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Bersani v. EPA: Wetlands Protection—The EPA Veto Power Under the Clean Water Act

I. Introduction

The Congressional objective of the Clean Water Act (CWA)¹ is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”² Sections 301(a)³ and 404⁴ of the CWA regulate the discharge of dredged or fill material into navigable waters⁵ which include wetlands.⁶ No discharge is permitted if there is a practicable

1. 33 U.S.C. §§ 1251-1387 (1982 & Supp. V 1987).

2. CWA § 101, 33 U.S.C. § 1251.

3. CWA § 301(a), 33 U.S.C. § 1311(a). This section provides: “Except as in compliance with this section and section[] . . . 404 [§ 1344] of this title, the discharge of any pollutant by any person shall be unlawful.” *Id.*

4. CWA § 404(a)-(c), 33 U.S.C. § 1344(a)-(c). These subsections state in relevant part:

(a) The Secretary may issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites (b) Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary [of the Army] (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary (c) The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines . . . that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.

Id.

5. CWA § 502(7), 33 U.S.C. § 1362(7). This section states: “The term ‘navigable waters’ means the waters of the United States, including the territorial seas.” The meaning of the phrase “waters of the United States” has been judicially determined to include wetlands. *Id.* See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

6. 33 C.F.R. § 328.3(b) (1990). This section states in relevant part:

The term “wetlands” means those areas that are inundated or saturated

alternative.⁷ The relevant time at which to determine if a practicable alternative is available to a developer's wetlands site was at issue in *Bersani v. EPA*.⁸ In *Bersani*, the developers of a shopping mall,⁹ Pyramid, brought an action challenging the final determination by the EPA¹⁰ which vetoed the Army Corps of Engineers' (Corps) decision to issue a CWA section 404 permit to fill the Sweedens Swamp site in Attleboro, Massachusetts.¹¹ The district court granted summary judgment for EPA.¹² The United States Court of Appeals for the Second Circuit was asked to invalidate the EPA's inter-

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

Id.

7. 40 C.F.R. § 230.10(a)-(a)(2) (1990). This section states in relevant part:

(a) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. (1) For the purpose of this requirement, practicable alternatives include, but are not limited to: (i) Activities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters; (ii) Discharges of dredged or fill material at other locations in waters of the United States or ocean waters; (2) An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.

Id. [hereinafter the practicable alternatives test].

8. 850 F.2d 36 (2d Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989). In the Second Circuit, this case was incorrectly entitled as *Bersani v. Robichaud*. Robichaud was an intervenor on Bersani's behalf.

9. Specifically, the developers include John Bersani, the Pyramid Companies, Newport Galleria Group, and Robert J. Gongel (Pyramid, collectively).

10. EPA, Final Determination of the EPA's Assistant Administrator for External Affairs Concerning the Sweedens Swamp Site in Attleboro, Mass. Pursuant to Section 404(c) of the Clean Water Act (1986), *summarized in* 51 Fed. Reg. 22,977 (1986) [hereinafter Final Determination Sweedens Swamp].

11. *Bersani v. EPA*, 674 F. Supp. 405 (N.D.N.Y. 1987), *aff'd*, 850 F.2d 36 (2d Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989).

12. *Id.* at 420-21.

pretation of the guidelines¹³ promulgated pursuant to CWA section 404(b)(1).¹⁴ The court was also asked to invalidate the EPA's interpretation of the procedures promulgated pursuant to CWA section 404(c).¹⁵ The EPA's interpretation allowed it to apply the practicable alternatives test¹⁶ to sites available at the time of market entry,¹⁷ rather than just to sites available at the time of permit application.¹⁸ The United States court of appeals upheld the EPA's market entry approach.¹⁹ This case is significant for two reasons: 1) the timing of the application of the practicable alternatives test is an issue of first impression in the courts;²⁰ and 2) the upholding of the EPA's CWA section 404(c) veto promotes the preservation of wetlands.

This note will describe and analyze the conflicting arguments put forth on appeal in *Bersani* concerning the EPA's market entry approach. Section II will present the legal background regarding *Bersani*. The history of the Sweedens Swamp site, the district court and the court of appeals opinions will be reviewed in Section III. Section IV will analyze the courts' decisions and Section V will conclude that the court of appeals' affirmance is legally correct and environmentally sound.

13. Section 404(b)(1) [§ 1344(b)(1)]. Guidelines for the Specification of Disposal Sites for Dredged or Fill Material are codified at 40 C.F.R. §§ 230.1-.80 (1990). These guidelines were developed by the EPA in conjunction with the Corps. CWA § 404(b)(1), 33 U.S.C. § 1344(b)(1).

14. CWA § 404(b)(1), 33 U.S.C. § 1344(b)(1).

15. CWA § 404(c), 33 U.S.C. § 1344(c). Section 404(c) procedures are codified at 40 C.F.R. §§ 231.1-.8 (1989). These procedures are "to be followed by the Environmental Protection Agency in prohibiting or withdrawing the specification, or denying, restricting, or withdrawing the use for specification, of any defined area as a disposal site for dredged or fill material pursuant to section 404(c) of the Clean Water Act . . ." 40 C.F.R. § 231.1 (1990).

16. See *supra* note 7.

17. See *Bersani v. EPA*, 850 F.2d 36, 38 (2d Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989). Time of market entry refers to the point in time which a developer enters the real estate market in search of a site for his project. *Id.*

18. *Id.*

19. *Id.* The market entry approach refers to "the interpretation by EPA of the relevant regulation which led EPA to consider the availability of alternative sites at the time [the developer] entered the market for a site, instead of at the time it applied for a permit." *Id.* at 38.

20. *Id.* at 45.

II. Legal Background

A. Statutes and Regulations

The *Bersani* case concerns the statutory relationship between the EPA and the Corps regarding the issuance of CWA section 404 permits, the promulgation of interpretive regulations, and the section 404(c) veto. The EPA exercises paramount authority to administer the CWA.²¹ The United States Attorney General issued an opinion stating that when the EPA and the Corps conflict on jurisdictional policy matters, the EPA's interpretations are controlling.²² The Conference Committee report on the CWA clearly indicates that the EPA is to have veto power over the issuance of permits under section 404(c).²³ The Corps' special policies and procedures recognize the EPA veto, but the Corps will continue administrative processing of applications even if a section 404(c) procedure is initiated.²⁴ The EPA draws a distinction between its right to use the veto after issuance of the permit and its choice to do so.²⁵

Congress specifically intended CWA section 404 to protect wetlands. As Senator Muskie, a primary sponsor of the CWA, stated:

There is no question that the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage. The wetlands and bays, estuaries and deltas are the Nation's most biologically active areas. They represent a principal source of food supply. They are the spawning grounds for much of the fish and shellfish which populate the oceans, and they are passages for numerous upland game fish. They also provide nesting areas for a myriad of species of birds and wildlife. The unregulated destruction of these areas is a matter which needs to be

21. CWA § 101(d), 33 U.S.C. § 1251(d).

22. 43 Op. Att'y Gen. 15 (1979).

23. S. Rep. No. 1236, 92d Cong., 2d Sess. 142, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3820.

24. 33 C.F.R. § 323.6 (1990).

