The Impact of Section 404 of the Clean Water Act on Agricultural Land Use

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I.
BACKGROUND

Before reviewing the basis of wetlands regulation and its effect on agriculture, a brief examination of wetlands' function is in order. Most wetlands constitute a productive and valuable resource, serving many important roles. For example, wetlands provide a general habitat for fish and wildlife, as well as essential nesting, wintering, feeding, and resting grounds for many species of migratory water fowl.[1] Wetlands also purify water, maintain ground water supplies, store storm and flood waters, and prevent flooding.[2]

Excluding Alaska, when this nation was settled it contained approximately 215,000,000 acres of vegetated wetlands.[3] During the settlement of the United States, wetlands were generally regarded as wastelands or nuisances. This general consensus influenced Congress to make the draining and filling of wetland areas a national policy in the mid-1800s.[4] The total acreage of wetlands has declined to the point where a 1984 study estimated that only 90,000,000 acres of wetlands remain,[5] 95% of which are located in

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1. WILLIAM L. WANT, LAW OF WETLANDS REGULATION § 2.01[3] (1990).

2. 33 C.F.R. § 320.4(b) (1990); WANT, *supra* note 1.

3. S. REP. No. 445, 99th Cong., 2d Sess. 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6113.

4. The Swamp Land Acts of 1849, 1850 and 1860 granted 15 western states nearly 65,000,000 acres for swamp reclamation. *See* WANT, *supra* note 1, § 2.02[1].

5. U.S. Cong., Office of Technology Assessment, OTA-0-206, Wetlands: Their Use and Regulation 3 (1984).

inland, fresh water areas.[6] Wetlands losses have been estimated to total hundreds of thousands of acres per year, with between 80%[7] and 87%[8] of the losses resulting from draining and clearing of inland wetlands for agricultural development.

Only recently has the importance of wetlands been acknowledged. In the late 1960s, the federal government, acting through the Army Corps of Engineers (Corps), first issued regulations to protect the nation's wetlands. The Corps issued these regulations under the authority of the Rivers and Harbors Appropriation Act of 1899.[9] In addition, Congress has regulated wetlands through the Federal Water Pollution Control Act, dated June 30, 1948.[10] Later amendments to the Federal Water Pollution Control Act provided that the entire Act could be cited as the Clean Water Act (CWA).[11]

The objective of the CWA is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."[12] As part of its overall statutory framework for achieving this objective, the CWA prohibits the discharge of pollutants, including dredged or fill materials, into the "navigable waters" of the United States,[13] without a permit issued by the Corps pursuant to section 404 of the CWA.[14] Therefore, the CWA limits federal jurisdiction to "navigable waters." Section 502 of the CWA defines "navigable waters" as "waters of the United States, including the territorial seas."[15] The Corps' regulations further break down "waters of the United States" into seven categories.[16]

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6. *Id.*

7. *Id.* at 7.

8. RALPH W. TINER, FISH & WILDLIFE SERVICE, U.S. DEP'T OF THE INTERIOR, WETLANDS OF THE UNITED STATES, CURRENT STATUS AND RECENT TRENDS 31-32 (1984).

9. Rivers and Harbors Appropriation Act of 1899, ch. 425, § 10, 30 Stat. 1121, 1151 (codified as amended at 33 U.S.C. § 403 (1988)).

10. The Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948) (codified as amended at 33 U.S.C. § 1251-1376 (1988)).

11. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified at 33 U.S.C. §§ 1251-1376 (1988)).

12. 33 U.S.C. § 1251(a) (1989).

13. *Id.* §§ 1311 and 1362.

14. *Id.* § 1344.

15. *Id.* § 1362(7).

16. 33 C.F.R. § 328.3(a) (1990). Wetlands are included in the definitions of "waters of the United States." The code divides the waters into the following seven categories:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent

Initially, the CWA was construed to cover only waters which were navigable in fact. With the enactment of the CWA, however, Congress apparently intended to give the term "navigable waters" a broad constitutional interpretation.[17] Despite the CWA, the Corps initially declined to extend jurisdiction beyond the traditional definitions of navigability.[18] This refusal was challenged in *Natural Resources Defense Counsel, Inc. v. Calloway*.[19] According to the court, by enacting the CWA amendments of 1972, Congress intended to exercise "federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution."[20] The *Calloway* court held that for the purposes of the CWA, the term "navigable waters" was not to be limited by the traditional test of navigability.[21] Consistent with its findings, the district court ordered the Corps to promulgate revised regulations "clearly recognizing the full regulatory mandate" of the CWA.[22] The *Calloway* decision appears to have been a catalyst in the evolutionary process of section 404's permit program and its application to wetlands.

