, supra* note 17; *Statement of the National Livestock Feeders Ass'n Before the Water Resources Subcomm. of the House Comm. on Public Works & Transp.*, 93d Cong., 1st Sess. (1975).
88 38 Fed. Reg. 18003 (1973).
89 Hines, *supra* note 87, at 561-64. The major exception to the rule that agricultural discharges are not regulated under § 402 is in the area of discharges from feedlots. The FWPCA and its administering agency, the EPA, require National Pollutant Discharge Elimination System (NPDES) permits under § 402 for such discharges. *Id.* at 549-66.
90 *Id.*
91 *See Statement of Honorable Gillis Long Before the Water Resources Subcomm. of the House Comm. on Public Works & Transp.*, 93d Cong., 2d Sess. (1975).
92 *Id.*

Although the possibility of unintended control of agricultural activities under § 404 should be eliminated from the Corps' regulation, legislation which restores the traditional limits of navigability is not necessary to correct the problem. Amending the regulations with specific language exempting such activities and adding a more comprehensive list of specifically exempted agricultural activities would be sufficient.

B. *A Comparison of § 404 and the Coastal Zone Management Act: Illustration of § 404's Deficiencies*

The major problem with the use of expanded Corps jurisdiction to achieve wetlands control is that § 404 of the FWPCA was not initially enacted for the specific purpose of wetlands control. Rather, § 404 was included in the FWPCA in order to supplement the Corps' general powers to regulate dredging and filling with a mandatory duty to assess and consider the environmental impact of such operations.[93] Only the subsequent expansion of § 404 in accordance with the *Calloway* order was specifically directed towards achieving greater wetlands control.[94] Since § 404 was not initially designed to implement extensive wetlands control, it has several deficiencies in effecting that goal. These deficiencies are best illustrated by a comparison of § 404 with the Coastal Zone Management Act (CZMA),[95] a comprehensive federal statute which was specifically enacted for the purpose of regulating coastal wetlands. Although the CZMA itself is generally not preferable to § 404 as a vehicle for wetlands control, CZMA does illustrate that § 404 lacks several important features.

One important advantage of the CZMA is that it places the responsibility of administering the regulatory program on a capable federal agency. The National Oceanic and Atmospheric Administration (NOAA) was providently chosen to implement the CZMA because of the technical competence required in administering a water-related coastal program.[96] Since the CZMA was enacted for the specific purpose of preserving and actively protecting coastal resources such as wetlands, the Act designated an administering agency, the NOAA, which possesses the requisite expertise and scientific knowledge to carry out that specific function.[97] In contrast, FWPCA § 404 was enacted for a more general purpose of regulating the environmental impact of dredge and fill activities.[98] Yet, the agency charged with administering § 404, the Army Corps of Engineers, does not possess the same technical and scientific competence as the NOAA.

A second important feature of the CZMA which § 404 lacks is the great amount of state participation that is afforded by the CZMA program. The CZMA operates through state permit programs which meet uniform federal

93 *See* text accompanying notes 38-43 *supra.*
94 *See* text accompanying notes 12-26 *supra.*
95 16 U.S.C.A. §§ 1451-64 (1974).
96 Comment, *The Environmental Protection Agency and Coastal Zone Management: Striking a Federal-State Balance of Power in Land-Use Management,* 11 HOUSTON L. REV. 1152, 1177 (1974). *See* Ludwigson, *Coastal Zone Management, A Whole New Ball Game,* 5 BNA ENVIRONMENTAL REP. Monograph 18 (1974).
97 *Id.*
98 *See* notes 38-43 *supra.*

standards and receive federal grants.[99] Although the CZMA provides for federal approval, supervision, and funding, the actual administration of the coastal wetlands regulation is primarily implemented through the state programs and agencies.[100] In comparison, § 404 of the FWPCA allocates to the states a purely advisory role, since the regulatory program is strictly enforced by the Corps.[101] Although the Corps' regulations allow input from state programs, only the federal government, through the Corps, actually administers the § 404 permit program.[102]