25. EPA Denial or Restriction of Disposal Sites; Section 404(c) Procedures, 44 Fed. Reg. 58,076, 58,077 (1979) (codified at 40 C.F.R. § 231.3 (1990)).

corrected and which implementation of section 404 has attempted to achieve.²⁶

This congressional intent is carried forward in the EPA-promulgated guidelines which govern the issuance of CWA section 404 permits.²⁷ The section 404(b)(1) guidelines state as their fundamental precept that:

[D]redged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.²⁸

Additionally, section 404(b)(1) guidelines adopt as a national policy the position that:

[T]he degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.²⁹

Thus, section 404(b)(1) guidelines impose restrictions on discharges of dredged or fill material.³⁰ The guidelines create the rebuttable presumption that there are practicable³¹ alternatives to non-water dependent discharges³² proposed for special

26. 123 CONG. REC. S26,697 (daily ed. Aug. 4, 1977) (statement of Sen. Muskie).

27. See *supra* note 13.

28. 40 C.F.R. § 230.1(c) (1990).

29. *Id.* § 230.1(d).

30. *Id.* § 230.10.

31. The EPA has ruled that: "What is *practicable* depends on cost, technical, and logistic factors." EPA Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 45 Fed. Reg. 85,336, 85,339 (1980) (codified at 40 C.F.R. § 230.10 (1990)) (emphasis added). To be practicable an alternative must: 1) be capable of achieving the basic purpose of the proposed activity and 2) be reasonably available or obtainable. Reasonable availability is not necessarily determined by fact of ownership or lack of ownership. *Id.*

32. "Non-water dependent" discharges are defined as:

aquatic sites.³³ This presumption forces "a hard look at the feasibility of using environmentally preferable sites."³⁴ Another explicit, but rebuttable, presumption imposed is that "alternatives to discharges in special aquatic sites are less damaging to the aquatic ecosystem and are environmentally preferable."³⁵ The general burden of proof under these guidelines requires an applicant, who proposes to discharge in a special aquatic site, to persuade the permitting authority that both presumptions have been clearly rebutted.³⁶

B. *Prior Cases*

Although this is the first challenge to the EPA's section 404(c) veto, the Corps' decisions to grant section 404 permits have generated some case law regarding section 404(b)(1)

discharges . . . associated with activities which do not require access or proximity to or siting within the special aquatic site to fulfill their basic purpose. An example is a fill to create a restaurant site, since restaurants do not need to be in wetlands to fulfill their basic purpose of feeding people.

Id.

33. 40 C.F.R. § 230.10(a)(3) (1990). This section states in relevant part: Where the activity associated with a discharge which is proposed for a special aquatic site . . . does not require access or proximity to or siting within the special aquatic site . . . to fulfill its basic purpose . . . practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition . . . all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated [sic] otherwise.

Id.

Special aquatic sites are:

[T]hose sites identified in Subpart E. They are geographic areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values. These areas are generally recognized as significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region.

40 C.F.R. § 230.3(q-1) (1990).

Subpart E lists the following categories of special aquatic sites: sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs, and riffle and pool complexes. 40 C.F.R. §§ 230.40-45 (1990).

34. EPA Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 45 Fed. Reg. 85,339 (1980).

35. *Id.*

36. *Id.*

guidelines. In the following cases, the courts have addressed various aspects of the section 404(b)(1) guidelines, as applied by the Corps without reaching the issue of the timing of the practicable alternatives test.

In *National Audubon Society v. Hartz Mountain Development Corp.*,³⁷ the court addressed the collateral issue of whether a practicable alternative, that would serve the same basic purpose of the project, must be one actually available to the applicant as opposed to one available to someone else.³⁸ The plaintiffs in *National Audubon* sought a preliminary injunction against the placing of fill for the building of stores, offices, and warehouses in the Hackensack Meadows Wetlands complex in New Jersey.³⁹ The complaint alleged that the permit was invalid because it was issued in violation of CWA section 404 and corresponding regulations.⁴⁰ The plaintiffs contended that Hartz had not overcome the presumption of available practicable alternatives.⁴¹ Three practicable alternatives were identified by the Corps: 1) abandonment, 2) minimization of activity and 3) acquisition of another location.⁴² Surveys of light industrial and retail space, included in the record, indicated that other possible sites lacked access to transportation, were also wetlands, were being developed, were not properly zoned or could not be acquired.⁴³ The court held that the Corps correctly concluded that Hartz had clearly demonstrated that there were no practicable alternatives.⁴⁴

37. 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,724 (D.N.J. 1983).

38. *Id.* at 20,730-31.

39. *Id.* at 20,725, 20,731.

40. *Id.* at 20,730-31. The complaint also alleged that the Corps was in violation of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370(a) (1988) because: 1) it did not include the residential phase of the project in its consideration, 2) its evaluation of Hartz's mitigation plan was arbitrary and capricious, and 3) its finding that no environmental impact statement was needed was unreasonable. *National Audubon*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,728-30.

41. *National Audubon*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,728-30. See *supra* note 31.

42. *National Audubon*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,731. The abandonment alternative was not considered feasible because it did not serve the basic purpose of "profitably building a commercial-industrial complex." *Id.*

43. *Id.*

44. *Id.*

Two years later, in *Friends of the Earth v. Hintz*,⁴⁵ environmental groups appealed the district court's summary judgment which upheld the Corps' issuance of a CWA section 404 permit to the owner of a logging company.⁴⁶ The owner had filled in a seventeen-acre tract of wetlands with wood waste to create an export log storage and sorting facility.⁴⁷ Friends of the Earth claimed that the activity in question was not water dependent and therefore, practicable alternatives to the permit site existed.⁴⁸ The court of appeals affirmed the district court's decision.⁴⁹ On the water dependency issue the court stated, "The facility is an integrated complex so that the log storage area is used both for domestic and export purposes. Accordingly, the storage area must be adjacent to the ship-loading facility, and therefore is a water dependent activity."⁵⁰ On the question of alternative sites, the court held that "the Corps made the proper analysis and weighed the correct factors in making its determination that no feasible alternatives existed."⁵¹ When conducting the CWA section 404(b)(1) evaluation, the Corps considered the logger's logistical needs and the prohibitive expense of alternative sites.⁵²

In *Hough v. Marsh*,⁵³ the court reversed the Corps' permit decision because the presumption of available alternatives to wetland sites had not been adequately rebutted.⁵⁴ Plaintiffs, the residents of Edgartown on Martha's Vineyard, alleged abuse of discretion by the Corps in the issuance of a section 404 permit to the defendants.⁵⁵ Defendants, Carroll and Jones, planned to build private residences and a tennis

45. 800 F.2d 822 (9th Cir. 1986).

46. *Id.* at 829.

47. *Id.* at 825. The leachate from wood waste contains highly toxic materials. *Id.*

48. *Id.* at 831. Appellants were foreclosed from raising a water quality issue on appeal. *Id.* at 834. See *supra* note 32 for definition of non-water dependent activity.

49. *Friends of the Earth* 800 F.2d at 831.

50. *Id.* at 833.

51. *Id.*

52. *Id.*

53. 557 F. Supp. 74 (D. Mass. 1982).

54. *Id.* at 77.

55. *Id.*

court on a three-acre tract of land.⁵⁶ This necessitated filling in approximately one-quarter acre of wetlands.⁵⁷ The court granted summary judgment for the plaintiffs and remanded for further corps consideration.⁵⁸ The court held:

[T]he fact that the project is not water-dependent should necessitate a more persuasive showing than otherwise concerning the lack of alternatives. Indeed, the EPA guidelines specifically require . . . that an applicant "clearly demonstrate" that practicable alternatives to the proposed fill of wetlands do not exist The private defendants' entire effort to satisfy this burden consisted . . . of the production of a certified letter from a single realtor written more than fourteen months prior to the Engineer's decision. There was no showing that this letter . . . remained an accurate depiction of the local real estate market during these fourteen months.⁵⁹

The court also noted that the defendants offered no explanation for limiting their inquiry into practicable alternatives to a single "prime residential" area.⁶⁰

C. *Final Determinations of the EPA*

To date, the EPA has vetoed only ten Corps decisions to grant permits⁶¹ and only the Final Determination Sweedens

56. *Id.* at 76.