In 1975, the Corps issued interim final regulations which redefined "the waters of the United States" to include not only actual navigable waters, but also tributaries of such waters, interstate waters and their tributaries, and nonnavigable intrastate waters whose

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streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters;

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters which are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

17. S. REP. No. 414, 92d Cong., 2d Sess. 144 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3822.

18. *See* 33 C.F.R. § 209.120(d)(1) (1975).

19. 392 F. Supp. 685 (D.D.C. 1975).

20. *Id.* at 686, U.S. CONST., art. I, § 8.

21. *Id.*

22. *Id.*

use could affect interstate commerce, including fresh water wetlands.[23] Thus, the definition of "waters of the United States" is two-fold: (1) all interstate waters and wetlands; and (2) all other waters, including intrastate wetlands, which could affect interstate or foreign commerce.

Federal courts have commented: "It is the intent of the Clean Water Act to cover, as much as possible, all waters of the United States instead of just some."[24] The expansion of the definition of "waters" simultaneously expanded the jurisdiction of the Corps. This was significant because it allowed the Corps to control the activities of private landowners whose properties contained fresh water wetlands. Thus, it appears as though semantics is the regulatory rudder of navigability.

A. *Definition of Wetlands*

The Corps' regulations define wetlands as follows:

> The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.[25]

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23. 33 C.F.R. § 328.3(a) (1990).

24. *E.g.*, Quivira Mining Co. v. EPA, 765 F.2d 126, 129 (10th Cir. 1985) (quoting Deltona Corp. v. United States, 657 F.2d 1184, 1186 (1981)), *cert. denied*, 474 U.S. 1055 (1986).

25. 33 C.F.R. § 328.3(b) (1990). In addition to the regulations, "[t]he Corps supplements its regulations with Regulatory Guidance Letters that provide guidance to the districts on specific issues that arise including jurisdictional issues." WANT, *supra* note 1, § 4.02(2).

A "fresh water wetland" was first defined as an area that is "periodically inundated" and is "normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." 33 C.F.R. § 209.120(d)(2)(h) (1976). In 1977, the wetland definition was revised, eliminating the reference to periodic inundation and making other minor changes. 33 C.F.R. § 323.2(c) (1978). These changes may have been the initial step in severing the connection between "navigable water" and isolated bodies of water or wetlands.

In 1982, the 1977 regulations were replaced by substantively identical regulations; the definition of "wetlands" remaining unchanged. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 124 (1985) (citing 33 C.F.R. § 323.2 (1985)). (Note that the definition of wetlands has been removed from C.F.R. § 323.2, and is currently located at 33 C.F.R. § 328.3 (b) (1990)).

Executive Order 11990, Protection of Wetlands, 3 C.F.R. 1977 Compilation 121 (1978), 42 Fed. Reg. 26, 961 (May 25, 1977), as reflected in 28 C.F.R. § 63.4(s) (1990), defines wetlands as:

> those areas that are inundated by surface or ground water with a frequency sufficient to support and under normal circumstances does or would support a prevalence of

The federal Fish and Wildlife Service, the Environmental Protection Agency (EPA), the Corps, and the Soil Conservation Service have produced a manual for identifying jurisdictional wetlands.[26]

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vegetative or aquatic life that requires saturated or seasonally saturated soil conditions for growth or reproduction. Wetlands generally include swamps, marshes, bogs, and similar areas such as sloughs, pot holes, wet meadows, river overflows, mud flats and natural ponds.

This definition corresponds with 33 C.F.R. § 328.3(b)(1990).

