Wetland Protection under Section 404 of the Clean Water Act: An Enforcement Paradox

Ted Griswold

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Comments

Wetland Protection Under Section 404 of the Clean Water Act: An Enforcement Paradox

"My position on wetlands is straightforward: All existing wetlands, no matter how small, should be preserved."
— President George Bush

I. INTRODUCTION

Section 404 of the Clean Water Act of 1977 is designed to protect some of the most sensitive and functionally valuable resources in America: our nation's wetlands. In the short history of the Act, a paradox has emerged between this purported intention of the Act and its enforcement. The paradox is that strong legislation exists to protect our nation's waters and wetlands, but it is administered by agencies that appear reluctant to enforce its provisions. A backup program is available to citizens to ensure enforcement, but it is constrained by judicial interpretations which make it virtually unusable. Administration occurs under an alliance of two agencies that have

3. "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (1982).
4. See id. § 1311.
historically held diametrically opposed views toward wetlands and their use. Moreover, there has been a continuing loss of wetland habitat despite public opinion polls and Presidential orders favoring their protection.6

This Comment investigates the reasons for this apparent paradox, focusing on the dual problems of agency conflicts in enforcement and judicial reticence in interpreting the ability of citizens to compel enforcement. Included is an overview of recent legislative and judicial changes which indicate a more consistent future for the enforcement of section 404. Finally, this Comment suggests changes in the system that would promote a more uniform administration of that section.

II. BACKGROUND

Wetlands have been described as “among the most important ecosystems on the Earth.”7 Economically, they are an integral part of a $10 billion United States commercial fishery and a fur industry valued at up to $400 million annually. They account for over $10 billion spent annually on outdoor recreation.8 They are also very important hydrologically9 and biologically.10

Unfortunately, these values have not always been known or appreciated. Actually, the destruction of wetland areas was encouraged by the federal government for most of the last 200 years.11 Since colo-

9. Although wetlands are often considered valuable as wildlife habitats, they also have been described as “the kidneys of the landscape” for the important functional values they hold in flood control, water quality purification, and groundwater replacement. W. Mitsch & J. Gosselink, supra note 7, at 3. Though more difficult to estimate, the economic benefits of these hydrologic functions of wetlands greatly exceed the economic benefit derived from commercial and recreational activities. See NWF, Status Report, supra note 8, at 8-9.
10. Wetlands provide habitats for a myriad of wildlife, including many endangered species. In many regions where wetland acreage has been drastically depleted (for example, in southern California), this function drives many of the wetland management decisions because the continued existence of these species depends on the preservation and restoration of what little wetland area remains. J. Zedler, Salt Marsh Restoration: A Guidebook for Southern California 7 (1984).
11. W. Mitsch & J. Gosselink, supra note 7, at 7. As early as 1763, George Washington was active in draining the Great Dismal Swamp in Virginia. In the mid-1900s, the Swamp Lands Acts provided an official federal policy of encouraging states to drain and fill wetlands for land reclamation. In 1906 the United States Department of Agriculture (USDA) began surveying wetland area for the purpose of agricultural conversion. This policy was continued in the 1940s by the Soil Conservation Service and again by the USDA in 1953. NWF, Status Report, supra note 8, at 28. For a brief history of United States wetlands policies, see also NWF, Status Report, supra note 8, at 28-35.

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nial times, wetland acreage in the continental United States has decreased by as much as fifty percent.\textsuperscript{12} Wetland loss has resulted from drainage for agricultural conversion,\textsuperscript{13} filling for urban development,\textsuperscript{14} water diversion for irrigation,\textsuperscript{15} and subtle degradation from contaminants.\textsuperscript{16} However, as the physical and ecological importance of wetlands becomes more widely recognized and the hazards of wetland destruction become increasingly evident,\textsuperscript{17} political leaders have begun to emphasize the need to protect and preserve this important resource.\textsuperscript{18}

A. The Clean Water Act

In the early 1970s, federal policy regarding the protection of wetlands was contradictory. The Department of Interior was arguing for wetland protection, while the policies of other agencies, such as the Army Corps of Engineers (Corps), continued to encourage wetland destruction.\textsuperscript{19} At the same time, Congress was creating a series of amendments to the Federal Water Pollution Control Act of 1948, later to become the Clean Water Act of 1972 (CWA).\textsuperscript{20} The objec-

\begin{itemize}
\item \textsuperscript{12} Estimates range from 30-50\%, depending on the methods used in determining the geographic limits of wetland acreage—current rates of wetland loss are projected at approximately 300,000 acres per year. U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, WETLANDS: THEIR USE AND REGULATION, OTA-O-2063 (1984) [hereinafter OTA, WETLANDS REGULATION].
\item \textsuperscript{13} NWF, STATUS REPORT, supra note 8, at 28, 30-31.
\item \textsuperscript{14} Id. at 31-32.
\item \textsuperscript{15} Id. at 34.
\item \textsuperscript{16} Id. at 33.
\item \textsuperscript{17} For a more complete discussion on the hazards of wetland loss, see J. KUSLER, OUR NATIONAL WETLAND HERITAGE, A PROTECTION GUIDEBOOK 4-7 (1983).
\item \textsuperscript{19} These policies included construction of flood control projects, reservoirs, seawalls, and groins which destroyed millions of acres of wetlands. The Soil Conservation Service and Bureau of Land Reclamation were also involved with wetland destruction policies, providing incentives to farmers who drained wetland areas for agricultural purposes. See J. KUSLER, supra note 17, at 55-56; W. MITSCH & J. GOSELINK, supra note 7, at 441-42.
\item \textsuperscript{20} 33 U.S.C. §§ 1251-1376 (1982).
\end{itemize}
tive of the CWA was “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” To realize this objective, Congress included section 404 in the CWA which was intended to help protect the nation’s wetlands.

Section 404 of the CWA prohibits the discharge of any pollutant into the nation’s waters without a permit; however, it does not regulate all of the activities that lead to wetlands loss. Following considerable congressional debate regarding the proper agency to oversee the permit program, a compromise was arranged so that the Environmental Protection Agency (EPA) and Corps share custody of the program.

It was decided that primary permitting authority under section 404 would be administered by the Corps with the EPA maintaining statutory power to veto any permits erroneously granted. The EPA was also required to produce, with the Corps,

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21. *Id.* § 1251(a).
22. While Congress did not explicitly include wetlands under the jurisdiction of section 404, the statute has been so interpreted by the Environmental Protection Agency and the Army Corps of Engineers. See 40 C.F.R. § 232.2(g) (1989); 33 C.F.R. § 328 (1989). In 1985, the Supreme Court upheld these interpretations and encouraged a broad reading of section 404. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).
23. 33 U.S.C. § 1311(a) (1982). Such pollutants include solid fill material such as dredge spoil, or upland soil and debris. *Id.* § 1344(f)(2). Activities that result in the loss of most of the wetland acreage each year, such as draining and ditching of wetlands for agricultural purposes, have “at times been interpreted by the Corps as not coming under its regulatory purview.” GAO REPORT, supra note 5, at 32.
24. The measure presented by the House granted primary administrative authority to the Corps, with the EPA having authority to designate critical areas where particular pollutants would be prohibited. H.R. 11,896, 92d Cong., 2d Sess. § 404 (1972), reprinted in Envtl. Pol’y Div., Congressional Research Serv., Library of Cong., 93d Cong., 1st Sess., 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1063-64 (Comm. Print 1973) [hereinafter LEGISLATIVE HISTORY]. The House rationale was that because the Corps was already regulating construction and fill activities in traditionally navigable waters and in the ocean under section 10 of the River and Harbors Act of 1899, 33 U.S.C. § 403 (1982), the final authority for permitting decisions should rest with the Corps. The Senate bill contained no separate dredge and fill program, treating such activities the same as polluting activities and regulated in the same way by the EPA. S. 2770, 92d Cong., 2d Sess. § 402 (1971), reprinted in LEGISLATIVE HISTORY, supra, at 1685-92. Senator Muskie argued for EPA administration based on the dichotomous mission of the two agencies—the Corps’ mission was to protect navigation and easy access to the nation’s waterways, while the EPA’s mission was to protect the environment. Kilgore, *EPA’s Evolving Role in Wetlands Protection: Elaboration in Bersani v. United States EPA, 18 Envtl. L. Rep.* (Envtl. L. Inst.) 10,479, 10,480 (1988). This unsure beginning with a mixed alliance of agencies holding divergent wetlands interests has led to a permitting program that has been repeatedly revised in response to court actions and indecisive administration.
25. LEGISLATIVE HISTORY, supra note 24, at 324-25. This shared custody has hampere ted the effectiveness of the section 404 program in realizing its goals. See OTA, WETLANDS REGULATION, supra note 12, at 167.
27. EPA may veto any permit “whenever [the EPA administrator] determines ... that the discharge of such materials into such area will have an unacceptable adverse affect on municipal water supplies, shellfish beds, ... fishery areas ... , wildlife, or recreational areas.” *Id.* § 1344(c).
specific guidelines for use in permit application decisions and to help in determining the extent of section 404 jurisdiction.28

B. Extent of 404 Jurisdiction—Navigable Waters

The section 404 program specifically regulates the dredging and filling of materials in the navigable waters of the United States.29 Two related questions arise when considering the definition of “navigable waters”: (1) What types of areas are included in the definition?,30 and (2) Within an area that falls under 404 jurisdiction, what is the landward extent of that jurisdiction? Originally, the Corps adopted a narrow interpretation of 404 jurisdiction that included only selected navigable waters and very few wetland areas.31 However, following several court challenges,32 the Corps was forced to expand its interpretation to include all navigable waters, their adjacent wetlands, and many isolated wetlands.33 After considerable prodding from the EPA, the Corps finally revised its section 404 regulations to provide specifically for wetland protection.34 Still, individ-

28. Id. § 1344(b)(1).
29. Id. §§ 1311(a), 1344(a), 1362(12). The Act defines “navigable waters” as the “waters of the United States including the territorial seas,” and does not emphasize the term “navigable.” Id. § 1362(7). This has been interpreted to mean that Congress intended all of the waters of the United States to be covered by the Act, whether they are technically navigable or not. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 124 (1985).
30. For example, are wetland areas adjacent to oceans, streams and lakes considered navigable by the statute? If they are isolated from open water, are they still regulated by section 404?
31. This limited reading of navigable waters stems from the Corps’ view of its role in the CWA as protecting the quality of the water and de-emphasizes wetland values. This interpretation runs counter to the reading of the CWA by the EPA and other federal resource agencies (such as the United States Fish and Wildlife Service and the National Marine Fisheries Service [hereinafter “resource agencies”]), frustrating their mission of environmental protection. OTA, WETLANDS REGULATION, supra note 12, at 70.
34. The revised regulations read in relevant part:
The regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system.

For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasona-
uals continue to challenge the types of wetlands covered under these new regulations.38

In 1985, the Supreme Court unanimously ruled that including wetlands within a broad definition of “navigable waters” is consistent with the legislative intent of the CWA.36 The decision encourages a policy of considering marginal areas to be waters under section 404 jurisdiction. The impact of this decision on the scope of the section 404 program is sufficiently addressed elsewhere.37

Once it became established that most, if not all, wetlands fall within section 404 jurisdiction, the next question became how to delineate the landward extent of a specific wetland area.38 The Corps and the EPA had considerable difficulty agreeing on uniform meth-

35. When challenged in court, artificial wetlands have usually been held to be under Corps jurisdiction. See, e.g., Swanson v. United States, 789 F.2d 1368 (9th Cir. 1986). In Bailey v. United States, 647 F. Supp. 44 (D. Idaho 1986), artificial wetlands were held to be under section 404 jurisdiction even if they were not inundated, so long as under normal circumstances the area had soils saturated enough to support wetlands vegetation. Other cases have found that it is the present condition of the area and not the manner in which the wetlands were created that is relevant to the jurisdictional issue. See, e.g., United States v. Akers, 651 F. Supp. 320 (E.D. Cal. 1987); Track 12, Inc. v. United States Army Corps of Eng'rs, 618 F. Supp. 448 (D. Minn. 1985).

