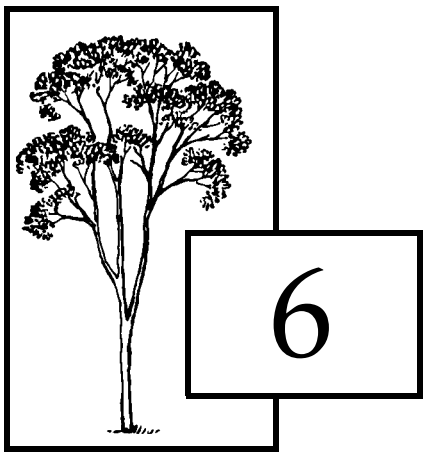

6

Wetlands

R. Timothy Weston and Tad J. Macfarlan

6-1
BASIS FOR WETLAND REGULATORY PROGRAMS

Over the past five decades, the subject of wetlands has emerged from the obscurity of ecological science to become a matter of special regulatory focus and spirited public debate. For developers, landowners, project sponsors, and their attorneys, wetlands regulation often seems a quagmire of rules and multi-agency decision-making. The legal basis for wetlands regulatory programs in Pennsylvania is found in different statutory frameworks at the federal and state levels.

At the state level, the Pennsylvania Department of Environmental Protection (DEP)[1] is authorized by the 1978 Dam Safety and Encroachments Act[2] to regulate the construction, operation, maintenance, modification, or abandonment of any dam, water obstruction, or encroachment. Water "obstructions" include any structure located in, along, across, or projecting into any watercourse, floodway, or body of water. An "encroachment" is any structure or activity that in any manner changes, expands, or diminishes the course, current, or cross-section of any watercourse, floodway, or body of water. Examples include dredging and drainage projects. For these purposes, the 1978 act defines "body of water" to include not only lakes, ponds, and reservoirs, but also any "swamp, marsh or wetland." Hence, under the Dam Safety and Encroachments Act, DEP regulates and requires permits for any structure or activity that encroaches on any wetland—including the placement of any fill; the installation of any structures over, under, or in a wetland; and the dredging or drainage of any wetland.

1. The statute refers to the Pennsylvania Department of Environmental Resources (DER). Effective July 1, 1995, the Department of Environmental Resources was renamed the Department of Environmental Protection (DEP).

2. Act of November 26, 1978 (P.L. 1375, No. 325), 32 P.S. §§ 693.1–693.27.

By contrast, the federal wetland regulatory program is founded on two statutory frameworks: sections 8 and 9 of the Rivers and Harbors Act of 1899[3] and section 404 of the federal Clean Water Act.[4]

Under the Rivers and Harbors Act, the U.S. Army Corps of Engineers regulates structures in navigable waters of the United States (waters that have been, are now, or may be developed for transport of commerce). Some of Pennsylvania's wetlands are adjacent to and part of these great navigable waterways, such as the Delaware River.

The major focus of the federal wetland program is found in section 404 of the Clean Water Act. Under section 404, the Corps (under the direction of the U.S. Environmental Protection Agency (EPA)) is empowered to regulate the "discharge of dredged and fill material" into "waters of the United States." As explained in section 6-5.3, below, the scope of federal jurisdiction (that is, what constitutes "waters of the United States") has been subject to considerable dispute and ongoing litigation, and is the subject of a major rulemaking proposed by the EPA and the Corps in March 2014.[5] At the same time, as discussed in 6-5.3, the question of what constitutes a discharge of dredged or fill material for purposes of triggering section 404 jurisdiction has triggered considerable regulatory flux and multiple court challenges. Broadly stated, under current prevailing interpretations, section 404 regulatory authority extends to the placement of any fill—such as dirt, sand, gravel, rubble, or even concrete forms—into streams or into wetlands having a "significant nexus" with navigable waters of the United States.[6]

6-2
DEFINITION OF WETLANDS

6-2.1
Regulatory Definition of "Wetlands"

Wetlands are, in essence, the intermediate zone between open water areas and uplands. The federal and state regulatory systems adopt essentially identical definitions of the term *wetlands.* For these purposes, wetlands are defined as "those areas that are inundated or saturated by surface water 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."[7]

This definition, and the process of identifying and delineating wetlands, involves three essential factors: (1) a prevalence of water-loving (hydrophytic) vegetation, (2) the presence of hydric soils (soils that are saturated with water for at least a portion of the year), and (3) hydrology (that is, a source of water).

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3. 33 U.S.C. §§ 402–403.
4. Id. § 1344.
5. 79 FR 22188.
6. See *Rapanos v. United States,* 547 U.S. 715 (2006); EPA and U.S. Army Corps of Engineers, "Clean Water Act Jurisdiction Following the United States Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States"* (December 2, 2008) (2008 Guidance), available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf.
7. 40 CFR 230.3(t); 25 Pa.Code § 105.1.

Applying these three factors, wetlands may be found in many shapes, sizes, and types. Some are obvious to the lay person; others require training and expertise to evaluate the relevant botanical, soil, and hydrologic information. The fact is that many Pennsylvania wetlands are not "wet"; some wetlands—particularly in the mountain and plateau areas of northwestern and northeastern Pennsylvania—are created by high groundwater tables that maintain saturated conditions sufficiently close to the surface of the ground to support wetland-type vegetation.

6-2.2 The Three-Parameter Approach

The question of precisely how to apply the three criteria used for identifying wetlands has produced considerable and continuing debate. A variety of methods and manuals have been developed by different agencies, providing guidance regarding how to identify a wetland in the field.[8] In 1989, four of the primary federal agencies—the U.S. Army Corps of Engineers, EPA, U.S. Fish & Wildlife Service, and U.S. Department of Agriculture Soil Conservation Service—came together in the publication of a common manual, entitled the *Federal Manual for Identifying and Delineating Jurisdictional Wetlands.* Subsequently, DER issued a public notice indicating that the 1989 federal manual would henceforth be used for making wetland determinations under the state program as well.[9]

Under the 1989 *Manual,* for an area to be a wetland, all three factors—vegetation, hydric soils, and hydrology—must be present.

One of the most important identifying factors involves vegetation. There are 2,500 plant species found in Pennsylvania that are indicators of wetland conditions. Plant species found in wetlands are classified as Obligate (99–100 percent of the time they are found in water); Facultative Wet (they occur more frequently in saturated conditions than not); and Facultative (they occur roughly 50 percent of the time in saturated conditions). Other plants are similarly classified as Facultative Upland and Upland Obligate. The Corps issued an updated National Wetland Plant List in 2014, to be used by agencies in delineating wetlands effective May 1, 2014, which contains over 8,000 plant species.[10]

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8. L. M. Cowardin, et al., *Classification of Wetlands and Deepwater Habitats of the United States,* U.S. Fish and Wildlife Service, Publ. No. FWS/OBS-79/31 (1979); Environmental Laboratory, *Corps of Engineers Wetland Delineation Manual,* U.S. Army Engineers Waterways Experiment Station, Vicksburg, MS, Tech. Rpt. Y-87-1 (1987); R. B. Reed, Jr., *National List of Plant Species That Occur in Wetlands: National Summary,* U.S. Fish and Wildlife Service, Biol. Rpt. 88(24) (1988); W. S. Sipple, *Wetland Identification and Delineation Manual, Vol. 1, Rationale, Wetland Parameters, and Overview of Jurisdictional Approach,* U.S. Environmental Protection Agency, Office of Wetlands Protection (1987); W. S. Sipple, *Wetland Identification and Delineation Manual, Vol. 2, Field Methodology,* U.S. Environmental Protection Agency, Office of Wetlands Protection (1987); R. W. Tiner, Jr., *Field Guide to Nontidal Wetland Identification,* Md. Dep't of Natural Resources and U.S. Fish and Wildlife Service, Region 5 (1988); U.S. Dep't of Agriculture, Soil Conservation Service, *Hydric Soils of the United States,* National Bulletin No. 430-2-7 (1982); U.S. Dep't of Agriculture, Soil Conservation Service, *Hydric Soils of the United States* (1987); U.S. Dep't of Agriculture, *National Food Security Act Manual* (1988); Federal Interagency Committee for Wetland Delineation, *Federal Manual for Identifying and Delineating Jurisdictional Wetlands,* U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, and U.S. Dep't of Agriculture, Soil Conservation Service (1989).

9. 19 Pa.B. 4612 (October 28, 1989), 25 Pa.Code § 105.451.

10. See http://wetland_plants.usace.army.mil.

Hydric soils are soils that are saturated with water for at least a portion of the year. As a starting point, one may turn to the mapping of soils conducted by the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS)[11] and the Agricultural Stabilization and Conservation Service, which are published in the form of county soil survey reports. A number of Pennsylvania soil types have been classified as hydric by NRCS, and the mapping of such soils on a particular piece of property is a red flag to the potential presence of wetland conditions. In the field, hydric soils are identified based on their organic content, the presence of gleying (dull bluish-green), the presence of oxidized areas in the root zone (noted by red speckles and lines, called mottling), and comparison of soil color and characteristics with those shown in the Munsell Color Charts (charts used by soil scientists to classify soils).

Hydrology may be among the most difficult factors to identify in the field. At the time a wetland delineation is conducted, the area may not be "wet." The 1989 *Manual* defines the required hydrology as including either the presence of water at the surface, or saturated soil conditions within 6 to 18 inches of the surface of the ground (that is, from high groundwater conditions) for at least seven days during the growing season. Earlier manuals used varying definitions of hydrologic conditions. Applying the 1989 *Manual* definition or any of the definitions in prior manuals requires the delineator to look for secondary evidence of surface water or high groundwater conditions—such as shallow roots, fluted or flared trunks, sedimentation marks, or water in a test pit.

6-2.3 Continuing Debate Over Delineation Methods

Although the 1989 *Manual* was intended to bring some measure of uniformity to the methods used by the various federal agencies involved, this did not end the debate. The 1989 *Manual* proved controversial, particularly with respect to its handling of areas subject to high groundwater tables—the "non-wet" wetlands. In August 1991, as part of the 1992 Energy and Water Development Appropriation Act, Congress stipulated that the 1989 *Manual* can no longer be used by the Corps of Engineers to identify or delineate wetlands. Since then, the Corps has reverted to using its 1987 *Manual*, which provides slightly different delineation methods. Responding to the 1992 act, the Corps and EPA initially announced proposals for a new manual, which would modify both the vegetative and hydrologic criteria. However, in the face of criticism that the proposed changes to the manual would cut back considerably on those areas considered wetlands, plans to go forward with a new manual were placed on hold. In January 1993, EPA announced that it was reverting to use of the 1987 *Manual*.[12]

Initially, the Pennsylvania DER continued to use the 1989 *Manual*. However, in 1996, DEP conformed its wetland identification criteria to the methodology followed by the Corps and EPA, formally adopting the 1987 *Manual*.[13]

To work through the process of applying the technical criteria, however, almost always requires the services of an expert trained in wetland identification. At one point, the Corps proposed rules for establishing a wetland delineator certification program,[14] but those regulations were never finalized. However, the Corps has proceeded with an unofficial train-

11. The Natural Resources Conservation Service was formerly known as the Soil Conservation Service.

12. 58 FR 4995.

13. 26 Pa.B. 494 (February 3, 1996), 25 Pa.Code § 105.451.

14. 60 FR 13654 (proposing a new 33 CFR part 333).

ing and certification program. At the same time, while some states have government-run wetland delineator certification or licensing programs, Pennsylvania does not. Along with the Corps, however, DEP has periodically offered wetland delineation training, and a private professional certification program has been established by the Society of Wetland Scientists.[15]

6-2.4 Special Exception—Prior Converted Cropland

One of the continuing debates has been the regulatory status of areas that were once wetlands, but have since been drained and used as croplands. For some time, different paths were followed by the federal agencies and DEP in regulating such areas. In 1993, the federal agencies adopted a definition of "waters of the United States" excluding "prior converted cropland."[16] In a policy statement issued in February 1996, DEP substantially conformed its practice to the federal approach, declaring that "prior converted croplands are not regulated as wetlands" under 25 Pa.Code ch. 105.[17] Prior converted croplands are defined for these purposes consistent with the *National Food Security Act Manual*[18] as those wetlands that were drained, dredged, filled, leveled, or otherwise manipulated prior to December 23, 1985, for the purpose of production of an agricultural commodity. To qualify, the agricultural commodity must have been planted or produced at least once prior to December 23, 1985, and the area must not have been abandoned. Abandonment occurs when there has been a cessation of cropping, forage production, or management on the cropland for five consecutive years, causing the cropland to revert in a manner meeting the wetland criteria. However, prior converted cropland is not considered abandoned if the area is enrolled in a conservation set-aside program or a federal or state wetland restoration program other than the Wetland Reserve Program.

6-3 JURISDICTIONAL DETERMINATIONS

6-3.1 The Jurisdictional Determination (JD) Procedure

The primary responsibility for determining whether and to what extent a wetland exists in a proposed project area rests with the project sponsor. Although some assistance is available through the permitting agencies (the Corps of Engineers and DEP), project sponsors bear the burden of preparing, through their consultants, studies identifying and delineating wetlands.

At the federal level, a process is available to confirm the delineations of wetlands, thereby allowing landowners to proceed with the development of permit applications based

15. For more information, see http://www.wetlandcert.org/overview.html.

16. 58 FR 45036.

17. 26 Pa.B. 494, 496 (February 3, 1996); 25 Pa.Code § 105.452.

18. U.S. Dep't of Agriculture, *National Food Security Act Manual* (180-V-NFSAM, Third Ed., March 1994). See *Gunn v. U.S. Dep't of Agric.*, 118 F.3d 1233 (8th Cir. 1997) (discussing definition of prior converted croplands).

on wetland lines confirmed by the Corps. This process is known as a "jurisdictional determination" or "jurisdictional delineation"—JD for short.

In the first instance, the Corps is authorized to determine whether particular areas or projects fall within its regulatory jurisdiction. However, under section 404 of the Clean Water Act, oversight of the entire section 404 program is maintained by EPA;[19] and EPA has final authority to decide whether, and to what extent, a body of water is within Clean Water Act jurisdiction.[20] The JD process usually starts with the applicant's consultant preparing a wetland study, following the procedures set forth in the applicable manual (currently the 1987 *Manual*). A map of the consultant-identified wetlands, together with supporting data (including pictures and field notes) is submitted to the appropriate Corps district office (Philadelphia, Baltimore, Pittsburgh, or Buffalo). After review of that information, and perhaps a site visit by Corps staff (sometimes aided by the U.S. Fish & Wildlife Service or other agencies), the Corps will issue a JD letter indicating concurrence (with or without modifications) in the mapped wetland line. Such JD letters must be in writing, and are valid for a period of three years unless new information warrants revision of the delineation before the expiration date.

Although Corps guidance provides an option under which Corps staff will complete the necessary documentation and field visits to render a wetland delineation, such efforts will be undertaken, in the Corps' words, "consistent with other work priorities." With limited staffing, "other priorities" means, for practical purposes, that Corps staff may not get out to a site for 6 to 12 months. To move the process along, applicants are strongly advised to use their own consultants to prepare the necessary field documentation.

6-3.2 Challenging a JD

The landowner who questions the extent or line of wetlands determined in a JD faces a serious roadblock to obtaining relief. Several lower court cases have held that the Corps' assertion of jurisdiction under section 404 and the Corps' determination that a project must obtain an individual permit does not constitute a final agency action reviewable under the Clean Water Act (CWA) or Administrative Procedure Act (APA).[21] In contrast, however, it has been suggested in several cases that where the Corps or EPA interpret their statutory authority as *not* extending to certain areas, environmental and citizen groups may seek judi-

19. 33 U.S.C. § 1344(b), (c).

20. *Administrative Authority to Construe Section 404 of the Federal Water Pollution Control Act,* 43 Op. Att'y Gen. No. 15 (September 5, 1979); *Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897, 903, n.12 (5th Cir. 1983). See *National Wildlife Fed'n v. Hanson,* 859 F.2d 313, 315–16 (4th Cir. 1988) (EPA has ultimate authority over issuance of permits).

21. *Hampton Venture No. One v. United States,* 768 F.Supp. 174 (E.D. Va. 1991) (Corps assertion of jurisdiction not reviewable); *Lotz Realty Co. v. United States,* 757 F.Supp. 692 (E.D. Va. 1990) (Corps' determination that project could not proceed under nationwide general permit, but required an individual permit, is not a reviewable final agency action). These cases substantially rely on a series of cases concerning pre-enforcement review of administrative orders issued by EPA and the Corps, including *Southern Pines Assocs. v. United States,* 912 F.2d 713 (4th Cir. 1990) (EPA compliance order not reviewable prior to commencement of federal enforcement action); *Hoffman Group, Inc. v. EPA,* 902 F.2d 567 (7th Cir. 1990) (EPA compliance order not reviewable); *Leslie Salt Co. v. United States,* 789 F.Supp. 1030 (N.D. Cal. 1991) (Corps' cease and desist order not reviewable); *Fiscella & Fiscella v. United States,* 717 F.Supp. 1143 (E.D. Va. 1989) (Corps' cease and desist order may not be challenged prior to commencement of federal enforcement action); but see *Michigan Peat v. EPA,* 175 F.3d 422 (6th Cir. 1999) (issuance of a proposed section 404 permit for discharge into a wetland is a final agency action and thus subject to judicial review).

cial review. While a 2012 United States Supreme Court opinion may affect the future view of when Corps' determinations and related actions become reviewable, thus far the lower courts have not reached a consensus as to whether JDs can be appealed by landowners.[22]

In general, only "final" agency actions are appealable. For an agency action (including a failure to act) to be considered "final," it (1) "must mark the 'consummation' of the agency's decisionmaking process" and (2) "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"[23] In *National Wildlife Federation v. Laubscher,*[24] the court attempted to distinguish the well-settled rule that an individual may not seek judicial review to challenge a government agency's decision not to take enforcement action[25] by characterizing the plaintiff's case as a challenge to an agency interpretation of the statute. The posture of *Laubscher* was unusual, since after commencement of the case, all parties agreed that the specific area in question was a wetland, and plaintiffs then broadened their attack seeking an injunction against future "misinterpretation" of jurisdiction over certain types of wetlands.[26]

In 2008, the United States Court of Appeals for the Ninth Circuit issued the first published circuit court opinion concerning the appealability of JDs. In *Fairbanks North Star Borough v. U.S. Army Corps of Engineers,*[27] the circuit court held that "an approved jurisdictional determination finding that [landowner's] property contained waters of the United States did not constitute final agency action under the APA for purposes of judicial review."[28] The court reasoned that although the JD represents a culmination of the agency's decision-making, and reflects an assertion of the Corps' ultimate administrative position regarding the presence of wetlands on a property, a landowner's rights "remain unchanged by the approved jurisdictional determination" in that it "does not itself command [the landowner] to do or forbear from anything."[29]

In a case distinguishing *Fairbanks*, the United States District Court for the District of South Carolina held that a JD is a final agency action when the Corps issues a "negative" determination, meaning the Corps determines that it *lacks* jurisdiction over some portion of the reviewed area.[30] That case, however, is unlike a typical challenge where a landowner is aggrieved by the Corps' assertion of jurisdiction. Instead, the plaintiff challenged the JD on the basis that, although the Corps found jurisdiction over two tributaries, the Corps arbitrarily and capriciously failed to assert jurisdiction over other waters in the area. The court reviewed the agency action as final because the Corps refused jurisdiction, meaning it was a "negative" determination. The court held that the JD was appealable because, consistent with the reasoning in *Fairbanks*, legal consequences flowed from the Corps' decision; namely, the landowner's ability to fill the areas the Corps determined were not "waters of the United

22. *Sackett v. EPA,* 132 S. Ct. 1367 (2012) (see the discussion below).

23. *Bennett v. Spear,* 520 U.S. 154, 177–78 (1997).

24. *National Wildlife Fed'n v. Laubscher,* 662 F.Supp. 548 (S.D. Tex. 1987).

25. See *Heckler v. Chaney,* 470 U.S. 821 (1985).

26. *Laubscher,* 662 F.Supp. at 550.

27. *Fairbanks North Star Borough v. U.S. Army Corps of Eng'rs,* 543 F.3d 586 (9th Cir. 2008).

28. Id. at 591. The Ninth Circuit noted several prior unpublished circuit court opinions: *Greater Gulfport Props., LLC v. U.S. Army Corps of Eng'rs,* 194 Fed. Appx. 250 (5th Cir. 2006) (holding that district court lacked jurisdiction to review an approved JD), and *Commissioners of Pub. Works v. United States,* 30 F.3d 129 (4th Cir. 1994) (unpublished) (same).

29. *Fairbanks,* 543 F.3d at 593–94.

30. *Deerfield Plantation Phase II-B Prop. Owners Ass'n, Inc. v. U.S. Army Corps of Eng'rs*, 801 F.Supp.2d 446, 457–59 (D.S.C. 2011).

States."[31] Essentially, this case holds that environmental groups and other plaintiffs may appeal JDs to extend Corps jurisdiction to regulate an area, but landowners may not appeal JDs to limit Corps jurisdiction.

Although not a challenge to a JD, in the case of *Sackett v. EPA,*[32] the United States Supreme Court held that EPA compliance orders are final agency actions that are reviewable by courts under the APA, even before the agency brings an enforcement action in court under the CWA.[33] The EPA compliance order in *Sackett* directed the landowners to restore wetlands that they filled without a permit.[34] The court held that the order was a final agency action under the two-part test described above, reasoning that the order determined the landowners' rights and obligations by legally requiring them to restore the wetlands; that legal consequences flowed from the order, since the landowners were subject to potential additional penalties and possible permitting restrictions; that the order marked the end of EPA's decision-making process, as the order's findings and conclusions were not subject to further agency review; and that the landowners had no other adequate remedy in court.[35] The court then held that the CWA does not expressly or impliedly preclude judicial review under the APA.[36] After *Sackett,* landowners faced with an EPA compliance order need not wait until EPA enforces the order in court to challenge the threshold jurisdictional question of whether an area is "waters of the United States."

