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Buttrey v. United States: The Meaning of “Public Hearings” Under Section 404

I. Introduction

In deciding the case of *Buttrey v. United States*,¹ the Fifth Circuit Court of Appeals was called upon to interpret section 404 of the Clean Water Act (CWA).² The court held that section 404 did not require the United States Army Corps of Engineers (the Corps) to use the full trial-type, adversarial procedures of sections 554, 556 and 557 of the Administrative Procedure Act (APA)³ when holding a public hearing to determine whether to issue a permit for a dredge and fill operation. The Fifth Circuit interpreted section 404 to require only the informal notice and comment procedures of section 553 of APA.⁴ The court's holding is significant because it distinguishes the meaning of “public hearing” under section 404 from identical language, used in section 402 of the same act,⁵ which had previously been held to require full trial-type proceedings.⁶

This note analyzes the court's holding in *Buttrey* and compares the rationale behind the decision with that of other courts which have reached different conclusions when constru-

1. 690 F.2d 1170 (5th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983).

2. Act of June 30, 1948, ch. 758, title IV, amended by Act of Oct. 18, 1972, Pub. L. 92-500, § 2, 86 Stat. 884, amended by Act of Dec. 27, 1977, Pub. L. 95-217, § 67(a), (b), 91 Stat. 1600, codified at 33 U.S.C. § 1344 (1982).

3. 5 U.S.C. §§ 551-559, 701-706 (1982). *See* 5 U.S.C. §§ 554, 556, 557 (1982).

4. 5 U.S.C. § 553 (1982).

5. 33 U.S.C. § 1344 (CWA § 404) provides that the Secretary of the Army “may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” 33 U.S.C. § 1344(a) (1982).

6. 33 U.S.C. § 1342 (CWA § 402) provides that the Administrator of EPA “may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants. . . .” 33 U.S.C. § 1342(a) (1982).

6. *See* Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 (1st Cir. 1978), *cert. denied*, 439 U.S. 824 (1978); Marathon Oil Co. v. EPA, 564 F.2d 1253 (9th Cir. 1977); United States Steel Corp. v. Train, 556 F.2d 822 (7th Cir. 1977).

ing similar language in section 402 of the statute. The note contrasts the opinions and shows both the consistencies and the inconsistencies in the rationales. It suggests that the *Buttrey* holding is irreconcilably inconsistent with the previous holdings in other circuits. Finally, the note examines the actual impact *Buttrey* has made on subsequent lower court decisions and submits that the *Buttrey* holding may have been incorrectly decided.

II. Facts of the Case

John Buttrey and Buttrey Developments Inc. (hereinafter collectively referred to as "Buttrey") are involved in the business of developing land for residential use. Buttrey's operations include both the development of the land and the construction and sale of the residential housing upon the developed land.

In 1978, Buttrey began operations to develop an area near Slidell, Louisiana known as the Gum Bayou. Because proper development of the area required the channelization of a small, slow running stream to improve drainage, Buttrey applied to the district office of the Corps for a dredge and fill permit to dredge the stream bottom and fill its low lying banks. Upon receipt of Buttrey's application, the Corps issued a public notice of Buttrey's proposed alteration of the stream. Publication of the notice resulted in numerous and vehement objections to the proposed alteration from both public agencies and private interest groups. The basis of the objections made by these groups to the proposed development was that the Buttrey project would destroy natural drainage and sewage capacity, destroy a natural habitat for wildlife, damage an aesthetically pleasing wetlands area, and increase the risk of flooding in neighboring areas.

Buttrey responded to the objections by filing memorandums of law, reports and studies by environmentalists and engineers, and letters from adjoining homeowners, all of which favorably supported the development of the Gum Bayou area. In addition, Buttrey requested that the Corps grant him an adversarial hearing in the event that the objections raised to

his plan for development would require a denial of the issuance of the dredge and fill permit.

The Corps reviewed the evidence and personally discussed the matter with Buttrey. On April 2, 1980, the Corps issued an environmental assessment which disapproved Buttrey's proposed development and denied Buttrey the permit. Buttrey later brought suit in the District Court for the Eastern District of Louisiana⁷ challenging the Corps' decision and seeking damages and injunctive relief against the Corps. The district court, holding in favor of the Corps, denied Buttrey any relief. Buttrey then appealed the district court decision to the Fifth Circuit Court of Appeals asserting, inter alia, that he was denied his statutory and constitutional rights by not being granted a full adversarial hearing during the permit proceedings. The Fifth Circuit affirmed the lower court decision and found that:

- a) the Corps had jurisdiction to require a permit for Buttrey's development proposal;
- b) the procedure used by the Corps in denying the permit was not unconstitutional; and
- c) the Corps acted properly in denying the permit.

The circuit court further held that Buttrey had neither a constitutional right⁸ to an adversarial hearing nor a statutory right to such a hearing under section 404.

Recently, Buttrey's attempt to appeal the circuit court decision to the Supreme Court was thwarted when the Court denied his petition for certiorari.⁹

7. *Buttrey v. United States*, No. 80-1617 (E.D. La. Mar. 31, 1981).

8. This note will concentrate on the statutory interpretation of section 404 and Buttrey's rights as established in the language of the CWA. Buttrey's constitutional (due process) right to an adversarial hearing will not be addressed. However, the reader will find discussion of this constitutional issue in Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Elridge: Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28 (1976); Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975); and 4 Mezines, Stein & Gruff, *Administrative Law* § 32.01 (1983).

9. *Buttrey v. United States*, 461 U.S. 927 (1983).

III. Background: Notice and Comment Rulemaking Versus "On the Record" Adjudication¹⁰

The language of CWA imposes on both the Corps and the Environmental Protection Agency (EPA) the requirement that "public hearings" be held with respect to the decision whether to issue or deny a permit authorized by section 404 or section 402.¹¹ Neither CWA nor its legislative history, however, give precise definition or clarification as to the procedures which are required in these public hearings. To obtain clarification one must look to other sources of congressional intent as to the procedures which are to apply in these types of administrative actions. One such source is the Administrative Procedure Act.¹²

The general provisions of APA establish the procedure to be followed in any administrative hearing unless the hearing has been expressly exempted by Congress in the hearing's authorizing statute¹³ or the hearing is exempted by the provisions of APA itself.¹⁴

APA establishes two distinct standards for administrative

10. The purpose of this section is merely to give the reader a general understanding of the applicable provisions and principles of APA. For a more detailed study see 1 K. Davis, *Administrative Law Treatise* ch. 6 (2d ed. 1979 & Supp. 1982) (relating to rulemaking) and 2 K. Davis, *Administrative Law Treatise* ch. 12 (relating to the requirement of trial-type hearings).

