United States v. Larkins: Conflict Between Wetland Protection and Agriculture; Exploration of the Farming Exemption to the Clean Water Act's Section 404 Permit Requirement

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Originally published in SOUTH DAKOTA LAW REVIEW
35 S. D. L. REV. 272 (1990)

UNITED STATES v. LARKINS: CONFLICT BETWEEN WETLAND PROTECTION AND AGRICULTURE; EXPLORATION OF THE FARMING EXEMPTION TO THE CLEAN WATER ACT'S SECTION 404 PERMIT REQUIREMENT

Section 404 of the Clean Water Act requires a dredge and fill permit whenever dredge or fill material is deposited into any of the "waters of the United States." However, the Clean Water Act exempts incidental discharges into "waters of the United States" resulting from normal, ongoing types of farming activities. United States v. Larkins, *presented the Sixth Circuit United States Court of Appeals with the issue of whether the Clean Water Act's farm exemptions applied when the landowners replaced one type of wetland crop with another type of wetland crop, eventually draining and filling the wetland area of his property. The Sixth Circuit held that the farming exemption to section 404's permit requirement is not applicable when a farmer switches from one wetland crop to another thereby causing wetlands to be filled. This note will analyze the Sixth Circuit's position and will discuss why this position is consistent with the legislative history of the Clean Water Act.*

I. INTRODUCTION

The Federal Water Pollution Control Act, otherwise and more commonly known as the Clean Water Act (CWA),[1] seeks to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.[2] The CWA prohibits the discharge of pollutants, including fill material, into "navigable waters" of the United States without a permit issued by the Army Corps of Engineers (Corps) pursuant to section 404 of the Clean Water Act.[3] "Navigable waters" is defined by section 502 of the CWA as "waters of the United States, including the territorial seas."[4] The term is not further defined by the CWA. Prior to 1975, "waters of the United States" was defined narrowly by Corps regulations to include only waters which were "navigable in fact," effectively precluding Corps jurisdiction over freshwater wetlands.

In 1975, the Corps revised its regulations so that the term "navigable waters" came to include freshwater wetlands that are periodically inundated

1. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended at 33 U.S.C. §§ 1251-1376 (1982)). Prior to the 1977 amendments, the Act was known as the Federal Water Pollution Control Act. The 1977 amendments to the Federal Water Pollution Control Act provided that the entire Act may be referred to as the Clean Water Act. *Id.*

2. 33 U.S.C. § 1251 (1982).

3. *Id.* § 1344. "Fill material" is defined as "material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an [sic] waterbody." 33 C.F.R. § 323.2(e) (1989). "Dredge material" is defined as material that is excavated or dredged from waters of the United States. *Id.* § 323.2(c).

4. 33 U.S.C. § 1362(7) (1982).

and that support vegetation requiring saturated soil conditions for growth.[5] This expansion in the Corps' jurisdiction was significant because it brought within the Corps' control activities of private landowners concerning freshwater wetlands. Indeed, the expansion led to dissension by the farming and ranching community over the Corps' added control over their private activities. The controversy over the Corps' expanded jurisdiction prompted Congress to amend the CWA in 1977 to exempt routine farming, silviculture and ranching activities from the permit requirement.[6]

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5. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) (quoting 33 C.F.R. § 209.120(d)(2)(h) (1976)). *See infra* notes 76-79 and accompanying text.

6. The Corps' proposals for expanded jurisdiction and the legislative attempts to restrict it are discussed in Comment, *The Move to Amend § 404 of FWPCA: House Passes Bill Limiting Federal Authority over Dredge and Fill Activities*, 7 ENVTL. L. REP. (Envtl. L. Inst.) 10,082-83 (1977).

The farm exemption is found in 33 U.S.C. § 1344(f) which provides that:

> (1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material-
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> (A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
>
> (B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;
>
> (C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;
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> . . . .
>
> is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).
>
> (2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

Subsection 2 will be referred to throughout this note as "the recapture provision."

In addition, Corps' regulations provide:

> (a) *General.* Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under section 404:
>
> (1)(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (a)(1)(iii) of this section.
>
> (ii) To fall under this exemption, the activities specified in paragraph (a)(l)(i) of this section must be part of an established (i.e., on-going) farming, silviculture, or ranching operation and must be in accordance with definitions in § 323.4(a)(1)(iii). Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. *Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation.* An operation ceases to be established when the area on which it was conducted has been coverted [sic] to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit, whether or not it is part of an established farming, silviculture, or ranching operation.
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> (iii) . . .
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> (C)(1) Minor Drainage means:
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> (i) The discharge of dredged or fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands. (Construction and maintenance of upland (dryland) facilities, such as ditching and tiling, incidential [sic] to the planting, cultivating, protecting, or harvesting

Diverse factual situations have brought the farming and silviculture exemptions into question and have forced courts to determine when the exemptions excuse landowners from obtaining a section 404 permit. In *United States v. Larkins*,[7] the specific issue was whether the farm exemption applied when the landowner gradually replaced wetland trees, which were harvested, with "row crop" and eventually drained and filled the wetland area of his property to facilitate growing row crops.[8] The Sixth Circuit Court of Appeals construed the exemption narrowly, holding that the "exception contained in 33 U.S.C. § 1344(f)(1)(A) applies to the *normal* harvesting of timber, not to the activity of clearing timber 'to permanently change the area from wetlands into non-wetland agricultural tract for row crop cultivation.' "[9]

This note begins with a discussion of the facts of the *Larkins* case. Secondly, the note addresses the expansion of the Corps' jurisdiction under the CWA and how controversy over that expansion led Congress to enact exemptions from the CWA section 404 permit requirements for normal, ongoing farming and silviculture activities which result in minor, incidental draining and filling of "waters of the United States." Case authority which narrowly applies these exemptions will become a third focus. Fourth, this note will analyze the *Larkins* case, taking the position that farming activities which change wetlands into dry land are not exempt from the section 404 permit requirements regardless of the fact that the change in use is from one wetland type of crop to another. Finally, this note will analyze the legislative history

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of crops, involve no discharge of dredged or fill material into waters of the United States and as such never require a section 404 permit.);

. . . .

(c) Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraphs (a)(1) through (6) of this section must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States nay [sic] be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration. *For example, a permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from silvicultural to agricultural use when there is a discharge of dredged or fill material into waters of the United States in conjunction with construction of dikes, drainage ditches or other works or structures used to effect such conversion. A conversion of a Section 404 wetland to a non-wetland is a change in use of an area of waters of the United States. A discharge which elevates the bottom of waters of the United States without converting it to dry land does not thereby reduce the reach of, but may alter the flow or circulation of, waters of the United States.*

33 C.F.R. § 323.4 (1989) (emphasis added).

It is important to note that draining of wetlands alone does not require a § 404 permit unless the drainage activity involves depositing dredged or fill material into the wetland. Comment, *Federal Regulation of Agriculture Drainage Activity in Prairie Potholes: The Effect of Section 404 of the Clean Water Act and the Swampbuster Provisions of the 1985 Farm Bill*, 33 S.D.L. REV. 511, 515 (1988).

7. 852 F.2d 189 (6th Cir. 1988), *cert. denied*, — U.S.—, 109 S. Ct. 1131 (1989).

8. The Larkins' position is that the row crops are also wetland crops and that therefore, they have merely changed from one wetland use to another. Larkins' Petition for Writ of Certiorari at 4, United States v. Larkins, 852 F.2d 189 (No. 88-1025), *cert. denied*, — U.S. —, 109 S. Ct. 1131 (1989) [hereinafter *Larkins' Petition*].

Row crops include such crops as corn and soybeans, which are usually planted in rows. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1,981 (1976).

9. *Larkins*, 852 F.2d at 192 (quoting Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 926 n.46 (5th Cir. 1983)).

of the CWA and will discuss why the courts' interpretations of the farming exemption are consistent with the purposes of the CWA.

II. FACTS AND PROCEDURE

The Larkins brothers engaged in all phases of farming, including growing and harvesting of "row-crop," timber, cattle, hogs, and pond-fish.[10] In 1976, they acquired 550 acres of land in the floodplain of Obion Creek, a tributary of the Mississippi River in Carlisle County, Kentucky.[11] Approximately 110 acres of the land were bottomlands.[12] The bottomlands had been continuously used as farmland for the growing and harvesting of crops and timber from 1924 until the late 1960's or early 1970's. Ten to twelve acres were covered in knee-deep water.[13] The bottomlands were forested with oak, hickory, and other bottomland hardwoods, but the Larkins also observed cypress, which is a wetland tree, on the site.[14] In December of 1976, the Larkins began digging drainage ditches, cutting back dead and damaged timber, blasting out beaver dams and lodges, and began filling gullies and washouts.[15] In 1977, the Larkins continued harvesting timber.[16] As commercial timber was harvested, the area was replanted with more economical row crops.[17]

In May of 1979, an attorney for the Corps of Engineers requested permission to make an inspection. The Larkins denied the Corps access to their property to inspect unless it agreed to identify who had turned them in.[18] In November of 1979, the Corps advised the Larkins that the matter had been turned over to the Justice Department.