57. *Id.*

58. *Id.* at 88. On remand, the Corps had to: 1) consider the applicability of Edgartown's zoning by-law prohibiting the filling of any tidal marsh, *id.* at 85-86, 2) consider the adverse economic impact of the destruction of the Edgartown lighthouse located on the proposed site, *id.* at 86, and 3) officially determine if the lighthouse was eligible to be placed on the National Register of Historic Places, *id.* at 87-88.

59. *Id.* at 83-84.

60. *Id.* at 84.

61. The following is a chronological listing of EPA determinations which exercise the section 404(c) veto: EPA, Final Determination of the EPA's Administrator Concerning the North Miami Landfill Site Pursuant to Section 404(c) of the Clean Water Act (1981), *summarized in* 46 Fed. Reg. 10,203 (1981) [hereinafter Final Determination North Miami]; EPA, Final Determination of the EPA's Administrator Concerning the M.A. Norden Site Pursuant to Section 404(c) of the Clean Water Act (1984), *summarized in* 49 Fed. Reg. 29,142 (1984) [hereinafter Final Determination Norden]; EPA, Final Determination of the EPA's Assistant Administrator for External Affairs

Swamp has generated case law. Particularly notable are the Final Determination Norden and the Final Determination Maybank. At trial these determinations were cited as instances where the EPA did not apply its market entry approach.⁶² A synopsis of each determination in chronological order follows.

The EPA's first exercise of its section 404(c) veto is found in the Final Determination North Miami.⁶³ The City of North Miami proposed to create a recreational area. The original plan called for the filling of 291 acres, of which 103 were wetlands, the creation of three shallow ponds with tidal connections, and the preservation of 8.2 acres of mangrove swamp.⁶⁴ After receiving its permit, the City of North Miami applied

Concerning the Jack Maybank Site on Jehossee Island, S.C. Pursuant to Section 404(c) of the Clean Water Act (1985), *summarized in* 50 Fed. Reg. 20,291 (1985) [hereinafter Final Determination Maybank]; EPA, Final Determination of the EPA's Assistant Administrator for External Affairs Concerning the Bayou Aux Carpes Site in Jefferson Parish, Louisiana Pursuant to Section 404(c) of the Clean Water Act (1985), *summarized in* 50 Fed. Reg. 47,267 (1985) [hereinafter Final Determination Bayou Aux Carpes]; Final Determination Sweedens Swamp, *supra* note 10; EPA, Final Determination of the EPA's Assistant Administrator for Water Concerning Wetlands Owned by the Russo Development Corporation in Carlstadt, N.J. (1988), *summarized in* 53 Fed. Reg. 16,469 (1988) [hereinafter Final Determination Russo]; EPA, Final Determination of the EPA's Assistant Administrator for Water Concerning Three Wetland Properties (Sites Owned by Henry Rem Estate, Marion Becker, et al. and Senior Corporation) For Which Rockplowing is Proposed in East Everglades, Dade County, Fla. (1988), *summarized in* 53 Fed. Reg. 30,093 (1988) [hereinafter Final Determination East Everglades]; EPA, Final Determination of the EPA's Assistant Administrator for Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Proposed Lake Alma Impoundment and Proposed Mitigation of Associated Environmental Impacts in Alma, Bacon County, Ga. (1989), *summarized in* 54 Fed. Reg. 6,719 (1989) [hereinafter Final Determination Lake Alma]; EPA, Final Determination of the EPA's Assistant Administrator for Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Proposed Ware Creek Water Supply Impoundment, James City County, Va. (1989), *summarized in* 54 Fed. Reg. 33,608 (1989) [hereinafter Final Determination Ware Creek]; EPA, Final Determination of the EPA's Assistant Administrator for Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Proposed Big River Water Supply Impoundment in Kent County, R.I. (1990), *summarized in* 55 Fed. Reg. 10,666 (1990) [hereinafter Final Determination Big River].

62. *Bersani v. EPA*, 850 F.2d 36, 44 (2d Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989).

63. Final Determination North Miami, *supra* note 61.

64. *Id.* at 2-3.

for a modification which proposed to excavate the tidal ponds to thirty-five feet below mean sea level, to convert the mangrove preserve to a borrow area, and to operate the site as a sanitary landfill using garbage as fill material.⁶⁵ This site is adjacent to North Biscayne Bay which, along with the adjoining mangrove swamps, supports recreational and commercial fishing, serves as nursery grounds for marine fish and invertebrates, and provides a major feeding area for birds and wildlife, including two endangered species.⁶⁶ Based on evidence that leachate generated by garbage already in place, adjacent to the site, was contaminating shallow groundwater with ammonia,⁶⁷ and data from EPA models used to predict production of leachate from garbage, the Administrator concluded that: "[T]he use of the North Miami landfill site for the placement of garbage will have unacceptable adverse effects on shellfish and fisheries areas, wildlife, and recreational areas."⁶⁸ The Administrator further determined that "imposition of restrictions would be more appropriate than a total prohibition against discharges."⁶⁹

Three years later, in the Final Determination Norden,⁷⁰ the EPA did not reach the issue of timing of the practicable alternatives test because there were seven concurrently available sites which met Norden's criteria.⁷¹ The M.A. Norden Company proposed to fill twenty-five acres of freshwater wetlands in Mobile, Alabama to build a recycling facility.⁷² This tidally-influenced area is part of a larger freshwater forested

65. *Id.* A borrow area is an area from which fill is obtained. *See id.* at 19.

66. *Id.* at 10. The endangered species are the Eastern Brown pelican and the West Indian manatee. *Id.*

67. Ammonia is acutely toxic to various aquatic species, and its chemical breakdown may result in eutrophication. *Id.* at 8-9.

68. *Id.* at 11.

69. *Id.* at 12. Some restrictions were imposed: a ban on garbage as fill, prohibition on converting the 8.2-acre mangrove preserve into a borrow area, and a prohibition on filling with any material the unfilled waters of the United States within the site. *Id.*

70. Final Determination Norden, *supra* note 61.

71. *Id.* at 11-12. A special task force was commissioned to address the issue of alternative sites. *Id.* at 10.

72. *Id.* at 1.

wetland complex.⁷³ Plant biomass produced at this site was significant to the shellfish and fishery resources of Mobile River and Bay.⁷⁴ Thus, the Administrator concluded that: "[L]ess environmentally damaging alternatives are practicable taking into consideration costs, technology and logistics [T]he adverse impacts on shellfish beds and fishery areas and wildlife areas, if the site in question were to be filled, are unacceptable."⁷⁵ Therefore, the Administrator prohibited the specification of the twenty-five acres as a disposal site.⁷⁶

The following year, the EPA decided the Final Determination Maybank,⁷⁷ but specifically did not address the issue of available alternatives.⁷⁸ Mr. Maybank proposed to construct earthen dikes to impound tidal wetlands for duck hunting and aquaculture.⁷⁹ The dikes were to be built on top of remnant rice field embankments.⁸⁰ If the new dikes were constructed to a height of 3.3 to 4.5 feet above the mean high-water mark, twenty-two to thirty-two acres of wetlands would have been destroyed.⁸¹ Furthermore, studies indicated that impoundments "adversely impact the aquatic environment by reducing the availability of marsh-derived organic carbon to the estuary and by limiting access by numerous species of fish and shellfish to required breeding, feeding and nursery habitat."⁸²

Based on the direct destruction and the results of the impoundment studies, the Assistant Administrator for External Affairs determined that the replacement of "open, free flushing" tidal marsh with impoundments resulted in unacceptable

73. *Id.* at 4.