Eliminating "periodic inundation" from the definition of wetlands expanded federal jurisdiction. This is illustrated by the United States Supreme Court case of United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985). In *Bayview*, the Supreme Court reviewed the question of whether the CWA and Corps regulations authorized the Corps to require landowners to obtain section 404 permits before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries. *Id.* at 123. The court specifically reserved the question of whether the CWA reached isolated wetlands. *Id.* at 124 n.2, 131 n.8. The nation's highest court rejected the Sixth Circuit's conclusion that inundation or frequent flooding is an indispensable requisite of a wetland as defined by federal regulation. *Id.* at 129. Said the court: "Indeed, the regulation could hardly state more clearly that saturation by either surface or ground water is sufficient to bring an area within the category of wetlands, provided that the saturation is sufficient to and does support wetland vegetation." *Id.* at 129-130.

The Supreme Court clearly held that ground water sources were sufficient for wetlands jurisdictions. *Id.* Referring to the *Bayview* decision, a subsequent federal district court decision stated: "[T]here is no requirement that an area be saturated at the surface to be characterized as a wetland. It is sufficient if saturation by either surface or ground water can support wetland vegetation." Bailey v. United States Army Corps of Engineers, 647 F.Supp. 44, 48 (D. Idaho 1986); accord United States v. Larkins, 852 F.2d 189, 192 (6th Cir. 1988) (holding that saturation can be demonstrated by the presence of wetlands plants).

The *Bayview* court further opined that the history of the federal wetlands regulation emphasizes the absence of any requirement of inundation. 474 U.S. at 130. When the Corps deleted the reference to "periodic inundation," the justices noted that the Corps "was repudiating the interpretation of that language 'as requiring inundation over a record period of years.' " *Id.*; *see also* 42 Fed. Reg. 37,128 (1977).

26. FEDERAL INTERAGENCY COMMITTEE FOR WETLAND DELINEATION, FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS: AN INTERAGENCY COOPERATIVE PUBLICATION (1989) [hereinafter FEDERAL MANUAL].

The MANUAL may undergo several changes in the near future as a result of proposed revisions published in August 1991; 1989 "Federal Manual for Identifying and Delineating Jurisdictional Wetlands"; Proposed revisions, 56 Fed. Reg. 40,446 (1991). The public comment period had been extended to December 14, 1991, at the time of this writing. 56 Fed. Reg. 51,868 (1991). The proposed revisions are a result of criticism covering the expansion of jurisdiction which was identified and discussed in this article. *See* Kathleen Rude, *When Politics Defines Wetlands*, DUCKS UNLIMITED, Sept./Oct. 1991, at 16. The scientists who wrote the MANUAL met in early 1991 to reassess the MANUAL and prepared a revised draft. *Id.* at 18-19. The revised draft was sent to the Office of Management and Budget and the Domestic Policy Council's Wetland Task Force. *Id.* at 19. The Task Force proposed further revisions, and the final draft appears in the Federal Register. *Id.*; *see also* 56 Fed. Reg. 40,446 (1991). The proposed revisions decrease the number of areas which would qualify as wetlands, as is the Administration's obvious intent. *See id.*; *see also* RENO GAZETTE-JOURNAL, Nov. 17, 1991, at 8A. The proposed revisions have been politically and scientifically controversial. *See id.*

The Corps and EPA are responsible for making jurisdictional determinations of wetlands regulated under the CWA.[27] "Jurisdictional wetlands" is a term used to describe whether an area is determined to be a wetland under the jurisdiction of the Corps. The Corps' jurisdiction does not distinguish between privately and publicly owned land. Jurisdiction is based on (1) wetlands characteristics, (2) the effect on interstate commerce, and (3) whether the activity is regulated by the CWA.

1. Wetlands Characteristics

The Federal Manual bases its determination of a wetland on the satisfaction of three technical criteria: hydrology, hydrophytic vegetation and hydric soils.[28] Under some circumstances, however, the Federal Manual allows one criterion "to be presumed from the presence of another."[29] The regulatory definition of wetlands does not distinguish between natural and man-made wetlands. Whether natural or man-made, the regulations require an examination of the soil, hydrology and vegetative conditions.[30] "[F]ederal jurisdiction is determined by whether the site is presently wetlands and not by how it came to be wetlands."[31] Statutory and administrative definitions of waters and wetlands encompass man-made wetlands and their inclusion is consistent with underlying legislative intent.[32]

2. Effect of Wetlands on Interstate or Foreign Commerce

The United States Constitution requires as a prerequisite to the exercise of federal authority that there be an effect on interstate commerce.[33] The Corps' regulations specifically state that waters affecting interstate commerce include those that people or businesses use for recreational, fishing, or industrial purposes.[34] Moreover, the Courts have liberally applied the interstate commerce connection to validate the assertion of federal authority over wet-

27. *Id.* at 1. (The Fish and Wildlife Service and Soil Conservation Service provide comments to the Corps.)