In 1980, despite advanced warning from the Corps, the Larkins began construction of a series of earthen dikes and levees. On February 1, 1982, the Corps notified Thomas Larkins that aerial inspection had revealed "unauthorized deposition of material into water of the United States" in violation of the CWA.[19] The Larkins, nevertheless, completed construction of the dikes and levees, thereby forming an eighteen acre impoundment designed to capture upland drainage. This action facilitated the cultivation of formerly inundated lowlands.[20] In February of 1984, after completion of the dikes, the Justice Department filed an action against the Larkins in the United States District Court of Kentucky. The trial court subsequently ordered two on-site inspec-

10. *Larkins' Petition* at 4 (cited in note 8).
11. *Larkins*, 852 F.2d at 190.
12. *Larkins' Petition* at 4 (cited in note 8). Bottomlands are defined alternatively as ground under water or low-lying land, especially along a watercourse. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 259 (1976).
13. *Larkins' Petition* at 4-5 (cited in note 8). The inundation was attributed by the Larkins to the activity of beavers which had been introduced to the area by government officials. *Id.*
14. United States v. Larkins, 25 E.R.C. 1911, 1913 (W.D. Ky. 1987).
15. *Id.*
16. *Larkins' Petition* at 6 (cited in note 8).
17. *Id.*
18. *Larkins*, 25 E.R.C. at 1913.
19. *Id.*
20. *Id.*

tions of the Larkins' property.[21]

At trial, the Larkins argued that their land did not constitute wetlands, and that if it did, their actions fell within the permit exemption contained within 33 U.S.C. § 1344(f) for normal farming, foresting and ranching activities.[22] The government presented aerial photographs showing standing water on the land. The photos showed that in 1972 and in 1979 the area was forested and contained several areas of standing water. Photos taken in 1980 also showed a prevalence of vegetation which, according to expert testimony, appeared to be, by its "signature,"[23] wetland vegetation.[24] Expert soil analysis concluded that the land in question contained hydric soil, which is a wetland soil low in oxygen and formed under saturated conditions.[25] The Larkins presented two witnesses who testified that flooding on their property was only occasional during wet years and that surface water tended to drain off naturally within a matter of hours.[26] The trial court found that the United States had proven by a preponderance of the evidence that the area impounded and the areas east, northeast and southwest of the impoundment were wetlands within the meaning of Corps' regulations[27] and were subject to regulation under the CWA.[28]

The trial court also ruled against the Larkins on the exemption issue, finding that the Larkins were not entitled to the farming exemption because they had constructed the dikes and levees for the purpose of bringing the wetlands under cultivation, and this change in land use—from timber area to cropland—constituted a use to which the land had not been previously subjected. Further, in clearing and cultivating that acreage, the Larkins reduced the reach of the navigable waters of the United States thereby reducing the reach of the wetlands. Therefore, the change fell within the "recapture" provision of CWA section 404(f)(2),[29] and consequently, their activities did not qualify for the farm exemption.[30]

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21. *Id.*

22. *Id.* at 1912.

23. "Signature" refers to the vegetation's color, shading, tint and texture. With this evidence, one of the government's witnesses testified that the area in the photos contained black willow, button bush and several species of herbaceous aquatic and semi-aquatic plants, all typically associated with wetlands. *Id.* at 1916.

24. *Id.*

25. *Id.* The finding that hydric soil predominates on the property is not enough, alone, to classify the area as wetland conclusively. A corroborative finding of wetland vegetation is also required. FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTION WETLANDS 16 (1989) [hereinafter MANUAL]. Discussed *infra* at note 68.

26. *Larkins' Petition* at 8-9 (cited in note 8). On cross-examination, however, both witnesses agreed that, before being purchased by the Larkins, the land tended to be covered by standing water. *Larkins*, 852 F.2d at 191.

27. "Wetlands" was defined by Corps regulations as those areas that are "saturated . . . at a frequency and *duration sufficient to support*" a prevalence of wetland vegetation. *Larkins*, 25 E.R.C. at 1914 n.13 (quoting 33 C.F.R. § 323.2(c) (1982)). The court noted that this definition was identical to the 1977 regulations which were in effect at the time the Corps first contacted the Larkins. *Id.* at 1914 n.9. The current regulations retain this definition of wetlands. 33 C.F.R. § 328.3 (1989).

28. *Larkins*, 25 E.R.C. at 1917 (wetlands are part of the waters of the United States which are protected by the CWA).

29. Section 404(f)(2) quoted in part at note 6, *supra*.

30. *Larkins*, 25 E.R.C. at 1918-19. The court stated that even if the wetlands had been culti-

The trial court ordered the Larkins to restore the site, noting that the Larkins had previous notice that they were in violation prior to construction of the dikes and levees.[31] The Larkins appealed to the United States Court of Appeals for the Sixth Circuit, asserting that the district court had erred in concluding that the land in question was "wetlands." They argued that the court had failed to examine the amount and frequency of the soil's saturation or hydrology in making its determination and had erroneously concluded that the defendants were not entitled to the farm exemption.[32]

The Sixth Circuit affirmed the trial court on both issues.[33] The court noted that in *United States v. Riverside Bayview Homes, Inc.*,[34] the United States Supreme Court approved the Corps' regulations defining wetland as land sufficiently saturated to support and which does support wetland vegetation.[35] The Larkins argued that the land was, in fact, used for silviculture prior to the draining and filling. As the trees were harvested, the Larkins maintained that they replaced them with other, more profitable crops. Therefore, the Larkins insisted, the discharge of dredged or fill material stemmed from normal and consistent farming and silviculture activities. The Sixth Circuit rejected the Larkins' argument and followed the Fifth Circuit Court of Appeals[36] holding that the "silviculture exception contained in 33 U.S.C. § 1344(f)(1)(A) applies only to the *normal* harvesting of timber, not to the activity of clearing timber to effect a conversion of a wetland from silviculture to agricultural use."[37] The court adopted the district court's finding that the wetlands had not been previously cultivated, and concluded that the Larkins' activities were designed to bring the area into a use to which the wetlands had not been previously subjected. Thus, the Larkins' activities failed to escape

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vated or logged before beaver had entered the region and interfered with the drainage of the property, the activity was not exempt from the permit requirement. Activities are subject to exemption only if they are established and "on-going." Activities cease to be established when the property on which they were once conducted "has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations." *Id.* at 1918 n.23 (quoting 33 C.F.R. § 323.4(a)(1)(ii)).

31. *Id.* at 1919.

32. *Larkins*, 852 F.2d at 192.

33. *Id.* at 192-93. Judge Merritt, concurring, noted that two issues were not raised by the Larkins on appeal. The first issue was whether Corps jurisdiction included wetlands adjacent to nonnavigable waterways such as Obion Creek, an issue left undecided by the United States Supreme Court. *Id.* at 193 (Merritt, J., concurring). *See infra* note 86. The second issue was whether the trial court's injunction, which required the Larkins to restore their property to its original nonagricultural use, constituted a taking without compensation in violation of the fifth amendment when the land's only "economically viable use" appeared to be agricultural. *Larkins*, 852 F.2d at 194. *See infra* note 75. Judge Merritt emphasized that since these issues were not raised by the Larkins they were not being decided by the court. *Larkins*, 852 F.2d at 194.

34. 474 U.S. 121 (1985). *See infra* notes 82-86 and accompanying text.

35. *Larkins*, 852 F.2d at 192.

36. *See* Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983). *See infra* notes 102-105 and accompanying text.

37. *Larkins*, 852 F.2d at 192 (quoting *Avoyelles*, 715 F.2d at 926 n.46). "[A] permit will be required for the conversion of a wetland from silviculture to agricultural use when there is a discharge of dredged or fill materials into waters of the United States in conjunction with the construction of dikes, ditches or other works or structures used to effect such conversion." *Id.* (quoting 33 C.F.R. § 323.4(c)).

the farming exemption's recapture provision in 33 U.S.C. § 1344(f)(2).[38]

The Larkins petitioned for a writ of certiorari to the Supreme Court of the United States claiming that a conflict exists among the United States circuit courts as to whether a farmer may change from one wetland crop[39] to another without a section 404 permit from the Corps of Engineers.[40] The United States Supreme Court denied the Larkins' petition for writ of certiorari.[41]

III. BACKGROUND

At the time the United States was first settled, approximately 215 million acres of wetlands existed.[42] By the mid-1970's, only ninety-nine million acres remained.[43] Nine million acres were lost between the mid-1950's and the mid-1970's alone.[44] As these statistics indicate, the national policy at that time was to "reclaim" the land by draining and filling as much wetland area as possible.[45] However, in the late 1960's, the Corps of Engineers promulgated regu-

38. *Larkins*, 852 F.2d at 192. The recapture provision in 33 U.S.C. § 1344(f)(2) provides that whenever an activity which results in the discharge of dredged or fill material into "waters of the United States" reduces the circulation or reach of those waters, and is conducted in order to bring the land into a new use, a § 404 permit is required. For text of the "recapture provision," *see supra* note 6.

39. Wetland crops generally grow in saturated conditions and include, among others, rice and cranberries. *See* United States v. Akers, 785 F.2d 814 (9th Cir.), *cert. denied*, 479 U.S. 828 (1986). Upland crops grow in dryer climates and generally include such crops as corn and barley. *See* United States v. Huebner, 752 F.2d 1235 (7th Cir.), *cert. denied*, 474 U.S. 817 (1985).

40. *Larkins' Petition* at iii-iv (cited in note 8). Larkins claimed that the writ should be granted due to a conflict which exists among the United States circuit courts as to whether a farmer may change from one wetland crop (tree farming and harvesting) to another wetland crop (maize, corn, or soybeans) without having to obtain a § 404 permit from the Corps. *Id. See Akers*, 785 F.2d at 819-20 ("We do not believe that Congress intended to place the burden of Corps permit regulation on farmers who desire merely to change from one wetland crop to another."); *cf. Avoyelles*, 715 F.2d at 926 (farming and silviculture exemptions do not apply to discharges which convert extensive areas of water into dry land); *Larkins*, 852 F.2d at 192-93 ("The silviculture exception contained in 33 U.S.C. § 1344(f)(1)(A) applies to *normal* harvesting of timber, not to the activity of clearing timber to permanently change the area from wetlands into non-wetland agricultural tract for row crop cultivation.").

The Larkins also claimed that the Sixth Circuit erred in basing its decision in part on the current version of 33 C.F.R. § 323.4(c) which was not adopted until two years after the alleged violations by the Larkins. *Larkins' Petition* at 10-11 (cited in note 8). *See supra* note 37.