Prior to *Sackett*, some courts held that JDs are not immediately reviewable by reasoning that compliance orders, which are further along in EPA's decision-making process, were unreviewable.[37] It is clear that after *Sackett*, courts can no longer rely on this line of reasoning.

Since *Sackett*, courts have disagreed as to whether landowners' challenges to JDs are appealable "final" agency actions.[38] In *Hawkes Co. v. U.S. Army Corps of Engineers,* the United States District Court for the District of Minnesota followed *Fairbanks* and dismissed the landowners' appeal of a JD because, although it was the "consummation" of the Corps' decision-making process, it did not alter the landowners' rights and obligations.[39] The Fifth Circuit Court of Appeals came to the same conclusion in *Belle Co., L.L.C. v. U.S. Army Corps of Engineers*, affirming the dismissal of a landowner's challenge to a JD as nonappealable.[40] Both courts distinguished *Sackett* by reasoning that JDs, unlike compliance orders, do not independently impose legal obligations or expose landowners to immediate liability, and landowners faced with a JD may obtain a permit without any disadvantage.[41] Additionally, those courts found *Sackett* to be distinguishable because landowners faced with a JD were

31. Id. at 459.

32. *Sackett v. EPA,* 132 S. Ct. 1367 (2012).

33. Id. at 1374.

34. See id. at 1370–71.

35. Id. at 1371–72.

36. Id. at 1372–74.

37. See, e.g., *Lotz Realty Co. v. United States,* 757 F.Supp. 692, 695 (E.D. Va. 1990) ("Because *Southern Pines* tells us that judicial review of a compliance order is pre-enforcement review precluded by the [CWA], then it necessarily follows that judicial review at a stage even more preliminary is also precluded").

38. See, e.g., *Belle Co., L.L.C. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383 (5th Cir. 2014); *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 963 F.Supp.2d 868 (D. Minn. 2013), rev'd, rem'd, 782 F.3d 994 (8th Cir. 2015).

39. *Hawkes*, 963 F.Supp.2d at 873–78.

40. *Belle Co.*, 761 F.3d at 389–94.

41. Id. at 391–93; *Hawkes*, 963 F.Supp.2d at 876–77.

viewed to have other adequate remedies. Such landowners could theoretically (1) proceed to develop the land without a permit, forcing EPA or the Corps to either bring an enforcement action in court or issue a compliance order (now appealable under *Sackett*), or (2) apply for a permit and appeal any permit denial.[42]

However, in April 2015, the Eighth Circuit Court of Appeals reversed the Minnesota District Court in Hawkes, holding that the approved JD was a final agency action subject to immediate judicial review.[43] Expressly disagreeing with the Fifth Circuit in *Belle*, the Eighth Circuit found that the JD satisfied the second *Bennett* factor because it altered and adversely affected the appellants' right to use their property for otherwise lawful purposes, regardless of whether the JD compelled affirmative action or was self-executing.[44] Furthermore, the Eighth Circuit found that the alternate judicial remedies identified in the prior decisions were plainly inadequate because, as a practical matter, those options were prohibitively expensive and futile.[45] After the Eighth Circuit's decision, there is now a circuit split regarding the reviewability of JD's, increasing the chance that the Supreme Court will eventually revisit the issue.

6-3.3 Reliance on JDs

While project sponsors place a good deal of reliance on JDs issued by the Corps, a word of caution is merited. The Corps accords substantial deference to its JDs, provided that applicants have submitted proper documentation addressing the three criteria set forth in the delineation manual. However, the legal consequences of a JD are far from clear. As seen in such cases as *United States v. Boccanfuso*,[46] courts are extremely reluctant to find estoppel against the government, even where government agents have "affirmatively misstated" the jurisdictional limits of the agency's regulatory authority. In *Boccanfuso*, for example, a Corps representative had affirmatively stated to the property owner where the Corps' jurisdiction line was for purposes of permitting under section 404. Although the trial court found the landowner's reliance on the Corps' statements to be reasonable, the circuit court disagreed. Following the test provided in *Heckler v. Community Health Services*,[47] the court ruled that if at the time a party acted, the party had knowledge of the truth or the means by which to acquire the knowledge so that it would be negligent to remain ignorant by not using those means, the party cannot claim to have been misled by relying on the government's representation. Here, the court found that sufficient information was available to the landowner and the landowner's consultant regarding the scope of the Corps' section 404 jurisdiction, such that they could not reasonably rely on the Corps' own misidentification of the line.[48]

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42. See *Belle Co.*, 761 F.3d at 394, n.4; *Hawkes*, 963 F.Supp.2d at 877–78.
43. *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 1002 (8th Cir. 2015).
44. Id. at 1000–01.
45. Id. at 1001–02.
46. *United States v. Boccanfuso*, 882 F.2d 666 (2d Cir. 1989). See *United States v. Schmitt*, 734 F.Supp. 1035, 1054–56 (E.D.N.Y. 1990) (no evidence of affirmative misrepresentation by the government before activity commenced).
47. *Heckler v. Community Health Servs.*, 467 U.S. 51 (1984).
48. *Boccanfuso*, 882 F.2d at 670.

6-4
STATE REGULATORY PROGRAM

In October 1991, the Environmental Quality Board (EQB) published major revisions to Pennsylvania's dam safety and waterway management regulations, including provisions significantly tightening the state's regulation of wetland activities. These rules are codified at 25 Pa.Code ch. 105.

As mentioned previously, the state wetland rules are adopted primarily under the statutory authorities provided by the Pennsylvania Dam Safety and Encroachments Act. At the same time, however, these rules cite as additional authority the Clean Streams Law[49] and several other environmental statutes.[50] Hence, one needs to be concerned with not only the enforcement provisions and sanctions available under the Dam Safety and Encroachments Act (which are significant), but also the enforcement tools that might be used under the other environmental statutes.

6-4.1
Classification of Wetlands

The current chapter 105 regulations provide a specific scheme for the classification of wetlands. Basically, all wetlands are divided into two categories—Exceptional Value Wetlands and Other Wetlands.

Section 105.17 provides a listing of factors that may cause a wetland to be classified as "exceptional value" (EV). As might be expected, wetlands that serve as habitat for threatened or endangered species, listed under the Federal Endangered Species Act, the Wild Resource Conservation Act, the Fish & Boat Code, and the Game Code are considered exceptional value. Similarly treated are nearby or connected wetlands that "maintain the habitat of the threatened or endangered species." Wetlands in the corridors of federal and state wild and scenic rivers are also classified exceptional.

Several broader categories of "exceptional value" wetlands may present the greatest challenge for developers and landowners. For example, an EV wetland includes any wetland that is located in or along the floodplain of waters listed as exceptional value under DEP water quality criteria or that is within the floodplain of a "wild trout stream."[51] Increasing numbers of streams have been identified by the Pennsylvania Fish & Boat Commission as supporting the natural reproduction of wild trout, and although many of those streams are not "Class A wild trout streams," they may constitute "wild trout streams" for purposes of this provision in chapter 105. Likewise, an increasing number of waterways, particularly in the northern tier and Pocono region, have been accorded this "exceptional value" status—and by reference, such designations will impose severe strictures on wetland encroachments. Of particular note, EV status may be reflected not only in stream classification listings found in 25 Pa.Code ch. 93, but also through "existing use" determinations rendered by DEP, most frequently based on stream water quality or biological evaluations. Such "existing use"

49. Act of June 22, 1937 (P.L. 1987, No. 394), 35 P.S. § 691.1 et seq.

50. The rules are also adopted pursuant to sections 514, 1901-A, 1908-A, and 1920-A of the Administrative Code, 71 P.S. §§ 194, 510-1, 510-8, 510-17, and 510-20; and the Flood Plain Management Act, Act of October 4, 1978 (P.L. 851, No. 166), 32 P.S. § 679.101 et seq.

51. 25 Pa.Code ch. 93.

determinations are periodically "published" through listings on the DEP web page, and such lists need to be checked when framing a permit application.

The 1991 rules also classify as exceptional any wetland located along an existing public or private drinking water supply (including both surface water and groundwater sources) that "maintain the quality or quantity of the drinking water supply."[52] Thus, theoretically, any wetland that helps to maintain the quality or quantity of a private spring supply or a private well may be accorded exceptional value protection.

Unfortunately, there is no map or list of exceptional value wetlands. The determination of whether a particular wetland is exceptional under the regulatory criteria will be made at the time a permit is applied for. Although DEP has pledged to maintain a public list of permit decisions involving wetlands, which will eventually provide a tool for researching precedents in rendering such decisions, the fact remains that individual project sponsors may have difficulty finding out whether their particular area is or is not exceptional until after significant resources have been expended to compile and submit the data required for a DEP determination.

6-4.2 Determining Permit Requirements and Project Status

In determining whether, and to what extent, a particular project is subject to regulation, one needs to proceed through four steps:

1. Determine if the project is a regulated activity within the scope of the chapter 105 rules.
2. Ascertain if any permit waivers are applicable.
3. Determine if the project qualifies for one or more general permits.
4. If the project is not exempted by a waiver, or authorized by a general permit, evaluate whether the proposed project can satisfy the permit review criteria for obtaining an individual permit.

The chapter 105 rules cover any water obstruction or encroachment. Permits are required for any dike, bridge, culvert, wall, fill, pier, wharf, embankment, or other structure located in, along, across, or projecting into any watercourse, floodway, or body of water (including a wetland). Permits are also required for any encroachment activity that changes the course, the current, or the cross-section of any body of water.

Waivers: Pursuant to section 7 of the Dam Safety and Encroachments Act, DEP has waived permitting requirements (subject to certain conditions) for a variety of minor projects. These waivers are set forth in section 105.12 of the rules.

As an example, Waiver 2 exempts structures in a stream or floodway drainage area of less than 100 acres; but it is important to note that the waiver does not apply to projects affecting wetlands located in a floodway.[53] Waiver 5 excludes encroachments into any artificial wetland or impoundment that has been constructed and maintained for acid mine drainage, sewage, or other waste treatment, provided that the wetland or impoundment is part of a treatment facility constructed under a permit issued by DEP according to one or more listed environmental statutes.[54] Similarly, a waiver is provided for structures or activities placed in stormwater management and erosion/sedimentation control facilities, as long as

52. Id. § 105.17.

53. Id. § 105.12(a)(2).

54. Id. § 105.12(a)(5).

the facility was constructed and continues to be maintained for its designated purpose.[55] (Note, however, that DEP takes the position that when a sedimentation pond has ceased being maintained for erosion control purposes, and develops wetland vegetation, it may become a wetland subject to the full protection of the chapter 105 permitting requirements.) Waivers are also given for maintenance of field drainage systems that were constructed and continue to be used for crop production; and for plowing, cultivation, seeding, and harvesting for crop production.[56]

With respect to these and other waivers found in section 105.12, one important caveat should be noted. DEP reserves the right, upon complaint or investigation, to determine that a project otherwise eligible for a waiver has a significant effect upon safety or the protection of life, health, property, or the environment.[57] If DEP renders such a finding, it can require the owner of the structure to apply for and obtain a permit. Thus, although the landowner may proceed to make significant investments based on a waiver, DEP may subsequently require that a permit be obtained for the project or it may be removed.

Although a project may be accorded a permit waiver under chapter 105, it may still fall within the ambit of federal section 404 permit jurisdiction, as discussed later in this chapter. Although virtually all projects subject to state waivers would fall under federal general permits or the Pennsylvania State Programmatic General Permit (see section 6-5.4 in this chapter), approval by DEP of a waiver coupled with use of the State Programmatic General Permit may give rise to an appealable action that may be challenged by aggrieved third parties.[58]

General Permits: Section 7 of the Dam Safety and Encroachments Act also allows DEP to issue what are called general permits, either on a regional or statewide basis, authorizing certain specific categories of projects that can be regulated using standardized specifications and conditions. In essence, a general permit is a pre-published permit that sets forth plans and specifications for a particular type of project, such as a small road culvert. As long as landowners agree to follow the pre-published plans, specifications, and conditions, they will not be required to apply for and obtain an individual permit. Project sponsors may, however, be required to register with DEP their intent to use a general permit.

DEP has published a number of these general permits, including general permits for intake and outfall structures, utility line stream crossings, minor road crossings, temporary road crossings, abandoned mine reclamation, and water obstruction maintenance, repair, and replacement.

Caution is warranted, however. Each of these general permits is subject to a number of restrictions, including limitations on the areas where projects may be located and the way in which the authorized project may proceed. For example, GP-7, authorizing minor road crossings, cannot be used in any watershed that has been classified as exceptional value waters under state water quality criteria; the total length of a wetland crossing may not exceed 100 feet; the area of wetland occupied by a single crossing may not exceed 1/10th of an acre; and the area occupied by multiple crossings undertaken by the same project sponsor may not exceed 1/4 acre.

In February 1996, DEP issued General Permit 15, allowing placement and maintenance of fill in, or the excavation of, non-tidal wetlands for the construction or expansion of a single-family home to be used for the personal residence of the permittee. GP-15 was subject

55. Id. § 105.12(a)(6).

56. Id. § 105.12(a)(7), (8).

57. Id. § 105.12(a).

58. *Associated Wholesalers, Inc. v. DEP*, 1997 EHB 1174.

to challenge by environmental groups; a settlement of that appeal resulting in amended general permit conditions was published on March 8, 1997.[59] Under GP-15, as amended, the permittee must have purchased the lot prior to November 22, 1991. Fills and excavations may not exceed 40 percent of the total lot area, to a maximum of 0.5 acres. On small lots (less than 0.25 acres in size), the maximum affected area is 0.1 acres. This general permit may only be used once per individual. Those using GP-15 must either replace the wetlands or participate in the Pennsylvania Wetland Replacement Project by contributing a set amount (up to $7,500) to the National Fish and Wildlife Foundation, Pennsylvania Wetland Replacement Project fund. Although activities covered under GP-15 were not authorized under the conditions of the Army Corps of Engineers State Programmatic General Permit PASPGP-3, they are now authorized under PASPGP-4 (discussed in section 6-5.4 of this chapter). Therefore, a separate federal authorization for GP-15 is no longer required. Accordingly, on January 21, 2012, DEP modified GP-15 to provide consistency with PASPGP-4, including incorporation of GP-15 into the same registration process as other chapter 105 permits.[60] In July 2013, DEP finalized minor modifications for all Chapter 105 general permits to incorporate new fee requirements imposed under amendments to 25 Pa.Code §§ 105.13, 105.444, and 105.448.[61] Previously, DEP did not charge a fee for registration under a general permit. Since the amendments, general permit registrations are subject to fees similar to individual permit application fees for dams and other water obstructions and encroachments (which were also amended), although the fee amounts are generally less, ranging from $50 to $750 per registration.[62] Additional fees may be added in the general permits, including "disturbance review fees" for GP-11 (maintenance/repair/replacement of obstructions and encroachments) and GP-15 projects that are a minimum of 0.10 acre.[63] The additional disturbance review fees are calculated by combining all permanent disturbances ($800 per 0.10 acre) and temporary disturbances ($400 per 0.10 acre) to water bodies and wetlands. The amended general permit registration materials, which now contain a fee calculation worksheet, are available on DEP's website.

Most, if not all, of the general permits require that the project sponsor provide a written notice to DEP of intent to use the general permit; and also provide a notice to the Pennsylvania Fish and Boat Commission before beginning work.

6-4.3 Permit Review

If a proposed project does not fall under one of the waivers, and does not qualify under one of the general permits, an individual permit application must be submitted; and a permit must be received before any work is begun. Applications are submitted on a "Joint Permit Application" form, which is used by both DEP and the Corps.

The information that must accompany the application depends somewhat on the type of project being proposed. The rules require much more limited data with respect to "small projects" under section 105.13(e), but projects located in wetlands are specifically excluded from this definition. Thus, a wetland project faces the full panoply of information requirements.

59. 27 Pa.B. 1195 (March 8, 1997).

60. See 42 Pa.B. 439 (January 21, 2012).

61. See 43 Pa.B. 3775 (July 6, 2013); 43 Pa.B. 967 (February 16, 2013).

62. 25 Pa.Code § 105.13.

63. Id. § 105.13(c)(2)(ii)–(iii).

For most projects affecting wetlands, the application must include:

- a location map
- a detailed site plan
- a wetland delineation prepared in accordance with the 1989 *Manual*
- a project description, specifying the project purpose
- color photographs of the project area
- a stormwater management analysis
- a floodplain management analysis
- a risk assessment (if stormwater analyses indicate that peak runoff rates or flood elevations will be increased)
- an alternatives analysis
- an impacts analysis
- a mitigation plan

In addition, all projects encroaching in wetlands require submission of an environmental assessment under section 105.15. Based on that assessment, DEP may require the applicant to submit additional information and reports.

Permit Review Criteria: To see how all this information is used, we need to turn to the permit review criteria in section 105.18a.

DEP will not issue a permit for any project in or along an EV wetland, or otherwise affecting an EV wetland, unless four basic tests are met:[64]

(1) The project may not have an adverse impact on the wetland. (Information from the environmental assessment is used to make this judgment.)
(2) The project must be water-dependent; that is, it requires access or proximity to the wetland to fulfill the basic project purpose. (An environmental study center may be water-dependent; generally, a parking lot is not.)
(3) The applicant must show that there is no practicable alternative to the project that would not involve a wetland or would have less effect on the wetland, and would not have other significant adverse effects on the environment.
(4) Any affected wetlands must be replaced.

From all practical perspectives, it is rare that a project in or affecting an EV wetland will be permitted. Very few projects can meet all four of these tests.

For "other wetlands," the permitting test is only slightly less stringent. A project may be permitted in "non-exceptional" wetlands if the applicant shows:[65]

(1) The project will not have a significant adverse impact on the wetland.
(2) Any adverse impacts are reduced to the maximum extent possible.
(3) There is no practicable alternative to the project.
(4) The cumulative effect of the proposed project, together with other projects, will not result in a major impairment of the Commonwealth's wetland resources.
(5) Affected wetlands will be replaced.

Of these criteria, perhaps the most challenging is the "no practicable alternatives" test.

The rules define "practicable alternative" as an alternative to the proposed plan that is available and capable of being carried out after taking into consideration construction costs,

64. Id. § 105.18a(a).

65. Id. § 105.18a(b).

existing technology, and logistics.[66] In considering alternatives, DEP will require consideration of other sites not presently owned by the applicant, which might be acquired, used, expanded, or managed to fulfill the basic project purpose. Thus, if a landowner proposes to construct a mall, DEP will require an evaluation of other properties that might be or have been acquired by the applicant in the same market area to construct a shopping complex.[67]

The state rules, like the federal guidelines adopted under section 404(b)(1),[68] establish a rebuttable presumption that where the proposed project is not water dependent, there is a practicable alternative.[69] To rebut the presumption, the permit applicant must submit reliable and convincing evidence that no practicable alternative is available. To meet the no practicable alternatives test, the application needs to show a careful consideration of options, and a detailed documentation of each alternative considered and why it was found impractical or unavailable. Unless the no practicable alternative test can be satisfied, the application review process will not reach and consider the other tests, such as mitigation.[70]

The scope and intensity of the no practical alternatives analysis was illuminated by the Environmental Hearing Board in its 2004 adjudication in *Pennsylvania Trout v. DEP.*[71] In reviewing a third-party challenge to a permit issued for a mixed use commercial center, the board discussed at length both the procedural and substantive elements of the no practical alternatives test. From a procedural perspective, the EHB held that, while the developer bore the burden of producing evidence to rebut the presumption at 25 Pa.Code § 105.18a(b)(3) that a practicable alternative exists, the third-party appellants bore the ultimate burden of proving, by a preponderance of the evidence, that DEP's issuance of the permit was unreasonable, inappropriate, or not in conformance with law.[72] Turning to the substance of the alternatives analysis, the board noted the "Herculean" task facing a developer, whose efforts to evaluate alternatives were viewed as "a textbook example of how it 'should be done.'"[73] In determining that the developer met the burden of showing no practicable alternative, the EHB made several key points. First, the "basic project purpose" is integral to the alternatives analysis, and must be defined carefully. Considering the basic project purpose, reducing the size of the project to the point where it no longer serves the basic purpose is not required; and the universe of practicable alternatives that will rebut the presumption is limited to those that will meet the basic purpose of the proposed project. Second, it is not the role of DEP or the EHB to second-guess the applicant's decision to pursue a project, but rather to focus on the impacts to wetlands and practicable alternatives to the project. Third, both on-site and off-site alternatives must be considered. As to off-site alternatives, land that may not even be presently for sale but might be acquired must be considered when evaluating practicable and available sites (although that availability might be negated based on inquiry to the alternative-land landowners as to whether such land might be made available for sale). On-site alternatives may include modified configurations or designs of the project that can meet the basic project purpose with less impact to wetlands and the environment. Finally, in considering whether a

66. Id. § 105.18a(a)(3), (b)(3).

67. See *Bersani v. EPA,* 674 F.Supp. 405 (N.D.N.Y. 1987), aff'd, 850 F.2d 36 (2d Cir. 1988), cert. denied, 489 U.S. 1089 (1989) (no practicable alternatives test under EPA section 404(b)(1) guidelines).

68. 40 CFR part 230.

69. 25 Pa.Code § 105.18a(b)(3)(i)–(ii).

70. See *Hatchard v. DER*, 612 A.2d 621 (Pa.Cmwlth. 1992) (alternatives existed to placement of parking lot), app. denied, 622 A.2d 1378 (Pa. 1993).

71. *Pennsylvania Trout v. DEP,* 2004 EHB 310.