However, some of these challenges to section 404 jurisdiction have been successful. In United States v. Fort Pierre, 747 F.2d 464 (8th Cir. 1984), the court ruled that if an action by the Corps inadvertently created the wetlands, then it is not under section 404 jurisdiction. The court postponed dealing with the question of intentionally created wetlands. In Leslie Salt Co. v. United States, 700 F. Supp. 476 (N.D. Cal. 1988), the court conducted a de novo wetlands determination and found that salt ponds were not under the jurisdiction of the Corps because the ponds did not meet the definition of “wetlands.” The ponds were created by backflow onto the land without consent of the owner and would normally be dry. The ability of the Corps to assert federal jurisdiction has also been challenged. See National Wildlife Fed’n v. Laubscher, 662 F. Supp. 548 (S.D. Tex. 1987) (finding that if the wetlands are visited by migratory birds, then the interstate commerce issue is sufficient for Corps jurisdiction).

There, the Supreme Court ruled that wetlands jurisdiction under section 404 includes areas periodically inundated by the waters of the United States as well as areas saturated by groundwater and adjacent to waters of the United States. The Court expressly left open the question of whether wetlands saturated by groundwater, but not adjacent to open water, are covered by section 404. See id. at 124.
38. The current definition of wetlands includes “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.” 33 C.F.R. § 328.3(b) (1988).
ods to delineate the upper extent of a given wetland boundary. In January 1989, the agencies finally signed a Memorandum of Agreement (MOA) creating these uniform methods. This MOA is currently being incorporated into agency guidelines and has not yet been implemented. Therefore, its utility in resolving the issue remains unknown.

C. The Permit Process

The Corps’ permit review process is designed to occur in sequential phases. First, upon receiving a permit application, the Corps begins an initial review (or prepermit consultation) to suggest preliminary design changes and to determine if the project falls into a general permit classification, or whether it is an individual project.

Second, the project is evaluated for compliance with the section 404(b)(1) Guidelines (Guidelines). The Guidelines are intended to be “binding” and “regulatory.” If the planned project does not comply with them, the project must be modified or the permit must

39. The United States Attorney General concluded in 1979 that the EPA had the ultimate authority to decide whether a planned project fell within the scope of the Federal Water Pollution Control Act. 43 Op. Att’y Gen. No. 15, at 5 (1979). However, the way the permit program is set up, all applications are submitted to the Corps which then decides whether a project is a special case that should be referred to EPA. This decision depends, in part, on the wetlands jurisdiction issue. Therefore, while the EPA may officially have final authority in wetlands determinations, the definition used by the Corps is much more crucial in practice.


41. For an elaboration on recent findings regarding the permit review process, see Liebesman, Clean Water Act’s Section 404 Dredged and Fill Material Discharge Permit Program—Significant Issues, at 4-9, in FOURTH ANNUAL CONFERENCE ON WETLANDS LAW AND REGULATION (A.B.A., May 11-12, 1989).

42. To make the section 404 program more manageable, the 1977 amendments to the CWA authorized the issuance of general permits, which allow multiple activities similar in nature that will individually and cumulatively cause minimal environmental effects. The Corps may issue such permits on a state, regional or nationwide basis for periods not exceeding five years. General permit activities are supposed to cumulatively conform to the section 404(b)(1) Guidelines; however, review of cumulative impacts for individual activities under general permits is rare. If the project falls under an existing general permit, then the review process is usually bypassed—with the Corps treating it as if the process had already been completed. If the application is for a new general permit, then the review necessitates considerably more scrutiny than for an individual permit. EPA § 404(b)(1) Guidelines, 40 C.F.R. § 230.7 (1989).

43. Id. § 230.

be denied. The key provisions in the Guidelines focus on the availability of practicable alternatives to the project. The rules are quite specific, stating that “no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have a less adverse impact on the aquatic ecosystem . . . .” The Guidelines also state that for projects that are not water dependent, practicable alternatives are “presumed to be available, unless clearly demonstrated otherwise.” This presumption is designed to be difficult to overcome. During the permit review process, the Guidelines also require that cumulative impacts analysis of individual projects be conducted on a given ecosystem. The Corps' district engineer determines the geographic areas in which the cumulative impacts are considered. Within each of these areas, a history of development and fill activities is compiled along with anticipated future developments.

Third, once compliance with the Guidelines is confirmed, the permit must be certified to comply with state water quality standards, as required under section 401. Finally, the public interest review


46. The Guidelines state that “[a]n alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” See id. § 230.10(a)(2). This includes considering alternative sites that are not owned by the applicant. Id.

47. See id. § 230.10(a).

48. A project is water dependent if it “require[s] access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose.” See id. § 230.10(a)(3). For example, a marina would be considered a water dependent project while a shopping mall would not.

49. Id. § 230.10(a)(3). This section reads in part:

(a)(3) Where the activity associated with a discharge which is proposed for a special aquatic site (as defined by Subpart E) does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not “water dependent”), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

Id.; see also Liebesman, supra note 41, at 6.


Cumulative impacts are changes that take place in aquatic ecosystems [including wetlands] that are attributable to the collective effect of a number of individual discharges of dredged or fill material. Although the impact of a particular discharge may constitute a minor change in itself, the cumulative effect of numerous such piecemeal changes can result in a major impairment of the water resources and interfere with the productivity and water quality of existing aquatic ecosystems.

Id.; see also GAO REPORT, supra note 5, at 28.

51. EPA § 404(b)(1) Guidelines, 40 C.F.R. § 230.11(g)(2) (1989); GAO REPORT, supra note 5, at 29 (citing the Corps' Regulatory Guidance Letter No. 84-9).

52. This certification may be affirmatively waived by the states. CWA § 401, 33
process begins with a public notice acknowledging the permit application and inviting comments from concerned individuals and resource agencies. Comments from the United States Fish and Wildlife Service are given particularly strong consideration. Fifteen to thirty days after the public notice is issued, the Corps reviews public comments and has the option to call a public hearing for further input on the application. When damage to wetlands is involved, the Corps must analyze alternatives to the project from a public interest context and provide a benefits analysis on the alternatives. The Corps is then required to search for the "least harmful alternative that is feasible." When the project imposes an unavoidable impact on the wetland area and there is no practicable alternative, the applicant must attempt to compensate for the damage through mitigation.

D. Enforcement

Enforcement of section 404 regulations is shared by the EPA and the Corps. However, there is considerable latitude in the way the


The First Circuit recently affirmed the need for individual water quality certifications for all projects, including those falling under general permits. See United States v. Marathon Dev. Corp., 867 F.2d 96, 101 (1st Cir. 1989).

53. The purpose of this phase is to determine if the project is in the public's interest. Public notices of the application are issued within 15 days of receipt of the completed application by the Corps. Corps regulations require that the notices supply "information sufficient to give a clear understanding of the proposed activity in order to generate meaningful comments." GAO REPORT, supra note 5, at 40.

54. The public at large may also request a public hearing, but the district engineer for the Corps does not have to grant the request. 33 C.F.R. § 327.4(b) (1989).

In the public interest review, the Corps considers and balances impacts on conservation, economics, aesthetics, the general environment, historic values, fish and wildlife, flood damage prevention, water supply, water quality, energy and other concerns. See id. § 320.4(a)(1). Permit decisions must be made with all of these factors in mind. See Mall Properties, Inc. v. Marsh, 672 F. Supp. 561 (D. Mass. 1987), appeal dismissed, 841 F.2d 440 (1st Cir.), cert. denied, 109 S. Ct. 128 (1988). The Corps must also give full consideration to comments from the resource agencies (United States Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS)) regarding the impacts on wildlife resources. 33 C.F.R. § 320.4(2)(3) (1989).

55. Specifically, the Corps must "determine if the benefits of the alternative outweigh the damage to the wetlands resources, whether the activity is 'water dependent,' whether it can be shown that there are no feasible alternatives and the extent of public vs. private benefit for the project." Liebesman, supra note 41, at 5; see also 33 C.F.R. § 320.4 (1989).


57. The Corps has enforcement power over unpermitted discharges and the failure to comply with permit conditions. The EPA is empowered to independently enforce against unauthorized, unpermitted filling activities and violations of state-run, section
agencies may use their enforcement powers. Both agencies have authority to administer surveillance programs to monitor unpermitted activities and violations of permit conditions. When violations are found, the agencies may issue cease and desist orders, order restoration of the project site, or pursue civil penalties and occasionally, criminal prosecution. The Corps may also opt to enter into negotiations with the violator, arranging modifications to the project to bring it into compliance.

In addition to these enforcement capabilities, the EPA has the capacity to veto any permit decision made by the Corps. The provision for this power is derived from the original CWA congressional debates regarding whether the EPA or the Corps should administer the section 404 permit process. The veto capability has been repeatedly challenged and affirmed in the courts. Despite the potential utility of the EPA veto authority, it is used sparingly.

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58. However, neither agency is currently using this authority extensively. See GAO REPORT, supra note 5, at 55-65.

59. The CWA authorizes penalties of up to $25,000 per day of violation and one year imprisonment for any person that willfully or negligently violates a permit condition or limitation. Repeat offenders may receive a fine of up to $50,000 per day of violation, a prison term of up to two years or both. Id. at 65.

60. The EPA veto authority provision, § 404(c) of the CWA, provides: The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such a determination, the Administrator shall consult with the [Corps]. The [EPA] shall set forth in writing and make public [its] findings and [its] reasons for making this determination under this subsection.


61. See LEGISLATIVE HISTORY, supra note 24, at 177.


63. The EPA veto authority has been used only seven times through 1988. The sites involved in these veto decisions are: (1) North Miami Landfill (1981); (2) M.A. Norden Site, Mobile Alabama (June 15, 1984); (3) Jack Maybank Site, Jehosse Island, South Carolina (April 5, 1985); (4) Sweedens Swamp Site, Attleboro, Massachusetts (May 13, 1986); (5) Bayou Aux Carpes Site, Jefferson Parish, Louisiana (October 16, 1983); (6) Russo Development Corp. Site, Carlsbad, New Jersey (May 9, 1988); and (7) Lake Alma Project, Georgia (Feb. 14, 1989). Liebesman, supra note 41, at 9.

In the Russo Development Corp. case, the EPA vetoed a Corps after-the-fact permit for the first time. Russo Dev. Corp., 53 Fed. Reg. 16,469 (E.P.A. 1988). This veto is
The Water Quality Act of 1987 has increased the enforcement capabilities and flexibility of section 404 authorizing the EPA and the Corps to issue administrative orders directly imposing penalties, requiring corrective action, or both. In addition, the 1987 Act increased the extent of each of these remedies and the minimum fines imposed for violations.

E. Citizen Suits

In the event that an unpermitted project should slip past these agencies (or if the permit process, for one reason or another, has been compromised), Congress provided the ability for private citizens to become their own attorneys general. Citizens may sue the violating party and either the Corps or the EPA to compel enforcement of the CWA's provisions. However, the CWA places several restrictions on the availability of these suits. For example, citizens may sue only for violations of section 404 standards or for the failure currently being challenged in court. See Russo Dev. Corp. v. Thomas, No. 87-3916 (D.N.J. Nov. 6, 1989).

64. 33 U.S.C. § 1319(g) (1988). The agencies no longer must institute complicated and time consuming civil proceedings to compel compliance. This improvement should significantly enhance the efficiency of enforcement. The authority has already been used by the EPA on at least 18 occasions; the Corps has made no plans to implement the new enforcement powers. See Liebesman, supra note 41, at 17.


67. Section 505(a) of the CWA, reads in part:

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section . . . any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.


While the statute names only "the [EPA] Administrator," the Corps may also be sued under this section. National Wildlife Fed'n v. Hanson, 859 F.2d 313, 316 (4th Cir. 1988). Federal facilities that have violated the CWA regulations may also be sued pursuant to section 505(a)(1).
of the Corps or the EPA to perform a nondiscretionary duty.\(^8\) Also, citizens must give sixty days notice prior to filing suit,\(^9\) and may not file suit if an enforcement action is being diligently prosecuted by the Corps or the EPA.\(^7\) The notice period allows the agencies to review the administrative record (if there is one) and to modify the permit or take an enforcement action against the violator.