41. United States v. Larkins, — U.S. —, 109 S. Ct. 1131 (1989).

42. 1 IMPACT OF FEDERAL PROGRAMS ON WETLANDS; A REPORT TO CONGRESS BY THE SECRETARY OF THE INTERIOR 1 (1988) [hereinafter IMPACT OF FEDERAL PROGRAMS]. Wetlands provide habitat for many varieties of fish and other forms of wildlife, including many endangered species. In addition, wetlands perform important water purification functions by holding or transforming nutrients, sediments, and pollutants. They also provide valuable flood protection by containing rainwater which eventually percolates into the ground providing clean groundwater. See WANT, LAW OF WETLANDS REGULATION § 2.01[3], at 2-3 to -4 (1989) [hereinafter WANT].

43. 1 IMPACT OF FEDERAL PROGRAMS at 1 (cited in note 42).

44. *Id.* North and South Dakota lost approximately 388,000 acres of wetland habitat from construction of the Missouri River dams. *Id.* at 5.

45. Some federal programs continued to encourage drainage and filling of wetlands until very recently. For instance, low interest rates provided to farmers by the Farm Credit System and the Farmer's Home Administration have, in the past, reduced the cost of draining and converting wetlands. *Id.* at 12, 25. In addition, tax policies had the unintended effect of increasing the incentive to drain and convert wetlands. Recent legislation has reversed these policies. For example, the Tax Reform Act of 1986 reversed those provisions of the tax code which encouraged conversion of wetlands to farmland. *Id.* at 5. In addition, the swampbuster provisions of the Food Security Act of

lations to protect wetlands. It did so under section 10 and section 13 of the Rivers and Harbors Act of 1899.[46] Prior to that time, the Act was concerned primarily with navigation, regulating the obstruction of waterways by construction and the disposal of refuse in or near navigable waters.[47]

In response to growing concern over diminished water quality, Congress enacted the CWA.[48] The CWA is, as its name suggests, primarily concerned with the prevention of water pollution.[49] Section 402 gives the Environmental Protection Agency (EPA) Administrator authority to issue permits for the discharge of any pollutant[50] upon the condition that the discharge meet applicable requirements of the statute. This section is also known as the National Pollutant Discharge Elimination System (NPDES).[51] In addition, the CWA prohibits the discharge of dredged or fill materials into "navigable waters," unless authorized by a permit issued pursuant to section 404 of the CWA.[52] Because the Corps had previously administered the Rivers and Harbors Act's wetland protection program, the Corps' authority to regulate discharges of dredged and fill materials into certain waters of the United States is retained in section 404 of the CWA, carving out an exception from the EPA's general

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1985 regulates drainage activities in prairie wetlands. The provisions discourage converting prairie potholes and other wetlands for agricultural production by, essentially, disqualifying farmers who produce an agricultural commodity on a wetland from a broad range of United States Department of Agriculture financial assistance programs. Comment, 33 S.D.L. REV. at 522-23 (cited in note 6).

46. Section 10 prohibits the creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States except on approval of the Secretary of the Army. 33 U.S.C. § 403 (1982). Section 13 prohibits, without approval of the Secretary of the Army, any discharges into navigable waters of "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state." *Id.* § 407.

Corps jurisdiction is limited under the Rivers and Harbors Act to waters which are navigable. The Corps regulatory definition states:

> Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

33 C.F.R. § 329.4 (1989). Thus, jurisdiction under the Rivers and Harbors Act is based upon the interstate commerce clause of the Constitution. WANT § 4.07, at 4-19 (cited in note 42).

47. WANT § 2.02, at 2-6 (cited in note 42).

48. *See supra* note F.

49. WANT § 2.02[2], at 2-7 (cited in note 42). The CWA's lofty purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (1982). Its principal regulatory program is the National Pollutant Discharge Elimination System (NPDES) which is administered by the Environmental Protection Agency (EPA). Section 301 of the CWA prohibits the discharge of any pollutant without a permit. *Id.* § 1311. Section 402 authorizes the EPA to issue such permits. *Id.* § 1342. Additionally, CWA § 402 allows states to regulate navigable water quality within their borders subject to the EPA's approval and oversight. *Id.* § 1342(b).

50. 33 U.S.C. § 1342 (1982). "Pollutant" is broadly defined to include discharge of dredge material and implicitly includes fill material as well. CWA § 502(6) defines pollutant as

> dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

33 U.S.C. § 1362(6) (1982).

51. 33 U.S.C. § 1342 (1982). Those qualifying for § 404 permits are generally exempted from the NPDES permit system. 40 C.F.R. § 122.3(c) (1989).

52. 33 U.S.C. § 1344 (1982). *See supra* note 6. In addition, CWA § 401 requires that an applicant for a federal license or permit to conduct any activity that may result in a discharge of a pollutant into waters of the United States must obtain a certification from the state in which the discharge originates that the discharge will comply with the applicable effluent limitations and water quality standards. 33 U.S.C. § 1341 (1982).

authority under the CWA to prevent water pollution.[53]

Traditionally, the Corps' civil functions were tied to navigation. The Rivers and Harbors Act, accordingly, gave the Corps jurisdiction over "navigable waters."[54] Under the Rivers and Harbors Act, navigable waters were narrowly defined as waters which were in fact navigable, had been navigable in the past or were susceptible to navigation in the future. Jurisdiction was also limited geographically to waters which fell below "mean high tide" (M.H.T.).[55] This definition was sufficient to regulate navigation since little navigation occurred above M.H.T. and, of course, no navigation took place on non-navigable waters. However, jurisdiction limited to waters which were "navigable in fact" was inadequate for protecting wetlands because wetlands are often at or above M.H.T., and are seldom navigable.

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53. The EPA retains authority to make wetlands determinations although it does so infrequently and usually only where special circumstances exist such as where a great deal of controversy surrounds the determination. *See* WANT at § 7.02[2], at 7-3 (cited in note 42).

Although § 404(a) gives the Corps authority to issue permits for dredge and fill activities, § 404(b)(1) requires that such decisions be based upon guidelines established by both the Corps and the EPA. The guidelines establish environmental criteria to be used by the Corps in evaluating § 404 permits. These guidelines create a presumption against filling "special" aquatic areas defined as wetlands, sanctuaries, refuges, mud flats, and vegetated shallows, unless there is no practicable alternative which would have a less adverse impact on the aquatic ecosystem. 40 C.F.R. § 230.40-45 (1989). Additionally, even if there are no practicable alternatives, a permit application may be denied where the activity would cause significant degradation of the waters of the United States. *Id.* § 230.10(c). *See* WANT at § 6.05[1]-[2], at 6-8 to -11 (cited in note 42).

Finally, the decision of whether to issue a permit will be based upon a "public interest review." This is a general balancing process, weighing the benefits which reasonably may be expected to accrue from the proposal against the reasonably foreseeable detriments to the public's interest in both protection and utilization of important environmental resources. This balancing process considers the effects, including the cumulative effects from various independent but similar activities, on wetlands with the view that the wetland may be interrelated with other bodies of water. 33 C.F.R. § 320.4 (1989).

In addition to compliance with the § 404(b)(1) guidelines, the Corps must also determine whether the activity will have a significant adverse impact on the human environment, and if so, prepare an Environmental Impact Statement (E.I.S.) pursuant to the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 (1982). This step is required infrequently, but where it is, securing a permit may take over two years. *See* WANT § 6.12[4], at 6-30 to -31 (cited in note 42).

The Corps must also consult with the Fish and Wildlife Service, the National Marine Fisheries Service (where applicable), and state wildlife agencies concerning potential impact on fish and wildlife and mitigation measures which could be implemented. *Id.* § 6-12, at 6-27 to -34.

Under CWA § 404(c), the EPA retains veto authority over designation of disposal sights for dredge and fill materials:

> The administrator is authorized to prohibit the specification . . . of any defined areas 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, . . . wildlife, or recreational areas."

33 U.S.C. § 1344(c) (1982). *See* WANT § 7.03, 7-4 to -5 (cited in note 42).

54. 33 U.S.C. § 403 (1982).

55. Geographically, Corps jurisdiction covers the entire water surface and bed of a navigable waterbody. This includes all ocean and coastal waters within a zone three nautical miles seaward from shore. The shoreward limit of jurisdiction is the Mean High Tide. 33 C.F.R. § 329.11 (1989).

> On the East and West coast, there are two high tides and two low tides each day. On the Gulf Coast there is one high tide and one low tide each day. M.H.T. is the average of the highs and lows over an 18.6 year period (one lunar cycle).

WANT § 2.02[3], at 2-8 (cited in note 42).

Ordinary High Tide (O.H.T.) is used to determine geographic jurisdiction in bodies of freshwater. O.H.T. is the line on the shore established by fluctuations of water and indicated by physical characteristics such as a clear, natural line or impression on the bank. 33 C.F.R. § 329.11 (1989).

Under the CWA the Corps' jurisdiction is no longer limited to waters which are "navigable in fact." Instead, the definition of "navigable waters" contained in CWA section 502(7) was amended to include all "waters of the United States."[56] This definitional change was significant in that the waters at or above M.H.T., including wetlands, became potentially subject to the Corps' jurisdiction. Because the term "waters of the United States was not defined further in the CWA, confusion resulted as to whether the Corps could actually regulate non-navigable waters or freshwater wetlands.

