Pace Environmental Law Review

Volume 26
Issue 1 *Winter 2009*

Article 3

1-1-2009

General Permits Under Section 404 of the Clean Water Act

Steven G. Davison

Follow this and additional works at: http://digitalcommons.pace.edu/pelr

Recommended Citation
Steven G. Davison, *General Permits Under Section 404 of the Clean Water Act*, 26 Pace Envtl. L. Rev. 35 (2009)
Available at: http://digitalcommons.pace.edu/pelr/vol26/iss1/3

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Environmental Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact cpittson@law.pace.edu.

ARTICLES

General Permits Under Section 404 of the Clean Water Act

STEVEN G. DAVISON*

I. INTRODUCTION

Because the United States Army Corps of Engineers ("Corps of Engineers" or "Corps") is authorizing, under section 404[1] of the Clean Water Act ("CWA"), increasingly large numbers of activities under nationwide, state and regional permits that result in the uncompensated filling of large amounts of protected, ecologically valuable wetlands, the Corps should be required by the United States Environmental Protection Agency ("EPA") to adopt more stringent standards governing the issuance of such general permits that authorize the filling of wetlands, in order to provide greater protection to the valuable ecosystem services provided by this nation's federally-protected wetlands and to ensure the attainment of the national goal of "No-Net Loss of Wetlands."[2]

Although a permit is required under section 404 of the Clean Water Act for an addition from a point source of dredged or fill material into navigable waters (which include wetlands adjacent to certain other navigable waters) by any person,[3] sections 404(e),

* Professor of Law, University of Baltimore School of Law; J.D., 1971, Yale Law School; B.S., 1968, Cornell University.

1. 33 U.S.C. § 1344 (2008).

2. The 1990 Memorandum of Agreement Between the EPA and the Dep't of the Army Concerning the Determination of Mitigation Under the Clean Water Act, 55 Fed. Reg. 9210 (Feb. 6, 1990) (hereinafter cited as "Memorandum of Agreement"), states that for the Nation's wetlands there should be a "goal of no net loss of values and functions." The Corps' section 404 regulatory program "can contribute to the attainment of that goal. . . [but does not] establish a no net loss policy for the Nation's wetlands." *Id.* Furthermore, the MOA provides this goal is one of "no overall net loss to wetlands," and that "no net loss of wetlands functions and values may not be achieved in each and every permit action." *Id.*

3. 33 U.S.C. § 1344 (2008).

(g) and (h)[4] of the CWA authorize the issuance, by the Corps and by states with delegated authority to issue section 404 permits, of general section 404 permits for such discharges, on a nationwide, regional or state basis, in addition to the issuance of standard individual permits and letters of permission for such discharges. Such general section 404 permits can be issued without compliance with the substantive criteria and individualized application and review processes that are required for section 404 individual permits. A large number of such section 404 general permits have been issued in recent years for a wide variety of activities, including "maintenance of existing permitted facilities, pier construction, shoreline stabilization, boat ramps, installation of underwater utilities, minor dredging, construction access activities, and cleanup of hazardous or toxic wastes."[5]

The Corps reports that in Fiscal Year ("FY") 2003 (the latest year for which the Corps has reported such data on its official web site) it authorized 35,317 activities under nationwide general permits and 43,486 activities under regional permits, while it issued only 4023 standard individual permits and 3040 individual letters of permission - so that general nationwide and regional permits constituted 88% of the Corps' permit decisions in FY 2003.[6] The number of activities authorized by Corps' regional permits in FY 2003 was an increase of 5,361 over the number authorized by Corps' regional permits issued in FY 2002, while the number of activities authorized by nationwide general permits, individual permits and letters of permission issued by the Corps in FY 2002 was approximately the same as the number in FY 2002.[7]

The Corps' issuance of both individual and general permits under section 404 are required to be in compliance with EPA's guidelines issued under section 404(b)(1)[8] of the CWA:

4. *Id.* §§ 1344(e), (g), (h).

5. Directorate of Civil Works, Army Corps of Engineers, Draft Environmental Assessment, Finding of No Significant Impact, and Regulatory Analysis for Proposed Compensatory Mitigation Regulation 12 (2006), *available at* http://www.usace.army.mil/cw/cecwo/reg/news/Draft_EA_Reg_Analysis.pdf (last visited Oct. 4, 2008)[hereinafter *Draft Environmental Assessment*].

6. *Id.* at 3; Directorate of Civil Works, Army Corps of Engineers, Regulatory Programs 2003 Webcharts, *available at* http://www.usace.army.mil/cw/cecwo/reg/2003webcharts.pdf (last visited Oct. 4, 2008). The Corps reports that only 299 CWA 404 permit applications were denied in FY 2003. *Id.*

7. *Id.*

8. 33 U.S.C. § 1344(b)(1) (2008).

> A fundamental precept of the Section 404(b)(1) Guidelines is that no discharge of dredged or fill material in waters of the U.S. may be permitted unless appropriate and practicable steps have been taken to minimize all adverse impacts associated with the discharge (40 CFR 230.10(d)). Specifically, the Section 404(b)(1) Guidelines establish a mitigation sequence, under which compensatory mitigation is required to offset wetland losses after all appropriate and practicable steps have been taken to first avoid and then minimize wetland impacts. Compliance with these mitigation sequencing requirements is an essential environmental safeguard to ensure that CWA objectives for the protection of wetlands are achieved. The Section 404 permit program relies on the use of compensatory mitigation to offset unavoidable wetland impacts by replacing lost wetland functions and values.[9]

In fact, however, many compensatory mitigation projects (which usually seek to restore or enhance the functions of existing wetlands (which may have been degraded in the past) or to create new wetlands, in order to compensate for the loss of wetlands filled or otherwise adversely affected under the authorization of a section 404 permit) are not completely successful, because of inappropriate siting, lack of requisite hydrology or improper maintenance or design (such as improper choice of plant species for a project).[10]

---

9. Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, 65 Fed. Reg. 66,914 (Nov. 7, 2000) [hereinafter Federal In-Lieu-Fees Guidance].

10. *See Draft Environmental Assessment*, *supra* note 5, at 22-26. The Corps' Draft Environmental Assessment reports that "many on-site compensatory mitigation projects fail or are surrounded by altered landscapes or developments that adversely affect the functionality and sustainability of those projects." *Id.* at 52. The Draft Environmental Assessment also points out that although some types of wetlands (such as freshwater marshes) can be restored or created in wetlands compensatory mitigation projects, other types of wetlands such as fens and bogs cannot be restored or created. *Id.* at 22 (summarizing COMMITTEE ON MITIGATING WETLAND LOSSES, NATIONAL RESEARCH COUNCIL, COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT (2001)). The Draft Environmental Assessment also reports that the National Research Council's 2001 report and other scientific studies have found that many wetlands compensatory mitigation projects are unsuccessful or only minimally successful, particularly because of inappropriate siting or inadequate hydrology. *Draft Environmental Assessment*, *supra* note 5, at 22-26 (citing COMMITTEE ON MITIGATING WETLAND LOSSES, NATIONAL RESEARCH COUNCIL, COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT (2001)). The Corps and EPA adopted new regulations in April 2008 governing Compensatory Mitigation for Losses of Aquatic Resources, 33 C.F.R. §§ 332.1-.8 (Corps' regulations), 40 C.F.R. §§ 230.91-.98 (EPA's

Furthermore, although EPA's present section 404(b)(1) guidelines require that activities authorized under a Corps' or a state's general section 404 permit have only minimal impacts upon the environment, the EPA's present guidelines do not require section 404 general permits issued by the Corps or by a state to limit the maximum amount of acres of federally protected wetlands that can be filled by an authorized individual activity or facility and also do not require compensatory mitigation for each authorized activity or facility that will fill or otherwise harm a federally protected wetland. Consequently, in FY 2003 (the latest year for which the Corps has reported such data) only 19% of verified activities authorized under the Corps' general permits were subject to compensatory mitigation requirements.[11]

EPA's present section 404(b)(1) guidelines also do not require a person to provide the Corps with advance pre-construction notification (PCN) of an activity the person plans to undertake in the future which will result in the filling of a federally protected wetland or other waters protected under the Clean Water Act, which the person believes is authorized by a general section 404 permit. The PCN requirement is a significant method for protecting federally protected wetlands because a PCN for a planned activity sought to be undertaken under the authorization of a general section 404 permit provides a Corps District Engineer the opportunity, after receiving the PCN, to determine if the activity will cause more than minimal harm to wetlands or other parts of the environment (even though the activity will comply with a general permit's general conditions designed to minimize harm to wetlands and other parts of the environment). If a District Engineer determines that an activity sought to be undertaken under the au-

regulations), which are discussed *infra* notes 106-128 and accompanying text [hereinafter *Compensatory Mitigation regulations*].

11. *Draft Environmental Assessment*, *supra* note 5, at v. The Corps reports that 51% of individual permits issued in FY 2003 required compensatory mitigation. *Id.* This data reflects the fact that "[e]ach activity authorized by a Corps permit is not required to contribute to the 'no overall net loss' goal for wetlands. For some activities authorized by Corps permits, compensatory mitigation may be infeasible, impractical, or accomplish only inconsequential reductions in impacts." *Id.* at 3. The Corps also reports that in FY 2003 approximately 21,413 acres of wetlands were impacted by projects involving discharges of dredged or fill material into waters of the United States, for which 43,550 acres of compensatory mitigation was required. *Id.* The Draft Environmental Assessment does not state whether all of these required acres of compensatory mitigation were established and maintained successfully. The most recent National Wetlands Inventory in 2000 found 144,136,800 acres of wetlands in the contiguous United States. *Id.*

thorization of a section 404 general permit will have more than minimal adverse environmental effects, the District Engineer can require that the activity comply with appropriate, site-specific compensatory mitigation requirements and other special conditions to minimize harm to wetlands and other parts of the environment, in order for the activity to be authorized to proceed under the authorization of the general permit; or can require the person seeking to undertake the activity to apply for and be issued an individual section 404 permit instead of proceeding under authorization of a section 404 general permit.

At present, the Corps' own general permit regulations, policies, and conditions only impose maximum acreage limits, compensatory mitigation requirements, and PCN requirements upon some of the activities authorized by the Corps' nationwide, state, and regional general section 404 permits. In addition, Michigan and New Jersey (the two states that have been delegated authority to issue section 404 general permits) do not require each activity authorized under the state's general permits to provide compensatory mitigation and PCN to the Corps or to the state and do not place maximum limits on the acreage of wetlands that can be filled by any individual activity or facility authorized by a state general permit.

Consequently, in many cases a person can fill in a federally protected wetland under the authorization of a section 404 general permit without the person having to give prior notice to the Corps or a state that the person will be engaging in an activity that will fill a federally protected wetland, without a public hearing, without any limit on the total amount of protected wetlands that are filled under a particular general permit, and without any requirement that compensatory mitigation be provided for wetlands authorized to be filled or otherwise harmed under a general permit.

The environmental organizations Sierra Club and Natural Resources Defense Council have expressed "legitimate concerns over abuse of the general permitting process. Left unchecked, expanding the use of Section 404(e) general permits beyond their statutory scope would gut the individual permitting process and allow the Corps to circumvent the notice and public hearing requirements of Section 404(a) [of the Clean Water Act]."[12]

12. Sierra Club v. U.S. Army Corps of Engineers, 508 F.3d 1332, 1336 (11th Cir. 2007).

General permits under section 404 of the Clean Water Act are preferred, however, by private property owners and developers because section 404 general permits allow them to obtain a needed section 404 permit more quickly and at less cost than they can obtain an individual CWA section 404 permit. "The average applicant for an individual permit spends 788 days and $271,596 in completing the process . . . [while] the average applicant for a nationwide [general] permit spends 313 days and $28,915—not counting costs of mitigation or design changes."[13]

Because the Corps' increasing use of state and regional section 404 general permits under the CWA, in addition to the Corps' numerous, broad nationwide section 404 general permits, may authorize many activities that fill or otherwise harm large amounts of federally-protected wetlands, without the loss of or harm to those wetlands being adequately compensated by the restoration, enhancement or creation of wetlands, this article proposes that the United States Environmental Protection Agency (EPA) should appropriately modify its guidelines[14] under section 404(b)(1)[15] of the Clean Water Act. The Corps and some states (which have been delegated the authority to issue section 404 permits) are required to follow section 404(b)(1) in issuing section 404 general permits authorizing discharges of dredged or fill material by specified activities and facilities. Specifically, this article proposes that EPA should amend its section 404(b)(1) guidelines to require (1) appropriate compensatory mitigation for any activity authorized by a section 404 general permit and (2) a one-half acre limit on the maximum amount of federally protected wetlands that a person can fill or otherwise harm under a Corps or state-issued section 404 nationwide, regional, or state general permit. These compensatory mitigation and maximum acreage limitations should prevent significant adverse cumulative effects that could result from many large activities filling in or otherwise harming more than one-half acre of wetlands per activity without adequate compensatory mitigation (through restoration or enhancement of existing degraded wetlands or creation of new wetlands), which would threaten achievement of the national goal of "no net loss of wetlands." In addition, in order to provide additional protection to federally protected wetlands, this article also proposes that EPA's

13. Rapanos v. United States, 547 U.S. 715, 126 S.Ct. 2208, 2214 (2006) (citation omitted) (Scalia, J, announcing the judgment of the Court).

14. 40 C.F.R. § 230.7.

15. 33 U.S.C. § 1344(b)(1).

section 404(b)(1) guidelines should be amended to provide that a person seeking to engage in any activity, which will add dredged or fill materials into a federally protected wetland or other waters of the United States protected under the Clean Water Act, under a section 404 nationwide, regional, or state general permit, shall be required to give pre-construction notice (PCN) of the proposed activity to the appropriate Corps District Office (which would be required to forward the PCN to EPA and to the appropriate administrative agency of the state where the activity will take place (unless state law already requires PCN or its equivalent to the state agency)). The required pre-construction notice, which should be provided at least thirty days prior to the undertaking of the activity, would provide the Corps with the opportunity to ensure that any activity authorized by a section 404 general permit is subject to necessary compensatory mitigation requirements and other special conditions designed to minimize harm to wetlands and other parts of the environment (either under a section 404 general permit or a section 404 individual permit).

Part II of this article analyzes the provisions of the Clean Water Act that require a person to have a permit in order to add any pollutants (including dredged or fill materials) from any point source into navigable waters of the United States and that subject a person who makes a discharge of a pollutant in violation of the Act to various civil and criminal penalties and to appropriate equitable relief (including a restoration order). This part of the article includes a discussion of a regulation of the Corps and decisions of the United States Supreme Court that have interpreted "navigable waters" under the Clean Water Act to include certain wetlands adjacent to certain rivers, lakes and streams. Part III of this article analyzes the authority of the Corps of Engineers to issue permits under section 404 of the Clean Water Act for the discharge of dredged or fill material into navigable waters. This part also includes discussion of regulations of the Corps and court decisions that define what practices and activities constitute the "discharge of dredged or fill material" for which a permit can be issued under section 404 of the Clean Water Act, and an overview of the substantive criteria and procedures governing the Corps' issuance of individual and general section 404 permits and the authority of EPA and states under the Clean Water Act to veto the issuance of section 404 individual and general permits. Part IV of this article analyzes the procedural requirements governing the Corps' issuance of general permits under section 404 of the Clean Water Act,

while Part V analyzes in depth the substantive criteria and standards governing the Corps' issuance of section 404 general permits. Part VI analyzes the criteria and standards governing the issuance of general section 404 permits by a state to which EPA has delegated authority to issue CWA section 404 individual and general permits. Part VII discusses specific nationwide general permits that the Corps has issued under section 404 of the Clean Water Act, while Part VIII discusses specific state programmatic section 404 general permits issued by the Corps and the states of Michigan and New Jersey and Part IX discusses regional section 404 general permits that the Corps' thirty-eight Districts in the United States have issued under section 404.

In Parts V-IX, this article finds that the EPA's section 404(b)(1) guidelines and the Corps section 404 regulations and section 404 general nationwide, regional, and state permits do not in all cases prohibit an activity authorized under a section 404 general permit that fills or otherwise harms more than one-half acre of wetlands under a section 404 general permit and do not require in all cases appropriate compensatory mitigation and pre-construction notification (PCN) for an activity authorized by a section 404 general permit that fills or otherwise harms any federally protected wetland. Consequently, this article concludes with its proposals that EPA's section 404(b)(1) guidelines, the Corps regulations under section 404, and the section 404 nationwide, state, and regional general permits issued by the Corps and the states of Michigan and New Jersey, should be amended to prohibit any activity under a section 404 general permit that would fill or otherwise harm more than one-half acre of federally-protected wetlands and to require appropriate compensatory mitigation and pre-construction notification to a Corps District Office for any activity authorized under a section 404 general permit which would fill or otherwise harm any amount of federally protected wetlands.

II. REGULATION OF POINT SOURCE DISCHARGERS UNDER SECTION 301 OF THE CLEAN WATER ACT

Section 301(a)[16] of the Clean Water Act (CWA) generally makes it unlawful for any person[17] to discharge any pollutant

16. 33 U.S.C. § 1311(a) (2006).

17. Section 502(5), *id.* at § 1362(5), of the Clean Water Act defines "person" to mean "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State or any interstate body." "State" is defined

(sections 502(16)[18] and 502(12)(A)[19] of the CWA define "discharge" to include any addition of any pollutant[20] to navigable waters[21] from any point source[22]). However, section 301(a) authorizes a dis-

by section 502(3), *id.* at § 1362(3), of the Clean Water Act to mean "a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Commonwealth of the North Mariana Islands, and the Trust Territory of the Pacific Islands," while "municipality" is defined by section 502(4), *id.* at § 1362(4), to mean "a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under [33 U.S.C. § 1288]."

18. *Id.* at § 1362(16). Section 502(16) of the CWA states that "[t]he term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." The terms "discharge of a pollutant" and "discharge of pollutants" are defined by section 502(12), *id.* at § 1362(12), to mean "(A) any addition of any pollutant to navigable waters from any point source, [and] (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." "Contiguous zone" is defined by the CWA to mean "the entire area established or to be established by the United States under article 24 of the Convention of Territorial Sea and the Contiguous Zone," *id.* at § 1362(9), and "ocean" is defined by the CWA to mean "any portion of the high seas and the contiguous zone." *Id.* at § 1362(10).

19. *Id.* at § 1362(12)(A). The text of section 502(12)(A) of the CWA is set forth *supra* note 18.

20. "Pollutant" is defined by section 502(6), *id.* at § 1362(6), of the CWA to mean "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radiological materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." This section provides, however, that "pollutant" does not mean "(A) 'sewage from vessels or a discharge incidental to the normal operation of the Armed Forces' within the meaning of [33 U.S.C. § 1322]; (B) water, gas, or other material which is injected into a well facilitate the production of oil or gas, or water derived in association with oil and gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources."

21. Section 502(7), *id.* at § 1362(7), defines "navigable waters" to mean "the waters of the United States, including the territorial seas," and section 502(8), *id.* at § 1362(8), defines "territorial seas" to mean "the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles." The definition of "navigable waters" and "waters of the United States" under the CWA is discussed *infra* notes 33-55 and accompanying text.

22. "Point source" is defined by section 502(14), *id.* at § 1362(14), of the CWA to mean "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation,, or vessel or other floating craft, from which pollutants are or may be discharged," except for "agricultural stormwater discharges and return flows from irrigated agriculture."

charge of a pollutant that is in compliance with specified sections of the CWA.[23] These specified sections of the Clean Water Act, which apply to any point source discharge of any pollutant into CWA navigable waters, include four provisions[24] that provide for EPA to promulgate effluent limitations and performance standards for existing, new, and modified point sources (to regulate the types and amounts of discharges of pollutants from point sources into either CWA navigable waters or into Publicly Owned Treatment Works). In addition, the sections specified in section 301(a) of the CWA also include three provisions (sections 318,[25] 402,[26] and 404[27] of the CWA) that authorize the issuance of permits to point sources discharging pollutants into CWA navigable waters. Section 318 authorizes EPA to issue a permit under section 402 of the Clean Water Act for discharges of pollutants associated with an approved aquaculture project,[28] while permits under section 404 (which are issued either by the Corps of Engineers or by a state with delegated permit-issuing authority) regulate discharges from point sources of dredged or fill material into navigable waters at specified disposal sites.[29] Permits under section 402

An "addition" of pollutants into waters of the United States subject to section 301(a) of the CWA can occur when a point source conveys or transfers pollutants, that originated elsewhere and were not generated by the point source, into CWA navigable waters, S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 105 (2004), as well as when a point source generates or creates pollutants and then adds them to CWA navigable waters. Steven G. Davison, *Defining "Addition" of a Pollutant into Navigable Waters From a Point Source Under the Clean Water Act: The Questions Answered — and Those Not Answered — by South Florida Water Management District v. Miccosukee Tribe of Indians*, 16 FORDHAM ENVTL. L. REV. 1, 39 (2004). However, an "addition" of pollutants into CWA navigable waters does not occur under section 301(a) of the CWA when a point source pumps water (containing pollutants) from one part of a navigable water body into another part of that same water body. *Miccosukee Tribe*, 541 U.S. at 109-110, 112. This latter holding is analyzed in 16 FORDHAM ENVTL. L. REV. at 41-57.

23. Section 301(a), *id.* at § 1311(a), states: "Except as in compliance with this section and [33 U.S.C. §§ 1312, 1316, 1317, 1328, 1342, and 1344], the discharge of any pollutant by any person shall be unlawful."

24. 33 U.S.C. §§ 1311, 1312, 1316, 1317.

25. *Id.* at § 1328.

26. *Id.* at § 1342.

27. *Id.* at § 1344.

28. *Id.* at § 1328(a).

29. *Id.* at § 1344(a). Section 301(a) of the Clean Water Act prohibits any discharge of a pollutant that is not permitted under section 318, 402 or 404. Hughey v. JMS Dev. Corp., 78 F.3d 1523, 1529 (11th Cir. 1996). Consequently, any unpermitted discharge of any measurable amount of pollutants violates section 301(a)'s "zero discharge" standard; no threshold or minimum amount of discharge, by weight, volume, or concentration, is required in order for section 301(a) to be violated. *Id. Hughey*, however, recognized an exception to section 301(a)'s "zero discharge" standard when:

(which are issued either by EPA or by a state with delegated permit-issuing authority) regulate all other discharges from point sources of pollutants not covered by sections 318 and 404.[30]

If EPA has promulgated a Clean Water Act effluent limitation or performance standard that is applicable to a particular point source discharging pollutants, EPA is required to issue a permit under section 402 for that source and the Corps of Engineers cannot issue a permit under section 404 for that point source, because pollutants and waste products that are subject to EPA effluent limitations or performance standards under the Clean Water Act cannot be regulated by the Corps as "fill material."[31]

Discharges and additions of pollutants into navigable waters from non-point sources (sometimes referred to as runoff of pollution) are not subject to the effluent limitations and permit requirements that section 301(a) of the CWA imposes upon point sources that discharge or add pollutants into navigable waters.[32]

Clean Water Act "navigable waters" (which the CWA defines to mean "waters of the United States"[33]) include wetlands adjacent to traditional navigable-in-fact interstate surface bodies of water (those rivers, lakes, streams and other surface bodies of "water which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce. . ., including all [tidal] waters which are subject to the ebb and flow of the tide."[34]). Clean

(1) compliance with the standard is factually impossible; (2) no permit for the type of discharge has been established; (3) there was good faith compliance with local pollution control requirements which were substantially similar to proposed state discharge standards; and, (4) only minimal amounts of pollutants were discharged. *Id.* at 1529. In order for section 301(a) to be violated, a discharge of pollutants does not have to cause either "significant alteration in water quality" or a net increase in the amount of pollutants being introduced into the body of water into which the discharge is made. Comm. To Save Mokelumne River v. E. Bay Mun. Util. Dist., 13 F.3d 305, 309 (9th Cir. 1993).

30. *Id.* at § 1342(a)(1).

31. Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers, 486 F.3d 638, 647, 649, 653 (9th Cir. 2007), *cert. gr.*, 128 S.Ct. 2995 (2008).

32. League of Wilderness Defenders/Blue Mountains Diversity Project v. Forsgren, 309 F.3d 1181, 1183 (9th Cir. 2002). Non-point sources of water pollution may be regulated by states under management programs adopted under section 319 of the CWA, 33 U.S.C. § 1329, or by total maximum daily load (TMDL) programs under section 303(d) of the CWA, *id.* at § 1313(d). *See* Oliver A. Houck, *TMDLs, Are We There Yet? The Long Road Toward Water Quality-Based Regulation Under the Clean Water Act*, 27 ENVTL. L. REP. (BNA) 10391 (Aug. 1997).

33. 33 U.S.C. § 1362(7); *See supra* note 21.