Remedies for citizens' suits are generally confined to injunctive relief. However, prevailing parties are allowed to recover attorneys' fees and expert witness costs.\(^1\) Courts have balked at ordering recovery of these expenses from private parties, often noting that the permit applicant made an honest effort to comply with section 404 regulations as explained to them by Corps officials.\(^2\) In cases where violators lack these good intentions, courts are less hesitant to award attorneys' fees.\(^3\) This provision allows citizens to pursue responsible legal action with quality representation without incurring a large financial loss. Unfortunately, attorneys' fees are not awarded until after a final decision is rendered, which in environmental suits may take several years.

\(^6\) Section 505(b) of the CWA, reads in part:
(b) Notice

No action may be commenced—
(1) under subsection (a)(1) of this section—
(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or
(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator.\(^7\)

\(^7\) See Hanson, 859 F.2d at 319. "[I]t may be proper to treat private parties differently than governmental entities, for 'special care [should be exercised] regarding the award of fees against private parties.'" Aoyelles Sportsmen's League v. Marsh, 786 F.2d 631, 634 n.5 (5th Cir. 1986) (quoting Ruckelshaus v. Sierra Club, 463 U.S. 680, 692 n.12 (1983)).

III. Analysis

A. Problems

As seen from the above discussion, the section 404 permitting program is extensive, but it is designed to be easily implemented. In the absence of all-encompassing federal legislation governing the use of wetlands, section 404 is the primary regulatory program controlling wetland destruction and preservation. However, the section 404 program has not been administered as it was intended.

Independent assessments have severely criticized the section 404 program for failing to protect wetlands. For example, the Office of Technology Assessment, using Corps information from 1980 and 1981, estimated that the acreage protected in those years was less than 50,000 acres. This figure amounts to less than fifteen percent of the total wetland acreage lost each year. One reason for this criticism, and perhaps the primary limitation of the section 404 program, is that it regulates only filling and dredging activities. Nevertheless, there are substantial wetland areas and development activities covered by section 404 and Corps regulations. But enforcement of these regulations is largely ineffective, and the Corps' administration of the section 404 program has been characterized as lacklus-

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74. While there has been considerable litigation challenging and clarifying the section's language, section 404 remains a conceptually powerful tool to prevent wetland loss. The Supreme Court recently emphasized that "in defining the waters covered by the Act to include wetlands, the Corps is 'implementing congressional policy rather than embarking on a frolic of its own.'" United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 139 (1985) (quoting Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 375 (1969)).

75. It did not specify how much less. OTA, WETLANDS REGULATION, supra note 12, at 3-4.

76. See id. at 11. See generally GAO REPORT, supra note 5 (Critically examining the administration of the permit program by the Corps and disapproving of it). The section 404 program was labeled a "dismal failure" in protecting wetlands by the National Wildlife Federation. NWF, STATUS REPORT, supra note 8, at 37.

77. Activities that result in the loss of most of the wetland acreage each year, such as draining or clearcutting of vegetation for agricultural purposes, are not covered by the section 404 program. GAO REPORT, supra note 5, at 19. However, subsidies still exist for farmers that drain wetlands. OTA, WETLANDS REGULATION, supra note 12, at 12.

Even within those areas covered by section 404, there are categorical exemptions from jurisdiction for normal agriculture and ranching operations. The definition of those activities may vary widely, and these activities have been the cause of much of the wetlands lost. GAO REPORT, supra note 5, at 19. The GAO apparently believes that these definitions have been broadly construed by the Corps. A narrow interpretation of these exemptions, which has been contrary to Corps policy, would undoubtedly help reduce the amount of wetlands lost.
This lack of enthusiasm in enforcement pervades the program and was candidly criticized in a recent General Accounting Office (GAO) review of the Corps’ handling of the section 404 program. This congressionally requested review verified the EPA and Fish and Wildlife Service concerns over the continued loss of wetlands under the program.

These concerns present the other side of the section 404 paradox—the law is on the books and the congressional intent and popular sentiment to protect wetlands exist, but the law is easily circumvented and often unenforced. The EPA and the Corps are unable to agree on a uniform interpretation of the regulations and guidance written into section 404. The reasons for this are many and varied. However, they likely stem from two very different interpretations of the purpose of the section 404 program. On the one hand, the Corps has stated that the emphasis of section 404 is to protect the waters of the United States, and that it was not designed as a wetland protection program. The Corps sees its main goal as processing permits. Consequently, the Corps has adopted a narrow definition of nearly all of the pivotal terms in the Act. On the other hand, the EPA has read the Act as a mandate to protect wetlands to the fullest extent. To this end, it has construed the terms of section 404 broadly. The following analysis reviews some of the more obvious failures of the section 404 program, most of which are attributable to the Army Corps of Engineers.

1. **Insufficient Assertion of Wetland Jurisdiction**

As mentioned earlier, the Corps and the EPA have had considerable difficulty agreeing on methods for delineating the landward extent of a given wetland. While the uniform methods agreed to in

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78. See NWF, STATUS REPORT, supra note 8, at 36.
79. The GAO noted that not only is the section 404 program failing to control most of the wetland losses, reliable records are not being kept regarding the extent to which it has been effective. “[N]o definitive data are available to measure with precision the impact of the section 404 regulatory program in terms of wetlands acreage protected or lost. Moreover, permit documents do not always include the information necessary to begin compiling such data.” GAO REPORT, supra note 5, at 20. In fact, random samples of permit applications indicated that “permits often do not record the amount of wetlands to be affected by the proposed activity.” Id. If the amount of acreage affected is not recorded, the Corps automatically loses its enforcement leverage, because wetland loss due to noncompliance cannot be proven. The lack of this very basic information would seem to make the permit review process futile, and render monitoring of permit conditions impossible.
80. See NWF, STATUS REPORT, supra note 8, at 36; OTA, WETLANDS REGULATION, supra note 12, at 167.
81. See Kilgore, supra note 24, at 10,480.
82. See Liebesman, supra note 41, at 1-4. When the Corps and the EPA (and the Fish and Wildlife Service (FWS)) use different techniques to delineate wetland boundaries, the final acreage estimates can vary by thousands of acres. For example, the GAO
January 1989 may eventually help solve the problem, these methods have yet to be implemented and their effect is relatively unknown. Meanwhile, many wetlands currently under review have uncertain boundaries, and large areas of wetlands are continually being lost due to inconsistent delineation procedures. In addition, the new uniform methods have been criticized because they fail to consider regional differences in wetland types.

2. Disregard for the Section 404(b)(1) Guidelines

The Corps and the EPA view the section 404 application process differently, resulting in the use of different criteria to evaluate potential projects. While the CWA states that use of the Guidelines in permit review is nondiscretionary, it fails to provide a mandatory outline for their application. The EPA viewpoint tracks the plain report noted that records from the Vicksburg office of the Corps estimated the program allowed the loss of 800 acres in that region in 1986. The FWS office for the same region estimated that about 55,000 acres were adversely impacted by the program over the same period. In one 1985 project, the Corps received a permit application to fill 1300 acres of wetland (as estimated by FWS) for agriculture. The Corps decided that only 80 acres of wetland existed on the site, and approved the permit over a recommendation by the FWS to deny it. The 1220 acres that fell out of the Corps jurisdictional limits were subsequently filled and developed. GAO REPORT, supra note 5, at 24-25.

33. FEDERAL MANUAL, supra note 40.
34. This criticism has been raised in scientific circles because the criteria used in the new Memorandum of Agreement may greatly underestimate wetland acreage in arid areas such as the southwest. In these areas, the long-term hydrologic cycles may indicate that an area should be considered as wetlands. However, prolonged dry periods may make that area appear to lack a dominant hydrology for short periods of time. These short-term anomalies are not considered in the new method; rather, it considers the immediate condition of the project site. As a result, the timing of the project, not the physical characteristics of the site, may determine whether an area is allowed to be filled because of a lack of hydrology. Interview with Sharon Lockhart, Associate of the Pacific Estuarine Research Laboratory, in San Diego (July 29, 1989).

35. 33 U.S.C. § 1344(b) (1988). This section provides in part:
(b) Specification for disposal sites

Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary of the Army (1) through the application of guidelines developed by the Administrator [of the EPA], in conjunction with the Secretary[.] Id. (emphasis added).

However, there have been several cases where the Guidelines have been challenged in court with conflicting results. In Butrey v. United States, 690 F.2d 1170, 1180 (5th Cir. 1982), cert. denied, 461 U.S. 927 (1983), and Shoreline Assocs. v. Marsh, 555 F. Supp. 169 (D. Md. 1983), aff’d, 725 F.2d 677 (4th Cir. 1984), the courts found that the Corps must use the Guidelines. But in 1902 Atlantic Ltd. v. Hudson, 574 F. Supp. 1381 (E.D. Va. 1983) and National Audubon Soc’y v. Hartz Mountain Dev. Corp., 14 ENVTL. L. REP. (Envtl. L. Inst.) 20,724 (D.N.J. 1983), the courts minimized the importance of the Guidelines.
language of the CWA, which states that the process is intended to be sequential. The first step is to examine whether the project complies with the section 404(b)(1) Guidelines. If the project fails this threshold test, the process stops here, before the public review process and the permit is denied. Only if the project complies with the Guidelines does it move forward to the public review phase to see if it is in the public’s interest. Therefore, permit denial may occur on strict environmental grounds, regardless of economic concerns.

The Corps, on the other hand, does not consider satisfaction of the

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86. For the EPA viewpoint, see Ciupek, Protecting Wetlands Under Clean Water Act § 404: EPA’s Conservative Policy on Mitigation, 8 Nat’l Wetlands NewsL. 12 (1986). The CWA § 404(b)(1) Guidelines, promulgated by the EPA provide: § 230.5 General procedures to be followed.

In evaluating whether a particular discharge site may be specified, the permitting authority should use these Guidelines in the following sequence:

(a) In order to obtain an overview of the principal regulatory provisions of the Guidelines, review the restrictions on discharge in § 230.10(a) through (d), the measures to minimize adverse impact of Subpart H, and the required factual determinations of § 230.11.

(b) Determine if a General permit (§ 230.7) is applicable; if so, the applicant needs merely to comply with its terms, and no further action by the permitting authority is necessary. If the discharge is not covered by a General permit:

(c) Examine practicable alternatives to the proposed discharge, that is, not discharging into the waters of the U.S. or discharging into an alternative aquatic site with potentially less damaging consequences (§ 230.10(a)).

(d) Delineate the candidate disposal site consistent with the criteria and evaluations of § 230.11(f).

(e) Evaluate the various physical and chemical components which characterize the non-living environment of the candidate site, the substrate and the water including its dynamic characteristics (Subpart C).

(f) Identify and evaluate any special or critical characteristics of the candidate disposal site, and surrounding areas which might be affected by use of such site, related to their living communities or human uses (Subparts D, E, and F).

(g) Review Factual Determinations in § 230.11 to determine whether the information in the project file is sufficient to provide the documentation required by § 230.11 or to perform the pre-testing evaluation described in § 230.60, or other information is necessary.

(h) Evaluate the material to be discharged to determine the possibility of chemical contamination or physical incompatibility of the material to be discharged (§ 230.60).

(i) If there is a reasonable probability of chemical contamination, conduct the appropriate tests.

(j) Identify appropriate and practicable changes to the project plan to minimize the environmental impact of the discharge, based upon the specialized methods of minimization of impacts in Subpart H.

(k) Make and document Factual Determinations in § 230.11.

(l) Make and document Findings of Compliance § 230.12 by comparing Factual Determinations with the requirements for discharge of § 230.10.