The Corps initially sought to restrict its jurisdiction to navigable waters, traditionally defined as those waters actually navigable; those that used to be navigable; and those that by reasonable improvements could be made navigable, including non-navigable tributaries affecting navigable waters.[57] In 1975, however, the Corps' refusal to extend the geographic scope of the section 404 permit program beyond the traditional definition of navigability was challenged. In *Natural Resources Defense Council, Inc. v. Callaway*,[58] the United States District Court for the District of Columbia ruled that Congress, by expanding the term "navigable waters" to mean "waters of the United States," intended to assert federal jurisdiction over the Nation's waters "to the maximum extent permissible under the Commerce Clause of the Constitution."[59] Thus, the Secretary of the Army and the Chief of the Army Corps of Engineers were declared to have unlawfully adopted the traditional definition of navigable waters as the Corps' jurisdictional limit. The court ordered the Corps to promulgate new regulations in accordance with congressional intent.[60]

Pursuant to the court order, the Corps proposed interim final regulations to expand its jurisdiction and issued a press release.[61] The announcement of

56. 33 U.S.C. § 1362(7) (1982). Congress intended to give the term navigable waters "the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. REP. No. 414, 92d Cong., 2d Sess. 144, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3822. The Sixth Circuit held that Congress has authority under the interstate commerce clause of the Constitution to prohibit the discharge of pollutants into nonnavigable tributaries of navigable streams. United States v. Ashland Oil Transportation Co., 504 F.2d 1317, 1326-29 (6th Cir. 1974) ("Pollution control of navigable streams can only be exercised by controlling pollution of their tributaries.").

57. *See* 2 RODGERS, ENVIRONMENTAL LAW; AIR AND WATER 194-95 (1986). This definition of navigability continued to leave small feeder streams and tributaries, as well as, adjacent wetlands unprotected. *Id.* For the traditional definition of navigability, *see supra* note 46.

58. 392 F. Supp. 685 (D.D.C. 1975).

59. *Id.* at 686.

60. *Id.*

61. The press release stated that under some of the proposed regulations, "[f]ederal permits may be required by [a] rancher who wants to enlarge his stock pond, or [a] farmer who wants to deepen an irrigation ditch or plow a field . . . ." Press Release, Dep't of Army, Office of the Chief of Engineers (May 6, 1975), *reprinted in* 4 LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, at 1263 (1978) [hereinafter LEGISLATIVE HISTORY]. This was not Congress' intent in passing the CWA as evidenced by a statement made by Senator Muskie, a primary sponsor of the CWA, demanding that this release be retracted and stating that it was a "deliberate distortion" of the federal water pollution policy and that "[n]othing could be further from the truth . . . ." *Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings before the Committee on Public Works*, 94th Cong., 2d Sess. 336 (1976) (appended to a statement of Gus Speth on behalf of the Natural Resources Defense Counsel).

the proposed regulations raised fears among many farmers, ranchers and foresters that everyday operations, such as plowing fields or excavating stock ponds, would be subject to Corps regulations and would result in considerable delay and expense.[62] This press release was subsequently repudiated by the Corps as it expanded its jurisdictional coverage in three stages of regulation changes.[63]

In response to the perceived threat, opponents attempted to defeat the expanded jurisdiction by introducing legislation. In 1976 and 1977, the House of Representatives attempted to restrict the Corps' jurisdiction to traditionally navigable waters.[64] This attempt was defeated, but exemptions were put into place for certain farming, silviculture, and ranching activities.[65] Application

62. Comment, 7 ENVTL. L. REP. at 10,082 (Envtl. L. Inst.) (cited in note 6).

63. *Id.* Prior to July 25, 1975, only discharges into navigable waters as traditionally defined required a § 404 permit.

Phase I: After July 25, 1975, Corps jurisdiction was expanded to cover traditional navigable waters of the United States and adjacent wetlands.

Phase II: Effective September 1, 1976, the Corps expanded its permit program to include primary tributaries of navigable waters of the United States, including adjacent wetlands, and natural lakes greater than five acres in surface area.

Phase III: Effective July 1, 1977, the Corps was to exercise its section 404 authority over all waters of the United States. 42 Fed. Reg. 37,145 (1977) (codified at 33 C.F.R. § 323.3). "Waters of the United States" was administratively defined as: Traditionally navigable waters and their tributaries, including adjacent wetlands; interstate waters and their tributaries, including adjacent wetlands; and all other waters of the United States "the degradation or destruction of which could affect interstate commerce." *Id.* at 37,144 (codified at 33 C.F.R. § 323.2).

The term "Wetlands" was defined as:

> [T]hose 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. Wetlands generally include swamps, marshes, bogs and similar areas.

Id.

Since 1977, the scope of the § 404 geographical jurisdiction has remained essentially unchanged, with one exception. In 1986, the Corps moved the definitions formerly found in 33 C.F.R. § 323 into 33 C.F.R. § 328 to provide clarification by setting the definitions apart. 51 Fed. Reg. 41,216-17 (1986) (codified at 33 C.F.R. § 328.3). The preamble to the 1986 revision contains an explanatory statement that "waters of the United States" includes waters which could be used as habitat for migratory birds or endangered species. *Id.* at 41,217.

Because of the broad definition contained in the Corps' regulations, commentators have interpreted "waters of the United States" to include virtually all waters in the United States unless excepted by regulation or statute because the definition essentially eliminates the interstate commerce criterion as a restriction to Corps jurisdiction. *See* WANT § 4.05[3], at 4-13 to -14 (cited in note 42). The definition of "waters of the United States" remains substantively unchanged. 33 C.F.R. § 328.3 (1989). Thus, regulable waters currently include isolated intrastate lakes, rivers, streams, wetlands, sloughs, prairie potholes, and natural ponds. *Id.* § 328.3. *But see infra* note 65 discussing Nationwide Permit No. 26.

64. H.R. 3199, 95th Cong., 2d Sess., 15-16 (1977), *reprinted in* 4 LEGISLATIVE HISTORY 1157-58 (cited in note 61). Section 16 of H.R. 3199 would have curtailed the scope of federal regulatory power over dredge-and-fill operations by altering the definition of waters subject to federal regulation under § 404. The bill provided that federal jurisdiction would cover navigable waters and adjacent wetlands, but that navigable waters would include only "waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement, as a means to transport interstate or foreign commerce shoreward to their ordinary highwater mark (mean higher high water mark on the west coast)." *Id.* For the definition of ordinary high water mark, *see supra* note 55. This definition of navigability is much narrower than the broad definition contained in CWA § 502(7), "waters of the United States, including the territorial seas." Comment, 7 ENVTL. L. REP. (Envtl. L. Inst.) at 10,083 (cited in note 6).

65. H.R. CONF. REP. NO. 830, 95th Cong., 1st Sess., 38-39 (1977), *reprinted in* 3 LEGISLATIVE HISTORY at 185, 222-23 (1977) (cited in note 61). For text of the exemptions, *see supra* note 6.

In addition to the exemptions, the CWA amendment gave the Corps authority to issue general

of these exemptions to the permit requirement continues to be a source of considerable litigation.[66] The Corps' determination of whether an area constitutes "wetlands," and therefore "waters of the United States" subject to Corps' jurisdiction, is another area of controversy.[67]

A. *Determination of Wetlands*

Whether a landowner's property actually constitutes wetlands[68] is often

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permits. General permits may be issued on a state, regional or nationwide basis after public notice and opportunity for the public to comment. To qualify for a general permit, the activities involved must: be similar in nature; cause minimal adverse environmental effects when performed separately; and have only a minimal cumulative adverse effect on the environment. *Id.* at 38, *reprinted in* 3 LEGISLATIVE HISTORY at 222 (cited in note 61).

A general permit may also be issued if it "would result in avoiding unnecessary duplication of regulatory control exercised by another federal, state, or local agency" upon a determination that the individual and cumulative effects of the action are minimal. 33 C.F.R. § 323.2(h) (1989).

One such permit is Nationwide Permit No. 26 which grants permission for discharges of dredged and fill materials into certain non-tidal waters of the United States above the headwaters of navigable waters and other non-tidal waters, including adjacent wetlands, that are not part of a surface tributary system to interstate waters or navigable waters of the United States (isolated waters). In addition, the discharge must not cause the loss or substantial adverse modification of ten acres or more of "waters of the United States." Wetlands of one to ten acres may still be filled but require notification of the Corps. These notifications do not always receive full review by the Corps. *Id.* § 330.5(26). This general permit is controversial because approximately 36% of all prairie wetlands are smaller than ten acres. These small "potholes" are functionally important, especially to migratory and nesting waterfowl. 1 IMPACT OF FEDERAL PROGRAMS at 8-9 (cited at note 42).

66. *See, e.g., Avoyelles*, 715 F.2d 897; United States v. Cumberland Farms of Connecticut, Inc., 647 F. Supp. 1166 (D. Mass. 1986), *aff'd on other grounds*, 826 F.2d 1151 (1st Cir. 1987); *Huebner*, 752 F.2d 1235; *Akers*, 785 F.2d 814. *See infra* notes 88, 104, 113, 132 and accompanying text. *See also* Conant v. United States, 786 F.2d 1008 (11th Cir. 1986).

67. *See, e.g., Riverside Bayview Homes*, 474 U.S. 121. *See infra* notes 72-81 and accompanying text.

68. In 1989, the Department of the Army, the Fish and Wildlife Service, the EPA, and the Soil Conservation Service adopted the Federal Manual for Identifying and Delineating Jurisdictional Wetlands. MANUAL (cited in note 25). The manual sets forth three criteria for making wetlands determinations, however, one criterion may be presumed from the presence of another. *See* WANT § 4.09, at 4-23 (cited in note 42). The Criterion include:

1) Vegetation Criterion: This criterion lists types of plants and their frequency of occurrence in wetlands. The types include:

a) obligate wetland (estimated probability greater than 99%);
b) facultative wetland (estimated probability 67-99%);
c) facultative (estimated probability 34-66%);
d) facultative upland (estimated probability 1-33%); and
e) obligate upland (estimated probability less than 1%).

An area has wetland vegetation when, under normal circumstances, (1) more than 50% of the dominant species are either obligate wetland plants, facultative wetland plants or facultative plants; or (2) the species present yield a certain frequency occurrence value. MANUAL at 9-10 (cited in note 25).