72. Id. at 70–72.

73. Id. at 73.

site is really a practicable alternative, existing technology, logistics, and other "real world" considerations must be taken into account.[74]

Under the permit review criteria, there is one limited exception for certain projects, whether they affect EV wetlands or other wetlands. Section 105.18a(c) allows DEP to grant a permit, even if the project will have a significant adverse impact on a wetland, if the applicant demonstrates that the project is necessary to abate a substantial threat to public health and safety. An example might be a township's project to replace a narrow and unsafe bridge. To use this provision, however, efforts must be taken to reduce impacts to the maximum extent possible, the applicant must show no practicable alternative, and all affected wetlands must be replaced.

Mitigation: In all cases, section 105.20a requires that affected wetlands be replaced—that is, that new wetlands be constructed to compensate for those that are affected. The replacement generally must be conducted adjacent to the affected wetland, or (if DEP approves) in the same watershed. The general rule has been that the area of affected wetlands must be replaced on a ratio of at least 1:1—one acre of replacement of wetlands for every acre lost or degraded. At the same time, DEP requires that the functions and values of the affected wetland be replaced on at least a 1:1 ratio—in this regard, it is less clear what the ratio refers to, since wetlands serve a variety of functions and environmental values, which are not easily reducible to a single index. Where a project has been constructed without a permit, and DEP is willing to issue an after-the-fact permit, the minimum replacement ratios increase to 2:1.

In March 2014, DEP released a set of draft technical guidance documents for use in evaluating mitigation requirements under Chapter 105.[75] The guidance documents would establish a process for quantifying mitigation requirements based on the functions and values of the affected resource and proposed replacement projects. The primary guidance document, entitled *Pennsylvania Function Based Aquatic Resource Compensation Protocol,*[76] generates numerical values based on the size and type of impact on each of several aquatic resource functions. Waters are grouped into one of five resource value categories, ranging from "significant" to "minimal" resources waters, each of which is also assigned a numerical value. Three companion protocols are used to assess the condition of the particular affected water, generating a "condition index value."[77] Each protocol applies to a different aquatic resource class: wetland, riverine (watercourses, streams, wadeable rivers, and their floodplains), or lacustrine (lakes, reservoirs, and non-wadeable rivers). Based on the results of these assessments, compensation requirements for each resource function group would be

74. Id. at 74–85. See *Greater Yellowstone Coalition v. Flowers,* 359 F.3d 1257, 1270 (10th Cir. 2004), and cases cited therein (in determining whether to issue a section 404 [of the Clean Water Act] permit, the Corps have a duty to take into account the objectives of the applicant's project, as long as the objective is legitimate).

75. See 44 Pa.B. 1396 (March 8, 2014). The four draft guidance documents include: *Pennsylvania Function Based Aquatic Resource Compensation Protocol* (DEP Doc. No. 310-2137-001); *Pennsylvania Wetland Condition Level 2 Rapid Assessment Protocol* (DEP Doc. No. 310-2137-002); *Pennsylvania Riverine Condition Level 2 Rapid Assessment Protocol* (DEP Doc. No. 310-2137-003); and *Pennsylvania Lacustrine Condition Level 2 Rapid Assessment Protocol* (DEP Doc. No. 310-2137-004).

76. *Pennsylvania Function Based Aquatic Resource Compensation Protocol*, DEP Doc. No. 310-2137-001 (Draft Version 1.0, March 7, 2014), http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-99527/310-2137-001.pdf.

77. *Pennsylvania Riverine Condition Level 2 Rapid Assessment,* DEP Doc. No. 310-2137-003 (Draft Version 1.0, March 7, 2014), http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-99535/310-2137-003.pdf; *Pennsylvania Wetland Condition Level 2 Rapid Assessment,* Doc. No. 310-2137-002 (Draft Version 2.0, March 7, 2014) http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-99531/310-2137-002.pdf; *Pennsylvania Lacustrine Condition Level 2 Rapid Assessment,* DEP Doc. No. 310-2137-004 (Draft Version 1.0, March 7, 2014), http://www.elibrary. dep.state.pa.us/dsweb/Get/Document-99539/310-2137-004.pdf.

determined by a simple multiplication formula. The same basic process would be used to determine the value of proposed compensatory mitigation projects. Comments from the regulated community raised significant concerns as to various elements of the compensation protocols, and the resulting requirements for replacement on an acreage and functional basis. As this chapter update was being finalized, discussions between the department and regulated community technical experts were ongoing in an effort to further assess and refine these proposals.

Wetland mitigation and replacement is neither cheap nor easy. It takes substantial resources to develop a viable wetland, in terms of acquiring a suitable site, undertaking required grading, assuring a source of water and proper soils, and installing wetlands plantings. A rough rule of thumb is that developing replacement wetlands can easily cost on the order of $40,000–50,000 per acre. This is certainly a significant financial factor to be considered in project planning and design.[78]

To assist in the process of providing less expensive, but hopefully more effective, mitigation, DEP initiated a Pennsylvania Wetland Replacement Project in early 1996.[79] Under the policy establishing the project, permit applicants who propose activities affecting less than a half acre of wetlands, who do not have readily available opportunities to provide wetland replacement at their own sites, may opt to contribute to the fund created under the project. Activities affecting less than 0.05 acres are considered de minimis, and not required to contribute. Those affecting more than 0.05 acres up to 0.5 acres are required to contribute on a sliding scale of between $500 and $7,500. The fund is used, in turn, to finance wetland mitigation banks and other mitigation projects.

This original "fee in lieu of" program was found by the Corps to be not sufficient to satisfy federal mitigation requirements. On April 10, 2008, EPA and the Corps published a notice of final rulemaking in the *Federal Register* governing compensatory mitigation for losses of aquatic resources, codified at 33 CFR part 332.[80] Generally, this rulemaking established standards and criteria for mitigation programs and encouraged the use of mitigation banks, in-lieu fee programs, and watershed approaches over a myriad of separate, disjointed, permittee-responsible on-site and off-site in-kind mitigation approaches to satisfy mitigation requirements. However, the Corps found that Pennsylvania's Wetland Replacement Project fell short of meeting the requirements of that federal mitigation rule.

Addressing these concerns, DEP has developed and proposed a revised program, entitled the Pennsylvania Integrated Ecological Services Capacity Enhancement and Support (PIESCES) in-lieu fee program, which was submitted to the Corps for approval under 33 CFR 332.8. Under a public notice issued in the first part of 2014, the Corps invited public comment on the PIESCES program. As this chapter was being updated, however, the PIESCES in-lieu fee program remained in an unresolved status pending final action on DEP adoption and Corps approval of the program.

Finally, section 105.29a, added in 1991, provides that in a civil or administrative action taken by DEP under chapter 105, the person against whom the action is taken has the burden of proof to demonstrate that the project complies with the Dam Safety and Encroachments Act and regulations. In other words, if a landowner undertakes construction of a project, and

78. See *Franklin Twp. Mun. Sanitary Auth. v. DEP*, 706 A.2d 393 (Pa.Cmwlth. 1998) (holding that DEP properly withheld costs of wetlands mitigation when it subsidized the cost of upgrading sewage treatment facilities).

79. 26 Pa.B. 534 (February 3, 1996).

80. 73 FR 19594, *Compensatory Mitigation for Losses of Aquatic Resources*, http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_04_10_wetlands_wetlands_mitigation_final_rule_4_10_08.pdf.

DEP determines that the project involved disturbance or destruction of a wetland, the landowner has the burden of showing that the area affected was not a wetland.

There is a possibility that the legal authority for this provision will be challenged when DEP attempts to use it. The independent Pennsylvania Environmental Hearing Board (EHB) is authorized by statute to establish its own rules and regulations for procedures governing appeals of DEP actions;[81] and the EHB's procedural regulations include specific rules governing who bears the burden of proof.[82] DEP maintains that the burden of proof rules are "substantive"—and that the Environmental Quality Board (EQB) is authorized to establish burden rules that are binding on the EHB.

6-4.4 Section 401 Water Quality Certification Process

Section 401 of the Federal Clean Water Act requires that an applicant for a federal license or permit for an activity (including construction or operation of facilities) that may result in any "discharge into the navigable waters" provide to the federal agency a certification from the state where the discharge is located that the discharge will comply with applicable provisions of CWA sections 301, 302, 303, 306, and 307.[83] The "trigger" for requiring a section 401 certification is (1) an application for a federal license or permit (2) to conduct an activity (including construction or operation of a facility that (3) "may result" in a "discharge" to navigable waters of the United States.[84]

Because of the requirement that most wetland projects obtain a federal, as well as state permit, an important part of the wetland regulatory process involves the issuance by the state water quality management agency (DEP) of a "water quality certification" under section 401 of the Clean Water Act. Such a certification is a prerequisite to the issuance of any federal permit.

DEP issues its section 401 certifications as part of the permits given under the Dam Safety and Encroachments Act. Such certifications are included in a condition to individual DEP permits, and have also been issued to cover any project that qualifies for one of the state general permits issued under chapter 105.[85]

There are some projects, however, that are not subject to state dam safety and encroachments permit jurisdiction, but may require federal permits—for example, hydroelectric projects regulated by the Federal Energy Regulatory Commission. As noted above, section 401 water quality certifications are still required. In its 1991 regulations, DEP asserted authority to consider broader environmental impacts and to require environmental assessments prior to issuing such a section 401 certification.[86] Although the Pennsylvania Commonwealth Court had previously ruled that DEP lacks the power, as part of a 401 certification review, to examine the impact of physical changes in a river on aquatic resources and a project's effect on wetlands and fish migration,[87] the 1994 United States Supreme Court deci-

81. 35 P.S. § 7514.

82. 25 Pa.Code § 21.101.

83. 33 U.S.C. §§ 1311, 1312, 1313, 1316, and 1317.

84. See *S.D. Warren Co. v. Maine Bd. of Envtl. Protection*, 547 U.S. 370 (2006).

85. 22 Pa.B. 2487 (May 9, 1992); see 25 Pa.Code § 105.15(d).

86. 25 Pa.Code § 105.15(b).

87. *DER v. City of Harrisburg*, 578 A.2d 563 (Pa.Cmwlth. 1990) (ruling on interlocutory appeal of order limiting issues), aff'g 1988 EHB 925.

sion in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*[88] appears to open the door for some broader environmental considerations as part of a state's 401 certification.

In *Jefferson County*, the Supreme Court upheld imposition of a minimum stream flow requirement as a condition upon the state's section 401 certification. In doing so, the court found that all state actions related to water quality could be considered in framing a 401 certificate, and that the antidegradation provisions of the Washington water quality standards, which were adopted pursuant to section 303 of the federal Clean Water Act, were "other limitations" with which a state may assure compliance through appropriate conditions in a section 401 certificate. *Jefferson County* contains even broader language, however, indicating that a state may, as part of a section 401 certification, impose conditions necessary to ensure compliance with state water quality standards or "any other 'appropriate requirement of State law.'"[89]

The Environmental Hearing Board (EHB) has attempted to reconcile its earlier opinion limiting issues in the *City of Harrisburg* case with the United States Supreme Court's *Jefferson County* decision. After full hearing of the *City of Harrisburg* appeal, the EHB ruled that Jefferson County's situation was distinguishable. The EHB reasoned that *Jefferson County* was premised on the language of Clean Water Act section 401(d), which authorizes states to impose conditions on section 401 water quality certifications granted by the state water quality agency. In *City of Harrisburg*, DEP had denied the requested section 401 certification; and the EHB reasoned that when denying a certification, the state is limited under section 401(a) to determining whether the proposed "discharge" will comply with specific provisions of the federal Clean Water Act (including cross-referenced state-adopted water quality standards). Under section 401(a), the EHB ruled that DEP could only consider the impact of the "discharge" involved in constructing the proposed dam, and not the secondary impacts associated with creation of the impoundment (such as sediment deposition behind the dam).[90]

DEP may assert that the EHB's decision in *City of Harrisburg* is not a definitive view of the scope of allowable section 401 certification conditions after the Supreme Court's *Jefferson County* opinion. But even the *Jefferson County* decision suggests that there are bounds to a section 401 certification's conditions, although it provides scant guidance as to what those boundaries may be. Before launching into its analysis concluding that minimum flow standards were appropriate, the Supreme Court in *Jefferson County* stated:

> Although § 401(d) authorizes the State to place restrictions on the activity as a whole, that authority is not unbounded. The State can only ensure that the project complies with "any applicable effluent limitations and other limitations, under [33 U.S.C. §§ 1311, 1312]" or certain other provisions of the Act, "and with any other appropriate requirement of State law." 33 U.S.C. § 1341(d).[91]

Because it concluded that the Washington Department of Ecology section 401 certification's imposition of minimum flow conditions was directly supported by the state's water quality standards and antidegradation policy, the Supreme Court never reached the outer boundaries of what might be allowable.

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88. *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700 (1994).

89. Id. at 712.

90. *City of Harrisburg v. DER*, 1988 EHB 925, aff'd, 578 A.2d 563 (Pa.Cmwlth. 1990).

91. 511 U.S. at 712.

6-4.5
Relationship of State Program to Local Regulation

While the prime focus of wetland regulation remains at the federal and state levels, important and growing relationships exist between state wetland rules and local land use and development regulation.

For example, the Municipalities Planning Code specifically authorizes municipalities to consider, as one of the purposes of zoning, the "preservation of . . . wetlands,"[92] and allows for the adoption of regulations restricting structures and uses along or near "places having a special character or use affecting and affected by their surroundings."[93] At the same time, municipalities are required to consider wetland protection when evaluating alternatives for providing new or improved sewage facilities as part of any new or modified sewage facilities plan.[94] Furthermore, following the Pennsylvania Supreme Court's plurality landmark decision in *Robinson Township v. Commonwealth,*[95] municipalities arguably have obligations, along with the Commonwealth, as public natural resource "trustees" to "conserve and maintain" those wetlands and other water bodies that qualify as "public natural resources" under Article I, Section 27, of the Pennsylvania Constitution.[96]

Some communities have enacted specific wetland elements, including setback requirements, as part of their subdivision, zoning, or other land use ordinances. Others have required that wetlands be identified in land development plans, and stipulated that receipt of necessary federal and state permits is a condition of final plan approval. Municipalities entering into direct regulation of wetland activities face a number of challenges, including the continuing debate regarding proper definitions and delineation procedures, the difficulty of framing zoning around what is often a moving line, and the serious potential for exposure to claims of taking where building restrictions as applied to previously approved lots may render the parcel virtually unbuildable.

6-5
THE FEDERAL PERMIT PROGRAM

The U.S. Army Corps of Engineers holds primary responsibility for administration of the federal wetland regulatory program under section 404 of the Federal Water Pollution Control Act.[97] Under section 404, the Corps is authorized to regulate and issue permits for the "discharge of dredged and fill material" into waters of the United States.

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92. 53 P.S. § 10604(1).

93. Id. § 10605(2)(vii).

94. 25 Pa.Code § 71.21(a)(5)(i)(I).

95. *Robinson Twp. v. Commonwealth,* 83 A.3d 901 (Pa. 2013). We note that the three-justice opinion in *Robinson Township* was merely a plurality, and as such does not constitute legally binding precedent. See, e.g., *Commonwealth v. Thompson,* 985 A.2d 928, 937 (Pa. 2009) (a plurality decision "is not binding authority").

96. See 83 A.3d at 955 ("the concept of public natural resources includes not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property"); id. at 977 (discussing municipalities' trustee obligations).

97. 33 U.S.C. § 1344.

6-5.1 Scope of Federal Jurisdiction

The federal wetland regulatory program under section 404 has jurisdictional limitations whose ambit continues to be the subject of considerable confusion and debate. The scope of the federal program turns on two questions: (1) what wetlands or other bodies of water are subject to federal jurisdiction, and (2) what constitutes the "discharge" of dredged and fill material?

6-5.1.1 What Wetlands Are Subject to Federal Jurisdiction?

Decisions over the past decade have created significant uncertainty concerning the precise reach of federal jurisdiction over bodies of water, including wetlands, that are not clearly connected to tributaries of navigable waters.

Prior to the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC),[98] a line of federal court cases and regulations appeared to expand the range of waters regulated under section 404.[99] Within that scope were all wetlands adjacent to interstate waterway systems, and all wetlands whose use, degradation, or destruction could affect interstate or foreign commerce (including, for example, areas that could be used by interstate travelers for recreation, or that provide habitats for fish or shellfish sold in interstate commerce). However, challenges were brought questioning how far federal wetlands regulation may go under the Constitution's commerce clause, particularly in restricting activities affecting isolated wetlands.[100] In 1993, the Seventh Circuit determined that federal regulatory authority extended to wetlands that "could" be used by migratory birds, although the court vacated a civil penalty assessment, finding EPA had failed to provide substantial evidence that the wetland in question was suitable migratory bird habitat.[101] As a result of the Supreme Court's 1995 decision in *United States v. Lopez*,[102] even closer scrutiny has been applied to the nexus between wetland regulation and interstate commerce. In 1997, the Fourth Circuit ruled that the U.S. Army Corps of Engineers' regulation defining jurisdictional waters as including any waters whose degradation "could affect" interstate commerce[103] was an invalid exercise of power beyond the scope of congressional authorization.[104] The court found that the rule expanded the definition of "waters of the United States" too broadly, to include intrastate waters that have nothing to do with interstate or navigable waters.

In 2001, the expanding scope of federal jurisdiction over wetlands activities came to an abrupt halt with the Supreme Court's review in *SWANCC*. The court overturned the Seventh Circuit's decision, which was based on an expansive commerce clause analysis that con-

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98. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

99. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (corps' jurisdiction extends to wetlands adjacent to navigable waters; there is no requirement that wetlands be inundated frequently by adjacent navigable waters); *Natural Resources Def. Council v. Callaway*, 392 F.Supp. 685 (D.D.C. 1975) ("navigable waters" means all waters of the United States).

100. *Hoffman Homes, Inc. v. EPA*, 961 F.2d 1310 (7th Cir. 1992), vac. and reh'g granted, 975 F.2d 1554 (7th Cir. 1992), decision following reh'g, 999 F.2d 256 (7th Cir. 1993).

101. 999 F.2d at 262.

102. *United States v. Lopez*, 514 U.S. 549 (1995).

103. 33 CFR 328.3(a)(3).

104. *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997).

cluded migratory bird habitats provided sufficient basis to anchor federal regulatory jurisdiction.[105] Reversing, the Supreme Court (in a 5–4 decision) concluded that 33 CFR 328.3(a)(3) (1999), in attempting to extend regulatory jurisdiction under the "migratory bird rule," exceeded the authority granted under section 404(a) of the Clean Water Act. The court notably ducked the constitutional question and avoided ruling on the theoretical scope of commerce clause jurisdiction under *Lopez*. Instead, the majority chose to follow the principle that where an otherwise acceptable construction of a statute would raise serious constitutional questions, the court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.[106] Finding that the "migratory bird rule" would result in a significant impingement of states' traditional and primary power over land and water use, and the lack of express congressional intent to adjust the federal/state balance in this manner, the court interpreted section 404 as conferring more limited jurisdiction upon EPA and the Corps.[107]

After the Supreme Court's ruling in *SWANCC,* lower courts continued to grapple with the limits of federal regulatory jurisdiction over wetlands. Some circuit and district courts tended to read *SWANCC* more broadly to limit federal jurisdiction, adopting an interpretation that a body of water subject to regulation must be either actually navigable or adjacent to an open body of navigable water.[108] Other courts applied *SWANCC* narrowly, as only excluding the migratory bird rule and isolated wetlands that have no hydrological connection to navigable waters.[109] Such decisions tended to favor the extension of federal regulatory jurisdiction to any water that is adjacent to any ditch, waterway, or other conveyance that is a tributary to a navigable water.

In June 2006, the Supreme Court decided two consolidated cases in *Rapanos v. United States,*[110] which revisited the scope and extent of CWA section 404 jurisdiction over "waters of the United States" including "wetlands." The consolidated cases brought respectively by the Rapanos and Carabell families involved four Michigan wetlands lying near ditches or man-made drains. In the *Rapanos* case, the landowner, declining to obtain Corps permits, began filling wetlands on three properties to prepare them for commercial development. The United States sued and also pursued criminal charges for the landowners' failure to obtain CWA permits. The district court held the Rapanoses liable for filling approximately 54 acres of wetlands on the three properties, after determining that those wetlands were adjacent to tributaries of "traditional navigable waters" subject to regulation under the CWA and that

105. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 998 F.Supp. 946 (N.D. Ill. 1998), aff'd, 191 F.3d 845 (7th Cir. 1999), rev'd, 531 U.S. 159 (2001).

106. *SWANCC*, 531 U.S. at 173, quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

107. Another decision limiting the Corps' authority to regulate certain discharges emerged from the Ninth Circuit prior to the *SWANCC* decision. In *Resource Investments, Inc. v. U.S. Army Corps of Engineers*, 151 F.3d 1162 (9th Cir. 1998), the circuit court ruled that the permitting authority for landfills in wetlands areas rests with state waste management agencies and not the Corps.

108. See *Rice v. Harken Exploration Co.,* 250 F.3d 264, 269 (5th Cir. 2001); *United States v. RGM Corp.,* 222 F.Supp.2d 780 (E.D. Va. 2002).

109. See *United States v. Rapanos,* 376 F.3d 629 (6th Cir. 2004); *Headwaters, Inc. v. Talent Irrigation Dist.,* 243 F.3d 526 (9th Cir. 2001); *United States v. Deaton,* 332 F.3d 698, 702 (4th Cir. 2003); *Carabell v. U.S. Army Corps of Eng'rs,* 257 F.Supp.2d 917 (E.D. Mich. 2003); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs,* 261 F.3d 810 (9th Cir. 2001) (finding no jurisdiction over isolated vernal pool, but upholding jurisdiction over deep ripping of ditches); *Treacy v. Newdunn Assocs., LLP,* 344 F.3d 407 (4th Cir. 2003).