28. *Id.* at 8.

29. WANT, *supra* note 1, § 4.09 at 4-25.

30. United States v. Akers, 651 F. Supp. 320 (E.D. Cal. 1987), *aff'd*, 785 F.2d 814 (9th Cir. 1986), *cert. denied*, 479 U.S. 828 (1986); Swanson v. United States, 789 F.2d 1368 (9th Cir. 1986).

31. United States v. Ciampitti, 583 F. Supp. 483, 494 (D.N.J. 1984), *aff'd*, 772 F.2d 893 (3d Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986).

32. *Akers*, 651 F. Supp. at 323.

33. U.S. CONST., art. I, § 8, cl. 3.

34. 33 C.F.R. § 328.4(a)(3)(i-iii) (1990).

lands and other waters.[35] Currently, it is the practice of the Corps "not to consider interstate commerce as a possible restriction to regulation."[36] Although this practice was not always the case,[37] it now

35. For example, in Quivira Mining Co. v. EPA, 765 F.2d 126 (10th Cir. 1985), the Tenth Circuit upheld federal jurisdiction over a normally dry arroyo (dry gulch) in New Mexico that was not navigable in fact, and discharged its waters into navigable waters only during times of heavy rainfall.

In Utah v. Marsh, 740 F.2d 799 (10th Cir. 1984), a totality of the circumstances supported a finding of federal jurisdiction over an intrastate lake. The Court held that interstate commerce was affected because: (1) Utah lake is the hub of the Bonneville Unit of the Central Utah Projects; (2) water from the lake is used to irrigate crops which are sold in interstate commerce; (3) the lake supports a warm water fishery which markets most of its catch out of the state; (4) it provides recreational activities for nonresidents; and (5) it is the only flyway of several species of migratory waterfowl. *Id.* at 803-04.

36. WANT, *supra* note 1, § 4.05[1] at 4-14.

37. For example, in 1985, the EPA, along with certain environmental groups and various members of the Senate Environment and Public Works Committee criticized the Corps for restricting its wetlands jurisdiction based on the interstate commerce factor. *Id.* at § 4.05[2]. In a memorandum dated September 12, 1985, the EPA's General Counsel, Frances S. Blake, opined that the Corps' jurisdiction extended to waters of the United States that migratory birds or endangered species actually use or could use. *Id.* The National Wildlife Federation went a step further. It filed a lawsuit against the Corps on January 15, 1986, in which it alleged that the Corps' practice of restricting wetlands jurisdiction based on lack of interstate commerce was illegal. National Wildlife Fed'n v. Laubscher, 662 F. Supp. 548 (S.D. Tex. 1987).

In the face of such criticism, the Corps issued revised § 404 regulations, dated November 13, 1986, which addressed the interstate commerce question. Although the definition of "waters of the United States" was still connected to interstate commerce, the preamble to the regulations contained significant explanatory language on the interstate commerce criteria that the aforementioned September 12, 1985 EPA memo had addressed. 51 Fed. Reg. 41,217 (Nov. 13, 1986). The preamble noted that the EPA had clarified that "waters of the United States" also include waters which are or would be used as a habitat by birds protected by the migratory bird treaties, other migratory birds, or endangered species. *Id.* Therefore, the language of the preamble indicates coverage of practically all wetlands and should essentially eliminate the interstate commerce criterion as a restriction to regulating wetlands.

Subsequently, in National Wildlife Fed'n v. Laubscher, 662 F. Supp. 548 (S.D. Tex. 1987), the Court held that visits to a pond by migratory birds support the Corps' authority over the pond. *Id.* at 549.