2) Hydric Soils Criterion: These are soils which are saturated long enough to develop "anaerobic" conditions in the topsoil. Anaerobic refers to the absence of oxygen which is caused by saturation. This can lead to a change in soil color. These color changes can be compared to soil charts to determine whether soils are hydric. *Id.* at 16-18. Hydric soil determination is difficult to establish in the field. For this reason, emphasis is placed on hydrophytic vegetation and hydrologic factors.

3) Hydrologic Factors: This criterion refers to the presence of water for a week or more during the growing season. This saturation generally affects the type of soil present and the types of plants which grow (categories number 2 and 3). Saturation of more than a week's duration may be required to establish anaerobic soil conditions and wetland vegetation. The soil saturation must occur during periods of average rainfall (infrequent flooding will not cause an area to be classified as wetlands). *Id.* at 10-13.

As noted previously, the presence of one of the three factors may be presumed by the presence of another. For instance where hydric soils and hydrologic factors are present, wetland vegetation will be presumed. More commonly, where hydrologic modification is absent, that is, if there is no stand-

disputed by a landowner seeking to avoid the section 404 permit requirement or seeking to avoid being penalized for filling wetlands without such a permit.[69] A dispute over whether lands filled by the landowner constituted wetlands was reviewed by the United States Supreme Court in 1985. In *United States v. Riverside Bayview Homes, Inc.*,[70] the landowner, Riverside Bayview Homes, Inc., a developer, owned 80 acres of low-lying marshlands near the shores of Lake St. Clair in Michigan. When the landowner began filling a marsh to construct a housing development, the Corps initiated a suit in the Federal District Court for the Eastern District of Michigan seeking to enjoin the owner from filling the property without permission from the Corps.[71] Based on its findings that: (1) the landowner's property was characterized by the presence of vegetation requiring saturated soil conditions for growth and reproduction, (2) the source for such soil conditions was groundwater, and (3) the wetland on the property was adjacent to a body of navigable water, the court held that the property constituted wetlands and was thus subject to the Corps' permitting authority.[72] The district court enjoined the landowner from filling the marsh.[73] The Sixth Circuit Court of Appeals reversed, construing the Corps' regulation to exclude from "waters of the United States" wetlands that were not subject to periodic inundation from an adjacent navigable waterway. In the appellate court's view, since the property was not subject to flooding by the nearby lake, the marsh did not fall within the Corps' jurisdiction.[74]

The United States Supreme Court granted certiorari to consider the proper interpretation of the Corps' regulations defining "waters of the United States" and the scope of the Corps' jurisdiction. After addressing the possible takings problem,[75] the Court found that the plain language of the regulation contradicted the circuit court's conclusion that "frequent flooding" by an ad-

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ing water, a wetland determination may be made on the presence of wetland vegetation and hydric soils. Determinations may be made by on-site inspections or by off-site methods where geologic survey maps are available. For a discussion of the Manual *see* WANT § 4.09, at 4-23 to -26 (cited in note 42).

69. *See, e.g., Avoyelles*, 715 F.2d 897 (discussed at note 88); *Cumberland Farms*, 647 F. Supp. 1166 (discussed at note 104). *See also Conant*, 786 F.2d 1008.

70. 474 U.S. 121 (1985).

71. *Id.* at 124.

72. *Id.* at 130-31.

73. *Id.* at 124.

74. The appellate court justified its position by stating that a narrow interpretation of "wetlands" was required in order to prevent taking of private property without compensation. *Id.* at 125.

75. The Court held that the court of appeals erred in concluding that a narrow reading of the Corps' regulatory jurisdiction over wetlands was necessary to avoid a "taking problem."

> [T]he application of land-use regulations to a particular piece of property is a taking only 'if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land.' Moreover, we have made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking. . . . Only when a permit is denied and the effect of that denial is to prevent the owner from making 'economically viable' use of the land in question can it be said that a taking has occurred.

Id. at 126-28 (citation omitted). The Court reasoned that the mere fact that a taking may occur in some instances "is no justification for the use of narrowing constructions to curtail the program if compensation will in any event be available in those cases where a taking has occurred." *Id.* at 127-28 (citing the Tucker Act, 28 U.S.C. § 1491, which supplies a means of obtaining compensation for any taking that may occur through the operation of a federal statute).

jacent body of water was required for an area to be construed as wetlands.[76] The Court pointed out that the regulation very clearly requires only saturation by either surface or ground water, provided that the saturation is sufficient to support wetland vegetation and in fact does support wetland vegetation.[77] The fact that the Corps had revised its definition of "wetland" to exclude a requirement of periodic inundation underscored the absence of a requirement of inundation in the regulation before the Court.[78] The Court found that, in effect, the appellate court had reintroduced into the regulation a requirement that the Corps had specifically excised by amendment.[79]

The Court held that since the landowner's property was characterized by the presence of vegetation requiring saturated soil conditions for its survival, the definition of adjacent wetlands applied to the property.[80] The land constituted a wetland area which was adjacent to a navigable waterway and thus was a part of the "waters of the United States." Therefore, the property fell within the scope of the Corps' section 404 jurisdiction.[81]

The Court also discussed whether it was proper for the Corps to define "waters of the United States" to include wetlands adjacent to other "waters of the United States."[82] In answering this question, the Court examined the problem Congress was attempting to address when it passed the Clean Water Act. The CWA of 1972 constituted a comprehensive legislative attempt "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[83] In Congress' view, this goal mandated broad federal authority to control pollution because "water moves in hydrologic cycles and it is essential that the discharge of pollutants be controlled at the source."[84] Thus, Congress' definition of "navigable waters" as "waters of the United States" indicates that the term "navigable" is of limited import. The evident breadth of Congress' concern for protection of water quality made it reasonable for the Corps to interpret the term "waters" to encompass wetlands adjacent to waters as more conventionally defined, since wetlands adjacent to

76. *Id.* at 129-30. In 1975, "freshwater wetlands" was defined as an area that is "periodically inundated" and is "normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." *Id.* at 124 (quoting 33 C.F.R. § 209.120(d)(2)(h) (1976)). In 1977, the Corps refined its definition of wetlands by eliminating the reference to periodic inundation. The 1977 definition read as follows:

> The term "wetlands" means those areas that are inundated or saturated by surface or ground waters at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

Id. (quoting 33 C.F.R. § 323.2(c) (1978)). These regulations have been moved since but are substantively the same. *See* 33 C.F.R. § 328.3(b) (1989).

77. *Riverside Bayview Homes, Inc.*, 474 U.S. at 129-30.

78. *Id.* at 130.

79. *Id.*

80. *Id.* at 130-31.

81. *Id.* at 131.

82. *Id.*

83. *Id.* at 132 (quoting 33 U.S.C. § 1251 (1982)).

84. *Id.* at 133 (quoting S. REP. NO. 92-414, at 77 (1972)). Congress intended CWA jurisdiction to go beyond the traditional concept of navigable waters. Congress had both water quality and ecosystem integrity in mind and, therefore, intended to protect the entire aquatic system. *Id.*

navigable waters play a key role in protecting and enhancing water quality.[85] The Court concluded that the Corps' definition of "waters of the United States" encompassing wetlands adjacent to other bodies of water subject to Corps jurisdiction was a permissible interpretation of the Act.[86]

B. The Farming, Silviculture and Ranching Exemption

In addition to the controversy over the Corps' wetlands determinations, whether a landowner's activities fall within section 404's exemptions for normal farming and silviculture activities constitutes another area of considerable debate.[87] In *Avoyelles Sportsman's League v. Marsh*,[88] the farming exemption was narrowly construed so as not to apply where the landowners cleared and leveled land, cutting timber and vegetation at ground level to turn the area from forested wetland into dry land for growing soybeans. The land had previously been subject to spring flooding because it constituted part of a river basin and some areas of the 20,000 acre tract contained permanent impoundments of water. In August of 1978, the Corps ordered the landowners, Albert Prevot, H.P. Lambright and Elder Realty Company, to halt their activity pending an investigation as to whether the area was indeed wetlands. The Corps concluded, after its investigation, that thirty-five percent of the tract consisted of wetlands.[89] The Fish and Wildlife Service wrote a letter stating that it believed the entire tract constituted wetlands.[90] In November of the same year, numerous environmental groups brought an action against the Corps and EPA officials requesting a declaration that the entire tract consisted of wetlands and that the landowners could not continue draining and filling without permits.[91] The environmental groups claimed the federal officials had shirked their duties under the Clean Water Act.

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85. *Id.* at 133. "Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, will affect the other waters within that system. . . . '[Therefore], Federal jurisdiction under section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States as these wetlands are part of the aquatic system.' " *Id.* at 134 (quoting 42 Fed. Reg. 37,128 (1977)).

86. *Id.* at 134. The Court also noted that Congress implicitly approved the Corps' interpretation by defeating an amendment in 1977 which would have restricted the Corps' jurisdiction to waters which were, in fact, navigable. Even that proposed amendment would have allowed Corps control of wetlands adjacent to those navigable waters. Congress instead adopted the Senate's version which did not restrict Corps jurisdiction, but instead, included exemptions for normal farming, ranching and silviculture activities. *Id.* at 135-36 (citing H.R. 3199, 95th Cong., 1st Sess. § 16, *reprinted in* 4 LEGISLATIVE HISTORY at 1157 (cited in note 61)).

The Court did not rule on the issue of whether the Corps had authority to regulate "isolated wetlands." *Id.* at 131 n.8.

87. *See supra* note 66.

88. 715 F.2d 897 (5th Cir. 1983).

89. *Id.* at 901.

90. *Id.* When the Corps issues permits to allow dredging and filling of wetlands, it is required to give public notice and an opportunity for a hearing. 33 U.S.C. § 1344(a) (1982).

The EPA and the Fish and Wildlife Service have greater commenting authority than other federal agencies or the public in general. When one of the two agencies and the district engineer making the permit determination disagree, the agencies may elevate a district engineer's permit decision to a higher authority within the army. *See* WANT § 6.11[2][b], at 6-27 (cited in note 42).