74. *Id.* at 9.

75. *Id.* at 16.

76. *Id.* at 17.

77. Final Determination Maybank, *supra* note 61.

78. *See id.* Because the record did not provide "a conclusive demonstration regarding the practicability" of alternatives, the Assistant Administrator for External Affairs did not consider a proposed upland site as a "substantive criterion" in making his decision. *Id.* at 12.

79. *Id.* at 1, 2. The aquaculture involved shrimp farming. *Id.*

80. The unmaintained embankments were covered primarily by wetland vegetation and no longer barred tidal flooding of interior wetlands. *Id.* at 2.

81. *Id.* at 3.

82. *Id.* at 15.

adverse effects and restricted the use of the Maybank site.⁸³ No dredged or fill material could be deposited if it had the purpose or effect of impounding the marsh.⁸⁴

Later in the year, the EPA issued the Final Determination Bayou Aux Carpes.⁸⁵ The site involved a partially completed Corps flood control project⁸⁶ and contained approximately 3,000 acres of wetlands, including bottomland hardwoods, wooded swamps, scrub-shrub wetlands, fresh marshes, ponds and open waterways.⁸⁷ The Assistant Administrator for External Affairs restricted use of the site for any discharges of dredged or fill material⁸⁸ based on a finding of unacceptable adverse impacts.⁸⁹ These adverse impacts included: the elimination of the export detritus, the loss of wildlife habitat, the loss of pollution filtering values, the loss of recreational opportunities, and the resulting damage to hydrologically-connected wetlands.⁹⁰

Two years after the Final Determination Sweedens Swamp, the EPA issued the Final Determination Russo.⁹¹ This determination addressed an "after-the-fact" permit for 52.5 filled acres⁹² and a permit to fill an additional five acres in the Hackensack River basin⁹³ which had been granted by the Corps to the Russo Development Corporation (Russo).⁹⁴ Russo proposed completing a warehouse complex by maintaining the 52.5 acres, which were already filled, and by filling an additional five acres.⁹⁵ The Corps required a mitigation plan consisting of enhancement of an unspecified wetland

83. *Id.* at 20.

84. *Id.*

85. Final Determination Bayou Aux Carpes, *supra* note 61.

86. *Id.* at 1.

87. *Id.* at 9.

88. *Id.* at 22. The flood control project completion was allowed conditioned on the use of floodgates which would retain current hydrology except during storms. *Id.*

89. *Id.* at 15-16.

90. *Id.*

91. Final Determination Russo, *supra* note 61.

92. *Id.* at 2. These 52.5 acres were filled without authorization. *Id.*

93. The Hackensack River basin is located in New Jersey. Its associated wetlands are known as the Hackensack Meadowlands. *Id.* at 3.

94. *Id.* at 1.

95. *Id.*

within 1.5 miles of the site and the preservation of twenty-three acres of wetlands in an adjacent watershed.⁹⁶

A wetland evaluation conducted by the EPA revealed that the site was a rare local habitat.⁹⁷ The Assistant Administrator for Water concluded that the "proposed mitigation neither compensat[ed] for the loss of 57.5 acres of valuable wildlife habitat nor constitut[ed] appropriate and practicable mitigation"⁹⁸ and would result in "a net resource loss."⁹⁹ Based on a finding of unacceptable adverse effects on wildlife, the Assistant Administrator for Water prohibited any discharge on the site.¹⁰⁰

In the same year, the EPA issued the Final Determination East Everglades.¹⁰¹ This determination concerned three separately owned properties, collectively consisting of 432 acres of prairie wetlands,¹⁰² for which rockplowing was proposed.¹⁰³ The acting Assistant Administrator for Water prohibited the specification of the three sites as discharge sites for rockplowing.¹⁰⁴ This decision was based on a finding of unacceptable adverse effects to wildlife¹⁰⁵ due to loss of important habitat.¹⁰⁶ The acting Assistant Administrator for Water

96. *Id.* at 17. The adjacent watershed was in the Passaic River basin. *Id.* at 1.

97. *Id.* at 15. Four percent of the Hackensack Meadowlands is noncommon reed dominated. The unauthorized fill of the 52.5 acres destroyed about eight percent of this rare local habitat. *Id.*

98. *Id.* at 19.

99. *Id.* at 18. The Assistant Administrator for Water was mindful of the fact that the section 404(c) veto would not prevent or reverse most of the unacceptable adverse effects at this site. He stated that further actions would be necessary to "determine the extent of wetland value replacement and [to] pursue compensatory action." *Id.* at 20.

100. *Id.* at 20.

101. Final Determination East Everglades, *supra* note 61.

102. *Id.* at 19. Prairie wetlands are seasonally-inundated, irregular rocky limestone substrates, dominated by a vegetation of muhly grass and yellowtop, and interspersed with solution holes containing blue green algae. *Id.* at 11.

103. *Id.* at 1. Rockplowing is a process that uses a multitoothed plow-like implement to break up and crush the limestone substrate of wetlands to prepare the land for farming. *Id.* at 3.

104. *Id.* at 24.

105. *Id.*

106. *Id.* at 22. The loss of habitat would result in further declines in some species populations in the area. *Id.*

also noted that rockplowing was "contrary to ongoing efforts to improve and restore the Everglades' ecological functions which include support of a rich and diverse wildlife population."¹⁰⁷

Later the same year, the EPA issued the Final Determination Lake Alma.¹⁰⁸ This determination concerned the proposed impoundment of uplands and wetlands to create Lake Alma and the proposed mitigation of the associated environmental impacts.¹⁰⁹ The primary purpose of this impoundment was to provide "water-oriented outdoor recreational opportunities" for residents of Alma, Georgia.¹¹⁰ The proposal included the damming of Hurricane Creek¹¹¹ and the subsequent flooding of a portion of the flood plain. This proposal would create a lake with a surface area of 1,400 acres¹¹² and fourteen discrete mitigation impoundments on Hurricane Creek and its tributaries.¹¹³ As proposed, the construction of Lake Alma would impact on 1,155 acres of wetlands¹¹⁴ and the mitigation measures would result in a net physical loss of twelve acres of vegetated wetlands.¹¹⁵ Based on site specific cumulative impacts,¹¹⁶ the acting Assistant Administrator for Water concluded that the project would result in unaccept-

107. *Id.* at 23.

108. Final Determination Lake Alma, *supra* note 61.

109. *Id.* at 5.

110. *Id.*

111. *Id.* at 39. Hurricane Creek and its associated flood plain are characterized as a bottomland-hardwood wetland system. *Id.*

112. *Id.*

113. *Id.* at 6. These mitigation impoundments would be managed primarily for waterfowl production. *Id.*

114. *Id.* at 13. Approximately 957 acres of bottomland-hardwood wetlands would be destroyed and approximately 200 acres would have their habitat functional values reduced. *Id.* at 34.