110. *Rapanos v. United States,* 547 U.S. 715 (2006). The court declined to grant certiorari in the criminal case involving the same landowner (Rapanos), but granted certiorari in the related civil enforcement action.

the wetlands shared a hydrological connection with regulated waters. The United States Court of Appeals for the Sixth Circuit affirmed. It claimed to be following the majority rule interpretation of *SWANCC,* declaring that that ruling did not restrict CWA coverage to "wetlands directly abutting navigable water."[111]

The *Carabell* litigation arose when the subject landowners were denied a Corps permit to deposit fill in a wetland that was separated from a drainage ditch by an impermeable berm. The Carabells sued, but the district court found federal jurisdiction. The Sixth Circuit affirmed, holding that the wetland in question was "adjacent" to navigable waters (even though separated by the berm).[112]

In a 4–1–4 split decision,[113] a plurality of four justices—led by Justice Scalia—opined that federal jurisdiction should not attach to a wetland unless (1) the adjacent channel contains a water of the United States (i.e., a relatively permanent water body connected to traditional interstate, navigable waters), and (2) the wetland has continuous surface connection with that water, making it difficult to determine whether the water ends and the wetland begins. Justice Kennedy concurred with the result, but on the basis of a facially broader test requiring only a "significant nexus" between the area to be regulated and traditional navigable waters, with that "significant nexus" to be judged on the basis of whether the area to be regulated significantly affects the chemical, physical and biological integrity of other covered waters.[114] Under Justice Kennedy's iteration of the "significant nexus":

> [T]he Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense. The required nexus must be assessed in terms of the statute's goals and purposes. . . . Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."
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> When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely upon adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries. Given the potential overbreadth of the Corps' regulations, this showing is necessary to avoid unreasonable applications of the statute.[115]

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111. *United States v. Rapanos,* 339 F.3d 447, 453 (6th Cir. 2003).

112. *Carabell v. U.S. Army Corps of Eng'rs,* 391 F.3d 704 (6th Cir. 2004).

113. In *Rapanos,* five justices—the plurality and Justice Kennedy—agreed that there must be a "significant nexus" between the area to be regulated and a traditional navigable water. The five-justice majority determined that, in this case, the Corps had gone beyond its CWA jurisdiction by making the landowners obtain permits to dump rocks and dirt not only in marshes directly next to lakes and rivers but also in areas linked to larger bodies of water only through a network of ditches and drains.

114. The dissent concluded that the lower courts applied the right test—requiring significant nexus—and properly deferred to the Corps' expertise regarding what "significant nexus" means and whether it existed in this case. Accordingly, the dissent would have affirmed the lower courts' decisions.

115. 547 U.S. at 779–82.

As a result of the *Rapanos* decision, both EPA and Corps jurisdiction over areas such as intermittent streams, drainage ditches, and wetlands not directly connected with surface waterways has been thrown into considerable doubt. Lower courts, not surprisingly, have struggled with the application of *Rapanos.* Some have adopted Justice Kennedy's "significant nexus" test.[116] Others have seemingly adopted Justice Scalia's narrow "continuous surface connection" test, sharply rejecting Justice Kennedy's analysis.[117] Many have adopted an "either/or" test (adopted by the *Rapanos* dissent), i.e., finding EPA and Corps jurisdiction over waters of the United States if they meet *either* the Kennedy test *or* the Scalia test.[118] This latter group includes the Third Circuit.[119] Some have adopted Justice Kennedy's "significant nexus" test as controlling, but refuse to foreclose the possibility of applying Justice Scalia's "continuous surface connection" test in the future.[120]

In 2008, EPA and the Corps finalized a joint guidance document adopting the "either/or" approach.[121] The 2008 Guidance, which is still effective today, provides that the following classes of waters are categorically jurisdictional under the *Rapanos* tests:

- Traditional navigable waters
- Wetlands *adjacent* to traditional navigable waters
- Nonnavigable tributaries of traditional navigable waters that are *relatively permanent* where the tributaries typically flow year round or have continuous flow at least seasonally (e.g., typically three months)
- Wetlands that *directly abut* such tributaries

EPA and the Corps assert jurisdiction over these classes of waters without further analysis. The 2008 Guidance indicates that jurisdiction over tributaries that are not relatively permanent and other adjacent wetlands should be determined on a case-by-case basis under the "significant nexus" test. It also provides that the agencies will not assert jurisdiction over

116. *United States v. Robison,* 505 F.3d 1208 (11th Cir. 2007), reh'g en banc denied, 521 F.3d 1319 (11th Cir. 2008), cert. denied sub nom. *United States v. McWane,* 555 U.S. 1045 (2008); *United States v. Gerke Excavating, Inc.,* 464 F.3d 723 (7th Cir. 2006), cert. denied, 552 U.S. 810 (2007); *United States v. Fabian,* 522 F.Supp.2d 1078 (N.D. Ind. 2007); *Stillwater of Crown Point Homeowner's Ass'n, Inc. v. Kovich,* 820 F.Supp.2d 859 (N.D. Ind. 2011).

117. *United States v. Chevron Pipe Line Co.,* 437 F.Supp.2d 605 (N.D. Tex. 2006); but see *United States v. Lucas,* 516 F.3d 316 (5th Cir. 2008) (concluding that evidence supported jury's verdict under all *Rapanos* tests).

118. *United States v. Johnson,* 467 F.3d 56 (1st Cir. 2006), cert. denied 552 U.S. 948 (2007); *United States v. Cundiff,* 480 F.Supp.2d 940 (W.D. Ky. 2007), aff'd, 555 F.3d 200 (6th Cir. 2009), cert denied, 130 S. Ct. 74 (2009); *Simsbury-Avon Preservation Soc'y v. Metacon Gun Club, Inc.,* 472 F.Supp.2d 219 (D. Conn. 2007), aff'd sub nom. *Cordiano v. Metacon Gun Club, Inc.,* 575 F.3d 199 (2d Cir. 2009); *United States v. Bailey,* 571 F.3d 791, 798–800 (8th Cir. 2009).

119. *United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011), cert. denied, 132 S. Ct. 2409 (2012).

120. *Northern California River Watch v. Wilcox*, 633 F.3d 766, 781 (9th Cir. 2011) (as amended to avoid foreclosing application of the continuous surface connection test); *Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 288 (4th Cir. 2011) (refusing to decide which test controls because parties stipulated to "significant nexus" test); *United States v. Freedman Farms, Inc.*, 786 F.Supp.2d 1016, 1019–22 (E.D.N.C. 2011) (upholding jury instruction solely explaining "significant nexus" test and denying reconsideration). But see *Deerfield Plantation Phase II-B Prop. Owners Ass'n, Inc. v. U.S. Army Corps of Eng'rs*, 801 F.Supp.2d 446, 452–53, n.7 (D.S.C. 2011), aff'd, 501 Fed. Appx. 268 (4th Cir. 2012) (parties stipulated to either test); *United States v. Vierstra*, 803 F.Supp.2d 1166, 1171–72 (D. Idaho 2011), aff'd, 492 Fed. Appx. 738 (9th Cir. 2012) (applying both tests); *Sequoia Forestkeeper v. U.S. Forest Serv.*, No. CV F 09-392 LJO JLT (E.D. Cal. March 14, 2011) (adopting both tests).

121. "Clean Water Act Jurisdiction Following the United States Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*" (December 2, 2008) (2008 Guidance), available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos 120208.pdf.

swales, erosional features, and certain ditches (those that are excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water).

The agencies released another draft guidance in 2011, which, if finalized, would have been more expansive than the 2008 Guidance and proved to be controversial. In September 2013, EPA indicated that the guidance would be withdrawn. In its place, EPA and the Corps drafted a rule to clarify their jurisdiction under the Clean Water Act.

In support of the rulemaking, EPA produced a report synthesizing peer-reviewed scientific literature on the connectivity of smaller streams and wetlands to larger downstream waters, called *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (the "connectivity report").[122] The connectivity report, which was finalized in January 2015, provides a scientific basis for the assertion of jurisdiction over additional categories of waters under Justice Kennedy's "significant nexus" test, so that the agencies can dispense with the administrative burden of establishing such a connection on a case-by-case basis. The report does not purport to define legal terms such as "significant nexus" and "waters of the United States." Rather, it contains a series of major scientific conclusions, which, in relevant part, EPA has summarized as follows:

(1) The scientific literature unequivocally demonstrates that streams, regardless of their size or frequency of flow, are connected to downstream waters and strongly influence their function.
(2) The scientific literature clearly shows that wetlands and open waters in riparian areas (transitional areas between terrestrial and aquatic ecosystems) and floodplains are physically, chemically, and biologically integrated with rivers via functions that improve downstream water quality.
(3) There is ample evidence that many wetlands and open waters located outside of riparian areas and floodplains, even when lacking surface water connections, provide physical, chemical, and biological functions that could affect the integrity of downstream waters. Some potential benefits of these wetlands are due to their isolation rather than their connectivity.[123]

The agencies released their jurisdictional rule in proposed form on March 25, 2014,[124] and in final form on May 27, 2015.[125] Relying heavily on the findings from the connectivity report, the agencies' final rule establishes that the following classes of waters—in addition to those identified in the 2008 Guidance—are always jurisdictional:

- **All "tributaries"** (not just those that are relatively permanent) of downstream traditional navigable waters, interstate waters, or the territorial seas.[126] The rule broadly defines "tributary" to include any water that contributes flow, either directly or through another water, to these more substantial downstream waters and that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high-water mark.[127]

122. See http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414; 80 FR 2100.

123. See EPA fact sheet, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence,* available at http://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=521414.

124. 79 FR 22188.

125. See the final rule, http://www2.epa.gov/sites/production/files/2015-05/documents/rule_preamble_web_version.pdf.

126. Id. (amending 33 CFR 328.3(a)(5), 40 CFR 230.3(s)(1)(v)).

127. Id. (amending 33 CFR 328.3(c)(3), 40 CFR 230.3(s)(3)(iii)).

- **All waters (including wetlands) that are "adjacent" to such tributaries.**[128] The rule broadly defines "adjacent" to include all waters within (i) 100 feet of the ordinary high-water mark of a tributary, (ii) the 100-year floodplain of a tributary if also within 1,500 feet of the ordinary high-water mark of the tributary, (iii) 1,500 feet of the high-tide line of a traditional navigable water, interstate water, or the territorial seas, and (iv) 1,500 feet of the ordinary high-water mark of the Great Lakes.[129]

In addition, under the final rule, the jurisdictional status of certain other waters will be evaluated on a case-by-case basis under the "significant nexus" test. Specifically, the significant nexus test will apply to all waters located within (i) the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, and (ii) 4,000 feet of the high-tide line or ordinary high-water mark of these waters and their tributaries.[130] The significant nexus test will also apply to all prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools, and Texas coastal prairie wetlands, regardless of their location.[131] The final rule broadly defines "significant nexus" as follows:

> The term *significant nexus* means that a water, including wetlands, **either alone or in combination with other similarly situated waters in the region,** significantly affects the chemical, physical, or biological integrity of a [traditional navigable water, interstate water, or territorial sea]. The term "in the region" means the watershed that drains to the nearest [traditional navigable water, interstate water, or territorial sea]. For an effect to be significant, it must be **more than speculative or insubstantial.** Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream . . . waters shall be assessed by evaluating the [following] aquatic functions . . . (A) Sediment trapping, (B) Nutrient recycling, (C) Pollutant trapping, transformation, filtering, and transport, (D) Retention and attenuation of flood waters, (E) Runoff storage, (F) Contribution of flow, (G) Export of organic matter, (H) Export of food resources, and (I) Provision of life cycle dependent aquatic habitat.[132]

On the other hand, the final rule codifies exclusions from the agencies' jurisdiction for the following unique types of water features: (i) ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary; (ii) ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands; (iii) ditches that do not flow, directly or through another water, into a traditional navigable water, interstate water, or territorial sea; (iv) artificially irrigated areas that would revert to dry land should application of water to that area cease; (v) artificial, constructed lakes and ponds created in dry land; (vi) artificial reflecting pools, swimming pools, and small ornamental waters created in dry land; (vii) water-filled depressions created in dry land incidental to mining or construction activity; (viii) erosional features, including gullies, rills, and other ephemeral features that do

128. Id. (amending 33 CFR 328.3(a)(6), 40 CFR 230.3.3(s)(1)(vi)).

129. Id. (amending 33 CFR 328.3(c)(1)–(2), 40 CFR 230.3(s)(3)(i)–(ii)).

130. Id. (amending 33 CFR 328.3(a)(8), 40 CFR 230.3(s)(1)(viii)).

131. Id. (amending 33 CFR 328.3(a)(7), 40 CFR 230.3(s)(1)(vii)).

132. Id. (amending 33 CFR 328.3(c)(5), 40 CFR 230.3(s)(3)(v)) (emphases added).

not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; (ix) puddles; (x) groundwater, including groundwater drained through subsurface drainage systems; (xi) stormwater control features constructed to convey, treat, or store stormwater that are created in dry land; and (xii) wastewater recycling structures constructed in dry land, detention and retention basins built for wastewater recycling, groundwater recharge basins, percolation ponds built for wastewater recycling, and water distributary structures built for wastewater recycling.[133] Most of these water features are currently considered nonjurisdictional as a matter of policy, but the agencies have, until now, reserved the right to assert jurisdiction over these features on a case-by-case basis.

As expected, the rulemaking process on this important subject has been contentious, with strong reactions from the regulated community, environmental groups, states, and elected representatives alike. The final rule will likely be challenged in federal court by affected stakeholders.

6-5.1.2
What Constitutes a Discharge of Dredged and Fill Material?

The definition of what does and does not constitute the "discharge" of dredged" or "fill material" for purposes of section 404 involves a number of grey areas. "Dredged material" is material that is excavated or dredged from waters of the United States.[134] "Fill material" encompasses any material placed in waters of the United States where the material has the effect of either replacing any portion of the water with dry land, or changing the bottom elevation of any portion of the water body.[135] Examples of "fill material" include rock, sand, soil, construction debris, overburden from mining or other excavation activities, and "materials used to create any structure or infrastructure in the waters of the United States."[136] Notwithstanding this broad definition, the Corps and EPA have created an interesting distinction between fill material and "pilings." Corps and EPA regulations state that the placement of pilings constitutes a discharge of fill material and requires a section 404 permit when such placement would have the effect of a discharge of fill material, such as when pilings are so closely spaced that sedimentation rates would be increased, where pilings would impair flow or circulation of waters or adversely alter aquatic functions, or where the pilings themselves would effectively replace the bottom of the water body.[137] Placement of pilings that do not have such effects is not regulated under the federal rules as a discharge of fill materials.[138]

In 1993, EPA and the Corps published regulations (referred to as the "Tulloch" rule) redefining the term "discharge of dredged material" to include *any* redeposit of excavated material incidental to dredging, land clearing, ditching, or other excavation.[139] Since some spillage of excavated material almost always occurs incident to excavation, those rules were seen as substantially expanding the ambit of federal controls under section 404.

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133. Id. (amending 33 CFR 328.3(b), 40 CFR 230.3(s)(2)).

134. 33 CFR 323.2(c); 40 CFR 232.2.

135. 33 CFR 323.2(e); 40 CFR 232.2. EPA and the Corps unified their respective regulatory definitions of fill material in a 2002 rulemaking. See 67 FR 31129.

136. 33 CFR 323.2(e); 40 CFR 232.2.

137. 33 CFR 323.3(d); 40 CFR 232.2 (definition of "discharge of fill material).

138. Id.

139. 58 FR 45008, amending 33 CFR 323.2(d).

The Tulloch rule was challenged in *American Mining Congress v. U.S. Army Corps of Engineers* (*AMC*),[140] with the D.C. District Court and D.C. Circuit Court of Appeals holding that the 1993 rule's broad definition exceeded the statutory authority of EPA and the Corps by impermissibly regulating "incidental fallback." Following the *AMC* decision, the agencies initially altered the definition to conform to the court's order.[141] The definition adopted in 1999 attempted to retain much of the former language, but omitted the word "any" from the definition and expressly excluded "incidental fallback." Because the *AMC* decision specifically stated that "a reasoned attempt [by an agency] to draw such a line [between incidental fallback and regulatable deposits] would merit considerable deference," the *Federal Register* notice emphasized that the 1999 rule changes were only for the purpose of conforming to the court order and not an attempt to engage in notice and comment rulemaking on the issue. The agencies' temporary definition was upheld by the district court shortly thereafter.[142]

Effective in early 2001, EPA and the Corps published revised rules (Tulloch II) attempting to delineate the line between regulable "redeposits" and nonjurisdictional "incidental fallback."[143] Under the amended definition of "discharge of dredged material," EPA and the Corps took the position that the use of mechanized earthmoving equipment to conduct landclearing, ditching, channelization, instream mining, and other earthmoving activities in waters of the United States results in a discharge of dredged material unless project-specific evidence shows that the activity results in only incidental fallback.[144] The term "incidental fallback" was defined as the redeposit of small volumes of dredged material that is incidental to the excavation activities, when the material falls back to substantially the same place as the initial removal.[145]

In early 2007, the Tulloch II rules were invalidated by the D.C. District Court in *National Ass'n of Home Builders v. U.S. Army Corps of Engineers*.[146] The court found that the agencies had failed to follow the direction provided by the D.C. Circuit in *National Mining Ass'n*[147] in attempting to distinguish between "incidental fallback" (not subject to regulation) and "redeposit" (subject to permit requirements) on the basis of absolute (as opposed to relative) volume.[148] The court further concluded that "[t]he difference between incidental fallback and redeposit is better understood in terms of two other factors: (1) the time the material is held before being dropped to earth and (2) the distance between the place where the material is collected and the place where it is dropped."[149] The court also indicated that the Corps should "reconsider its statement that it 'regards' the use of mechanized earthmoving equipment as resulting in a discharged of dredged material unless project-specific evidence shows otherwise."[150]

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140. *American Mining Cong. v. U.S. Army Corps of Eng'rs,* 951 F.Supp. 267 (D.D.C. 1997), aff'd, 145 F.3d 1399 (D.C. Cir. 1998).

141. 64 FR 25120, amending 33 CFR 323.2(d)(1), 40 CFR 232.2.

142. *American Mining Cong. v. U.S. Army Corps of Eng'rs,* 120 F.Supp.2d 23 (D.D.C. 2000).

143. 66 FR 4550 (amending 33 CFR 323.2 and 40 CFR 232.2); 66 FR 10367 (delaying effective date until April 17, 2001).

144. 66 FR 4550, at 4575 (amending 33 CFR 323.2(d)(2)(i)).

145. 66 FR 4550, at 4575 (amending 33 CFR 323.2(d)(2)(ii)).

146. *National Ass'n of Home Builders v. U.S. Army Corps of Eng'rs,* 64 ERC (BNA) 2050 (D.D.C. 2007).

147. *National Mining Ass'n v. U.S. Army Corps of Eng'rs,* 145 F.3d 1399 (D.C. Cir. 1998).

148. *Home Builders*, above.

149. Id.

150. Id.

In response to the district court's decision in *Home Builders*, EPA and the Corps revised the definition of "discharge of dredged material" in a 2008 rulemaking, reverting to the definition promulgated in 1999.[151] This means that there is currently no regulatory definition of "incidental fallback," leaving the meaning of the term (and, in turn, the applicability of the CWA) to be decided on a case-by-case basis.[152] Thus, in many earthmoving circumstances, the issue of what precisely constitutes the discharge of dredged material for purposes of triggering section 404 permitting remains hazy.

More recently, the Supreme Court took up the issue of whether a discharge containing "fill material" requires a permit from the Corps or EPA when the discharge is also potentially subject to an EPA-promulgated new source performance standard. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*[153] involved a plan to reopen an Alaskan gold mine that contemplated the discharge of mining slurry, including solid tailings, into a nearby lake. EPA and the Corps decided, and the court agreed, that the discharge should be permitted by the Corps under section 404 because the slurry met the regulatory definition of "fill material" as a "material [that] has the effect of … [c]hanging the bottom elevation of any portion of a water of the United States."[154] In coming to this conclusion, the court declined to read into the CWA an "implicit exception" to the Corps' permitting authority for discharges of fill material that are facially subject an EPA new source performance standard,[155] which EPA typically applies in the course of issuing permits under section 402 of the CWA for discharges of non-dredge-and-fill-related pollutants.[156] Based on language in section 402, the court found that the CWA "is best understood to provide that if the Corps has authority to issue a permit for a discharge under § 404, then the EPA lacks authority to do so under § 402."[157] The court then deferred to the agencies' interpretation that, because the permit was to be issued by the Corps and not EPA, the relevant new source performance standard could not be lawfully applied to the discharge of fill material.[158]

6-5.2 Exceptions to Permit Requirement

The Clean Water Act contains a series of exceptions, excluding certain "discharges" from the requirement to obtain section 404 permits. These exceptions include:

- normal farming, silviculture, and ranching activities, such as plowing, seeding, cultivating, minor drainage, and harvesting of food, fiber, and forest products;[159]
- maintenance of serviceable structures, such as dikes, dams, levees, or bridge abutments, without any modification that changes the character, scope, or size of the original fill design;[160]

151. 73 FR 79641.
152. See id. at 79643.
153. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009).
154. Id. at 273–77; 33 CFR 323.2(e)(1)(ii).
155. See 33 U.S.C. § 1316.
156. Id. § 1342.
157. *Coeur Alaska*, 557 U.S. at 274.
158. Id. at 277–91.
159. 33 U.S.C. § 1344(f)(1)(A); see also 33 CFR 323.4(a)(1); 40 CFR 232.3(c)(1).
160. 33 U.S.C. § 1344(f)(1)(B); see also 33 CFR 323.4(a)(2); 40 CFR 232.3(c)(2).