11. See *supra* note 5.

12. See *supra* note 3.

13. See *Marcello v. Bonds*, 349 U.S. 302 (1955).

14. 5 U.S.C. § 553(a) (1982) states:

This section applies, according to the provisions thereof, except to the extent that there is involved — (1) a military or foreign affairs function of the United States; or (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

And 5 U.S.C. § 554(a) (1982) states:

This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved — (1) a matter subject to a subsequent trial of the law and the facts de novo in a court; (2) the selection or tenure of an employee except an administrative law judge appointed under section 3105 of this title; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military or foreign affairs functions; (5) cases in which the agency is acting as an agent for the court; or (6) the certification of worker representatives.

public hearings. One is the notice and comment process of section 553¹⁵ and the other is the adjudicatory process of section 554.¹⁶ Under section 553, an agency is only required to give notice of the proposed agency action in the Federal Register (such notice must include the time and place for a hearing to consider the proposed action)¹⁷ and give interested persons an opportunity to participate in the hearing on the proposed action by allowing them to submit written data or arguments in favor of or against the proposed action.¹⁸ The essence of the notice and comment hearing is that it is basically a "speech-making hearing"¹⁹ designed to allow public discussion and input of public opinion on the issue being considered by the agency. The purpose of the notice and comment hearing is to place before the agency all relevant information necessary for reasoned decisionmaking.

Section 554, on the other hand, involves more formalized proceedings which impose the stricter procedural requirements of sections 556 and 557.²⁰ Those procedural hearing requirements include provisions for the parties to have the right to cross examine witnesses,²¹ to present oral testimony,²² to have a written record of all testimony and evidence prepared,²³ and to submit proposed findings or conclusions based on the evidence.²⁴ Such adversarial procedures constitute what is commonly referred to as "on the record"²⁵ adjudica-

15. 5 U.S.C. § 553 (1982).

16. 5 U.S.C. § 554 (1982).

17. 5 U.S.C. § 553(b)(1) (1982).

18. 5 U.S.C. § 553(c) (1982).

19. 2 K. Davis, *Administrative Law Treatise* § 12:7 at 434 (2d ed. 1979).

20. See Comment, *The Requirement Of Formal Adjudication Under The Administrative Procedure Act: When Is Section 554(a) Triggered So As To Require Application Of Sections 554, 556, And 557?*, 11 *Env'tl. L.* 97 (1980).

21. 5 U.S.C. § 556(d) (1982).

22. *Id.*

23. 5 U.S.C. § 556(e) (1982).

24. 5 U.S.C. § 557(c)(1) (1982).

25. Section 554(a) states: "This section applies . . . in every case of adjudication . . . to be determined on the record . . ." 5 U.S.C. § 554(a) (1982).

Sometimes section 553 proceedings are also performed "on the record." See 5 U.S.C. § 553(c) ("When rules are required by statute to be made on the record . . . sections 556 and 557 . . . apply . . .")

tions. The procedures of sections 556 and 557 set up what is the functional agency equivalent of a judicial trial.

The stricter requirements of sections 554, 556 and 557, however, do not apply to any hearing unless they are clearly "required by statute."²⁶ Therefore it is necessary to find express congressional mandate or obvious congressional intent that the procedural requirements of sections 554, 556 and 557 apply to any particular hearing before those procedures can be judicially imposed on an agency.

A court reviewing any agency action is restricted to imposing either the notice and comment requirements of section 553 or the adjudicatory requirements of section 554. A court may not judicially impose any greater requirements than those set out in APA.²⁷

Buttrey's argument in this case was quite simple. He claimed that the language of section 404 of CWA, which states that the Corps may only issue permits after "opportunity for public hearings,"²⁸ is a clear statutory mandate from Congress requiring the Corps to hold full trial-type proceedings on the record when issuing dredge and fill permits.²⁹ Buttrey's asser-

26. 5 U.S.C. § 554(a) (1982). See also *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224 (1973).

27. Such additional requirements establish what is referred to as a "hybrid" proceeding. Such a proceeding is considered hybrid because it incorporates some of the aspects of both a section 553 hearing and a section 554 hearing. Some agencies implement hybrid proceedings voluntarily. See, e.g., 21 C.F.R. §§ 12.80-12.99 (1984) (Food and Drug Administration). However, the Supreme Court has ruled in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* (*Vermont Yankee*), 435 U.S. 519, 523-25 (1978), and later reaffirmed in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983), that hybrid procedures could not be judicially imposed on an agency in the absence of explicit statutory language to that effect.

For an example of a statutory requirement of hybrid proceedings see 15 U.S.C. § 57a (1982) relating to proceedings before the Federal Trade Commission. See also S. Williams, "Hybrid Rulemaking" *Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. Chi. L. Rev. 401 (1975) (general analysis of hybrid proceedings and a discussion of the development of hybrid proceedings prior to *Vermont Yankee*).

28. 33 U.S.C. § 1344(a) (1982).

29. Buttrey also asserted that the Corps hearing violated his right to due process, that the administrative record was incomplete, that the procedures used by the Corps to determine their jurisdiction were improper, and that the Corps's decision to deny the permit was arbitrary and capricious. 690 F.2d at 1174.

tion is based on previous circuit court holdings³⁰ which have construed the term "public hearings" under a similar section of CWA, section 402, to require full trial-type proceedings on the record.

IV. The Court's Interpretation of Section 404

The Fifth Circuit disagreed with Buttrey's argument and found that section 402 and section 404 each impose different procedural requirements. The court held that, although section 402 requires trial-type proceedings, section 404 requires no more than the minimal notice and comment procedures of section 553 of APA.

The court began its analysis by acknowledging that CWA gives no definition of the term "public hearing," and, therefore, found it necessary to ascertain the "substantive nature of the hearing Congress intended to provide."³¹ The court further found it necessary to look to the legislative history of section 404 in order to determine congressional intent. After examining the legislative history of section 404, the court stated that: "This is one of those rare instances when a statute's history leaves no room for doubt."³² The court decided that the legislative history evinced a clear intention by Congress to require the Corps to continue using the same, simplified, notice and comment hearings that the Corps had been using to issue dredge and fill permits since before the enactment of CWA.³³ The court held that the legislative history provided conclusive evidence that procedures characteristic of "on the record" adjudications were not to be used.

Perhaps a brief look at that legislative history, which so influenced the Fifth Circuit in its decision, is in order here. Prior to the enactment of CWA, Congress had vested in the Corps the authority to issue permits for dredge and fill activities in the navigable waters of the United States. That author-

30. See *supra* note 6.

31. 690 F.2d at 1174, quoting *Seacoast Anti-Pollution League v. Costle*, 572 F.2d at 876.

32. 690 F.2d at 1175.