115. *Id.* The mitigation would destroy thirty-five acres of wetland habitat to create twenty-three acres of wetlands of "unknown quality." *Id.*

116. Some of the impacts considered were: 1) an adverse effect on a significant percentage of wildlife species using the site; 2) impacts associated with the loss of a substantial portion of bottomland-hardwood wetlands in the Hurricane Creek flood plain; 3) impacts of the elimination of an integral link in the forested wetland corridor; and 4) the exacerbation of the significant loss of wildlife habitat associated with bottomland-hardwood wetlands which has already occurred in the southeastern United States. *Id.* at 42-43.

able adverse effects on wildlife¹¹⁷ and, therefore, restricted the site.¹¹⁸

The next year, the EPA issued the Final Determination Ware Creek.¹¹⁹ This determination concerned the proposed creation of a local water supply impoundment¹²⁰ on Ware Creek in James City County Virginia.¹²¹ The County proposed to construct an earthen dam¹²² in the Ware Creek basin to create a 1,217-acre water supply reservoir.¹²³ The impoundment would have resulted in the inundation of 381 acres of vegetated wetlands.¹²⁴ Forty-four acres of open water, presently less than two meters deep, would have been increased to a depth of sixteen feet.¹²⁵ The Ware Creek system¹²⁶ discharges into the Lower York River Basin at approximately twenty-three miles from where the York River empties into the Chesapeake Bay.¹²⁷ The hydrology of Ware Creek regu-

117. *Id.* at 43.

118. *Id.* The EPA prohibited the placement of fill for any activity associated with the creation of "any reservoir, lake or impoundment on described waters, including wetlands" *Id.*

119. Final Determination Ware Creek, *supra* note 61.

120. *Id.* at 4. Although the administrative record contained references to the need for a regional water supply for the Lower James River/York River Peninsula, the EPA based its determination on the fact that the proposed project did not address the region-wide, inter-jurisdictional water supply problems of the Lower Peninsula. *Id.* at 8.

121. *Id.* at 4.

122. *Id.* at 6. The dam as proposed would be 1,450 feet long, forty feet wide at the crest, and 300 feet wide at the base, with a crest elevation of forty-eight feet above mean sea level. *Id.*

123. *Id.* The reservoir would have an average depth of sixteen feet, a capacity of 6,355 million gallons, and provide a safe yield of 9.4 million gallons per day. *Id.* Safe yield is a supply sufficient to provide water, without depleting the source, during the drought of record. *Id.* n.3.

124. *Id.* at 1. The vegetated wetlands include scrub shrub, herbaceous and forested wetland vegetation. *Id.*

125. *Id.*

126. *Id.* at 14. Ware Creek and its associated tributaries, France Swamp, Cow Swamp, and Bird Swamp drain into a generally undisturbed watershed which lies within the coastal plain of the Tidewater region in southeastern Virginia. *Id.* The upland areas of the watershed are dominated by hardwood and mixed pine-hardwood forest. *Id.* at 15.

127. *Id.* at 14. Because of the estuarine tidal influx of the York River, the Ware Creek system experiences large scale fluctuations in salinity and a back flow of brackish waters well into the major creek channels. *Id.*

lates the accumulation and transport of organic matter through the vegetated wetland system, and is part of the normal input of organic matter into the Chesapeake Bay.¹²⁸ The Ware Creek system and associated upland support aquatic breeding and nursery habitat for fish species,¹²⁹ migratory birds,¹³⁰ resident bird populations,¹³¹ mammals,¹³² and amphibians and reptiles.¹³³ Based on a finding of unacceptable effects on wildlife,¹³⁴ the acting Assistant Administrator for Water restricted "the designation of the [Ware Creek basin] as a discharge site[] for dredged of fill material expressly for the purpose of establishing a local water supply for James City County and as such prohibit[ed] placement of fill for that purpose."¹³⁵

The following year, the EPA issued the Final Determination Big River.¹³⁶ This determination concerned a proposed project to create a municipal water supply impoundment on Big River in Kent County, Rhode Island.¹³⁷ The proposed project involved the construction of a dam to create a 3,400 acre

128. *Id.* at 15.

129. *Id.* at 63. These species include White perch and other species important to commercial and recreational fisheries. *Id.*

130. *Id.* The migratory bird species include the Great Blue heron, which utilizes a rookery within the proposed project site, and the Black duck, which has experienced serious national population declines due to habitat loss. *Id.*

131. *Id.* The Wood duck is just one example of the resident birds. *Id.*

132. *Id.* Mammals include species such as the Whitetail deer, the muskrat, and the River otter. *Id.*

133. *Id.* The amphibians and reptiles include species of salamanders, snakes, frogs, and turtles. *Id.* at 22.

134. *Id.* at 4. The EPA found that the impoundment: "[1] would result in the destruction and loss of a diverse wetland habitat that provides substantial and critical ecological support to wildlife in the Ware Creek wetlands systems and associated areas . . . [and] [2] would have an adverse impact on down stream aquatic systems including Chesapeake Bay." *Id.* The EPA also found that: "[T]here are practicable, less environmentally damaging alternatives that are available to James City County for the purpose of providing a water supply to meet the projected need for the County." *Id.*

135. *Id.* at 5.

136. Final Determination Big River, *supra* note 61.

137. *Id.* at 1. In 1979, the State of Rhode Island requested that the Corps evaluate the potential flood control and recreation benefits of the project. It was not until a subsequent permit application in 1986, that the State of Rhode Island stated that the purpose of the project was to provide a municipal water supply. *Id.* at 2.

impoundment¹³⁸ and the construction of an impermeable slurry wall, which would reach down to bedrock to prevent the natural flow of groundwater out of the Big River area.¹³⁹ Data indicated that 575 acres of wetlands exist within the proposed impoundment boundaries.¹⁴⁰ The Assistant Administrator for Water concluded that the proposed impoundment would: 1) impact on an area of "exceptional and diverse natural wetland and free flowing aquatic systems;"¹⁴¹ 2) cause direct loss of habitat for "an abundant and complex assemblage of wildlife species;"¹⁴² 3) alter groundwater flow;¹⁴³ 4) adversely impact downstream aquatic habitats;¹⁴⁴ and 5) significantly alter the present recreational use of the area.¹⁴⁵ Based on the unacceptable adverse effects to wildlife areas and the existence of available practicable alternatives, the Assistant Administrator for Water prohibited the designation of "Big River, Mishnock River and their tributaries and adjacent wetlands as discharge sites for dredged or fill material for the purpose of creating the Big River reservoir."¹⁴⁶

III. The Bersani Case

A. *History of the Attempt to Develop the Sweedens Swamp Site*

Sweedens Swamp, a 49.5-acre forested wetland, was a part of the eighty-two-acre site¹⁴⁷ located in South Attleboro,

138. *Id.* at 1. The dam would be approximately 2,300 feet long and seventy feet high. *Id.* The impoundment would have an average depth of twenty-five feet. *Id.*

139. *Id.* The slurry wall would be in the northeastern portion of the proposed reservoir. *Id.*

140. *Id.* at 6. Measurement data was obtained from aerial photography and field checking performed by the University of Rhode Island. *Id.*

141. *Id.* at 8.

142. *Id.*

143. *Id.* The slurry wall would interrupt groundwater flow into the Mishnock Lake and the forested wetlands in Mishnock Swamp. *Id.* at 9.

144. *Id.* at 9.

145. *Id.* Because the Big River project is primary for potable water, Rhode Island state policies would restrict access. *Id.*

146. *Id.* at 10-11.

