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COMMENTS

Minding the Public Interest: How the Not-So-Effective Standard Has Led to the Destruction of Wetlands in Louisiana

MEGAN BIERLEIN*

I. INTRODUCTION

Wetlands are one of the most important natural resources in the United States. The Army Corps of Engineers defines wetlands as “areas that are inundated or saturated by surface or ground-water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”¹

Wetlands commonly include swamps, marshes, and bogs.² They are a habitat for thousands of species of plants and animals such as water lilies, turtles, frogs, snakes, alligators, waterfowl, fish, migratory birds, and mammals.³ Many different species as well as many endangered and threatened species are dependent on wetlands as habitats.⁴

Wetlands protect water quality by filtering out pollutants, providing flood control by acting as a natural sponge and absorbing excess water, and acting as a buffer to protect coastal areas

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1. 33 C.F.R. § 328.3(b) (2005); 40 C.F.R. § 230.41(a)(1) (2005).

2. 33 C.F.R. § 328.3(b).

3. OFFICE OF WATER, U.S. ENVTL PROT. AGENCY, EPA REP. NO. 843-F-04-011A, WETLANDS OVERVIEW 1 (2004), *available at* <http://www.epa.gov/owow/wetlands/pdf/overview.pdf> [hereinafter WETLANDS OVERVIEW].

4. U.S. FISH AND WILDLIFE SERV., STATUS AND TRENDS OF THE NATION'S WETLANDS 2 (2004), *available at* <http://wetlands.fws.gov/bha/SandT/download/SandTPaper.pdf> [hereinafter STATUS AND TRENDS].

from erosion from waves, or storm surges.⁵ Wetlands' capability to control floods can lessen property damage, and can even save lives.⁶ This is especially true in wetland-dense areas similar to those found in Louisiana. Louisiana is home to one of the largest regional wetlands in North America.⁷

Until recent decades, wetlands were commonly filled in to make room for development projects. In the last few years, the country has made substantial progress in the protection of wetlands with a net gain of 72,000 acres of wetlands per year from 2001 to 2003.⁸ In 2003, 1,470,998 acres of wetlands nationally were enrolled in a wetlands reserve program.⁹ Defenders of the environment must remain committed to the protection of wetlands and see that these important resources are restored and protected.

The primary authority for the federal regulation of wetlands dredging or filling is in the Federal Water Pollution Control Act, or the Clean Water Act ("CWA").¹⁰ The CWA is more than a pollution statute. It was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."¹¹ Wetlands are considered to be "waters of the United States."¹² Dredge or fill activities that discard pollutants into navigable waters of the United States are prohibited unless they are in compliance with the CWA.¹³ Section 404 of the CWA grants authority to

5. *Id.*; see also 40 C.F.R. § 230.41(b).

6. WETLANDS OVERVIEW, *supra* note 3, at 2.

7. WILLIAM J. MITSCH & JAMES G. GOSSELINK, WETLANDS 53 (2d ed. 1993).

8. Natural Resources Conservation Service, United States Department of Agriculture, 2003 National Resources Inventory Wetlands Tables, <http://www.nrcs.usda.gov/technical/land/nri03/table4.html> (last visited Sept. 22, 2006). The National Resources Inventory is a statistical compilation of natural resource conditions on privately owned lands, tribal and trust lands, and lands controlled by state and local governments. Natural Resources Conservation Service, United States Department of Agriculture, 2003 Annual National Resources Inventory – Wetlands, <http://www.nrcs.usda.gov/technical/land/nri03/nri03wetlands.html> (last visited Sept. 22, 2006).

9. Natural Resources Conservation Service, United States Department of Agriculture, WRP Acres by State through FY 2003, http://www.nrcs.usda.gov/programs/wrp/State_Stats/acres_sm.jpg (last visited Sept. 22, 2006).

10. Federal Water Pollution Control Act § 404(b)(1), 33 U.S.C. § 1344(b)(1) (2000).

11. *Id.* § 1251(a).

12. See 40 C.F.R. § 230.3(s) (2005); see also *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (upholding Army Corps of Engineers' decision to require a permit for discharging fill material into wetlands); PAUL D. CYLINDER ET AL., WETLANDS REGULATION: A COMPLETE GUIDE TO FEDERAL AND CALIFORNIA PROGRAMS 35 (1995).

13. See 33 U.S.C. §§ 1311(a), 1344(a); see also 33 U.S.C. § 1362(6) ("pollutant" includes "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat,

the Army Corps of Engineers (“Corps”) to issue permits for any activity involving the dredging or filling of wetlands.¹⁴ Examples of fill material are “rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.”¹⁵

Common activities that require CWA section 404 permits include real estate development; dam construction; levees, highways, and airports; and the conversion of wetlands to uplands for agricultural purposes.¹⁶ Courts have held that land leveling,¹⁷ removal of vegetation,¹⁸ and the redeposit of spoil dredged by boat propellers¹⁹ are all activities that constitute a “discharge of pollutants.” The only exemptions to the permit requirement for discharges into wetlands are listed in CWA section 404(f), and they include normal farming, ranching, and harvesting activities, constructing irrigation ditches, and maintaining structures, that already exist.²⁰ Other statutes also impose requirements on those seeking a permit for dredging and filling activities,²¹ but the CWA contains the substantive aspects of obtaining a permit.

The Corps, acting through its Chief of Engineers, is the agency responsible for issuing or denying CWA section 404 permits for specific activities.²² The Corps itself is not an environmental agency but what it claims to be, an organization of engineers. It is made up of over 35,000 civilian and military members.²³ Perhaps because the Corps is not an environmental

wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water”).

14. 33 U.S.C. § 1344(a); see generally Mark A. Chertok & Kate Sinding, *The Federal Regulation of Wetlands, Part II: The Permitting Process*, NAT’L ENVTL. ENFORCEMENT J., Mar. 2003, at 3. [hereinafter *Federal Regulation of Wetlands, Part II*].

15. 33 C.F.R. § 323.2(e)(2) (2005).

16. OFFICE OF WATER, U.S. ENVTL. PROT. AGENCY, EPA REP. NO. 843-F-04-011, WETLAND REGULATORY AUTHORITY 1 (2004), available at http://www.epa.gov/owow/wetlands/pdf/reg_authority_pr.pdf.

17. *E.g.*, *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897, 929 (5th Cir. 1983).

18. *E.g.*, *United States v. Huebner*, 752 F.2d 1235, 1238, 1242 (7th Cir. 1985).

19. *E.g.*, *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985).

20. Federal Water Pollution Control Act, 33 U.S.C. § 1344(f) (2000); see also CYLINDER ET AL., *supra* note 12, at 35.

21. See, *e.g.*, National Environmental Protection Act, 42 U.S.C. §§ 4321-4370f (2000); Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (2000).

22. 33 U.S.C. § 1344(a), (d).