34. *Id.* at § 1344(g)(1). Such fresh bodies waters are considered navigable waters "shoreward to their ordinary high water mark, [while tidal waters are considered nav-

Water Act "navigable waters" include "wetlands adjacent [to such traditional navigable-in-fact interstate surface bodies of water]"[35] because section 404(g)(1)[36] of the Clean Water Act provides that states cannot be delegated authority to administer permit programs for the discharge of dredged or fill material into such traditional interstate navigable waters and "wetlands adjacent thereto." In 1985, in *United States v. Riverside Bayview Homes, Inc.*,[37] the Supreme Court unanimously held that the Corps of Engineers acted reasonably in interpreting the term "navigable waters" under the Clean Water Act to include wetlands adjacent to other bodies of water over which the Corps has jurisdiction under the Act. However, in 2001, a divided Court held, in *Solid Waste Agency of Northern Cook County [SWANCC] v. U.S. Army Corps of Engineers*,[38] that the Corps exceeded its jurisdiction under the Clean Water Act in classifying non-navigable, isolated, intrastate waters that "are or would be used as habitat" by migratory birds, as "navigable waters" under the Clean Water Act.

Justice Scalia, in his plurality opinion in *Rapanos v. United States*, noted that section 404(g)(1) of the Clean Water Act "shows that the [CWA's] term 'navigable waters' includes something more than traditional navigable waters," and indicated that "navigable waters" under the CWA probably includes not only traditional interstate navigable waters but also includes intrastate waters that are traditionally navigable and "relatively permanent, standing or flowing" tributary streams of traditionally navigable rivers, lakes and oceans that are "continuously present, fixed bodies of water" with a "continuous flow of water in a permanent channel."[39] In the

---

igable waters] shoreward to their mean high water mark, or mean higher high water mark on the west coast. . ." *Id.*

35. *Id.*

36. *Id.*

37. 474 U.S. 121 (1985).

38. 531 U.S. 159 (2001).

39. 547 U.S. 715, 731-33 (2006) (Scalia, J., announcing the judgment of the Court, in an opinion joined by three other Justices). Justice Scalia, therefore, does not consider intermittent or ephemeral streams ("ordinarily dry channels through which water occasionally or intermittently flows") to be "navigable waters" under the Clean Water Act, although he indicates that "*seasonal* rivers," which contain continuous flow during some months of the year but no flow during dry months—such as the 290-day, continuously flowing stream postulated by Justice Stevens' dissent, might be a "navigable waters" under the CWA. *Id.* at 733 n.5.

Justice Kennedy, in his concurring opinion in the *Rapanos* case, also found that section 404(g)(1) of the CWA "is explicit in extending the coverage of the Act to some nonnavigable waters" and "makes plain that at least some wetlands fall within the scope of the term 'navigable waters'." *Id.* at 768 (Kennedy, J., concurring). Justice

Rapanos case, however, a majority of the Justices of the United States Supreme Court (Justice Kennedy in his concurring opinion[40] and Justice Stevens in his dissenting opinion[41] (joined by three other Justices)) indicated that they consider intermittent tributary streams to be "navigable waters" under the Clean Water Act.

The Corps' regulation[42] defining "navigable waters" for purposes of the Corps' permit program under section 404 of the CWA classifies not only traditional interstate navigable-in-fact waters bodies as CWA "navigable waters," but also lists, as CWA "navigable waters," intrastate water bodies whose use, degradation, or destruction could affect interstate or foreign commerce, non-navigable tributaries of navigable-in-fact interstate and intrastate navigable water bodies (including intermittent streams), and wetlands[43] adjacent to navigable-in-fact water bodies and their tributaries.[44] The Corps defines "adjacent" as "bordering, contiguous [to], or neighboring,"[45] and considers "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like [to be] 'adjacent wetlands'"[46] that are protected by section 301(a) of the CWA.

In the *Rapanos* case (in which there was no majority opinion), the Justices of the Supreme Court disagreed on how "adjacent" should be defined for purposes of delineating which wetlands are "adjacent wetlands" that are "navigable waters" subject to protection under the Clean Water Act. In his dissenting opinion in the *Rapanos* case[47] Justice Stevens (joined by three other Justices) expressed approval of the Corps' definition of "adjacent wetlands" under the Clean Water Act as applied to wetlands "adjacent" to

---

Stevens, in his dissenting opinion in *Rapanos* (that was joined by three other Justices), stated that section 404(g)(1) "includes 'adjacent wetlands' in its description of 'waters' and thus 'expressly stated that the term 'waters' included adjacent wetlands.'" *Id.* at 805 (Stevens, J., dissenting) (citing *Riverside Bayview*, 474 U.S. at 138).

40. *Id.* at 769-71 (Kennedy, J., concurring).

41. *Id.* at 779-804 (Stevens, J., dissenting).

42. 33 C.F.R. § 328.3 (2008).

43. The Corps and EPA define "wetlands" for purposes of the CWA as lands "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b) (Corps definition); 40 C.F.R. § 122.2 (2008) (EPA definition).

44. *Rapanos*, 547 U.S. at 724.

45. 33 C.F.R. § 328.3(c).

46. *Id.*

47. *Rapanos*, 547 U.S. at 787 (Stevens, J., dissenting).

traditionally navigable waters and tributaries of these waters.[48] However, Justice Scalia concluded in his plurality opinion in the *Rapanos* case (which was joined by three other Justices) that a wetland is protected under the Clean Water Act as an "adjacent wetland" only if a wetland has a continuous surface water connection to a relatively permanent, standing or continuously flowing body of water that is either a traditional interstate navigable-in-fact river, lake, or other water body or a tributary that is connected to a traditional interstate navigable water body.[49]

Justice Kennedy, in his concurring opinion in the *Rapanos* case (which a number of federal courts of appeals[50] have held to be the opinion that determines the holdings in the *Rapanos* case), concluded that the Corps' definition of "adjacent" should be followed with respect to wetlands adjacent to traditional navigable-in-fact waters.[51] However, Justice Kennedy, in his concurring opinion in the *Rapanos* case, concluded that in order for a wetland connected to or near a non-navigable tributary of a navigable-in-fact water body to be protected under the Clean Water Act as an "adjacent wetland," such a wetland must be found, on the basis of a case-by-case determination, to significantly affect, either alone or in combination with other similarly situated wetlands in the region, the chemical, physical and biological integrity of other covered navigable waters.[52]

Because there was no majority opinion in the *Rapanos* case, federal courts of appeal and district courts will have difficulty in some cases in determining whether a particular wetland, river, lake or stream is a "navigable water" protected by the Clean Water Act. Such determinations may require a court to decide whether holdings in the *Rapanos* case can be derived only by combining Justice Scalia's plurality opinion in *Rapanos* (which was joined by three other Justices) with Justice Kennedy's concurring opinion in *Rapanos*, or whether holdings in the *Rapanos* case can be derived by combining Justice Stevens' dissenting opinion in

48. *Id.* at 787-88, 792-94.

49. *Id.* at 732-43.

50. United States v. Johnson, 467 F.3d 56 (1st Cir. 2006); United States v. Gerke Excavating, Inc. 464 F.3d 723 (7th Cir. 2006); N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023 (9th Cir. 2006).

51. *Rapanos,* 547 U.S. at 779-83 (Kennedy, J., concurring).

52. *Id.* at 780-82.

Rapanos (which was joined by three other Justices) with Justice Kennedy's concurring opinion in *Rapanos*.[53]

On December 2, 2008, EPA and the Corps of Engineers issued a revised joint guidance for the Corps' field offices that interprets the *Rapanos* case as recognizing the following three classes of water bodies as "navigable waters" that are protected under the Clean Water Act:

> (1) Traditionally navigable waters, including all rivers and other waters that are large enough to be used by boats that transport commerce and any wetlands adjacent to such waters;
>
> (2) Non-navigable tributaries that are relatively permanent and wetlands that directly abut such tributaries; and,
>
> (3) Other tributaries and wetlands adjacent to those tributaries that are found, on the basis of case-by-case determinations, to have certain characteristics that cause them to significantly affect the water quality of traditionally navigable waters.[54]

The determination of which wetlands are protected under the Clean Water Act by the *Rapanos* case as "adjacent wetlands" is an important issue, because commercial and residential development activities in wetlands often involve the addition of dredged or fill materials into an area of land that is saturated or covered with water, to provide fast land suitable for construction of commercial or residential facilities. A conclusion that under the *Rapanos* case a particular area is an "adjacent wetland" protected under the Clean Water Act probably will mean that a permit under section 404 of the Clean Water Act is required if the activity in that area involves the discharge/addition by a point source of dredged or fill material. However, a determination that a particular area is an "adjacent wetland" protected under the Clean Water Act is often a difficult one because there was no majority opinion in the *Rapanos* case, and thus, there can be disagreement as to how the holdings

53. *See* United States v. Johnson, 467 F.3d 56 (1st Cir. 2006); United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006); N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023 (9th Cir. 2006).

54. EPA & ARMY CORPS OF ENGINEERS, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN *Rapanos v. United States* & *Carabell v. United States*, http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanos 120208.pdf (last visited Jan. 26, 2009).

in the *Rapanos* case should be interpreted in some particular factual situations.[55]

A determination that development activity in a particular area requires a permit under section 404 of the Clean Water Act is significant because "[a]n unpermitted discharge of 'any pollutant' into 'navigable waters' constitutes a violation of CWA § 301(a)."[56] Liability under section 301(a) is determined on a strict liability basis,[57] without regard for whether a violation was caused by an intentional act[58] or whether a person intended to comply or made a good-faith effort to do so.[59]

"A party that discharges without meeting the conditions of a general permit or obtaining an individual permit faces both civil and criminal enforcement actions."[60] A person who violates section 301(a) of the CWA by making an unpermitted discharge is subject to various sanctions (with the CWA drawing no distinctions between discharges requiring an individual section 404 permit and discharges requiring only a general section 404 permit), including judicially-imposed civil penalties,[61] administrative civil penalties imposed by the Administrator of the United States Environmental Protection Agency (EPA),[62] criminal penalties (which may include imprisonment as well as monetary fines),[63] administrative compliance orders issued by EPA,[64] and civil actions for appropriate relief (including injunctive relief)[65] (which can include an order requiring a person who has illegally discharged pollutants in violation of section 301(a) of the CWA to restore the waters where the illegal discharge occurred to its original condition).[66]

55. *See* United States v. Johnson, 467 F.3d 56 (1st Cir. 2006); United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006); N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023 (9th Cir. 2006).

56. Indus. Highway Corp. v. Danielson, 796 F. Supp. 121, 123 (D.N.J. 1997).

57. United States v. Gulf Park Water Co., 972 F. Supp. 1056, 1059 (S.D. Miss. 1997).

58. Greenfield Mills, Inc. v. O'Bannon, 189 F. Supp. 2d 893, 905 (N.D. Ind. 2002), *aff'd in part and rev'd in part on other grounds*, 361 F.3d 934 (7th Cir. 2004).

59. *Gulf Park Water Co.*, 972 F. Supp. at 1059.

60. Nat'l Ass'n of Home Builders v. U. S. Army Corps of Eng'rs, 417 F.3d 1272, 1276 (D.C. Cir. 2005).

61. *See* 33 U.S.C. §§ 1319(d), 1365(a).

62. *See id.* § 1319(g).

63. *See id.* § 1319(c).

64. *See id.* § 1319(a)(3).

65. *See id.* §§ 1319(b), 1365(a).

66. *See* United States v. Weisman, 489 F. Supp. 1331, 1342-43 (M.D. Fla. 1980) (Court can order restoration of wetlands filled in violation of section 404 of the Clean

III. PERMITS UNDER SECTION 404 OF THE CWA FOR POINT SOURCE DISCHARGES OF DREDGED OR FILL MATERIAL

Section 404(a)[67] of the CWA provides that the United States Army Corps of Engineers (acting under authority delegated by the Secretary of the Army) may issue permits (which can be either individual permits or general permits under section 404(e)[68]) for the discharge by a point source[69] of dredged[70] or fill material[71] into the navigable waters at specified disposal sites.[72] A section 404 permit is required only for the discharge of dredged or fill material from a point source into navigable waters and is not required for the drainage,[73] dredging, ditching, channelization or excavation of wetlands, or other navigable waters.[74]

Water Act after weighing the merits, demerits and alternatives to a proposed restoration plan and deciding that the selected restoration plan will "(1) confer maximum environmental benefits, (2) be achievable as a practical matter and, (3) bear an equitable relationship to the degree and kind of wrong it is intended to remedy.").

67. 33 U.S.C. § 1344(a) (2008).

68. Crutchfield v. County of Hanover, 325 F.3d 211, 214 (4th Cir. 2003).

69. Dump trucks, bulldozers, and other types of earth-moving equipment that dump dredged or fill material into CWA navigable waters are Clean Water Act point sources. *See* Avoyelles Sportsmen's League, Inc. v. Marsh, 772 F.2d 897, 920-25 (5th Cir. 1983).

70. "Dredged material" is defined as "material that is excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(c) (2008) (Corps definition); 40 C.F.R. § 232.2 (2008) (EPA definition).

71. "Fill material" is defined as any material (other than garbage or trash) "placed in waters of the United States where the material has the effect of replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1) (2008) (Corps definition); 40 C.F.R. § 232.2 (2008) (EPA definition). Waste products that are subject to EPA effluent limitations or performance standards under sections 301 or 306 of the Clean Water Act, however, cannot be regulated by the Corps under section 404 as "fill material" even if the waste products have the effect of raising the bottom elevation of a water body, because waste products that are subject to EPA effluent limitations or performance standards are to be regulated under the Clean Water Act only by EPA under section 402 permits. *See* Se. Alaska Conservation Council v. U.S. Army Corps of Eng's, 486 F.3d 638, 644, 647, 649, 652, 653 (9th Cir. 2007), *cert. gr.*, 128 S.Ct. 2995 (2008).

72. The Corps also issues individual letters of permission under CWA section 404, which are a type of section 404 permit issued through an abbreviated processing procedure when certain conditions are satisfied. *See* 33 C.F.R. § 325.2(e)(1).

73. United States v. Mango, 997 F. Supp. 264, 286 (N.D.N.Y. 1998).

74. A permit may be required under section 10 of the Rivers and Harbors Act (RHA), 33 U.S.C. § 403 (2008), for dredging, ditching, channelization or excavation of a wetland or other water body that is a "navigable water" under the RHA, although only traditional interstate navigable-in-fact water bodies are "navigable waters" under the RHA. *See* Hardy Salt Co. v. S. Pac. Transp. Co., 501 F.2d 1156, 1165-69 (10th Cir. 1974).

A Corps' regulation defines "discharge of dredged material" to mean "[a]ny addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States."[75] This rule requiring a section 404 permit for a redeposit of dredged material follows holdings by numerous courts that a section 404 permit is required for the deposit, of soil or vegetation dug up or excavated from the bottom of a water body or from a wetland, back to the same place or a nearby part of that same water body or wetland.[76]

As indicated above, Corps' regulations consider "incidental fallback" of material from dredging, ditching, channelization, or excavating, at the point of removal of the material (e.g., at the excavation or dredging site) not to be the "discharge of dredged or fill material" that requires a permit under section 404 of the Clean Water Act.[77] The Corps' determination under these regulations of whether a particular activity involves regulated re-deposit or exempted incidental fallback is made on a case-by-case basis, with the Corps' and EPA's defining "incidental fallback" as "the re-deposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal."[78] A court has held that this definition of "incidental fallback" violates the Clean Water Act by requiring incidental fallback to have a small volume and by failing to require that material be dropped a short period of time after its removal.[79] The court held that the determination of whether a discharge is exempted incidental fallback is required to be determined only upon the basis of the length of time that material is held before being dropped back to earth and by the distance between where the material is collected and where it is dropped, and that the volume of the material being handled is irrelevant in determining whether the material is incidental fallback.[80]

75. 33 C.F.R. § 323.2(d)(1) (2008).

76. These court holdings are cited and analyzed in Steven G. Davison, *supra* note 22, 16 FORDHAM ENVTL. L. REV. at 86-93.

77. 33 C.F.R. §§ 323.2(d)(1)(iii), (d)(3)(iii) (2008).

78. *Id.* § 323.2(d)(2)(ii) (Corps definition); 40 C.F.R. § 232.2(2)(ii) (2008) (EPA definition).

79. Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, No. 01-0274, 2007 U.S. Dist. LEXIS 6366 (D.D.C. Jan. 30, 2007), *appeal dismissed*, No. 07-5111, 2007 U.S. App. LEXIS 12375 (D.C. Cir. May 25, 2007).

80. *Id.* at *11-12.

The Corps also does not consider the clearing of trees and vegetation by cutting or removing them above ground (by mowing, rotary cutting or chain sawing) to be a discharge of dredged or fill material that requires a section 404 permit where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that re-deposit excavated soil material.[81]

The Corps, however, considers the use of mechanized earth-moving equipment for land clearing, ditching, channelization, and in-stream mining, and other mechanized excavation activities, in waters of the United States, to result in a discharge of dredged material, unless a person presents project-specific evidence to establish the contrary.[82] Under this rule, these types of activities using mechanized earth-moving equipment, therefore, presumptively require a permit under section 404 of the CWA because they involve re-deposit of dredged material and not just exempted incidental fallback. This rule has been held to violate the Clean Water Act by improperly shifting the burden of proof to a landowner or developer to establish that mechanized land-clearing or earth-moving activities do not discharge dredged materials into navigable waters.[83]

The Corps also does not require a section 404 permit for any incidental addition, including re-deposit, of dredged material associated with any activity that the Corps finds does not have or would not have the effect of destroying or degrading an area of waters of the United States.[84] An activity associated with a discharge of dredged material is considered by the Corps to degrade an area of waters of the United States if it has more than *de minimis* (i.e., inconsequential) effects on the area by causing an identifiable individual or cumulative adverse effect on any aquatic function.[85]

Except as provided by section 404(f)(2),[86] section 404(f)(1)[87] exempts the discharge of dredged or fill material from a number of specified farming, silviculture and ranching activities and from certain facility and road maintenance and construction activities,

81. 33 C.F.R. § 323.2(d)(3)(ii).
82. *Id.* § 323.2(d)(2)(i).
83. *Nat'l Ass'n of Home Builders*, 2007 U.S. Dist. LEXIS 6366. at *13-14.
84. 33 C.F.R. § 323.2(d)(4)(i).
85. *Id.* § 323.2(d)(6).
86. 33 U.S.C. § 1344(f)(2).
87. *Id.* § 1344(f)(1).

from regulation under sections 404, 301(a) and 402 of the Clean Water Act (except for effluent standards or prohibitions under section 307[88]). Section 404(f)(2) (referred to as a "recapture" provision) states that "[a]ny discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under . . . section [404]."

Subject to section 404(c)[89] of the CWA, the Corps is required to specify each such disposal site for each section 404 permit through the application of guidelines developed under section 404(b) of the CWA by the Administrator of the United States Environmental Protection Agency (EPA) in conjunction with the Corps. Section 404(b) requires that these "(1) . . . guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under [33 U.S.C. § 1343(c)], and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage."[90] EPA has promulgated guidelines[91] to comply with this directive under section 404(b)(1), which "set forth regulations regarding compliance, testing, evaluation, and minimization of adverse effects and contain a variety of criteria to be considered (including the potential impact on human use characteristics and physical, chemical, and biological characteristics of the aquatic ecosystem and special aquatic sites) to determine whether the benefits of proposed activities authorized by a permit outweigh the damage caused by those activities."[92]

The Corps' issuance of a section 404 permit is based not only upon EPA's section 404(b)(1) guidelines,[93] but also is based upon the Corps' public interest standard[94] that governs all permits issued by the Corps.[95] The Corps' public interest standard requires

88. *Id.* § 1317.
89. *Id.* § 1344(c).
90. *Id.* § 1344(b).
91. 40 C.F.R. §§ 230.1-.80 (2008).
92. Sierra Club v. U.S. Army Corps of Eng'rs, 464 F. Supp. 2d 1171, 1218 (M.D. Fla. 2006), *aff'd per curiam*, 508 F.3d 1332 (11th Cir. 2007).
93. 40 C.F.R. §§ 230.1-10.
94. 33 C.F.R. § 320.4(a) (2008).
95. Preamble to the Corps' 1987 Nationwide General Permits, 51 Fed. Reg. 41,206 (Nov. 13, 1986) (codified at 33 C.F.R. pt. 330 (1986)) (no permit can be issued under

the Corps to base its decision as to whether to issue a permit upon a case-by-case weighing of the costs and benefits (to both the applicant and public) of granting or denying a particular permit, with the Corps' public interest standard regulation specifying a non-exclusive list of twenty-seven public interest factors that are not necessarily given equal weight or given the same weight in each case.[96]

As discussed earlier,[97] EPA's section 404(b)(1) guidelines for issuance of an individual CWA section 404 permit utilize a "sequencing'" approach which requires three criteria to be met in order for a section 404 individual permit to be issued. The first criterion, avoidance of harm to the aquatic environment, prohibits, except as authorized by section 404(b)(2),[98] the issuance of an individual section 404 permit "if there is a practicable alternative to the proposed discharge which [sic] would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences."[99] "An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes."[100] EPA's avoidance criterion also raises two presumptions that are followed unless the contrary are clearly demonstrated: (1) practicable alternatives not involving special aquatic sites (which include wetlands protected under the CWA) are presumed to be available if the activity associated with a discharge proposed for a special aquatic site is not "water dependent" (e.g., does not require access or physical proximity to or siting within a special aquatic site to fulfill its basic purpose); and, (2) all practicable alternatives to a proposed discharge associated with a non-water dependent activity, which al-

section 404 of the CWA unless it complies with EPA's section 404(b) guidelines, and a 404 permit cannot be issued under section 404 of the CWA if it will be contrary to the public interest).

96. *Id.*

97. *See supra* notes 8-9 and accompanying text.

98. 33 U.S.C. § 1344(b)(2) (2008). Section 404(b)(2) provides that in any case where EPA's section 404(b)(1) guidelines alone would prohibit the specification of a disposal site for the discharge of dredged or fill material, the Corps can specify a disposal site "through the application additionally of the economic impact of the site on navigation and anchorage. . ."

99. 40 C.F.R. § 230.10(a) (2008) (EPA regulation); *see also* 33 C.F.R. §§ 320.4(a)(1), (b)(4) (Corps regulation).

100. 40 C.F.R. § 230.10(a)(2) ("If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered." *Id.*).

ternatives do not involve a discharge into a special aquatic site, are presumed to have less adverse impact on the aquatic ecosystem.[101]

The second criterion of EPA's section 404(b)(1) guidelines, minimization of harm, requires, except as provided by section 404(b)(2) of the CWA, that no individual section 404 permit shall issue "unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem."[102]

The third criterion of EPA's sequencing approach under its section 404(b)(1) guidelines, compensatory mitigation, requires "[a]ppropriate and practicable compensatory mitigation . . . for unavoidable adverse impacts which remain after all appropriate and practicable minimization has been required."[103] However, "[e]ach activity authorized by a Corps permit is not required to contribute to the 'no overall net loss' goal for wetlands."[104] For some activities authorized by Corps permits, compensatory mitigation "may not be required if mitigation is not practicable. . ., feasible or would result in only inconsequential environmental benefits."[105]

---

101. *Id.* § 230.10(a)(3).

102. *Id.* § 230.10(d); *See also* Memorandum of Agreement, *supra* note 2, at 9212 (minimization of harm is accomplished through project modifications and permit conditions).

103. Memorandum of Agreement, *supra* note 2, at 9212. However, 40 C.F.R. § 332.1(f)(2) (effective June 9, 2008), provides that "this part [40 C.F.R. part 332] applies instead of the provisions relating to the amount, type, and location of compensatory mitigation projects, including the use of preservation, in the February 6, 1990, Memorandum of Agreement (MOA) [*supra* note 2] . . . [and that] [a]ll other provisions of the MOA remain in effect." EPA has a similar regulation at 40 C.F.R. § 230.91(e)(2) (effective June 9, 2008).

The Corps recently reported that permittees are responsible for approximately 59% of compensatory mitigation projects, while mitigation banks are utilized for 33% of compensatory mitigation projects and in-lieu-fee programs are utilized for 7% of compensatory mitigation projects. *See* Draft Environmental Assessment, *supra* note 5, at 46-47.

104. Draft Environmental Assessment, *supra* note 5, at 5.

105. Memorandum of Agreement, *supra* note 2, at 9211. The Corps and EPA recently stated that "[i]t is not practicable or appropriate to require compensatory mitigation for every standard [individual] permit, or for every general permit authorization." Preamble, Compensatory Mitigation regulations, *supra* note 10, 73 Fed. Reg. at 19,603 (April 10, 2008). In FY 2003, only fifty-one percent of the Corps' individual permits and nineteen percent of the Corps' general permit verifications required compensatory mitigation. *See* Draft Environmental Assessment, *supra* note 5, at v.