91. The environmental groups included: the Avoyelles Sportsmen's League, Point Bass Hunting Club, Inc., Avoyelles Bass Runners, Inc., Ira J. Marcotte, Avoyelles Natural Guard, Inc., the Environmental Defense Fund, Inc., and the National Wildlife Federation. Avoyelles Sportsmen's League,

The trial court issued a temporary restraining order preventing the landowners from engaging in the landclearing and filling activities.[92] In January of 1979, the district court granted plaintiff's motion for a preliminary injunction and ordered the Corps and the EPA to make a final wetlands determination.[93] The EPA, which had agreed to make the final determination,[94] concluded that eighty percent of the tract constituted wetlands. The landowners claimed the area was not wetlands and that, even if it was, their activities fell within the farming exemption.

The trial court subsequently held that over ninety percent of the lands in question were indeed wetlands and that a section 404 permit was required for the landclearing activity.[95] The trial court stated that since no farming could have taken place on the tract until the trees were cleared, the activity of clearing and filling the land did not constitute normal farming activities within the meaning of section 404(f)(1)(A).[96] The court reasoned that the word " 'normal' connoted an established and continuing activity."[97] The defendants appealed, contending that their activities were normal farming activities exempt under section 404(f) of the CWA.[98]

The Fifth Circuit Court of Appeals agreed with the trial court's reasoning.[99] The appellate court stated: "Read together, the two parts of section 404(f) provide a narrow exemption for agricultural and silviculture activities that have little or no adverse effect on the nation's waters."[100] The court found this interpretation consonant with congressional intent that the exemptions not apply to discharges which convert extensive areas of water into dry land, impede circulation of waters, or reduce the reach or size of the water body.[101] Since the landowners' activities were completed in order to bring "an area of

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Inc. v. Alexander (Avoyelles II), 511 F. Supp. 278, 280 n.1 (W.D. La. 1981), *aff'd sub nom.* Avoyelles Sportsmen's League v. Marsh, 715 F.2d 897 (5th Cir. 1983).

92. *Avoyelles*, 715 F.2d at 902.

93. *Id.* at 902-03.

94. Because of the significant difference in determinations between the Corps and the EPA, the court needed to ascertain which agency had the ultimate authority to make the wetlands determination. The United States Attorney General submitted an opinion which stated that the EPA had the ultimate authority for wetlands jurisdictional determinations, based on the fact that the EPA has overall responsibility for the CWA. *See* WANT § 7.02[1], at 7-2 (cited in note 42). As a result of the *Avoyelles* conflict, the EPA and the Corps entered into a Memorandum of Agreement which provided that in special cases, that is, cases involving significant controversy, the EPA would make the wetland determination. The Corps continues to make the routine determinations. *See id.* § 7.02[2], at 7-3.

95. *Avoyelles*, 715 F.2d at 903.

96. *Id.* at 925. For the text of the CWA farming exemption, *see supra* note 6.

97. *Avoyelles*, 715 F.2d at 925.

98. *Id.*

99. *Id.*

100. *Id.* at 926.

101. *Id.* The court quoted Senator Edmund Muskie during the debate on the 1977 Amendments:

> New subsection 404(f) provides that Federal permits will not be required for those narrowly defined activities that cause little or no adverse effects either individually or cumulatively. While it is understood that some of these activities may necessarily result in incidental filling and minor harm to aquatic resources, the exemptions do not apply to discharges that convert extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body.

Id. (quoting 123 CONG. REC. 38,997 (1977), *reprinted in* 3 LEGISLATIVE HISTORY at 474 (cited in note 61)).

the navigable waters into a use to which it was not previously subjected,"[102] that is, changed from forest to soybean production, the activities were not normal, ongoing activities. The court also noted that these changes would have a significant adverse impact on the wetlands and thus were not exempt from the permit requirement.[103]

In a similar factual situation, the Massachusetts District Court, in *United States v. Cumberland Farms of Connecticut, Inc.*,[104] found that the activities of a landowner who had cleared a swamp by removing standing timber and leveling soil for planting did not fall within the statutory exemption for agricultural activities.[105] The land involved consisted of two thousand acres of forested freshwater swamp, one of the largest freshwater swamps in Massachusetts. In 1972, V.S. Hasiotis, Inc. purchased the wetland and then leased it to Cumberland Farms of Connecticut, Inc. Cumberland Farms began removing timber and converting the wetland using dredge and fill techniques to prepare the area for planting.[106] In 1983, the Corps received a complaint from a private citizen about these activities. It quickly responded by informing Cumberland Farms that they were in violation of the CWA. Cumberland Farms asserted that its activities fell within the farming exemptions in CWA section 404(f) because a portion of the site had been farmed previous to Cumberland Farms' acquisition.[107]

The court stated that to apply the section 404(f)(1) farming exemption, the landowner's activities must be "analyzed by a contextual review of its 'total activities.' "[108] The court found that there was no persuasive evidence that the site had actually been farmland prior to Cumberland Farms' acquisition.[109] The fact that some farming of a portion of the site had in fact occurred was not dispositive to the court.[110]

In addition, the court noted that in enacting the section 404(f)(2) recapture provision, Congress intended to prevent conversion of wetlands into dry land. It was therefore necessary, in the court's view, to consider the substantiality of the impact on the wetlands caused by Cumberland Farms' activities in assessing whether the activities escaped the recapture provision. Since the activities conducted by Cumberland Farms constituted a "wholesale modification of a major aquatic system," the court held that Cumberland Farms' activities required a section 404 permit.[111] The court ordered restoration of the swamp to its 1977 level via filling of ditches and erecting of a series of check dams.[112]

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102. *Id.*
103. *Id.*
104. 647 F. Supp. 1166 (D. Mass. 1986), *aff'd on other grounds*, 826 F.2d 1151 (1st Cir. 1987).
105. *Id.* at 1176-77.
106. *Id.* at 1170-71.
107. *Id.* at 1175.
108. *Id.* (quoting *Avoyelles*, 715 F.2d at 926).
109. *Id.*
110. *Id.*
111. *Id.* at 1176-77.
112. *Id.* at 1180-83.

In 1985, the issue of what constitutes a normal farming operation again arose. In *United States v. Huebner*,[113] the Seventh Circuit Court of Appeals narrowly construed section 404 of the CWA to exclude from the farming exemption ditching and other agricultural activities associated with a large cranberry farming operation in Wisconsin. In 1977, the Huebners acquired the five-hundred acre Bear Bluff Farms, the largest continuous area of wetlands in the state. Since the turn of the century, the land had been used intermittently for various agricultural purposes, including upland crop production. However, for the twenty years preceding the Huebners' ownership, the only crop grown on the farm had been cranberries. The Huebners intended not only to expand the cranberry operation, but also to use a portion of the farm for growing upland crops.[114] After the Huebners began to plow sections of the farm to clear out existing ditches and dig new ones, the federal government brought an action alleging that the activities constituted a "permitless discharge of dredged or fill material" into the wetlands and thus violated section 301 of the CWA.[115]

The parties settled the lawsuit in 1978 by entering into a consent decree which enjoined the Huebners from engaging in any further unpermitted dredge or fill activity and required them to perform certain restoration and maintenance activities on culverts, embankments and ditches.[116] In 1982, however, the Huebners initiated additional plowing, leveling and scraping activities and the government sought an order holding them in contempt of the consent decree. The district court, on August 4, 1983, entered such an order, rejecting the Huebners' defense that these activities fell within the farming exemption.[117] The district court stated:

> [I]t is clear that the amendments that created the subsection (f) exceptions on which defendants rely were not intended to exempt all farming operations from the permit requirements, but only those whose effect upon wetlands or other waters was so minimal as not to warrant federal review and supervision.[118]

The district court analyzed the Huebners' actions in light of the purposes of the CWA and held that the activities were not exempt from the section 404 permit requirement.[119]

Affirming the district court's narrow interpretation of the farming exemption, the Seventh Circuit addressed, in some detail, the purpose and scope of the section 404(f) exemption. The court reviewed the legislative history and concluded that:

> [B]ecause of the significance of inland wetlands, which make up eighty-

113. 752 F.2d 1235 (7th Cir.), *cert. denied*, 474 U.S. 817 (1985).
114. *Id.* at 1237.
115. *Id.* at 1237-38. CWA § 301 prohibits the discharge of pollutants into the navigable waters. 33 U.S.C. § 1311 (1982). "Pollutant" is defined to include dredge material and fill material. *See supra* note 50.
116. *Huebner*, 752 F.2d at 1238.
117. *Id.* at 1238-39.
118. *Id.* at 1240 (quoting the trial court's unpublished opinion).
119. *Id.*

> five percent of the nation's wetlands, Congress intended that Section [404] (f)(1) exempt from the permit process only 'narrowly defined activities . . . that cause little or no adverse effects either individually or cumulatively [and which do not] convert more extensive areas of water into dry land or impede circulation or reduce the reach and size of the water body.'[120]

Quoting from a statement by Senator Muskie, the CWA's primary sponsor, the court noted that only "routine activities," such as "draining poorly drained farm or forest land of which millions of acres exist," would be covered by the exemption.[121] The dredging of "ditches or channels . . . in a swamp, marsh, bog or other truly aquatic area" would on the other hand, require an individual permit.[122]

In light of this legislative history, the court applied its interpretation of section 404(f) to the specific activities conducted by the Huebners. First, it held that the Huebners' use of a marsh plow to plow and remove wetland vegetation from three reservoirs violated the purposes of the CWA and the terms of the consent decree.[123] Second, the Huebners' use of backhoes to clear and deepen existing ditches, as well as their sidecasting and spreading of materials into the wetlands, were not exempt from the permit requirement.[124] The court ruled that even if the ditches were irrigation ditches within the meaning of section 404(f)(1)(C),[125] these activities did not escape recapture under section 404(f)(2) because they reduced the reach of the wetlands surrounding the ditches at issue.[126] Nor did section 404(f)(1)(E)[127] apply to the Huebners' bulldozing activities since the Huebners failed to use best management practices in their maintenance of the farm roads.[128]

Relying on the Corps' regulations,[129] the court held that the Huebners' unpermitted expansion of cranberry beds violated the consent decree because

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120. *Id.* at 1240-41 (quoting 123 CONG. REC. 38,997 (1977), *reprinted in* 3 LEGISLATIVE HISTORY at 420 (cited in note 61) (statement of Rep. Harsha, member of the conference committee during House debates)).