- construction and maintenance of farm or stock ponds and irrigation ditches;[161]
- construction of temporary sedimentation basins on a construction site that does not involve placement of fill materials in waters of the United States;[162]
- construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment, where such roads are constructed in accordance with best management practices and meet numerous other restrictions;[163]

These exceptions are not applicable if the subject projects are 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 may be impaired or the reach of such waters reduced."[164]

6-5.3 Nationwide General Permits

Most large projects affecting wetlands are subject to submission of individual permit applications, and receipt of individual permits from the Corps following procedures and criteria set forth in 33 CFR part 320. However, to reduce the burden of paperwork, and focus regulatory attention on more significant projects, the Corps has published a series of "nationwide general permits" (NWPs) in 33 CFR part 330.

In January 2002, the Corps of Engineers published final rules reissuing and modifying the entire set of NWPs.[165] In March 2007, the Corps reissued, with a few modifications, all existing NWPs, and issued six new NWPs, all of which had an expiration date of March 18, 2012.[166]

In June 2010, the Corps temporarily suspended NWP-21 ("Surface Coal Mining Activities," in Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia).[167] In February 2011, however, the Corps proposed to reissue all NWPs except NWP-47 ("Pipeline Safety Program Designated Time Sensitive Inspections and Repairs"); to modify some, including NWP-21; and to issue two new NWPs for renewable energy projects.[168] Accordingly, in February 2012, the Corps modified NWP Nos. 3, 4, 5, 6, 8, 12, 13, 15, 16, 20, 21, 27, 29, 31, 33, 36, 37, 39, 40, 42, 43, 44, 45, 48, 49, and 50; reissued an amended version of NWP-21; and added NWP Nos. 51 and 52.[169] All NWPs have the same effective date (March 19, 2012) and expiration date (March 18, 2017).

The applicability of these NWPs must be checked carefully. As noted below, the Corps has also issued a Pennsylvania State Programmatic General Permit (PASPGP-4) that accords a federal permit in parallel with the issuance of a state chapter 105 permit or state general permit.[170] In many of the situations where the PASPGP-4 applies, the NWPs have

161. 33 U.S.C. § 1344(f)(1)(C); see also 33 CFR 323.4(a)(3); 40 CFR 232.3(c)(3).

162. 33 U.S.C. § 1344(f)(1)(D); see also 33 CFR 323.4(a)(4); 40 CFR 232.3(c)(4).

163. 33 U.S.C. § 1344(f)(1)(E); see also 33 CFR 323.4(a)(6); 40 CFR 232.3(c)(6).

164. 33 CFR 323.4(c); 40 CFR 232.3(b); see also 33 U.S.C. § 1344(f)(2).

165. 67 FR 2020.

166. 72 FR 11092

167. 75 FR 34711.

168. 76 FR 9174.

169. 77 FR 10184.

170. U.S. Army Corps of Engineers, *Pennsylvania State Programmatic General Permit - 4 (PASPGP-4),* (July 1, 2011), available at http://www.nab.usace.army.mil/Portals/63/docs/Regulatory/Permits/PASPGP-4.pdf.

been "suspended."[171] However, where the PASPGP-4 is not applicable (such as for projects in certain navigable waterways), the same NWPs may not be suspended, and thus may be used.[172]

Among the current set of NWPs are several that may apply to activities typically encountered in a land development project. Those subject to partial suspension and displacement by PASPGP-4 are noted with an asterisk (PASPGP-4 did not change any previous suspensions under PASPGP-3). Significant modifications to NWPs contained in the 2012 reissuance package are noted in italics.

(1) NWP-7* covers construction and modification of outfalls and associated intake structures, where the effluent being discharged is approved under an NPDES permit.

(2) NWP-12* allows discharges associated with excavation, backfill, and bedding for utility lines, including intake and outfall structures, provided there are no changes to preconstruction bank and bottom contours. This general permit essentially allows disturbance of a wetland for the burial of lines under or through the wetland area, followed by restoration of the overlying wetland, as well as for the construction of access roads for the maintenance of such lines. The term *utility lines* includes gas, water, sewer, telephone, cable, liquid and slurry pipelines, and similar lines. Persons using general permit 12 for projects must provide preconstruction notification to the Corps' district engineer for those projects involving mechanized landclearing of a forested wetland, placement of a line that spans more than 500 feet, installation of a line parallel to a streambed, activities that will result in the loss of more than one-tenth of an acre of waters, construction of permanent access roads longer than 500 feet, placement of access roads made of impervious materials into waters, construction of substations occupying greater than one-tenth acre of wetlands, or activities in any body of water subject to section 10 of the 1899 Rivers and Harbors Act.

(3) NWP-14* provides authorization for "linear transportation projects" (for example, roads, railroads, airport runways, and trails) of streams and other bodies of water. Nonlinear associated projects, such as areas for storage, equipment maintenance, and parking, are not covered by this permit, and only stream channels that are in the immediate area of the project may be modified. Following completion of the project, any temporary fills must be removed and the ground returned to its preconstruction grading and vegetation. Preconstruction notification to the district engineer is required if the discharge causes a loss of greater than one-tenth of an acre of waters or if the discharge is into a "special aquatic site," including wetlands.

(4) NWP-21 allows for discharges associated with surface coal mining and related reclamation operations, where the mining is covered by a permit issued

171. U.S. Army Corps of Engineers, Baltimore District, *Final Regional Conditions and Suspension for the 2012 Nationwide Permits,* Special Public Notice No. 12-32 (March 19, 2012), available at http://www.nab.usace.army.mil/Portals/63/docs/Regulatory/PN/SPN%2012-32.pdf; U.S. Army Corps of Engineers, Pittsburgh District, *Nationwide Permits for the Commonwealth of Pennsylvania,* Special Public Notice No. 12-17 Revised (July 31, 2012), available at http://www.lrp.usace.army.mil/Portals/72/docs/regulatory/publicnotices/PN12-17rev.pdf.

172. Id.; see also U.S. Army Corps of Engineers, *Issuance of the Pennsylvania State Programmatic General Permit - 4 (PASPGP-4) for a five year period,* Special Public Notice No. 11-44 (June 3, 2011).

either by the federal Office of Surface Mining or by a state implementing an approved state program under the Surface Mining Conservation and Reclamation Act. The Corps temporarily suspended NWP-21 prior to reissuance on March 18, 2012.

The reissued NWP-21 includes new restrictions to address the concerns that led to its temporary suspension, primarily regarding the impact of valley fills from mountaintop mining. NWP-21 may not be used to authorize new activities discharging dredged or fill material to construct valley fills, nor any new activities resulting in a loss of more than one-half acre of non-tidal waters or more than 300 linear feet of stream bed. (For intermittent and ephemeral streams, the 300-linear-foot limit may be waived by the Corps after interagency coordination.) Activities previously authorized under the 2007 version of NWP-21 may be reauthorized without regard to these limits after obtaining Corps approval.[173]

(5) NWP-29* provides for discharges conducted for the construction or expansion of a single residence, multiple-unit residential development, or residential subdivision, provided that the project does not cause the loss of greater than one-half acre of non-tidal wetlands or more than 300 linear feet of streambed. (For intermittent and ephemeral streambeds, this 300-linear-foot limit may be waived by the district engineer.) Discharges into non-tidal wetlands adjacent to tidal waters (such as the Delaware estuary) are not allowed under this general permit.

(6) NWP-39* covers the "construction or expansion of commercial and institutional building foundations and building pads and attendant features" in non-tidal waters, excluding non-tidal wetlands that are adjacent to tidal waters. The project cannot affect more than one-half acre of non-tidal waters or more than 300 linear feet of streambed, including intermittent and ephemeral streambeds. NWP-39 explicitly requires applicants to create and maintain wetland or upland vegetated buffers, 25 to 50 feet wide, next to open waters or streams.

(7) NWP-40* provides authorizations for "agricultural activities" in non-tidal wetlands, including constructing farm ponds and building pads for farm buildings. Authorized activities include installation of drainage tiles, ditches, and levees; mechanized land clearing; land leveling; relocation of existing drainage ditches; and similar activities.

In 2012, the Corps added a limit on streambed impacts, similar to NWP-29 and NWP-39, for all stream impacts under NWP-40 (not just relocation of ditches, as was the case under previous iterations of NWP-40). Projects cannot affect more than one-half acre of non-tidal waters or more than 300 linear feet of streambed, including intermittent and ephemeral streambeds (the district engineer may waive the limit for intermittent or ephemeral streambeds).[174]

(8) NWP-41* authorizes the "reshaping" of existing drainage ditches for the improvement of water quality by regrading with gentler slopes. The reshaping cannot increase drainage capacity beyond the original design nor expand the area drained by the ditch as originally designed. While compensatory mitiga-

173. 77 FR 10184 at 10274; but see the discussion below regarding challenges to NWP-21's grandfathering provision.

174. Id. at 10279.

tion is not required, preconstruction notice to the district engineer is required if more than 500 linear feet of drainage ditch will be reshaped.

(9) NWP-42* authorizes construction and expansion of recreational facilities, including ski areas, football and baseball fields, basketball and tennis courts, horse, biking, and hiking trails, nature centers, and non–recreational vehicle campgrounds. The construction of minor support facilities directly related to the recreational activity is also authorized. The loss associated must be no more than one-half of an acre of non-tidal waters and no more than 300 linear feet of streambed.

(10) NWP-43* provides authorization for the construction and maintenance of stormwater management facilities and associated activities. The activity must not cause the loss of more than one-half acre of non-tidal wetlands or 300 linear feet of perennial streambed, although the Corps may waive the latter requirement for intermittent and ephemeral streambeds. Any discharge into perennial streams is prohibited. Preconstruction notice to the district engineer is required if the project involves the construction of a new, or the expansion of an existing, stormwater management facility, but is not required when the project is for the restoration of a facility's original design capacities.

In 2012, the Corps added "low impact development integrated management features" to the examples of covered activities. These features include site design approaches and small-scale features that use natural systems for infiltration, evapotranspiration, and reuse of rainwater (including biorentention facilities, grassed swales, and infiltration trenches).[175]

(11) NWP-44 authorizes discharges for mining activities except those related to coal mining. The loss associated must be no more than one-half an acre of non-tidal waters, and if reclamation is required, a copy of the reclamation plan must be submitted to the district engineer.

In 2012, the Corps added a linear-foot limit similar to other NWPs. Projects authorized under the general permit cannot affect more than 300 linear feet of streambed, including intermittent and ephemeral streambeds (the district engineer may waive the limit for intermittent or ephemeral streambeds).[176]

(12) NWP-45* authorizes discharges for repairing upland areas damaged, within the past two years, by "discrete events" such as storms or floods. Restoration may be obtained by dredging or excavation, and bank stabilization may be implemented to protect the restored uplands. The restored area may not exceed the pre-event contours or ordinary high-water mark, and any dredging should not alter preexisting bottom contours.

In 2012, the Corps clarified that the permit does not authorize beach nourishment or restoration, which may be authorized by individual or regional general permits.

(13) NWP-46* authorizes discharges into upland, non-tidal ditches that both (a) receive water from another water of the United States, and (b) divert water to another water of the United States. This permit does not apply to ditches constructed in streams or other waterways, or in streams that have been relocat-

175. Id. at 10279–80.

176. Id. at 10280.

ed upland, and the discharge must not increase the drainage capacity of the ditch. The loss associated must be no more than one acre of water.

(14) NWP-49 allows for discharges associated with remining and reclamation of lands previously mined for coal, provided that the mining is authorized by a permit from either the federal Office of Surface Mining or a state operating an approved program under the Surface Mining Control and Reclamation Act. The permit allows coal mining activities on adjacent areas, provided that the newly mined area is less than 40 percent of the area being remined.

In 2012, the Corps clarified how it determines whether the newly mined area is less than 40 percent of the remined area. The reissued permit also requires submission of documentation with the preconstruction notice that will describe how the mining plan "will result in a net increase in aquatic resource functions."

(15) NWP-50 permits discharges into non-tidal waters associated with underground coal mining and relating to mine reclamation activities approved by either the Office of Surface Mining or a state operating an approved program under the Surface Mining Control and Reclamation Act.

In 2012, the Corps added acreage and linear-foot limits similar to other NWPs. Projects cannot affect more than one-half acre of non-tidal waters or more than 300 linear feet of streambed, including intermittent and ephemeral streambeds (the district engineer may waive the limit for intermittent or ephemeral streambeds).

(16) NWP-51, issued for the first time in 2012, authorizes discharges into non-tidal waters, except non-tidal waters adjacent to tidal waters, for construction, expansion, or modification of land-based renewable energy production facilities, including attendant features. The permit covers infrastructure to collect solar (either concentrating solar power or photovoltaic), biomass, wind, or geothermal energy. Attendant features may include, but are not limited to, roads, parking lots, and stormwater management facilities within the land-based renewable energy generation facility. Utility lines constructed to transfer the energy from the land-based renewable generation facility to a distribution system, regional grid, or other facility are generally eligible for separate authorization under NWP-12. Projects cannot affect more than one-half acre of non-tidal waters or more than 300 linear feet of streambed, including intermittent and ephemeral streambeds (the district engineer may waive the limit for intermittent or ephemeral streambeds). This permit requires a preconstruction notice for all activities.[177]

(17) NWP-52, issued for the first time in 2012, authorizes structures and work in navigable waters and discharges into waters for construction, expansion, modification, or removal of water-based wind or hydrokinetic renewable energy generation pilot projects and their attendant features. The permit covers structures and infrastructure to collect energy and transfer energy to land-based distribution facilities, including, but not limited to, distribution facilities, control facilities, roads, parking lots, and stormwater management facilities. Utility lines constructed to transfer the energy from the land-based collection facility to a distribution system, regional grid, or other facility are generally eligible for separate authorization under NWP-12. Projects cannot affect more than one-half acre of non-tidal waters or more than 300 linear feet of streambed, including intermittent and ephemeral streambeds (the district engineer may waive the limit for intermittent or ephemeral streambeds). The permit may only

177. Id. at 10281.

> *cover 10 generation units per project (e.g., 10 wind turbines or hydrokinetic devices). Some areas are restricted from permitting. This permit requires a preconstruction notice for all activities. NWP-52 authorizes activities under both section 10 of the 1899 Rivers and Harbors Act and section 404 of the Clean Water Act.*[178]

In the recent reissuance of NWPs, the Corps has clarified that a district engineer will issue a waiver of linear-foot limits only after making a written, project-specific determination that the project will have minimal adverse effects.

Most of the NWPs, such as NWP Nos. 12, 14, 29, 39, 40, 41, 42, 43, 44, 45, 46, 49, 50, 51, and 52, require that the "general permittee" file a preconstruction notice (together with a wetland delineation) with the Corps' district office in most cases. The procedure for handling those notifications is set forth in General Condition 31 to the general permits. When a notice is required, the project sponsor may not proceed under the general permit for 45 days. During that period, the district engineer (in consultation with other agencies) may impose additional conditions or determine that an individual permit should be required. If no such notice is given, the projects under most general permits may proceed under the general permit. However, certain general permits (including 21, 49, and 50) require an affirmative written approval from the Corps before commencement of any work.

In addition, each person who uses a general permit is required to file a written certification with the Corps verifying that the project as completed complies with all conditions of the applicable general permits, including implementation of any required mitigation measures. In Pennsylvania, additional region-specific conditions have been imposed on many of the NWPs by the Baltimore and Pittsburgh Districts of the Corps. Project sponsors in the Ohio River Basin should consult the Pittsburgh conditions, and project sponsors in the Delaware and Susquehanna River Basins should consult the Baltimore conditions.

There is one major prerequisite to the use of any general permit. In order for a nationwide general permit to be effective within a state, the state water quality agency (in this case, DEP) must issue a "water quality certification" under section 401 of the Clean Water Act, certifying that any "discharges" associated with the activity or class of activities authorized by the general permit will conform to state water quality standards and limitations. DEP has issued a water quality certification for the 2012 general permits subject to a series of conditions, including the requirement that any covered activities obtain all other permits required under Pennsylvania state environmental laws (including chapter 105 permits).

It should be noted that these nationwide general permits may be used in combination with each other (subject to some limitations set forth in the NWP rules). Such "stacking" of nationwide permits has been judicially upheld,[179] and is not an infrequent occurrence.

Finally, some of the reissued NWPs described above have been subject to legal challenges, including NWP Nos. 12 (utility lines) and 21 (surface coal mining).

With respect to NWP-12, an Oklahoma federal court upheld the Corps' 2012 reissuance of NWP-12 in a facial challenge involving the Corps authorization of a segment of the Keystone XL Pipeline.[180]

The status of NWP-21, on the other hand, remains in question, at least with respect to mining activities grandfathered until 2017 under the conditions from the 2007 version of

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178. Id. at 10281–82.

179. *Utah Council, Trout Unlimited v. U.S. Army Corps of Engr's,* 187 F.Supp.2d 1334 (D. Utah 2002).

180. *Sierra Club, Inc. v. Bostick,* 78 ERC (BNA) 1376 (W.D. Okla. 2013) (denying plaintiffs' summary judgment motion, which argued that reissuance of NWP-12 was arbitrary and capricious under the CWA and the National Environmental Policy Act (NEPA)).

NWP-21. When it reissued NWP-21 in 2012, the Corps instituted a grandfathering mechanism in NWP-21 subparagraph (a) that it summarized as follows:

> Nationwide permit 21 activities that were authorized by the 2007 NWP 21 may be reauthorized without applying the new limits imposed on NWP 21, provided the permittee submits a written request for reauthorization to the district engineer by February 1, 2013, and the district engineer determines that the on-going surface coal mining activity will result in minimal adverse effects on the aquatic environment and notifies the permittee in writing that the activity is authorized under the 2012 NWP 21.[181]

Although the 2007 version of NWP-21 was previously vacated by a West Virginia district court in 2009 (because of deficiencies in the Corps' 2007 cumulative effects analysis),[182] the 2012 grandfathering provision implicitly extended the life of the 2007 version for another five years by allowing grandfathered operators to avoid the more stringent NWP-21 standards detailed above.

Courts have arrived at different conclusions regarding whether the Corps' continued implementation of the less stringent 2007 standards is permissible. In *Kentucky Riverkeeper, Inc. v. Rowlette*, the Sixth Circuit Court of Appeals refused to dismiss a challenge to the 2007 NWP-21 as moot, finding that the 2012 grandfathering provision "extended [the Corps'] reliance on the challenged cumulative-impacts analysis."[183] The court then invalidated the 2007 NWP-21 because of the Corps' failure, in 2007, to properly assess the cumulative effects of authorized projects pursuant to NEPA and the CWA.[184] On the other hand, in *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, the Northern District of Alabama rejected a challenge to the 2012 NWP-21 grandfathering provision, finding that the Corps adequately assessed the cumulative effects of projects authorized under NWP-21, including grandfathered projects, when it reissued the permit in 2012. [185] The court explicitly disagreed with the Sixth Circuit's conclusion that the Corps "extended its reliance on the 2007 NWP 21 [cumulative effects] analysis to determine that 2012 NWP 21(a) would have minimal cumulative effects."[186] However, in March 2015, at the Corps' request, the Eleventh Circuit Court of Appeals reversed and remanded the Northern District of Alabama's decision, after the Corps disclosed that it had underestimated the acreage of waters that would be affected by projects authorized under NWP-21.[187] The Eleventh Circuit, however, did not vacate NWP-21, instead directing the district court to remand the permit to the Corps for reevaluation of its CWA and NEPA determinations.[188] In the wake of these decisions, it is unclear whether previously authorized mining projects in Pennsylvania will be able to rely on the 2012 NWP-21 grandfathering provision.

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181. 77 FR 10184, at 10209.

182. *Ohio Valley Envtl. Coalition v. Hurst*, 604 F.Supp.2d 860, 885–95 (S.D. W. Va. 2009).

183. *Kentucky Riverkeeper, Inc. v. Rowlette*, 714 F.3d 402, 406–07 (6th Cir. 2013).

184. Id. at 407–13.

185. *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 23 F.Supp.3d 1373, 1387–92 (N.D. Ala. 2014), aff'd in part, rev'd in part, rem'd, 781 F.3d 1271 (11th Cir. 2015).

186. 23 F.Supp.3d at 1390, n.9.

187. *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271 (11th Cir. 2015).

188. Id. at 1289–92.

6-5.4 State Programmatic General Permit

On January 17, 1995, the Baltimore, Philadelphia, and Pittsburgh Districts of the Corps jointly issued Pennsylvania State Programmatic General Permit PASPGP-1 as a means of streamlining the permitting process for many projects. This general permit became effective March 1, 1995. General Permit PASPGP-1 was replaced effective July 1, 2001, with Pennsylvania State Programmatic General Permit #2 (PASPGP-2). PASPGP-2, in turn, was replaced effective July 1, 2006, by PASPGP-3. The most recent iteration is PASPGP-4, which has been available for use since July 16, 2011, when DEP issued its section 401 water quality certification, and which will expire on June 30, 2016.[189] The issuance of PASPGP-4 also required DEP to make minor modifications to permit application materials and supporting documents, including the Joint Permit Application.[190]

The Programmatic General Permit generally finds that the Pennsylvania chapter 105 permit process meets the requirements of the federal Clean Water Act. Accordingly, many, if not most, projects receiving a permit, general permit, or permit waiver from DEP will not be required to obtain a separate Corps permit.

PASPGP-4 grandfathers in all activities and special conditions previously authorized by PASPGP-3, provided they did not expire before June 30, 2011. The term of the reauthorization depends on the category of activity authorized under chapter 105.