The Corps and EPA in April 2008 adopted new regulations[106] which establish new requirements for the circumstances where compensatory mitigation will be required for losses of wetlands and other aquatic resources, and the type(s) of compensatory mitigation to be required in such circumstances, for activities authorized by permits issued by the Department of the Army (including permits issued under section 404 of the Clean Water Act).[107] These new compensatory mitigation regulations, which apply to any compensatory mitigation which is required by any individual or general permit issued by the Corps of Engineers,[108] require, "to the extent appropriate and practicable,"[109] that a watershed approach be used in selecting the type and location of compensatory mitigation projects, in order "to maintain and improve the quantity and quality of wetlands and other aquatic resources in watersheds through selection of compensatory mitigation project sites."[110] The regulations authorize four methods[111] (in order of preference[112]) for carrying out compensatory mitigation:

> (1) restoration (i.e., reestablishment or rehabilitation) of a previously existing or degraded wetland or other aquatic site; (2) enhancement of the functions of an existing wetland or other aquatic site; (3) the establishment (i.e., creation) of a new wetland or other aquatic site; and (4) preservation of an existing wetland or other aquatic site.[113]

---

106. 33 C.F.R. §§ 332.1-.8 (Corps' regulations); 40 C.F.R. §§ 230.91-.98 (EPA's regulations).

107. These new regulations do "not affect the determination as to when compensatory mitigation is required, only the requirements for conducting such mitigation once the district engineer determines that it is necessary. . .. [T]his rule does not change the threshold for determining when compensatory mitigation is required; it instead focuses on where and how compensatory mitigation will be required." Preamble to Compensatory Mitigation regulations, *supra* note 10, 73 Fed. Reg. at 19,602. "This rule does not alter the circumstances under which the district engineers require compensatory mitigation or the threshold for determining when compensatory mitigation is required for a particular activity." *Id.* at 19607.

108. *Id.*

109. 40 C.F.R. § 332.3(c)(1) (Corps' regulation); 40 C.F.R. § 230.93(c)(1) (EPA's regulation).

110. Preamble to Compensatory Mitigation regulations, 73 Fed. Reg. at 19,598. This watershed approach, however, "does not require a formal watershed plan." *Id.* at 19,599.

111. 33 C.F.R. §§ 332.3(a)(2) (Corps' regulation); 40 C.F.R. § 230.93(a)(2) (EPA's regulation).

112. *Id.*

113. Preamble to Compensatory Mitigation regulations, 73 Fed. Reg. at 19,594. Preservation may be used to provide compensatory mitigation for an activity author-

In addition, the regulations authorize three mechanisms[114] (in order of preference[115]) for providing such methods of compensatory mitigation: (1) mitigation banks,[116] in-lieu fee programs,[117]

---

ized by a Corps of Engineers' permit only when the activity meets criteria specified in 33 C.F.R. § 332.3(h) (Corps' regulation) and 40 C.F.R. § 230.93(h) (EPA's regulation).

114. Preamble to Compensatory Mitigation regulations, 73 Fed. Reg. at 19,594.

115. *Id.*

116. "Mitigation bank" is defined by the Corps and EPA to mean:

> [A] site, or sites, where resources (e.g., wetlands, streams, riparian areas) are restored , established, enhanced and/or preserved for the purpose of providing compensatory mitigation for impacts authorized by [Department of the Army] permits. In general, a mitigation bank sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the mitigation bank sponsor. The operation and use of a mitigation bank are governed by a mitigation bank instrument.

33 C.F.R. § 332.2 (Corps' definition); 40 C.F.R. § 230.92 (EPA's definition).

The new regulations require mitigation banks "to achieve certain milestones, including site selection, plan approval, and financial assurance, before they can sell credits and generally sell a majority of its credits only after the physical development of compensation sites has begun." Preamble to Compensatory Mitigation regulations, *supra* note 10, 73 Fed. Reg. at 19,595.

The Corps' and EPA's new compensatory mitigation regulations authorize mitigation banks to be sponsored and operated not only by commercial, non-profit and governmental entities, but also by private landowners, *id.* at 19,606, and to be located on public lands as well as on private lands. *Id.* at 19,649; 33 C.F.R. § 332.3(a)(3) (Corps' regulation); 40 C.F.R. § 230.93(a)(3) (EPA's regulation). A mitigation bank therefore can be either a "single-user" bank whose mitigation credits are used only by the operator of the bank for its activities requiring section 404 permits (such banks have been established by some state transportation or highway departments) or a commercial bank that sells mitigation credits to third parties. *See* Draft Environmental Assessment, *supra* note 5, at 19-21.

Under the Corps' and EPA's new compensatory mitigation regulations, a mitigation bank must have its mitigation bank instrument approved by a Corps' district engineer. 33 C.F.R. § 332.8(a)(1) (Corps' regulation); 40 C.F.R. § 230.98(a)(1) (EPA's regulation). Such an instrument must specify the geographic service area within which impacts can be mitigated at a specific mitigation bank. 33 C.F.R. § 332.8(d)(6)(ii)(A) (Corps' regulation); 40 C.F.R. § 230.98(d)(6)(ii)(A) (EPA's regulation).

An overview of existing approved mitigation banks operating in the United States as of 2006 is provided in the Draft Environmental Assessment, *supra* note 5, at 19-21.

117. "In-lieu fee program" is defined by the Corps and EPA to mean:

> [A] program involving the restoration, establishment, enhancement, and/or preservation of aquatic resources through funds paid to a governmental or non-profit natural resources management entity to satisfy compensatory mitigation requirements for [Department of the Army] permits. Similar to a mitigation bank, an in-lieu fee program sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the in-lieu fee program sponsor. However, the rules governing the operation and use of in-lieu fee programs are somewhat different from the rules governing operation and use of mitigation banks. The operation and use of an in-lieu fee program are governed by an in-lieu fee program instrument.

and permittee-responsible mitigation (defined as compensatory mitigation "undertaken by the permittee (or an authorized agent

33 C.F.R. § 332.2 (Corps' definition); 40 C.F.R. § 230.92 (EPA's definition).

Under this definition, the Corps and EPA limit sponsorship and operation of in-lieu fee programs to government or non-profit natural resources management entities. Preamble to Compensatory Mitigation regulations, *supra* note 10, 73 Fed. Reg. at 19,600. This limitation is based upon the facts that "only in-lieu fee programs are allowed to sell advance credits, before a site has been secured or a specific mitigation project reviewed and approved," *id* at 19,602, and that "in-lieu fee programs have fewer up-front planning requirements than mitigation banks, and are not expected to be operated as commercial ventures. The [Corps and EPA] thus believe it is appropriate to limit sponsorship of in-lieu fee programs to governmental or non-profit land management activities that operate explicitly in the public interest." *Id.* at 19,614. EPA and the Corps have stated that "'[i]n-lieu fee' mitigation occurs in circumstances where a permittee provides funds to an in-lieu fee sponsor instead of either completing project-specific mitigation or purchasing credits from a mitigation bank. . ." Federal In-Lieu-Fees Guidance, *supra* note 9, 65 Fed. Reg. at 66,914 (superseded by Compensatory Mitigation regulations, *supra* note 10. 33 C.F.R. § 332.1(f)(1) (Corps' regulation); 40 C.F.R. § 230.91(f)(1)(EPA's regulation)). . . The Corps and EPA also have stated that "in-lieu fee, fee mitigation, or other similar arrangements, wherein funds are paid to a natural resource management entity for implementation of either a specific or general wetland or other aquatic resource development project are not considered to meet the definition of mitigation banking because they do not typically provide compensatory mitigation in advance of project impacts." Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks, 60 Fed. Reg. 58,613 (Nov. 28, 1995) (superseded by Compensatory Mitigation regulations, *supra* note 10. 33 C.F.R. § 332.1(f)(1) (Corps' regulation); 40 C.F.R. § 230.91(f)(1) (EPA's regulation)). Instead, in-lieu fees involve payments to another entity that will use those payments in the future for compensatory mitigation restoration, enhancement, creation or preservation projects in a specified geographic service area, to replace wetlands functions and values adversely affected by activities already carried out under a section 404 permit. *See* Preamble, 73 Fed. Reg. at 19,595.

Although the Corps of Engineers and EPA in 2006 proposed new regulations, 71 Fed. Reg. 15,520, 15,530-31 (March 28, 2006), which would have phased out the use of in-lieu fee programs as an authorized method of providing compensatory mitigation under section 404 of the Clean Water Act (by requiring in-lieu fee programs, after a five–year transition period, either to meet the same standards as mitigation banks or to cease operations), the Corps and EPA's new compensatory mitigation regulations adopted in 2008, 33 C.F.R. §§ 332.1-.8 (Corps' regulations); 40 C.F.R. §§ 230.91-.98 (EPA's regulations), continue to authorize compensatory mitigation through in-lieu fee programs that have an in-lieu fee program instrument approved by a district engineer. 33 C.F.R. § 332.8(a)(1) (Corps' regulation); 40 C.F.R. § 230.98(a)(1) (EPA's regulation). An "approved instrument for an in-lieu fee program must include a compensation planning framework that will be used to select, secure, and implement aquatic resource restoration, establishment, enhancement and/or preservation activities." 33 C.F.R. § 332.8(c)(1) (Corps' regulation); 40 C.F.R. § 230.98(c)(1) (EPA's regulation). The framework must specify the specific geographic service area within which impacts can be mitigated through a specific in-lieu fee program. 33 C.F.R. § 332.8(c)(2)(i) (Corps' regulation); 40 C.F.R. § 230.98(c)(2)(i) (EPA's regulation).

The Corps' Draft Environmental Assessment, *supra* note 5, at 21-22, 32-34, provides an overview of existing approved in-lieu fee programs operating in the United States as of 2006.

or contractor) . . . for which the permittee retaines full responsibility"[118]).

In the case of both mitigation banks and in-lieu fee mitigation, compensatory mitigation activities occur off-site[119] and are conducted by a third party who is a mitigation bank sponsor or an in-lieu fee program sponsor.[120] The new regulations

> have established a preference for mitigation bank credits, since mitigation banks must have an approved mitigation plan and other assurances in place before credits can be provided by permittees. . . . Because of the requirements imposed on mitigation banks, they generally involve less risk and uncertainty than in-lieu fee programs and permittee-responsible mitigation.[121]

When a permittee is seeking to provide permittee-responsible mitigation, the new regulations specify a preference for permittee-responsible mitigation through on-site[122] and in-kind[123] mitigation and, last in preference, by permittee-responsible mitigation through off-site and/or out-of-kind[124] mitigation.[125] The new regulations have abandoned the previous preference for on-site com-

118. 40 C.F.R. § 332.2 (Corps' definition); 40 C.F.R. § 230.92 (EPA's definition).

119. "Off-site" is defined to mean "an area that is neither located on the same parcel of land as the impact site, nor on a parcel of land contiguous to the parcel containing the impact site." 33 C.F.R. § 332.2 (Corps' definition); 40 C.F.R. § 230.92 (EPA's definition).

120. Preamble to Compensatory Mitigation regulations, *supra* note 10, 73 Fed. Reg. at 19,594.

121. *Id.* at 19,605.

122. "On-site" is defined to mean an "area located on the same parcel of land as the impact site or on a parcel of land contiguous to the impact site." 33 C.F.R. § 332.2 (Corps' definition); 40 C.F.R. § 230.92 (EPA's definition).

123. "In-kind" is defined to mean "a resource of a similar structural and functional type to the impacted resource." 33 C.F.R. § 332.2 (Corps' definition); 40 C.F.R. § 230.92 (EPA's definition). The regulations state that "i]n general, in-kind mitigation is preferable to out-of-kind mitigation because it is most likely to compensate for the functions and services lost at the impact site," 33 C.F.R. § 332.3(e)(1) (Corps' regulation); 40 C.F.R. § 230.93(e)(1) (EPA's regulation), although "[i]f the district engineer determines, using the watershed approach. . . , that out-of-kind compensatory mitigation will serve the aquatic resource needs of the watershed, the district engineer may authorize the use of such out-of-kind compensatory mitigation." 33 C.F.R. § 332.3(e)(2) (Corps' regulation); 40 C.F.R. § 230.93(e)(2) (EPA's regulation).

124. "Out-of-kind" is defined to mean "a resource of a different structural and functional type from the impacted resource." 33 C.F.R. § 332.2 (Corps' definition); 40 C.F.R. § 230.92 (EPA's definition).

125. 33 C.F.R. §§ 332.3(b)(1)-(6) (Corps' regulations); 40 C.F.R. §§ 230.93(b)(1)-(6) (EPA's regulations).

pensatory mitigation that the Corps and EPA had followed since 1990,[126] because the failure rate for such projects is quite high.[127]

The new regulations require an amount and type of compensatory mitigation that is, to the extent appropriate and practicable, sufficient to replace lost aquatic resource functions, with the amount of required compensatory mitigation not necessarily specified on a one-to-one ratio (although when functional or conditional assessments or other suitable measurements are not used, a minimum one-to-one acreage or linear foot compensation ratio must be used).[128]

The compensatory mitigation requirement for standard individual section 404 permits "does not apply to general permits, such as nationwide permits, or letters of permission."[129] Consequently, compensatory mitigation "is normally not required for the wetland impacts [of activities authorized by Corps' nationwide general permits] that do not require submission of pre-construction notification to district engineers."[130] However, "[f]or general permits, compensatory mitigation to replace lost or impacted aquatic resources may be required by district engineers to ensure that the proposed work will result in minimal adverse effects on the aquatic environment."[131]

---

126. This earlier preference for on-site compensatory mitigation is set forth in the 1990 Memorandum of Agreement, *supra* note 2, at 9212.

127. Preamble to Compensatory Mitigation regulations, *supra* note 10, 73 Fed. Reg. at 19,601. "On-site compensatory mitigation activities, especially wetland restoration or establishment, are particularly sensitive to land use changes. . .. In many cases, there are circumstances in which on-site mitigation is neither practicable nor environmentally preferable." *Id.*

128. 33 C.F.R. § 332.3(f)(1) (Corps' regulation); 40 C.F.R. § 230.93(f)(1) (EPA's regulation). A mitigation ratio greater than a one-to-one ratio may be required in certain situations specified in 33 C.F.R. § 332.3(f)(2) (Corps' regulation); 40 C.F.R. § 230.93(f)(2) (EPA's regulation).

129. Draft Environmental Assessment, *supra* note 5, at 7.

130. *Id.* at 10.

131. *Id.* at 5 (citing 33 C.F.R. § 330.1(e)(3) which authorizes district engineers to require compensatory mitigation for an activity authorized by a nationwide general permit in order to minimize harm to the environment):

> For activities authorized by regional general permits, there may be specific consolidated compensatory mitigation programs or sites that can be used by permittees. For example, a regional general permit may be conditioned by the district engineer to require specific compensatory mitigation as a part of a special area management plan [or] . . . may also prescribe specific locations or types of compensatory mitigation, including in-lieu fee programs or mitigation banks. Likewise, compensatory mitigation for activities authorized by a state programmatic general permit may be provided by a specific program run by the state for restoring, creating, enhancing, and preserving waters and wetlands.

In addition, because EPA's section 404(b)(1) guidelines provide that "consideration of alternatives in [40 C.F.R.] § 230.10 are [sic] not directly applicable to [g]eneral permits,"[132] EPA's "no practicable alternative" requirement, and its two rebuttable presumptions under the avoidance criterion of its sequencing criteria for individual section 404 permits, do not have to be satisfied for an individual activity that is authorized under a section 404 general permit.

Consequently, an individual activity that is authorized by a section 404 general permit is not subject to the avoidance and compensatory mitigation requirements that apply to the issuance of a standard individual section 404 permit, although the issuance of a section 404 general permit is subject to a provision[133] of the EPA section 404(b)(1) guidelines that provides that any discharge of dredged or fill material shall minimize adverse environmental effects (this minimization of harm requirement is similar to the second criterion of EPA's sequencing criteria).[134] EPA's section 404(b)(1) guidelines have additional standards for section 404 general permits that require section 404 general permits to minimize harm to aquatic ecosystems.[135]

In addition to EPA having authority to issue these section 404(b)(1) guidelines, EPA has authority to veto the issuance of a

---

Draft Environmental Assessment, *supra* note 5, at 5-6.

132. 40 C.F.R. § 230.7(b)(1) (2008).

133. *Id.* § 230.10(d).

134. The Corps' regulations at 33 C.F.R. § 330.4(f) and EPA's section 404(b)(1) guidelines, 40 C.F.R. § 230.10(b)(3), also require that the Corps' issuance of section 404 nationwide general permits comply with section 7(a)(2) of the Endangered Species Act, which provides that:

> [e]ach Federal agency shall, in consultation with and with the assistance of [the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS)], insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or modification of habitat of such species which is determined by the [FWS or NMFS] to be critical, unless such agency has been granted an exemption . . . [for such action under 16 U.S.C. § 1536(h)]. .

See Steven G. Davison, *Federal Agency Action Subject to Section 7 of the Endangered Species Act*, 14 MO. ENVTL. L. & POL'Y REV. 29 (2007), for analysis of section 7(a)(2) of the Endangered Species Act. .

Another Corps regulation, 33 C.F.R. § 330.4(d), also requires the Corps' issuance of section 404 nationwide general permits to be consistent with approved state coastal zone management programs in accordance with section 307 of the Coastal Zone Management Act, 16 U.S.C. § 1456.

135. *See* 40 C.F.R. § 230.7 (2008). EPA's section 404(b)(1) guidelines for the Corps' section 404 general permits are discussed, *infra* notes 289-312 and accompanying text.

section 404 permit under section 404(e)[136] of the Clean Water Act, which provides that:

> The [EPA] Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.[137]

EPA under section 404(c) may veto both Corps-issued and state-issued section 404 individual permits and general permits,[138] and may do so either because it finds an "unacceptable adverse effect" due to the proposed discharger's failure to satisfy EPA's section 404(b)(1) guidelines[139] or because it finds "an impact which is likely to result in significant degradation of municipal water supplies. . . or significant loss of or damage to fisheries, shellfishing or wildlife habitat, or recreation areas."[140]

Section 401[141] of the Clean Water Act provides each state a limited veto authority over the Corps' issuance of both individual and general permits under section 404 of the Clean Water Act. Section 401(a)[142] of the Clean Water Act requires an applicant for either an individual or general section 404 permit to provide the Corps of Engineers a certification, from the state in which a discharge of dredged or fill material into navigable waters will occur, that the discharge will be in compliance with Clean Water Act effluent limitations and water quality standards.[143] Section 401(a)

136. 33 U.S.C. § 1344(c).
137. *Id.*
138. 40 C.F.R. § 231.1(a) (2008).
139. *Id.* §§ 231.1(a), 231.2(e).
140. *Id.* § 231.2(e).
141. 33 U.S.C. § 1341 (2008).
142. *Id.* § 1341(a).
143. *See* 33 C.F.R. § 330.4(c)(1) (2008) (provides that state certification under CWA section 401 is required for a section 404 nationwide general permit's authorization of an activity which may in that state result in a discharge of pollutants from a point source into waters of the United States); *see also* United States v. Marathon Dev. Corp., 867 F.2d 96, 100 (1st Cir. 1989) (holding that the certification requirements of section 401(a) of the CWA apply both to individual section 404 permits and to general section 404 permits). The Corps' regulations with respect to state certification under section 401 of the CWA are at 33 C.F.R. § 330.4(c)(1).

further provides that no permit shall be granted until the required section 401 certification has been obtained or been waived by the state and that no permit shall be granted if certification has been denied by the State—thus providing a state with authority to veto the Corps' issuance of section 404 individual and general permits on water quality grounds.

When a discharge of dredged or fill material regulated under CWA section 404 will take place in a state that has a coastal zone management program that has been approved by the Secretary of Commerce under the Coastal Zone Management Act (CZMA), the CZMA requires either that the state's coastal zone management agency concur with the applicant's certification that the proposed discharge complies with and will be conducted in a manner that is consistent with the state's program or, if the state objects to the certification, the Secretary of Commerce must determine that the proposed discharge is consistent with the purposes of the CZMA or is necessary in the interest of national security.[144]

A person who violates any condition or limitation of a section 404 permit issued by the United States Army Corps of Engineers is subject to various sanctions (without no distinction drawn in the CWA between violations of individual section 404 permits and general section 404 permits), including an administrative compliance order issued by the Corps,[145] a civil action for appropriate relief (including injunctive relief),[146] civil penalties assessed by a court,[147] administrative civil penalties imposed by the Corps,[148] and criminal penalties (which can include imprisonment as well as monetary fines).[149] A person who violates any condition or limitation of a permit issued under section 404 by a state under an approved permit program is subject to various federal sanctions (with no distinction drawn in the CWA between violations of state individual permits and state general permits), including an administrative compliance order issued by EPA,[150] a civil action in federal court by the United States for appropriate relief (including injunctive relief),[151] civil penalties imposed by a federal court,[152]

144. 33 C.F.R. § 325.2(b)(2)(ii) (2008).
145. 33 U.S.C. § 1344(s)(1) (2008).
146. *Id.* § 1344(s)(3).
147. *Id.* § 1344(s)(4).
148. *Id.* § 1319(g)(1)(B).
149. *Id.* § 1319(c).
150. *Id.* § 1319(a)(1), (3).
151. *Id.* § 1319(b).
152. *Id.* § 1319(d).

administrative civil penalties imposed by EPA,[153] and federal criminal penalties (which can include imprisonment as well as monetary fines).[154]

IV. PROCEDURES FOR INDIVIDUAL AND GENERAL PERMITS UNDER SECTION 404 OF THE CLEAN WATER ACT

As noted earlier, a permit under section 404 of the CWA authorizing a point source discharge of dredged or fill material into waters of the United States can be either an individual permit or a general permit.[155] An individual permit is issued to a particular point source following a review by the Corps of the point source's individual application for a section 404 permit[156] and "extends only to a given project, based upon site-specific review of the particular activities proposed there."[157]

> An individual permit applicant [is required to] provide [ ] the Corps with, *inter alia*, "a complete description of the proposed activity including necessary drawings, sketches, or plans" and "the location, purpose and need for the proposed activity" and includes descriptions of "[a]ll activities which the applicant plans to undertake which are reasonably related to the same project."[158]

The Corps, after receiving an application for an individual section 404 permit, issues public notice of the application and invites comments and other relevant information from the public with respect to the activities that would be authorized under the permit.[159] The Corps will conduct a public hearing on the individual permit application if such a hearing is found to be necessary.[160] In addition,

153. *Id.* § 1319(g)(1)(A).
154. *Id.* § 1319(c).
155. Crutchfield v. County of Hanover, 325 F.3d 211 (4th Cir. 2003).
156. 33 C.F.R. § 320.1(c).
157. Keating v. FERC, 927 F.2d 616, 619 (D.C. Cir. 1991). A Corps' regulation defines an "individual permit" to mean "a Department of the Army authorization that is issued following a case-by-case evaluation of a specific project involving the proposed discharge(s) in accordance with the procedures of this part and 33 CFR part 325 and a determination that the proposed discharge is in the public interest pursuant to 33 CFR part 320." 33 C.F.R. § 323.2(g).
158. Sierra Club v. U. S. Army Corps of Eng'rs, 464 F. Supp. 2d 1171, 1184 (M.D. Fla. 2006), *aff'd per curiam*, 508 F.3d 1332 (11th Cir. 2007) (quoting 33 C.F.R. § 325.1(d)).
159. 33 C.F.R. §§ 325.2(a)(2), 325.3(a).
160. *Id.* § 325.2(a)(5).

the Corps, as required by the National Environmental Policy Act,[161] will consider a proposed permitted activity's direct, indirect, and cumulative effects on the human environment and alternatives to issuance of the proposed permit (usually in either an environmental impact statement (EIS) or in an Environmental Assessment (EA)).[162] The case-by-case review of an application for an individual section 404 permit "requires a resource-intensive review that entails submission of voluminous application materials, extensive site-specific research and documentation, promulgation of public notice, opportunity for public comment, consultation with other federal agencies, and a formal analysis justifying the ultimate decision to issue or refuse the permit."[163] The Corps issues a written memorandum documenting its decision to approve or deny an application for an individual section 404 permit and its findings with respect to its public interest review and compliance with EPA's section 404(b)(1) guidelines.[164]

A general permit, on the other hand, "authorize[s] a category or categories of activities in specific geographic regions or nationwide."[165] The Corps' nationwide section 404 general permits in most cases do not authorize activities of a continuing nature; "[I]n general, they authorize construction activities with specific start and end dates."[166] A section 404 general permit "authorizes any party to engage in the sort of activity described in the permit without the need to seek prior project-specific authorization"[167] or to submit in advance "specific plans, descriptions, locations, purposes or needs of anticipated projects."[168] However, the Corps, pursuant to its authority under section 404(e)(2) to revoke or modify a section 404 general permit when the Corps "determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropri-

161. 42 U.S.C. § 4332(2)(C) (2008).