87. Ciupek, supra note 86, at 12. This does not include prepermit consultations.

88. Economic and social concerns are first addressed at the public review phase.

Guidelines a prerequisite to the public review process. Instead, it sees the Guidelines as merely advisory, providing a checklist of what to look for in simultaneously balancing environmental effects with "the public interest" during the public interest review.\(^9\) However, the Second Circuit Court of Appeals has confirmed that use of the Guidelines in evaluating a permit is mandatory, and that the Corps may not issue a permit if it violates those guidelines, even if the Corps' public interest review weighs in favor of the project.\(^9\) Further, the court ruled that the public interest review, which lacks specific standards for evaluation, is not mandatory under section 404.\(^9\) This decision is contrary to several earlier decisions addressing the issue,\(^9\) and it remains to be seen whether it will be controlling.

3. **Inadequate Consideration of Practicable Alternatives**

Many of the disputes between the Corps and the EPA regarding the Guidelines concern the analysis of practicable alternatives.\(^9\) In particular, these disputes involve the extent to which a given project is water dependent.\(^9\) There is a stated presumption in the Guidelines that there are less damaging, more practicable alternatives to a project if it is not water dependent.\(^9\) To fill a wetland area for a non-water-dependent project, the applicant must successfully refute this presumption. The Corps has chosen to rely on the permit applicants to determine if there are practicable alternatives to the project and to define the "purpose of the project," which is used to make that determination.\(^9\) As a result, few permits are denied on the basis of the practicable alternatives test because applicants can define their project goals narrowly enough to make the proposed project site the...

\(^91\) Bersani, 850 F.2d at 39-40.
\(^92\) Id. at 40; see also Kilgore, *supra* note 24, at 10,482.
\(^94\) The section 404(b)(1) Guidelines prohibit the discharge of fill or dredge spoil into wetlands if there are less environmentally damaging, practicable alternatives to the project available. 40 C.F.R. § 230.10 (1989).
\(^95\) "Water dependent" is defined *supra* note 48.
\(^97\) GAO REPORT, *supra* note 5, at 26.
The EPA, on the other hand, defines the purpose of a project broadly, which allows for a wider spectrum of project alternatives. An applicant that wants his or her project approved by the EPA would define the same project even more narrowly. In Bersani v. Robichaud, the Second Circuit ruled that the EPA was justified in using its broad interpretation of alternatives. The court also found that the applicant must consider whatever alternatives were available at the time the applicant entered the market for that development project, as opposed to the time of application for the permit.

Another major problem with the alternatives analysis is that the EPA and the Corps disagree on the extent to which practicable alternatives are considered in permit issuance. The EPA emphasizes environmental concerns regarding practicable alternatives, regardless of whether they are more costly to the applicants. The Corps, however, considers an alternative practicable only if the applicant does. In commenting on the GAO report, the Department of Defense stated that "it is not reasonable to take a stance that would result in a denial of all non-water-dependent section 404 applications on the basis of the lack of proof that no practicable alternatives exist." Whether the Corps thinks this is reasonable or not, this is exactly what the section 404(b)(1) Guidelines mandate.

4. Failure to Account for Cumulative Impacts

Both the Corps and resource agencies agree that cumulative impact studies are not adequately addressed in the permitting process. Logistical reasons are usually given for not considering cumulative

98. Id. at 27. The EPA commented on this problem in 1987, stating that "for the majority of the cases we have seen, the Corps practice is to issue permits for whatever the applicant wants with very little consideration given to the 'tests' within the Guidelines that address prohibition and alternatives, or EPA stated concerns." GAO REPORT, supra note 5, at 27 (quoting a memo to the EPA Office of Wetlands Protection from EPA region VI staff (May 26, 1987)).

99. GAO REPORT, supra note 5, at 27. For example, a project would be referred to generically as a shopping center (not water dependent) or a marina (water dependent).

100. For example, an applicant would describe his or her shopping center as a nautical theme shopping center with a waterfront boardwalk and restaurants with a bay view. It would be much more difficult to find an alternative site for such a project using this description of the project's purpose.


102. "In short, we conclude that a common sense reading of the statute can only lead to the use of the market entry approach [to practicable alternatives analysis] used by the EPA." Id. at 44.

103. GAO REPORT, supra note 5, at 27.

104. Id.

105. Id. at 28.

impacts; it is easier to consider the permit applications individually.\textsuperscript{107} Part of this logistical problem stems from poor record keeping by the Corps. Total acreage affected is incalculable because many permits lack specific figures on wetland loss.\textsuperscript{108}

Although Corps regulations require cumulative impacts evaluation in all permits,\textsuperscript{109} resource agencies’ concerns over cumulative impacts, known to the Corps, often are not heeded.\textsuperscript{110} For example, when the Laguna Niguel, California office of the Fish and Wildlife Service wrote the Corps’ district engineer asking for consideration of cumulative impacts in permit decisions, the Corps responded that it did not have the resources to worry about such impacts.\textsuperscript{111} Resource agencies appear particularly concerned with projects that are authorized by nationwide (or general) permits because, once granted, the resource agencies lose their opportunity to comment on individual projects.\textsuperscript{112}

In commenting on the findings of the GAO, the Department of Defense agreed that it is difficult to assess cumulative impacts, but that “[t]he Corps must not adopt a narrow view that all wetlands must be equally protected without consideration. . . of public and private needs. No exact methodology exists concerning cumulative impacts assessment . . . .”\textsuperscript{113} The GAO reported that with no offi-

\begin{footnotesize}
\begin{enumerate}
\item See GAO REPORT, supra note 5, at 28.
\item Id. at 20.
\item "The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest." 33 C.F.R. § 320.4(a) (1989).
\item The GAO reported an instance where the EPA recommended denial of a permit to fill 12 acres of bottomland hardwood wetland because the area had been impacted by earlier agricultural activities and the bottomland hardwoods were regionally depleted. The EPA pointed out that the further loss of the functional values of these areas would adversely affect the overall system. The Corps acknowledged that there would be a reduction in functional values, but felt the impact would not be significant. GAO REPORT, supra note 5, at 29.
\item "Unfortunately, I cannot recommend discretionary action without objective data on the degree of cumulative impacts occurring and we lack the resources necessary to collect and compile such data." Letter from Tadahiko Ono, Los Angeles District Engineer, USFWS, to Nancy Kaufman, Field Supervisor, USFWS (February 27, 1989).
\item GAO REPORT, supra note 5, at 30. Once a nationwide permit is granted, individual projects are not required to go through section 404(b)(1) and practicable alternatives analyses. 33 C.F.R. § 330.8 (1989). However, district engineers have the authority to revoke nationwide permit status and require individual project analysis if they have concerns regarding the environmental soundness of a project. Nevertheless, the resource agency offices that were reviewed by GAO provide specific instances of the Corps systematically ignoring their comments regarding cumulative environmental impacts. See GAO REPORT, supra note 5, at 30-32.
\item See GAO REPORT, supra note 5, at 86 (comments from the Department of Defense).
\end{enumerate}
\end{footnotesize}
cial method available for estimating cumulative impacts, and because of fundamental differences between the Corps and resource agencies regarding how and when assessment is made, the issue appears deadlocked.114 The result is a continued loss of wetlands until the issue is decided by the agencies or the courts, or is addressed by Congress through amendments to the CWA.

5. Improper Use of Mitigation

Ideally, the destruction of wetlands is a last resort and an undesirable conclusion to the section 404 permit process. All options to avoid or minimize impacts should be exhausted before the permit is granted.115 When impacts are unavoidable (for example, wetlands are filled) for a given project, the permittee is required to mitigate the loss of the wetlands through compensation techniques, such as wetland creation or restoration in some nearby area.116 The mitigation requirement, however, has become a double-edged sword.

Instead of using compensatory mitigation as a last resort, the Corps often grants permits that fail to comply with the Guidelines, allowing the permittee to mitigate for wetland loss in another area.117 By considering the compensatory alternative throughout all phases of permit review, the Corps is conceding the loss of wetlands, so long as the applicant mitigates the loss. Such a philosophy reduces the incentive for permit applicants to minimize impacts at the proposed project site. In addition, compensatory mitigation efforts often produce wetland types that are not the same as those lost.118 Even when the correct wetland type is created, there is no assurance that

114. See id. at 33. Since the GAO report was released, the Corps and EPA have tentatively agreed on general methods to estimate cumulative impacts; however, these methods have not been adopted by either agency. For the methods, see Gosselink & Lee, Cumulative Impact Assessment in Bottomland Hardwood Forests, 9 WETLANDS 1 (1989).

115. Once the practicable alternatives analysis is completed and there is found to be no practicable alternative to the project, environmental impacts are to be minimized by modifying the project to include buffer zones, timed discharges, and restoration of the affected area. EPA § 404(b)(1) Guidelines, 40 C.F.R. §§ 230.10(d), 230.72 (1989).

116. This type of mitigation is referred to as “compensatory mitigation.” See Ciupesk, supra note 86, at 12.

117. The EPA has emphasized that compensatory mitigation is not to be considered “a remedy for destroying wetlands when a practicable alternative exists.” Id. at 13 (address by Jennifer Joy Wilson, EPA Assistant Administrator for External Affairs, at Senate oversight hearing held by the Environmental Pollution Subcommittee on Environment and Public Works (July 31, 1986)).

118. See OTA, WETLANDS REGULATION, supra note 12, at 129. The temporal loss of wetlands in the interim between the development and the functional completion of the wetland mitigation is another issue that is only now being addressed. The importance of the issue is underscored by the fact that many endangered species and migratory waterbirds are reliant on wetlands at particular times of the year. See 1 WETLAND CREATION AND RESTORATION: THE STATUS OF THE SCIENCE (J. Kusler & M. Kentula eds. 1989) [hereinafter WETLAND CREATION].
the wetland constructed or restored is able to replace the functional values of the wetlands lost. In other words, the Corps is forfeiting functional wetland habitat in exchange for an unknown commodity.

6. Failure to Abide by Resource Agency Recommendations

Before receiving a permit application, the Corps usually receives a consultation request from the potential applicant. The consultation is shared with the various resource agencies, which assess the project and discuss any less damaging alternatives. The resource agencies generally agree that these consultations are valuable when used. However, the frequency with which the Corps actually includes the agencies in these consultations varies between districts, and there is no department-wide policy on their use.

Where pre-application meetings do occur, the agencies’ complaints include lack of control over the agenda, infrequency of meetings, and a recent decrease in emphasis on agency involvement.

Following the pre-application consultation (if there is one), the Corps releases a public notice of the permit application to solicit comments from resource agencies and the public at large. The information on which the agencies must rely for their comments is contained in these notices. The accuracy of this information is often questionable, and problems include illegible information, incorrect project locations, and incomplete descriptions of project scope. One reason for notice inaccuracies is that the Corps often uses unverified information supplied by the applicant.
The resource agencies also provide input during the public review process.129 The agencies often feel that the Corps pays little attention to their comments, particularly with respect to recommendations for denial of permits.130 For example, some districts do not inform the agencies on how their recommendations are used131 while others fail to document how recommendations are incorporated even for their own records.132 As a result, feedback is difficult to obtain. The resource agencies may appeal a permit issued over their recommendations by requesting an “elevation.”133 However, elevation appeals are rare because the agencies believe that the process is both time consuming and futile.134 Other recommendations, such as project modifications or permits issued under special conditions, are generally met more favorably.135 In some districts, recommendations have been accepted when they involve the agency’s area of expertise, but not otherwise.136

When direct conflicts arise, the elevation power is rarely used.137 Instead of elevating a decision when they feel that a permit should be denied, the agencies often choose to negotiate a compromise with the Corps or the applicant, arranging a modification of the permit.138 The result is partial development of the wetland area, and further wetland acreage is lost in small sections. Each of these losses is too insignificant for the agencies to pursue individually, but together

know that it may require additional scrutiny. Id.

129. Id. at 41. Resource agencies either do not object or do not comment on a majority of permit applications. The reason usually given is lack of sufficient resources for complete review of all applications. In these cases, the agencies often make an in-house evaluation of the project and conclude that it is not likely to have a major environmental impact. Id. However, such evaluations do not become part of the Corps record on the project because they remain in-house; as such, they are unavailable to the Corps for possible cumulative impact assessment.