23. United States Army Corps of Engineers, Who We Are, <http://www.usace.army.mil/who/> (last visited Oct. 23, 2006).

agency, the granting of a permit is subject to a veto by the Environmental Protection Agency ("EPA").²⁴ Additionally, a number of other agencies, including the United States Fish and Wildlife Service ("FWS"), the United States Coast Guard, and regional agencies such as the Tennessee Valley Authority ("TVA"), may submit comments and recommendations to the Corps.²⁵ The Corps reviews each permit application on a case-specific basis using data regarding the proposed site of the project, input from a public hearing, and information from a public interest review, before making a final determination.²⁶

The Corps is required to follow guidelines in Titles 33 and 40 of the Code of Federal Regulations when ruling on permit applications and is expected to be neutral towards the proposed project.²⁷ The Corps has only ninety days from the date of the permit application to reach a decision.²⁸ The permitting process involves public notice and, normally, a thirty-day comment period to allow other interested agencies and organizations to provide input on the validity of the application.²⁹ During the permit process, the Corps may hold a public hearing regarding the proposed project.³⁰ The Corps must also issue a statement of findings³¹ or, where an environmental impact statement has been prepared, a record of decision on all permit decisions.³² Although the Corps' procedure is highly regulated by the Section 404 guidelines, the character of the actual process can be subjective and vary greatly depending on the particular district handling the permit application.³³

The Corps must consider the public interest in every permit decision. The public interest review is quite broad, including consideration of a number of environmental factors, such as:

24. 33 U.S.C. § 1344(c); United States Environmental Protection Agency, Wetlands, EPA's Clean Water Act Section 404(c): Veto Authority, <http://www.epa.gov/owow/wetlands/facts/fact14.html> (last visited Oct. 2, 2006). This paper will use the word "Corps" to refer to both the Army Corps of Engineers, in general, as well as the particular District Engineer that may be responsible for the initial permit decision.

25. RONALD KEITH GADDIE & JAMES L. REGENS, *REGULATING WETLANDS PROTECTION: ENVIRONMENTAL FEDERALISM AND THE STATES* 36 (2000).

26. *Home Builders Ass'n of Greater Chi. v. U.S. Army Corps of Eng'rs*, 335 F.3d 607, 612 (7th Cir. 2003) (citing 33 C.F.R. §§ 320.4, 323 (2003)).

27. 33 C.F.R. § 320.1(a)(4), (d) (2005); 40 C.F.R. § 230.1(d) (2005).

28. GADDIE & REGENS, *supra* note 25, at 38.

29. *Id.*

30. 33 C.F.R. § 327.4.

31. *Id.* § 325.2(a)(6).

32. *Id.*; see generally *Federal Regulation of Wetlands, Part II*, *supra* note 14, at 3-4 (discussing the processing of applications for individual permits).

33. CYLINDER ET AL., *supra* note 12, at 49-50.

conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.³⁴

Wetlands inherently perform important functions to the benefit of the public interest; thus, any “unnecessary alteration or destruction” of them is considered contrary to the public interest.³⁵ The statutory guidelines generally do not allow the Corps to issue a permit for an activity if a practicable alternative exists that has a less detrimental impact on the environment.³⁶ In deciding whether to issue or deny a permit, the Corps is required to evaluate all of the above-mentioned factors and weigh them against the benefits of the proposed activity, whether economic or social.

This article will examine how the Corps has used the factors of the public interest standard to issue and deny permits and the effect its decisions have had on wetlands. Specifically, this article will attempt to show that the Corps’ inconsistent application of the public interest standard has led to the destruction of vital wetlands in Louisiana. This comment is restricted in its focus to the Corps’ review policies when addressing a permit to dredge or fill. It will not analyze the guidelines for the EPA³⁷ or the standard of review in the courts.³⁸

Part II analyzes the public interest standard. It focuses on the following factors contained in section 404 of the CWA: (1) the practical alternatives analysis and (2) the cumulative impact and secondary effects tests.³⁹ It then examines cases to demonstrate how the Corps has applied such factors in its permit decisions, and concludes by discussing the appropriate interpretation of the standard. Part III applies the same analysis of the inconsistent public interest standard to Louisiana by examining specific contradictory

34. 33 C.F.R. § 320.4(a)(1).

35. *Id.* § 320.4(b).

36. *See* 40 C.F.R. § 230.10(a) (2005).

37. *Id.* § 230.1(c); *see also* Mark A. Chertok & Kate Sinding, *The Federal Regulation of Wetlands, Part I*, NAT’L ENVTL. ENFORCEMENT J., Feb. 2003, at 3 (discussing the role of the EPA in the permitting process and its intersection with the Corps).

38. *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2000) (an agency’s action will be set aside if it is found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

39. Federal Water Pollution Control Act, 33 U.S.C. § 1344(b) (2000).

cases and decisions of the Corps which demonstrate how the Corps manipulates the standard to fit its present-time goals.

Part IV concludes by showing that the public interest standard has the potential to be the environment's biggest ally. However, the Corps is not fulfilling its duty to issue permits only when it is beneficial to wetlands and the environment. Because of the bias towards private developers and the Corps' lack of an essential environmental purpose, its permitting decisions have led to the destruction of wetlands in Louisiana and around the country.

The goals of this comment are to provide a critical analysis of the Corps' process for evaluating a permit application for dredge and fill activities and to draw attention to the Corps' manipulation of the public interest standard. This article will argue the need for objective guidance and proper interpretation of the words "public interest." The public interest standard contains a plethora of factors to consider, but not every factor is considered in every case.

II. ANALYSIS OF THE PUBLIC INTEREST STANDARD

The Corps' public interest evaluation for permit applications follows the policies set forth in 33 C.F.R. § 320.4.⁴⁰ Each permit application will introduce different relevant factors. The Corps must balance those factors important to the public interest, the foreseeable detriment of the project, and the benefits that are expected to materialize from the proposed activity in order to determine if a permit may be issued.⁴¹

Immediately before the CWA was enacted, *Zabel v. Tabb* addressed the need for a public interest review to evaluate the potential impact of proposed wetlands dredging and filling projects on the surrounding environment.⁴² In this case, landowners filed for both a permit from local authority and a federal permit from the Corps to perform dredging and filling in order to build a trailer park in St. Petersburg, Florida.⁴³ When the Corps, with input from the FWS, refused to issue a permit, these landowners filed a

40. 33 C.F.R. § 320.4 (2005).

41. *Id.* § 320.4(a)(1) ("All factors which may be relevant to the proposal must be considered including the[ir] cumulative effects . . .").

42. *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *rev'g* 296 F.Supp. 764 (M.D. Fla. 1969).

43. *Id.* at 201-02. The authority for Corps to issue permits at this time was under the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401-413. *See id.* at 203.

complaint in federal court.⁴⁴ Throughout the litigation, there was virtually unanimous opposition to the proposed construction from the district engineer, the FWS, and other state agencies because they believed that the project was contrary to the public interest.⁴⁵ The district judge, however, ultimately held that the chief of engineers could not consider any public interest factors other than interference with navigation and required the Corps to issue a permit.⁴⁶

Zabel v. Tabb marks the first time that the question of whether the Corps has the authority to refuse a permit for dredge and fill activities in privately owned navigable waters for purely ecological reasons was presented to the court.⁴⁷ On appeal, the reviewing court praised the Corps for recognizing its responsibilities to evaluate permits for dredge and fill activities with an eye toward protecting environmental resources and reversed the lower court.⁴⁸ Although this case does not consider section 404 of the CWA because it was not passed yet, it sets the groundwork for the passage of the CWA and the guidelines put in place to protect the public interest standard.