162. 33 C.F.R. § 325.2(a)(4).

163. Crutchfield v. County of Hanover, 325 F.3d 211, 214 (4th Cir. 2003).

164. 33 C.F.R. § 325.2(a)(6).

165. *Id.* § 320.1(c) (further explaining "The term 'general permit' . . . refers to both those regional permits issued by district or division engineers on a regional basis and to nationwide permits which are issued by the Chief of Engineers through publication in the Federal Register and are applicable throughout the nation.").

166. Reissuance of Nationwide Permits, 72 Fed. Reg. 11,092, 11,096 (Mar. 12, 2007).

167. Keating v. FERC, 927 F.2d 616, 619 (D.C. Cir. 1991).

168. Sierra Club v. U. S. Army Corps of Eng'rs, 464 F. Supp. 2d 1171, 1185 (M.D. Fla. 2006), *aff'd per curiam*, 508 F.3d 1332 (11th Cir. 2007).

ately authorized by individual permits,"[169] provides its District and Division Engineers discretionary authority to require a prospective permittee under a nationwide general permit to apply for an individual section 404 permit.[170]

The purpose of the section 404 nationwide general permit program is "to reduce administrative burdens on the Corps and the regulated public, by efficiently authorizing activities that have minimal adverse environmental effects,"[171] without the need for prior approval by the Corps of discharges of dredged or fill materials associated with such activities.[172] "The general permitting provisions were added to the Clean Water Act by Congressional amendment in 1977 to reduce the administrative paperwork and delay otherwise caused by having the Corps review every proposed dredge or fill activity under the individual permitting scheme."[173]

Unless otherwise provided, the issuance of a general nationwide section 404 permit is automatic because if a person qualifies for a general nationwide permit, no individualized inquiry is required[174] and the person does not need to file an application for a section 404 permit with the Corps before the person begins the discharge activity.[175] The Corps' authorization of an activity under a section 404 general permit can occur in less time than the time required to authorize an individual section 404 permit; "[a]ccording to the [C]orps, the average processing time for nationwide permits in 2003 was 27 days, versus 144 days for individual permits."[176]

Although a person proposing to engage in an activity that is authorized under a CWA section 404 general permit usually does not have to submit an application for a CWA section 404 permit to

169. 33 U.S.C. § 1344(e)(2) (2008).

170. *See* 33 C.F.R. § 330.1(d). EPA's section 404(b)(1) guidelines also provide that a Corps' "permitting authority may require an individual permit for any proposed activity under a General permit where the nature or location of the activity makes an individual permit more appropriate." 40 C.F.R. § 230.7(b)(2).

171. Reissuance of Nationwide Permits, 72 Fed. Reg. at 11,095.

172. *See, e.g.*, Riverside Irrigation Dist. v. Stipo, 658 F.2d 762, 764 (10th Cir. 1981); Orleans Audubon Soc'y v. Lee, 742 F.2d 901, 909 (5th Cir. 1984).

173. Sierra Club v. U. S. Army Corps of Eng'rs, 464 F. Supp. 2d 1171, 1188 (M.D. Fla. 2006) (citations to legislative history omitted), *aff'd per curiam*, 508 F.3d 1332 (11th Cir. 2007).

174. Crutchfield v. County of Hanover, 325 F.3d 211, 214 (4th Cir. 2003).

175. Riverside Irrigation Dist. v. Andrews, 758 F.2d 508, 511 (10th Cir. 1985).

176. John Sullivan, *Army Corps Reissues Nationwide Permits, Adds Permits for Mining, Pipeline Repairs*, 38 Env't Rep. (BNA) 624, (Mar. 16, 2007), *available at* http://pubs.bna.com/ip/bna/ENR.NSF/eh/a0b4d2y9w4.

the Corps, a person must comply with the conditions contained in the general permit,[177] which often include general conditions to "protect all jurisdictional waters, including small wetlands and other waterbodies. . .,"[178] such as acreage limits, linear foot limits, and mitigation requirements (including compensatory mitigation requirements that may involve "aquatic resource restoration, establishment, enhancement, and preservation activities. . . .").[179]

The Corps also authorizes its District Engineers to add regional conditions to the Corps' nationwide general section 404 permits that "further condition or restrict the applicability of an NWP,"[180] because:

> [r]egional conditions are necessary to account for regional differences in aquatic resource functions, services, and values and to ensure that the NWPs authorize only those activities that have minimal individual and cumulative adverse effects on the aquatic environment and other public interest review factors. Regional conditions are important tools for protecting endangered and threatened species, designated critical habitat for those species, essential fish habitat, historic properties, and other important resources.[181]

On the other hand, "[i]n areas where environmental conditions and other circumstances warrant less restrictive general permit conditions, district engineers may issue regional general permits to authorize similar activities, as long as those general permits meet applicable requirements."[182]

In addition, a person seeking to undertake certain activities under a particular Corps general section 404 permit may be required to provide the Corps prior pre-construction notification (PCN) of a proposed activity[183] "in writing as early as possible prior to commencing the proposed activity."[184] A pre-construction notification, however, does not have to be posted on the Internet

177. *See* 33 C.F.R. § 320.1(c) (2008).
178. Reissuance of Nationwide Permits, 72 Fed. Reg. 11,092, 11,093 (Mar. 12, 2007).
179. *Id.*
180. *Id.* at 11,099 (citing 33 C.F.R. § 330.1(d)).
181. Reissuance of Nationwide Permits, 72 Fed. Reg. at 11,098-99.
182. *Id.* at 11,099.
183. 33 C.F.R. § 320.1(c).
184. *Id.* § 330.1(e). This notification sometimes is referred to as a predischarge notification (PDN) requirement. *See* Proposal to Amend Nationwide Permit Program Regulations and Issue, Reissue, and Modify Nationwide Permits, 56 Fed. Reg. 14,598 (proposed Apr. 10, 1991).

for a period of time for public comment,[185] so members of the public may not be aware in advance of the construction of an activity under a section 404 general permit even though the person undertaking the activity has provided PCN to the Corps. A state, however, as a condition for its certification of a Corps' general permit under section 401 of the Clean Water Act, may require that PCN also be given to the state as well as to the Corps.[186]

The Corps first used a PCN requirement beginning in 1992 for Nationwide Permit 26,[187] and since then has added PCN requirements for other nationwide general permits [NWP]:

> where the Corps believes there may be a potential for some activities authorized by the NWP to have more than minimal adverse impacts on the aquatic environment or the public interest. The PCN will allow the DE [District Engineer] to ensure that the activity will not have more than minimal adverse impacts and that it will comply with the terms and conditions of the NWP. If an activity will have more than minimal adverse impacts the DE will either add case specific conditions so that the impacts will be minimal or instruct the prospective permittee that the activity is not authorized by the NWP and provide information on the procedures to seek authorization under a regional general or individual permit.[188]

Alternatively, a Corps' District Engineer often has the authority "to waive limits after the review of a pre-construction notification and a written determination that the adverse effects of a particular NWP activity will be minimal[,] provid[ing] flexibility to the NWP program, and allow[ing] the Corps to focus more of its resources on those activities that require individual permits and may have substantial adverse effects on the aquatic environment and the public interest."[189]

Unless notified otherwise by a District Engineer, a general NWP permittee subject to the PCN requirement may not proceed with the proposed activity until after thirty calendar days from

185. Reissuance of Nationwide Permits 72 Fed. Reg. at 11,093.

186. *See* 33 C.F.R. § 330.4(c)(2). *See also infra* notes 378-381 and accompanying text.

187. Proposal to Amend Nationwide Permit Program Regulations and Issue, Reissue, and Modify Nationwide Permits, 56 Fed. Reg. at 14,598 (this PCN requirement for NWP 26 resulted from the Corps' settlement of a lawsuit brought by the National Wildlife Federation).

188. *Id.* at 14,600.

189. Reissuance of Nationwide Permits, 72 Fed. Reg. at 11,098.

the date of submission of the prior advance notification, although a general NWP permittee may presume that its proposed activity qualifies for the NWP unless he is otherwise notified by a DE within thirty calendar days of the submission of the prior advance notification.[190] In cases where prior advance notification is required for a nationwide general permit, "the Corps will verify the applicability of the NWP to the proposed activity," although "NWP verification is much simpler than the individual permit process."[191] If a private party acts under an assumption that its discharge of dredged or fill material from a point source into waters of the United States is allowed under a general nationwide permit under section 404 of the CWA and makes that discharge, "that party bears the risk of liability for rectifying the harm done if in fact the discharge is not permitted."[192] To allow persons to avoid such risks, the Corps' District Engineers are authorized to issue formal determinations as to the applicability of general permits to proposed activities.[193]

For one of the Corps' presently existing nationwide general permit (NWP 21), which authorizes discharges of dredged or fill material associated with surface coal mining and reclamation projects),[194] the Corps requires a prospective permittee not only to meet the PCN requirements but also requires a proposed project to be individually approved and authorized by a District Engineer after the DE determines that the proposed "activity complies with the terms and conditions of [NWP 21] and that the adverse environmental effects are minimal both individually and cumulatively. . . ."[195] Some of the Corps' state programmatic and regional section 404 general permits also contain a requirement for approval/authorization by the Corps of an individual activity or project after the Corps receives PCN of the activity or project.[196]

190. Proposal to Amend Nationwide Permit Program Regulations and Issue, Reissue, and Modify Nationwide Permits, 56 Fed. Reg. at 14,607.

191. Crutchfield v. County of Hanover, 325 F.3d 211, 214-15 (4th Cir. 2003).

192. Orleans Audubon Soc'y v. Lee, 742 F.2d 901, 910 (5th Cir. 1984).

193. 33 C.F.R. §§ 320.1(a)(6) (2008).

194. Issuance of Nationwide Permits, 67 Fed. Reg. 2020, 2081 (Jan. 15, 2002).

195. *Id.*

196. For example, the state programmatic general permits issued by the Corps St. Paul District for Minnesota, GP-001-MN, http://www.mvp.usace.army.mil/docs/regulatory/special%20notices/2007001408PN.pdf (last visited Mar. 3, 2008), and for Wisconsin, GP-001-WI, http://www.mvp.usace.army.mil/docs.regulatory/gp01wi.pdf (last visited Mar. 3, 2008), require an individual project authorization by the District Engineer following receipt of PCN for the project. The Corps' Jacksonville District's SAJ-86 (which is discussed *infra* notes 227-254, 271-288 and accompanying text), which

A court has held that "nothing in section 404 prohibits the Corps from issuing a general permit that contains a requirement of post-issuance individualized consideration or authorization by the Corps."[197] Such an authorization of an individual project does not have to be preceded by public notice and an opportunity for a public hearing by the Corps, when the Corps provided public notice and an opportunity for public comment and a public hearing when it proposed the general permit and prior to issuance of the general permit.[198] "The process for obtaining authorization under a general permit—even one [like NWP 21] requiring individualized review by the Corps—is significantly more expeditious than the process for obtaining an individual permit under section 404(a),"[199] with the Corps stating[200] in 2002 that the average time to verify a NWP activity after a prospective permittee provides a District Engineer with a PCN is 19 days (which is faster than the time for processing an application for an individual section 404 permit because neither public notice nor the same level of review is required for authorization of an activity under a general permit).

Because a general requirement for Corps' authorization/approval of each specific activity or facility sought to be undertaken under the authorization of any section 404 general permit probably would impose significant additional administrative workload and expenses on the Corps, this article does not propose that the Corps should be required to authorize or approve each specific activity or facility sought to be undertaken under the authorization of a section 404 general permit. However, the Corps certainly should be encouraged to utilize a project approval/authorization requirement for particular activities, facilities or geographic areas where the Corps believes individual project/facility review and approval is necessary to prevent significant adverse impacts on federally-protected wetlands.

---

authorizes a wide variety of suburban development activities in a large area of northwestern Florida, also requires an individual project authorization by the District Engineer following receipt of PCN for the project. In addition, the Corps' Mobile District regional general permit SAM-20, http://www.sam.usace.army.mil/RD/reg//rgp/SAM-20.htm (last visited Mar. 3, 2008), which authorizes certain residential development activities in six counties in Mississippi, requires an individual project authorization by the District Engineer following receipt of PCN for the project.

197. Ohio Valley Envtl. Coal. v. Bulen, 429 F.3d 493, 503 (4th Cir. 2005).

198. *Id.* at 504.

199. *Id.* at 503.

200. Issuance of Nationwide Permits, 67 Fed. Reg. at 2024, *quoted in Ohio Valley,* 429 F.3d at 503.

For some large projects, some parts of the activities involved in the construction of the large project may qualify for a nationwide general permit (NWP) although individual permits are required for other parts of the large project,

> [B]ut only if the portions of the project qualifying for NWP authorization would have independent utility and are able to function or meet their purpose independent of the total project. When the functioning or usefulness of a portion of the total project qualifying for an NWP is dependent on the remainder of the project, such that its construction and use would not be fully justified . . . if the Corps were to deny the individual permit, the NWP does not apply and all portions of the project must be evaluated as part of the individual permit process.[201]

V. CRITERIA AND STANDARDS FOR SECTION 404 GENERAL PERMITS

Section 404(e)(1)[202] of the CWA authorizes the Corps of Engineers, after notice and opportunity for public hearing, to:

> [I]ssue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the [Corps] determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.[203]

---

201. 33 C.F.R. § 330.6(d) (2008).
202. 33 U.S.C. § 1344(e)(1) (2008).
203. *Id.* The Corps' regulations define "general permit" to mean:

> [A] Department of the Army authorization that is issued on a nationwide or regional basis for a category or categories of activities when:
> (1) Those activities are substantially similar in nature and cause only minimal individual and cumulative environmental impacts; or
> (2) The general permit would result in avoiding unnecessary duplication of regulatory control exercised by another Federal, State or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal.

33 C.F.R. §§ 322.2(f), 323.2(h) (internal cross-references omitted).

The Corps also has referred to this second category of general permits as a "programmatic general permit," "a type of regional general permit based on an existing state, local or other federal agency program and . . . designed to avoid duplication." Draft Environmental Assessment, *supra* note 5, at 3:

> [I]n allowing the Corps to issue a general permit for categories of activities which are "substantially similar in nature" . . . or when the general permit issuance "would result in avoiding unnecessary duplication of regulatory control," [33 C.F.R. § 323.2(h)] impermissibly seeks to expand the statutory language and allows the Corps to ignore the statutory require-

Neither section 404(e) nor any other provision of the Clean Water Act defines the scope of a region that can be subject to a section 404(4) regional general permit, although the placement in section 404(e)(1) of the word "regional" between the words "State" and "nationwide" might be interpreted as indicating an intent by Congress that a region that can be subject to a section 404 regional general permit must be an area encompassing navigable waters within two or more entire states. However, the few reported court decisions[204] deciding challenges to Corps' section 404 regional general permits have involved regional permits that applied to areas lying wholly within a single state and that did not include the navigable waters of an entire state, and none of these court decisions addressed the issue of the scope of a region that permissibly can be the subject of a section 404 regional general permit.

> ment that a category of permitted activities be "similar in nature." Such an interpretation cannot be a permissible construction of the statute and is therefore not due to be afforded *Chevron* deference.

Sierra Club v. U. S. Army Corps of Eng'rs, 464 F. Supp. 2d 1171, 1192 (M.D. Fla. 2006) (emphasis omitted) (first quoting 33 C.F.R. § 323.2(h) then citing Sierra Club v. Johnson, 436 F.3d 1269, 1274 (11th Cir. 2006)), *aff'd per curiam*, 508 F.3d 1332 (11th Cir. 2007). The District Court in *Sierra Club* subsequently noted that it was debatable whether the regulation's "substantially similar" standard is a more difficult standard to meet—or a less onerous standard—than section 404(e)'s "similar' standard." *Id.* at 1196 n.37.

Another Corps' regulation states that the Corps uses general permits, joint processing procedures, interagency review, coordination and authority transfers (when authorized by law) to avoid duplication. *See* 33 C.F.R. § 320.1(a)(5).

The Corps issues a public notice of a proposed general permit, provides an opportunity for members of the public to comment on a proposed section 404 general permit and holds a public hearing on a proposed general permit when necessary. *See Sierra Club* at 1185. The Corps, in compliance with the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C), also considers the direct, indirect and cumulative effects upon the human environment that would result from the activities that would be authorized by the proposed general permit and alternatives to issuing the proposed general permit; and also determines if issuance of the proposed general permit is consistent with the Corps' public interest standard and EPA's section 404(b)(1) guidelines (which are discussed *infra* notes 289-312 and accompanying text). *Id.*

The Corps' issuance of a general permit under section 404(e) of the Clean Water Act is a "final agency action" that is ripe for judicial review under the Administrative Procedure Act. *See* Nat'l Ass'n of Home Builders v. U. S. Army Corps of Eng'rs, 417 F.3d 1272 (D.C. Cir. 2005).

204. *See, e.g.*, *Sierra Club*; Alaska Ctr. for the Env't v. West, 157 F.3d 680 (9th Cir. 1998) (judicial challenge to five Corps' section 404 general permits that apparently applied to certain areas of Anchorage, Alaska); Wyo. Outdoor Council v. U. S. Army Corps of Eng'rs, 351 F. Supp. 2d 1232 (D. Wyo. 2005) (challenge to a Corps' section 404 general permit that apparently applied only to certain areas within Wyoming).

A. General Permits for "Categories of Activities . . . Similar in Nature"

Neither the Clean Water Act nor Corps' regulations define "category of activities . . . similar in nature" under section 404(e) of the CWA.[205] The Corps' general position, however, is that section 404(e)'s "similar in nature" provision "does not require . . . activities [authorized under a section 404(e) nationwide general permit] to be identical to each other"[206] and "is to be interpreted broadly, for practical implementation of the general permit program."[207] The Corps therefore defines the "category of activities" that can be authorized under a particular general permit issued under section 404(e) of the CWA on an *ad hoc*, permit-by-permit basis—an approach which has led to litigation challenging a number of the nationwide and regional general permits that the Corps has issued under section 404(e) of the Clean Water Act.[208]

In decisions discussed below, courts have recognized that the Corps can consider various different activities and facilities, that have different functions and purposes, to be a "category of activities similar in nature" that can be regulated under a single section 404 general permit, particularly when the various activities are subject under the general permit to similar general and special conditions that cause all of the activities authorized under the single general permit to have similar minimal individual adverse impacts upon the environment. In these cases the Corps has been held not to be required to limit section 404 general permits either to "narrowly defined" categories of activities or to a small maximum amount of acreage of waters or wetlands that are dredged or filled and destroyed by activities or projects authorized by a section 404 general permit.[209]

205. *See* Sierra Club v. U. S. Army Corps of Eng'rs, 508 F.3d 1332, 1334 n.1 (11th Cir. 2007) ("We agree. . . that Section 404(e) is ambiguous and that the Corps has issued no formal regulation . . . ."); *Id.* at 1336 ("The Corps has issued no regulation or formal interpretation defining the key terms at issue in this case.").

206. Reissuance of Nationwide Permits, 72 Fed. Reg. 11,092, 11,095 (Mar. 12, 2007).

207. *Id.*

208. Alaska Ctr. for the Env't v. West, 157 F.3d 680 (9th Cir. 1998); Ohio Valley Envtl. Coalition v. Bulen, 429 F.3d 493 (4th Cir. 2005), *reh'g en banc denied*, 437 F.3d 421 (4th Cir. 2006); Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp. 2d 1232 (D. Wyo. 2005); Sierra Club v. U.S. Army Corps of Eng'rs, 464 F. Supp. 2d 1171 (M.D. Fla. 2006), *aff'd per curiam*, 508 F.3d 1332 (11th Cir. 2007).

209. *Sierra Club*, 464 F. Supp. 2d at 1188-89.

In *Alaska Center for the Environment v. West*,[210] the Ninth Circuit Court of Appeals held that five general permits issued by the Corps authorizing the construction of various facilities in Anchorage, Alaska, satisfied section 404(e)'s requirement that a general permit be for "activities similar in nature." One of the general permits applied to residential buildings not exceeding fifty feet in height (including single and two-family dwellings, row houses, and rooming homes); a second general permit applied to residential streets and alleys not exceeding seventy-five feet in width; and a third general permit applied to businesses listed in the Anchorage Municipal Code and public and private institutions (except underground storage tanks, air pollutant sources other than normal heating and power, and any uses of hazardous substances for cleaning and maintenance exceeding incidental uses). The fourth general permit applied only to certain industrial development involved with inert materials, while the fifth general permit applied to wetlands, habitat and water quality enhancement projects. The Corps argued that it acted reasonably and lawfully under section 404(e) in deciding that each of these general permits covered "activities. . . similar in nature" because the Corps' general and special conditions for the activities authorized by the general permits[211] were designed so "that the activities allowed would each have a similar minimal effect on the environment" and "so that secondary impacts that might differentiate the activities proposed for authorization have been reduced such that environmental impacts would not now differ among the [general permits]."[212] The Ninth Circuit held that section 404(e) does not require the Corps to limit a general permit to "a narrowly defined activity"[213] and that the Corps' interpretation of section 404(e) of the CWA, as allowing it to rely upon restrictions in general and special conditions as the basis for finding that the activities authorized by each general permit would be similar in nature, was a reasonable de-

210. *Alaska Ctr.*, 157 F.3d 680.

211. The general conditions in the general permits included "buffer zones to protect adjacent wetlands and water bodies of higher environmental value; limits on the type of discharge materials; and a requirement that the applicant receive an initial opinion of compliance from the municipality." *Id.* at 683. Each general permit also had special conditions that limited the activities and facilities authorized by each general permit. *Id.*

212. *Id.* at 683.

213. *Id.*

termination and was not plainly erroneous, inconsistent with the Corps' regulations or arbitrary or capricious.[214]

In *Ohio Valley Environmental Council v. Bulen*,[215] the Fourth Circuit Court of Appeals upheld Nationwide Permit (NWP) 21 (issued in 2002),[216] which authorized the discharge of dredged or fill material associated with surface coal mining and reclamation operations, but only if three conditions were satisfied. These three conditions were: (1) the operations had to be authorized under the Surface Mining Control and Reclamation Act of 1977 (SMCRA) by the United States Department of Interior or by a state with an approved program under the SMCRA; (2) the permittee had to give prior notification to a Corps' District Engineer of the discharge; and, (3) the District Engineer had to authorize the discharge as being in compliance with NWP 21 and as having minimal environmental effects both individually and cumulatively. The court of appeals, disagreeing with the district court's holding that NWP 21 violated section 404(e) because it "defines a procedure instead of permitting a category of activities," held that NWP 21 complied with section 404(e) of the CWA by authorizing a "category of activities."[217] The Fourth Circuit held that "[t]he district court erroneously reasoned that NWP 21 does not authorize a 'category of activities' because it is defined by procedural requirements 'rather than objective requirements or standards'."[218] The Fourth Circuit's conclusion that the District Court erred in holding that NWP 21 does not define a "category of activities" was based upon a finding that NWP 21 does contain substantive requirements—the SMCRA's "host of 'performance standards' on 'all surface coal mining and reclamation operations';"[219] and "[m]ore importantly, [by the fact that] nothing in section 404(e) or in logic prohibits, much less unambiguously prohibits, the use of procedural, in addition to substantive, parameters to define a 'category'."[220]

214. *Id.* at 684.

215. Ohio Valley Envt'l Council v. Bulen, 429 F.3d 493 (4th Cir. 2005), *reh'g en banc denied*, 437 F.3d 421 (4th Cir. 2006).

216. Issuance of Nationwide Permits, 67 Fed. Reg. 2020, 2081 (Jan. 15, 2002).

217. *Ohio Valley*, 429 F.3d at 498.

218. *Id.* (noting that the district court stated "NWP 21 imposes no limit on the number of linear feet of a stream, for example, that might be impacted by a valley fill or surface impoundment. It does not limit the total acreage of a watershed that might be impacted.").