However, the Corps' expansive interpretation of interstate commerce was judicially limited with a ruling by the Fourth Circuit Court of Appeals in Tabb Lakes, Ltd. v. United States, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989). The Appellate Court held that the Corps does not have interstate commerce jurisdiction based on possible visits to an area by migratory birds. The court based its decision on the fact that the Corps failed to comply with the notice and comment procedures of the Administrative Procedures Act in issuing the interstate commerce criterion.

In response to the *Tabb Lakes* ruling, on January 19, 1990, the Corps and EPA issued a joint memorandum stating that the Federal government believes that the *Tabb Lakes* decision was incorrect, but that the government would not appeal the decision. According to one legal treatise, the government intends to reinstitute the rule-making process to satisfy the *Tabb Lakes* ruling. WANT, *supra* note 1, § 4.05[5]. In the interim,

appears that the issue is a dead letter.

3. Activities Subject to Wetlands Jurisdiction

As discussed above, there are certain types of geographic areas which may be subject to regulation if the area affects or could affect interstate commerce. An additional component of the jurisdictional equation is the type of activity employed within a wetland area. Although many activities are regulated, the "regulation of activities affecting wetlands is tied not so much to logic on this matter as to the general statutory scheme of the Clean Water Act, which has as its chief purpose—regulating water pollution."[38]

Basically, the CWA's objective is to eliminate all pollutant discharges into our nation's navigable waters.[39] To accomplish this goal, discharges from a defined point source are prohibited unless a discharge permit has been issued.[40] As an interesting background note, it so happens that the Corps itself is the nation's largest navigational dredger.[41] Not wishing to have its dredging operations regulated by the EPA, and given the fact that the Corps already was administering a permit system, the Corps convinced Congress to create an exemption to section 404 of the CWA regarding certain discharges of dredged or fill material.[42] Consequently, section 404 carves out an exception to the EPA's general authority and permits the Corps to issue discharge permits for two pollutants: "dredged material" and "fill material".[43]

"Dredged material" is defined as material that is either excavated or dredged from waters of the United States.[44] The "discharge of dredged material" means any "addition of dredged material into the

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the government will not adhere to the *Tabb Lakes* ruling in any circuit except the Fourth.

Following the *Tabb Lakes* ruling, however, the Ninth Circuit upheld the Corps' jurisdiction and satisfaction of interstate commerce requirements over local waters which may provide habitat to migratory birds and endangered species. Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990). It should be noted that the Ninth Circuit did not even mention the *Tabb Lakes* decision. Therefore, migratory birds may be a further method of extending Corps jurisdiction to any wet area.

38. *Id.* § 4.06[1].

39. 33 U.S.C. § 1251(a)(1) (1988).

40. *Id.* § 1344.

41. *See* 2 WILLIAM H. RODGERS, ENVIRONMENTAL LAW: AIR & WATER § 4.12 at 185 (1986).

42. 33 U.S.C. § 1344 (1988); *see* 1 Sen. Comm. on Public Works, 93d Cong., First Sess. A Legislative History of the Water Pollution Control Act Amendments of 1972, at 173 (Comm. Print 1973).

43. 33 U.S.C. § 1344 (1988).

44. 33 C.F.R. § 323.2(c) (1990).

waters of the United States."[45] Therefore, dredging a wetlands area and disposing of the dredged material in a non-wetlands area is not subject to the requirements of section 404.[46] The rationale for this position is simple: there has been no discharge into waters of the United States.[47]

The Federal Regulations defined "fill material" as any "material used for the primary purpose of replacing an aquatic area with dry land or changing the bottom elevation of a water body."[48] As with the discharge of dredged material, the discharge of fill material is also defined as the addition of fill material into the waters of the United States.[49] Like dredged material, the discharge of fill material is subject to the requirements of section 404.

In addition to the discharge of dredged and fill materials, another activity which may affect the agricultural community is landclearing. Landclearing appears to be an activity where Corps jurisdiction is disputed. For example, in *Save Our Wetlands, Inc. v. Sands*,[50] a power company proposed to clear trees in a wetland area for a power line corridor. The Court found no section 404 violation because no fill material was to "replace an aquatic area with dry land or change the elevation of a water body."[51] Instead, the wooded swampland would be remodeled with different swampland vegetation, including grasses, shrubs and other low growth.[52]

On the other hand, in *Avoyelles Sportsmen's League v. Marsh*,[53] the Fifth Circuit held landclearing to be a violation of section 404 when the landowner cleared and leveled land, and cut timber and vegetation at ground level, thus converting the area from forested wetland to dry land for future soybean production. The process also involved the depositing of fill material, leveling of the land, and filling in certain streams.[54] In reaching this decision, the court

45. *Id.* § 323.2(d).