130. After reviewing over 1400 permit applications, the GAO estimated that the Corps issued permits over denial recommendations 37% of the time. Id. Most of these denial recommendations stem from a violation of the section 404(b)(1) Guidelines, such as non-water-dependency, inadequate mitigation, practicable alternatives, and so on. Id. at 42. Other recommendations were accepted from 58 to 100% of the time, depending on the district office. Id. at 37. For specific examples see id. at 43-44.

131. Id. at 42.

132. Id. at 44. As a result, neither the Corps nor the resource agencies have verifiable data on how often the recommendations are used. Id.

133. Id. at 42. An “elevation” is a review of the permit administrative record, granted at the discretion of the Corps, above the district engineer level. Id. at 48. See Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army (January 1987) [hereinafter 1987 MOA]; Kilgore, supra note 24, at 10,485.

134. GAO REPORT, supra note 5, at 43.

135. Id. at 46.

136. Id. at 46-47.

137. Id. at 48.

138. Id. Because the process is resource-intensive, the agencies only elevate those decisions that are of extreme importance and “have the best chance for reversal.” Id. at 49.
they have a significant impact on the nation's resource.

7. Lack of Active Monitoring Programs

The Corps district engineers are authorized to conduct regular surveillance to detect unpermitted activities and violations of permit conditions in their regions.139 This authorization is de-emphasized in most Corps offices, with no systematic methods of surveillance in use in 1989.140 While acknowledging that unauthorized activities may go undetected without surveillance programs, the Corps chooses instead to channel its resources into permit processing.141 The Corps also claims that monitoring and enforcement of unpermitted activities not in violation of permit conditions is the job of the EPA.142 However, none of the resource agencies have routine surveillance programs, and they generally report unauthorized activities only through casual observations.143

After a permit is granted, the Corps district offices have discretionary power to inspect sites for compliance with permit conditions.144 However, in a sample of 197 permits issued from five Corps districts, post-permit visits occurred in just twenty-eight percent of the projects.145 This lack of permit follow-up is attributed to a lack of enforcement resources in the district offices.146

While the Corps and the EPA may not actively search for violations, unauthorized activities and violations of permit conditions are often brought to attention by outside sources.147 However, investiga-

139. Id. at 55. Corps regulations also encourage district offices to involve their staff, other federal and state employees, and the public in reporting unpermitted fill. Id. at 56.

140. Id. at 55. However, there are some state agencies that assume this surveillance role. Id. at 55-56. Aerial surveys are a potentially powerful and economical tool for surveillance programs. However, budget cuts in the mid-1980s have resulted in a phasing out of the aerial program. Id. at 57-58.

141. Id. at 55. Budgetary concerns are one reason given for this low priority of enforcement. Id. One district chief rationalizes the district's passive policy on surveillance by noting that if the Corps actively searched for violations, it would have "many more cases of unpermitted fills than they would be able to handle." Id. at 56.

142. Id. at 55. The Department of Defense claims that the Corps is only empowered to enforce against violations of permit conditions and does not have the power to enforce against unpermitted activities. Id. at 57.

143. Id.

144. Id. at 62.

145. Id. Of the five districts surveyed, one district visited only one of 32 permit sites and another failed to visit any of the 40 project sites permitted. Id.

146. Id. at 55.

147. For example, local agencies and individuals are often the source of reported violations. Id. at 56.
tions of these violations are normally delayed for weeks or months, or in some cases not done at all.\textsuperscript{148} Such delays lead to undocu-
mented wetland loss and hamper investigation and enforcement efforts.\textsuperscript{149}

8. Unclear Whether Enforcement is Mandatory

One area of great judicial uncertainty is whether enforcement of section 404 by the EPA and the Corps is mandatory or discretionary. This issue is crucial in light of the availability of citizens suits under section 505, which allows such suits against EPA and the Corps only when the agency has failed to perform a nondiscretionary duty under section 404.\textsuperscript{150} The plain language of section 404\textsuperscript{151} indicates en-
forcement was meant to be mandatory.\textsuperscript{152} However, courts have not definitely interpreted this language.

In the 1977 case of \textit{Sierra Club v. Train},\textsuperscript{153} the Fifth Circuit Court of Appeals felt it necessary to use extrinsic evidence to deter-

\begin{itemize}
\item \textsuperscript{148} In some cases, active violations were not investigated by the Corps for over six months after being reported. \textit{See GAO REPORT, supra} note 5, at 58.
\item \textsuperscript{149} With the Corps' relaxed methods for following up on reported violations, the likelihood of estoppel claims as a defense to belated enforcement becomes a definite possi-
bility. Already, one permit violator has attempted to use such a claim to avoid civil penalties for unauthorized filling activities. In United States v. Boccanfuso, 695 F. Supp. 693 (D. Conn. 1988), \textit{rev'd}, 882 F.2d 666 (2d Cir. 1989), the Corps misstated its jurisdic-
tional limits to the applicant, saying it only extended to the mean high water mark. The Corps then failed to respond to the permit application within six months, misleading the applicant into believing no permit would be needed. The district court ruled that the Corps was estopped from asserting its jurisdiction over the fill site because it had affirm-
avatively misled the applicant into believing that his project was outside Corps jurisdiction. \textit{Id.} at 698-99. The Second Circuit later reversed, finding that estoppel claims against the government must be used only in limited circumstances. \textit{Boccanfuso}, 882 F.2d 666. The court found that other communications with the Corps should have put Boccanfuso on notice of his permitting obligations; therefore, he could not have reasonably relied upon a single misstatement. \textit{Id.} at 670-71. The court affirmed that estoppel against the govern-
ment is a possible, albeit limited, ground for avoiding the enforcement authority. \textit{Id.} at 670.
\item \textsuperscript{150} 33 U.S.C. § 1365(a) (1982); \textit{see supra} note 67.
\item \textsuperscript{151} Section 404(s)(1) reads:
\begin{quote}
(s) Violation of permits
(1) Whenever on the basis of any information available to him the Secretary finds that any person is in violation of any condition or limitation set forth in a permit issued by the Secretary under this section, the Secretary \textit{shall bring a civil action in accordance with paragraph (3) of this subsection.}
\end{quote}
\item \textsuperscript{152} The key to the controversy is whether the use of the word "shall" in the statute indicates a mandatory intent by Congress. The statutory use of the word "shall" generally indicates a mandatory intent in the statute, unless convincing evidence is pro-
\item \textsuperscript{153} 557 F.2d 485 (5th Cir. 1977).
\end{itemize}
mine the legislative intent of section 404(s). The court noted that usual statutory interpretation dictates that unless a convincing argument is made to the contrary, the term "shall" indicates mandatory intent. After examining extrinsic evidence for its interpretation, the court determined that it was inconclusive on the issue. Despite the presumption of mandatory intent and inconclusive extrinsic evidence of legislative intent to the contrary, the Sierra Club court interpreted the statute as discretionary.

Several subsequent decisions have used this interesting rationale to conclude that enforcement was discretionary. In one such case, the court explained that if the EPA were forced to investigate and enforce all reported violations of the CWA, it would be impossible to achieve the goal of the statute. Other courts refused to adopt the

154. Id. at 489-91. The court acknowledged that extrinsic aids to interpretation are generally used only when the language of the statute is unclear or ambiguous. According to the court, however, when such evidence is available, there is no rule of law against ignoring convention and using such evidence. Id. at 489.
155. Id.
156. The court used the administrative agency's interpretation, the legislative history, and the statute as a whole to clarify the issue. Id. at 489-91.
157. The court ruled that unless there is a strong argument that the administrative agency in charge of the statute misconstrued its meaning, the construction by that agency should prevail. Id. The court failed to resolve the issue by looking at the legislative intent or the statute as a whole, and therefore allowed the administrative agency's construction to stand. Id. However, the administrative agency in this instance was also the defendant in the case. Therefore, by effectively reversing the presumption of interpretation, the court has essentially allowed the agency-defendant to decide its own case.
158. For example, in Goodyear v. LeCraw, 15 ENVTL. L. REP. (Envtl. L. Inst.) 20,846, 20848 (S.D. Ga. 1980), the court found that the term "shall" did not make enforcement of permit conditions mandatory (irrelevant in this case, which was for nonpermitted fill), citing Sierra Club v. Train, 557 F.2d 485 (5th Cir. 1977). In Harmon Cove Condominium Ass'n v. Marsh, 815 F.2d 949, 951 (3d Cir. 1987), a citizen suit to require Corps investigation and enforcement of permit conditions was rejected, the court noting that neither section 404 of the CWA nor section 10 of the River and Harbors Act created such a mandatory duty. The court pointedly did not rule on whether enforcement was mandatory if the Corps determined that the permittee was in violation. Harmon Cove, 815 F.2d at 953 n.5.

In a related case, the Eighth Circuit Court of Appeals supported the Sierra Club interpretation as the majority view in overturning a lower court's interpretation that the legislative "spirit" required mandatory enforcement. Dubois v. Thomas, 820 F.2d 943 (8th Cir. 1987). In Dubois, the court refused to find the legislative intent (primarily testimony by Senator Muskie during the Senate hearings on the CWA amendments) controlling, and relied instead on a "well established principle of judicial review [that] the view of the agency charged with administering the statute is entitled to considerable deference . . . ." Id. at 947; see also State Water Control Bd. v. Train, 559 F.2d 921 (4th Cir. 1977) (dictum); Zemansky v. EPA, 24 Env't Rep. Cas. (BNA) 1447 (D. Alaska 1986); National Wildlife Fed'n v. Ruckelshaus, 21 Env't Rep. Cas. (BNA) 1776 (D.N.J. 1983).

159. Dubois, 820 F.2d at 947. The court cited the goal of the statute "to restore
reasoning of *Sierra Club v. Train* and, instead, have interpreted the Act to require mandatory enforcement. This judicial ambiguity has helped confuse the issue and emphasizes the need for congressional clarification of the statute's purpose.

9. **Failure to Utilize Appropriate Remedies**

When violations are discovered by the Corps or the EPA, the agencies rarely use the full extent of legal remedies available to penalize the violator or to deter further violations. Instead of using legal actions, the Corps usually pursues administrative solutions, even if they take months or years to resolve. Two common administrative remedies are to require the violators to restore the area to its original conditions and to grant "after-the-fact" permits to the violator. Such remedies are employed even where violations are repeated or are in open defiance to the Corps' orders to cease and desist.

The Corps' administrative solutions to unauthorized activities generally begin with requesting voluntary compliance and negotiating voluntary restoration of the area. This enforcement tactic often

and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* at 947. Instead, the EPA should have the discretion to allocate its resources toward the enforcement of the most egregious violations. *Id.* By using such a rationale, the court appears to be accepting the futility of CWA enforcement for small-scale violations that could have significant cumulative impact.

More recently, a district court in Texas ruled that the Corps' decision not to enforce is judicially unreviewable, but the Corps' interpretation of the extent of its jurisdiction is reviewable. *See* National Wildlife Fed'n v. Laubscher, 622 F. Supp. 548 (S.D. Texas 1987).


161. The legal remedies available to the EPA and the Corps include civil and criminal penalties levied against violators. In reviewing the activities of five Corps district offices from 1984 to 1986, the GAO found that the Corps pursued no criminal actions, and only six civil actions. Among these districts, two pursued no civil or criminal actions at all during the three years surveyed, and one district did not maintain any records regarding enforcement. In addition, only two monetary fines were imposed by the five districts during this period (totaling $12,500). GAO REPORT, *supra* note 5, at 66.

162. Corps district officials give several reasons for avoiding legal remedies, "including the high costs of adjudication, limited environmental impact of most violations, perceived adversarial nature of some courts to the section 404 program, and the tendency of violators to voluntarily restore affected areas." *Id.*

163. *Id.* at 67. In reviewing 87 unauthorized activities brought to the attention of the Corps, the GAO found that the Corps required restoration in 36 cases, and issued after-the-fact permits in 25 cases. *Id.* Despite temporal and spatial losses of wetland functional values, mitigation was rarely required. *Id.*

164. *Id.*

165. *Id.* at 68-72. By negotiating a compromise with the violator, the Corps allows a temporal and net loss of wetland habitat, even if the restoration is completed. In addition, the scientific jury is still out regarding the ability of wetland restoration projects to create a fully functional wetland ecosystem. *See* WEtLAND CREATION, *supra* note 118.
continues even when the unpermitted activity has not ceased during the negotiation period. Similar tactics are used when violations of permit conditions are discovered.