A. The Practicable Alternatives Test

One important factor in the Corps' public interest standard is whether a "practicable alternative" exists that would have a less adverse impact on the environment.⁴⁹ A practicable alternative location does not have to be presently owned by the applicant, but if it can be reasonably obtained, used, or expanded in order to carry out the basic purpose of the proposed activity, it may be deemed to be a practicable alternative.⁵⁰ The applicant defines the project's purposes, which are reviewed by the Corps, but the test of "practicable alternative" is a decision the Corps itself makes.⁵¹ The CWA section 404(b)(1) guidelines establish a presumption that all alternatives that are not "water dependent" or do not involve a discharge into wetlands have a less adverse im-

44. *Id.* at 202-03.

45. *Id.* at 202.

46. *Id.* at 203.

47. *Id.*

48. *Id.* at 214-15.

49. 40 C.F.R. § 230.10(a) (2005); *see also id.* § 230.5(c).

50. *Id.* § 230.10(a)(2).

51. Leonard Shabman & William Cox, *Urban Water Supply and the Environment: Extending the Reach of Section 404 of the Clean Water Act*, 23 VA. ENVTL. L.J. 75, 90 (2004).

pact on the environment.⁵² The presumption will not be rebutted unless the applicant presents clear contrary evidence.⁵³ Further, a non-water dependent practicable alternative is only considered available and capable of being utilized when taken “in light of overall project purposes.”⁵⁴

The alternatives analysis effectively creates incentives for developers to avoid choosing wetlands as potential building sites.⁵⁵ To evaluate whether the builder chose the best alternative, the Corps must evaluate the alternatives that were available at the time the builder chose the work site, not at the time the applicant applied for a permit.⁵⁶ Without enforcing the alternatives test at the time of market entry, the developer has no incentive to look for non-wetland sites. In *Bersani v. Robichaud*, for example, the EPA vetoed a CWA section 404 permit granted by the Corps because the EPA found that an alternative site was available to Bersani, a developer, at the time he entered the market to search for a site to build a mall.⁵⁷ Although a different developer later purchased the alternative site so that it was unavailable at the time Bersani applied for a permit, in order to retain the functionality of the practicable alternatives test and protect wetlands, the EPA exercised its veto power and deemed this information irrelevant.⁵⁸ The EPA’s interpretation of the regulations was upheld and Bersani did not receive a permit.⁵⁹

In *City of Shoreacres v. Waterworth*, the Corps issued a CWA section 404 permit to the Port of Houston Authority in Texas to construct a marine terminal in phases over the course of twenty years.⁶⁰ The City of Shoreacres alleged, among other things, that the Corps failed to consider a practicable and available alternative.⁶¹ The City argued that the project was not the least environmentally damaging practicable alternative under the CWA, and

52. 40 C.F.R. § 230.10(a)(3).

53. *Id.*

54. *Id.* § 230.10(a)(2); see also *Alliance for Legal Action v. U.S. Army Corps of Eng’rs*, 314 F. Supp. 2d 534, 548 (M.D.N.C. 2004) (“Once the Corps determines the water dependency of a project, it no longer considers the ‘basic project purpose’ but analyzes practicable alternatives ‘in light of overall project purposes.’” (quoting 40 C.F.R. § 230.10(a)(2))).

55. *Bersani v. Robichaud*, 850 F.2d 36, 44 (2d Cir. 1988).

56. *Id.* at 43-44.

57. *Id.* at 38.

58. *Id.*

59. *Id.* at 38, 43.

60. *City of Shoreacres v. Waterworth*, 332 F. Supp. 2d 992, 996 (S.D. Tex. 2004).

61. *Id.* at 1000.

therefore the permit should not have been issued.⁶² The court held, however, that the Corps' determination that two alternative areas were not practicable alternatives was not arbitrary and capricious, even though building on the approved site involved destroying many areas of unique wetlands.⁶³ One site was determined to be unavailable because the Port Authority was unable to condemn it; they would have been forced to purchase the site, which was not an option.⁶⁴ The court stated that it is not appropriate for the court or the Corps to get involved in how the Port should allocate finances.⁶⁵ In reviewing the Corps' decision to issue CWA section 404 permits, the court need not reevaluate the alternatives available or reweigh the evidence; rather, the court only has to determine whether the decision was based on a consideration of the relevant factors.⁶⁶ The court had no choice but to find that the Corps complied with the regulations in the CWA because the Corps had asserted that the alternatives were insufficient, and the EPA did not disagree.⁶⁷

In *Town of Norfolk v. U.S. Army Corps of Engineers*, the Corps issued a permit to the Massachusetts Water Resources Authority ("MWRA") to place fill materials in an artificial wetland to create a landfill in Walpole, a town located near Norfolk, Massachusetts.⁶⁸ The district court granted summary judgment for the Corps and the First Circuit affirmed.⁶⁹ The town challenged the permit as contrary to the public interest because, along with other complaints, the MWRA failed to demonstrate that no practicable alternative with a lesser impact on the environment existed.⁷⁰ The court held the practicable alternatives test was satisfied, because the field of 299 alternative sites for the proposed landfill was narrowed to ten sites, and then Walpole was chosen, even though the court acknowledged the Corps did not "substantially" evaluate the other proposed alternative sites.⁷¹ The Corps is not required to do independent feasibility evaluations; it is sufficient

62. *Id.* at 998.

63. *Id.* at 1021-23.

64. *Id.* at 1021.

65. *Id.*

66. *Id.* at 1004-05; *see also* *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989); *Delta Found., Inc. v. United States*, 303 F.3d 551, 563 (5th Cir. 2002).

67. *City of Shoreacres*, 332 F. Supp. 2d at 1023.

68. *Town of Norfolk v. U.S. Army Corps of Eng'rs*, 968 F.2d 1438, 1442 (1st Cir. 1992), *aff'g* 772 F. Supp. 680 (D. Mass. 1991).

69. *Id.*

70. *See* 40 C.F.R. § 230.10(a) (2005); *Town of Norfolk*, 968 F.2d at 1443-44.

71. *Town of Norfolk*, 968 F.2d at 1447-48.

that the Corps found that no alternatives would have less adverse effects.⁷² According to the court, the Corps reasonably relied on the applicant's (MWRA) evaluation as well as some input from the EPA.⁷³ The court essentially held that it is unable to overturn a Corps decision if the Corps reasonably relied on the applicant's determination about the project site. So, the court relied on the Corps' decision and the Corps relied on the applicant's decision and the result is a chain of conclusions affecting the environment where no one is doing an independent analysis of the nature of the project and the feasibility of alternative sites.