147. Final Determination Sweedens Swamp, *supra* note 10, at 7. The site also included emergent wetland, shrub swamp, streams, and standing water. *Id.*

Massachusetts, where developers proposed to construct a shopping mall.¹⁴⁸ It is identified as a "high-quality red maple swamp" by the Massachusetts Division of Fisheries and Wildlife.¹⁴⁹ In spite of extensive adjacent development, illegal dumping, and motorbike intrusion in some areas of the site,¹⁵⁰ Sweedens Swamp remains a functional island ecosystem which provides wildlife habitat, food chain production, natural flood storage, groundwater discharge, and waterborne pollutant removal.¹⁵¹

The first attempt to build a shopping mall on the Sweedens Swamp site was undertaken by Pyramid's predecessor, the Edward J. DeBartolo Corporation (DeBartolo).¹⁵² When DeBartolo purchased the site, some time before April 1982, an alternative site was available in North Attleboro.¹⁵³ Pursuant to state requirements,¹⁵⁴ DeBartolo applied to the Massachusetts Department of Environmental Quality Engineering (DEQE) for a building permit. The DEQE denied the permit in April 1982.¹⁵⁵ In December 1983, while the denial was on appeal to the DEQE, Pyramid took over the project. Pyramid won the appeal started by DeBartolo and the DEQE granted a permit in March 1985 under the old regulations.¹⁵⁶ A subsequent court challenge by a citizens group resulted in the Massachusetts Supreme Judicial Court upholding the

148. *Id.* at 2.

149. *Id.* at 7.

150. *Id.* at 7-8.

151. *Id.* at 8.

152. *Bersani v. EPA*, 850 F.2d 36, 40 (2d Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989).

153. *Id.* Pyramid subsequently concluded that the North Attleboro site was not a practicable alternative. Pyramid based its conclusion on the following factors: 1) lack of sufficient traffic volume; 2) lack of sufficient local road access; 3) strong doubts from potential tenants; and 4) strong community resistance to previous developments. *Bersani v. EPA*, 674 F. Supp. 405, 410 (N.D.N.Y. 1987).

154. *Bersani*, 850 F.2d at 40. *See also* MASS. GEN. LAWS ANN. ch. 131, § 40 (West 1974 & Supp. 1989). In addition to federal approval, Massachusetts requires state approval for projects that fill wetlands. *Bersani*, 850 F.2d at 40.

155. *Bersani*, 850 F.2d at 40.

156. *Id.* at 41. Massachusetts adopted new standards for permit approval in April 1986. The new standards included wildlife habitat as a protected wetland value and required an absence of a practicable alternative to a proposed wetland site. *Id.*

DEQE permit because Pyramid was held to stand in its predecessor's shoes.¹⁵⁷

In July 1984, Pyramid applied to the New England regional division of the Corps for a federal permit under CWA section 404.¹⁵⁸ Pyramid's development plan proposed to fill thirty-two acres of the 49.5-acre red-maple swamp, to alter thirteen acres of existing wetland, and to excavate nine acres of upland to create artificial wetlands on-site.¹⁵⁹ Pyramid modified its plan in April 1985 to include off-site mitigation which would have included the creation of thirty-six acres of wetlands.¹⁶⁰

A review of Pyramid's application was conducted by the EPA, the Fish and Wildlife Service (FWS), and the Corps.¹⁶¹ In November 1984, the EPA and the FWS recommended that the Corps deny Pyramid's application because of inconsistencies with CWA section 404(b)(1) guidelines.¹⁶² Pyramid had failed to overcome the presumption of available practicable alternatives and had failed to adequately mitigate the adverse impact on wildlife. *See* 40 C.F.R. § 230.10 (1990).¹⁶³ After hiring a consultant to investigate the feasibility of the Sweedens Swamp and the North Attleboro sites, the Corps advised Pyramid that it intended to deny the permit.¹⁶⁴ Normally, the re-

157. *Citizens for Responsible Envtl. Mgt. v. Attleboro Mall, Inc.*, 400 Mass. 658, 511 N.E.2d 562 (1987). The Massachusetts District Court had reversed the DEQE on the ground that the new regulation should have been applied, but the Massachusetts Supreme Judicial Court upheld the DEQE's permit approval. *Id.*

158. Final Determination Sweedens Swamp, *supra* note 10, at Appendix A. Public notice describing the project was issued in August 1984. *Id.*

159. *Id.* at 5.

160. *Id.*

161. *Bersani v. EPA*, 850 F.2d 36, 41 (2d Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989).

162. *Id.* at 41-42. CWA section 404(b)(1) [§ 1344(b)(1)] guidelines require that developers of wetlands whose projects do not "require access or proximity to or siting within special aquatic sites to fulfill their basic purpose" must overcome the rebuttable presumption of practicable alternatives, 45 Fed. Reg. 85,336, 85,339 (1980) (codified at 40 C.F.R. § 230.10 (1990)), and must adequately mitigate the adverse impact on wildlife. *See* 40 C.F.R. § 230.10 (1990).

163. *Bersani*, 850 F.2d. at 42-43. Pyramid failed to meet both criteria. *Id.*

164. *Id.* at 42. The consultant determined that either site was a feasible location for a mall. However, the area could support only one mall. *Id.*

gional division office would have made the final decision.¹⁶⁵ However, General John F. Wall, the Director of Civil Works at Corps headquarters, reviewed and reversed the regional decision.¹⁶⁶ The EPA vetoed the issuance of the section 404 permit because it found:

(1) that the filling of the Swamp would adversely affect wildlife; (2) that the North Attleboro site could have been available to Pyramid at the time Pyramid investigated the area to search for a site; (3) that considering Pyramid's failure or unwillingness to provide further materials about its investigation of alternative sites, it was uncontested that at best, Pyramid never checked the availability of the North Attleboro site as an alternative; (4) that the North Attleboro site was feasible and would have less adverse impact on the wetlands environment; and (5) that the mitigation proposal did not make the project preferable to other alternatives because of scientific uncertainties of success.¹⁶⁷

B. *The District Court Opinion*

Both the EPA and Pyramid made cross-motions for summary judgment before the United States District Court for the Northern District of New York.¹⁶⁸ Pyramid sought an order vacating the EPA's decision.¹⁶⁹ Pyramid contended that the EPA's decision was incorrect as a matter of law because "(1) the EPA impermissibly relied on the 'avoidability' of environmental impacts in determining their 'unacceptability' under section 404(c) and (2) the EPA impermissibly reconsidered the section 404(b) availability question and backdated

165. *Id.*

166. *Bersani*, 850 F.2d at 42. Wall stated: "In a proper case, mitigation measures can be said to reduce adverse impacts of a proposed activity to the point where there is no 'easily identifiable difference in impact' between the proposed activity (including mitigation) versus the alternatives to that activity." *Id.*

167. *Id.* at 42-43.

168. *Bersani v. EPA*, 674 F. Supp. 405, 407 (N.D.N.Y. 1987), *aff'd*, 850 F.2d 36 (2d Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989).