46. *Id.*; WANT, *supra* note 1, § 4.06[2]. The distinction is between discharge on dry land and discharge on wetlands; the latter is covered by the statute, the former is not.

47. 51 Fed. Reg. 41,210 (1986).

48. 33 C.F.R. § 323.2(e) (1990).

49. *Id.* § 323.3(f).

50. 711 F.2d 634 (5th Cir. 1983).

51. *Id.* at 647.

52. *Id.*

53. 715 F.2d 897 (5th Cir. 1983).

54. *Id.* at 923; *see also* United States v. Larkins, 852 F.2d 189 (6th Cir. 1988); United States v. Cumberland Farms of Connecticut, Inc., 647 F. Supp. 1166 (D. Mass. 1986), *aff'd on other grounds*, 826 F.2d 1151 (1st Cir. 1987); United States v. Huebner, 752 F.2d 1235 (7th Cir. 1985), *cert. denied*, 474 U.S. 817 (1985); United States v. Akers, 785 F.2d 814 (9th Cir. 1986), *cert. denied*, 479 U.S. 828 (1986).

stated that the term "discharge" may reasonably be understood to include "redeposit" and concluded that the term "discharge" should encompass the redepositing of soil taken from wetlands as is a common occurrence during mechanized landclearing activities.[55]

In connection with the *Avoyelles* language, the Corps issued a regulatory guidance letter dated July 18, 1990 (expiration date December 31, 1992), in which the Corps stated:

> [I]t is our position that mechanized landclearing activities in jurisdictional wetlands result in a redeposition of soil that is subject to regulation under section 404. Some limited exceptions may occur, such as cutting trees above the soil's surface with a chainsaw, but as a general rule, mechanized landclearing is a regulated activity.[56]

The holdings of cases which have touched on landclearing issues seem to indicate that landclearing *per se* is permissible as long as there is no discharge. On the other hand, landclearing for agricultural purposes, which would cause a depositing of fill material and convert the area from aquatic to dry land, is a violation of section 404.[57]

When discussing activities subject to regulation, the act of draining a wetland area must be briefly discussed. Draining activities are responsible for destroying a large amount of wetlands.[58] Nevertheless, activities which do not discharge dredged or fill material into waters of the United States are not regulated and do not require a permit under section 404.[59] As provided for in the Federal Manual and discussed in the Agricultural memo issued jointly by the Corps and EPA, when a wetlands area is "effectively and legally drained to the extent that it no longer meets the regulatory wetlands hydrology criteria (as interpreted by the [Federal] Manual), it is not a wetland subject to jurisdiction under section 404 of the Clean Water Act."[60] Consequently, draining activities are not regulated by the CWA if they do not involve a discharge of dredged or fill material. However, the Corps takes the position that each case is "site spe-

55. *Avoyelles*, 715 F.2d at 923-924.

56. Regulatory Guidance Letter 90-05, dated July 18, 1990 concerning "landclearing activities subject to section 404 jurisdiction," 56 Fed. Reg. 2411 (1991) [hereinafter RGL 90-05].

57. *See* WANT, *supra* note 1, § 4.06[5]. The same principles that apply to landclearing would apply to land leveling activities in wetland areas. *Cf.* RGL 90-05 (discussing landleveling in the context of land clearing).

58. *Id.* § 4.06[3].

59. *Id.*; Joint Memorandum from the Corps and EPA on Section 404 Regulation of Agricultural Activities (1990) as *reprinted in* WANT, *supra* note 1, app. 19 [hereinafter Agricultural Memo], by implication.