The CZMA's greater use of state participation in a wetlands control program is important because such land use regulation is traditionally reserved to state government. The states' traditional powers to regulate the use of wetland areas derive from the common law doctrine that the states hold title to the tidelands in trust for the public.[103] This common law right was statutorily supplemented by the Submerged Lands Act of 1953, which gave to the states all the power to regulate the use of submerged lands and waterbeds, subject only to federal powers to protect navigation.[104] Thus, state control of wetlands located in tidal areas is firmly rooted both in common law and statutory bases. One clear advantage of state control over wetlands is that the state can more readily adapt and more specifically direct wetlands regulation to meet the particular geographic needs of the state. Since each state has its own peculiar wetlands problems, it is preferable for the federal government to defer whenever possible to state judgments in these areas.[105]

Despite the CZMA's favorable features of a competent administering agency and greater state participation in administering the permit program, the CZMA is not more suitable than § 404 of the FWPCA as a vehicle for federal wetlands control. The CZMA is seriously deficient for such a role in several respects. First, the CZMA is an entirely voluntary program on the part of the states; the only sanction provided for a state's failure to comply with the Act is termination of federal aid.[106] Thus, in a state where no federally approved program exists, the CZMA permit program does not operate. Secondly, only coastal wetlands are controlled under the CZMA.[107] This exempts freshwater wetlands, which are regulated under § 404 of the FWPCA, from the permit requirements of the CZMA.[108] The cost of remedying these two serious deficiencies of the CZMA would be prohibitive, since the existing CZMA permit system would require ex-

99 16 U.S.C.A. §§ 1454-55 (1974).
100 *Id.* at § 1456.
101 *See* Corps' Regulation 209.260(d)(2)(h), 40 Fed. Reg. 31324 (1975).
102 *Id.*
103 United States v. Holt State Bank, 270 U.S. 49 (1926); Baer v. Moran Bros. Co., 153 U.S. 287 (1894); Barney v. Keokuk, 94 U.S. 324 (1876); Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845); Martin v. Waddell, 41 U.S. (16 Pet.) 366 (1842). *See generally* Ausness, *A Survey of State Regulation of Dredge and Fill Operations in Nonnavigable Waters,* 8 LAND & WATER L. REV. 65 (1973); Kingham, *supra* note 16; Teclaff, *supra* note 16; Comment, *Water Recreation—Public Use of "Private Waters,"* 52 CALIF. L. REV. 171 (1969).
104 43 U.S.C. §§ 1301-43 (1970).
105 *See, e.g.,* Haskell, *Land Use and the Environment: Public Policy Issues,* 5 BNA ENVIRONMENTAL REP. Monograph 20 (1974).
106 16 U.S.C.A. § 1458 (1974).
107 *Id.* at § 1453(a).
108 Corps' Regulation 209.260(d)(2)(n), 40 Fed. Reg. 31325 (1975).

tensive modification and expansion. Since § 404 of the FWPCA already provides an established and uniform system of federal regulation, it is preferable to modify the § 404 program to better meet the requirements of federal wetlands control.

C. *Implementing Greater State Participation in a Wetlands Control Program*

1. The Insufficiency of State Wetlands Programs Alone

As indicated, a serious deficiency of the use of § 404 for wetlands control is the limited participation of the states. The choice of § 404 of the FWPCA as the primary means of wetlands regulation contemplates a federally oriented program. However, efforts to preserve wetland areas have not been confined to the federal government. Both state and local governments have attempted to regulate activities in wetland areas. At the present time, approximately 11 states have enacted statewide wetlands protection programs which are generally administered by a professional employee or agency of the state.[109] Many other states provide more limited regulation through coastal zone management programs.[110]

However, a federally coordinated program for wetlands control is preferable to individual state programs for several reasons. First, although some states do have comprehensive regulations, the provisions of such acts vary according to the state in terms of coverage and effectiveness.[111] One program, for example, does not even have a regulatory permit system, but simply provides for general supervision of wetland areas.[112] Furthermore, the majority of states have no wetlands program. Therefore, a federally coordinated program is necessary to ensure that the programs for wetlands protection meet uniform standards and that such regulation is consistently administered for the preservation of wetlands in all states.