219. *Id.*

220. *Id.*

In *Wyoming Outdoor Council v. United States Army Corps of Engineers*,[221] a district court held that a general permit, which authorized the release of dredged and fill material for the creation of reservoirs to contain releases of subsurface water resulting from the production of coal bed methane in the Powder River Basin of Wyoming, complied with section 404(e)'s "similar in nature" requirement. This general permit authorized discharges of dredge and fill materials associated with surveys, road construction, well pads, utilities, reservoirs, erosion control, hazardous waste cleanup and mitigation, but permitted no more than 0.3 acres to be filled without an individual section 404 permit.[222] The court accepted the Corps' argument that the Corps' classification of these various activities as "similar in nature" because the activities had a similar purpose (oil and gas production in Wyoming)[223] was "a reasoned choice . . . to avoid unnecessary duplication of regulatory controls."[224] The court noted that the Corps' might have issued separate general permits authorizing each of the various activities that were authorized by the one general permit.[225] The court held that the Corps acted reasonably, and not arbitrarily and capriciously, in categorizing activities subject to the general permit on the basis of the purpose of the activities, although the court stated that the Corps alternatively might have categorized activities on the basis of the size of an activity, the type of mineral being extracted by an activity, the physical characteristics of an activity, or the location of an activity.[226]

In *Sierra Club v. United States Army Corps of Engineers*,[227] regional general permit (RGP) SAJ-86 issued by the Corps' Jacksonville District, that permits the discharge of dredge and fill material into an area of 48,150 acres (over seventy-five square miles) in Florida for a variety of residential, commercial, recreational, and institutional facilities (that the Corps characterized as "sub-

221. Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp. 2d 1232 (D. Wyo. 2005).

222. *Id.* at 1257.

223. *Id.* at 1257-58.

224. *Id.* at 1258.

225. *Id.*

226. *Id.* at 1259.

227. Sierra Club v. U.S. Army Corps of Eng'rs, 464 F. Supp. 2d 1171 (M.D. Fla. 2006), *aff'd per curiam*, 508 F.3d 1332 (11th Cir. 2007). The Eleventh Circuit Court of Appeals noted "the accuracy and thoroughness of the analysis performed by the district court and joining in its deep concern over the questions involved," agreed with the lower court reasoning and affirmed. 508 F.3d at 1334.

urban development")[228], was held to satisfy section 404(e)'s "similar in nature" requirement. SAJ-86 authorizes discharges of dredged or fill material into non-tidal waters of the United States for:

> [T]he construction of residential, commercial, recreational and institutional projects, including building foundations, building pads and attendant features that are necessary for the use and maintenance of the structures. Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, and stormwater management facilities. Residential developments include multiple and single unit developments. Examples of commercial developments include retail stores, light industrial facilities, restaurants, business parks, and shopping centers. Examples of recreational facilities include playgrounds, playing fields, golf courses, hiking trails, bike paths, horse paths, stables, nature centers and campgrounds. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship.[229]

The Eleventh Circuit Court of Appeals characterized regional general permit SAJ-86 as:

> [A]uthorizing all landowners engaged in "suburban development" in a large contiguous area of the Florida panhandle to discharge limited types and amounts of dredged and fill materials into some, but far from all, federal waters in the Permit area, pursuant to specific conditions designed to (a) limit development to specific subunits in the Permit area and minimize significantly the environmental impact of that development, and (b) preserve a large portion of the Permit area with no development at all.[230]

Although stating that the question of whether the Corps' issuance of regional general permit SAJ-86 complies with section 404(e) of the CWA is "extremely close,"[231] the court of appeals concluded in its *per curiam* opinion that SAJ-86 "is within Congress'

228. *Sierra Club*, 464 F. Supp. 2d at 1185.

229. *Id.* at 1190. The permit's list "flatly states that it contains only *examples* of the activities to be permitted, implying that other activities not even mentioned could be authorized by the permit as well . . . ." *Id.* at 1191-92.

230. Sierra Club v. U.S. Army Corps of Eng'rs, 508 F.3d 1332, 1333 (11th Cir. 2007).

231. *Id.* at 1337. Earlier in its opinion the court of appeals stated that the question of whether the issuance of regional general permit SAJ-86 was a proper exercise of

grant of authority to the Corps to issue general permits."[232] The court of appeals additionally stated that it agreed with the district court's reasoning in its opinion in support of its conclusion that SAJ-86 is in compliance with section 404(e)(1)'s requirement that a general permit authorize activities "similar in nature."[233] The court of appeals also stated that "[t]he Permit is replete with special conditions designed to narrow the category of activities authorized by the permit so they are similar in nature, and minimize the environmental effects of development by preserving much of the area and mitigating adverse effects imposed by the proposed activities."[234] The court of appeals noted that SAJ-86 contains 24 special conditions, which the court of appeals described as:

> [E]xtensive,. . . reflect[ing] the Corps' efforts to design a permit that is considerate of the Act and yet tailored to the unique problems presented by this large area of northwest Florida. The Permit both strategically manages development in the entire Permit Area and provides the Corps wide powers to control adverse impacts associated with any particular individual project.[235]

Although the court of appeals' opinion "only highlight[s] a few [of SAJ-86's special conditions] illustrating the broad powers retained by the Corps,"[236] the court of appeals' discussions of SAJ-86's special conditions in its opinion only explicitly emphasize that the permit "more than generally authorizing dredge and fill activities in the Permit Area, . . . imposes numerous restrictive conditions and oversight procedures designed to conserve large portions of the Permit area and minimize the impact of the dredging and filling activities."[237] However, the court of appeals' opinion does not explain how these special conditions make the activities authorized by SAJ-86 "similar in nature" as required by section 404(e)(1) of the Clean Water Act.

---

the Corps' section 404(e) general permitting authority is "a very close case." *Id.* at 1334.

232. *Id.* at 1337.

233. *Id.* at 1333-34.

234. *Id.* at 1334 (citation omitted). Near the end of its opinion the court of appeals similarly stated that "[w]e ultimately agree with the district court's reasoning that the Permit, largely through these special conditions, is within the scope of Section 404(e), limiting the type of activities allowed so they are 'similar in nature' and mitigating any environmental impacts so they are minimal." *Id.* at 1337.

235. *Id.* at 1337.

236. *Id.* at 1334 n.2.

237. *Id.* at 1335.

The district court in the opinion affirmed by the court of appeals,[238] rejected the plaintiffs' arguments[239] that a section 404 general permit only can authorize a "narrowly defined" category of activities and that a section 404 general permit must place a small maximum limit on the amount of acreage of wetlands or waters that can be dredged or filled by any project authorized under a particular general permit.[240] The district court noted that although some of the Corps' nationwide general permits have been for "narrowly defined" categories of activities:

> [S]uch as homeowner docks, utility poles or navigation aids, general permits also have been used to authorize dredge and fill activities to support projects that are more broadly defined, such as oil spill cleanup (NWP20), recreational facilities (NWP 42), cleanup of hazardous and toxic waste (NWP 38), mining activities (NWP 44), and—similar to this permit [SAJ-86]—residential, commercial and institutional development and residential and commercial development (SAJ-74).[241]

The district court in *Sierra Club* also noted that although "most general permits do provide concrete acreage limits [1/4 - 1/2 acre] on the amount of dredge and fill activities authorized by these projects [*sic*], other general permits contain no preset limits,"[242] and stated that "nothing in the [CWA] compels the Corps to use specific per-project wetlands acreage limits. . . ."[243] The district court therefore ruled in *Sierra Club* that neither the "language" of the Clean Water Act nor "history or logic" require that "general permits [be] unalterably reserved for certain narrow types of uses or that SAJ-86 operates in a manner that obliterates any necessary distinctions between individual and general permitting processes."[244]

238. *Id.* at 1334.

239. Sierra Club v. U.S. Army Corps of Eng'rs, 464 F. Supp. 2d 1171, 1186-87 (M.D. Fla. 2006), *aff'd per curiam*, 508 F.3d 1332 (11th Cir. 2007).

240. *Id.* at 1187-89.

241. *Id.* at 1189 (citations omitted).

242. *Id.* at 1188-89 (describing the permits as follows: "NWP 38 (authorizing cleanup of hazardous and toxic waste with no preset limits); NWP 21 (authorizing surface coal mining activities with no preset limits); SAJ-74 (authorizing residential and commercial development in Dade County with no preset limits)" (citation omitted)). The district court later stated that there are no per-project acreage limits in NWPs 1 - 4, 6 - 11, 13, 15 - 17, 20 - 25, 27, 28, 30, 31, 33, 35, 37, 38, and 41. *Id.* at 1199.

243. *Id.* at 1199.

244. *Id.* at 1189.

The district court in *Sierra Club* then specifically addressed section 404(e)'s "similar in nature" requirement, stating that "[a]lthough the permit itself does not explain how these activities are similar in nature,"[245] "there is no statutory (or regulatory) requirement that the label which ties the authorized activities together be contained on the face of the permit,"[246] and that the Corps, in response to a public comment challenging the scope of SAJ-86 as failing to comply with the CWA, "stated that these activities are 'similar in nature' because they are all components of 'suburban development'."[247] The Corps also argued that the activities authorized by SAJ-86 were:

> defined not only by the lengthy list outlined [in the permit itself], but by the other conditions of the permit, which the Corps argues operate in a manner to give concrete limits to what might otherwise be a limitless list of activities. For example, . . . by limiting the road and bridge widths to 100 feet, by significantly restricting the amount of land that can be developed in the permit region, and by implementation of the other permit conditions, only 'suburban development' activities [but not 'urban development' or 'development'] could comply.[248]

The Corps, however, did not appear to argue in *Sierra Club*,[249] as it had similarly and persuasively argued in *Wyoming Outdoor Council*,[250] that SAJ-86 could be held lawful under section 404(e) of the CWA because it simply consolidated into one general permit various different categories of residential, commercial, recreational, and institutional projects that could have been lawfully authorized under section 404(e) in four or more separate regional general permits.

---

245. *Id.* at 1190.

246. *Id.* at 1195.

247. *Id. a*t 1190.

248. *Id.* at 1191-92.

249. The Corps argued in *Sierra Club* that the category of activities authorized by SAJ-86 are similar in nature "because they are all components of suburban development and the special and general conditions of the permit ensure that only suburban development activities would meet the permit terms." *Id.* at 1193. The Corps also argued that "the uniform topography and undeveloped character of the geographic region covered by this permit combined with the limits to the developable area within each sub-basin further ensures that activities associated with other types of development (such as urban development) would not be authorized by this permit." *Id.*

250. Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp. 2d 1232, 1258-59 (D. Wyo. 2005).

In *Sierra Club*, the district court relied upon the holdings in *Alaska Center, Wyoming Outdoor Council*, and *Ohio Valley Environmental Coalition* that the Corps can meet the "similar in nature" requirement by reliance on a general permit's general and special conditions that minimize the cumulative environmental effects of the activities authorized by the general permit, and held that "the Corps' reliance on the special and general conditions of SAJ-86 sufficiently tailor what otherwise might be a virtually limitless list of activities into a category of activities that are sufficiently similar in nature."[251] The district court concluded that "the Corps' determination that the category of activities for [SAJ-86] is similar in nature . . . is sufficiently persuasive to be accorded respect." Although the district court stated that "[t]he plain language of the statute simply does not permit the similarity of the impacts of the activities to equate to the similar in nature determination,"[252] the district court concluded that it was "[s]atisfied, though barely, that the Corps has met the statutory requirement that SAJ-86 authorize a category of activities that are similar in nature."[253] The district court therefore concluded that "[a]lthough this is admittedly an extremely close call, the court finds the Corps has not acted arbitrarily or capriciously, abused its discretion, or acted contrary to law in applying the statute or its implementing regulations to find that the category of activities authorized by SAJ-86 is similar in nature."[254]

The decisions of both the district court and the court of appeals in *Sierra Club* reflect the broad discretion that federal courts grant to the Corps of Engineers to issue a single nationwide, state, or regional general permit under section 404(e) that authorizes a broad range of different kinds of activities, if all of these differing and broad range of activities authorized by the single permit are subject to similar general and special conditions designed to minimize adverse impacts on federally-protected wetlands and other parts of the environment.

However, because the Corps is authorized to issue a section 404 general permit for large numbers of arguably similar (but not identical) activities that cumulatively may result in the filling of

251. *Id.* at 1194 ("The Corps narrowed the types of activities that would be authorized by creating special permit conditions that limit road and bridge widths and that restrict areas to be developed by using multiple sub-basins and limiting to a specific percentage the amount of wetlands that can be dredged or filled.").

252. *Id.* at 1195.

253. *Id.*

254. *Id.* at 1196.

large amounts of federally protected wetlands if not adequately compensated, this article proposes that the EPA and the Corps should amend their regulations to (1) require appropriate compensatory mitigation and pre-construction notification to the Corps for any activity authorized under a section 404 general permit that will fill or otherwise harm any amount of federally-protected wetlands and (2) prohibit any activity under the authorization of a section 404 general permit that will fill more than one-half acre of a federally protected wetland. These requirements should avoid significant cumulative adverse harm to federally-protected wetlands from inadequately compensated projects authorized by section 404 general permits and should help to prevent activities authorized by section 404 general permits from preventing achievement of the national goal of "no overall net loss of wetlands."

B. General Permits for Activities That Will Have Only Minimal Adverse Environmental Effects

Neither section 404(e) nor any other provision of the Clean Water Act clearly indicates whether the individual, separate "adverse environmental effects" and "cumulative adverse environmental effect[s]," which the Corps must evaluate before issuing a general permit under section 404(e),[255] only include effects upon wetlands, other waters of the United States and other parts of the aquatic environment[256]—or includes effects upon the non-aquatic environment as well as the aquatic environment.[257] Although

255. EPA's section 404(b)(1) guidelines require the Corps to perform a "written evaluation of potential individual and cumulative impacts of the categories of activities to be regulated under the general permit," 40 C.F.R. § 230.7(b) (2008). "Since the required evaluation must be completed before the NWP is issued, the analysis is predictive in nature." 72 Fed. Reg. 11,092, 11,094 (Mar. 12, 2007).

256. EPA's section 404(b)(1) guidelines require the Corps, before issuing a section 404 general permit for a category of activities, to determine whether "the activities in such category will have only minimal cumulative adverse effects on water quality and the aquatic environment." 40 C.F.R. § 230.7(a)(3). The term "aquatic environment" is defined by EPA's guidelines as "waters of the United States, including wetlands, that serve as habitat for interrelated and interacting communities and populations of plants and animals." *Id.* § 230.3(c). "As the definitions demonstrate, the aquatic environment encompasses more than just wetlands." *Wyo. Outdoor Council,* 351 F. Supp. 2d 1232, 1255 (D. Wyo. 2005).

257. *Wyo. Outdoor Council*, 351 F. Supp. 2d at 1254 n.11 (D. Wyo. 2005) ("environment" under section 404(e) may be broader term than the term "aquatic environment" in EPA's section 404(b)(1) guidelines, 40 C.F.R. § 230.7(a)(3)); Sierra Club v. U.S. Army Corps of Eng'rs, 464 F. Supp. 2d 1171, 1198 n.39 (M.D. Fla. 2006), *aff'd per curiam*, 508 F.3d 1332 (11th Cir. 2007) (noting that the Corps' historical practice in

EPA's section 404(b)(1) guidelines[258] require the Corps to determine, before issuing a section 404 general permit for a category of activities, that the activities will have only minimal cumulative adverse effects on water quality and the aquatic environment, the Corps position is that "activities authorized by NWPs must also result in minimal adverse effects with regards to the Corps' public interest factors (see 33 C.F.R. 330.1(d)), which includes other components of the environment."[259] However, "[n]either the CWA nor the Corps[']] regulations define what is [*sic*] 'minimal effects'.. . ."[260]

The Corps is not required before issuing a general permit under section 404(e) of the CWA to "provide an *ex ante* guarantee that the activities authorized by [the general permit] would have only a minimal impact."[261] Section 404(e)(2) of the CWA,[262] by authorizing the Corps to revoke or modify a general permit if the Corps:

> [D]etermines that the activities authorized by such general permit have "an adverse impact on the environment," demonstrates that Congress anticipated that the Corps would make its initial minimal-impact determinations under conditions of uncertainty and that those determinations would therefore sometimes be inaccurate, resulting in some general permits that authorize activities with more than minimal impacts. It also demonstrates that Congress expected that the Corps would engage in post-issuance policing of the activities authorized by general permits

conducting "minimal environmental effects" analyses under section 404(e) is to evaluate both the direct effects to wetlands and other water bodies caused by the discharges as well as any indirect or secondary effects to other aspects of the environment caused by the discharges).

258. 40 C.F.R. § 230.7(a)(3).

259. 72 Fed. Reg. 11,092, 11,095 (Mar. 12, 2007).

260. *Sierra Club*, 464 F. Supp. 2d at 1197. The district court noted that when the Corps reissued nationwide general permits in 2002, it explicitly "declined to issue a minimal adverse environmental effects definition by regulation." *Id.* at 1208 n.52. The district court further noted that in 67 Fed. Reg. 2020, 2075 (Jan.15, 2002), the Corps explained "the criterion for evaluating whether adverse environmental effects are minimal is best left to district engineers who are familiar with site specific factors that account for the variety of aquatic resources and functions." *Id.*

261. Ohio Valley Envtl. Coal. v. Bulen, 429 F.3d 493, 500 (4th Cir. 2005) ("it is simply not the case that issuance of a general permit functions as a guarantee *ab initio* that every instance of the permitted activity will have only a minimal impact").

262. Clean Water Act (CWA), 33 U.S.C. § 1344(e)(2) (2006).

in order to ensure that their environmental impacts are minimal.[263]

The Corps' interprets one of EPA's section 404(b)(1) Guidelines at 40 C.F.R. § 230.7 as "not prohibit[ing] the consideration of mitigation when making the predictive evaluation of potential individual and cumulative impacts that may be authorized by an NWP,"[264] and the Corps therefore has stated that "[t]he practice of using compensatory mitigation to ensure minimal adverse individual and cumulative adverse effects is an important component of the NWP program. . . ."[265] The Corps' position that "minimal adverse environmental effects" under section 404(e) is the "net" adverse environmental effects caused by a general permit (after the implementation of both compensatory mitigation of wetlands required by a general permit and a general permit's special conditions to minimize adverse environmental effects, which result in amelioration of the adverse environmental effects caused by the projects authorized by a general permit) has been held to be a reasonable interpretation of section 404(e).[266]

Section 404(e)'s requirement, that the Corps must find that activities authorized under a section 404(e) general permit will have only "minimal effects" upon the environment before issuing a section 404 general permit, therefore does not have be based solely upon the nature of the activities authorized by a general permit.[267] Rather, a Corps' finding of "minimal effects" also can be based, at least in part, upon a general permit's general and special conditions (including compensatory mitigation of wetlands) that seek to minimize the adverse environmental effects caused by projects and activities authorized by a general permit[268] and upon post-permit procedural requirements that a person seeking authorization of a project under a general permit must follow (such

263. *Ohio Valley*, 429 F.3d at 500 (citation omitted). Section 404(e)(2) also authorizes the Corps to revoke or modify a section 404 general permit if it determines that "the activities authorized by such general permit . . . are more appropriately authorized by individual permits." 33 U.S.C. § 1344(e)(2).

264. 72 Fed. Reg. 11,092, 11,095 (Mar. 12, 2007).

265. *Id.* (citing 33 C.F.R. § 330.1(e)(3) (2008)).

266. Sierra Club v. U.S. Army Corps of Eng'rs, 464 F. Supp. 2d 1171, 1207-11 (M.D. Fla. 2006), *aff'd per curiam*, 508 F.3d 1332 (11th Cir. 2007).

267. *Ohio Valley*, 429 F.3d at 499-500.

268. *Id.* at 499-501; Alaska Ctr. for the Env't v. West, 157 F.3d 680, 683-85 (9th Cir. 1998); Sierra Club v. U.S. Army Corps of Eng'rs, 464 F. Supp. 2d 1171, 1204-11 (M.D. Fla. 2006), *aff'd per curiam*, 508 F.3d 1332 (11th Cir. 2007) (conditions included wetlands mitigation requirements).

as pre-construction notification (PCN) to a Corps' District Engineer that provides notice to the Corps of the project that a prospective permittee intends to undertake and the project's anticipated environmental effects[269] (or, as discussed in the next paragraph, PCN and application to a Corps' District Engineer for authorization of the project and receipt of the DE's authorization of the proposed project under the general permit).[270]

In *Sierra Club v. United States Army Corps of Engineers*,[271] the Eleventh Circuit Court of Appeals held that the special conditions of regional permit SAJ-86 "mitigate any environmental impacts such that the Permit is a proper exercise of the Corps' Section 404(e) general permitting authority"[272] and that "more than generally authorizing dredge and fill activities in the Permit area, the Permit imposes numerous restrictive conditions and oversight procedures designed to conserve large portions of the Permit area and minimize the impact of the dredging and filling activities."[273]

The district court in its opinion in *Sierra Club* (with whose reasoning the court of appeals agreed[274]) found that the Corps acted reasonably in basing its "minimal effects" finding under section 404(e)(1) for regional general permit SAJ-86 upon PCN and project authorization requirements and upon general and special conditions (including requirements for compensatory mitigation of wetlands) in SAJ-86. SAJ-86 requires a person proposing to undertake a residential, commercial, recreational, or institutional project that will involve dredge or fill activities that impact wetlands within the permit area to meet with the Corps and other state and federal agencies to evaluate the scope and location of the

269. *Ohio Valley,* 429 F.3d at 501 n.5 (dictum).

270. *Id.* at 501-02; Sierra Club v. U.S. Army Corps of Eng'rs, 464 F. Supp. 2d 1171 (M.D. Fla. 2006), *aff'd per curiam*, 508 F.3d 1332 (11th Cir. 2007). The court of appeals in *Ohio Valley* did not address the Corps' contention that the CWA "allows it to issue a nationwide permit so long as it makes the minimal-impact determinations before the permit is actually used to authorize discharges, even if after the issuance of the permit." *Ohio Valley,* 429 F.3d at 498 n.3.

271. *Sierra Club,* 464 F. Supp. 2d 1171.

272. *Sierra Club*, 508 F.3d at 1334.

273. *Id.* at 1335. The court of appeals stated later in the opinion that "[w]e ultimately agree with the district court's reasoning that the Permit, largely through these special conditions, is within the scope of Section 404(e), limiting the type of activities allowed so they are 'similar in nature' and mitigating any environmental impacts so they are minimal. We conclude this Permit is within Congress' grant of authority to the Corps to issue general permits." *Id.* at 1337.