One way the Corps can rebut allegations of failure to consider alternatives is to provide a complete administrative record explaining why alternatives were rejected as insufficient. That is what the Corps did in *Sierra Club v. Pena*.⁷⁴ The Sierra Club brought suit to prevent construction of a roadway, alleging that the parties responsible for the construction failed to show that no practical alternatives existed.⁷⁵ The court found that the Corps had fulfilled its duty to consider alternatives.⁷⁶ The administrative record detailed both the evaluation of proposed alternatives and the rejection of such alternatives.⁷⁷ Although the plaintiffs could disagree with the substantive decision that they were not practicable alternatives, the Corps was able to show that they engaged in the proper discourse and that was enough to satisfy the court.⁷⁸

In 2004, the Corps granted a permit to expand airport facilities in North Carolina.⁷⁹ A non-profit group filed suit to enjoin construction and invalidate the permit.⁸⁰ The district court granted summary judgment for the defendant airport.⁸¹ In this case, the airport authority in charge of the construction sought the involvement of the Federal Aviation Administration ("FAA").⁸² The FAA prepared an Environmental Impact Statement, formu-

72. *Id.*

73. *Id.*

74. *Sierra Club v. Pena*, 915 F. Supp. 1381 (N.D. Ohio 1996), *aff'd*, 120 F.3d 623 (6th Cir. 1997).

75. *Id.* at 1386, 1398.

76. *Id.* at 1398.

77. *Id.*

78. *Id.*

79. *Alliance for Legal Action v. U.S. Army Corps of Eng'rs*, 314 F. Supp. 2d 534, 536 (M.D.N.C. 2004).

80. *Id.*

81. *Id.* at 536-37.

82. *Id.* at 537.

lated a purpose statement, analyzed alternatives to the project, and considered the preliminary environmental impacts.⁸³ When making the permit decision, the Corps said it was not in the business of designing airports and adopted the FAA's purpose statement and alternatives analysis.⁸⁴ The Corps did not re-evaluate any alternatives rejected by the FAA or examine any additional alternatives.⁸⁵ The court said that it is appropriate for the Corps to rely on input from many other agencies to assist the Corps in the decision-making process.⁸⁶ Here, the Corps acted properly in relying on the FAA's expertise regarding airport operations, safety concerns, as well as alternatives.⁸⁷

Even more recently, a New Jersey district court approved the Corps' decision to grant a permit where the alternatives considered were limited to the actual site of the proposed project.⁸⁸ The area in dispute is home to the Continental Airlines Arena, Giants Stadium, the Meadowlands Racetrack, other buildings, and parking facilities.⁸⁹ The Corps determined there were no practicable alternatives.⁹⁰ The Corps framed the alternatives analysis to the site the developers had already chosen because the project's purpose was site-specific.⁹¹ By framing the analysis in this way, the Corps effectively sidestepped the presumption (that alternatives to a non-water dependent project exist)⁹² by construing the project's purpose in a specific way, which restricted the possible field of alternative sites to the site already chosen by the applicant.⁹³ The project's purpose was stated in such a narrow manner that it restrained the Corps' alternatives analysis to the area already proposed and restricted the court in its review.⁹⁴

There are at least five things to take away from these cases to improve the standard regarding practicable alternatives and to

83. *Id.* at 537-38.

84. *Id.* at 540.

85. *Id.*

86. *Id.* at 551 (citing *Sierra Club v. Alexander*, 484 F. Supp. 455, 466-67 (N.D.N.Y. 1980)).

87. *Id.* at 552.

88. *Sierra Club v. U.S. Army Corps of Eng'rs*, No. 05-1724, 2005 U.S. Dist. LEXIS 36385, at *1-3, 39-57 (D.N.J. Aug. 29, 2005).

89. *Id.* at *6.

90. *Id.* at *57.

91. *Id.* at *6-7, *29.

92. 40 C.F.R. § 230.10(a)(3) (2005).

93. *Sierra Club*, 2005 U.S. Dist. LEXIS 36385, at *6, *29-30 (explaining that the overall purpose of the project was to redevelop the Continental Airlines Arena site).

94. *Id.* at *29-30, *35-36 (citing *Nat'l Wildlife Fed'n v. Whistler*, 27 F.3d 1341, 1346 (8th Cir. 1994)).

make it more appropriate. First, the Corps' analysis in *Town of Norfolk*⁹⁵ is unacceptable. Although there was some evidence that the EPA was involved,⁹⁶ the Corps relied too heavily on the findings of the MWRA. The MWRA was the applicant and the Corps should have conducted separate analyses of the practicable alternatives, destruction to overall wetland resources and groundwater resources, and the adverse impact on habitats for wildlife.⁹⁷ Although it may be true that the outcome of the permit application would have been the same, the Corps should not have been excused from completing their duty to fully investigate the proposed project.

Second, the Corps must not be constrained by technicalities that hinder a complete and effective review of the public interest practicable alternatives analysis. In *Sierra Club v. U.S. Army Corps of Engineers*,⁹⁸ the project's purpose was framed by the applicant in such a narrow manner that the Corps was restricted from analyzing any practicable alternatives other than on the site that was already chosen. The applicant, being the most knowledgeable about the project, defines the project's purposes, but the Corps should review such purposes for merit because ultimately, the practicable alternatives decision is made by the Corps.⁹⁹ The Corps should have the authority to decide when a project's purposes are unworkable, and applicants should not be able to bypass analysis of other possible sites by defining the project's purposes in such a narrow fashion.

Third, the issue of when to consider the alternatives available to the developer or builder was decided in *Bersani*¹⁰⁰ and should continue to be followed. When the Corps evaluates practicable alternatives, it examines those alternatives that were available to the developer at the time it entered the market for a location.¹⁰¹ Framed this way, the test prevents the Corps from ignoring or side-stepping the practicable alternatives test. It also encourages builders to find the best site in the beginning of their plans, or else they may later be forced to relocate the project. The practicable alternatives test is a key public interest factor, as demonstrated in

95. *Town of Norfolk v. U.S. Army Corps of Eng'rs*, 968 F.2d 1438 (1st Cir. 1992).

96. *Id.* at 1443 (EPA prepared an environmental impact statement and approved the Walpole site).

97. *Id.* at 1443-44.

98. *Sierra Club*, 2005 U.S. Dist. LEXIS 36385.

99. See Shabman & Cox, *supra* note 51, at 90.

100. *Bersani v. Robichaud*, 850 F.2d 36, 38, 43 (2d Cir. 1988).

101. *Id.* at 44.

numerous cases, because it is the best option to protect wetlands.¹⁰² It is better than any mitigation efforts because it avoids building on wetlands altogether.

The fourth lesson to take away from the cases discussed in this article is for the Corps to constantly involve other agencies, both local and federal. In *Alliance for Legal Action*, the Corps relied on recommendations from the FAA because it had no independent knowledge on the technicalities of expanding airports.¹⁰³ The FAA was able to prepare an analysis of what the project would entail, how it would affect the environment, and what alternatives were available, if any.¹⁰⁴ The documents provided to the Corps were more thorough than any it could have prepared itself. Further, the Corps was proper in relying on these documents, as the court held, because the FAA was a neutral entity providing the Corps with the expertise necessary to make the permitting decision.¹⁰⁵

Lastly, it is important for the Corps to provide the court with a detailed record, as it did in *Sierra Club v. Pena*.¹⁰⁶ When the court has the same information in front of it that the Corps had when it made the permit decision, the court can then follow the Corps' analysis of each of the proposed alternatives. The court noted in its decision in *Pena*, that, with regards to the practical alternatives, "the administrative record on this one issue is lengthy, detailed, and exhibits a careful evaluation on the part of the [Corps]."¹⁰⁷ There can be no accusations pointed at the Corps for failing to engage in the requisite considerations.