The other administrative enforcement tactic commonly used by the Corps includes granting the violator an after-the-fact permit. This strategy is chosen even for serious violators, persons who refuse to comply with Corps cease and desist orders, and for repeat offenders. By accepting such applications, the Corps allows the applicant to circumvent the entire section 404 process, including the section 404(b)(1) Guidelines compliance analysis, the practicable alternatives analysis, and the public review process. In addition, by issuing an after-the-fact permit, the Corps may preclude EPA enforce-

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166. GAO REPORT, supra note 5, at 70. The Corps views pursuing voluntary compliance instead of legal action as exercising “good government.” Id. at 72. The Vicksburg District Regulatory Branch Chief has acknowledged that the policy, which has continued on the advice of the district’s counsel, creates a problem in deterrence of unpermitted activities. Id. at 70. When this avenue ultimately fails, the Corps seldom pursues legal action. Id. at 67-71. The Department of Defense attributes this to the desire for quicker action (through administrative action as opposed to judicial action), and the inability to convince United States attorneys to pursue any but the most significant cases. Id. at 71.

167. The Corps rarely suspends or revokes permits when permit conditions are violated, choosing instead to seek voluntary compliance or to modify the permits to allow the unauthorized activity. Id. at 72. In five Corps districts reviewed by the GAO, no permits were revoked from 1984-1986. Id. This may be attributed to the lack of routine inspections of permitted projects. Id. at 73. Without proper documentation of violations through inspections, suspension or revocation actions cannot be processed. Id. at 67-71. After-the-fact permits are those granted by the Corps after the discharge of fill has occurred. The Corps is not required to grant such permits before pursuing an enforcement action. United States v. Cumberland Farms, Conn., Inc. 826 F.2d 1151, 1161 (1st Cir. 1987), cert. denied, 484 U.S. 1061 (1988). These permits are sometimes granted in exchange for an agreement to mitigate the damage at a nearby site. GAO REPORT, supra note 5, at 67.

168. GAO REPORT, supra note 5, at 67-68. Conceding that this strategy may be appropriate action in many cases, the GAO found that it was used at times where referral to United States attorneys for legal action was warranted. Id. For example, the Portland district office of the Corps issued two cease and desist orders to a violator that had dumped 5000 cubic yards of fill into a wetland area without a permit. The GAO reports that “[a]fter issuance of the first cease-and-desist order, the company made no effort to avoid further wetland fill and consequently fresh fill continued to accumulate on the wetland. Currently, the Corps is pursuing voluntary restoration and plans to issue an after-the-fact permit.” Id. at 70. Based on the findings of the GAO study, this case is not exceptional. Id. at 67-71.

169. All of these steps in the permit process are designed to provide input regarding whether or not the permit should be granted, the project modified, or both. By granting a permit after the project has been completed, the Corps has eliminated the period in which these analyses are to occur. Nevertheless, resource agencies sometimes offer unsolicited comments on the unpermitted activity. However, their recommendations (usually for permit denial and restoration) are often ignored. For specific examples in five Corps districts, see id. at 68-72.
ment action by essentially legitimizing the previous illegal activities. The EPA is also given independent enforcement powers against unpermitted fills under the CWA and the 1987 amendments. In addition to the permit elevation process, section 404(c) allows the EPA to veto any Corps permit decision if it feels the project will adversely affect the aquatic ecosystem. Despite the broad capabilities of this veto power, it is rarely used. However, the EPA may become more active in the enforcement of section 404 now that it has the power to levy administrative penalties. In the few cases where civil actions are pursued, the general trend of the courts is to impose heavy fines on violators unless the site is restored. While this strategy provides incentive for the violator to restore the wetland area, it ignores the temporal loss of wetland functional values and works off the bold assumption that wetlands can be successfully restored.

10. **Jurisdictional Restrictions on the Availability of Citizen Suits**

As a result of broad judicial interpretations, many citizen suits are decided on jurisdictional, rather than substantive grounds. As

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172. GAO REPORT, supra note 5, at 60. The number of enforcement actions by each of the individual regions over a two year period (1986-1987) ranged from zero to fifty-seven, with one region having no section 404 enforcement program at all over the last eight years. Id. at 61.
173. See supra note 135.
174. CWA § 404(c), 33 U.S.C. § 1344(c) (1982).
175. The EPA veto has been used only seven times through 1988. See supra note 63. It is believed that the threat of using the veto is almost as effective as using it. GAO REPORT, supra note 5, at 51.
176. The EPA commenced 18 administrative enforcement actions in the 1988 fiscal year. See Liebesman, supra note 41, at 17.
177. See, e.g., United States v. Cumberland Farms of Conn., Inc., 826 F.2d 1151 (1st Cir. 1987), cert. denied, 484 U.S. 1061 (1988), where a willful violation brought a $540,000 civil penalty, of which $150,000 was paid and the rest forgiven after restoration. In United States v. Larkins, 657 F. Supp. 76, 87 (W.D. Ky. 1987), aff'd, 852 F.2d 189 (6th Cir. 1988), cert. denied, 109 S. Ct. 113 (1989), a fine of $40,000 was to be completely forgiven once restoration was completed.
178. The scientific community has not yet concluded that such efforts fully restore wetland functional values. See WETLAND CREATION, supra note 118.
179. Substantive issues are often not reviewed in cases where standing is found to be inadequate. The end result of these cases is that the violations which the lawsuit intended to stop often go unchecked. For example, the majority view is that the Clean Water Act does not require mandatory enforcement against unpermitted fill. See, e.g., Dubois v. Thomas, 820 F.2d 943 (8th Cir. 1987); Harmon Cove Condominium Ass'n v. Marsh, 815 F.2d 949 (3d Cir. 1987); Goodyear v. LeCraw, 15 ENVTL. L. REP. (ENVT. L. INST.) 20,846, 20,848 (S.D. Ga. 1980); Sierra Club v. Train, 557 F.2d 485 (5th Cir. 1977). However, a strong minority has found that enforcement is mandatory. See, e.g., Green v. Costle, 577 F. Supp. 1225 (W.D. Tenn. 1983); South Carolina Wildlife Fed'n v. Alexander, 457 F. Supp. 118 (D.S.C. 1978); Illinois v. Hoffman, 425 F. Supp. 71 (S.D. 1977).
mentioned earlier, courts have disagreed as to which sections of the CWA actually create mandatory duties. The use of the section 404(b)(1) Guidelines in permit application review is treated as mandatory by some courts and discretionary by others. The enforcement of provisions respecting violations reported to the EPA and the Corps is likewise interpreted as a mandatory duty by some courts and discretionary by others. Because most citizen suits are based either on claims of erroneous permit review (failure to use the Guidelines) or failure to enforce section 404 regulations, these decisions are crucial to the effectiveness of the citizen suit provision.

The issue was clarified somewhat in National Wildlife Federation v. Laubscher. The court agreed that it lacked authority to review Corps decisions not to take enforcement action, but held that it could review the Corps' interpretation of the CWA that jurisdiction was not authorized by statute. Still, considerable uncertainty surrounds this issue, perhaps discouraging future investment of time and money by citizen groups to challenge unauthorized activities.

Another limitation on citizen suits is that suits are not allowed if the Corps or the EPA are "diligently prosecuting" enforcement actions. In the past, this debate centered around the threshold judicial action needed to constitute sufficient "diligent prosecution" to preclude a citizen suit. With the 1987 amendments to the CWA

180. See cases cited supra note 179.
182. See cases cited supra note 181. The majority trend at this time is that if the statute cannot clearly be shown to have intended a mandatory duty, then the duty will be assumed to be discretionary by the agency administrator. See Sierra Club v. Train, 557 F.2d 485, 491 (5th Cir. 1977).
183. If both duties are found to be discretionary, the impact of citizen suits is severely limited. Likewise, if both duties are considered mandatory, citizen suits have the potential for greater impact on section 404 enforcement. The general intent of the statute indicates that citizen suits are to be used as a supplementary enforcement tool and as a type of watchdog mechanism. See supra note 71.
185. Id. at 550.
187. This argument revolves around the subjectivity of the term "diligently prose-
authorizing administrative penalties from the Corps and the EPA, the question will likely advance to the threshold types of administrative action needed to preclude suits.

Finally, as an incentive for individuals to pursue responsible legal actions against violators of the CWA, section 505 entitles “prevailing parties” to recover attorneys’ fees and expert witness costs. Attempts to limit this reimbursement award have met with mixed results. The primary restriction on recovering attorneys’ fees in citizen suits is that it is difficult, if not impossible, to recover them from private party defendants. The consequence of this restriction is that if the administrative suit were brought against only a private party, it would likely be reviewed de novo. However, if the Corps or the EPA were party to the suit, the case would turn on whether decisions in the administrative record were “arbitrary and capricious,” greatly reducing the availability of extrinsic evidence.

B. Recent Improvements

Despite the problems with the section 404 permitting program, several recent changes indicate potential for more effective administration. The latest amendments to the CWA include several improvements in the enforcement powers of the CWA, including increased maximum civil and criminal penalties. Perhaps more important is the new authority granted to the EPA and Corps to levy administrative penalties against section 404 violators. Without the cumbersome procedure of judicial action, enforcement of section 404

188. See 33 U.S.C. § 1365(d) (1988); see also supra note 71.

189. See 33 U.S.C. § 1365(d) (1988); see also supra note 71.

190. Ransel, supra note 189.


193. The new authority allows the EPA or the Corps to classify violations into two classes. Class I violations carry maximum penalties of $10,000 per violation, with a maximum total fine of $25,000, and may be imposed after an informal hearing has been held to allow the alleged violator to be heard. Class II violations require a formal hearing under the rules of the Administrative Procedure Act and carry maximum penalties of $10,000 per violation per day, with an aggregate maximum of $125,000. 33 U.S.C. § 1319(g) (1988).
regulations is expected to increase dramatically. The EPA has used this authority enthusiastically, initiating eighteen administrative penalty actions in fiscal year 1988. The Corps has yet to use this new authority in pursuing violations of permit conditions.

In January 1989, the Corps and the EPA entered into three Memoranda of Agreement (MOA) regarding the enforcement of section 404. In these MOAs, the EPA has taken a stronger position regarding final jurisdiction determinations. This move may direct future administration of the program toward wetlands protection. The EPA’s veto power was recently tested for the first time. In Bersani v. Robichaud, the Second Circuit upheld an EPA veto, ruling the use of the section 404(b)(1) Guidelines in permit review is mandatory, and public interest review, which the Corps emphasizes in permit processing, is discretionary. The court emphasized that the Corps may not approve a permit for any project that violates the Guidelines, even if the public interest review indicates approval. This endorsement of the EPA’s influence in the section 404 program is reflective of the court’s interpretation of section 404 as a wetlands protection statute.

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194. The streamlined enforcement process may also increase voluntary compliance because potential violators will realize that the agency resources allocated to enforcement will reach beyond the egregious violations. See GAO REPORT, supra note 5, at 72.


196. Id.

197. One of these memoranda concerns the allocation of enforcement responsibilities for section 404, one addresses enforcement procedures on previously issued Corps permits, and the third deals with jurisdiction determinations and exempted activities under section 404(f)(1). For a general discussion of these MOAs see Ransel, EPA and the Corps Enter Three MOAs on Allocation of Regulatory Responsibility Under the § 404 Program, 11(1) NAT’L WETLANDS NEWSL. 2 (1989).

198. While the Corps retains the authority to make wetlands jurisdictional determinations, they now must be done pursuant to EPA guidelines, and the EPA has the final say in any interpretative or regulatory questions involving geographic jurisdiction or exemptions. See id.