33. See, e.g., 33 C.F.R. § 209.120(d)-(g) (1969).

ity was established in section 10 of the Rivers and Harbors Appropriation Act of 1899 (RHA).³⁴ The procedures used by the Corps for authorizing dredge and fill activities under RHA are presently codified in the Code of Federal Regulations (the Code).³⁵ The procedures set out in section 327 of the Code call for a simplified hearing open to the public and all interested parties. The hearing requirements of section 327 of the Code impose stricter procedural requirements than those required by section 553 of APA,³⁶ yet they are not as strict as the procedures under sections 554, 556 and 557.³⁷ Indeed, the procedures used by the Corps could properly be labeled as hybrid.³⁸ Congress was well aware of the procedures used by the Corps when it drafted the statute which eventually became the present CWA.³⁹

The initial draft of CWA had two versions. The first, the Senate bill,⁴⁰ vested EPA with the authority under section 402

34. Rivers and Harbors Appropriation Act, § 10, ch. 425, 30 Stat. 1121, 1151 (1899), *codified in* 33 U.S.C. § 403 (1982). The Act states, in pertinent part: "it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of . . . any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

35. 33 C.F.R. § 322.3(a) (1984), which derives its authority from 33 U.S.C. § 403 (1982) (the present codification of the Rivers and Harbors Appropriation Act), states that a permit under section 404 of CWA is required if an activity involves the discharge of dredged or fill material into the waters of the United States.

33 C.F.R. pt. 327 (1984) establishes the procedures to be followed in any public hearing held to determine whether to issue a section 404 permit.

36. *Compare* 33 C.F.R. § 327.8(b), which allows for oral statements and the presentation of testimony through witnesses, *with* 5 U.S.C. § 553(c), which gives the agency discretion to deny a party the opportunity to make oral statements and, in addition, has no provision for the use of witnesses. Also, *compare* 33 C.F.R. § 327.8(e), which requires a verbatim transcript of the proceedings to be compiled, *with* 5 U.S.C. § 553, which has no provision for the compilation of a transcript.

37. *Compare* 5 U.S.C. § 556(d), which requires that a party be allowed to cross examine witnesses when a matter of fact is in issue, *with* 33 C.F.R. § 327.8(d), which expressly forbids the use of cross examination.

38. *See supra* note 27.

39. In the 1977 amendments to the Federal Water Pollution Control Act (FWPCA), Congress established the common designation of FWPCA to be the "Clean Water Act of 1977." Act of Dec. 27, 1977, Pub. L. No. 95-217, 91 Stat. 1566.

40. *See* S. Rep. No. 414, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 3668.

to issue permits for all discharges of any material, including dredged and fill material, into the waters of the United States.⁴¹ The second version, which contained an amendment added by the House, established section 404 as a separate section which vested the Secretary of the Army with the power to grant permits for the discharge of dredged and fill material.⁴² Congress consciously adopted the House's amended version when it enacted CWA. The Fifth Circuit interpreted this action by Congress to mean that Congress intended to incorporate into section 404 the existing simplified procedures previously used by the Corps for issuing dredge and fill permits.

A report delivered by Senator Muskie on behalf of the Conference Committee discussed significant portions of CWA.⁴³ That report briefly refers to the provisions for the control of discharge of dredge and fill material and acknowledges that the Conference Committee was "uniquely aware of the process by which the dredge and fill permits [were then] handled and did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed."⁴⁴ Based on this evidence extracted from the legislative history, the court declined to impose upon the Corps the strict requirements of a full adversarial hearing conducted on the record.

The court buttressed its findings by analyzing subsequent amendments to CWA made in 1977.⁴⁵ The court found that the 1977 amendments left the section 404 procedures for issuing permits virtually untouched and, further, found that the changes which did occur were aimed at "eliminating delay and red tape in processing applications."⁴⁶ Thus, the court reasoned that Congress had acquiesced in the simplified permit-issuing procedures which were being used and, further, amended the procedures in an effort to increase the simplicity

41. *Id.* at 3735-39.

42. See S. Conf. Rep. No. 1236, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 3818-19.

43. 118 Cong. Rec. 33,699 (1972).

44. *Id.*

45. 690 F.2d at 1175.

46. *Id.*

of section 404 implementation.⁴⁷

Finally, the Fifth Circuit concluded its statutory interpretation of section 404 by opining that the term "public hearing" should be given its plain and obvious meaning. That is, "a speech-making hearing rather than a [trial-type] hearing . . . on the record."⁴⁸ The court cautioned that to hold otherwise would result in reading more into the statute than was intended by its draftsmen.

V. Analysis of the Court's Holding

The court's rationale has several strong points as well as several weaknesses. The legislative history of section 404 certainly offers persuasive evidence that Congress did not intend to burden the Corps with full-blown, adversarial hearings on the record. However, that evidence is discounted by the fact that Congress did not include in CWA any explicit statutory language to support such an intention. Furthermore, the legislative history does not indicate a clear intention to impose informal notice and comment proceedings, but refers only to re-

47. Those amendments included:

(a) the imposition of a fifteen day deadline (beginning upon receipt of a complete application) for the Secretary of the Army to issue public notice (and thus begin the proceedings), (section 404(a));

(b) authorization for the Secretary of the Army to issue general regional, state or nationwide dredge and fill permits for activities and categories of activities which cause only minimal adverse environmental effects, (section 404(e));

(c) the exemption from the permit process of certain wetlands activities which do not significantly affect the environment, (section 404(f));

(d) authorization for the secretary of the Army to delegate his permit-issuing power to the states once they have adopted a suitable implementation plan, (section 404(g)).

The amendments were introduced for the stated purpose of reducing "administrative paperwork and delay." S. Rep. No. 370, 95th Cong., 1st Sess. 80 (July 28, 1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 4326, 4405. However, the primary concern of Congress appeared to be with providing the Corps with a simple and streamlined procedure for regulating dredge and fill operations which involved only minor environmental impact. Except for the fifteen day deadline, the amendments do not seem to be aimed at simplifying those *ordinary* dredge and fill permit procedures which involve a single applicant whose proposed activity will cause a significant environmental impact.

48. 690 F.2d at 1176, *quoting* 2 K. Davis, *Administrative Law Treatise* § 12:7, at 434 (2d ed. 1979).

quiring non-burdensome proceedings. Therefore, the crucial question which arises is whether imposing the adversarial procedures of APA sections 554, 556 and 557 on the Corps is to be considered "burdensome" and, thus, not what Congress intended.⁴⁹

The greatest deficiency in the court's holding is its obvious inconsistency with the previous interpretation of the term "public hearings" under section 402 of CWA as made by other circuit courts.⁵⁰ Those courts have consistently held that a "public hearing" under section 402 of CWA means a full adversarial hearing conducted on the record in accordance with the procedures of sections 556 and 557 of APA.

The Fifth Circuit attempts to explain away this discrepancy in interpretation by, first, espousing the principle that it is possible "for a term to have different meanings, even in the same statute,"⁵¹ a principle which was enunciated in *Environmental Defense Fund, Inc. v. Costle* (*Environmental Defense Fund*).⁵² Proceeding on this principle, the court reasons that an examination of the legislative history of sections 404 and 402 makes it obvious that Congress intended the term "public hearing" to have different meanings and, therefore, a reviewing court must give deference to this congressional intention.

Although the principle set out in *Environmental Defense Fund* does have some appeal, the courts should exercise great caution in its implementation. *Environmental Defense Fund* involved an interpretation of the term "public hearings" under section 16(b) of the Federal Insecticide, Fungicide and

49. Although the Supreme Court stated in *Vermont Yankee* that a reviewing court is limited to imposing either the procedures set by section 553 of APA or the procedures set by section 554, 556 and 557, this does not mean that section 553 proceedings are "non-burdensome" and section 554 proceedings are "burdensome." For example, if it is possible for the Corps to fully comply with sections 554, 556 and 557 in its permit proceedings simply by increasing their manpower, then one might question whether the imposition of those sections would be such a "burden" that compliance, therefore, must be rejected.