B. The Secondary Effects and Cumulative Impacts Test

Another important factor in the Corps' public interest standard is to evaluate a potential permit project for its "probable impacts, including cumulative impacts . . . on the public interest."¹⁰⁸ When the Corps analyzes the cumulative impacts of a proposed

102. See, e.g. *Sierra Club v. Flowers*, 423 F. Supp. 2d 1273 (S.D. Fla. 2006); *Fla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 401 F. Supp. 2d 1298 (S.D. Fla. 2005); *City of Shoreacres v. Waterworth*, 420 F.3d 440 (5th Cir. 2005).

103. *Alliance for Legal Action v. U.S. Army Corps of Eng'rs*, 314 F. Supp. 2d 534 (M.D.N.C. 2004).

104. *Id.* at 537-38.

105. *Id.* at 540, 551-52.

106. *Sierra Club v. Pena*, 915 F. Supp. 1381 (N.D. Ohio 1996), *aff'd*, 120 F.3d 623 (6th Cir. 1997).

107. *Id.* at 1398.

108. 33 C.F.R. § 320.4(a)(1) (2005).

project, the Fifth Circuit has stated that it should consider: (1) the area in which the effects will be felt; (2) the expected impacts; (3) past projects, other proposed actions, and reasonably foreseeable projects that had or could have impacts in the same area; (4) the expected impacts from these other projects; and (5) the overall effect that will result if the individual impacts amass.¹⁰⁹

In *City of Shoreacres v. Waterworth*, the City argued that, in addition to the practicable alternatives analysis, the Corps must consider whether the cumulative impacts of the proposed project will cause significant degradation to the nation's waters in violation of the CWA.¹¹⁰ In this case, the Corps granted a permit without analyzing whether the project would deepen the Houston Ship Channel, and the City of Shoreacres alleged that consideration of such an impact would have led to the denial of the permit.¹¹¹ Although the plan to deepen the channel was not part of the articulated project, the City argued that it would be absolutely necessary in the near future and should have been included.¹¹² The Corps concluded that the channel-deepening was too distant a project to be considered a reasonably foreseeable cumulative impact.¹¹³ The court agreed.¹¹⁴

In *Town of Norfolk*, another question before the court was whether the Corps failed to consider secondary impacts on wetlands from the proposed discharge from the landfill.¹¹⁵ In granting the permit to build a landfill in Walpole, the Corps analyzed two secondary impacts on surrounding wetlands: (1) the possibility that a leak from the landfill could reach surface waters, and (2) the possibility of losing surface or groundwater recharge.¹¹⁶ The Corps concluded as to both potential impacts that any effects were not likely to have a major harmful impact; the Corps, however, did not consider the cumulative effect of these potential impacts.¹¹⁷ Although particular changes to wetlands may be minor, their cu-

109. *Save Our Wetlands, Inc. v. Conner*, No. 98-3625, 2000 U.S. Dist. LEXIS 10496, at *12-13 (E.D.L.A. 2000) (citing *Fritiofson v. Alexander*, 772 F.2d 1225, 1236 (5th Cir. 1985)).

110. *City of Shoreacres v. Waterworth*, 332 F. Supp. 2d 992, 999 (S.D. Tex. 2004).

111. *Id.*

112. *Id.* at 1006-08.

113. *Id.*

114. *Id.* at 1008.

115. *Town of Norfolk v. U.S. Army Corps of Eng'rs*, 968 F.2d 1438, 1448 (1st Cir. 1992).

116. *Id.* at 1442, 1448.

117. *Id.* at 1448.

mulative effect could cause major damage to wetland resources.¹¹⁸ In this case, the court stated that 33 C.F.R. § 320.4(b)(3), authorizing the Corps to consider the cumulative effect, did not apply because the wetland was not part of a complete wetland system.¹¹⁹ Isolated wetlands have little impact on wetland systems as a whole, and later decisions affirm that isolated wetlands are indeed not considered to be “waters of the United States” under the CWA section 404.¹²⁰ Therefore, the Corps effectively ignored any of the potentially damaging effects to the local wetland.

Not every potential impact qualifies as a secondary effect on wetlands that the Corps is permitted to analyze. The Corps is not permitted to “consider socio-economic harms that are not proximately related to changes in the physical environment.”¹²¹ In *Mall Properties, Inc. v. Marsh*, a developer of a shopping mall was denied a permit by the Corps under the CWA’s public interest review.¹²² Guided by 33 C.F.R. § 320.4(a), the permit was denied because significant people in the community found the project to be contrary to the socio-economic interests of New Haven, Connecticut, a town located ten miles from where the development was to be built.¹²³ The reviewing court criticized the Corps for basing its decision on impacts which “would not result from any effect the mall would have on the physical environment generally or wetlands particularly.”¹²⁴ While the Corps may consider economic factors that relate to the impact on the environment, the Corps does not have the power to regulate economics between cities or to choose to protect one city’s economic interests against those of another.¹²⁵

In *Mall Properties*, the Corps denied the fill permit to protect economic interests that were completely unrelated to the environment.¹²⁶ The court’s decision limited the broadness of the public interest standard and reminded the Corps that their function is to protect the public interest relating to the environment alone. The

118. *Id.* at 1449

119. *Id.*

120. *Id.* (citing *Buttrey v. United States*, 690 F.2d 1170 (5th Cir. 1982)); see also *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 165-67 (2001) (decided after *Town of Norfolk* and holding that isolated intrastate waters are not subject to the Corps’ jurisdiction).

121. *Mall Props., Inc. v. Marsh*, 672 F. Supp. 561, 563 (D. Mass. 1987).

122. *Id.* at 563-65.

123. *Id.*

124. *Id.* at 565.

125. *Id.* at 565-68.

126. *Id.* at 565.

scope of the economic factors to be considered by the Corps “is limited to the effects of impacts on the physical environment, such as commercial or recreational value of areas directly affected by a change in the environment.”¹²⁷ *Mall Properties* is an example of how the Corps disregards its primary role in the permitting process—to protect the environment and prevent the unnecessary destruction of wetlands.

The Corps can improve the appropriate standard for evaluating secondary and cumulative effects. The overall theme of the cases seems to be reasonableness. It is reasonable to consider any proximate effects if they can be verified.¹²⁸ Environmentalists, scholars, and courts must urge the Corps to more often consider possible derivative effects and the effects of projects that are likely to happen in the future. The purpose of requiring permits before a person can dredge or fill wetlands is to preventively protect the environment. If the Corps is not permitted to take into account foreseeable projects that would have an effect on the environment and their decision, the function of the Corps as a body preventing the destruction of wetlands is lost.¹²⁹

III. THE COSTS OF AN INCONSISTENT STANDARD IN LOUISIANA

In addition to the federal government, many states have recognized policies of protection for important natural resources. In Louisiana, numerous statutes have been enacted to protect and restore the state’s natural resources, including wetlands.¹³⁰ Wetlands are one of the most productive natural resources in that state.¹³¹ The local population has an interest in preserving benefits of wetlands such as the protection from hurricane storm surges outside of levee systems and the reduction of flooding inside the levees.¹³² However wetlands protection has declined in

127. *Id.* at 567-68.