200. The court reasoned that the public interest review was “standardless,” while the Guidelines provided specific standards for evaluation. Id. at 39-40.

201. Id.

202. The EPA can conduct a de novo investigation of the Corps’ practicable alternative analysis. Id. at 45. The test for a practicable alternative to the project weighs what was available at the time the permit applicant entered the market for the project. While this market entry analysis places a great burden on the developer to search for a practicable alternative to filling wetland areas, it was deemed “consistent with the intent of the CWA” by the court. Id. at 47. The EPA’s skepticism toward using mitigation to offset the filling of existing wetlands resources was accepted as reasonable by the court.
The courts also have recently clarified several important questions with regard to citizen suits. Most noteworthy is the decision of the Fourth Circuit in National Wildlife Federation v. Hanson.\textsuperscript{203} In Hanson, the court held that citizen suits under section 505(a)(2) may challenge jurisdictional decisions by the Corps and the EPA.\textsuperscript{204} This type of enforcement suit is not specifically authorized by the CWA; thus Hanson opens up new territory for future citizen suits.\textsuperscript{205} The court also concluded that despite the fact that section 505(a)(2) explicitly provides for citizen suits against only the EPA administrator, the intent of the statute is to allow suits against the Corps as well.\textsuperscript{206}

Perhaps the greatest impact of Hanson will come from its ruling on the availability of attorneys' fees for plaintiffs.\textsuperscript{207} The court found that "prevailing parties," as intended by the writers of the statute, need not win their cases outright. Rather, the parties are deemed "prevailing" if the purposes of their lawsuits are met. When the court ordered the wetlands determination remanded to the Corps, the plaintiff was said to have prevailed for the purposes of section 505.\textsuperscript{208} This decision also affirmed that under section 505(d), attorneys' fees should be computed at the prevailing community rates, thus providing a greater incentive for counsel to accept such cases in the future.\textsuperscript{209}

IV. RECOMMENDATIONS

The section 404 regulatory program has a long way to go before it is the effective national wetlands protection device envisioned by Congress.\textsuperscript{210} To realize this goal, significant legislative and bureaucratic changes must occur to broaden the scope of jurisdiction and to provide a more consistent administration of the program. Such

\begin{itemize}
\item Bersani v. EPA, 674 F. Supp. 405, 420 (N.D.N.Y. 1987), aff'd sub nom. Bersani v. Robichaud, 850 F.2d 36 (2d Cir. 1988), cert. denied, 109 S. Ct. 1556 (1989). The wetland involved was neither large nor spectacular and was protected for its inherent value as a wetland. Kilgore, supra note 24, at 10,490. For an indepth review of Bersani and how it has increased the EPA's role in the section 404 program, see Kilgore, supra note 24.
\item 859 F.2d 313 (4th Cir. 1988).
\item The suit challenged a wetlands determination that was alleged to be "arbitrary and capricious." Id. at 316.
\item See 33 U.S.C. § 1365(a) (1982).
\item Hanson, 859 F.2d at 316. This argument had been forwarded by the Corps in other cases, but was not specifically ruled on until now. See Ransel, supra note 187, at 10,007.
\item The plaintiff in Hanson recovered attorneys' fees of over $400,000. See Ransel, supra note 195, at 8.
\item Hanson, 859 F.2d at 316-17.
\item For an indepth analysis of the Hanson decision, see Ransel, supra note 187.
\item See generally LEGISLATIVE HISTORY, supra note 24; 33 U.S.C. § 1251(a) (1982).
\end{itemize}
changes will not occur overnight, and in the interim, wetlands will continue to be irreparably lost. However, enforcement of the present form of the section 404 program would be greatly enhanced by a broader use of the citizen suit provision. Although legislative changes to the program are needed, citizen suits could be used for more immediate improvements.

A. Long-Term Modifications

1. A Comprehensive Wetlands Program

The most pressing problem with the section 404 program is its limited scope. While the program has received criticism for its effectiveness, most of the wetland acreage lost each year falls outside section 404 jurisdiction. Ultimately, the answer to this problem is a National Wetlands Protection Program that regulates all activities directly or indirectly affecting wetlands. There are precedents for such comprehensive legislation. The new program would administer section 404, as well as oversee the regulation of operations such as wetlands draining or flooding and agricultural conversion. Coordination and cooperation between agencies would be crucial to this program, much as it is in the administration of the Endangered Species Act.

211. Section 404 only regulates wetland loss caused by dredge and fill operations. Wetland loss from flooding, draining and clearcutting are not regulated by section 404 (or any other wetland protection policy). See GAO REPORT, supra note 5, at 19; OTA, WETLANDS REGULATION, supra note 12, at 167.


213. The Endangered Species Act provides in part:
§ 1536. Interagency cooperation.
(a) Federal agency actions and consultations
(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.
(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or
Uniform records regarding the regulatory history of specific wetland areas would be standardized and centralized under such a system to facilitate communication between agencies. This standardization would also make it easier to assess cumulative impacts, determine sensitive areas for EPA protection, and evaluate the success of the regulatory program, while preventing destructive activities from escaping jurisdiction. The creation of such a system should be urgently encouraged; however, immediate enactment of such a program is unlikely.

2. Statutory Changes

Because sweeping changes in the nature of federal wetlands protection is unlikely, Congress can nonetheless improve the existing system. Since the congressional hearings on the amendments to the CWA, the debate persists regarding the proper agency to administer the section 404 regulatory program. The resulting bifurcation of enforcement duties, however well intentioned, has led to inadequate administration and enforcement of the Act. The time has come for one agency—the EPA—to assume all of the administrative duties under the Act. The reasons for this change are simple and the improvements to the section 404 program would be substantial.

By placing administration of the section 404 program with an agency that has a historic mission of protecting the environment, rather than permit processing (as the Corps does), Congress would send an unambiguous message that the purpose of the statute is to protect wetland ecosystems. Consolidation under the EPA would

threatened species or result in the destruction or adverse modification of habitat of such species . . .


A similar provision should be included in a National Wetlands Program to ensure that all governmental agencies are mandated to effectuate the Program's intent.

214. Improved communication would allow a more efficient allocation of administrative resources when separate agencies are reviewing permit applications. Because limited resources is a recurring complaint from agency personnel, such a system should alleviate some of the problems with time constraints.

215. One such activity that escapes regulation is the granting of exemptions from permit requirements for agricultural projects under section 404(f). See 33 U.S.C. § 1344(f) (1982). In many cases, once such an exemption is granted and the land is farmed for a few years, it is then developed without further permit review. Such actions are difficult to detect because current records by the Corps often fail to provide the history of the particular area.

216. See LEGISLATIVE HISTORY, supra note 24.

217. See OTA, WETLANDS REGULATION, supra note 12, at 167.

218. The EPA already has general jurisdiction over the regulations in the CWA under 33 U.S.C. § 1251(d) (1982). In addition, the EPA is assuming an increasingly powerful role in section 404 administration, as evidenced by the three recent Memoranda of Agreement between the Corps and EPA. See Ransel, supra note 197.

219. This intent is apparently not clear to the Corps of Engineers. See OTA, WETLANDS REGULATION, supra note 12, at 167.
also reduce the jurisdictional and interpretive inconsistencies that have plagued the program. Additionally it would facilitate communication and coordination with other resource agencies, such as the Fish and Wildlife Service and the National Marine Fisheries Service. More specifically, permit review activities would regularly use the section 404(b)(1) Guidelines and would likely stress practicable alternatives analysis and cumulative impacts assessment. Finally, enforcement and full use of available remedies would be conducted more enthusiastically with just one agency to shoulder the blame for ineffective administration.

While not a panacea for the problems with the system, EPA administration would certainly add some consistency to the section 404 program. Congress may also consider several minor amendments to the CWA that would have immediate impact on its effectiveness in wetlands protection. Suggestions for these amendments include: (1) Requiring cumulative impacts review of all individual activities which fall under general permits; (2) creating a timetable for actions taken on reported violations; and (3) redefining the public interest review process to make it more predictable.

B. Immediate Solutions

1. Expand Citizen Suit Availability

Notwithstanding the need for new legislation and statutory changes in section 404, the program is currently constructed to protect much more of the wetlands resource than it has historically pro-

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220. These are all areas that the EPA has stressed in the current partial administration of section 404, but they have been largely mishandled by the Corps. See GAO REPORT, supra note 5, at 26-29.

221. With a single-agency administration, confusion would diminish regarding which agency's duty it is to enforce against unauthorized activities. Id. at 55.

222. Just as in the Corps, EPA policy decisions regarding a particular project or region are subject to the interpretation of regional officials. In addition, the EPA record on enforcement of the current program is not spotless. Id. at 60-62.

223. No such review has yet been adopted, and the Corps has denied that it is its job to investigate such impacts. See supra notes 111, 114 and accompanying text.

224. There is currently no explicit timetable for enforcement decisions when unauthorized activities are reported. However, statutory regulations do include a timetable for permit processing. 33 U.S.C. § 1344(a)(1982). A parallel provision for enforcement action is needed.

225. The Corps currently uses no standard pattern for reviewing permits during the public interest review period and it considers mitigation throughout the public interest balancing process. This makes it difficult for other agencies to evaluate and comment on the permit applications, and it provides the Corps with extraordinary discretion on how specific factors should be considered. See GAO REPORT, supra note 5, at 37-39.
ected. The inability of the program to realize its potential stems in large part from lack of enforcement. While awaiting statutory changes to improve the program, citizens can immediately effect enforcement through more aggressive use of the citizen suit provision. Several recent cases have increased the capabilities for citizens to sue under section 505 of the CWA and the Administrative Procedures Act (APA). These cases can be utilized to resolve some of the major problems with the section 404 program as it is currently administered.

In Bersani v. Robichaud, the Second Circuit ruled that the Corps has a mandatory duty to base its permit decisions on the section 404(b)(1) Guidelines. While this case has received considerable attention for its ruling upholding the EPA's practicable alternatives analysis, it may become more significant as a tool for citizen suits. Section 505 of the CWA allows citizens to sue either the EPA or the Corps when these agencies fail to perform a duty that is non-discretionary under CWA. By ruling that the use of the Guidelines is mandatory under section 404(b), the Second Circuit opened the door for citizen suits to compel Guideline use by the Corps.

In National Wildlife Federation v. Hanson, the Fourth Circuit determined that citizens may bring suit under 505(a)(2) to challenge a Corps wetland determination. The court based its decision on the Corps' "nondiscretionary duty to regulate dredged or fill material" deposited into wetlands, and in so doing, to "make reasoned wetlands determinations." This requirement to make "reasoned determinations" allows citizens to hold the Corps accountable for its rationale in decisions not to pursue enforcement remedies against known violators. The court based its review on the APA standard, which allows courts to "set aside agency actions, findings, and conclusions found to be arbitrary, capricious, or an abuse of discretion." The court

226. Id. at 55-74.
229. The court emphasized that no permit may be issued for activities that would violate the Guidelines, even if the Corps public interest review indicates that it should be granted. Id. at 39.
232. Id. § 1344(b).
233. 859 F.2d 313 (4th Cir. 1988). This decision presumably extends reviewability to include other jurisdictional decisions. See Ransel, supra note 187, at 1003.
234. Hanson, 859 F.2d at 315. In making a reasoned decision, "[t]he Corps has a mandatory duty to ascertain the relevant facts, correctly construe the applicable statutes and regulations, and properly apply the law to the facts." Id. at 315-16.
235. 5 U.S.C. § 706(2)(A) (1982). The court used this standard because the CWA does not establish a standard for reviewing jurisdictional determinations by the Corps or the EPA. Hanson, 859 F.2d at 315; see also Avoyelles Sportsmen's League, Inc. v.
also ruled that using a standard of review to evaluate permit decisions which lies outside the CWA does not preclude the ability to award attorneys' fees to the plaintiff under CWA section 505(d). 236

Finally, in National Wildlife Federation v. Laubscher,237 the district court held that agency decisions not to take enforcement actions are not judicially reviewable. 238 However, an agency's interpretation of a regulatory statute is reviewable. 239 As a result, in cases that hinge on crucial statutory interpretations, citizens are allowed to challenge the interpretation chosen by the agency in question. 240

These findings create a foothold for litigating the crucial issues of section 404. More importantly, they provide a framework for evaluating the possibility of initiating a citizen suit to question specific agency actions. The vulnerability of agency actions on a given issue is roughly estimated by asking two questions. First, is there a nondiscretionary duty stipulated under section 404 that either the Corps or the EPA has failed to complete? If so, section 505 will provide the proper jurisdiction for a citizen suit to compel action on that duty. Second, is there an interpretation issue or an agency decision that lacks sufficient reasoning so as to be deemed "arbitrary and capricious"? If so, a citizen suit to remand the decision or interpretation for proper analysis is grounded on section 706 of the APA. 241 Answering these questions with respect to some of the perceived problem areas of section 404 reveals that many of these issues are immediately vulnerable to citizen suit challenges. These challenges may immediately bring about some of the needed changes in the system.