50. See *supra* note 6.

51. 690 F.2d at 1175, quoting *Environmental Defense Fund, Inc. v. Costle*, 631 F.2d 922, 927 (D.C. Cir. 1980), cert. denied, 449 U.S. 1112 (1981).

52. 631 F.2d 922 (D.C. Cir. 1980), cert. denied, 449 U.S. 1112 (1981).

Rodenticide Act (FIFRA).⁵³ The D.C. Circuit found that "public hearing" could have several different meanings in its various uses under FIFRA. The rationale of the D.C. Circuit, however, is not so clearly applicable to the *Buttrey* case and CWA. The term "public hearing," as it was used in the various sections of FIFRA, referred to procedurally dissimilar and relatively unrelated aspects of the statute.⁵⁴ On the other hand, "public hearing" as used in sections 402 and 404 of CWA, refers to virtually identical substantive aspects of the statute, i.e., sections which both establish hearings to determine whether or not to issue a permit for discharge. The question not entirely answered by *Environmental Defense Fund* is whether it is possible for a term, which is used in substantively identical aspects of a statute, to have drastically different meanings although the statute contains no express language which indicates that a difference in meanings should exist. The *Buttrey* court posits that this question should be answered in the affirmative. However, any answer to this question is difficult to justify. Whether one answers in the negative or the affirmative depends on whether one attributes

53. 7 U.S.C. §§ 136-136y (1982); see 7 U.S.C. § 136n(b).

54. The sections of FIFRA referred to in *Environmental Defense Fund* were section 136n(b), section 136d(b) & (d), and section 136l(a)(3):

Section 136n(b) allows for review by a United States court of appeals of "any order issued by the Administrator following a public hearing" 7 U.S.C. § 136n(b) (1982).

Section 136d(d) sets the procedures to be followed during a hearing requested pursuant to section 136d(b). Section 136d(b) authorizes the Administrator to issue notice of and conduct a "hearing to determine whether or not [a pesticide] registration should be canceled or its classification changed." 7 U.S.C. § 136d(b) (1982).

Finally, section 136l(a)(3) prohibits the agency from levying a civil penalty against any person who violates the act "unless the person charged shall have been given notice and opportunity for hearing" 7 U.S.C. § 136l(a)(3) (1982).

Thus, section 136n(b) merely uses the term "public hearing" to determine a jurisdictional standard for judicial review. See also 631 F.2d at 927-28 n.25. Sections 136d(b) & (d), on the other hand, refer to a hearing used to modify a regulation of general application (i.e., classification of a pesticide), and section 136l(a)(3) sets up a hearing, which is prosecutorial in nature, to determine the assessment of civil penalties against a single individual.

The three uses of the term "public hearing" here are obviously made in strikingly dissimilar contexts. It is no wonder the court had no reservations about finding different meanings.

greater weight to the facial language of the statute or whether one finds the legislative history of the statute controlling. Perhaps this is why the Fifth Circuit in *Buttrey* concentrated so heavily on the legislative history of section 404 rather than becoming involved in a facial analysis of the statute's language.

A review of federal case law reveals that courts have generally accepted the practice of giving different meanings to identical terms used in the same statute.⁵⁵ Perhaps the existence of such a commonly used practice explains the Fifth Circuit's summary conclusion that the term "public hearing" had different meanings under CWA.

A. *The Decisions Interpreting Section 402*

As stated above, the greatest apparent weakness in the Fifth Circuit's holding is that the interpretation of the meaning of "public hearings" under section 404 is inconsistent with previous interpretations of the same term used under section 402 of the same Act. Those prior decisions have ruled that "public hearings" under section 402 require full adversarial proceedings conducted on the record. The difference in interpretations sets up visible inconsistencies which may indicate erroneous reasoning by one or a number of the circuit courts.

The present interpretation of section 402 of CWA was first developed in *United States Steel Corp. v. Train (U.S. Steel)*.⁵⁶ In that case, the Seventh Circuit addressed a challenge by the petitioner to the procedures used by EPA in issuing a National Pollutant Discharge Elimination System (NPDES)⁵⁷ permit. The court concluded that the provisions of APA applied to the NPDES permit-issuing proceedings⁵⁸ and that CWA mandated the use of trial-type proceedings

55. See, e.g., *Investment Co. Inst. v. Board of Governors of the Fed. Reserve Sys.*, 551 F.2d 1270, 1278 (D.C. Cir. 1977)(interpreting the word "order" under the Bank Holding Company Act); *Federal Trade Comm'n v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960)(interpreting "price discrimination" under the Robinson-Patman Act).

56. 556 F.2d 822 (7th Cir. 1977).

57. A NPDES permit, when issued by EPA, is the same permit as that issued under section 402.

58. *Id.* at 833.

during any NPDES permit hearing.⁵⁹ The court based its holding on two grounds:

Section 509(b)(1)⁶⁰ of CWA, which provides for judicial review, enumerates various sections of the act which involve an "action"⁶¹ by the Administrator of EPA. The section then provides for review of these actions by a circuit court of appeals. Of the sections enumerated by section 509(b)(1), only one, section 307,⁶² expressly requires that the "action" to be reviewed must be taken only after a hearing is held "on the record."⁶³ The court considered it improbable that, of all of the sections enumerated in section 509(b)(1), Congress would intend that only review of actions under section 307 would be conducted with a written record and that actions taken under the remaining sections would be reviewed without such a record.⁶⁴ Furthermore, the court noted that section 509(c),⁶⁵ which provides for the taking of additional evidence when necessary, is applicable to "any judicial proceeding brought under [section 509(b)] in which review is sought of a determination under this chapter required to be made *on the record* after notice and opportunity for hearing . . ."⁶⁶ The Seventh

59. *Id.*

60. 33 U.S.C. § 1369(b)(1) (1982). Section 1369(b)(1) provides, in part: "Review of the Administrator's action . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides . . . upon application by such person."

61. Sections which involve reviewable actions under 509(b)(1) are: 33 U.S.C. § 1316 (relating to promulgation of performance standards); 33 U.S.C. § 1316(b)(1)(C) (although this section does not exist, Congress was probably referring to 33 U.S.C. § 1316(c) relating to approval of state performance standards); 33 U.S.C. § 1317 (relating to promulgation of effluent standards for, prohibition of, or pretreatment standards for toxics); 33 U.S.C. § 1342(b) (relating to approval of state NPDES programs); 33 U.S.C. §§ 1311, 1312, 1315 (relating to approval and promulgation of effluent limitations); and 33 U.S.C. § 1342 (relating to permits for pollutant discharge).

62. 33 U.S.C. § 1317 (1982).