128. *See id.*

129. *See, e.g., City of Shoreacres v. Waterworth*, 332 F. Supp. 2d 992 (S.D. Tex. 2004).

130. Gregg L. Spyridon & Sam A. LeBlanc, III., *The Overriding Public Interest in Privately Owned Natural Resources: Fashioning a Cause of Action*, 6 TUL. ENVTL. L.J. 287, 302-03 (1993).

131. Ryan M. Seidemmann & Catherine D. Susman, *Wetlands Conservation in Louisiana: Voluntary Incentives and Other Alternatives*, 17 J. ENVTL. L. & LITIG. 441, 441 (2002).

132. Sheila Grissett, *Wetlands Development Tackled in Parish Plan: 22,000 Acres at Stake in Jeff*, TIMES-PICAYUNE, May 22, 2003, at B1, B3.

many areas because private landowners can profit from water-front developments and the oil business.¹³³

The majority of wetlands in Louisiana are controlled by private landowners who view federal protection of wetlands as a severe intrusion on their property rights.¹³⁴ Because of the feelings of local landowners, the Corps in Louisiana suffers from increased pressure when issuing permits for dredge and fill activities. The acting Corps in Louisiana, however, follows the same statutory guidelines as the Corps does throughout the United States. The factors considered in the permitting process are the same, including the practicable alternatives test and the secondary effects or cumulative impacts test.¹³⁵ As applied in Louisiana, the result of the Corps' public interest analysis has been much of the same.

Creppel v. Army Corps of Engineers was the first case to address the CWA and the requisite public interest standard.¹³⁶ In this case, landowners challenged a Corps decision to remove a pumping station from a proposed flood control project.¹³⁷ The project was set out in phases, and between those phases, the CWA was passed.¹³⁸ The Corps then required that all work cease until a public hearing and public interest review could be conducted.¹³⁹ After such review was completed, the Corps intended to approve the project as originally planned, with the pumping station, but the EPA objected.¹⁴⁰ Eventually, the two agencies reached a compromise that provided for hurricane protection in exchange for allowing the Corps to issue the permit.¹⁴¹ The landowners, however, claimed that the proposed changes still abandoned the purposes of the initial project.¹⁴² Here, the Corps concluded that the project as modified would render flood control benefits and the court would not act as an engineer to re-evaluate its conclusion.¹⁴³

Creppel, as the first Fifth Circuit case to apply the CWA section 404 public interest standard, involved the court's refusal to question a decision reached by the Corps. Other agencies were

133. Seidemann & Susman, *supra* note 131, at 442.

134. GADDIE & REGENS, *supra* note 25, at 37-38.

135. 40 C.F.R. § 230.10(a)(2) (2005); 33 C.F.R. § 320.4(a)(1) (2005).

136. *Creppel v. U.S. Army Corps of Eng'rs*, 670 F.2d 564 (5th Cir. 1982).

137. *Id.* at 566.

138. *Id.* at 567.

139. *Id.* at 567-68. The pumping station was still not built at the time of the court's decision. *Id.* at 568-69.

140. *Id.* at 569.

141. *Id.* at 570.

142. *Id.* at 573.

143. *Id.*

urging the Corps to make a decision that favored protection of wetlands.¹⁴⁴ The Corps and the EPA construed the legislation to allow changes in the project to better serve the public interest. These types of changes in proposed activities allow the Corps to issue the permit for the applicant while still ensuring that steps are being taken to protect viable resources such as wetlands. Such changes are a vital tool of compromise for the Corps to use in its permitting process to meet both sides of the confrontation as best as possible.

A. The Practicable Alternatives Test in Louisiana

A court reviewing a permit decision has only the administrative record of the agency to base its decision on and does no independent investigations itself. Thus, it is not surprising that one federal court chastised the Corps for failing to prepare administrative records on proposed projects.¹⁴⁵ In *Save Our Wetlands, Inc. v. Witherspoon*, the Corps simply stated that no reasonable alternatives were available.¹⁴⁶ According to the record provided to the court, the Corps relied only on a report which contained a statement that, during a meeting, the applicant determined that no alternatives to the projects were available.¹⁴⁷ No data was provided identifying the alternate sites that were considered or why they were determined to be unavailable or impractical.¹⁴⁸ This case is an example of the Corps shirking its responsibility to thoroughly evaluate the public interest. In addition, the court was left with no record from which to evaluate the Corps' decision.

Save Our Wetlands v. Witherspoon is a case from Louisiana, but it is similar to *Town of Norfolk*.¹⁴⁹ In *Town of Norfolk*, the court was satisfied at the Corps reliance on evaluations conducted by others, namely the local water authority and the EPA.¹⁵⁰ In *Witherspoon*, however, the court was disappointed that the Corps provided no documentation of the information considered at the time the decision was made.¹⁵¹ In both cases, the Corps did very little active investigation or analysis of the factors involved in is-

144. *Id.* at 569.

145. *Save Our Wetlands, Inc. v. Witherspoon*, 638 F. Supp. 1158, 1165 (E.D. La. 1986).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 1158; see *supra* note 68 and accompanying text.

150. *Town of Norfolk*, 968 F.2d at 1448.

151. *Witherspoon*, 638 F. Supp. at 1165.

suing the permit, the difference in *Town of Norfolk* was that a different agency provided data to the record, whereas in *Witherspoon*, the record was bare.¹⁵²

The Corps is required to discuss alternatives to projects which would reduce environmental harms while still achieving the goals of the proposed project.¹⁵³ In *South Louisiana Environmental Council, Inc. v. Sand*, appellant environmental groups sought injunctive relief against construction of a navigation project by the Corps.¹⁵⁴ The plaintiffs contended that the Corps gave a distorted assessment of economic benefits and the costs of the project were underestimated.¹⁵⁵ The court held that the Corps made a good faith effort to satisfy its obligations under section 404 of the CWA and that to require reconsideration of the project on the basis of marginal benefits from the project would be an impermissible substitution of its judgment for the expert judgment of the agency.¹⁵⁶ This case is an example of how the Corps' determination is most often followed by the courts because they are unwilling to challenge the Corps' judgment. If the Corps is performing all the functions that are prescribed to protect the public interest, the court need not intervene. The problem arises, however, because the Corps is not performing its duties, and courts are then unable to make independent findings.

The real fear with regard to the Corps making decisions to protect the environment is that, because it is not strictly an environmental body, the Corps will make decisions favorable to the applicants at the expense of the environment. In *Louisiana Wildlife Federation, Inc. v. York*, the plaintiff asserted that very premise.¹⁵⁷ In this case, the Corps issued CWA section 404 permits to landowners, allowing them to clear approximately 5200 acres of wetlands for agricultural purposes.¹⁵⁸ The question before the court was whether the Corps erred in considering only "profit-maximizing alternatives" for the practicable alternatives test.¹⁵⁹ In this case, the court determined that the Corps no longer has to consider an alternative site that may bring less revenue for the

152. *Town of Norfolk*, 968 F.2d at 1448; *Witherspoon*, 638 F. Supp. at 1165.