A second reason for preferring federal over state programs is that the basis of federal power to regulate wetlands is more firmly established constitutionally. State wetlands programs are enacted on the basis of police powers, and several courts have invalidated such regulation as an unconstitutional exercise of that power.[113] For example, in *State v. Johnson*,[114] the supreme court of Maine held

109 CONN. GEN. STAT. ANN. ch 423, §§ 22a-28 to 22a-45 (1973); ME. REV. STAT. ANN. tit. 12, §§ 4701-09 (1974); MD. ANN. CODE §§ 9-101 to 9-501 (1974); MASS. ANN. LAWS ch. 130, §§ 27A, 105 (1972); MISS. CODE ANN. §§ 49-27-1 to 49-27-69 (Supp. 1975); N.H. REV. STAT. ANN §§ 483-A:1 to 483-A:6 (Supp. 1973); N.J. STAT. ANN. §§ 13:9A-1 to 13:9A-10 (1975); R.I. GEN. LAWS ANN. §§ 2-1-13 to 2-1-25 (Supp. 1974); VA. CODE ANN. ch. 2.1, §§ 62.1-13.1 to 62.1-13.20 (1975); RULES OF FLORIDA DEPT. OF POLLUTION CONTROL: FLORIDA ADMINISTRATIVE CODE ch. 17-4, §§ 17-4.02 to 17-4.28 (1975).

110 ALASKA STAT. §§ 46.03.110-240 (1971); CAL. WATER CODE §§ 13000-970 (West 1971); DEL. CODE ANN. tit. 7, §§ 7001-13 (1975); GA. CODE ANN. tit. 40, § 3519(1975); WASH. REV. CODE ANN. tit. 90, §§ 58.010-930 (Supp. 1974).

111 Ausness, *supra* note 94, at 72-73.

112 N.C. GEN. STAT. §§ 113-229(1975).

113 Bartlett v. Zoning Comm'n, 161 Conn. 24, 282 A.2d 907 (1971); State v. Johnson, 265 A.2d 711 (Me. 1970); Commissioner of Natural Resources v. Vople & Co., 349 Mass. 104, 206 N.E.2d 666 (1965). *See generally* Dooley v. Town Plan & Zoning Comm'n, 151 Conn. 304, 197 A.2d 770 (1964); Morris County Land Improvement Co. v. Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963). *But see* Consolidated Rock Products Co. v. Los Angeles, 57 Cal. 2d 515, 370 P. 2d 342, 20 Cal. Reptr. 638 (1962); CEEED v. California Coastal Zone Conserv. Comm'n, 43 Cal. App. 3d 306, 118 Cal. Reptr. 315 (1974); Candlestick Properties, Inc. v. San Francisco Bay Conserv. & Dev. Comm'n, 11 Cal. App. 3d 557, 89 Cal. Reptr. 897 (1970); Potomac Sand & Gravel Co. v. Governor of Maryland, 266 Md. 358, 293 A.2d 241 (1972); Just v. Marinette County, 56 Wis. 7, 201 N.W.2d 761 (1972).