PASPGP-4 applies to activities in most streams and waters of the Commonwealth, but it does not cover projects waterward of the ordinary high-water line (in non-tidal areas) or mean high-water line (in tidal areas) of certain navigable waterways, such as parts of the Delaware, Schuylkill, and Youghiogheny, Rivers, and all of the Beaver, Monongahela, and Ohio Rivers (and several other listed stream reaches). PASPGP-4 modified PASPGP-3 to authorize projects in waters not previously covered, including areas of the Delaware, Lehigh, and Schuylkill Rivers. If projects are ineligible for coverage because they are in certain navigable waterways, they remain subject to the full Corps permit program (unless otherwise covered by a Corps nationwide general permit).

Among the most significant elements of PASPGP-4 are a new distinction between what is considered a "single and complete project" and requirements for considering the cumulative impacts of all crossings of waters and/or wetlands involved in an overall linear project (such as a road or pipeline). PASPGP-4 authorizes placement of structures or fill that receive DEP permits or permit waivers for "single and complete" projects, including all attendant features (temporary and/or permanent), that individually or cumulatively result in impacts to 1.0 acre or less of waters of the United States, including jurisdictional wetlands. Single and complete projects involving more than 1.0 acre of impact must apply for and obtain an individual section 404 permit. In general, the single and complete project provisions govern what projects may be eligible for PASPGP-4 coverage, while the cumulative impact analysis will govern whether the overall projects falls into a category requiring higher levels of scrutiny.

PASPGP-4 is structured around a series of exclusions and inclusions, which need to be parsed carefully in order to determine project status. First, like the previous PASPGP-3,

189. 41 Pa.B. 3938 (July 16, 2011).

190. 41 Pa.B. 4255 (August 6, 2011).

PASPGP-4 contains the following exclusions (meaning that excluded projects will require an individual permit, and cannot use the statewide general permit):

- single and complete or linear project that will have more than minimum individual or cumulative adverse environmental impacts as determined by the Corps;
- single and complete projects that do not comply with all terms and conditions of PASPGP-4, including the terms and conditions specific to each listed category of activities;
- single and complete projects that result in a total of more than one acre of impacts to waters of the United States, including jurisdictional wetlands;
- activities located waterward of the ordinary high-water mark on non-tidal waters or the mean high-water line on tidal waters of certain rivers (including Lake Erie, the Delaware River below Trenton, the Schuylkill River below Fairmount Dam, the Allegheny River below river mile 197.4, the Ohio, Beaver, Monongahela, and Mahoning Rivers, and several other streams);
- instances where the EPA regional administrator notifies the Corps and applicant of the exercise of EPA's authority under section 404(c) of the Clean Water Act to prohibit, deny, restrict, or withdraw use of a defined area as a disposal site for dredged and fill material;
- designated "Special Case" circumstances identified by the EPA regional administrator as part of a memorandum of agreement between EPA and the Corps;
- activities that have been denied a DEP Chapter 105 Permit, or Section 401 Water Quality Certification, or Coastal Zone Consistency Determination;
- activities that would divert more than 10,000 gallons per day of surface or groundwater into or out of the Great Lakes Basin;[191]

In applying these exclusions from eligibility for PASPGP-4 coverage, the term "single and complete project" is critical. PASPGP-4 defines the term to mean "the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers." That definition goes on, however, to differentiate between nonlinear and linear projects.

For linear projects (such as roads and pipelines), a "single and complete project" means each crossing of a separate waterbody or wetland at the given location. For these purposes, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, are not considered separate waterbodies. Notably, as discussed below, multiple crossings of various waterbodies by linear projects are considered on a cumulative basis when determining the "category" of review to which such a project will be subjected.

For nonlinear projects, the "single and complete project" must have "independent utility," meaning "it would be constructed absent the construction of other projects in the project area." Portions of a multiphase project that depend on other phases do not have independent utility; but on the other hand, phases of a project that would be constructed even if other phases were not built can be considered as separate projects with independent utility.

For both linear and nonlinear projects, PASPGP-4 establishes directions on how the linear footage thresholds are determined. Under those directions, for example, the linear

191. PASPGP-4 removed two exclusions found in PASPGP-3, adding coverage for previously ineligible (1) activities authorized by DEP GP-15 (private residential construction in wetlands) and (2) activities authorized by chapter 105 permits in conjunction with coal and noncoal mining permits issued by the DEP District Mining Offices.

reach of a project is determined by the greater of the width of stream crossed, or the upstream-to-downstream area of either permanent or temporary impact (e.g., the area between two cofferdams used in installing a pipeline).

Subject to the exclusions cited above, PASPGP-4 authorizes several categories of activities without the need for an individual Corps permit, if the project obtains a DEP permit waiver, state general permit, or individual permit. These "categories" reflect different degrees of review prior to allowing the project to move forward under the general permit, and knowing what category is applicable is important in terms of timing.

1. Category I: PASPGP-4 authorizes 28 types of projects, without need for additional notification to the Corps district (including many covered under DEP waivers and general permits), provided that the project components do not result, individually or in cumulative combination, in a permanent loss of more than 1.0 acre[192] of waters or jurisdictional wetlands or more than 250 linear feet of temporary or permanent impacts to watercourses (expanded to 500 linear feet for fish habitat enhancement and stream bank rehabilitation and protection projects).

   In PASPGP-4, the Corps added the following Category I activities:

   - No. 11: Private residential construction in wetlands, which was previously ineligible under PASPGP-3. Category I activities must be authorized by DEP under GP-15, or else they require a Corps permit. As mentioned in section 6-4.2, above, DEP has proposed to incorporate GP-15 into the normal chapter 105 registration process.
   - No. 19: Activities waived at 25 Pa.Code § 105.12(a)(16) (Waiver 16 for restoration activities). PASPGP-4 includes activities approved or sponsored by the DEP Bureau of Abandoned Mine Reclamation (BAMR) to improve waters affected by acid mine drainage, provided that the activity impacts less than 0.05 acres of vegetated wetland. This waiver provision also includes restoration activities where DEP has issued a programmatic 401 Water Quality Certification and received approval from the Environmental Review Committee (ERC).
   - No. 23: Certain listed activities or existing structures completed before July 1, 1979 (25 Pa.Code § 105.12(b)(1)–(7) and § 105.12(c)).
   - No. 27: Maintenance activities conducted under terms and conditions of previously issued permits.
   - No. 28: Grandfathered activities and special conditions authorized under PASPGP-3. All activities, including Category I, II, and III activities, are authorized without further notice.

2. Category II: Projects that do not fall under Category I may obtain coverage under PASPGP-4 after notification through publication in the *Pennsylvania Bulletin*, and an opportunity for review and comment by the Corps, other federal and state resource agencies, and the general public. As in Category I, the cumulative impact of the Category II "single and complete project" must affect less than 1.0 acre of waters/wetlands and 250 linear feet of watercourses.

192. Under PASPGP-3, this limitation was 0.25 acres for a single and complete project. PASPGP-4 adds cumulative evaluation criteria, meaning that fewer projects with multiple crossings will be eligible for Category I, and many will be kicked into Category III.

3. Category III: Certain projects may be allowed to proceed under PASPGP-4 only after case-by-case review of issues of federal concern. For example, these include projects that would otherwise fall under Categories I and II as to which the Corps or another agency has requested special review; activities exceeding the acreage or linear impact thresholds for Categories I and II; activities that may affect threatened or endangered species or their critical habitat; projects under DEP Waiver 1 (small dams); projects under DEP Waiver 2 (water obstructions in a stream with a drainage area less than 100 acres); activities potentially affecting historic or cultural resources; projects potentially affecting fish passage; and activities potentially affecting a component of the national wild and scenic rivers system or a river designated by Congress as a study river.

In PASPGP-4, the Corps modified or added the following Category III activities (meaning that these activities are subject to greater scrutiny):

- Activities that may affect threatened or endangered species or their habitat will be classified as Category III unless already cleared by the U.S. Fish and Wildlife Service. Thus, if a potential conflict exists for threatened or endangered species, the Corps will review these activities as Category III activities to ensure compliance with section 7 of the Endangered Species Act.
- Activities that require an environmental impact statement (EIS) will be subject to review under Category III to ensure compliance with NEPA.
- Activities in portions of the Delaware River located upstream of the Morrisville-Trenton Railroad bridge in Morrisville, Pennsylvania. (*Note:* Activities in the Delaware River below Trenton are not eligible for coverage under PASPGP-4).
- Activities across state boundaries, not wholly within Pennsylvania, are subject to review to determine whether they are eligible for PASPGP-4 coverage.
- Coal and noncoal mining activities authorized under chapter 105 in conjunction with DEP mining permits, including Pennsylvania GP-101, GP-102, and Waiver 4, are eligible under PASPGP-4, but subject to Category III review.
- Construction of mitigation banks and in lieu fee sites.
- Activities waived under 25 Pa.Code § 105.12(a)(2) (Waiver 2 for water obstructions in a stream or floodway with drainage area of 100 acres or less).
- Activities affecting Corps Civil Works projects, Corps property, or projects that are part of the Corps Rehabilitation and Inspection Program. The Corps removed Special Condition No. 14 (GP-11 activities for maintenance of existing flood control projects) under PASPGP-3 to include these activities in PASPGP-4 and ensure compliance with 33 U.S.C. § 408.

The Corps also added general conditions and procedural requirements in PASPGP-4. This includes a condition to ensure compliance with Corps regulations addressing structures across navigable waters, and contains a list of navigable waters. The modifications also include a requirement to complete U.S. Coast Guard approval, a Private Aids to Navigation Application (CG-2554), and, within 30 days of receipt, provide the approval to the Corps.

DEP has made PASPGP-4 subject to the condition that, before commencing any activities covered by the permit, the applicant must first obtain all necessary permits or approvals under other laws.[193]

193. See 41 Pa.B. 2762 (May 28, 2011); 41 Pa.B. 3938 (July 16, 2011).

A Pennsylvania Natural Diversity Inventory (PNDI) search, completed within 12 months of the application, is required for all activities to avoid conflicts with threatened and endangered species and their habitat.

As noted above, the category into which a project is classified significantly affects the manner and degree to which it is reviewed, and the time frame for obtaining coverage under the Corps' statewide general permit.

Within covered waters, Category I projects are authorized without the need for forwarding the permit application to the Corps. For these projects, DEP will review the project as before, and attach a copy of PASPGP-4 to the DEP final decision, indicating that the action is authorized under the Programmatic General Permit.[194]

As to Category II activities, DEP will publish notice of the project in the *Pennsylvania Bulletin* with a 30-day public comment period. The Corps and federal and state resource agencies will review the *Pennsylvania Bulletin* notice to determine the need for federal review, and will provide notice of such a requirement prior to expiration of the 30-day comment period. The Corps may notify DEP that the activity is eligible for authorization under PASPGP-4, with or without special conditions, or may notify DEP that the project is not eligible for PASPGP-4 coverage.

Category III projects are also subject to the 30-day notice requirement for public comment. Applications identified as Category III will be reviewed by the Corps and DEP, and where applicable, the EPA, U.S. Fish and Wildlife Service, National Marine Fisheries Service, Pennsylvania Fish and Boat Commission, Pennsylvania Game Commission, and Pennsylvania Historic and Museum Commission, to determine eligibility to proceed under PASPGP-4. All appropriate agencies must have an opportunity to review and comment on the application, and the Corps must determine that the activity will have no more than minimal adverse environmental impacts for the project to obtain coverage

Where an agency asserts an objection to Category II or III projects, and the Corps does not concur with the objection, the agency has an additional 15 days from the close of the public comment period to express a formal objection. The Corps will attempt to resolve the objection within 45 days of the formal request, although experience has shown that the objection resolution procedure may consume significantly greater time. If the objection is not resolved, the project will not qualify for authorization under PASPGP-4, and the project will be required to proceed through the individual permit process.

The Programmatic General Permit converts the prior joint permit application process into a joint application, review, and permit issuance process. The potential for easing the permitting process is significant.

6-5.5 Permit Review Criteria

Where projects are subject to individual permit application and review, the federal permit review centers around the Corps' "public interest" test and criteria found in the section 404(b)(1) guidelines established by EPA.

Under the "public interest review," the "decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the pro-

194. *Associated Wholesalers, Inc. v. DEP*, 1997 EHB 1174 (holding that issuance of a PASPGP-1 authorization by DEP for an activity covered by a chapter 105 permit waiver is an action of the DEP that may be appealed to the Environmental Hearing Board).

posed activity and its intended use on the public interest."[195] This test includes consideration of the relevant extent of public or private need for the proposed structure or work,[196] and the practicability of using reasonable locations and methods to accomplish project purposes.[197] In applying this test, consideration by the Corps of socioeconomic impacts not closely related to changes in the physical environment is outside the scope of section 404 authority.[198]

EPA's section 404(b)(1) guidelines center upon the no practicable alternatives test. As a general rule:

> No discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.[199]

Like the state version of the test, practicability is judged based on whether the alternative is available and can be done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. In applying these factors, the agency must consider not only alternatives that may have lesser environmental impacts, but also "must take into account the objectives of the applicant's project."[200] Also, like the state rules, the federal rules incorporate a "water dependency" test, which creates the presumption of a practicable alternative if a project "does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose."[201]

Finally, the section 404(b)(1) guidelines require that appropriate and practicable steps be taken to minimize potential adverse impacts on the aquatic ecosystem.[202] Among those steps is mitigation, through the creation of replacement wetlands to compensate for lost habitat and other functions.

It is important to note that the Corps' issuance of section 404 permits is also subject to the requirements of NEPA,[203] and thus the Corps' evaluations are guided by both the section 404(b)(1) guidelines and NEPA procedures with respect to environmental assessments and environmental impact statements.[204]

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195. 33 CFR 320.4(a). See *Water Works & Sewer Bd. v. U.S. Army Corps of Eng'rs*, 983 F.Supp. 1052 (N.D. Ala. 1997), aff'd, 162 F.3d 98 (11th Cir. 1998), cert. denied, 528 U.S. 951 (1999) (discussing at length and upholding application of the Corps' public interest review criteria). In *Water Works*, the court found that the Corps was not required to hold a public hearing in assessing public interest factors; that the Corps' consideration of needs and alternatives was adequate; and that the Corps was not required to conduct a broad economics analysis.

196. 33 CFR 320.4(a)(2)(i).

197. 33 CFR 320.4(a)(2)(ii).

198. *Mall Props., Inc. v. Marsh*, 672 F.Supp. 561 (D. Mass. 1987).

199. 40 CFR 230.10(a).

200. *Friends of the Earth v. Hintz*, 800 F.2d 822 (9th Cir. 1986); *Louisiana Wildlife Fed'n, Inc. v. York*, 603 F.Supp. 518 (W.D. La. 1984), aff'd in part and vac. in part, 761 F.2d 1044 (5th Cir. 1985).

201. 40 CFR 230.10(a)(3).

202. 40 CFR 230.10(d).

203. 42 U.S.C. §§ 4321–4370e.

204. In implementing its NEPA obligations, the Corps may render a Finding of No Significant Impact after an environmental assessment, avoiding the need for a full-blown EIS; and that finding will generally receive substantial deference by the courts. See *Sierra Club v. Slater*, 120 F.3d 623 (6th Cir. 1997); *Sierra Club v. U.S. Army Corps of Eng'rs*, 935 F.Supp. 1556 (S.D. Ala. 1996).

6-5.6
EPA Veto Authority

While the Corps maintains lead responsibility for issuance of federal permits under section 404 of the Clean Water Act, EPA retains what is frequently referred to as a "veto" authority pursuant to section 404(c). That subsection authorizes EPA to "prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site," whenever EPA determines "that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas."[205]

EPA has exercised this veto authority sparingly, and limited case law has discussed the parameters of EPA's use of this power. In early 2009, the United States District Court for the District of Columbia, however, addressed a challenge brought by environmental group plaintiffs claiming that EPA acted in an arbitrary and capricious manner by *not* exercising a veto to preclude issuance of a permit for a reservoir project. In *Alliance to Save the Mattaponi v. U.S. Army Corps of Engineers*,[206] a team of environmental and Indian tribe organizations sought to overturn permits issued for the City of Newport News's proposed Cohoke Creek reservoir and associated water withdrawal facilities. EPA had found that the proposed project "would represent the largest single permitted wetland loss in the Mid-Atlantic region in the history of the Clean Water Act Section 404 program,"[207] but nevertheless did not use its section 404(c) power to veto the project. The district court noted that EPA's decision to forego vetoing the permit was subject to review, and enunciated the standard as one requiring a judgment as to whether the agency's exercise of discretion over the proposed "discharge will have an unacceptable adverse effect."[208] The court found that the EPA regional administrator's decision to forego a veto was not based on a determination that the permit would not likely have unacceptable adverse effects, but rather on reasons "completely divorced from the statutory text," such as the adequacy of the Corps' extensive public involvement process and the water supply shortfall that needed to be addressed.[209] The district court granted summary judgment on the claim that EPA had failed to apply the proper considerations in failing to veto the permit.

The *Mattaponi* decision appeared to signal a new level of scrutiny and EPA involvement in section 404 permit decisions to create yet another potential hurdle for permittees, particularly those involved in large or controversial projects. In fact, months after the *Mattaponi* decision, EPA used its veto power to essentially strip a mountaintop removal project of its existing Corps permit—an unprecedented action that was initially rejected by the United States District Court for the District of Columbia, but was ultimately upheld by the United States Court of Appeals for the D.C. Circuit in *Mingo Logan Coal Co. v. EPA*.[210] In *Mingo Logan*, the Corps issued a section 404 permit for a mountaintop removal mine in West Virginia and, about two years later, EPA asked the Corps to use its authority to suspend,

205. 33 U.S.C. § 1344(c).

206. *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, 606 F.Supp.2d 121 (D.D.C. 2009).

207. Id. at 126.

208. Id. at 140, citing to earlier decision in same case, 515 F.Supp.2d 1, 8–9 (D.D.C. 2007).

209. Id.

210. *Mingo Logan Coal Co. v. EPA*, 714 F.3d 608, 612–16 (D.C. Cir. 2013), cert. denied, 134 S. Ct. 1540 (2014).

modify, or revoke it, citing new information that demonstrated water quality impacts downstream from the project.[211] When the Corps rejected EPA's request, EPA finalized a determination, almost four years after the permit was issued, to withdraw the Corps' "specifications" of disposal sites in certain streams that comprised approximately 88 percent of the permit's discharge authorization.[212]

The district judge held that EPA lacked the statutory authority to withdraw the specifications after the permit was issued, finding that EPA's action failed each step of the *Chevron* statutory interpretation analysis.[213] Under the first step of the *Chevron* analysis, the judge held that, when considering the CWA as a whole, the statute does not give EPA the authority to withdraw existing permits *after* issuance, but merely gives EPA the authority to withdraw a *specification* beforehand.[214] According to the district judge, EPA's actions revoked the entire permit, not merely a specification.[215] The judge reasoned that section 404 provides permittees with compliance assurance and, as the judge stated, the notion that a permit "will simply evaporate upon EPA's say-so is at odds with the exclusive permitting authority accorded the Corps in section 404(a) and the legal protection Congress declared that a permit would provide in section 404(p)."[216] With regard to *Chevron* step two, the judge found that, even assuming the statutory language was ambiguous, EPA's interpretation was not reasonable, primarily because of the lack of certainty and finality it would infuse into a section 404 permit.[217]

On appeal, however, the D.C. Circuit reversed, holding pursuant to step one of *Chevron* that section 404(c) unambiguously gives EPA the statutory authority to withdraw disposal-site specifications after permit issuance.[218] The court reasoned that section 404(c) contains no temporal limit, "but instead expressly empowers [EPA] to prohibit, restrict or withdraw the specification '*whenever*' [EPA] makes a determination that the statutory 'unacceptable adverse effect' will result."[219] The court further reasoned that the term "withdraw" supports this retrospective application because EPA can only "withdraw" a specification if it has already been made.[220] The court found this construction supported by the fact that the Corps did not make the specifications for the final disposal sites until the permit itself was issued (which is the Corps' typical practice).[221]

While the Corps is primarily responsible for issuing section 404 permits, the *Mingo Logan* case holds that EPA can effectively override the Corps' decision to issue a permit by

211. *Mingo Logan Coal Co. v. EPA,* 850 F.Supp.2d 133 (D.D.C. 2012), rev'd by, rem'd by, 714 F.3d 608 (D.C. Cir. 2013). Although EPA had participated in the comment process, the agency wrote the Corps to persuade it to reconsider the approval in light of new data. Id.

212. Id.

213. Id. at 138–53.

214. Id. at 138–48.

215. See id.

216. Id. at 144.

217. Id. at 151–53.

218. 714 F.3d at 612–16.

219. Id. at 613.

220. Id.

221. Id. at 613–14.

withdrawing a disposal-site specification when there are "unacceptable adverse effects."[222] When a specification in a permit is withdrawn, however, "the permit itself remains otherwise in effect to the extent it is usable"—for example, where other specifications in the permit have not been withdrawn.[223]

Following its victory before the D.C. Circuit, EPA proposed to use its veto authority to block a controversial copper mining project near Alaska's Bristol Bay, spawning new legal challenge. On February 28, 2014, prior to the submittal of a section 404 permit application, EPA Region 10 issued a letter expressing its intent to review the project's potential adverse environmental effects on the Bristol Bay watershed.[224] Shortly thereafter, the project sponsor filed a complaint in the United States District Court for the District of Alaska alleging that EPA exceeded the scope of its authority under section 404 by deciding to conduct a veto proceeding *before* a permit application was filed with the Corps.[225] In July 2014, EPA released for public comment its proposed determination to restrict the use of certain waters in the Bristol Bay watershed for disposal of dredged or fill material associated with the project.[226] On September 26, 2014, the district court dismissed the project sponsor's legal challenge as premature because EPA had not yet issued a final veto decision.[227] However, two months later, the same court preliminarily enjoined EPA from taking any further action to veto the contemplated mine project until the court rules on the merits of a second legal challenge initiated by the project sponsor.[228] As of the date of this publication, the second court challenge, which alleges violations of the Federal Advisory Committee Act, is still pending, and EPA has not yet released a final determination. As this case shows, the scope of EPA's veto authority continues to be a contentious topic whenever it is employed.