2. Challenge Assertions of Wetlands Jurisdiction

Following the lead of Hanson, future challenges to wetlands determinations are expected. 242 Through Hanson, the Corps received notice that it is now required to regulate fill activities in wetlands, and that simply stating that an area is not wetlands, without supporting

Marsh, 715 F.2d 897, 904 (5th Cir. 1983).
236. Hanson, 859 F.2d at 316.
238. Id. at 550.
239. Id.
240. These statutory interpretation cases would likely turn on whether the agency administering the act (and interpreting the statute) was reasonable in its interpretation, or they may be based on the APA "arbitrary and capricious" standard.
242. These would include challenges on whether a given area was considered a wetland, as well as on the landward extent of acknowledged wetland areas.
data, is no longer acceptable to the courts. With increasing scientific information available to make sound wetlands determinations, courts may find it simpler to determine whether or not such decisions are reasoned. Likewise, citizens may find it easier to challenge erroneous wetlands determinations under section 505 because there is now a general standard which the Corps must use in its decisions.

3. Compel Proper Use of Section 404(b)(1) Guidelines

Perhaps the area of section 404 administration most vulnerable to citizen suits is the Corps’ failure to use the section 404(b)(1) Guidelines in its permitting decisions. The use of the Guidelines is mandatory under section 505 jurisdiction. The Guidelines emphasize that “[t]he permitting authority must address all of the relevant provisions of the Guidelines in reaching a Finding of Compliance in an individual case.” Nevertheless, several sections of the Guidelines are routinely ignored by the Corps. The failure to address the Guidelines could be a basis of a citizen suit.

The manner in which the Corps uses the Guidelines in the permit review process is not in accordance with the intent of the statute. The Corps’ decision to refrain from using the Guidelines sequentially, as mandated, is an issue for a future citizen suit challenging this policy as an “arbitrary and capricious” use of discretion. In addition, the Corps completely circumvents the Guidelines when it issues after-the-fact permits. Important (and mandatory) sections of the Guidelines, which pertain to minimizing environmental impacts through project modification prior to the issuance of a permit, are ignored under this policy. In addition, public and other govern-

243. Hanson, 859 F.2d at 315-16.
244. Mandatory use was affirmed in Bersani v. Robichaud, 850 F.2d 36, 39-40 (2d Cir. 1988), cert. denied, 109 S. Ct. 1556 (1989).
245. EPA § 404(b)(1) Guidelines, 40 C.F.R. § 230.5(l) (1989) (emphasis added). In addition, all of the requirements of § 230.10 (restrictions on discharge) must be met. Id. at § 230.10.
247. The mandatory duty to regulate fill operations also provides a basis for suits to compel proper use of the Guidelines. The Guidelines acknowledge that not every section of the Guidelines will apply in its entirety to a particular activity. EPA § 404(b)(1) Guidelines, 40 C.F.R. § 203.6(a) (1989). As a result, the discussion here is confined to only those sections that would require compliance in all permits.
248. The Guidelines explicitly state the sequence which should be used in evaluating a permit application. 40 C.F.R. § 230.5 (1989). However, the Corps maintains that a stepwise approach to the section 404(b)(1) Guidelines is not required. Barrows, supra note 90, at 12.
249. See supra notes 86, 90 and accompanying text.
250. This issue may also be challenged by characterizing the misuse of the Guidelines as a failure to act on a mandatory duty.
mental agencies are precluded from commenting on after-the-fact permits since the fill has already occurred. This policy is subject to challenge because of the Corps’ failure to act on a nondiscretionary duty. It is also subject to challenge under the “arbitrary and capricious” standard.  

4. Compel Proper Alternatives Analysis

The Guidelines explicitly require that practicable alternatives be sought for a project that involves filling of wetlands. In Bersani, the Second Circuit upheld the EPA’s use of “market entry” alternatives analysis when issuing a permit veto. While the court stopped short of endorsing this method of alternatives analysis for all permits, it sent a message that the statute calls for a strict analysis. This strict standard, combined with explicit statutory language declaring that wetlands be filled only as a last resort, indicates that the Corps’ alternatives analysis policies are subject to challenge in the courts as “arbitrary and capricious.” In particular, the Corps’ practice of allowing permit applicants to provide their own definition of the “purpose of the project,” which is later used to determine if there is a practicable alternative to the project, rarely reveals alternatives. This policy is subject to citizen suit scrutiny because it forsakes the purpose of the statute for efficiency in permit processing. In addition, non-water-dependent projects are presumed to have less damaging practicable alternatives “unless clearly demonstrated otherwise.” The Corps’ ability to credibly meet this standard when it issues permits for projects that are not water dependent could be challenged immediately.

255. Id. at 43-48.
258. This practice permits definition in a way that makes the proposed fill site the only possible location for the project. See GAO REPORT, supra note 5, at 40.
259. See supra note 48.
5. Compel Consideration of Cumulative Impacts

Investigation and documentation of cumulative impacts of each individual project is also required by the Guidelines. The failure by the Corps to consider cumulative impacts in permit decisions is well documented and in many cases this policy is vulnerable to attack by citizen suits as a failure to act on a nondiscretionary duty. While this may change if the recently developed protocol for cumulative impacts assessment is adopted by the EPA and the Corps, it remains to be seen how these guidelines will be used. It is likely that the Corps will retain the policy of not considering cumulative impacts for individual activities under general permits. However, this policy is ripe for challenge as indicated by United States v. Marathon. In Marathon, the First Circuit Court of Appeals affirmed that individual water quality certifications may be required for each activity under a general permit. Likewise, compelling assessments of cumulative impacts from individual actions under general permits may become a target for future litigation.

6. Compel Proper Use of Mitigation

The EPA requires mitigation when there is absolutely no alternative but to destroy an area of wetlands. The Corps has misread this policy to allow the use of mitigation as a tradeoff for developing wetlands, and it considers mitigation throughout its permit review process to balance adverse impacts. This interpretation directly conflicts with the EPA, which uses mitigation sparingly and which does not use mitigation as an affirmative tradeoff for wetlands loss. There is legal precedent for actions based on inadequate mitigation, and similar actions may be used to challenge the wrongful use of mitigation by the Corps in its public interest review.

262. See GAO REPORT, supra note 5, at 28-32.
263. See Glosselink & Lee, supra note 114.
264. GAO REPORT, supra note 5, at 28-32.
266. Id. at 101.
268. Barrows, supra note 90, at 12.
269. The policy of the EPA, which is echoed in the section 404(b)(1) Guidelines, is that "it is appropriate to consider mitigation after you have gone through, first, attempting to avoid the loss of the wetland; second, trying to minimize the impact of the proposed project; third, trying to repair or rehabilitate that which would still be damaged; fourth, by reducing the impact over time by preservation and maintenance; and finally by compressing, after all of those steps have been gone through, for remaining unavoidable loss." Ciupek, supra note 86, at 12 (quoting Jennifer Joy Wilson, EPA Assistant Administrator of External Affairs).
7. Compel Use of Agency Recommendations

Recommendations by resource agencies on permit issuance or denial are supposed to be given “full consideration” in the final decision of whether to grant or modify a permit application. In addition, use of resource agency recommendations is mandated by the Fish and Wildlife Coordination Act (FWCA). Still, the Corps often disregards these recommendations, issuing permits despite resource agency objections. Arguably, the Guidelines and the FWCA create a mandatory duty to consider resource agency recommendations and to either incorporate agency input into the final permit decisions or to provide satisfactory rationale for its exclusion. Although this theory has not yet been tested in a citizen suit, this reasoning may be used to challenge the silent rejection of agency recommendations in future permit decisions.

8. Compel Enforcement Actions

The puzzling and contradictory interpretations of the duty to enforce section 404 provisions remains an unsettled issue. The decision in Hanson, that the Corps has a “nondiscretionary duty to regulate fill,” should lend support to the argument that enforcement actions, at least for known violations, are mandatory for the purposes of section 505 cases. At the very least, Hanson may aid the citizens’ cause by applying the “reasoned wetland determination” standard to nonenforcement decisions as well.

9. Other Areas to Expand Citizen Suits

The ability of prevailing parties in citizen suits to recover attorneys’ fees and costs from the government when the court “determines that the award is appropriate” is well established. While these costs are also available from the permit violators themselves,

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271. 33 C.F.R. § 320.4(c) (1989). The CWA also requires acceptance of agency participation in the permit process. 33 U.S.C. §§ 1251(e), 1344(m) (1982).
273. See GAO REPORT, supra note 5, at 52.
274. See supra notes 153-60 and accompanying text.
275. In Hanson, the court found a mandatory duty to make a reasoned wetlands determination based on the information available. National Wildlife Fed’n v. Hanson, 859 F.2d 313, 315 (4th Cir. 1988).
276. 33 U.S.C. § 1365(d) (1982); see also Hanson, 859 F.2d 313; Avoypelles Sportsmen’s League v. Marsh, 786 F.2d 631 (5th Cir. 1986).
courts have balked at ordering their payment from private parties, noting permit applicants’ honest efforts to comply with section 404 regulations as explained to them by Corps officials. In cases where the violator lacked good intentions, courts are less hesitant to award attorneys’ fees. The CWA explicitly authorizes recovery of fees from private parties. This area could be expanded.

The allowable method for calculating recoverable fees was addressed in Hanson. This method calculates attorneys’ fees based on the rates available at the time of litigation, but fees are awarded only after the final decision. Environmental cases often extend over several years and, therefore, require either considerable capital for retainer fees, or patience on the part of the attorney. This restrictive policy could be challenged as contrary to Congress’ intent expressed in the citizen suit provision.

Another area subject to future citizen suits is the advanced identification of sensitive areas of the EPA, which precludes permitted operations in EPA-designated “sensitive areas.” Historically, this authority has been used sparingly by the EPA, presumably because of lack of resources. In a proactive effort to stem the loss of wetlands, citizen groups may consider suing to compel the designation of certain areas as “sensitive lands.” The CWA is silent on the availability of such actions, although designating “sensitive areas” could provide a valuable tool for limiting destruction of selected wetlands.

V. CONCLUSION

Despite overwhelming public support for the protection of wetlands and a regulatory framework that should significantly limit wetlands destruction, the nation’s wetlands continue to disappear. The section 404 program is burdened with contradictory administration, misinterpreted guidelines, and ambiguous court decisions. Understaffed agencies have allocated their resources to streamline the regulatory process and to protect against only the most egregious losses. Meanwhile, piecemeal losses of wetland habitat, by the thousands, add up to a collective catastrophic loss. Recent changes in the Act indicate that section 404 administration is improving; however, action from Congress is needed if the “no net loss” goal of wetland

278. See Hanson, 859 F.2d at 319.
280. See supra notes 67, 71.
281. Hanson, 859 F.2d at 316.
282. Id. at 316-17.
283. Ransel, supra note 189, at 10,007.
284. The EPA is authorized to designate sensitive habitat areas in advance that would preclude future permitted activities. 33 U.S.C. § 1344(c)(1982).
protection is to be realized. In the meantime, citizen groups can facilitate considerable improvement by pursuing new angles in citizen lawsuits.

TED GRISWOLD