169. *Id.*

the inquiry.”¹⁷⁰ Pyramid also alleged that the EPA amended its regulations without following the Administrative Procedure Act (APA).¹⁷¹ The EPA argued that: 1) it had clear statutory authority under CWA section 404(c) to prohibit the filling of wetlands which unacceptably and adversely impact wildlife; 2) it had authority to consider CWA section 404(b)(1) guidelines in determining the unacceptability of environmental impacts; and 3) its timing of the practicable alternatives test was proper and consistent with the goals of the CWA and its regulations.¹⁷²

Judge McAvoy granted the EPA’s motion for summary judgment.¹⁷³ He determined that, in order to overturn the EPA’s decision, the decision must have been “arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law.”¹⁷⁴ The court held that EPA’s feasibility determination and its finding of site availability at market entry were not arbitrary.¹⁷⁵ On the issue of whether CWA section 404(b)(1) guidelines¹⁷⁶ could be used in CWA section 404(c) review,¹⁷⁷ the court held the “EPA’s interpretation that the avoidability of a loss may be considered in conjunction with its magnitude in determining whether it is ‘unacceptable’ within the meaning of section 404(c) and ‘significant’ within the meaning of the implementation regulation is reasonable.”¹⁷⁸ In reviewing the legislative history of the CWA, the court found that “none of the history cited demonstrate[d] that the Administrator [could] not consider the practicable alternatives test originally employed by the Corps in determining the environmental impact of a proposed discharge on the five identified resources.”¹⁷⁹ Additionally, the court held that

170. *Id.* at 411-12.

171. *Id.* at 412 n.18. The court rejected this contention. *Id.*

172. *Id.* at 412.

173. *Id.* at 420-21.

174. *Id.* at 412.

175. *Id.* at 417, 419.

176. *See supra* note 13.

177. *See supra* note 15.

178. *Bersani*, 674 F. Supp. at 415.

179. *Id.* at 417. CWA section 404(c) [§ 1344(c)] identifies the following five resources: municipal water supplies, shellfish beds and fishery areas, wildlife, or recrea-

the "Final Determination must be upheld as reasonable because it was based upon a rational, independent finding that a significant loss in wildlife resources would result from the construction of a mall at Sweeden's Swamp."¹⁸⁰

C. *The Court of Appeals Affirms*

1. *The Majority Opinion*

On appeal, Pyramid's principal argument challenged the EPA's market entry approach.¹⁸¹ The two main points of Pyramid's challenge were: 1) the market entry approach was inconsistent with regulatory language and past practices of the Corps and the EPA;¹⁸² and 2) the court should not defer to the EPA's regulatory interpretation because this issue did not require environmental expertise, and because section 404 permitting is a jointly administered program.¹⁸³ Pyramid also made other subordinate claims in support of its challenge.¹⁸⁴ These claims were: 1) the market entry approach was not specific enough to constitute public notice as to when one must consider alternative sites, therefore, it violated the APA; 2) the EPA was fundamentally unfair in applying its new approach in this case; and 3) the district court exceeded its authority because it supplied a rationale not offered by the EPA.¹⁸⁵

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tional areas. CWA § 404(c), 33 U.S.C. § 1344(c).

180. *Bersani*, 674 F. Supp. at 419.

181. *Bersani v. EPA*, 850 F.2d 36, 38 (2d Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989).

182. *Id.* at 38, 43. Pyramid argued that CWA section 404(b)(1) [§ 1344(b)(1)] guidelines were framed in the present tense, while the market entry approach focused on the past. Pyramid then cited to *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987) to support its contention that present tense language should refer only to the present and future. *Bersani*, 850 F.2d at 43. Pyramid also argued that neither the Corps nor the EPA had ever applied a market entry approach. *Id.* at 44.

183. *Bersani*, 850 F.2d at 38, 45-46. Pyramid contends that when two jointly responsible administering agencies "reach divergent conclusions," the court must use its own judgment in construing a regulation. *Id.* at 46.

184. *Id.* at 38, 46.

185. *Id.* at 46.

cuit affirmed the lower court's opinion.¹⁸⁶ The court held "(1) that the market entry theory is consistent with both the regulatory language and past practice; (2) the EPA's interpretation, while not necessarily entitled to deference, is reasonable and its application of its rule is supported by the record; and (3) that Pyramid's other arguments lacked merit."¹⁸⁷ Based upon a review of the regulations as a whole and in the context of the controlling statute, the court concluded that:

[W]hen the agencies drafted the language in question they simply were not thinking of the specific issues raised by the instant case, in which an applicant had available alternatives at the time it was selecting its site but these alternatives had evaporated by the time it applied for a permit.¹⁸⁸

The court agreed with the district court's conclusion that the "regulations are essentially silent on the issue of timing"¹⁸⁹ The court then considered the objectives of the CWA and the intent underlying the promulgation of the regulations and concluded that "a common sense reading of the statute can lead only to the use of the market entry approach used by the EPA."¹⁹⁰ Upon examination of prior EPA and court decisions, the court was satisfied that the issue was one of first impression.¹⁹¹ The court viewed the EPA's action in this case as "an application of the regulatory language to the specific needs of this case which arose here for the first time."¹⁹² The court agreed with the district court's conclusion that the EPA's findings were not arbitrary and capricious.¹⁹³

186. *Id.* at 38.

187. *Id.* at 47.

188. *Id.* at 43.

189. *Id.*

190. *Id.* at 44. The majority rejected an argument based on *Gwaltney* that the most natural reading of the regulations would result in a time-of-application rule. *Id.* at 43.

191. *Id.* at 45.

192. *Id.*

193. *Id.* at 38.

Regarding Pyramid's other claims,¹⁹⁴ the court held that the "EPA did not create and announce a 'new' standard and apply it retroactively to Pyramid. Rather the EPA interpreted the law to apply it to the facts of this case"¹⁹⁵ and the "EPA could reasonably have determined that Pyramid should be held to 'stand in the shoes' of DeBartolo, especially since it was able to obtain state approval of the project under the less-stringent . . . standards that had originally applied to DeBartolo."¹⁹⁶ Finally, the court of appeals held that the district court did not supply a rationale for the EPA but used one of several supplied by the EPA.¹⁹⁷

2. *The Dissent*

Judge Pratt, writing a strong dissent, stated:

Finding that a "common-sense reading" of 33 U.S.C. § 1344(c) "can lead only to the use of the market entry approach", the majority today holds that in determining whether an "alternative is available", EPA is to look, not at the present circumstances and most current data, but rather at circumstances and data which existed, perhaps years earlier, when the developer "entered the market". This market entry theory approaches a sensitive environmental problem through a time warp, it ignores the statute's basic purpose, and it creates unfair and anomalous results.¹⁹⁸

In examining the legislative history, Judge Pratt determined that the statute was directed at the land itself, and not at whether the potential developer was dealing with clean

194. *Id.* at 46. Pyramid claimed: (1) the EPA's market entry theory violated administrative law principles because of the lack of public notice as to when alternative sites must be considered; (2) the EPA unfairly applied market entry to this case; and (3) the district court exceeded its authority by supplying a rationale not offered by the EPA. *Id.*

195. *Id.* at 46-47.

196. *Id.* at 47.

197. *Id.* at 47.