121. *Id.* at 1241 (quoting 4 LEGISLATIVE HISTORY at 1042 (cited in note 61) (statement of Senator Muskie)).

122. *Id.* (quoting 4 LEGISLATIVE HISTORY at 1042-43 (cited in note 61) (statement of Senator Muskie)).

123. *Id.* at 1242.

124. *Id.*

125. CWA § 404(f)(1)(C) exempts discharges related to the construction or maintenance of irrigation ditches. 33 U.S.C. § 1344(f)(1)(C). For text of § 1344(f)(1)(C), *see supra* note 6.

126. *Huebner*, 752 F.2d at 1242.

127. CWA § 404(f)(1)(E) exempts discharge of dredge or fill material

> for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized.

33 U.S.C. § 1344(f)(1)(E) (1982).

128. *Huebner*, 752 F.2d at 1242-43.

129. These regulations provide that an operation ceases to be established as an ongoing farm activity when the area on which it was conducted is "converted to some other use or has lain idle for so long that modifications to the hydrological regime are necessary" to resume those activities. 33 C.F.R. § 323.4(a)(1)(ii) (1989).

the expansion required the conversion of adjacent wetlands into cranberry beds, a use to which they had not been previously subject. Therefore, the conversion failed to escape section 404(f)(2)'s recapture provision and required a permit.[130] Finally, the Seventh Circuit upheld the district court's finding that the Huebners' use of a bulldozer to move large amounts of dirt and to level a ten to twelve acre area was an unpermitted discharge in violation of the decree and section 404 of the CWA.[131]

At about the same time that the Seventh Circuit decided *Huebner*, the Corps sought an injunction to prevent a California landowner from dredging and filling swampland on his property. In *United States v. Akers*,[132] the landowner, Akers, purchased land in California, including 2,889 acres of swampland known as Big Swamp. The swamp consisted of prime habitat for many forms of wildlife, including some endangered species. The swamp is adjacent to Ash Creek, which is a tributary of the Pit River.[133]

In March of 1984, the Corps learned of Akers' plan to grade the land, thereby converting it to farm land suitable for growing upland crops.[134] The Corps determined that it had jurisdiction and that a permit was required to carry on such activities. Akers brought suit in May of 1984 seeking a declaratory judgment against the Corps. The court entered a temporary restraining order (T.R.O.) against both parties, preventing Akers from clearing the property.[135] Ten days later, Akers' motion for a preliminary injunction was denied and Akers dropped the suit.[136]

In July of 1984, Akers began to build dikes on the property. He told the Corps he was cleaning ditches, but later said he was repairing a pre-existing structure. In late July or early August, the Corps issued a cease and desist order which was later withdrawn.[137] In September of the same year, aerial surveys revealed a large ditch on the eastern edge of the property filling two natural channels of Ash Creek. In addition, some wetland property had been leveled. In October, the United States sued Akers seeking declaratory and injunctive relief, civil penalties and restoration of the property to wetland status.[138] Two days later, a T.R.O. was entered by the district court.[139] On January 15, 1985, the court entered an order declaring that Akers was not to deposit any material into waters delineated by the Corps without first ob-

130. *Huebner*, 752 F.2d at 1243.

131. *Id.* In so holding, the court relied on the Corps' regulations which state that § 404(f)(1)'s exemption for plowing "does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land." 33 C.F.R. § 323.4(D) (1989).

132. 785 F.2d 814 (9th Cir.), *cert. denied*, 479 U.S. 828 (1986).

133. *Id.* at 816.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 816-17. The order was withdrawn on Akers' assurance that the dikes would only be used for purposes that a previous structure had served. *Id.* at 817.

138. *Id.*

139. *Id.*

taining a permit.[140] Akers never applied for the permit and appealed the order.

The Ninth Circuit Court of Appeals, noting the approval in *Riverside Bayview Homes, Inc.* of the Corps' definition of wetlands,[141] concluded that Akers' property constituted wetlands. Therefore, absent an applicable exception to the permit requirement, Akers was required to obtain a permit before dredging and filling the swampland.[142] Akers argued that his operation was entitled to the farm exemption because the wetland area of his property had been farmed since 1897. The appellate court rejected Akers' contention that his activities fell within the "normal farming" exemption to the permit requirement. The court, instead, agreed with the district court's finding that upland crop production had not occurred in the wetlands on a *regular basis*, but only during dry periods. Therefore, the upland farming represented a new use of the wetlands.[143] The court held that the Corps had authority to require a permit when upland farming, silviculture or ranching is initiated and results in filling of wetlands.[144]

The Ninth Circuit also found that, even if Akers had established that his activities constituted "normal farming activities," they would not escape the recapture provision in CWA section 404(f)(2). The appellate court adopted the lower court's decision which refused to look at Akers' activities in isolation. The lower court had, instead, focused on the consequences of the activities and found that Akers' activities constituted an effort to convert the area into dry land for farming purposes.[145] The appellate court stated that, "[w]hile the exemptions and regulations do not distinguish major and minor changes, *the intent of Congress in enacting the Act was to prevent conversion of*

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140. *Id.*

141. The court noted that under the Corps' definitions, wetlands

> means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

Id. at 818 n.2 (quoting 33 C.F.R. § 323.2(c) (1985)).

142. *Id.* at 818.

143. *Id.* at 819.

144. *Id.* The court noted that at oral argument the government contended that if a property owner were to switch from one type of wetland crop to another, thereby filling in wetlands, he would be required to obtain a permit if that crop had not been previously grown. A permit is required under the recapture provision because the property owner would be subjecting the land to a "use" to which it had not been previously subjected. The court rejected this position, stating that Congress had not intended to place the burden of obtaining § 404 permits on farmers who merely wish to "change from one wetland crop to another." *Id.* at 820. Since the court specifically found that Akers had in fact changed from wetland use to upland farming, its response to the government's argument can only be construed as dicta. *See infra* notes 149-54 and accompanying text.

145. *Akers*, 785 F.2d at 822. The *Akers* court also found that Akers could not escape the impact of *Avoyelles* and *Huebner* which stand for the proposition that the farming exemption is to be narrowly construed to situations which do not change a wetland's hydrological regime. *Id. See Avoyelles*, 715 F.2d at 926 ("Read together, the two parts of § 404(f) provide a narrow exemption for agricultural and silvicultural activities that have little or no adverse effect on the nation's waters."); *Huebner*, 752 F.2d at 1241 (filling wetlands to expand cranberry operations and to grow upland crops did not fall within the farming exemptions which are to be narrowly construed as applying to activities which cause little or no adverse effects, which do not convert extensive areas of water into dry land, nor impede circulation of or reduce the size and reach of the water body). *See supra* notes 88 and 113.

wetlands to dry lands. It is thus the substantiality of the impact on the wetland that must be considered in evaluating the reach of [section] (f)(2)."[146] The court held that Akers' activities were not exempt from CWA's section 404 permit requirement due to the likely drying effect of the activities.[147]

IV. ANALYSIS

Based on language in the *Akers* case, the Larkins claim that a conflict exists among the federal circuit courts as to whether a farmer may change from one wetland crop to another without a Corps section 404 permit even though the change involves the filling of wetlands.[148] The *Akers* court noted that at oral argument, counsel for the government advocated a position of complete authority to prohibit *all* changes in wetland use involving discharges of dredged or fill material. The prohibited changes, according to the government's counsel, would include changes from one wetland crop to another.[149] The court stated that it did not agree with the government's position, inferring that Congress had not "intended to place the burden of Corps permit regulation on farmers who desire merely to change from one wetland crop to another."[150] Although the Larkins claimed that they had merely switched from one wetland farming operation to another,[151] the Sixth Circuit did not specifically address this issue. The court, instead, focused upon the effect of the Larkins' activities which resulted in the conversion of wetlands into dry farmland and held that the Larkins were not entitled to the farming exemption.[152] The Larkins assert that this holding conflicts with the language in *Akers* rejecting the government's claim of authority to regulate changes from one wetland use to another.[153]

The *Akers* court concluded, however, that Akers' activities did not constitute a change from one wetland use to another. Rather, the change constituted a conversion of wetland to dry land suitable for upland farming. This

146. *Akers*, 785 F.2d at 822 (emphasis added). The appellate court quoted Representative Harsha:

> To assure that the extent of these exempted activities will not be misconstrued, . . . (f)(2) provide[s] common sense limitations to protect the chemical, biological, and physical integrity of the Nation's waters. While it is understood that some of these activities may necessarily result in incidental filling and insignificant harm to aquatic resources, the exemptions do not apply to discharges that convert more extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body.

Id. (quoting 123 CONG. REC. 38,997 (1977), *reprinted in* 3 LEGISLATIVE HISTORY at 420 (cited in note 61) (House Debate, Dec. 15, 1977, Representative Harsha)).

147. *Id.* at 822-23. The court stated: "Giving the recapture provision the appropriate common sense reading, it appears that Akers' activities are not exempt from permit requirements due to the likely drying effect." *Id.*

148. *Larkins' Petition* at iii-iv (cited in note 8).

149. *Akers*, 785 F.2d at 820.