63. 33 U.S.C. § 1317(a)(2) provides: "The Administrator, in his discretion, may publish in the Federal Register a proposed effluent standard In addition, if within thirty days of publication of any such proposed effluent standard (or prohibition) any interested person so requests, the Administrator shall hold a public hearing in connection therewith."

64. 556 F.2d at 833.

65. 33 U.S.C. § 1369(c) (1982).

66. *Id.* (emphasis added).

Circuit construed this language to imply that *all* of the sections enumerated under section 509(b)(1) required a hearing on the record at the administrative level.⁶⁷

Secondly, the Seventh Circuit saw the NPDES permit proceeding as, essentially, an adjudicatory-type licensing proceeding which was subject to the procedures set by sections 556 and 557 of APA.⁶⁸ Although in reaching this conclusion the court incorrectly construed section 558(c) of APA as requiring the application of sections 556 and 557 in all licensing proceedings, it is clear that the court viewed the NPDES permit proceeding as an adjudication which required strict procedural protections.⁶⁹

67. Since section 307 is the only enumerated section of section 509(b) which expressly requires "on the record" hearings, the language of section 509(c), if construed to apply only to section 307, "would have been an unusual way of singling out § 307 from all the sections listed in § 509(b)." 556 F.2d at 833 (footnote omitted).

68. 556 F.2d at 833.

69. The Seventh Circuit, in *City of West Chicago v. United States Nuclear Regulatory Commission* (West Chicago), 701 F.2d 632 (7th Cir. 1983), expressly reversed the portion of *U.S. Steel* which relied upon section 558(c) as an independent trigger of sections 556 and 557. In *West Chicago*, the Seventh Circuit adopted the view of the First, Fifth and Ninth Circuits that section 558(c) does not independently provide for formal adjudicatory hearings in licensing proceedings and that section 554(a) is the sole trigger for determining when sections 556 and 557 will apply. 701 F.2d at 644. The Seventh Circuit was correct in its reversal. Section 558(c) provides, in part:

When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision.

5 U.S.C. § 558(c) (1982). This first sentence, upon which the court in *U.S. Steel* based its holding, is obviously ambiguous. In fact, some circuit courts made the same mistake as the *U.S. Steel* court and interpreted this section as independently requiring the application of sections 556 and 557 to all licensing proceedings. See *New York Pathological & X-ray Laboratories, Inc. v. Immigration & Naturalization Service*, 523 F.2d 79, 82 (2d Cir. 1975); *Porter County Chapter of the Izaak Walton League of America v. Nuclear Regulatory Comm'n*, 606 F.2d 1363, 1368 n.12 (D.C. Cir. 1979). However, a review of the legislative history of APA reveals that section 558(c) was intended merely as a section of general limitation. See H. Rep. No. 1980, 79th Cong., 2d Sess. (1946), reprinted in 1946 U.S. Code Congressional Service 1195, 1205 ("[The Act] states the . . . general limitations on administrative powers (sec. [558])."; *Id.* at 1206 ("Section [558] limits sanctions . . .").

Section 558(c) appeared in the original version of APA as section 9(b) under the heading of "Sanctions and Powers." See Pub. L. No. 404, ch. 324, 60 Stat. 237, 242 (June 11, 1946). The language, similar to the present statute, read as follows:

Later in 1977, in *Marathon Oil Co. v. EPA (Marathon Oil)*,⁷⁰ the Ninth Circuit addressed the same question raised in *U.S. Steel*, namely, whether the adjudicatory proceedings under section 402 of the CWA must comply with the procedural requirements of sections 556 and 557 of APA. The Ninth Circuit answered in the affirmative, but did not wholly adopt the rationale in *U.S. Steel*.⁷¹ The Ninth Circuit, like the Seventh Circuit, relied on the interpretation of the provision for judicial review (section 509) in reaching its holding. But, the court went on to support its holding on a finding that a hearing under section 402 is clearly an adjudication because it is concerned with the determination of past and present rights and liabilities where "the issues of fact are often sharply controverted."⁷² The court also felt that an adversarial proceeding would be the best suited for "guaranteeing both reasoned decisionmaking and meaningful judicial review" when the proceeding involves adjudication of disputed facts in particular cases and does not involve the promulgation of policy

Licenses. — In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections [556 and 557] of this Act or other proceedings required by law and shall make its decision.

It is somewhat clearer that, under this section of "Sanctions and Powers," the first sentence of section 9(b) was merely intended as a grant of power which authorized the agency, as opposed to some other body (like a court), to set and complete licensing proceedings when such proceedings were required by law. Further, the section also designated the agency as the body authorized to render the decision on the license application.

The most that can be said about section 558(c), to the extent that it relates to trial-type proceedings, is that "Congress assumed that most licenses would be governed by §§ 556 and 557." *Seacoast Anti-Pollution League v. Costle*, 572 F.2d at 878 n.11; see also Comment, *The Requirement Of Formal Adjudication Under The Administrative Procedure Act: When Is Section 554(a) Triggered So As To Require Application Of Sections 554, 556, And 557?*, 11 *Env'tl. L.* at 120-21.

70. 564 F.2d 1253 (9th Cir. 1977).

71. "We agree with the Seventh Circuit that APA adjudicatory hearing requirements apply. However, we reach this result by a slightly different route." 564 F.2d at 1260 (footnote omitted).

72. 564 F.2d at 1262, quoting *The Att'y General's Manual on APA*, at 14-15 (1947).

based rules or standards for general application.⁷³ The court concluded that section 402 proceedings were the type of adjudicatory proceedings which Congress sought to address in sections 554, 556, and 557 of APA and, therefore, required their application.

Finally, in 1978, in *Seacoast Anti-Pollution League v. Costle* (*Seacoast*),⁷⁴ the First Circuit reached the same conclusion as the Seventh and Ninth Circuits as to the procedures required at a section 402 hearing. The First Circuit rationale more closely resembled that of the *Marathon Oil* decision than the *U.S. Steel* decision because the First Circuit examined the substantive nature of the proceeding at hand and found it to be essentially adjudicatory.⁷⁵ The court found the section 402 adjudication to be one which seriously impacts an applicant's private rights and, therefore, the strict procedural requirements of sections 556 and 557 were necessary to protect those rights. The holding in *Seacoast* is significant because, unlike the prior holdings, the court based its decision principally on the adjudicative nature of the decision at issue and explained the *necessity* of making specific factual findings pursuant to sections 556 and 557 in order to protect those rights of the applicant.

B. *Buttrey's Inconsistency with the Prior Holdings*

In light of these three cases one might ask whether the *Buttrey* decision can be reconciled against these prior holdings which view permit proceedings under CWA as essentially adjudicatory. Reconciliation appears difficult when one examines the similarity in substance of sections 402 and 404.⁷⁶

Under the rationale of *U.S. Steel*, the *Buttrey* decision does not withstand scrutiny. The *U.S. Steel* court apparently viewed the section 402 permit hearing as a licensing proceeding and intimated that certain procedural protections ought to

73. 564 F.2d at 1262.

74. 572 F.2d 872 (1st Cir. 1978), *cert. denied*, 439 U.S. 824 (1978).