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222. Id. at 615. In another recent case endorsing a broad conception of EPA's authority under section 404, the D.C. Circuit rejected a challenge to the Corps' and EPA's "enhanced coordination process" for screening and evaluating section 404 permit applications. *National Mining Ass'n v. McCarthy*, 758 F.3d 243 (D.C. Cir. 2014). The coordination process called for EPA to screen certain applications for compliance with EPA's section 404(b)(1) guidelines, and if necessary, to initiate enhanced, coordinated review of the application with the Corps and the permit applicant. The court below had initially held that this process would intrude on the Corps' sole permitting authority while expanding EPA's "clearly defined supporting role" beyond its limits. *National Mining Ass'n v. Jackson*, 816 F.Supp.2d 37, 44–45 (D.D.C. 2011) ("if a responsibility involving the permitting process has not been delegated to the EPA by Congress, that function is vested in the Corps as the permitting authority"). The D.C. Circuit disagreed, holding that the CWA neither explicitly nor implicitly forbade this kind of interagency coordination, which the court characterized as "commonplace and often desirable." 758 F.3d at 249. Furthermore, the court indicated that restrictions on executive agency coordination "would raise significant constitutional concerns" because "[u]nder Article II of the Constitution, departments and agencies in the Executive Branch are subordinate to one President and may consult and coordinate to implement the laws passed by Congress." Id.

223. 714 F.3d at 615.

224. Letter from Dennis J. McLerran, Regional Administrator, EPA Region 10, to Pebble Limited Partnership, Alaska Department of Natural Resources, and U.S. Army Corps of Engineers (February 28, 2014), available at http://www2.epa.gov/sites/production/files/2014-02/documents/bristol-bay-15day-letter-2-28-2014.pdf.

225. Complaint, *Pebble Ltd. P'ship v. EPA*, No. 3:14-cv-0097-HRH (D. Alaska May 21, 2014).

226. See 79 FR 42314; *Proposed Determination of the U.S. Environmental Protection Agency Region 10 Pursuant to Section 404(c) of the Clean Water Act: Pebble Deposit Area, Southwest Alaska* (July 2014), available at http://www2.epa.gov/sites/production/files/2014-07/documents/pebble_pd_071714_final.pdf.

227. Order, *Pebble Ltd. P'ship v. EPA*, No. 3:14-cv-0097-HRH (D. Alaska September 26, 2014).

228. Order, *Pebble Ltd. P'ship v. EPA*, No. 3:14-cv-0171-HRH (D. Alaska November 25, 2014).

6-6
THE PERMIT REVIEW PROCESS

An application to both the DEP and Corps of Engineers is initiated by filling out and submitting a Joint Permit Application form—a form that has been adopted by both DEP and the Corps. The form consists of several modules and checklists, requiring additional information to be attached as appropriate for different types of projects. The form was most recently updated in June 2011 for consistency with PASPGP-4.

The DEP Regional Office distributes copies of the application materials as appropriate to the Corps and the Pennsylvania Fish and Boat Commission, and then initially reviews the application to determine whether the materials are complete. (As noted above, many projects will be covered under the Programmatic General Permit PASPGP-4, and only some such projects will need to be forwarded to the Corps district office for review and determination as to whether an individual permit is required.) If the application is incomplete, the applicant will be advised of the additional information required.

Relatively complex or controversial wetland projects may be referred to an interagency Environmental Review Committee (ERC). The ERC, which meets periodically, consists of representatives from DEP, the Corps, EPA Region III, Pennsylvania Fish and Boat Commission, Pennsylvania Game Commission, and U.S. Fish and Wildlife Service. At one time, most wetland projects subject to individual permit applications were reviewed at ERC meetings. Since devolution of the permitting program to the DEP regional offices, relatively few applications are addressed at formal ERC meetings, although frequently ad hoc comments and consultations occur between the agencies. In order to avoid a multitude of ad hoc comments and responses, project sponsors may request that their project be the subject of an ERC session so that all agencies can get their issues out on the table at one time.

The involvement of these myriad agencies is built around a complex set of interagency arrangements, in large part dictated by Congress. Section 404 sets up a dual agency administrative scheme, with authority shared by the Corps and EPA. In addition, the Fish and Wildlife Coordination Act requires consultation with the state and federal fish and wildlife agencies; and the Pennsylvania Game Code gives the game commission certain enforcement authorities under the Dam Safety and Encroachments Act for wetland violations.

Where a project is referred to the ERC for comment, after consideration of the application by the ERC (a process that may involve several monthly meetings) the ERC makes its recommendations to DEP and the Corps. DEP at this point has the final decision on whether to issue the state permit, and the Corps will exercise its authority through either the PASPGP-3 process or an individual federal permit. However, under section 404(c), EPA may veto or restrict individual permits approved by the Corps.[229]

229. See *James City County v. EPA*, 12 F.3d 1330 (4th Cir. 1993), cert. denied, 513 U.S. 823 (1994) (discussing relationship between Corps permitting authority and EPA veto powers); *Alameda Water & Sanitation Dist. v. Reilly,* 930 F.Supp. 486 (D. Colo. 1996) (standard for court review of a 404(c) veto is an arbitrary and capricious standard; and EPA may review water quantity impacts as well as water quality impacts under *PUD No. 1 of Jefferson County*). See also *Cascade Conservation League v. M.A. Segale, Inc.*, 921 F.Supp. 692 (W.D. Wash. 1996) (holding that EPA's failure to review a Corps decision is not reviewable under the APA because such was within EPA's discretion).

6-7
ENFORCEMENT PROCEDURES

Both the federal and state regulatory agencies are taking an increasingly aggressive enforcement posture concerning unauthorized encroachments into wetlands. As highlighted by well-publicized cases such as the *Pozsgai* prosecution,[230] the federal and state agencies have available a vast array of enforcement tools—including administrative orders, civil penalties, injunctive actions, and criminal prosecutions.

At the federal level, compliance procedures are usually initiated by either a violation notice or cease and desist order, issued after a field observation of the site by a federal inspector. It should be noted that the Corps has entered into a Memorandum of Understanding with the Fish and Wildlife Service, authorizing Fish and Wildlife Service field personnel to undertake certain enforcement actions as agents for the Corps. A Fish and Wildlife Service order would be treated as a Corps order for these purposes.

Similarly, at the state level, enforcement actions usually are preceded by issuance of a notice of violation that provides the landowner with information on what must be done to correct the intrusion.

A typical cease and desist order requires that the alleged violator cease filling or construction in wetlands. This is usually followed by a request that the landowner submit a restoration plan for removing unauthorized fill, where possible, and a mitigation plan for replacing those wetlands that cannot be restored (for example, wetlands under constructed homes that have been sold to other parties).[231] Such orders are generally not appealable under the APA or Clean Water Act; challenges must await commencement of an enforcement proceeding.[232]

A variety of sanctions are available to the Corps and EPA to enforce compliance with section 404 requirements. The Clean Water Act gives EPA and the Corps the right to issue administrative compliance orders,[233] followed by a civil action to enforce that order,[234] or to proceed directly with the commencement of an enforcement action.[235] In an enforcement action before the federal district court, the court may issue an injunction to require compliance, and may impose civil penalties of up to $37,500 per day for each violation of the act, of a permit, or of a compliance order.[236] EPA and the Corps may also impose administrative penalties of up to $37,500 without a formal hearing, or up to $187,500 with a formal hearing

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230. *United States v. Pozsgai,* 757 F.Supp. 21 (E.D. Pa. 1991), sentence aff'd in part, rev'd in part, 947 F.2d 938 (3d Cir. 1991) (upon conviction of 40 counts of violating the Clean Water Act, defendant sentenced to 3 years of imprisonment and $200,000 fine. Imposition of the fine remanded for consideration of defendant's ability to pay, and ultimately reduced to $5,000). For related civil enforcement action, see *United States v. Pozsgai,* 999 F.2d 719 (3d Cir. 1993), cert denied, 510 U.S. 1110 (1994) (injunction and contempt citation upheld), on remand, Civil Action No. 88-6545 (E.D. Pa. March 8, 2007) (finding that, using Justice Kennedy's significant nexus test, *Rapanos* does not prevent finding of contempt).

231. See, e.g., *United States v. Brink,* 795 F.Supp.2d 565 (S.D. Tex. 2011) (ordering compliance with Corps' order to remove dam); *Sabot v. DEP,* 2008 EHB 500 (affirming DEP's order for restoration), aff'd, No. 456 C.D. 2009 (Pa.Cmwlth. January 13, 2010) (unpublished opinion).

232. *Leslie Salt Co. v. United States,* 789 F.Supp. 1030 (N.D. Cal. 1991); *Mulberry Hills Dev. Corp. v. United States,* 772 F.Supp. 1553 (D. Md. 1991); *Route 26 Land Dev. Ass'n v. United States,* 753 F.Supp. 532 (D. Del. 1990), aff'd, 961 F.2d 1568 (3d Cir. 1992); *Fiscella & Fiscella v. United States,* 717 F.Supp. 1143 (E.D. Va. 1989).

233. 33 U.S.C. §§ 1319(a)(5)(A), 1344(s)(1).

234. Id. §§ 1319(b), 1344(s)(3).

235. Id. § 1319(b). *Southern Pines Assocs. v. United States,* 912 F.2d 713, 715 (4th Cir. 1990).

236. 33 U.S.C. §§ 1319(d), 1344(s)(4); 78 FR 66643, at 66647.

of record,[237] considering such factors as the nature, circumstances, extent and gravity of the violation, prior violation, history, degree of culpability, and economic benefits or savings resulting from the violation. Where provoked, the federal agencies have available criminal sanctions under the Clean Water Act.[238]

Under these enforcement authorities, EPA and the Corps frequently negotiate and enter into consent orders or decrees, requiring corrective actions with stipulated penalties for noncompliance. Failure to abide by such settlement arrangements can result in very severe consequences.[239]

The state enforcement tools parallel those available at the federal level. DEP may invoke enforcement remedies under the Dam Safety and Encroachments Act, the Clean Streams Law, or (as is usually the case) both statutes. The Dam Safety and Encroachments Act provides for administrative enforcement orders,[240] civil proceedings for injunctive relief,[241] criminal prosecutions,[242] and civil penalties of up to $10,000 plus $500 per day,[243] to be assessed in a proceeding before the EHB.

In the resolution of cases involving unpermitted filling of wetlands, a good deal of confusion has arisen regarding the effectiveness of after-the-fact permits. On the one hand, Nationwide General Permit 32 provides approval for fill remaining in place in compliance with the terms of a final federal court decision, decree, or settlement agreement. However, the preamble to the federal rules notes that this general permit is not applicable to nonjudicial agreements (those that are not entered as a consent order in federal court).[244] Thus, for those cases that are handled or settled through administrative enforcement procedures, and not lodged in court, either the activity must qualify for another of the nationwide permits, or must proceed to obtain an individual after-the-fact permit (which may be very difficult to obtain).

The state process is essentially the same, although with greater emphasis on the use of administrative consent orders and agreements. DEP still requires that for encroachments to remain in place, an after-the-fact permit application be processed. It is DEP's starting position that such a permit will not be granted unless the project satisfies the permit review criteria in section 105.18. However, section 105.21 provides that where a project has been constructed without a permit, and the project does not meet the requirements of the regulations, it might still be permitted under special circumstances. Specifically, a permit may be issued if:

- restoration of the wetlands would cause destruction of a dwelling occupied by a party who had no role in planning or construction of the project;
- restoration of the wetlands would cause more long-term damage than allowing the project to remain;

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237. 33 U.S.C. § 1319(g); 78 FR 66643, at 66647.

238. 33 U.S.C. § 1319(c). See *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997) (holding that 33 U.S.C. § 1319(c)(2)(A) "requires the government to prove the defendant's knowledge of *facts* meeting each essential element of the substantive offense, but need not prove that the defendant knew his conduct to be illegal" [citation omitted]).

239. See, e.g., *United States v. Krilich*, 126 F.3d 1035 (7th Cir. 1997) (upholding EPA enforcement of a consent decree requiring a developer to pay $1.3 million in stipulated penalties for failure to timely complete wetland restoration project).

240. 32 P.S. § 693.20.

241. Id. § 693.19.

242. Id. § 693.22.

243. Id. § 693.21.

244. 56 FR 59110, at 59128.

- restoration would not be successful;
- other extraordinary circumstances preclude restoration;

In all such cases, the state rules require that the wetlands be replaced (mitigated) on a 2:1 ratio.

Finally, note should be made of the citizen suit provisions under the Clean Water Act. Not only may the Corps and EPA bring enforcement actions under the Clean Water Act, section 505 of the act allows any citizen, after 60 days notice, to bring a citizen suit seeking injunctive relief and civil penalties for violations—including unauthorized discharge of fill in contravention of section 404.[245] Although most citizen suit actions under the act have been brought to enforce effluent limits imposed by NPDES permits, several citizen actions have been brought to stop developments allegedly encroaching on wetlands.

6-8
THE TAKINGS ISSUE

In charting the course through the wetland regulations, perhaps no more contentious issue exists than the question of "takings."

The Supreme Court long ago abandoned the notions found in *Mugler v. Kansas,*[246] that a lawful exercise of the state's police power to protect health, safety, and welfare could not constitute a "taking." Almost 90 years ago, the court in *Pennsylvania Coal Co. v. Mahon*[247] stated: "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Since 1922, the question has been, how far is "too far." Although it has been recognized since *Mahon* that there is such a thing as a "regulatory taking," the instances in which such a taking was found have been rare.[248] The court has generally relied on an ad hoc review of facts in each case, looking to three factors: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action.[249]

Until recently, in wetland regulation as in other fields of regulation, the courts have been reluctant to entertain any taking claim until a required permit has been applied for and denied. In *Riverside Bayview Homes, Inc. v. United States,*[250] the court noted the general rule that only when a permit is denied, and the effect of the denial is to prevent economically via-

245. 33 U.S.C. § 1365. Compliance with the statute's notice provisions is a mandatory prerequisite to bringing a citizen suit. *Center for Biological Diversity v. Marina Point Dev. Co.,* 566 F.3d 794 (9th Cir. 2009) (holding that a citizen group's compliance with the 60-day notice is a jurisdictional necessity, and absent such compliance, district courts lack jurisdiction to hear citizen suits claiming violation of section 404), citing *Hallstrom v. Tillamook County,* 493 U.S. 20 (1989).

246. *Mugler v. Kansas,* 123 U.S. 623 (1887).

247. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

248. See *Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725 (1997); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

249. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986), citing *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470 (1987).

250. *Riverside Bayview Homes, Inc. v. United States,* 474 U.S. 121 (1985).

ble use of the land, can it be said that a taking has occurred.[251] However, in the Supreme Court's June 2001 decision in *Palazzolo v. Rhode Island*,[252] a 5–4 majority of the court distinguished *Riverside Bayview Homes, Inc.* and other cases[253] finding that where wetland regulations are sufficiently unequivocal that it becomes clear that the agency lacks discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim may ripen.[254]

In a series of early wetland taking cases, landowners met with little success.[255] More recently, several well-publicized cases—*Florida Rock Industries v. United States*[256] and *Loveladies Harbor, Inc. v. United States*[257]—have indicated some greater sympathy for landowner claims. In its second of three *Florida Rock* decisions, the Federal Circuit observed that wetland cases involve several factors in weighing of private and public interest. While noting that "the preservation of wetlands bears a substantial relationship to the public welfare as perceived by the best lights of our time," the court in *Florida Rock* found the "pollution" or water quality impacts cited by the federal government to be temporary, and not deemed serious. Rather, the focus of agency concern was to "continue existence of the wetland, not the temporary and

251. See *Heck v. United States*, 134 F.3d 1468 (Fed. Cir. 1998) (holding that no taking claims can be recognized since the Corps did not deny a developer's permit but merely removed developer's application from consideration due to a failure to obtain a state water quality certificate under Clean Water Act section 401); but see *Bayou des Familles Dev. Corp. v. United States*, 130 F.3d 1034 (Fed. Cir. 1997) (after denial of permit, a regulatory takings claim accrued and must be brought within six-year statute of limitations; availability or exhaustion of administrative, judicial, or other potential remedies to overturn permit decision does not affect legal entitlement to bring takings claim); accord, *Cristina Inv. Corp. v. United States*, 40 Fed. Cl. 571 (1998), app. dismissed by 155 F.3d 570 (Fed. Cir. 1998).

252. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

253. See, e.g., *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

254. In *Palazzolo*, the property owner had submitted several applications for larger subdivisions that had been rejected by the state wetlands regulatory agency. Rejecting state arguments on appeal that he should have applied for a 74-lot subdivision and awaited determination of that application, the Supreme Court majority noted that its "ripeness decisions do not impose further obligations on petitioner, for the limitations the wetland regulations imposed were clear from the Council's denial of his applications, and there is no indication that any use involving any substantial structures or improvements would have been allowed. Where the state agency charged with enforcing a challenged land use regulation entertains an application from an owner and its denial of the application makes clear the extent of development permitted, and neither the agency nor a reviewing state court has cited non-compliance with reasonable state law exhaustion or prepermit processes … federal ripeness rules do not require the submission of further and futile applications with other agencies." 533 U.S. at 625–26 (citations omitted).

255. *Deltona v. United States*, 657 F.2d 1184 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982) (regulation leaving 80 percent of plaintiff's land for development not a taking); *Jentgen v. United States,* 657 F.2d 1210 (Ct. Cl. 1981) (regulation allowing plaintiff valuable use of 40 acres out of 80 acres not a taking), cert. denied, 455 U.S. 1017 (1982).

256. *Florida Rock Industries v. United States,* 8 Cl. Ct. 160, 22 ERC (BNA) 1943 (Ct. Cl. 1985), aff'd in part and vac. in part, 791 F.2d 893 (Fed. Cir. 1986), cert. denied, 479 U.S. 1053 (1987), decision on remand, 31 ERC (BNA) 1835 (Ct. Cl. 1990) (compensation of $1,029,000 awarded for permit denial preventing use of quarry property), rev'd, 18 F.3d 1560 (Fed. Cir. 1994), cert. denied, 513 U.S. 1109 (1995).

257. *Loveladies Harbor, Inc. v. United States,* 15 Cl. Ct. 381 (Ct. Cl. 1988), 31 ERC (BNA) 1847 (Cl. Ct. 1990) (award of $2,658,000 for denial of permit to develop remaining 51 acres of what was originally a 250-acre parcel), aff'd, 28 F.3d 1171 (Fed. Cir. 1995) (evidence supported conclusion that landowner had been deprived of all economically beneficial use of the land, and that building on wetlands did not constitute a nuisance under traditional state nuisance law).

moderate pollution incident to the occurrence of actual mining."[258] Responding to the government's arguments, the Federal Circuit concluded:

> Denial of the permit requires [plaintiff] to maintain at its own expense a facility, the wetlands, which by presently perceived wisdom operates for the public good, and benefits a large population who make no contribution to the expense of maintaining such facility. This appears to be a situation where the balancing of public and private interest reveals a private interest much more deserving of compensation for any loss actually incurred.[259]

The Supreme Court's decision in *Lucas v. South Carolina Coastal Council*[260] added further dimensions to the taking debate. In *Lucas,* the court set forth a new "categorical" rule rendering compensable any "total" taking. The court found that "where regulation denies all economically beneficial or productive use of land," a taking will be found without a case-specific inquiry into the public interest advanced in support of the regulation. This categorical rule is tempered by a narrow exception: even where all beneficial and productive use of the land is prevented, the regulation may be upheld and compensation will be denied if the prevented use constitutes a private or public nuisance under traditional common-law doctrines. The court, however, essentially shifted the burden to the state, noting that the state must "do more than proffer the legislature's declaration that the uses [the landowner] desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as sic utere tuo ut alienum non laedas."[261] In deciding *Lucas*, the court left open just what should be considered in determining whether there has been a deprivation of all, or virtually all, economic value of the property, and how to treat a governmental regulation that prevents development of a significant part, but not all of, what is or was once a large parcel of land.

Following issuance of *Lucas,* the Federal Circuit's subsequent decisions in *Florida Rock* and *Loveladies Harbor* underscore the continuing difficulty of determining when a taking has occurred. In *Loveladies Harbor*, the court found that the government's denial of a section 404 permit prevented all economically viable use of the last 12.5 acres of what had once been a 250-acre parcel. Applying the *Lucas* test, and observing that building in wetlands was not a traditional nuisance, the Federal Circuit upheld the lower court's judgment that compensation was due for a taking. In contrast, the third chapter of the *Florida Rock* saga presented the court with facts indicating that some significant value was left to the land, despite the Corps' denial of a permit to mine the property. In the absence of a "categorical taking" akin to that seen in *Lucas,* the Federal Circuit reversed the Court of Claims' award of compensation, and remanded for determination of whether a taking had occurred.[262] That determination is to be based on a "balancing" of factors. The Federal Circuit noted the need to consider both the loss of economic use to the property owner as a result of the regulatory imposition, and whether or not compensating benefits accrue to the property as a result of the regulatory scheme. Where the regulatory scheme provides "mutual benefits" to all property (as

258. 791 F.2d at 904.

259. Id.

260. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

261. "One should use one's own property in such a manner as not to injure that of another." Id. at 1058.