60. Agricultural Memo, *supra* note 59, at 1-2.

cific," i.e., whether an activity will be regulated depends on the circumstances of each case. One author has noted that "[t]he Corps, and particularly EPA, sometimes examine the method of draining carefully to determine if there is any associated regulated activity involved."[61]

In summary, the Corps' jurisdiction has been continuously expanding. Its ability to find jurisdiction is broadened by liberal interpretations of wetlands physiology, the area's effect on interstate commerce, and the particular activity affecting the wetland itself. Judge Merritt of the Sixth Circuit has stated:

> [T]he Corps has now expanded the definition "navigable waters" to include any creek or stream or moist area. . . . A farmer's low-lying farmland or a homeowner's low-lying backyard—adjacent to a small stream or creek, but many miles from any navigable water way—has apparently been converted into government property no longer subject to control or improvement by the owner without government permission.[62]

The CWA's water quality goals have been transformed and extended under section 404 into a national land planning and zoning law. Unfortunately, the end result is the fact that simple productive activities on one's own land may require a permit from the federal government. The uncertainty of control over privately held land is heightened by the fact that if one cannot easily obtain a permit, few property owners can afford the time or expense to challenge federal jurisdiction. Therefore, the zealous regulatory expansion may have obscured the goals of the CWA at the expense of private property owners being able to reasonably use their land in ways which have a negligible effect on water quality. This effect, however, is tempered somewhat by statutory exemptions in the CWA.

II.
THE CLEAN WATER ACT'S EXEMPTION FOR "NORMAL FARMING ACTIVITIES"

A. *Statutory and Regulatory Exemptions*

The CWA prohibits the discharge of dredged or fill materials into waters of the United States. Such materials are broadly defined and include the physical placement of sand, soil and gravel into wetlands. Permits may be obtained from the Corps for the discharge of

61. WANT, *supra* note 1, § 4.06[3].

62. United States v. Larkins, 852 F.2d 189, 193-94 (6th Cir. 1988) (Merritt, C.J., concurring), *cert. denied*, 489 U.S. 1016 (1989).

materials into the nation's waters.[63] Section 404(f) exemptions, which were added to the CWA in 1977, provide for non-prohibited discharges during the course of normal farming, ranching and forestry activities.[64] Such activities, however, must be "part of an established, ongoing operation."[65] The statutory language of the CWA includes plowing, seeding, cultivating, minor drainage and harvesting as "normal" farming and ranching activities.[66] Further exemptions include the construction and maintenance of irrigation ditches, maintenance of drainage ditches, and construction and maintenance of farm roads.[67]

Federal regulations specifically define statutory exemptions set forth in section 404.[68] In order to be considered a normal farming or ranching activity, the activity must be connected with an established and ongoing operation.[69] The key to falling within the protective parameters of the exemption is avoidance of *conversion*: activities involving a discharge which converts a wetland to dry land are regulated and are not included in the exception for ongoing farming activities.[70] Therefore, a farmer who has been cultivating and harvesting a crop in a wetland area can continue to do so without a permit, so long as he does not convert the wetlands to dry lands.[71]

The regulations give further detail as to what constitutes a normal farming operation. First, any specific farming activity which is introduced as part of an ongoing farming operation is permitted.[72] Thus, when crops have been grown on a regular basis, the mere introduction, variance or change in cultivation techniques is considered part of the operation (e.g., disking between rows to control weeds instead of using herbicide).[73] Second, the planting of different crops as part of an established rotation is permissible, such as soybean to rice or other conventional wetlands/non-wetlands crop

63. 33 U.S.C. § 1344 (1988).

64. *Id.* § 1344(f)(1).

65. Agricultural Memo, *supra* note 59, at 2.

66. 33 U.S.C. § 1344(f)(1)(A) (1988).

67. *Id.* § 1344(f)(1)(C), (E).

68. *See* 33 C.F.R. § 323.4 (1990).

69. *Id.* § 323.4(a)(1)(ii).

70. Agricultural Memo, *supra* note 59, at 3.

71. *Id.* at 2. A recent EPA letter has changed this understanding by defining pasture grass, alfalfa and other perennial crops as outside of the exemption for agricultural commodities. *See* RGL 90-05, *supra* note 56.

72. 33 C.F.R. § 323.4(a)(1)(ii) and (iii) (1990); Agricultural Memo, *supra* note 59, at 2.