150. *Id.*

151. *Larkins' Petition* at 7-8 (cited in note 8). Specifically, the Larkins' argued that their land was being used for silviculture purposes. When they cleared the land they were merely harvesting trees. The trees were not replanted because the Larkins' decided to plant more economical crops. *Larkins*, 852 F.2d at 192.

152. *Larkins*, 852 F.2d at 192-93.

153. *Larkins' Petition* at 17-18 (cited in note 8).

conversion represented a "new operation in the wetlands."[154] Thus, the language rejecting the government's assertion of jurisdiction to regulate changes from one wetland use to another may properly be construed as dicta since it was not necessary to the court's disposition of the case. Consequently, there is, in reality, no conflict among the federal circuit courts as to whether a farmer may change from one wetland crop to another without a section 404 permit when the change involves the filling of wetlands.

Neither the trial court nor the appellate court in *Larkins* reached the precise issue purportedly reached in *Akers* as to whether changing from one form of wetland farming to another constitutes a normal farming activity within the meaning of section 404(f)'s farming exemption.[155] The *Larkins* court did not focus on the change in farming activities initiated by the Larkins, but instead, focused upon the change in the wetlands brought about by the Larkins' activities. A landowner cannot permanently alter an area's hydrological regime by discharging dredge and fill materials into wetlands without obtaining a section 404 permit.[156] The Larkins' activities of constructing levees and filling low-lying areas converted their property from forested wetlands into a non-wetland agricultural tract. Therefore, a permit was required to carry out the Larkins' activities and the Larkins were properly found to be in violation of the CWA.

Even if the *Larkins* court had focused on the Larkins' change in farming activities instead of focusing on the change in the wetlands, the court's finding that the Larkins were in violation of the CWA was still proper. The Larkins alleged that their activity of harvesting trees and replacing them with row crops constituted a "normal" farming technique.[157] However, when both parts of section 404(f) are read together, they provide a very narrow exemption for farming and silviculture activities.[158] The silviculture exemption applies only to the *normal* harvesting of timber, *not to the activity of clearing timber "to permanently change the area from wetlands into non-wetland agricultural tract for row crop cultivation."*[159] The Larkins activities clearly fell within this language. Therefore, the Larkins were not entitled to the silvicul-

154. *Akers*, 785 F.2d at 819.

155. The district court addressed a very similar issue raised by the Larkins in their post trial briefs. They contended that since the land had been subject to silviculture and cultivation activity prior to beavers flooding the property, their subsequent use of the land in a similar way did not constitute a use to which the land had not previously been subjected within the meaning of the recapture provision of (f)(2). The court rejected this contention, holding instead that "activities subject to the farm exemption qualify only if established and ongoing." *Larkins*, 25 E.R.C. at 1918 n.23. "Activities cease to be established when the property on which they were once conducted 'has been converted to another use or *has lain idle so long that modifications to the hydrological regime are necessary to resume operations.*'" *Id.* (quoting 33 C.F.R. § 323.4(a)(1)(ii) (1986)).

156. *See Avoyelles*, 715 F.2d at 926.

157. *Larkins' Petition* at 7 (cited in note 8). "Since the land in question had been continuously used for the raising and harvesting of food, fiber, and forest products, the continued use of such land by petitioners in either of these three categories [falls] within the explicit terms of the farm exemption." *Id.* at 7-8.

158. *See infra* note 162 and accompanying text.

159. *Avoyelles*, 715 F.2d at 925-26 (emphasis added).

ture exemption and their filling activities were subject to the section 404 permit requirement.

The analysis in *Larkins* is consistent with the analysis of other courts interpreting the section 404 permit exemptions.[160] In addition, the approach of focusing on the drying effects of the changes in land use in addressing the farming and silviculture exemption issue is consistent with Congress' stated intention of expanding the Corps' jurisdiction as far as constitutionally permissible in order to deal effectively with the threat of pollution and the diminishing number of wetlands.

The legislative history behind the farming exemption demonstrates Congress' intention that these exemptions be narrowly construed as applying only to established, everyday farming activities, such as plowing, harvesting and minor draining of occasionally inundated farmland, which have minimal effects on wetlands.[161] The exemptions were never intended to apply to conversions of wetlands to dry land suitable for upland cultivation. This is clearly shown by statements made by Senator Edmund Muskie, the CWA's primary sponsor:

> New subsection 404(f) provides that Federal permits will not be required for those narrowly defined activities that cause little or no adverse effects either individually or cumulatively. While it is understood that some of these activities may necessarily result in incidental filling and minor harm to aquatic resources, the exemptions do not apply to discharges that convert extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body.[162]

It is thus evident that, regardless of the landowner's change in use, to qualify for an exemption from the section 404 permit requirement, the change may not convert extensive areas of wetlands into dry land.[163] This view has

160. *See id.* "Read together, the two parts of section 404(f) provide a narrow exemption for agricultural and silviculture activities that have little or no adverse effect on the nation's waters." *Id.* at 926. Since no farming activity could have taken place on the tract until the trees were cleared, the activity of clearing and filling the land did not constitute normal farming activities within the meaning of § 404(f)(1). *Id.* at 925. *See also Cumberland Farms*, 647 F. Supp. at 1175-77. Given Cumberland Farms' total activities, there was no persuasive evidence that any portion of the site had been farmland prior to Cumberland's acquisition. *Id.* at 1175. The project in question constituted a "wholesale modification of a major aquatic system" and therefore required a § 404 permit. *Id.* at 1176. *See also Huebner*, 752 F.2d at 1240-41 (because of the significance of inland wetlands, Congress intended that § 404(f)(1) exempt from the permit process only narrowly defined activities that cause little or no adverse effects and which do not convert more extensive areas of water into dry land). *See also Conant*, 786 F.2d 1008, 1010 (construction of fish-farming ponds is not an established, ongoing farming operation and involves a new use affecting the flow of circulation within the wetlands and therefore does not qualify for the farming exemption).

161. *Akers*, 785 F.2d at 819. The minor draining exemption applies to occasionally flooded areas which do not support the growth of wetland vegetation. 33 C.F.R. § 323.4(a)(1)(iii)(C)(1)(i) (1989).

162. 123 CONG. REC. 39,188 (1977), *reprinted in* 3 LEGISLATIVE HISTORY at 474 (cited in note 61) (statement of Senator Muskie during the Senate debate of Dec. 15, 1977).

It is interesting to note that because of the massive confusion and uproar over the § 404 permit requirements, based on what he construed as a misrepresentation of congressional intent, Senator Muskie, at one point, opined that perhaps the best course to follow would be to scrap the § 404 program entirely. Discharges of dredged spoil and fill material would consequently be regulated by the EPA or the states under § 402 (NPDES). *Hearings before the Senate Committee on Public Works*, 94th Cong., 2d Sess. 2 (1976) (Senator Muskie's opening remarks).

163. This is not to say that minor discharges into wetlands will be subject to § 404(f)(2)'s recap-

been codified by the Corps in its current regulations.[164] In explaining the "recapture provision," the Corps regulation states:

> For example, a permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from silvicultural to agricultural use when there is a discharge of dredged or fill material into waters of the United States in conjunction with construction of dikes, drainage ditches or other works or structures used to effect such conversion. A conversion of a Section 404 wetland to a non-wetland is a change in use of an area of waters of the United States.[165]

Construing the normal farming exemptions to include conversion of wetlands to dry land would encourage farmers to convert wetlands to more economical dry land and thereby frustrate congressional intent to preserve the Nation's wetlands.

V. CONCLUSION

As the cases discussed in this note have indicated,[166] the approach consistently used by the courts, in addressing the farm exemption issue, is to focus primarily on the effect of the change in land use on the wetland habitat rather than on the specific change in land use. The courts reject artificial labels placed on activities by landowners and instead look at the activity's true purpose and effect—that of filling wetlands in order to put the resulting dry land to more economical use. Secondly, the courts focus upon the original use of the area effected by the farming activity. Where an area served primarily wetland functions, even though adjacent to farming activities, the courts have consistently found that if the effect of the change in land use is to convert extensive areas of water into dry land, the conversion is not a "normal" farming or silviculture activity within the meaning of section 404(f)(1). In addition, such changes in land use fail to escape section 404(f)(2)'s recapture provision as such changes are invariably held to be:

> [An] activity having as its purpose, bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters [is] impaired or the reach of such waters [is] reduced.[167]

The conversions are therefore subject to section 404's permit requirement.

The court in *Larkins* followed the same approach in examining the consequences of the landowner's activity. Even though the Larkins used the bottomlands for silviculture and some row crop cultivation prior to draining and

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ture provision. The Corps has issued several Regulatory Guidance Letters (R.G.L.) which provide guidance as to how Corps regulations are to be enforced. One such R.G.L. states that application of the recapture provision is a judgment call which must be made in a reasonable fashion. One shovelful of dirt, even though it technically reduces the reach of the water, would not be a reasonable candidate for enforcement as enforcement would defeat the purpose of the exemption. R.G.L. No. 87-9, *reprinted in* WANT app. at 9-16 (cited in note 42).

164. 33 C.F.R. § 323.4(c) (1989).

165. *Id. See supra* note 40.

166. *See supra* note 160.

167. 33 U.S.C. § 1344(f)(2) (1982).

filling the land, the court refused to hold that the conversion to dry land fell within the section 404 permit exemption. It instead found that the activity of clearing timber and filling the bottomland to permanently change the area from wetlands into a non-wetland agricultural tract did not constitute "normal" harvesting of timber and therefore, the silviculture exemption in section 404(f)(1) did not apply.[168] In addition, the conversion constituted a use to which the land had not been previously subject, and which reduced the reach of the wetlands, thereby falling within the recapture provision of section 404(f)(2).[169] The holding in *Larkins* is consistent with the general approach used by other courts and is consonant with Congress' intention that the farming exemption be construed narrowly.

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168. *Larkins*, 824 F.2d at 192-93.
169. *Id.*