153. *S. La. Env'tl. Council, Inc. v. Sand*, 629 F.2d 1005, 1017 (5th Cir. 1980).

154. *Id.* at 1008-09.

155. *Id.* at 1010.

156. *Id.* at 1018.

157. *La. Wildlife Fed'n, Inc. v. York*, 761 F.2d 1044, 1047 (5th Cir. 1985).

158. *Id.* at 1046.

159. *Id.* at 1047.

developer.¹⁶⁰ This case held that even if a developer would be able to profit from the project if moved to the alternative site, if the new location would render less revenue than the environmentally damaging site applied for, it is no longer considered a “practicable alternative.” The Corps and the court are unwilling to make sacrifices for the environment at the expense of a landowner’s profit-making. The public interest test in this sense will only protect the interests of *some* of the public—the private landowners profiting from environmentally damaging activities.

The Corps in Louisiana, like the Corps elsewhere, needs to consistently provide courts with an administrative record with details of the analysis it undertook when deciding the issue of practicable alternatives. With a complete administrative record, the courts are given a greater ability to play a role in the protection of wetlands. They are also more effective in reviewing decisions made by the Corps. When a court is not given the details necessary to properly review a permit decision, they are bootstrapped into simply approving the decision of the Corps.¹⁶¹ Further, the practicable alternatives test in Louisiana plays an important role not only in protecting the environment, but protecting the lives of citizens. If the Corps was better able to avoid building on wetlands in the first place, by finding an alternative site, there would be more protection from hurricanes and flooding, and less destruction when natural disasters struck.

B. The Secondary and Cumulative Impacts Test in Louisiana

Save Our Wetlands, Inc. v. Witherspoon involved three different permits for one project.¹⁶² The cumulative impacts were considered significant only within the localized area around the project site.¹⁶³ The applicant acknowledged that at one of the proposed sites, the project contributes to the cumulative loss of wetlands in the area and that at some point in time, it may become a significant loss.¹⁶⁴ However, there was absolutely no documentation in the record to support these conclusions, and the Corps

160. *Id.*; see also *Friends of the Earth v. Hintz*, 800 F.2d 822, 833 (9th Cir. 1986) (stating that when deciding whether there is a practicable alternative, the Corps must take into account the applicant’s overall costs).

161. See *Save Our Wetlands, Inc. v. Witherspoon*, 638 F. Supp. 1158, 1165 (E.D. La. 1986).

162. *Id.* at 1159.

163. *Id.* at 1165.

164. *Id.*

therefore decided that the project site would have no significant impact on the environment.¹⁶⁵ The court was satisfied with the Corps' decision based on only the testimony and evidence submitted at trial.¹⁶⁶ The court wanted to remand the matter to the Corps to better prepare a reviewable record, but held that it was too costly.¹⁶⁷

Witherspoon is a case that reiterates the need for the Corps to do a more thorough analysis of the public interest and provide the court with the data gathered. Although the court here was able to gather the information at trial, it is imperative that the Corps provide courts with investigative work and specific findings. Cases like this demonstrate that it is virtually impossible for a reviewing court to evaluate whether the Corps' decision was proper when the only information given to the court is a general finding that no cumulative impacts existed or that it was not contrary to the public interest.¹⁶⁸

Even in more recent cases, the courts have stressed that the Corps needs to do more to address the specific facets of the issue of cumulative impacts.¹⁶⁹ In *Save Our Wetlands, Inc. v. Conner*, a Louisiana case from 2000, the court ultimately agreed with the Corps that the project could be approved, but its decision regarding the impact of cumulative effects was due almost entirely to mitigation efforts.¹⁷⁰ *Save Our Wetlands* charged that the Corps failed to engage in a vigorous assessment of the cumulative impacts of the proposed projects.¹⁷¹ The court basically agreed that it was unknown whether the Corps had weighed the surrounding development projects, but decided that by taking into account the mitigation requirements and the isolated nature of the wetlands, the Corps decision was not arbitrary and capricious.¹⁷² The mitigation requirements satisfied the test for the court, but the court itself acknowledged that the Corps had not even weighed the impact from other development projects. As late as the year 2000, the Corps continued to perform incomplete analyses of the public interest test.

165. *Id.* at 1165-66.

166. *Id.*

167. *Id.* at 1166.

168. *See supra* notes 70-74 and accompanying text.

169. *See, e.g., Save Our Wetlands, Inc. v. Conner*, No. 98-3625, 2000 U.S. Dist. LEXIS 10496, at *12-13 (E.D. La. July 20, 2000).

170. *Id.* at *13-18.

171. *Id.* at *16-17.

172. *Id.* at *17-18.

The Corps is permitted to include benefits in its analysis, however, an increase in the number of jobs, due to a construction project, is not included in the economic benefits the Corps is permitted to consider. In one case, *Buttrey v. United States*, a land developer applied for a permit in the Mobile, Alabama district office of the Corps of Engineers to build a subdivision of residential homes.¹⁷³ The Corps denied the permit.¹⁷⁴ The United States District Court for the Eastern District of Louisiana granted summary judgment for the Corps.¹⁷⁵ On appeal, the decision was affirmed.¹⁷⁶ The court stressed that the unnecessary alteration of wetlands is strongly discouraged and that the burden of overcoming it was on the applicant.¹⁷⁷ Petitioner Buttrey argued that the Corps should have considered in the public interest review the number of jobs provided by his construction project.¹⁷⁸ The court stated that jobs are not the sort of economic benefit the public interest review considers.¹⁷⁹

Buttrey is an early example of how the Corps needs precise analysis of specific factors in the public interest review.¹⁸⁰ The Corps, in this case, fully addressed each of Buttrey's arguments and justified its decision using proper analysis.¹⁸¹ The Corps then came to the conclusion that jobs from construction are not the type of economic factor to be taken into account by 33 C.F.R. § 320.4(a).¹⁸² The environmental assessment made by the Corps noted numerous public interest factors weighing against Buttrey: destruction of tupelo gum swamp, change in the land use, potential air pollution problems, increased noise levels, and increased traffic.¹⁸³ The public interest was properly considered and the Corps determined that it is best served by a denial of the permit request.¹⁸⁴ The Corps' decision was backed by what all their decisions should be backed by—reason and analysis.

173. *Buttrey v. United States*, 690 F.2d 1170, 1172 (5th Cir. 1982).

174. *Id.* at 1173; *see also* 33 U.S.C. § 1344(a) (2000).

175. *Buttrey*, 690 F.2d at 1174.

176. *Id.* at 1172.

177. *Id.* at 1180.

178. *Id.*

179. *Id.* (citing Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,122, 125-26 (1977)).

180. *Id.*

181. *Id.* at 1183.

182. *Id.* at 1180.

183. *Id.* at 1184-85.

184. *Id.* at 1185.