75. "This is exactly the kind of quasi-judicial proceeding for which the adjudicatory procedures of APA were intended." 572 F. 2d at 876.

76. Compare 33 U.S.C. § 1342(a)(1)-(2) with 33 U.S.C. § 1344(a)-(b).

apply in such proceedings.⁷⁷ Indeed, this interpretation is clearly in accord with section 551(8) of APA⁷⁸ which defines a license as including "the whole or a part of an agency permit,"⁷⁹ and section 551(9)⁸⁰ which defines licensing as an "agency process respecting the grant [or] denial . . . of a license."⁸¹ Therefore, by definition, a licensing proceeding includes a permit proceeding.

Since section 402 proceedings are considered licensing proceedings and the language calling for a hearing under section 402 of CWA is virtually identical to that calling for a hearing under section 404, one would logically assume that the APA should apply equally to both. The *Buttrey* court, however, did not follow this logic.

Attention should be accorded an observation made by the Ninth Circuit when it rendered its decision in *Marathon Oil* since it reflects the essence of the First, Seventh, and Ninth Circuits' perception of nature of a section 402 proceeding. In *Marathon Oil* the court stated that "[t]he setting of effluent limitations under § 402 of the [CWA] . . . falls squarely within the mainstream of traditional adjudications."⁸² The court obviously meant that section 402 permit proceedings were to be accorded all of the procedural protections normally involved in adjudicatory hearings because the permit proceeding there was inherently adjudicatory in nature. In essence, the Ninth Circuit recognized that "certain administrative decisions closely resemble judicial determinations and . . . require similar procedural protections."⁸³ These types of pro-

77. Again, although the court incorrectly construed section 558(c) of APA it is obvious that the court was searching for some justification for the imposition of the procedural protections of sections 556 and 557, which it considered were necessary. Indeed, it appears that the court bent over backwards to apply sections 556 and 557 and, therefore, must have thought the application of those sections to be of great importance.

78. 5 U.S.C. § 551(8) (1982).

79. *Id.*

80. 5 U.S.C. § 551(9) (1982).

81. *Id.*; see also *National Wildlife Fed'n v. Marsh*, 568 F. Supp. 985, 992 n.12 (D.D.C. 1983).

82. 564 F.2d at 1263.

83. 564 F.2d at 1261.

ceedings are termed "quasi-judicial"⁸⁴ and are exactly the "category of proceedings [which] Congress sought to address" in sections 554, 556 and 557 of APA.⁸⁵

Proceedings to grant, revoke, or modify certain types of licenses have long been recognized as proceedings which are quasi-judicial in character and, thus, entitled to a full trial-type hearing.⁸⁶ Since a proceeding to license or permit the discharge of pollutants into the waters of the United States — such discharge being necessary for an applicant to carry on the operation of a business — is considered a quasi-judicial proceeding, then, is not a proceeding to permit a discharge of dredge or fill material into the same waters — such discharge likewise being necessary for an applicant to carry on the operation of a business — also a quasi-judicial proceeding? Contrary to the obvious answer, *Buttrey* answers "no."

Under both the *Marathon Oil* and the *Seacoast* decisions, the *Buttrey* rationale also appears flawed. The section 404 permit proceedings will inevitably involve the adjudication of the same type of factual issues and result in the same infringement upon private rights as would result in a section 402 permit hearing. As stated above, an individual applying for either a section 402 or a section 404 permit usually desires a permit to discharge material into the water in order that he might conduct some profitable, or otherwise personally beneficial, venture. The discharge of the material will often be essential to the successful operation or completion of that venture. Denial of a permit under either section 402 or section 404 will result in the particular applicant being denied a right to use his property as he desires. In both instances the applicant's right to use his property will be pitted against the de-

84. *Id.* at 1261.

85. *Id.* at 1264.

86. "The basic principle governing opportunity to be heard — that a trial-type of hearing is required on issues of adjudicative fact when important interests are at stake, in absence of sufficient reason for refusing or modifying a trial-type of hearing — is fully applicable to denying, refusing to renew, suspending, or revoking licenses of various kinds." K. Davis, *Administrative Law Treatise* § 7:18, at 493 (1958 ed.); See also *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964); *L.B. Wilson, Inc. v. Federal Com. Comm'n*, 170 F.2d 793 (D.C. Cir. 1948).

gree of adverse environmental effect resulting from his activity.⁸⁷ In either case, determination of the degree of this

87. 33 C.F.R. § 320.4 (1984) sets out the policy considerations which must be addressed at every hearing for determination of whether to issue a dredge and fill permit under section 404 of CWA. Among the considerations which the Corps *must* address before issuing a dredge and fill permit are:

1) The "probable impact including cumulative impacts of the proposed activity and its intended use on the public interest." 33 C.F.R. § 320.4(a)(1). (All relevant factors which bear upon the impact an activity may have on the public interest must be considered. The detrimental factors must be weighed against the beneficial factors. Factors for consideration include: conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, flood plain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs and, in general, the needs and welfare of the people. 33 C.F.R. § 320.4(a)(1).)

2) "The relative extent of the public and private need for the proposed . . . work[.]" 33 C.F.R. § 320.4(a)(2)(i).

3) "Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed . . . work[.]" 33 C.F.R. § 320.4(a)(2)(ii).

4) "The extent and permanence of the beneficial and/or detrimental effects which the . . . work may have on the public and private uses to which the area is suited." 33 C.F.R. § 320.4(a)(2)(iii).

Items numbered one through four are commonly referred to as the Corps' public interest review. It was an adverse determination using this method of review which prompted the Corps to deny Buttrey's permit. 690 F.2d at 1173.

In addition, the Corps must also address the following considerations where applicable:

1) The damage to vital wetlands. 33 C.F.R. § 320.4(b).

2) The direct and indirect loss of and damage to fish and wildlife. 33 C.F.R. § 320.4(c).

3) Compliance or non-compliance with water quality standards. 33 C.F.R. § 320.4(d).

4) The effect on values such as those associated with historic, cultural, scenic, and recreational areas. 33 C.F.R. § 320.4(e).

5) The effect on the coast line or base line of the territorial United States. 33 C.F.R. § 320.4(f).

6) The interference with adjacent property owners or water resource projects. 33 C.F.R. § 320.4(g).

7) The effect on any coastal zone management program. 33 C.F.R. § 320.4(h).

8) The impact on any marine sanctuary. 33 C.F.R. § 320.4(i).

9) The safety of impoundment structures. 33 C.F.R. § 320.4(k).

See also 33 C.F.R. §§ 323.1-323.6 (1984) for additional restrictions on the granting of permits for discharge of dredge and fill material.

All of the above listed considerations must be resolved in favor of a proposed project before a dredge and fill permit may be authorized. Obviously the resolution of many of the considerations will be based on facts which will be open to various per-

adverse environmental impact will often involve highly controverted facts. Determinations of this type are best served by full trial-type proceedings. Moreover, the *Seacoast* and *Marathon Oil* courts' perception — that hearings to issue permits are inherently adjudications of private rights which require formal procedural protections — is diametrically opposed to the *Buttrey* court's perception.