274. *Id.* at 1334.

activities and to delineate affected wetlands,[275] and then to "apply to the Corps' District Engineer who may authorize individual projects upon finding them to be compliant with the terms of SAJ-86"[276] and upon approval of proposed mitigation plans and additional requirements which a District Engineer may impose to minimize adverse environmental impacts.[277] However, if a proposed project fails to meet the requirements of regional permit SAJ-86, "it could be submitted for consideration as an individually permitted project, to be evaluated in accordance with the individual permit application process . . ." under section 404 of the CWA.[278] In *Sierra Club*, the district court noted that because the area covered by general permit SAJ-86 "is permeated with wetlands, which account for approximately 60% of the land area, most of these developments require a CWA [section 404] permit so that wetlands can be dredged or filled to accommodate the development."[279] Rather than regulate development in the general permit area through individual section 404 permits, the Corps issued SAJ-86 to regulate development in the general permit area under "a regional development plan through use of a general permit that would guide growth in a manner which maximized protection of wetlands on a larger scale than would be possible on an individual project-by-project basis."[280]

The district court stated that "[b]y all accounts, SAJ-86 is unique and unprecedented in that it covers an extraordinarily large land area (over seventy-five square miles) in comparison to other regional general permits and because a single landowner (St. Joe [Company, Inc.]) owns an overwhelming proportion of the land covered by the permit (over 80%) and has specific rights and obligations under the permit terms that do not apply to the other landowners who own property within the RGP area."[281] An owner of land within the permit area (other than St. Joe Company) can apply for an individual section 404 permit under the Clean Water Act, or seek authorization for the project under another general

275. *Sierra Club*, 464 F. Supp. 2d at 1186.
276. *Id.* at 1180.
277. *Id.*
278. *Id.* at 1186.
279. *Id.* at 1177. The district court stated later that the Corps recognized that the configuration of wetlands and other waters within the area covered by SAJ-86 made the area "*virtually undevelopable* without some degree of [Corps'] regulat[ion]." *Id.* at 1201 (emphasis added by the court).
280. *Id.* at 1178.
281. *Id.*

permit (including a Corps' nationwide general permit) for a project impacting wetlands which would be covered by SAJ-86, but St. Joe Company "is obligated by the terms of [the Ecosystem Management Agreement (EMA) between St. Joe Company and the Florida Department of Environmental Protection (DEP)] to use the EMA and RGP exclusively for construction activities covered by the permit."[282] The district court also pointed out that:

> Under SAJ-86, landowners can dredge or fill wetlands to construct residential, commercial, recreational and institutional projects in the regional general permit area . . . , the amount of wetlands dredged or filled as a result of these construction activities are limited in the following ways: first, impacts to "high quality" wetlands throughout the permit area are limited to 125 total acres; second, impacts to "low quality" wetlands are limited to 20% of the wetlands in any one of nineteen different geographic sub-basins; third, all lost wetlands are to be mitigated either through on-site mitigation or through two off-site mitigation banks; and fourth, the permit designates up to 13,200 acres of land as "conservation units," which land St. Joe (the owner of the 13,200 acres) is to ultimately place into conservation by granting easements to the Florida Department of Environmental Protection ("DEP") for the perpetual protection of those acres . . . . The permit contains numerous other terms that do not directly affect the amount of wetlands to be dredged or filled but that otherwise affect the impact of construction activities on wetlands and the environment generally, such as wetland buffer requirements, restrictions on the type of wetland fill that can be used, septic tank and drainfield prohibitions, required methods of storm-water management for new construction projects, and limits to the placement of road crossings.[283]

Although the Corps did not include specific limits on the maximum amount of wetlands that could be destroyed by an individual

282. *Id.* at 1180. Additional land that St. Joe Company might acquire within the general permit area after the issuance of SAJ-86 and the EMA, would not be subject to the EMA. *Id.* at 1180 n.13. St. Joe Company can seek authorization of an activity not covered by SAJ-86 under either another section 404 general permit or under an individual section 404 permit. *Id.*

283. *Id.* at 1178-80 (citations omitted). "The [general] permit also contemplates the execution between St. Joe and the DEP of a 30 page Ecosystem Management Agreement ('EMA'), the conditions of which are specifically incorporated into SAJ-86 as special conditions applicable to St. Joe. . . . Among those conditions is that the EMA (and by extension, the RGP) will serve as the exclusive mechanism for St. Joe to initiate the types of activities authorized by the permit within the 31,369 acres (the total acreage St. Joe owns in the RGP area) covered by the EMA." *Id.*

project authorized by SAJ-86, the district court in *Sierra Club* found that the Corps did not act arbitrarily and capriciously in "issuing SAJ-86 without any specific per-project wetland acreage limits,"[284] with the district court noting that "nothing in the [CWA] compels the Corps to use specific per-project wetlands acreage limits" and that a low per-project acreage limit in a general permit does not mean that the adverse environmental impacts from the entire permit will be low.[285]

The district court concluded in *Sierra Club* that although the activities permitted by SAJ-86 may "result in the dredge and fill of up to 1500 acres of wetlands (and possibly more ([with a] wetlands impact under [the] permit . . . [of] up to 2037 acres)) and, within that limit, up to 20% destruction of low quality wetlands within any one of the nineteen sub-basins and impacts of up to 125 total acres of high quality wetlands,"[286] the Corps reasonably could find that SAJ-86, with its special conditions for particular types of projects, wetlands compensatory mitigation requirements, and project authorization requirements, would have minimal adverse environmental effects (both separately for each individual project authorized under SAJ-86 and cumulatively for all authorized projects).[287] The district court also stated "that the Corps' determination that the adverse environmental effects of the activities authorized by SAJ-86 are both individually and cumulatively minimal is not arbitrary and capricious because the special conditions sufficiently ameliorate what . . . would otherwise be more than minimal adverse environmental effects from the activities authorized by this permit."[288]

Because the courts do not interpret section 404 of the Clean Water Act as either requiring the Corps to limit the maximum amount of wetlands acreage that can be filled by an activity authorized under a Corps section 404 general permit or as requiring the Corps to require appropriate compensatory mitigation for any activity authorized under a section 404 general permit that will fill any amount of federally protected wetlands, this article pro-

284. *Id.* at 1200.

285. *Id.* at 1199. The district court noted that the Corps in 2006 estimated that NWP 39 for residential, commercial and institutional developments would be used 7,500 times over a five year period, resulting in the loss of 1,250 acres of wetlands and that NWP 14 for linear transportation projects would be used 25,000 times over a five year period, resulting in the loss of 2,000 acres of wetlands. *Id.*

286. *Id.* at 1197 (citation omitted).

287. *Id.* at 1204-17.

288. *Id.* at 1207 (citation omitted).

poses that EPA should amend its section 404(b)(1) guidelines to prohibit the Corps from authorizing under any section 404 permit an activity that will fill more than one-half of an acre of federally protected wetlands or that will fill any federally protected wetland without adequate compensatory mitigation.

C. EPA's Section 404(b)(1) Guidelines for General Permits

Section 404(e)(1) of the CWA requires any general permit issued under section 404(e)(1) to be based upon EPA's guidelines under section 404(b)(1)[289] of the CWA. EPA's present section 404(b)(1) guidelines[290] do not require either pre-construction notification to the Corps or adequate compensatory mitigation for any activity authorized under a section 404 general permit that will fill federally protected wetlands and also do not prohibit section 404 general permits from authorizing any activity that will fill more than one half acre of federally protected wetlands. Furthermore, the compensatory mitigation requirement of EPA's section 404(b)(1) guidelines that applies to standard individual section 404 permits does not apply to section 404 general permits.[291] In addition, because EPA's section 404(b)(1) guidelines provide that "consideration of alternatives in [40 C.F.R.] § 230.10(a) are [*sic*] not directly applicable to General permits,"[292] a section 404 general permit does not have to comply with the "no practicable alternatives" requirement of EPA's sequencing approach that regulates the issuance of individual section 404 permits.[293]

Section 404 general permits, however, are subject to a provision[294] of the EPA section 404(b)(1) guidelines that provide "[e]xcept as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystems."[295] Furthermore, EPA's section 404(b)(1) guidelines also provide that:

289. Clean Water Act (CWA), 33 U.S.C. § 1344(b)(1) (2006).

290. 40 C.F.R. § 230 (2008).

291. Memorandum of Agreement, *supra* note 2, at 9211; Draft Environmental Assessment, *supra* note 5, at 7.

292. 40 C.F.R. § 230.7(b)(1).

293. *See supra* notes 97-105 and accompanying text (discussing EPA's sequencing approach for individual section 404 permits under EPA's section 404(b)(1) guidelines).

294. 40 C.F.R. § 230.10(d).

295. *Id.* ("Subpart H [of 40 C.F.R. § 230] identifies such possible steps").

> A General Permit for a category of activities involving the discharge of dredged or fill material complies with the Guidelines if it meets the applicable restrictions on the discharge in § 230.10 and if the permitting authority determines that:
>
> (1) The activities in such category are similar in nature and similar in their impact upon water quality and the aquatic environment;
>
> (2) The activities in such category will have only minimal adverse effects when performed separately; and
>
> (3) The activities in such category will have only minimal cumulative adverse effects on water quality and the aquatic environment.[296]

The Corps can reasonably find that the first criterion's "similar in impact" requirement is satisfied for various activities authorized by a single section 404 general permit when general and special conditions in the permit reduce secondary environmental impacts caused by the various authorized activities, so that the environmental effects caused by the various authorized activities do not differ and therefore are similar.[297]

For purposes of the third criterion, the term "aquatic environment" (which is defined by EPA to mean "waters of the United States, including wetlands, that serve as habitat for interrelated and interacting communities and populations of plants and animals"[298]) "encompasses more than just wetlands."[299] Cumulative effects to the aquatic environment are described by the guidelines

296. *Id.* § 230.7(a) (The guideline's "similar in nature" requirement for section 404 general permits is identical in language to section 404(e)(1)'s "similar in nature" requirement, and therefore both provisions should be interpreted identically).

297. Alaska Ctr. for the Env't v. West, 157 F.3d 680, 683-84 (9th Cir. 1998); *Wyo. Outdoor Council v. United States Army Corps of Engineers*, 351 F. Supp. 2d 1232, 1260 (D. Wyo. 2005), similarly held that "the Corps' reliance on permit conditions to find that impacts to the environment would be similar is not arbitrary and capricious." *Sierra Club v. United States Army Corps of Engineers*, 464 F. Supp. 2d 1171, 1218 (M.D. Fla. 2006), *aff'd per curiam*, 508 F.3d 1332 (11th Cir. 2007), held that the Corps complied with the guidelines' "similar in impact" requirement because the uniformity of affected wetlands, "combined with the permit conditions . . . , ensure that the impacts to the aquatic environment will be similar and that even the effects of activities as diverse as golf courses and parking lots will be similar throughout the [general permit] region."

298. 40 C.F.R. § 230.3(c).

299. *Wyo. Outdoor Council*, 351 F. Supp. 2d at 1255. "The guidelines require the Corps to consider more than just cumulative effects on wetlands. The Corps must consider cumulative adverse effects to the aquatic environment, . . . which includes wetlands . . . ." *Id.* at 1256.

as those "changes in an aquatic environment that are attributable to the collective effect of a number of individual discharges of dredged or fill material."[300] The guidelines require "the Corps to base its prediction of cumulative effects on an evaluation which 'shall include the number of individual discharge activities likely to be regulated under a General permit until its expiration, including repetitions of individual discharge activities at a single location."[301] Under the guidelines, "secondary effects, or those effects 'that are associated with a discharge of dredged or fill materials, but do not result from the actual placement of the dredged or fill material,' [must] be considered [by the Corps] before issuing a general permit."[302]

EPA's present section 404(b)(1) guidelines specify that:

> In the case of activities covered by General permits . . . , the analysis and documentation required by the Guidelines will be performed at the time of General permit issuance . . . and will not be repeated when activities are conducted under a General permit. . . . These Guidelines do not require reporting or formal written communication at the time individual activities are initiated under a General permit. . . . However, a particular General permit may require appropriate reporting.[303]

In order to make these determinations, a permitting authority is required by the EPA guidelines to prepare a written "evaluation of the potential individual and cumulative impacts of the category of activities to be regulated under the General permit."[304] The evaluation is required to include consideration of the provision[305] of the EPA guidelines that prohibits certain discharges[306]

300. 40 C.F.R. § 230.11(g)(1). EPA's section 404(b)(1) guidelines only require the Corps to "consider cumulative effects on water quality and the aquatic environment," *Wyo. Outdoor Council*, 351 F. Supp. 2d at 1255 (footnote omitted), although the Corps' public interest standard, 33 C.F.R. § 320.4(a)(1), requires the Corps to "consider the cumulative effect of the general permit on the various public interest factors." *Id.*

301. *Sierra Club*, 464 F. Supp. 2d at 1219 (quoting 40 C.F.R. § 230.7(b)(3)).

302. *Wyo. Outdoor Council*, 351 F. Supp. 2d at 1255 (quoting 40 C.F.R. § 230.11(h)(1)).

303. 40 C.F.R. § 230.6(d).

304. *Id.* § 230.7(b).

305. *Id.* § 230.10(b).

306. 40 C.F.R. § 230.10(b) prohibits a discharge of dredged or fill material if it (1) causes or contributes to violation of any applicable water quality standard; (2) violates any applicable toxic effluent standard or prohibition under section 307 of the CWA; (3) jeopardizes the continued existence of any species listed as endangered or threatened under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544 (2006), or results in the likelihood of the destruction or adverse modification of habitat desig-

and the provision[307] of the EPA Guidelines that prohibits, except as provided under section 404(b)(2) of the CWA, any discharge of dredged or fill material "which will cause or contribute to significant degradation of waters of the United States."[308]

> The evaluation shall include a precise description of the activities to be permitted under the General permit, explaining why they are sufficiently similar in nature and in environmental impact to warrant regulation under a single General permit based on Subparts C through F of the Guidelines. Allowable differences between activities which will be regulated under the same General permit shall be specified. Activities otherwise similar in nature may differ in environmental impact due to their location in or near ecologically sensitive areas, areas with unique chemical or physical characteristics, areas containing concentrations of toxic substances, or areas regulated for specific human uses or by specific land or water management plans (e.g., areas regulated under an approved Coastal Zone Management Plan).[309]

The evaluation also is required to "include documented information supporting each factual determination"[310] that seeks to comply with the provision[311] of the EPA Guidelines that requires a permitting authority to "determine in writing the potential short-term or long-term effects of a proposed discharge of dredged or fill material on the physical, chemical and biological components of the aquatic environment in light of subparts C through F [of the EPA Guidelines]."[312]

---

nated as critical under the ESA (either of which result would violate section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2)); or (4) violates any requirement imposed under Title III of the Marine Protection, Research and Sanctuaries Act, 16 U.S.C. §§ 1431-1445 (2006).

307. 40 C.F.R. § 230.10(c).

308. *Id.* §§ 230.10(c)(1)-(4) (providing a non-exclusive list of various types of adverse effects, including impacts on human health and welfare (including recreational, aesthetic and economic values), fish and wildlife, that contribute to significant degradation of waters of the United States).

309. *Id.* § 230.7(b)(2). This provision, which "requires a 'precise description of the activities' themselves. . .[,] is [not] satisfied by [the Corps'] record statement that the activities are similar in nature because they 'essentially involve the placement of fill material into two pre-identified and evaluated classes of wetlands for the construction of various components that typically comprise suburban development.'" Sierra Club v. U.S. Army Corps of Engineers, 464 F. Supp. 2d 1171, 1219 (M.D. Fla. 2006), *aff'd per curiam*, 508 F.3d 1332 (11th Cir. 2007).

310. 40 C.F.R. § 230.7(b)(1).

311. *Id.* § 230.11.

312. *Id.* § 230.11. This determination of effects includes "[s]econdary effects on an aquatic ecosystem that are associated with a discharge of dredged or fill materials,

D. Corps' Requirements and Standards for Section 404 General Permits

A Corps' section 404(e) general permit is required to "set forth the requirements and standards which shall apply to any activity authorized by such general permit."[313] The Corps has issued numerous general conditions for its nationwide general permits (NWPs), which "'must be followed in order for any authorization by an NWP to be valid'."[314] Some of these nationwide general permits require a prospective permittee to provide pre-construction notification to a District Engineer of the project the permittee intends to undertake under the general permit and the project's environmental effects,[315] and some Corps' general section 404 permits, such as 2007 Nationwide Permit 21, require a prospective permittee not only to provide PCN to a District Engineer but also to receive a District Engineer's authorization of a project in order for a project to be authorized under the general permit.[316]

Because a general permit issued under section 404(e)(1) cannot be for a period of more than five years from the date of its issuance,[317] a Corps' regulation specifies that if a nationwide general permit "is not modified or reissued within five years of its effective date, it automatically expires and becomes null and void."[318] An activity that was completed under the authorization of an NWP that was in effect at the time of the activity's completion continues to be authorized under that NWP;[319] and an activity which is commenced or is under construction at a time when that activity is authorized by an NWP that is in effect remains authorized by that NWP provided that the activity is completed within twelve (12) months of the date of expiration, modification or revocation of the NWP, unless a District Engineer has exercised discretionary authority, on a case-by-case basis, to modify, suspend or revoke the authorization of the NWP.[320]

---

but do not result from the actual placement of the dredged or fill material." *Id.* § 230.11(h).

313. Clean Water Act (CWA), 33 U.S.C. § 1344(e)(1)(B) (2006).

314. Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 417 F.3d 1272, 1276 n.2 (D.C. Cir. 2005) (quoting 67 Fed. Reg. 2020, 2089 (Jan. 15, 2002)).

315. *See supra* notes 183-193 and accompanying text (discussing pre-construction notification).

316. *See* Ohio Valley Envtl. Coal. v. Bulen, 429 F.3d 493, 503 (4th Cir. 2005).

317. 33 U.S.C. § 1344(e)(2).

318. 33 C.F.R. § 330.6(b) (2008).

319. *Id.*

320. *Id.*

Section 404(e)(2)[321] of the CWA provides that a general permit issued under section 404(e) "may be revoked or modified by the [Corps] if, after opportunity for public hearing, the [Corps] determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits."[322]

If the Corps has such concerns about a proposed activity that is authorized by a section 404 nationwide general permit, the Corps therefore has "'discretionary authority' to restrict the otherwise automatic application of the NWP program while its concerns are addressed."[323] The Corps has statutory authority under the CWA not only to promulgate regulations under which the Corps retains discretion to suspend the use of a section 404 nationwide general permit by a particular point source, but also retains discretion to require a particular point source authorized by a section 404 general permit instead to apply for and obtain an individual section 404 permit when the Corps finds such action is necessary to protect an aquatic environment.[324] The Corps has adopted a regulation[325] that gives a Corps' District or Division Engineer (DE) discretionary authority to suspend, modify, or revoke authorizations under a nationwide general permit (NWP) where a DE has concerns for the aquatic environment under EPA's guidelines under section 404(b)(1) of the CWA or for any factor of the public interest. "If the DE finds that the proposed activity would have more than minimal individual or cumulative net adverse effects on the environment or otherwise may be contrary to the public interest, he shall modify the NWP authorization to reduce or eliminate those adverse effects, or he shall instruct the prospective permittee to apply for a regional general permit or an individual permit."[326]

Conversely, the Corps is authorized to approve a proposed activity, for which an applicant has applied for an individual section 404 permit, under a general nationwide permit (NWP) "even if the applicant initially requested a type of individual permit that would have required more rigorous review."[327] Corps' regula-

321. 33 U.S.C. § 1344(e)(2).
322. *Id.*
323. Crutchfield v. County of Hanover, 325 F.3d 211, 215 (4th Cir. 2003).
324. Indus. Highway Corp. v. Danielson, 796 F. Supp. 121, 128 (D.N.J. 1992).
325. 33 C.F.R. § 330.1(d) (2008).
326. *Id.*
327. *Crutchfield*, 325 F.3d at 213.

tions[328] require the Corps to review each application for an individual section 404 permit to determine if the proposed activity, either as originally proposed or with some modifications, is eligible for a general NWP under section 404, even if the applicant does not so request, and to notify an applicant for an individual section 404 permit if its proposed activity, either as originally proposed or as modified according to the Corps' specifications, qualifies for a general NWP under section 404 of the CWA.[329]

VI. ISSUANCE OF SECTION 404 PERMITS BY A STATE UNDER AUTHORITY DELEGATED BY EPA

Upon application of a state and a finding by the EPA Administrator that the state meets criteria specified in section 404(h)[330] of the CWA, the EPA Administrator may delegate to that state the authority:

> [T]o administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters within the state's jurisdiction (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto).[331]

"State assumption of the section 404 program is limited to certain waters, as provided in section 404(g)(1). The federal program operated by the Corps of Engineers continues to apply to the remaining waters in the State even after program approval."[332] Once a state has had its permit program approved under section 404(h) and begun to administer its state permit program, the Corps is required to suspend its issuance of individual and general permits

328. 33 C.F.R. § 330.1(f).

329. *Crutchfield*, 325 F.3d at 215, 219 (4th Cir. 2003).

330. Clean Water Act (CWA), 33 U.S.C. § 1344(h) (2006).

331. *Id.* § 1344(g)(1). EPA regulations specifying procedures and criteria for approving, reviewing and withdrawing approval of state programs under section 404 are at 40 C.F.R. § 233.1 (2008).

332. 40 C.F.R. § 233.1.

under section 404 of the CWA for activities with respect to which a permit may be issued under such state permit program.[333]

An EPA regulation[334] provides that a state with delegated authority to issue section 404 permits "may issue a general permit for categories of similar activities if [it] determines that the regulated activities will cause only minimal adverse effects when performed separately and will have only minimal cumulative adverse effects on the environment" and if the general permit is in compliance with EPA's section 404(b)(1) guidelines.[335] Another EPA regulation[336] provides that a state general permit must specifically describe the activities authorized by the general permit and the limitations for any single activity, and precisely describe the geographic area to which the general permit applies.[337] In addition to a state issuing its own section 404 general permits, "[u]pon notification from a State with a permit program approved under [33 U.S.C. § 1344(h)] that such State intends to administer and enforce the terms and conditions of a general permit issued by the [Corps under section 404(e) of the CWA] with respect to activities in such State to which such general permit applies, the [Corps] shall suspend the administration and enforcement of such general permit with respect to such activities."[338]

At the present time, the only states to which section 404 permit-issuing authority has been delegated are Michigan[339] and New Jersey.[340] General permits have been issued by both Michigan[341] and New Jersey[342] under this delegated authority, for certain discharges of dredged and fill materials.

333. 33 U.S.C. §§ 1344(h)(2)(A)(3).

334. 40 C.F.R. § 233.21(b).

335. *Id*.

336. *Id.* § 233.21(c).

337. *Id*. A state general permit may require pre-discharge notification or other reporting requirements on a case-by-case basis in order to ensure compliance with section 404(e) of the Clean Water Act. *Id.* § 233.21(d). A state has discretionary authority to require any person, whose activity is authorized by a state general permit, to apply for an individual state permit. *Id.* § 233.21(e).

338. 33 U.S.C. § 1344(h)(5) (A state, after approval of its section 404 permit program by EPA, may administer and enforce general permits previously issued by the Corps in state-regulated waters). *See also* 40 C.F.R. § 233.21(a).

339. 40 C.F.R. § 233.70 (Michigan's section 404 state permit program became effective on Oct. 16, 1984).

340. *Id.* § 233.71 (New Jersey's section 404 state permit program became effective Mar. 2, 1994).

341. MICH. ADMIN. CODE r. 281.923 (2008). *See also* Michigan Dep't of Envtl. Quality (DEQ), http://www.michigan.gov/deq/ (Follow the "Water" hyperlink on the left; then follow the "Surface Water" hyperlink on the left; follow the "NPDES Permits" hyperlink; then follow "General NPDES Permits" under "Permits.").

The EPA Administrator may withdraw approval of a state permit program if the Administrator determines that the state is not administering the state permit program in accordance with section 404, including EPA's section 404(b)(1) guidelines, in which case the Corps resumes issuance of individual and general permits under sections 404(a) and (e).[343]

As discussed earlier,[344] EPA has authority under section 404(c)[345] of the Clean Water Act to veto the issuance of a section 404 general permit by a state with delegated authority to issue section 404 permits. In addition, section 404(j)[346] of the CWA authorizes the EPA Administrator to veto a new state general permit proposed by a state that has been delegated authority to issue state dredged and fill material discharge permits, when the EPA Administrator provides the state with written comments in which the EPA objects to the new general permit "as being outside the requirements of [section 404], including, but not limited to, the [EPA] guidelines developed under [section 404(b)(1)] unless the state modifies such proposed permit in accordance with such comments."[347] Alternatively, if the State does not revise such proposed new general permit within a specified time period to meet such objection, the Corps may issue the general permit pursuant to section 404(e) in accordance with the guidelines and requirements of the Clean Water Act.[348]

VII. CORPS' NATIONWIDE GENERAL SECTION 404 PERMITS

In accordance with the requirement in section 404(e)(2)[349] of the CWA, that no general permit issued by the Corps under section 404(e) of the CWA "shall be for a period of more than five years," the Corps in July 1977 first issued section 404(e) nationwide permits[350] for the five year period between July 1977 and 1982, and then subsequently issued revised section 404(e) nation-

342. N.J. ADMIN CODE §§ 7:7A-4.1 to -4.6, 7:7A-5.1 to -5.27 (2003), *available at* http://www.state.nj.us/dep/landuse/7-7a.pdf.

343. 33 U.S.C. § 1344(i).

344. *See supra* notes 136-140 and accompanying text.

345. 33 U.S.C. § 1344(c).

346. *Id.* § 1344(j).

347. *Id.*

348. *Id.*

349. *Id.* § 1344(e)(2).

350. 33 C.F.R. § 323.4 (1977).

wide general permits, for five-year periods, in 1982,[351] 1987,[352] 1992,[353] 1997,[354] 2002,[355] and 2007.[356]

The initial section 404 nationwide general permits included a general permit for discharges of dredged or fill material into wetlands or non-navigable waters that occurred prior to July 25, 1977. This 1977 general permit:

> [P]rovided for a phase-in of the individual permit requirements to wetlands and non-navigable waters. Discharges into wetlands or non-navigable waters prior to the phase-in dates [July 25, 1977 for wetlands and non-navigable waters] were not subject to individual permit requirements if they did not violate certain health and environmental restrictions, subject to the Corps' exercise of discretionary authority to require an individual permit if the circumstances 'indicate[d]the need for such action because of . . . adverse impacts to the affected waters' . . . .[357]

In 1977 the Corps also issued a so-called "headwaters and isolated wetlands" nationwide general permit[358] which authorized, subject to compliance with specific conditions to minimize harm to the environment and public health, discharges of dredge and fill material into (1) non-tidal rivers, streams and their lakes and im-

351. 47 Fed. Reg. 31,794, 31,800 (1982). The Corps' 1982, 1987, 1992, 1997, 2002 and 2007 nationwide general permit regulations combined the Corps' nationwide general permits issued under section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 (2006), with the Corps' CWA section 404 nationwide general permits. Under these regulations some nationwide permits were issued only under section 10 of the Rivers and Harbors Act, some were issued under both Acts, and some were issued only under section 404 of the Clean Water Act. Because a joint general permit issued under both section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act is legally a section 404 general permit, this article counts it as such.

352. 51 Fed. Reg. 41,206 (Nov. 13, 1986) (codified at 33 C.F.R. pt. 330) (effective Jan. 12, 1987).