A positive example from Louisiana is *Save Our Wetlands v. Julich*.¹⁸⁵ In this case, the Corps *did* address the cumulative effect of a project to construct a development project.¹⁸⁶ The Corps listed six different negative impacts that would result from the project and other reasonably foreseeable projects, but analyzed each one and concluded that these changes would be minor.¹⁸⁷ The Corps also took into account positive secondary effects such as enhanced economics of the town and newly available municipal funds to improve drainage and alleviate flooding.¹⁸⁸ According to the court, the Corps' conclusion that there was no significant negative impact was correct.¹⁸⁹ In this case, the court was satisfied that the Corps took into account both the direct and indirect effects of the proposed project and weighed their disadvantages and benefits sufficiently.¹⁹⁰

Julich is a working example of how the Corps can function properly and make positive decisions for the environment when it cooperates with other agencies.¹⁹¹ During the permit process, the Corps got feedback from the Louisiana Department of Environmental Quality, the EPA, the U.S. Department of Commerce and National Marine Fisheries Services, the Louisiana Department of Wildlife and Fisheries, the FWS, the U.S. Department of Agriculture, and other concerned citizens.¹⁹² This input not only helps the Corps in its initial permit determination, but also provides the court with a comprehensive record from which to review the Corps' decision. In this case, the Corps considered the cumulative effects of the proposed project as well as potential future projects and all of the agencies involved were satisfied.¹⁹³

185. *Save Our Wetlands, Inc. v. Julich*, No. 01-3472, 2002 U.S. Dist. LEXIS 1294 (E.D. La. Jan. 15, 2002).

186. *Id.* at *1, *6-7.

187. *Id.* at *6-7.

188. *Id.* at *7.

189. *Id.* at *11-13.

190. *Id.*

191. *Id.* at *4-5; *see also* *B & B P'ship v. United States*, No. 96-2025, 1997 U.S. App. LEXIS 36086, at *4-5, *14 (4th Cir. July 15, 1997) (Corps relied on input from FWS and the National Marine Fishery Service to deny a permit for a project whose adverse impacts outweighed the project's benefits).

192. *Julich*, 2002 U.S. Dist. LEXIS 1294, at *4-5. The EPA listed requirements that had to be met before the Corps could issue a permit. *Id.* at *4.

193. *Id.* at *6-7, *12.

IV. CONCLUSION

This paper has suggested that the destruction of wetlands in Louisiana, in particular, and across the United States, in general, is due in large part to the inconsistent use of the public interest standard. The standard of review for the court is that it must uphold a decision of the Corps unless it is "arbitrary, capricious, an abuse of discretion, [or] not in accordance with law" ¹⁹⁴ This results in the courts having a narrow scope of review in order to find grounds for reversal of the agency's decision. Courts have determined that they cannot substitute their judgment for the Corps'. A court can only evaluate whether the Corps' decision was based on the consideration of relevant factors, which has led courts to allow many of the Corps' permit granting decisions, including its public interest determinations, to stand. ¹⁹⁵ Even if a court would have reached a different conclusion than the Corps, "Congress has imparted this decision to the Corps of Engineers" and the court will not upset its decision. ¹⁹⁶ Courts acquiesce that this deference to the Corps may be necessary when dealing with complex environmental regulations such as the CWA. ¹⁹⁷ However, because the courts have such a narrow standard of review, it is imperative that the Corps performs a thorough investigation into the impacts on the surrounding environment and the public interest.

Property owners complain that government regulation of wetlands restricts their ability to develop their land, while environmentalists argue that the destruction of wetlands creates serious ecological damage. It is the Corps' duty to issue permits to develop land only when doing so would not be detrimental to wetlands and the environment. The public interest standard has the potential to be the environment's biggest ally. However, if the considerations contained in 33 C.F.R. § 320.4(a) are not meaningfully and consistently applied by the Corps, wetlands everywhere

194. *City of Shoreacres v. Waterworth*, 332 F. Supp. 2d 992, 1004 (S.D. Tex. 2004) (quoting *Welch v. U.S. Air Force*, 249 F. Supp. 2d 797, 806 (N.D. Tex. 2003)).

195. *Id.* at 1003 (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); *City of Alexandria v. Fed. Highway Admin.*, 756 F.2d 1014, 1017 (4th Cir. 1985)); *Town of Norfolk v. U.S. Army Corps of Eng'rs*, 968 F.2d 1438, 1445-46 (1st Cir. 1992).

196. *Creppel v. U.S. Army Corps of Eng'rs*, 670 F.2d 564, 572 (5th Cir. 1982) (citing *C.A. White Trucking Co. v. United States*, 555 F.2d 1260, 1264 (5th Cir. 1977)).

197. *See, e.g., Env'tl. Coal. of Broward County, Inc. v. Myers*, 831 F.2d 984, 986 (11th Cir. 1987).

will be no more protected than if the public interest standard did not exist at all.

The surrounding environment is affected in some way every time the earth is dug into, moved, changed, and built upon. The terms in 33 C.F.R. § 320.4 were created to effectuate the best possible protection of the environment when changes are proposed. The Corps itself must actually develop techniques to deal with each of the factors in the public interest review. The Corps cannot simply declare that it “determined the proposed project has no significant impact on the environment” as a convenient way of satisfying the court and simultaneously deflecting attacks by environmentalists on its granting of permits. In Louisiana, environmentalists are not shy about accusing the Corps of taking the side of developers and encouraging the destruction of wetlands.¹⁹⁸

It is a daunting task to try to persuade the Corps to adopt a more uniform approach to the public interest standard when reviewing permit applications. This is a task not only for environmental groups across the country, but for every city and every developer and builder as well. One of the main problems associated with this task is that the Corps, being the body charged with protection of the environment, sees the section 404 guidelines as mere factors, which it then weighs against other factors in the public interest review, rather than seeing the guidelines as threshold standards to which they must adhere.¹⁹⁹

As this article pointed out, the Army Corps of Engineers is not an environmental agency. The Corps is part of the national army. It is comprised of engineers, scientists, and real estate specialists who work mostly with national security and emergency matters.²⁰⁰ In fact, the Corps’ regulations until 1968 focused only on the protection of navigation.²⁰¹ The Corp did not have any governing environmental principles until 2002.²⁰² They are certainly not in the best position to advocate for and protect the environ-

198. Vicki Ferstel, *Environmentalists Protest Wetlands Permit Changes: Industry and Landowners Giving Cautious Approval*, THE ADVOCATE, Nov. 1, 1997, at 3B.

199. See *id.* (discussion of how the EPA and the FWS view section 404 as a threshold rather than a factor of economic analysis or part of a balancing process as the Corps views section 404 due to a “fundamental conflict” in the missions of each agency).

200. United States Army Corps of Engineers, *Who We Are*, <http://www.usace.army.mil/who/> (last visited Oct. 23, 2006).

201. 33 C.F.R. § 320.1(a)(1) (2005).

202. United States Army Corps of Engineers, *Environmental Operating Principles*, <http://www.hq.usace.army.mil/cepa/envprinciples.htm> (last visited Oct. 23, 2006).

ment. This paper challenges all individuals and organizations to work to influence the legislature and the Corps to develop environmentally friendly and consistent definitions for the factors comprising the public interest review. A case-by-case analysis does not have to be illogical or unjust. All citizens of the environment should be able to expect the Army Corps of Engineers to issue fill permits in a manner that is consistent with the goals of the CWA.