114 256 A.2d 711 (Me. 1970).

that an application of that state's wetlands act which substantially destroyed the value of the owner's land constituted an unlawful "taking" without compensation in violation of the due process clause of the United States Constitution.[115]

Federal regulation of wetlands which is based upon Congress' power under the commerce clause is not subject to the same constitutional infirmities. The courts have recognized that the power to regulate commerce unquestionably includes the power to regulate activities resulting in water pollution which has a serious effect on interstate commerce.[116]

2. Delegation of Power to States Under a Federal § 404 Permit Program

Although problems of uniformity and constitutionality indicate the need for federal regulation of wetlands, such regulation should be in cooperation with, and not in substitution for, state regulation. As noted, it is preferable to allow the state governments to retain the right to impose controls on the use of wetland regions.[117] Furthermore, the use of greater state participation in implementing wetlands regulation may compensate for the Corps' lack of specific technical and scientific competence as compared to that of NOAA, since the individual state agencies are more familiar with the specific problems and sources of wetlands pollution that are endemic to the state region.

Although the expanded § 404 regulations of the Corps do give some consideration to state evaluations in processing permits, the state is allotted only an advisory role. The Corps' regulations provide that as long as the policies and requirements of the FWPCA have been considered, and in the absence of overriding national factors of public interest, the Corps should generally issue a permit when a favorable state determination is rendered.[118] Although the regulations provide for such state input, all decision-making powers for the issuance of a § 404 permit are retained by the Corps. Unfortunately this involves a duplication of state and federal resources where the state already has an adequate wetlands regulation permit system.

A possible solution to this problem of duplication is the establishment of a program under § 404 which delegates the authority to grant permits to states which have federally approved permit programs. A similar approach under § 402[119] of the FWPCA, which establishes the National Pollutant Discharge System, provides a workable model. Under such a delegation program, the Corps could authorize a state with an adequate program to issue § 404 permits. The Corps

115 U.S. CONST. amend. XIV, § 1.
116 Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971). *See generally* United States v. Ashland Oil & Transp. Co., 504 F.2d 1317 (6th Cir. 1974); United States v. Phelps Dodge, Civil No. CR-74-776-TUC-WCF (D. Ariz., Apr. 8, 1974).
117 *See* text accompanying notes 103-05 *supra*.
118 Corps' Regulation 209.260(f)(3)(iii), 40 Fed. Reg. 31327 (1975).
119 33 U.S.C. § 1342 (Supp. II, 1972).

would receive copies of state actions on all permit applications and would be authorized to take corrective action where the state fails to administer the program in accordance with the requirements of the FWPCA.[120]

VI. Conclusion

The Corps' new regulations which were issued pursuant to *Calloway* expand the federal role in environmental protection. Section 404 of the FWPCA has been designated as the primary vehicle for implementing an extensive federal program for the control of wetland areas. The *Calloway* court order forced the expansion of the Corps' powers in order to adapt § 404 to this task. The expansion represents an acknowledgement that wetlands are ecologically critical areas which are threatened by pollution and require federal protection.

The goal of federal wetlands protection is not at issue; the environmental value of wetlands and the need for their preservation are readily affirmed by courts and legislatures. Rather, it is the mechanism that has been chosen to achieve wetlands control that is questioned. Generally, the expanded Corps regulations under § 404 confer adequate power on the Corps to regulate and protect wetlands from pollution. The new regulations define the Corps' jurisdiction in far broader terms than had prior regulations under the FWPCA and the 1899 Act.

However, several serious deficiencies in the § 404 regulations remain. The threat of unintended regulation of common agricultural activities can be eliminated by a careful addition to the regulation which specifically exempts such activities. The need for greater state participation under § 404 is a more difficult problem. This may be solved by delegating the power to issue § 404 permits to states with Corps-approved permit programs; this has already been accomplished in the NPDES program under § 402 of the FWPCA. Such a change is necessary to allow states to retain their traditional powers to regulate wetland disposition so that individual problems of state areas can be solved.

Therefore, regardless of the major and minor criticisms and necessary changes, the Corps' expanded regulations under § 404 provide a viable mechanism for federal wetlands control.

At the least, the Corps' § 404 expanded regulations enlarge the coverage of wetland areas beyond the limitations of prior federal regulations and statutes.

Joanne M. Frasca

120 Section 402 of the FWPCA is administered by delegation of permit granting powers to states in this manner. *Id.*