C. *Buttrey's Consistency with the Prior Holdings*

In spite of the apparent inconsistency between the interpretation of section 404 in *Buttrey* and the interpretation of section 402 by other circuits, there is evidence which, arguably, justifies the difference in the holdings.

The basic premise of the Fifth Circuit in *Buttrey* is that Congress *intended* that the term "public hearing" was to have different meanings. The court supports this argument almost totally by an examination of the legislative history of CWA. However, there are certain other aspects of CWA which support the court's finding:

1) *The independence of section 404 from the remainder of CWA.* As originally proposed by the Senate, section 402 of CWA was to control the issuance of *all* permits for the discharge of any material into the waters of the United States.⁸⁸ The House, however, removed from section 402 the control over the issuance of permits for the discharge of dredged and fill material and placed it under the control of section 404.

Except for the requirement that the Secretary of the

ceptions. Indeed, many of the designated considerations are extremely amorphous.

EPA, too, must consider the environmental effects of issuing a permit. However, EPA is not required to go through a detailed environmental analysis every time it issues a permit. Instead, CWA provides for the establishment of standards and limitations for effluent discharges (33 U.S.C. §§ 1311 & 1312) and standards for performance of specific categories of dischargers (33 U.S.C. § 1316), all of which, in turn, are based on water quality criteria established under 33 U.S.C. § 1314. The bulk of the environmental assessment is conducted by EPA during the promulgation of these various standards. Therefore, the primary duty of EPA during a permit-issuing proceeding is to determine whether issuance of a permit will comply with the established standards and determine what conditions must be imposed on an applicant in order to insure compliance.

88. See 1972 U.S. Code Cong. & Ad. News 3668, 3816.

Army confer with the Administrator of EPA when adopting guidelines for proposed disposal sites,⁸⁹ section 404 has the capability to operate quite independently from the remainder of CWA. For example, although enforcement of section 404 permit violations may be accomplished by EPA under section 309,⁹⁰ the Secretary of the Army is given totally separate and distinct authority to enforce section 404 permits under section 404(s).⁹¹ In addition, compliance with the provisions of a section 404 permit is automatically deemed to constitute compliance with the remainder of CWA, regardless of whether, in fact, such compliance exists.⁹²

It appears that the procedures and interpretations accorded to the CWA may not have the same applicability to section 404 on the basis that section 404 is, in essence, a wholly separate and distinct scheme of regulation. Therefore, public hearings may be properly construed to have separate meanings under sections 402 and 404 since, arguably, they are not part of the "same" statute.

2) *Absence of section 404 from the provisions for judicial review.* In *U.S. Steel* and *Marathon Oil*, both courts examined section 509(b)(1) of CWA (which provides for review of agency action in the circuit courts of appeal) to find support for the proposition that section 402 proceedings were intended to be conducted on the record. The proposition was derived from an inference that since one enumerated section (section 307) under 509(b)(1) expressly provided for trial-type hearings at the agency level, then all the sections enumerated under 509(b)(1) were meant to be handled in the same way. Secondly, the proposition was derived from the principle that courts of appeal are not equipped to take evidence and, therefore, it is assumed that a complete record will have previously been compiled by the acting authority (in this case, the agency). Moreover, since notice and comment proceedings do not traditionally produce, nor do they guarantee the produc-

89. See 33 U.S.C. § 1344(b)-(c) (1982).

90. 33 U.S.C. § 1319 (1982).

91. 33 U.S.C. § 1344(s) (1982).

92. See 33 U.S.C. § 1344 (1982).

tion of, a complete record of *all* relevant evidence, logic requires that the proceedings under the enumerated sections of section 509(b)(1) be conducted on the record.⁹³

Examination of section 509(b)(1) reveals, however, that section 404 is *not* one of the enumerated sections which require review in a court of appeals. Indeed, CWA makes absolutely no provision for judicial review of a permit granted or denied under section 404.⁹⁴ If Congress had intended that a section 404 hearing be conducted on the record, presumably Congress would have acted consistently and provided for judicial review in the courts of appeal as was required for all other hearings under CWA which are intended to be conducted on the record.

3) *Jurisdiction vested in different agencies.* Jurisdiction over the issuance of section 402 permits is vested in EPA. Congress consciously vested authority for the issuance of section 404 permits in the Corps after considering and rejecting the possibility of vesting such authority in EPA.⁹⁵

The organizational make-up of the Corps is substantially dissimilar to that of EPA. The Corps is a decentralized agency composed of thirty-six district engineers and eleven division engineers.⁹⁶ The power to review applications for permits is vested in the district engineers who review the application, publicize a notice that an application has been received, and receive information and comments regarding the application.⁹⁷ The district engineer may make a decision to grant or deny the permit or he may forward the application and related materials to the appropriate division engineer, or higher authority such as the Chief Engineer or the Secretary himself, who then decides to issue or deny the permit.⁹⁸ Whether the

93. See Att'y General's Manual on APA, at 41 (1979) (A provision for judicial review of an agency proceeding in a court of appeals implies that the agency proceeding is to be conducted on the record).

94. Judicial review of section 404 permit grants or denials is therefore provided by 5 U.S.C. § 702 which allows for review of agency action in any court of the United States.

95. See *supra* notes 40-42.

96. See 33 C.F.R. § 320.1(a)(2) (1984).

97. 33 C.F.R. § 325.2 (1984).

98. 33 C.F.R. § 325.2(a)(6) (1984).

decision to issue or deny the permit is made by the division engineer, the district engineer or higher authority, that decision, and the notice thereof to the applicant, is considered a "final action" appealable in a federal court.⁹⁹ There is no provision for any administrative appeal of the decision once it is made.¹⁰⁰

EPA, on the other hand, is a much more complex agency. EPA has a central headquarters in Washington, D.C. which oversees ten regional offices throughout the United States.¹⁰¹ The headquarters is a complex organization within itself, composed of nine staff offices, each delegated with authority to handle certain aspects of the administrative process.¹⁰² The staff offices include divisions for enforcement of environmental regulations as well as divisions to hear and adjudge controversies. The agency also has internal procedures for appeal and review of adjudicatory findings.

As stated earlier, Congress was aware of the simplified procedure used by the Corps for issuing permits under the Rivers and Harbors Appropriation Act of 1899. Congress was also aware of the difference in organizational make-up between the Corps and EPA. Congress' choice to vest authority to issue permits in an organization as small and as ill-equipped as the Corps is to handle complex and lengthy adversarial trials, is evidence that Congress did not intend such adversarial trials to be required. To hold otherwise might result in giving CWA an unreasonable meaning. Such a practice is not sound statutory construction.¹⁰³

The Seventh Circuit court in *U.S. Steel* acknowledged the possibility that an interpretation which required a trial-type hearing might have to be rejected if such an interpretation produced unreasonable results. The court pointed out that a certain interpretation of a statute might be rejected if a party could demonstrate that such an interpretation might

99. 33 C.F.R. § 325.2(a)(7) (1984).