353. 56 Fed. Reg. 59,110 (Nov. 22, 1991) (codified at 33 C.F.R. pt. 330 Appendix A (1992)) (effective Jan. 21, 1992), *amended by* 60 Fed. Reg. 38,650 (July 27, 1995) (establishing NWP 29 for single-family housing) (effective Sept. 25, 1995).

354. 61 Fed. Reg. 65,874 (Dec. 13, 1996) (effective Feb. 11, 1997). The Corps did not publish these 1997 general permits or subsequent general permits in the Code of Federal Regulations, on the ground that permits are not regulations. *Id.* at 65,878.

355. 67 Fed. Reg. 2020 (Jan. 15, 2002); 67 Fed. Reg. 6692 (Feb. 13, 2002); 67 Fed. Reg. 8,579 (Feb. 25, 2002). These 2002 NWPs were not codified in the Code of Federal Regulations.

356. 72 Fed. Reg 11,092 (Mar. 12, 2007). These 2007 NWPs are not codified in the Code of Federal Regulations.

357. Orleans Audubon Soc'y v. Lee, 742 F.2d 901, 905 (5th Cir. 1984), *superseded by* 47 Fed. Reg. 31,794, 31,800 (July 22, 1982) (citation omitted) (citing 33 C.F.R. §§ 323.4-1(a), 323.4-4 (1977)).

358. 33 C.F.R. § 323.4 (1977).

poundments, including adjacent wetlands, that are located above the headwaters (except for some waters in Wisconsin for which the state of Wisconsin denied water quality certification under section 401 of the CWA)[359] and (2) other non-tidal waters of the United States that were not part of a surface tributary system to interstate waters or navigable waters of the United States. In 1982 this general permit was extended another five years;[360] in 1987, this general permit was modified and reissued as nationwide general permit 26, which was the "most widely used" nationwide general permit.[361]

The Corps' nationwide permit 26, which first became effective on January 12, 1987,[362] and continued in its original form until January 21, 1992,[363] authorized only activities in non-tidal waters and wetlands[364] that involved the discharge of dredged or fill material into non-tidal waters when the discharge caused the loss or substantial modification of less than ten acres of wetlands or waters of the United States.[365] Where a discharge of dredged or fill material into non-tidal waters or wetlands would destroy or substantially modify between one and ten acres of waters or wetlands, an applicant for NWP 26 was required to notify the Corps of the proposed activity and to receive the Corps' authorization for the activity before the activity could lawfully occur.[366] Nationwide permit 26 did not require prior notification to the Corps of an activity that involved the discharge of dredged or fill material into non-tidal waters or wetlands which caused the loss or substantial modification of less than one acre of waters or wetlands.[367] Such prior notification was required, however, for an activity that would fill less than one acre of wetlands where that activity would cause the loss or substantial modification of one to ten acres of

359. Clean Water Act (CWA), 33 U.S.C. § 1341 (2006).

360. 33 C.F.R. § 330.4 (1982); 47 Fed. Reg. 31,794 (July 22, 1982) (effective date July 22, 1982).

361. Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 453 F. Supp. 2d 116, 120 (D.D.C. 2006), *appeal dismissed per curiam*, 2008 U.S. App. LEXIS 2895 (D.C. Cir. 2008). In 1995 alone 13,837 activities were authorized by NWP 26. 61 Fed. Reg. 65,874, 65,892 (Dec. 13, 1996).

362. 33 C.F.R. § 330.5(a)(26) (1987); 51 Fed. Reg. 41,206 (Nov. 13, 1986) (effective date Jan. 12, 1987).

363. 33 C.F.R. § 330.5(a)(26) (1992); 56 Fed. Reg. 59,110 (Nov. 22, 1991) (effective date Jan. 21, 1992).

364. O'Connor v. U.S. Army Corps of Eng'rs, 801 F. Supp. 185, 192 n.2 (N.D. Ind. 1992).

365. *Id.* at 190.

366. *Id.*

367. *Id.*

waters or wetlands, both in the present and in the future.[368] In two different circumstances the Corps could require an applicant for nationwide general permit 26 to apply instead for an individual section 404 permit:

> First is when the application concern[ed] waters that [were] already identified by or of importance to other federal and state agencies and, after being notified of the nationwide permit application, those agencies opine[d] that an individual permit should be required. . .. Second is when the Corps on its own initiative, exercise[d] its discretionary authority to override nationwide permits by requiring individual permit applications on a case-by-case basis. . .when the Corps determine[d] that the CWA's 'concerns for the aquatic environment,' as enunciated in the EPA guidelines, 40 C.F.R. § 230.10, would be better served by the more in depth review required by the individual permit application process.[369]

In 1997, the Corps amended NWP 26[370] to reduce, from one acre to one third (1/3) of an acre, the maximum amount of waters or wetlands that could be destroyed under NWP 26 without prior notice being given to a Corps District Engineer, and to reduce, from ten acres to three acres, the maximum amount of waters or wetlands that could be destroyed under NWP 26. NWP 26, as revised in 1997, provided that a discharge of dredged or fill material into isolated waters was authorized only if the discharge did not cause the loss of more than 3 acres of waters of the United States nor cause the loss of waters of the United States for a distance greater than 500 linear feet of the stream bed; and required a permittee to provide prior notification to a Corps' District Engineer for discharges causing the loss of greater than 1/3 acre of waters of the United States. The notification was required to include a delineation of affected wetlands and other special aquatic sites when a discharge occurred in a wetlands or another special aquatic site. Revised NWP 26, which expired on June 7, 2000,[371] also required a person whose discharge caused a loss of 1/3 acre or less of waters of the United States to submit to a Corps' District Engineer,

368. *Id.* at 192-94.

369. *Id.* at 190-91 (citations omitted).

370. 61 Fed. Reg. 65,874, 65,916 (Dec. 13, 1996) (effective Feb. 11, 1997).

371. 65 Fed. Reg. 14,255 (Mar. 16, 2000). The original expiration date for revised NWP 26 had been December 13, 1998, *see* 61 Fed. Reg. 65,874 (Dec. 13, 1996), but this initial expiration date was extended first to April 14, 2000 (with some exceptions), *see* 64 Fed. Reg. 69,994 (Dec. 15, 1999) and then to June 7, 2000. 65 Fed. Reg. 14,255.

within thirty days of completion of the work, a report containing specified information.

In 2000, the Corps replaced NWP 26 with five new activity-specific nationwide general permits (NWPs 39, 41, 42, 43 and 44) and six revised activity-specific nationwide general permits (NWPs 3, 7, 12, 14, 27 and 40) and modified general conditions for nationwide general permits.[372] Most of these new and revised NWPs were limited to discharges that caused the loss of no more than a half (1/2) acre of waters or wetlands, and required prior notification to a Corps' District Engineer of any discharge of dredged or fill material causing a loss of wetlands exceeding one-tenth (1/10) of an acre of wetlands.[373]

These new and revised NWPs that were issued in 2000 to replace NWP 26 were reissued in both 2002[374] and 2007,[375] with some modifications to the specific activities authorized by some of the NWPs and some modifications to the general conditions for the NWPs.

The Corps' most recent section 404 nationwide general permits, which became effective on March 19, 2007, contain forty-one different nationwide general permits issued under section 404, with thirty-five of the section 404 NWPs being re-issued existing NWPs (although some of them have been modified) and six of the section 404 NWPs being new. The existing section 404 NWPs that were re-issued in 2007 authorize such activities as work on utility lines, shoreline/ stream bank stabilization activities, bridges approved by the Coast Guard, and cleanup of hazardous and toxic wastes. The six new general permits authorize activities involving emergency repairs of levees, fills, or uplands; discharges into non-tidal ditches; surface coal mining and reclamation operations; re-mining for coal at previously mined sites; underground coal mining; and, inspection, repair and replacement of pipelines that are time-sensitive. "Many of the NWPs have acreage limits, and most

372. 65 Fed. Reg. 12,818, 12,886-92 (Mar. 9, 2000) (effective June 5, 2000).

373. The revised 2000 NWPs and general conditions were upheld in *National Association of Home Builders v. United States Army Corps of Engineers*, 453 F. Supp. 2d 116 (D.D.C. 2006), *appeal dismissed per curiam*, 2008 U.S. App. LEXIS 2895 (D.C. Cir. 2008).

374. 67 Fed. Reg. 2020 (Jan. 15, 2002) (effective Mar. 18, 2002, through Mar. 19, 2007). The revised 2002 NWPs and general conditions were upheld in *National Association of Home Builders v. United States Army Corps of Engineers*, 453 F. Supp. 2d 116 (D.D.C. 2006), *appeal dismissed per curiam*, 2008 U.S. App. LEXIS 2895 (D.C. Cir. 2008).

375. 72 Fed. Reg. 11,092 (Mar. 12, 2007), corrected 72 Fed. Reg. 26,082, 26,084 (May 8, 2007).

of those that do not are self-limiting due to the nature of the authorized activity. . . . Acreage limits in NWPs cannot be waived by the district engineer."[376] The most common acreage limit for 2007 NWPs is one-half acre,[377] which is the acreage limit proposed by this article for all activities that would fill or otherwise harm federally-protected wetlands under the authorization of a Corps section 404 nationwide, regional, or state general permit.

Twenty-seven of these forty-one categories of 2007 section 404 NWPs require pre-construction notification (PCN) to the Corps for at least some of the activities undertaken under these 27 NWPs. All activities authorized by seventeen of the 2007 section 404 NWPs require PCN, while an additional ten of the 2007 section 404 NWPs require PCN for some (but not all) of the activities authorized under these NWPs.[378] Three[379] of these latter ten 2007 NWPs require PCN for any activity that will discharge dredge or fill material into a special aquatic site (the definition of which includes wetlands), while another[380] of these latter ten NWPs requires PCN for almost half of its 2007 NWPs for any activity involving mechanized land clearing in a forested wetland for a utility line right of way. Consequently, almost half of the Corps' 2007 NWPs require PCN for any activity that will fill any amount of a wetland, although the Corps, without explanation, has stated that it "disagrees that pre-construction notification is necessary for all NWP activities."[381] This article, however, proposes that the Corps should require pre-construction notification for any activity that will discharge dredged or fill material into any waters of the

376. *Id.* at 11,093-94.

377. One-half acre of waters of the United States (which includes wetlands) is the maximum acreage limitation for activities under the following 2007 section 404 NWPs: 14 (Linear Transportation Projects), 29 (Residential Developments), 39 (Commercial and Institutional Developments), 40 (Agricultural Activities), 42 (Recreational Facilities), 43 (Stormwater Management Facilities) and 44 (Mining Activities). 72 Fed. Reg. at 11,183, 11,184, 11,186, 11,187, 11,189. The maximum acreage limitation is 10 acres for 2007 NWP 34 (Cranberry Production), 5 acres for 2007 NWP 32 (Completed Enforcement Actions), 1 acre for 2007 NWP 46 (Discharges in Ditches), and 0.10 acres for 2007 NWP 18 (Minor Discharges). *Id.* at 11,184, 11,187, 11,188, 11,190.

378. *Id.* at 11,095. "[A]ll activities conducted under NWPs 7, . . . 17, 21, 29, 31, 33, 34, 37, 38, 39, 40, 42, 44, 45, 46, 49 and 50 now require pre-construction notification, regardless of acreage impacted." *Id.* In addition, pre-construction notification also is required for certain specified activities conducted under NWPs 12, 13, 18, 22, 23, 27, 36, 41, 43 and 48. *Id.* at 11,183, 11,184, 11,185, 11,186, 11,188, 11,189, 11,191.

379. NWPs 13 (Bank Stabilization), 18 (Minor Discharges) and 22 (Removal of Vessels). *Id.* at 11,183, 11,184.

380. NWP 12 (Utility Line Activities). *Id.* at 11,183.

381. *Id.* at 11,095.

United States (including wetlands) protected under the Clean Water Act, in order to ensure that the national goal of "no overall net loss of wetlands" is achieved through adequate compensatory mitigation for any activity authorized under any Corps section 404 general permit that will fill any amount of a federally protected wetland.

General Condition 20 (*Mitigation*) of the 2007 NWPs "requires permittees to avoid and minimize adverse effects to the maximum extent practicable on the project site,"[382] requiring that "[t]he activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (i.e., on site)."[383] This general condition also requires that "[m]itigation in all of its forms (avoiding, minimizing, rectifying, reducing, or compensating) will be required to the extent necessary to ensure that the adverse effects to the aquatic environment are minimal,"[384] with the Corps stating that "[c]ompensatory mitigation is an important mechanism to help ensure that the NWPs authorize activities that result in minimal individual and cumulative adverse effects on the aquatic environmental [sic]."[385] The Corps' position is that "wetland restoration should be the first compensatory mitigation option considered" "[s]ince the likelihood of success is greater and the impacts to potentially valuable uplands are reduced . . . ."[386] Permittees, however, "may propose the use of mitigation banks, in-lieu fee arrangements or separate activity-specific compensatory mitigation."[387]

General Condition 20(c) for the Corps' 2007 NWPs provides that "[c]ompensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed 1/10 acre and require pre-construction notification, unless the district engineer determines in writing that some other form of mitigation would be more environmentally appropriate and provides a project-specific

382. *Id.* at 11,093.

383. *Id.* at 11,193 (General Condition 20(a)). "Where certain functions and services of waters of the United States are permanently adversely affected, such as the conversion of a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse effects of the project to the minimal level." *Id.* at 11,194 (General Condition 20(h)).

384. *Id.* at 11,193 (General Condition 20(b)).

385. *Id.* at 11,100.

386. *Id.* at 11,193 (General Condition 20(c)).

387. *Id.* at 11,194 (General Condition 20(g)).

waiver of this requirement."[388] This compensatory mitigation requirement applies only to permanent losses of wetlands,[389] and can be waived by a district engineer on a case-by-case basis for an activity that results in minimal adverse effects on the environment.[390] However, "[f]or wetland losses of 1/10 acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in minimal adverse effects on the aquatic environment."[391] However, "[c]ompensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWPs."[392]

The Corps, in support of its general requirement for compensatory mitigation only for a wetlands loss exceeding one-tenth of an acre, stated that it "does not believe it is appropriate or practicable to require compensatory mitigation for all activities authorized by NWPs that result in wetland losses[,] [e]ven though there are several hundred mitigation banks and in-lieu fee programs in the United States that are currently operational, [because] these mitigation banks and in-lieu fee programs are not distributed throughout the country . . . [and] [I]n many regions, individual permittee-sponsored projects are the only option available for

388. *Id.* at 11,193 (General Condition 20(c)).

389. *Id.* at 11,164.

390. *Id.* at 11,163.

391. *Id.* at 11,193 (General Condition 20(c)). "For losses of streams or other open waters that require pre-construction notification, the district engineer may require compensatory mitigation, such as stream restoration, to ensure that the activity results in minimal adverse effects on the aquatic environment." *Id.* (General Condition 20(d)). "Compensatory mitigation plans for projects in or near streams or other open waters will normally include a requirement for the establishment, maintenance, and legal protection (e.g., conservation easements) of riparian areas next to open waters." *Id.* (General condition 20(f)). These riparian areas "should consist of native species" and normally "will be 25 to 50 feet wide on each side of the stream . . . ." *Id.* "Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (e.g., riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses." *Id.* at 11,193-94.

392. *Id.* (General Condition 20(e)). "For example, if an NWP has an acreage limit of 1/2 acre, it cannot be used to authorize any project resulting in the loss of greater than 1/2 acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to ensure that a project already meeting the established acreage limits also satisfies the minimal impact requirement associated with the NWPs." *Id.*

compensatory mitigation to offset losses authorized by NWP activities."[393]

However, this article agrees with those commentators that have asserted "that compensatory mitigation should be required for all wetland losses, because of the potential cumulative impacts resulting from many small wetlands losses . . . [and because] there are enough mitigation banks and in-lieu fee programs throughout the country to require compensatory mitigation losses of less than 1/10 acre."[394] In order to ensure that such cumulative wetland losses in some regions of the country do not prevent the national goal of "no net loss of wetlands," this article proposes that compensatory mitigation should be required for any activity authorized under a Corps' general section 404 permit that fills or otherwise harms any amount of wetlands, no matter how small the acreage of wetlands that are filled or adversely affected (even if less than one-tenth of an acre of wetlands). This article also proposes that the Corps and EPA should amend their new compensatory mitigation regulations[395] to allow an activity authorized under a Corps' general permit to be carried out through the purchase of mitigation credits from either a mitigation bank or an in-lieu fee program that geographically is the closest to the permitted activity's site, when wetlands restoration, enhancement or creation cannot occur on-site or at a nearby off-site location and when there is no approved wetland mitigation bank or in-lieu fee program whose geographic service area includes the area where the activity will occur.[396]

---

393. *Id.* at 11,163. The Corps has explained, however, that:

> [I]n some areas of the country, there are no mitigation banks and in-lieu fee programs provide the only option for third-party compensatory mitigation . . . [I]n certain areas, such as coastal areas, . . . options for economically viable mitigation banks are limited. Also, in some parts of the country, there is a low density of dredge and fill projects requiring compensatory mitigation, and it may not be economically viable to obtain the level of up-front financing that is necessary to start a mitigation bank. Therefore, there are regions where in-lieu fee programs may be the only available third-party compensatory mitigation option.

Draft Environmental Assessment, *supra* note 5, at 52.

394. 72 Fed. Reg. at 11,163.

395. 33 C.F.R. §§ 332.1-.8 (Corps' regulations); 40 C.F.R. §§ 230.91-.98 (EPA's regulations). These new regulations are discussed supra at notes 106-128 and accompanying text.

396. At least one Corps regional section 404 general permit authorizes compensatory mitigation through the purchase of mitigation credits from a mitigation bank located outside an activity's geographic service area. The Corps' Mobile District's SAM-20 regional permit, *available at* www.sam.usace.army.mil/rd/reg/rgp/permit.pdf, is at least one regional section 404 regional permit that authorizes compensatory mit-

Because a state, under section 401(d) of the Clean Water Act,[397] may condition its issuance of CWA section 401 certification for a Corps' general section 404 permit[398] "upon any limitations necessary to ensure compliance with state water quality standards or any other 'appropriate requirements of State law'. . . ,"[399] a state has the authority under section 401 of the CWA to require any activity authorized by a Corps' general section 404 permit to provide pre-construction notification of the activity to the Corps, the state and/or the public, to provide adequate compensatory mitigation, and to limit the amount of wetlands filled or otherwise harmed to no more than one half acre. The Corps, in general condition twenty-three of its 2007 nationwide general permits, requires that an "activity must comply. . . with any case specific conditions added . . . by the state, Indian Tribe, or U.S. EPA in its section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination."[400] The Corps further states, in a note prior to its general conditions for its 2007 nationwide permit conditions, that prospective nationwide permittees should contact the appropriate Corps District office "to determine the status of Clean Water Act Section 401 water quality certification and/or Coastal Zone Management Act consistency for an NWP."[401]

In addition, a Corps District Engineer can require a person, seeking to conduct an activity within the District under the authority of a Corps' nationwide section 404 general permit, to provide pre-construction notification of the activity to the District Engineer, the state and/or the public, to provide adequate compensatory mitigation and to limit the amount of wetlands filled or otherwise harmed to no more than one half acre. A Corps' District Engineer has this authority under general condition twenty-three

---

igation through the purchase of mitigation credits from a mitigation bank located outside an activity's geographic service area. The SAM-20 has a compensatory mitigation requirement which can be satisfied through the purchase of in-kind mitigation credits either from a Corps-approved mitigation bank located in the activity's service area or from the Corps-approved mitigation bank that is next-closest to the activity's site. *Id.*

397. Clean Water Act (CWA), 33 U.S.C. § 1341(d) (2006).

398. 33 U.S.C. § 1341; 33 C.F.R. § 330.4(a)(1) (2008). Certification by a state under section 401 of the Clean Water Act is a prerequisite for a Corps' section 404 general permit to be valid within the state. *See supra* notes 142-43 and accompanying text.

399. P.U.D. No. 1 of Jefferson County v. Washington Dept. of Ecology, 511 U.S. 700, 713-14 (1994) (quoting 33 U.S.C § 1311).

400. 72 Fed. Reg. 11,192, 11,194 (Mar. 12, 2007).

401. *Id.* at 11,194.

of the Corps 2007 NWPs, which states that an activity "must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps . . . ."[402] This authority of a Corps' District Engineer also is provided in a note prior to the general conditions for the 2007 NWPs that states that "[t]o qualify for NWP [nationwide permit authorization], the prospective permittee must comply with the [NWP] general conditions, as appropriate, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer.[403] Some of the Corps' District Offices, apparently acting under the authority of general condition twenty-three of the 2007 NWPs as well as Corps' regulations[404] which authorize the Corps' District Engineers to add special conditions to Department of Army permits to satisfy the public interest, have imposed regional general conditions (although not the kinds proposed in this article) upon some categories of activities authorized under the Corps' 2007 nationwide section 404 permits, which apply within all or part of a particular Corps' district.[405]

Furthermore, a state can prevent a Corps' nationwide section 404 general permit from becoming effective within the state by

402. *Id.*

403. *Id.* at 11,191.

404. Clean Water Act (CWA), 33 C.F.R. §§ 325.4, 330.4(e) (2008).

405. U.S. Army Corps of Eng'rs, *Districts by State*, http://www.usace.army.mil/how doi/where.html (last visited Dec. 9, 2008). (To access individual districts scroll down to the "Districts by State" list of hyperlinks; selected desired district; then follow "Permit(s)" hyperlink; select "Nationwide Permits" hyperlink to see State Certifications and associated conditions).

Some of the regional conditions which some of the Corps' districts have added to the Corps' 2007 Nationwide General Permits can be found at: the Corps' Baltimore District's Special Public Notice # 07-37 Enclosure A (Sept. 11, 2007), http://www.nab.usace.army.mil/Regulatory/PublicNotice/SPN/spn07-37EnclA.pdf (Corps' Baltimore District) (last visited Nov. 2, 2007); http://www.sac.usace.army.mil/?action=permits.nationwide (Corps' Charleston District) (last visited Nov. 2, 2007); http://www.spl.usace.army.mil/regulatory/pn/NWP2007FinalPN.pdf (Los Angeles District) (last visited Oct. 31, 2007). http://www.lrn.usace.army.mil/cof/conditions_for_nation_wide_permits.htm (regional conditions for Alabama, Kentucky, Mississippi and Tennessee) (Corps' Nashville District) (last visited Oct. 27, 2007); http://www.nao.usace.army.mil/technical%20services/Regulatory%20branch/NWP2007/401certifications.pdf (Corps' Norfolk District) (last visited Nov. 2, 2007); http://www.now.usace.army.mil/html/od-rmt/mtregcon2002.pdf (regional conditions for Montana) http://www.nwo.usace.army.mil/html/od-rnd/ndhome.htm (regional conditions for North Dakota), https://www.now.usace.army.mil/html/od-rwy/wroconditions.pdf (regional conditions for Wyoming) (Corps' Omaha District) (last visited Nov. 1, 2007); http://www.mvs.usace.army.mil/permits/FINALMONWP401certRegCond2007PUBLIC%20NOTICE[1].doc

denying CWA section 401 certification for the permit.[406] In addition, as discussed in the next part, some Corps' District Offices have suspended some or all of the categories of nationwide general permits within particular states because they have issued state programmatic section 404 general permits for those states that cover categories of activities similar to those covered by Corps' nationwide section 404 general permits.

Although the Corps has issued state programmatic section 404 general permits for particular states and regional section 404 general permits for particular regions of a single state, the Corps has not adopted any regulations which specify either procedural requirements (such as pre-construction notification or approval requirements) or general conditions (such as compensatory mitigation requirements or limits on the maximum acreage of wetlands that can be filled or otherwise harmed) for Corps' state programmatic or regional general section 404 permits issued by the Corps' district engineers.

VIII. CORPS' STATE GENERAL SECTION 404 PERMITS

Although the Corps' regulations do not explicitly refer to the Corps' issuance of a general section 404 permit on a State-wide basis (as authorized by section 404(e)(1)[407] of the CWA), the Corps has issued state programmatic general permits under section 404 (and under section 10 of the Rivers and Harbors Act) for a number of states, including the New England states (Connecticut, Massachusetts, Rhode Island, New Hampshire, Vermont, and Maine)[408] and the states of Delaware,[409] Florida,[410] Maryland,[411] Minne-

406. 33 U.S.C. § 1341(a) ("No license or permit [to conduct any activity which may result in any discharge into navigable waters] shall be granted if certification has been denied by any State. . .."). "If a state denies a required 401 certification for an activity otherwise meeting the terms and conditions of a particular NWP, that NWP's authorization for all such activities within that state is denied without prejudice until the state issues an individual 401 certification or waives its right to do so. State denial of a 401 water quality certification for any specific NWP affects only those activities which may result in a discharge." 33 C.F.R. § 330.4(c)(3) (2008).