262. *Florida Rock Industries v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), cert. denied, 513 U.S. 1109 (1995). See *Broadwater Farms Joint Venture v. United States*, 121 F.3d 727 (Fed. Cir. 1997), reh'g denied, No. 96-5100 (3d Cir. October 14, 1997) (remanding to lower court to apply *Florida Rock* factors to determine whether a partial taking occurred).

assumed to result from traditional zoning), a taking is unlikely to be found. The court suggests a different balancing occurs, however, where the regulation imposes costs focused on a few in order to provide benefits to the community and society in general.

The Supreme Court's *Palazzolo* decision adds grist to the mill in terms of both what it decided, and did not decide. On the one hand, as noted above, the court found that the landowner's taking claim was ripe. It went on to reject the argument that the landowner's claim was barred because the landowner in question had purchased the property after adoption of the wetlands regulations that limited its use, stating:

> A regulation or common-law rule cannot be a background principle for some owners but not for others. The determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed.[263]

On the other hand, the court avoided deciding the thorny issue of what is the proper denominator in the takings fraction, that is, how to judge whether a particular regulation that affects development of part of a property so affects the value of the parcel as to constitute a taking.[264] In *Palazzolo*, the landowner had not challenged the state agency's contention and a trial court's finding that his parcel retained $200,000 in development value under the state's wetland regulations. The fact that the regulation permitted the landowner to build a substantial residence on an 18-acre parcel did not leave the property economically idle, thus precluding in the court's view any claim of total taking under *Lucas*.[265] But absent a total taking claim, the landowner was left, for consideration on remand, with a claim under the analysis prescribed in *Penn Central Transportation Co. v. New York City.*[266] As explained by the court:

> Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. . . . These inquiries are informed by the purpose of the Takings Clause, which is to prevent the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[267]

Unless there is a physical or categorical taking, courts will generally use the regulatory takings analysis set forth in *Penn Central* for claims arising from section 404 permits.[268]

More recently, the Court of Federal Claims addressed wetlands takings issues, including the appropriate denominator when the wetlands are part of a larger developed area. In *Lost Tree Village Corp. v. United States*,[269] a developer sought a section 404 permit to fill wetlands on a 4.99-acre parcel of land that appeared to be part of a larger development scheme,

263. 533 U.S. at 630.

264. Id. at 631.

265. Id. at 630–31.

266. *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978).

267. 533 U.S. at 617–18 (citations omitted).

268. See, e.g., *Mehaffy v. United States,* 499 Fed. Appx. 18, 22–23 (Fed. Cir. 2012), cert. denied, 134 S. Ct. 897 (2014) (holding that the landowner did not have reasonable, investment-backed expectations to develop property by filling wetlands without obtaining a section 404 permit).

269. *Lost Tree Vill. Corp. v. United States*, 92 Fed. Cl. 711 (2010).

but the Corps denied the application. There was no overall development plan, and the residential community had developed gradually since the 1960s until the 1990s. Throughout the 1990s, the developer ceased development operations and sold almost all remaining parcels, including plats 54 and 55.[270] Then, in 2004, the developer sought a section 404 permit to develop a new 4.99-acre tract, plat 57, but the Corps denied the application.[271] In 2010, the court first addressed the denominator issue on summary judgment to determine the appropriate amount of land subject to the takings analysis, explaining that the following factors are relevant:

> (1) the degree of contiguity, (2) the dates of acquisition, (3) the extent to which a common development scheme applied to the parcel, (4) the extent to which the parcel has been treated as a single economic unit, (5) the extent to which the regulated lands enhance the value of the remaining lands, and (6) the extent any earlier development had reached completion and closure.[272]

The court's analysis focused on factor number 6 regarding the temporal aspects of development. Citing to *Loveladies Harbor* and similar cases, the court explained that "the primary focus is on the economic reality of development and the relationship of the parcel subject to the regulatory action to the overall developmental pattern."[273] Accordingly, the court focused on whether, and at what point in time, the relevant parcel was "temporally severed from the preexisting pattern" of development. Although the stipulated facts showed that plat 57 was physically contiguous to the rest of the development, the record relating to the temporal break in development throughout the 1990s was insufficient for the court to decide the case on summary judgment.[274]

In August 2011, the court again addressed the denominator issue, this time on the merits, explaining that *Loveladies Harbor* and other cases stress the importance of the temporal element of development:

> [F]acts regarding the progression and status of development plus sale of potentially-related properties are aspects of property ownership that reflect manifestations of a property owner's use and projected use of property. If the particular circumstances and realities of usage indicate that temporal considerations are salient, then temporality has to be taken into account in determining the "parcel as a whole."[275]

When determining the relevant parcel, the court pointed to the lack of a single master plan for development and the intended usage of plat 57, which was not tied to the previous development of the entire community.[276] The court held that, under *Penn Central*, the relevant parcel for the takings analysis included plat 57, along with nearby land in plat 55 and other scattered wetlands in the community, all of which were owned by the developer at the time of the section 404 permit application for plat 57.[277] Under *Penn Central*, the character of the

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270. Id. at 716–21.

271. Id. at 716.

272. Id. at 718.

273. Id. at 719.

274. Id. at 721–22.

275. *Lost Tree Vill. Corp. v. United States*, 100 Fed. Cl. 412, 430 (2011), rev'd by, rem'd by, 707 F.3d 1286 (Fed. Cir. 2013).

276. 100 Fed. Cl. at 430–33.

277. Id. at 433–35.

government action weighed in favor of the developer because the Corps targeted it for adverse treatment when denying its permit.[278] However, the court did not find a compensable taking because the diminution in value of 58.4 percent was insufficient.[279]

On appeal, however, the Federal Circuit reversed, ruling that the Court of Federal Claims erred in its determination of the relevant parcel.[280] The Federal Circuit held that the relevant parcel for consideration under the *Penn Central* test should be the 4.99-acre plat 57 alone.[281] The court reasoned that "Lost Tree did not treat Plat 57 as part of the same economic unit as other land it developed into the John's Island community," but instead largely ignored it until at least seven years after the initial development was completed.[282] The court held that the Court of Federal Claims erred as a matter of law because Lost Tree treated plat 57 as a separate economic unit from the community, and "the mere fact that the properties are commonly owned and located in the same vicinity is an insufficient basis on which to find they constitute a single parcel for purposes of the takings analysis."[283] Accordingly, the court remanded the case to the Court of Federal Claims to determine the loss in economic value to plat 57 that resulted from the permit denial and whether a compensable taking occurred.

On remand, the Court of Federal Claims found that plat 57 had incurred an estimated 99.4 percent diminution in value because of the Corps' permit denial (from $4,245,387.93 to $27,500), and held that this "constitutes a categorical taking under *Lucas*."[284] The $4,245,387.93 figure represented the "value of Plat 57 as permitted and ready for preparation for use as a site for a home," whereas the $27,500 figure was based on the "nominal value of Plat 57 without a permit."[285] "For completeness," the Court of Federal Claims also applied the *Penn Central* three-factor framework, reaching the same result.[286] The court affirmed its prior findings regarding the first two factors: (1) the character of the governmental action (which weighed against the government because the Corps had singled out Lost Tree for adverse treatment), and (2) Lost Tree's reasonable investment-backed expectations (which did not weigh in either party's favor).[287] With regard to the third factor—economic impact—the court found that the 99.4 percent diminution in value weighed "very strongly in Lost Tree's favor."[288] The result in *Lost Tree* further suggests that courts may be increasingly receptive to takings claims based on section 404 permit denials.

Likewise, a recent United States Supreme Court case, *Koontz v. St. Johns River Water Management District*,[289] illustrates that courts may entertain takings claims for wetlands permit conditions imposed by the government. A pair of United States Supreme Court cases, *Nollan v. California Coastal Commission*[290] and *Dolan v. City of Tigard*,[291] previously established

278. Id. at 437–39.

279. Id.

280. *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286 (Fed. Cir. 2013).

281. Id. at 1293–95.

282. Id. at 1293–94.

283. Id. at 1294.

284. *Lost Tree Vill. Corp. v. United States*, 115 Fed.Cl. 219, 231 (2014).

285. Id.

286. Id. at 232–33.

287. Id. at 232.

288. Id. at 233.

289. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

290. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

291. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

that "a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use."[292] *Koontz* addressed the separate but related questions of (1) whether a regulatory takings claim can be predicated on non-land-use "monetary exactions" demanded by the government as a condition for permit approval, and (2) whether a landowner can still bring a takings claim if the allegedly unconstitutional condition is never actually imposed because the landowner refuses to accept the government's proposal and the permit is denied.

In *Koontz*, a landowner submitted an application for a state permit to fill wetlands on a 3.7-acre section of his property. To mitigate environmental impacts of development, he offered to deed an 11-acre section of his land to the district for a conservation easement. The district thought this proposal was inadequate, and instead offered to approve the development only if he agreed either to (1) reduce the development to 1 acre and deed his remaining 13.9 acres to the district or (2) proceed with the 3.7-acre development, but convey a conservation easement to the district on his remaining property *and* also hire contractors to improve district-owned land miles away from his own land.[293] The landowner refused, and the permit was denied.[294]

In a 5–4 decision, the Supreme Court held that the district's demands for "'monetary exactions' must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*."[295] The Supreme Court acknowledged that "teasing out the difference between [permissible] taxes and [unconstitutional] takings is more difficult in theory than in practice," and refused to "decide at precisely what point a land-use permitting charge denominated by the government as a 'tax' becomes [an unconstitutional taking of property]."[296]

Furthermore, the Supreme Court held that the principles undergirding its decisions in *Nollan* and *Dolan* "do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so."[297] The court explained:

> Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. … [T]he impermissible denial of a governmental benefit is a constitutionally cognizable injury.[298]

The court was careful to note, however, that where a permit is denied and an "unconstitutionally extortionate … condition is never imposed," there is no Fifth Amendment "taking" and thus the proper remedy is not "just compensation."[299] Instead, "whether money damages are available is … a question of … the cause of action—whether state or federal—on which the landowner relies."[300] Because the landowner brought his claim pursuant to a

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292. 133 S. Ct. at 2592.
293. Id. at 2592–95.
294. Id. at 2593.
295. Id. at 2599.
296. Id. at 2601–02.
297. Id. at 2595.
298. Id. at 2596.
299. Id.
300. Id. at 2597.

state-law cause of action, the court did not "discuss what remedies might be available for a *Nollan/Dolan* unconstitutional conditions violation" and remanded the case to the Florida state courts.[301]

On remand, the Fifth District Court of Appeal of Florida, in a brief opinion and over a vigorous dissent, affirmed its original judgment in favor of the landowner.[302] The dissent argued that there was no remedy for the landowner under the relevant Florida state law, which only made damages available for "unreasonable exercise of the state's police power constituting a taking without just compensation."[303]

Koontz is somewhat different from the typical takings cases described above. It illustrates that a landowner may assert a takings claim where wetlands permit conditions require excessive mitigation as a condition to approval.[304]

At the state level in Pennsylvania, our own Supreme Court has not yet considered a wetland taking case—although sooner or later a challenge to a permit denial will surely result in a landowner inverse condemnation case.

The current status of Pennsylvania jurisprudence on the taking issue is far from clear. On the one hand, Pennsylvania state court decisions on regulatory takings continue to reflect notions that an agency engaged in proper exercise of the police power cannot effectuate a de facto taking.[305] State court decisions strongly suggest that if a regulatory decision goes too far, "it becomes the judicial duty to declare the given exercise of the police power invalid."[306] State cases have distinguished compensable and noncompensable regulatory "takings" based on the purposes of the regulation, and whether the regulation is sufficiently related to health, morals, safety, or general welfare to support exercise of "police power."[307]

After the Pennsylvania Supreme Court's November 1993 decision in *United Artists' Theater Circuit v. Philadelphia Historical Commission,*[308] upholding (after reargument) Philadelphia's ordinance to preserve historic buildings, one would hesitate to predict where the court may be headed on the overall taking issue.[309]

In one case, *Mock v. DER,* the EHB held that it had jurisdiction to entertain a taking claim by a disappointed permit applicant.[310] The EHB found that unless the regulation deprived the property owner of any reasonable use of the site, no taking could be found. The EHB supported its ruling with the argument that, because projects affecting streams have

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301. Id.

302. *St. Johns River Water Mgmt. Dist. v. Koontz*, No. 5D06-1116 (Fla. Dist. Ct. App. April 30, 2014).

303. Id. (citing Fla. Stat. § 373.617).

304. Where a landowner is seeking to use a property for wetland mitigation credits, instead of for development as in *Koontz*, a takings claim may be difficult to maintain. For example, the United States Court of Appeals for the Federal Circuit has held that the Corps' wetlands mitigation bank program is different from section 404 permitting under the takings analysis, and that the Corps' denial of a mitigation bank proposal does not implicate a cognizable property interest. *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1330–32 (Fed. Cir. 2012), cert. denied, 132 S. Ct. 2780 (2012).

305. See *Reilly v. DER,* 391 A.2d 56 (Pa.Cmwlth. 1978).

306. Id.

307. *Redevelopment Auth. v. Woodring,* 445 A.2d 724 (Pa. 1982).

308. *United Artists' Theater Circuit v. City of Philadelphia,* 635 A.2d 612 (Pa. 1993).

309. See *Park Home v. Williamsport*, 680 A.2d 835 (Pa. 1996) (holding that refusal of a permit to demolish a historic building was not a compensable taking under *United Artists' Theater Circuit* because property owners did not show that they were deprived of any profitable use).

310. *Mock v. DER,* 1992 EHB 537, aff'd, 623 A.2d 940 (Pa.Cmwlth. 1993), aff'd per curiam, 667 A.2d 212 (Pa. 1995), cert. denied, 517 U.S. 1216 (1996).

long been subject to regulation under the predecessor statutes to the Dam Safety and Encroachments Act, a landowner's investment-backed expectations must take into account that additional regulations may be imposed on riparian land. The EHB decided *Mock* before the Supreme Court's *Lucas* opinion, and the EHB's decision did not reflect the flavor of *Lucas* or recent Claims Court decisions. When the *Mock* case reached Commonwealth Court, however, the court's majority found that the circumstances did not fall within the categorical rule articulated in *Lucas,* or traditional taking analysis.[311] The court reasoned that unlike the situation in *Lucas,* DER's denial of a wetland disturbance permit did not bar all construction on the site, but only development of the commercial project sought by the Mocks.

A significant regulatory takings case that was litigated starting in the 1990s, *Machipongo Land & Coal Co. v. DER*, has had a significant impact on the law of regulatory takings in Pennsylvania.[312] In *Machipongo,* the coal owners claimed that they lost all of the value of their coal as a result of the issuance of a DER regulation that declared all of their coal land within the designated area as "unsuitable for mining," resulting in a taking of the coal owners' coal. In ruling against the Commonwealth's motion for summary judgment, the Commonwealth Court ruled that there are four relevant factors to be examined in a regulatory takings challenge: (1) whether the public interest requires regulatory interference with the property right, (2) whether the regulation is reasonably related to the goal, (3) whether the amount of property taken deprives an owner of all economically viable uses of the property, measured by what was taken (the numerator) against what was left (the denominator), and (4) whether the property owner's actions or proposed actions would constitute a nuisance.[313] Following a four-day bench trial in Pennsylvania Commonwealth Court in January 2000, Judge Dan Pellegrini ruled that the regulation effectuated a taking as to a portion of the coal owners' lands.[314] The Commonwealth Court did not address the issue of compensation. Instead, it explained that if any or all of the coal reserves were mineable, then the unsuitable for mining designation would be stricken. Following that logic, certain portions of the designation rule were stricken.[315] Judge Pellegrini ruled that the coal owners could now seek damages for a temporary taking of their coal "through the normal eminent domain process for a temporary taking."[316]

On appeal, the Pennsylvania Supreme Court reversed, in part.[317] In its extended discussion of the takings issue, the Supreme Court tackled some of the thorny questions in takings jurisprudence, including the "denominator problem" of defining what is the parcel against which the takings tests are to be applied. Specifically, the court addressed the key question of whether property would be considered divisible (in terms of extent or estates in land) when determining the extent and nature of the regulatory imposition, and whether other viable uses of the property remained. The Pennsylvania high court concluded that, despite the traditional state law differentiation in estates of land between surface and mineral rights, under the prevailing "property as a whole" view espoused by the United States

311. 623 A.2d at 941–42, 945–50.

312. *Machipongo Land & Coal Co. v. DER*, 624 A.2d 742 (1993) (*Machipongo I*); *Machipongo Land & Coal Co. v. DER*, 648 A.2d 767 (Pa. 1994) (*Machipongo II*); *Machipongo Land & Coal Co. v. DER*, 676 A.2d 199 (Pa. 1996) (*Machipongo III*); *Machipongo Land & Coal Co. v. DER*, 719 A.2d 19 (Pa.Cmwlth. 1998) (*Machipongo IV*).

313. 719 A.2d at 26.

314. *Machipongo Land & Coal Co. v. DER*, No. 248 M.D. 1992 (Adjudication and Decree Nisi, August 21, 2000), slip op. at 38.

315. Id., slip. op. at 37–38.

316. Id., slip op. at 38.

317. *Machipongo Land & Coal Co. v. DEP*, 799 A.2d 751 (Pa. 2002).

Supreme Court, the parcel could not be vertically segmented, and must be considered to include both surface and mineral rights. With respect to the horizontal extent of the property to be considered, the court adopted what it described as a "flexible approach, designed to account for factual nuances."[318] Under this flexible approach, the court stated that it would consider factors including the unity and contiguity of ownership; dates of acquisition; the extent to which the proposed parcel has been treated as a single unit; the extent to which the regulated holding benefits the unregulated holdings; the timing of transfers, if any, in light of the developing regulatory environment; the owner's investment-back expectations; and the landowner's plans for development.[319] The court remanded for a determination of those many factors. Further, it found that the Commonwealth Court had not proceeded with a complete evaluation under the traditional *Penn Central* takings analysis. That analysis, as reiterated by the court, requires a consideration of the economic impact of the regulation, the character of the governmental action, and whether health, safety, and morals would be promoted by prohibiting particular land uses—all to be weighed in determining whether the regulation was unduly oppressive and forced some persons alone to bear public burdens that, in all fairness and justice, should be borne by the public as whole.[320] Finally, the court held that the Commonwealth Court had incorrectly barred the Commonwealth from presenting evidence arguing that the proposed use of the property would constitute a public nuisance, indicating that the state should have an opportunity to prove whether the property owner's proposed activity (mining) would unreasonably interfere with the public's right to unpolluted water.[321]

Applying the *Machipongo* tests, the EHB confronted a takings claim arising from wetlands regulation in *Davailus v. DEP.*[322] The board rejected the claim asserted by landowners who, for years, had harvested peat from wetlands on their property, but whose permit application to continue such operations had been denied by DEP (a denial that had been previously upheld by the EHB). Although the harvesting of peat was found not to satisfy the permitting criteria of showing that the public benefits of the project would outweigh the harm, the EHB held that it did not constitute a public nuisance; therefore, a takings claim was not barred. Turning to the question of defining the affected property (the "denominator" issue), the board noted that Davailus had purchased one substantial parcel of land, that, although subdivided at the margins, had never been comprehensively subdivided. Given the history of ownership and use of the property, the board determined that it had to be considered as a unitary whole, rather than separate areas. Finding that the landowner was not deprived of all economic use of the land such as to invoke *Lucas,* the EHB's analysis of the *Penn Central/Machipongo* factors, the board concluded that, despite the significant impact of the peat mining permit denial, the landowner had failed to prove that the interference with his reasonable investment-backed expectations was unduly oppressive;[323] therefore, fairness and justice did not require the Commonwealth to pay the landowner for not destroying the remaining wetlands habitat on his property.[324]

318. Id. at 768, quoting *Loveladies Harbor, Inc. v. United States,* 28 F.3d 1171, 1181 (Fed.Cir. 1994).

319. Id. at 768–69.

320. Id. at 765, citing *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001).

321. Id. at 774–75.

322. *Davailus v. DEP,* 2003 EHB 101.

323. Id. at 151.

324. Id. at 155.

In discussing the taking issue, there is often a tendency—particularly by government counsel—to intermingle debate regarding the purposes of wetland regulation with the foundations of other environmental regulatory laws. It might be suggested, however, that the wetlands taking issue is somewhat unique in the spectrum of environmental programs. Many environmental laws, such as those dealing with hazardous waste, wastewater treatment, and air quality, reflect the imposition of governmental limits on activities that might (in the absence of such limitations) give rise to a nuisance. In essence, the regulations act as a check upon the activities of one landowner who may impose pollution or harm upon public health or the lands of others.

The rationale behind wetland regulation, to be sure, is founded on a belief that wetlands serve a significant public benefit. Wetlands provide wildlife habitat, serve as a natural filter to cleanse waters of sediment and nutrient pollutants, provide retention of floodwaters, and recharge groundwaters. What is different in the field of wetland regulation is that here the government seeks to impose restrictions on land use—not so much based on an argument that the landowner's development will cause pollution, damage to others, or a nuisance—but rather based upon a decision that the land in its natural condition provides public benefits that would be lost if the land is converted and put to other uses. From the landowner's perspective, it appears that the public is requiring that the land remain undeveloped so that the public at large can continue to enjoy the benefits provided by the land in its natural state. One of the themes in recent federal cases appears to be a concern regarding the purpose of the government regulation, compared to the sometimes harsh results imposed on the landowner where a permit is denied.

The bottom line on the taking issue is that, under certain circumstances, government regulation may go too far. For the individual landowner who, by virtue of a permit denial, is denied all viable use of a lot, a compensable taking may well be found someday by a federal or state court. On the other hand, the cases have been less sympathetic with respect to large landowners and land developers, who may be unable to develop some portions of their land, but are left with some viable areas to develop and use for residential, commercial, and other economic uses. And with respect to the purposes and overall impact of wetland rules, the jury is still out on defining just how far is too far.