100. 33 C.F.R. § 320.1(a)(2) (1984).

101. See 40 C.F.R. § 1.5(a) (1984).

102. See 40 C.F.R. subpart B (1984).

103. See 2A Sutherland, *Statutory Construction* § 45.12 (4th ed. 1984). But see *T.V.A. v. Hill*, 437 U.S. 153, 194 (1978).

overburden an agency with an amount of litigation impossible to handle.¹⁰⁴ The court's holding in *Buttrey* preserves the status quo and prevents the Corps from being overburdened with complex adjudications to the point that the Corps' permit-issuing operation is stultified.

VI. Criticism and Conclusion

The holding in *Buttrey* espouses several principles, some of which are supported by a questionable rationale. The primary rule of law established in *Buttrey* is that, under CWA, applicants for a section 404 dredge and fill permit are not entitled to a trial-type hearing before the Army Corps of Engineers. The holding states that neither CWA itself, nor the principles of constitutional due process require such an adversarial hearing.

Shortly after *Buttrey* had been decided, the rationale was followed in two district court cases. In *Shoreline Associates v. Marsh (Shoreline Associates)*,¹⁰⁵ the District Court for the District of Maryland relied on the *Buttrey* holding to sustain the denial of a dredge and fill permit to Shoreline Associates, a developer which wished to dredge and fill approximately 8.2 acres of Assawoman Bay in Ocean City, Maryland, in order to build a townhouse community and marina.

Several months later, in *National Wildlife Federation v. Marsh (National Wildlife)*,¹⁰⁶ the District Court for the District of Columbia used the *Buttrey* holding as a basis for dismissing National Wildlife's assertion that the Corps should have held a trial-type hearing before issuing a permit which allowed an energy company to dredge a part of the Elizabeth River and a portion of the Chesapeake Bay in Virginia in order to build an oil refinery. The significance of *National Wildlife* is that it applies the *Buttrey* rationale to the side of the coin not involved in *Buttrey* and *Shoreline Associates*, i.e., that, in addition to an *applicant* requesting the issuance of a permit, an interested party *opposing* the issuance of a

104. 556 F.2d at 834.

105. 555 F. Supp. 169 (D. Md. Jan. 1983), *aff'd*, 725 F.2d 677 (4th Cir. 1984).

106. 568 F. Supp. 985 (D.D.C. July 1983).

permit is also not entitled to a full trial-type hearing.

The rule of law denying trial-type hearings to an applicant or challenger to a section 404 permit, which *Buttrey* and these cases establish, may be flawed in two respects. First, the rule is based on, what the court considers, the intent of Congress underlying section 404 of CWA. That is, the court believes that it was Congress' intent not to have trial-type hearings apply to section 404 proceedings. Query, however, whether one can reasonably say that this was truly Congress' intent?

The fact that projects requiring dredge and fill permits often draw widespread and enthusiastic response either in support of or opposed to the proposed project (which response is channeled into the permit proceeding),¹⁰⁷ is an indication that both the public and the applicant have substantial interest in the matter in question. Indeed, section 404 permit proceedings almost always involve issues of public health or convenience as well as private economic loss or gain.¹⁰⁸ Often the interests at stake involve huge sums of money (often the issuance of a permit will determine the success or failure of a development project) and matters of substantial public health. It seems logical that these important interests might best be served by being handled in a trial-type hearing which allows extensive investigation into all crucial factors. Moreover, the use of an impartial judge who concerns himself with general societal good, rather than a specialized body narrowly concerned with technical matters, might be the best arbiter of such a controversy. Did Congress fail to foresee that matters of such substantial public and private concern would be handled by the section 404 proceedings? It seems unlikely.

The section 404 permit process has become a very powerful weapon for use by environmentalists and citizen groups in

107. For example, in *National Wildlife* over 1000 people attended the first public hearing, and 535 letters were received during the comment period. 568 F. Supp. at 989.

108. The economic loss or gain may privately affect either the applicant himself or other individual members of the public who are uniquely involved with the area affected.

their battles against unwanted developers.¹⁰⁹ The effect of the *Buttrey* decision has been to put this incredible power in the hands of the Corps of Engineers with only minimal judicial control.¹¹⁰ Congress must have been aware of the power it was granting to the Corps, if nothing else, from the fact that it granted jurisdiction over *all* the waters of the United States.¹¹¹ It would seem reasonable that Congress would intend some kind of check or judicial supervision over this plenary power so as not to allow it to be wielded in an informal, unguided and cursory manner.

Secondly, the *Buttrey* rule has overlooked the fact that a section 404 permit proceeding, like a section 402 permit proceeding, is inherently an adjudication. The First, Ninth, and Seventh Circuits all recognized the adjudicatory nature of section 402 proceedings. Section 404 proceedings — which were themselves originally intended to be section 402 proceedings, but were removed to a different part of CWA — are of the same nature. That is, both section 404 and 402 proceedings involve determinations of factual issues which substantially affect the rights of applicants and other individuals who are affected by the subject site. Indeed, the result of the *Buttrey* holding has been to further obscure the applicability of APA to permit-issuing proceedings in general. As examined earlier,¹¹² APA defines licensing to include the grant of an agency permit, therefore, the section 404 permit proceeding is, in fact, a licensing proceeding.¹¹³ Under APA the general rule

109. The classic and probably most popular example has been the initiation of a lawsuit, based on CWA section 404 and NEPA, to stall the multi-million dollar Westway project in New York City. See *Sierra Club v. United States Army Corps of Engineers*, 701 F.2d 1011 (2d Cir. 1983).

110. The standard of judicial review of section 553 notice and comment proceedings is the extremely deferential "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). This standard, in effect, only requires the Corps to follow minimal procedures when examining the matter in controversy and will rarely result in the court's substitution of its own judgment for that of the Corps.

111. See S. Rep. No. 370, 95th Cong., 1st Sess. at 75, reprinted in 1977 U.S. Code Cong. & Ad. News at 4400 (Discussing the extent of the Corps' jurisdiction under section 404); 118 Cong. Rec. 33,699 ("The Conferees fully intend that the term navigable waters be given the broadest possible constitutional interpretation . . .").

112. See *supra* notes 78-81.

113. If the dredge and fill permit could somehow be shown not to fall within the

has been that those licensing proceedings which rely intensively on the determination of factual issues or the determination of the rights of specific individuals, usually require a trial-type proceeding. *Buttrey* cuts against this reasonable rule.

In effect, what the Fifth Circuit has done is ignore the inherent character of the section 404 permit proceeding. The holding not only impairs the right of the applicant to have a fair determination of his rights, but it also impairs the rights of other affected individuals to properly protect their rights which may be infringed by the issuance of a permit.

What has been established is possibly flawed precedent which excepts section 404 permit proceedings from the generally accepted rules of law concerning licenses. Moreover, the court has made this exception without conclusive congressional directive. It is quite possible, therefore, that the court has exceeded the legitimate scope of its power and engaged in improper judicial legislation.

Robert R. Sappe

category of a license, the court in *Buttrey* made no such showing.