407. 33 U.S.C. § 1344(e)(1).

408. http://www.nae.usace.army.mil/reg/index.htm (last visited Feb. 14, 2008) (issued by Corps' New England District).

409. SPGP-20, http://www.nap.usace.army.mil/cenap-op/regulatory/spgp20.pdf (last visited Mar. 1, 2008) (issued by Corps' Philadelphia District).

410. http://www.saj.usace.army.mil/regulatory/assets/docs/permitting/gen/spgpIV/pnSPGPIV24JUL2006.pdf (last visited Feb. 16, 2008) (issued by Corps' Jacksonville District).

sota,[412] New Jersey,[413] Oregon,[414] Pennsylvania,[415] Virginia,[416] and Wisconsin.[417] A state programmatic section 404 general permit is based upon an existing state or local government wetlands protection and/or water pollution control program, and is designed to avoid duplication by requiring an applicant to file only a joint federal/state permit application with a state agency and by providing that a state or local government license or permit also constitutes a Clean Water Act section 404 general permit, if the applicant complies with the state programmatic section 404 general permit's procedures and conditions. In addition to these Corps' state programmatic section 404 general permits, statewide section 404 general permits have been issued by the states of Michigan[418] and New Jersey[419] (the two states to which EPA has delegated the authority to issue permits under section 404 of the Clean Water Act).

In some of these states, a state programmatic section 404 general permit issued by a Corps District office replaces all or some of the Corps' nationwide section 404 permits within the state. The Corps' New England District has revoked the Corps' nationwide general permits in the New England states (Connecticut, Massa-

411. MDSPGP-3, http://www.nab.usace.army.mil/Regulatory/Permit/MDSPGP-3.pdf (last visited Feb. 14, 2008) (issued by Corps' Baltimore District). A state programmatic general permit first was issued for Maryland in 1996 for a five year period, and a second state general permit for Maryland was issued for a five year period in 2001. http://www.mde.state.md.us/assets/document/Enviromatters_101806.pdf (last visited Feb. 14, 2008).

412. GP-001-MN, http://www.mvp.usace.army.mil/docs/regulatory/special%20notices/2007001408PN.pdf (last visited Mar. 3, 2008) (issued by Corps' St. Paul District).

413. NJSPGP-19, http://www.nap.usace.army.mil/cenap-op/regulatory/spgp19.pdf (last visited Feb. 14, 2008) (issued by Corps' Philadelphia District).

414. Oregon SPGP, http://www.oregon.gov/DCBS/RSL/docs/streamlining_water/SPGP_docs/SPGP_Permit_Instru.pdf (last accessed March 3, 2008) (effective dates Jan. 3, 2006-Jan. 3, 2008) (issued by Corps' Portland District). *See* https://www.nwp.usace.army.mil/pa/news/shownews.asp?rn=05-103 (last visited Feb. 8, 2008).

415. PASPGP-3, http://www.nab.usace.army.mil/Regulatory/Permit/PASPGP-3.pdf (last visited Feb.14, 2008) (issued jointly by Corps' Baltimore, Philadelphia and Pittsburgh Districts).

416. 07-SPGP-01, http://www.nao.usace.army.mil/technical%20services/Regulatory%20branch/spgp_2007_SPGP-01.pdf (last visited on Mar. 2, 2008) (issued by Corps' Norfolk District).

417. GP-001-WI, http://www.mvp.usace.army.mil/docs/regulatory/gp01wi.pdf (last visited Mar. 3, 2008) (issued by Corps' St. Paul District).

418. MICH. ADMIN. CODE R 281.923(1) (2005); http://www.deq.state.mi.us/documents/deq-1wm-wetlands-GPBACKGROUND.pdf (last visited Feb. 15, 2008).

419. N.J. ADMIN. CODE §§ 7:7A-4.1-4.6, 7:7A-5.1-5.27 (2003), http://www.state.nj.us/dep/landuse/7-7a.pdf (last visited Feb. 15, 2008).

chusetts, Rhode Island, New Hampshire, Vermont, and Maine) and replaced them with separate state programmatic general permits for each of the seven New England states.[420] Similarly, the Corps' St. Paul District has issued state programmatic general permits for the states of Minnesota and Wisconsin which apply instead of the Corps' nationwide general permits in those two states.[421] Because the Corps' Maryland and Pennsylvania state general permits authorize many activities that are similar to activities authorized under the Corps' 2007 nationwide general permits, the Corps has suspended many of the Corps' 2007 nationwide permits in Maryland and Pennsylvania for activities that qualify for authorization under the Maryland and Pennsylvania state general permits.[422]

Although some of these Corps and state section 404 state programmatic general permits require some of the authorized activities to provide pre-construction notification to the Corps, to provide adequate compensatory mitigation and to fill or otherwise harm no more than one half acre of federally-protected wetlands, none of these state programmatic section 404 general permits require all of these proposed requirements to be satisfied by each authorized activity. Pre-construction notification (PCN) to a Corps District Office is required for each activity authorized by the Delaware, Minnesota, New Jersey, and Wisconsin state programmatic general permits, but PCN to a Corps' District Office only is required for some of the activities authorized by the state programmatic section 404 permits for the New England states and for the Maryland and Pennsylvania state programmatic section 404 general permits. The Maryland state programmatic section 404 general permit is the only one of these state general permits to require compensatory mitigation for all authorized activities,[423] although the Virginia state programmatic general permit requires compensatory mitigation for any unavoidable impacts to wetlands

420. http://www.nae.usace.army.mil/reg/index.htm (last visited Oct. 26, 2007).

421. http://www.mvp.usace.army.mil/docs/regulatory/gp01wi.pdf (last visited Oct. 26, 2007).

422. Corp's Baltimore District Special Public Notice #07-37 Sept. 11, 2007), http://www.nab.usace.army.mil/Regulatory/PublicNotice/SPN/spn07-37.pdf (last visited Oct. 26, 2007).

423. Under the Maryland state programmatic general permit MDSPGP-3, "[g]enerally, compensatory mitigation will be required for all permanent tidal or nontidal wetland impacts either through the state tidal or nontidal wetland compensation fund or by the permittee as required by special condition of the MDGPSP-3 or the State authorization." http://www.nab/usace.army.mil/Regulatory/Permit/MDSPGP-3.pdf (last visited Mar. 1, 2008).

caused by authorized linear transportation projects and for any unavoidable impacts to more than 0.10 acres of protected wetlands caused by authorized residential, commercial or institutional development activities.[424] The Maryland, Pennsylvania, and Virginia state programmatic general permits are the only state programmatic section 404 general permits that prohibit at least some authorized activities from filling or otherwise harming more than one half acre (or less) of wetlands,[425] although the Maryland, Pennsylvania, and Virginia state programmatic general permits authorize some other activities that fill or impact more than one half acre of wetlands.[426]

IX. CORPS' REGIONAL GENERAL SECTION 404 PERMITS

The Corps defines a section 404 regional permit as "a type of general permit" that "may be issued by a division or district engineer."[427] The Corps' usual practice seems to be to issue section 404 regional general permits for a region that is an entire state or only part of a single state.[428] However, the Corps has not adopted any regulations which specify either procedural requirements or gen-

424. 07-SPGP-01, *supra* note 416, parts III.A, III.B, at 3, 4 and 9.

425. Under the Maryland state general permit MDSPGP-3, *supra* note 404, the activities listed under Category I (except for special area management plan study areas), which do not require a site-specific review by the Corps of Engineers, are limited to activities that fill no more than one-half acre of wetlands. Under the Pennsylvania state programmatic general permit PASPGP-3, *supra* note 396, the activities listed under category I (for which pre-construction notification to the Corps is not required), must not result in the loss of more than 0.25 acres of protected waters or wetlands. The Virginia state programmatic section 404 general permit 07-SPGP-01, *supra* note 405, prohibits any authorized linear transportation project from filling or impacting more than one-third acres of wetlands. While in effect from Jan. 3, 2006, until Jan. 3, 2008, the Oregon state programmatic general permit, *supra* note 403, only authorized activities that did not fill more than 0.5 acres of wetlands. The state of New Jersey's general permits # 6, 8, 10A, 10B, 11, 17, 19, 24, and 25, N.J. ADMIN. CODE §§ 7:7A-5.6, .8, .10A, .10B, .11, .17, .19, .24 & .25 (2003), have maximum acreage limitations of one-half acre or less.

426. The Maryland and Pennsylvania state programmatic permits do not permit any authorized discharge of dredged or fill material which will result in direct or indirect impacts exceeding 1.0 acres of waters of the United States (which include some wetlands). The Virginia state programmatic general permit does not permit any authorized residential, commercial or institutional development that will impact more than 1.0 acres of waters of the United States (including protected wetlands).

427. 33 C.F.R. § 325.5(c).

428. *See supra* notes 192-194 and accompanying text. The Corps' Jacksonville District Office has issued some regional general permits that apply to the entire area of the state of Florida. http://www.saj.usace.army.mil/regulatory/permitting/gen/gen.htm (last visited Feb. 29, 2008).

eral conditions for regional section 404 general permits, so the provisions of Corps' regional section 404 general permits vary considerably.[429]

Most of the Corps' thirty-eight district offices located within the United States have issued one or more regional section 404 general permits. As of February 17, 2008, the web sites of the Corps' thirty-eight district offices within the United States listed a total of 259 regional general permits that have been issued by Corps' district offices under section 404 of the Clean Water Act and that will remain in effect after June 1, 2008; these regional general permits authorize certain specified activities either throughout an entire state or in part of a single state which is within the jurisdiction of a particular Corps' district.[430]

429. "After a regional permit has been issued, individual activities within those categories that are authorized by such regional permits do not have to be further authorized by the procedures of [33 C.F.R. § 325]." 33 C.F.R. § 325.2(e)(2). 33 C.F.R. § 325.5(c) provides, however, that "[i]f the public interest so requires, the issuing authority may condition the regional permit to require a case-by-case reporting and acknowledgment system. However, no separate applications or other authorization documents will be required [for regional permits]." However, when the authority issuing a regional section 404 general permit "determines on a case-by-case basis that concerns for the aquatic environment so indicate, he may exercise discretionary authority to override the regional permit and require an individual application and review." *Id.* at § 325.2(e)(2).

430. The general permits that had been issued as of February 17, 2008, by the Corps' 38 District Offices under either section 404 of the Clean Water Act, or jointly under both section 404 of the CWA and section 10 of the Rivers and Harbors Act, could be be found on-line at the following District web sites:
http://www.poa.asace.army.mil/reg/gps.htm (Alaska District - 16 regional permits) (last visited Feb. 17, 2008);
http://www.spa.usace.army.mil/reg/Regional%20Permits/RGNL.asp (Albuquerque District - 2 regional permits) (last visited Feb. 17, 2008);
http://www.lrb.usace.army.mil/regulatory/reg_perms.htm (Buffalo District - 6 regional permits) (last visited Feb. 16, 2008);
http://www.sac.usace.army.mil/?action=permits.regional (Charleston District - 4 regional permits) (last visited Feb. 16, 2008);
http://www.lrc.usace.army.mil/co-r/modified4webRFPfinal.pdf (Chicago District - 13 regional permits) (last visited Feb. 16, 2008);
http://www.lre.usace.army.mil/who/regulatoryoffice/districtinformation/ (Detroit District - 3 regional permits (one statewide regional permit for Michigan; and one statewide regional permit for Indiana and one programmatic general permit for Indiana (both Indiana general permits issued jointly with the Corps' Louisville District)) (last visited Feb. 9, 2008);
http://www.swf.usace.army.mil/pubdata/environ/regulatory/permitting/gp.asp (Fort Worth District - 3 regional permits (2 regional general permits and 1 programmatic general permit)) (last visited Feb. 17, 2008);
http://www.swg.usace.army.mil/reg/permitgp/general.asp (Galveston District - 8 regional general permits) (last visited Feb. 17, 2008);
http://www.lrh.usace.mil/_kd/Items/actions.cfm?action=Show&item_id=3681&destination=ShowItem (Huntington District - 2 regional permits (1 general

permit listed on Huntington District's web site, 1 regional general permit for abandoned mine lands reclamation jointly issued with Pittsburgh District which is accessible on the Pittsburgh District's web site, http://www.lrp.usace.army.mil/or/or-f/aml.pdf) (last visited Feb. 16, 2008);

http://www.saj.usace.army.mil/regulatory/permitting/gen/gen.htm (Jacksonville District - 21 regional permits (11 regional permits and 10 programmatic general permits)) (last visited Feb. 29, 2008);

http://www.nwk.usace.army.mil/regulatory/regulatory.htm (Kansas City District - 6 regional general permits) (last visited Feb. 16, 2008);

http://www.swl.usace.army.mil/regulatory/regionalpermits.html (Little Rock District - 7 regional permits) (last visited Feb. 16, 2008);

http://www.spl.usace.army.mil/regulatory/current_RGPs.htm (Los Angeles District - 13 regional permits) (last visited Feb. 8, 2008);

http://www.lrl.usace.army.mil/orf/article.asp?id=145&MyCategory=95 (Louisville District - 3 regional permits (1 regional permit listed only on the Louisville District web site; the Louisville District and the Detroit District jointly have issued one statewide general permit for Indiana and one programmatic general permit for Indiana which are accessible on the Detroit District web site, http://www.lre.usace.army.mil/who/regulatoryoffice/districtinformation) (last visited Feb. 16, 2008);

http://www.mvm.usace.army.mil/regulatory/regionalgp/Final%20PN_Grand%20Prairie%20GP.pdf (Memphis District - 1 regional permit (jointly issued with Vicksburg District)) (last visited Feb. 16, 2008);

http://www.sam.usace.army.mil/RD/reg/rgp/regional.htm (Mobile District - 31 regional permits (15 regional permits for Alabama, 15 regional permits for Mississippi, and 1 regional general permit for six counties in Mississippi) (last visited Feb. 29, 2008);

http://www.lrn.usace.army.mil/cof/pdf/RPLIST.pdf (Nashville District - 11 regional permits) (last visited Feb. 16, 2008);

http://www.mvn.usace.mil/ops/regulatory/genperm.htm (New Orleans District - 17 regional general permits) (last visited Feb. 16, 2008);

http://www.nao.usace.army.mil/technical%20services/Regulatory%20branch/RBregional.asp (Norfolk District - 7 regional permits) (last visited Feb. 16, 2008);

https://www.nwo.usace.army.mil/html/od-tl/generalpermits.html,

https://www.nwo.usace.army.mil/html/od-rne/gp.html,

https://www.nwo.usace.army.mil/html/od-rmt/mtspecific.html,

https://www.nwo.usace.army.mil/html/od-rsd/gp.html,

https://www.nwo.usace.army.mil/html/od-rwy/gpermits.htm (Omaha District - 13 general permits, each issued for a specified single state within the District) (last visited Feb. 16, 2008);

http://www.lrp.usace.army.mil/or/or-f/regional_permits.htm (Pittsburgh District - 5 regional permits, one issued jointly with Huntington District) (last visited Feb. 16, 2008);

https://www.nwp.usace.army.mil/op/g/rgpmaiin/asp (Portland District - 2 regional general permits) (last visited Feb. 16, 2008);

http://www2.mvr.usace.army.mil/Regulatory/Documents/2007-1349.pdf (Rock Island District - 10 regional permits) (last visited Feb. 16, 2008);

http://www.spk.usace.army.mil/organizations/cespk-co/regulatory/regional.html (Sacramento District - 7 regional permits) (last visited Feb. 16, 2008);

http://www.spn.usace.army.mil/regulatory/regper.html (San Francisco District - 11 regional permits) (last visited Feb. 16, 2008);

http://www.sas.usace.army.mil/permit.htm (Savannah District - 1 regional general permit) (last visited Feb. 16, 2008);

Although some of the presently-in-effect regional section 404 general permits that have been issued by Corps' District offices prohibit any activity that will fill half an acre or less of federally protected wetlands[431] and require pre-construction notification

http://www.nws.usace.army.mil/PublicMenu/
Menu.cfm?sitename=REG&pagename=mainpage_RGPs (Seattle District - 6 regional permits) (last visited Feb. 16, 2008);
http://www.mvp.usace.army.mil/docs/regulatory/Special%20Notices/2005006862RGP-003-MN.pdf and http://www.mvp.usace.army.mil/docs/regulatory/Special%20Notices/20050 07181SN.pdf (St. Paul District - 4 general permits (2 regional general permits for parts of Minnesota and parts of Wisconsin and 2 statewide programmatic general permits for Minnesota and Wisconsin)) (last visited Feb. 16, 2008); http://www.swt.usace.army.mil/nationwidepermits/genpmt.12.pdf and
http://www.swt.usace.army.mil/nationwidepermits/genpmt.14.pdf (Tulsa District - 2 general permits) (last visited Feb. 17, 2008);
http://www.mvk.usace.army.mil/offices/od/odf/GP%20Summary%20Jul05.pdf (Vicksburg District - 11 regional permits)10 regional permits listed on the Vicksburg District's web site; the Vicksburg District also has jointly issued the Grand Prairie Regional General Permit with the Memphis District, which is listed on the Memphis District's web site, at
http://www.mvm.usace.army.mil/regulatory/regionalgp/Final%20PN_
Grand%20Prairie%20GP.pdf) (last visited Feb. 16, 2008);
http://www.nww.usace.army.mil/html/offices/op/rf/PN/Interim%20RP-27.pdf (Walla Walla District - 1 regional permit) (last visited Feb. 17, 2008).
http://www.saw.usace.army.mil/WETLAND/general_permits.html (Wilmington [North Carolina] District - 12 regional permits) (last visited Feb. 17, 2008).
As of February 17, 2008, no regional permits issued by the Corps' district under section 404 of the Clean Water Act were listed on the web sites for the Corps' Baltimore District, http://www.nab.usace.army.mil/ (last visited Feb. 16, 2008); Honolulu District, http://www.poh.usace.army.mil/ (last visited Feb. 16, 2008), New England District, http://www.nae.usace.army.mil/ (Feb. 16, 2008); New York District, http://www.nan.usace.army.mil/ (last visited Feb. 17, 2008); Philadelphia District, http://www.nap.usace.army.mil/ (last visited Feb. 16, 2008); or St. Louis District, http://www.mvs.usace.army.mil/ (Feb. 16, 2008).

431. The Corps' Chicago District has issued several regional section 404 general permits (Regional Permits #3 (Transportation Projects), #4 (Minor Discharges and Dredging)), and #7 (Temporary Construction Activities), http://www.lrc.usace.army.mil/co-r/modified4webRPPfinal.pdf (last visited Feb. 11, 2008), that prohibit any activity that will fill more than one-quarter (0.25) acres of waters of the United States (which include wetlands). Regional Permit #3's 0.25 acreage limitation applies to any single crossing; for projects with multiple crossings, Regional Permit #3 provides that the cumulative impacts to waters of the U.S. cannot exceed 1.0 acres. Regional Permit #4 also provides that minor discharges and dredging shall not exceed 25 cubic yards and shall not impact high-quality aquatic resources (which, as defined by Appendix A to the Chicago District's Regional Permits, include certain types of wetlands). Several of the Chicago District's other section 404 regional general permits (Regional Permits #1 (Residential, Commercial and Institutional Developments), #2 (Recreation Projects), and #8 (Utility Line Projects)) only prohibit an activity that causes the loss of more than one (1.0) acre of waters of the United States. The Chicago District's other 6 regional general permits do not specify maximum acreage restrictions. The Omaha District's regional general permit GP-03-02 (for boat projects in Montana), http://www.now.usace.army.mil/html/od-rmt/mtgp03-02.pdf (last visited Feb. 16, 2008), has

(PCN)[432] and compensatory mitigation[433] for an activity authorized under a regional section 404 general permit that will fill or otherwise harm any amount of federally-protected wetlands, most of the Corps' presently-in-effect regional general permits do not prohibit an authorized activity from filling or otherwise harming more than half an acre of federally-protected wetlands and do not require both pre-construction notification to the Corps and appropriate compensatory mitigation for an activity authorized by a regional section 404 general permit that will fill or otherwise harm any amount of a federally protected wetland.

---

a maximum one half acre limitation on affects of permitted activities, with a limitation of 0.10 acres on filling of wetlands.

432. The 13 regional section 404 general permits issued by the Corps' Chicago District, http://www.lrc.usace.army.mil/co-r/modifed4webRPPfinal.pdf (last visited Feb. 9, 2008), require, under General Condition #21 (Notification), pre-construction notification to the Corps for activities authorized by the regional permits. Pre-construction notification also is required for some, but not all, of the activities authorized by the regional general permits issued by the Corps' Albuquerque, Buffalo, Detroit, Fort Worth, Galveston, Huntington, Kansas City, Little Rock, Los Angeles, Louisville, Memphis, Mobile, Norfolk, Omaha, Pittsburgh, Sacramento, Savannah, Vicksburg, and Wilmington Districts, which can be accessed at web sites previously noted.

433. The Albuquerque District's general permit for boat ramps and minor facilities, http://www.usace.spa.usace.army.mil/reg/200100594/200100594.pdf (last visited Feb. 16, 2008), requires compensatory mitigation for unavoidable adverse impacts to the aquatic environment. Four regional general permits issued by the Corps' Jacksonville District (SAJ-13, SAJ-14, SAJ-84 and SAJ-90, http://www.saj.usace.army.mil/regulatory/permitting/gen/gen/.htm (last visited Feb. 29, 2008), require compensatory mitigation for unavoidable adverse impacts to waters of the United States (including protected wetlands). The Kansas City District's regional general permit GP-39M, http://www.nwk.usace.army.mil/regulatory/gp/GP-39M.pdf (last visited Feb. 16, 2008), contains detailed compensatory mitigation requirements for unavoidable adverse impacts to aquatic resources caused by flood detention dams authorized by the general permit. The Mobile District's regional general permit SAM-20, http://www.usace.army.mil/rd/reg/rgp/SAM-20.htm (last visited Feb. 29, 2008), has compensatory mitigation requirements for the residential development activities authorized by the general permit. The New Orleans District's regional general permits NOD-8, http://www.mvn.usace.army.mil/ops/regulatory/NOD-8.pdf and NOD-28, http://www.mvn.usace.army.mil/ops/regulatory/NOD-28.pdf (last visited Feb. 16, 2008), require compensatory mitigation for unavoidable wetland losses caused by certain authorized activities associated with oil and gas wells. The Omaha District's regional permit NOW-206-186-DEN, http://www.nwo.usace.army.mil/html/od-tl/gp.udfcd-text.16-feb-07.pdf (last visited Feb. 16, 2008), contains detailed compensatory mitigation requirements for channel maintenance and construction activities on the South Platte River authorized by the general permit. The Portland District's regional general permit for Oregon Transportation Department bridge repair and replacement projects, https://www.nwp.usace.army.mil/op/g/permit.asp?cms_g=1174602717460 (last visited Feb. 16, 2008), has detailed compensatory mitigation requirements. The Sacramento District's RGP7, http://www.spk.usace.army.mil/organizations/cespk-co/regulatory/gp/GP07.pdf (last visited Feb. 17, 2008), requires compensatory mitigation for all new construction associated with flood control facilities authorized by the general permit which will adversely and permanently affect waters of the United States.

X. CONCLUSION

Because the Corps and EPA's present section 404 regulations and most of the Corps' nationwide, state and regional general section 404 permits do not prohibit a generally-permitted activity from filling or otherwise harming more than one-half acre of federally protected wetlands and do not require a person engaging in an activity authorized by a Corps' section 404 general permit to provide either adequate compensatory mitigation or pre-construction notification to the Corps when the activity will fill or otherwise harm federally-protected wetlands, the Corps' increasing authorization under section 404 general permits of large numbers of activities that fill in federally protected wetlands without adequate compensatory mitigation places the national goal of "no overall net loss of wetlands" at risk.

In order for the United States to have a better chance of achieving this goal, either EPA should amend its section 404(b)(1) guidelines or the Corps should amend its section 404 regulations, to provide that the Corps shall not issue any nationwide, state, or regional section 404 general permit for any activity that will fill or otherwise harm more than one-half acre of any federally-protected wetland and that the Corps shall require appropriate compensatory mitigation and pre-construction notification for any activity authorized by any section 404 nationwide, state or regional general permit that will fill or otherwise harm any amount of federally-protected wetlands. If the EPA and Corps fail to do so, states should utilize their authority under section 401 of the Clean Water Act to impose such restrictions and requirements upon the Corps' nationwide, state, and regional section 404 general permits, so that large amounts of federally protected wetlands are not filled in or otherwise harmed under the authorizations of Corps section 404 general permits that do not require adequate compensatory mitigation.