198. *Id.* at 47-48 (Pratt, J., dissenting) (emphasis in original).

hands.¹⁹⁹ He interpreted CWA section 404 as creating a test balancing "biological integrity" against commerce or other economic factors.²⁰⁰ Judge Pratt further stated that "[C]ongress designed the section to preserve the environment consistent with reasonable accommodation to the economic and social needs of the public; it was not concerned with the identities or past activities of particular developers."²⁰¹ The EPA's market entry theory ignored this balancing which is central to section 404.²⁰² The EPA also incorrectly focused on the "decisionmaking techniques and tactics of a particular developer" rather than on the actual alternatives to wetland development.²⁰³ The market entry theory was further flawed because it is a vague standard²⁰⁴ which actually achieved a punitive result against Pyramid by blindly looking only at alternatives available at the time of market entry.²⁰⁵ Judge Pratt supported a time of decision theory because: 1) the EPA should function in much the same way as a court of equity and consider the circumstances which exist at the time it makes its decision; and 2) the present tense language "is available" commands the EPA to apply the regulation to the present, not the past.²⁰⁶

IV. Analysis of the Decision

As the majority correctly affirmed, the EPA's veto was not inconsistent with the EPA's or the Corps' practices.²⁰⁷ The EPA was correct to classify Pyramid's mall development as non-water dependent. This classification carried with it the rebuttable presumption of alternative availability. As in

199. *Id.* at 48.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 49. Agencies must articulate standards with sufficient clarity so that the affected community may know what those standards are. *Id.* See also *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 48 (1983).

205. *Bersani*, 850 F.2d at 49 (Pratt, J., dissenting).

206. *Id.* See also *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.* 484 U.S. 49, 57 (1987).

207. *Bersani*, 850 F.2d at 44-47.

Hough v. Marsh,²⁰⁸ the burden was on Pyramid to overcome the presumption and Pyramid failed to do so. *Bersani* may have been decided differently if Pyramid had been able to produce a record of extensive search for alternatives as was produced in *National Audubon Society*.²⁰⁹ The documentation of a thorough and valid search would have supported the argument that Pyramid made regarding the North Attleboro site. Furthermore, if the EPA were to function as a court of equity,²¹⁰ it could not ignore the fact that Pyramid benefited from standing in DeBartolo's shoes in the Massachusetts courts. For the EPA to do so would be anomalous and unfair.²¹¹

The EPA was correct in rejecting General Wall's determination that Pyramid's off-site mitigation would make Pyramid's Sweedens Swamp proposal the alternative with the least adverse effect on the aquatic environment.²¹² The Corps is to review applications for permits "in accordance with" section 404(b)(1) guidelines.²¹³ These guidelines clearly state that "where proposed development and restoration techniques have not yet advanced to the pilot demonstration stage, [they must be] initiated . . . on a small scale to allow corrective actions if unanticipated adverse impacts occur."²¹⁴ The proposed creation of thirty-six completely new acres of wetlands does not follow the guidelines.²¹⁵

208. 557 F. Supp. 74 (D. Mass. 1982). See *supra* text accompanying notes 53-60.

209. 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,724 (D.N.J. 1983). See *supra* text accompanying notes 37-44.

210. See *supra* text accompanying note 206.

211. See *supra* text accompanying note 196.

212. Final Determination Sweedens Swamp, *supra* note 10, at 5.

213. 33 C.F.R. § 323.6(a) (1990) states that the Corps is to review applications for permits "in accordance with guidelines promulgated by the Administrator, EPA, under authority of § 404(b)(1) of the CWA" and section 323.6(b) prohibits the Corps from issuing a permit when the EPA exercises its section 404(c) [§ 1344(c)] veto.

214. 40 C.F.R. § 230.75(d) (1990).

215. Final Determination Sweedens Swamp, *supra* note 10, at 27. The science of creating wetlands is much less advanced than that of wetland restoration and enhancement.

A created wetland is vulnerable to a number of natural forces Consequently, it takes a considerable period of time to be sure that a wetland has become successfully established and even then there is some uncertainty as

Additionally, the present tense language in the section 404(b)(1) guidelines²¹⁶ does not command the EPA to limit its veto review to the present. The market entry approach is not contrary to the prospective reading requirement of *Gwaltney*.²¹⁷ The Court in *Gwaltney* distinguished the citizens suit provision of CWA section 505²¹⁸ from the enforcement provision of CWA section 309.²¹⁹ Even though both sections contain present tense language, the Court applied a prospective reading only to section 505. In making this distinction, the Court noted that Congress had characterized section 505 as an injunctive measure and that the Court had previously held that section 309(d) constituted a separate grant of enforcement authority.²²⁰ The EPA guidelines²²¹ interpret section 404 of the CWA. Section 404 of the CWA does not provide for injunctive relief; it is a grant of permitting authority.²²² Therefore, it is not logical to apply a prospective reading to section 404 of the CWA.

In his dissent, Judge Pratt interpreted the majority's holding to limit the EPA's determination of available practicable alternatives to one fixed time in the past.²²³ This was

to how well it will function These uncertainties, and the consequent need for long-term monitoring, increase with the size of the project.

Id.

216. 40 C.F.R. § 230.10(a) (1990). This section states in relevant part:

(a) . . . no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences(a)(2) An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purposes

Id. (emphasis added).

217. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987).

218. CWA § 505, 33 U.S.C. § 1365.

219. CWA § 309, 33 U.S.C. § 1319.

220. *Gwaltney*, 484 U.S. at 58 (citing to *Tull v. United States*, 481 U.S. 412, 425 (1987)).

221. 40 C.F.R. §§ 230.1-233.60 (1990).

222. CWA § 404(c), 33 U.S.C. § 1344(c).

223. *Bersani v. EPA*, 850 F.2d 36, 48 (2d Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989).

too narrow a reading of the majority's opinion. In its analysis of the practicable alternatives test, the majority stated that the purpose of this test was "to create an incentive for developers to avoid choosing wetlands when they could choose an alternative upland."²²⁴ The majority correctly pointed out that applying the practicable alternatives test at the time of the permit application would create little incentive for developers to find alternatives, "especially if [the developers] were confident that alternatives soon would disappear."²²⁵ This spectrum of review was clearly contemplated by the majority. The majority stated that "in a case in which alternatives were not available at the time the developer [entered the market], but became available by the time of [permit] application, the developer's application would be denied"²²⁶ In its Final Determination on Sweedens Swamp, the EPA reviewed the entire continuum from market entry up until its decision was made.²²⁷ This full spectrum section 404 review is exactly what is needed to prevent the systematic destruction of the nation's wetlands.²²⁸

V. Conclusion

Over the past 200 years, the United States has lost approximately fifty percent of its original wetlands primarily through conversion to other uses such as agriculture and urbanization.²²⁹ The most recent federal estimate puts the annual wetland conversion rate at about 300,000 acres per year.²³⁰ By implementing section 404 of the CWA, Congress sought to prevent the ecological damage caused by the unreg-

224. *Id.* at 44.

225. *Id.*

226. *Id.*

227. *See supra* note 10.

228. *See supra* text accompanying note 26. This full spectrum review will also help attain the goal of no net loss of wetlands. *See generally National Wetlands Panel Seeks New Policy To Protect, Restore, Improve U.S. Wetlands*, 19 Env't Rep. (BNA) 1461 (Nov. 18, 1988).

229. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, PUB. NO. OTA-0-206, WETLANDS: THEIR USE AND REGULATION (1984).

230. *Id.* at 11.

ulated destruction of the nation's wetlands.²³¹ Clearly, Congress gave the EPA its section 404(c) veto power to accomplish that end. Limiting the EPA's review of a section 404 permit would limit the scope of the EPA's veto power and thereby defeat congressional intent. The court of appeals' affirmation is correct because it upholds the EPA's right to apply the practicable alternatives test and to assert the veto across the entire spectrum of the developer's activities, rather than limit the EPA to one static moment in time. By upholding the section 404(c) veto, the court prevented the EPA from being blind sided by a developer's decision making tactics and helped insure maximum wetlands protection.

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231. *See supra* note 26.