73. Agricultural Memo, *supra* note 59, at 2.

rotation.[74] In contrast, a farmer cannot replace wetland crops with non-wetland agricultural crops and have it be considered a normal farming activity.[75] Likewise, any activity which brings a wetland area into farming or ranching use is not considered part of an established operation.[76] Third, the resumption of agricultural activities on land laying fallow as part of a conventional rotational cycle is considered part of an established operation.[77] However, an operation is not considered established and ongoing when the area has been "converted to another use or laying idle so long that modifications to a hydrological regime are necessary to resume operations."[78]

As noted above, the section 404 farming and ranching exemptions permit minor drainage. For example, in Nevada the applicable drainage regulations are limited to discharges associated with connecting upland drainage facilities to waters of the United States in order to remove excess soil moisture from upland crop fields, and to remove blockages from floods and other similar events.[79]

With respect to the minor drainage issue, the federal regulations contain an important paragraph as to the draining of wetlands. Minor drainage is limited to drainage within areas that are part of an established farming operation.[80] Thus, minor drainage of an established farming or ranching area is regulated. On the other hand, the minor drainage requirements do not apply to drainage associated with either the immediate or gradual conversion of a wetland area to a non-wetland area.[81]

Unfortunately, what the government giveth, it also taketh away. After granting farmers and ranchers a narrow exemption in section 404(f)(1) for normal agricultural activities, the exception was restricted even further with what is known as the "recapture provision." The recapture provision, found in section 404(f)(2), states:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters be impaired or the

74. *Id*; *see also* 33 C.F.R. § 323.4(a)(1)(iii)(C)(1)(iii) (1990).

75. *See* United States v. Akers, 785 F.2d 814 (9th Cir. 1986), *cert. denied*, 479 U.S. 828 (1986).

76. 33 C.F.R. § 323.4(a)(1)(ii) (1990).

77. *Id.*

78. *Id.*

79. *Id.* § 323.4(a)(1)(iii)(C)(1)(i), (iv).

80. *Id.* § 323.4(a)(1)(iii)(C)(2).

81. *Id.*

reach of such waters be reduced, shall be required to have a permit under this section.[82]

"Read together, the two parts of § 404(f) provide a narrow exemption for agricultural . . . activities that have little or no adverse effect on the nation's waters."[83] Therefore, to be exempt from the section 404 permit requirements, "one must demonstrate the proposed activities both *satisfy* the requirements of (f)(1) and *avoid* the exception to the exemptions . . . of § (f)(2)."[84] A farmer must not only demonstrate a normal farming activity, but avoid the exceptions of the recapture provision. According to the *Akers* court, Congress intended the CWA to prevent the conversion of wetland areas to dry lands.[85] Consequently, when evaluating the scope of section 404(f)(2), the substantiality of the impact on the wetland must be considered.[86]

B. *Recent Pronouncements of the Corps and EPA*

On September 26, 1990, the Corps issued Regulatory Guidance Letter 90-07 (RGL 90-07), which could have a substantial impact on farmers and ranchers.[87] The purpose of the letter was to clarify the concept of "normal circumstances" with respect to crop wetland areas. "Normal circumstances" refers to "the soil and hydrologic conditions that are normally present, without regard to whether the vegetation has been removed."[88] The basic premise of the "normal circumstances" definition is that certain altered wetlands, even where the vegetation has been removed in order to plant agricultural crops, retain hydrological characteristics to the extent hydrophytic vegetation would reappear if agricultural crops were removed.[89]

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82. 33 U.S.C. § 1344(f)(2) (1988).

83. Avoyelles Sportsmen's League v. Marsh, 715 F.2d 897, 926 (5th Cir. 1983).

84. United States v. Akers, 785 F.2d 814, 819 (9th Cir. 1986).

85. *Id.* at 822.

86. *Id.*

87. Regulatory Guidance Letter 90-07, dated September 26, 1990, "Classification of the Phrase 'Normal Circumstances' As It Pertains to Cropped Wetlands" *reprinted in* 56 Fed. Reg. 2412 (1991) [hereinafter RGL 90-07].

88. FEDERAL MANUAL, *supra* note 26, at 71; RGL 90-07, *supra* note 87.

> The primary consideration in determining whether a disturbed area qualified as a section 404 wetland under "normal circumstances" involves an evaluation of the extent and relative permanence of the physical alteration of wetlands hydrology and hydrophytic vegetation. In addition, consideration is given to the purpose and cause of the physical alterations to hydrology and vegetation.

Id.

89. RGL 90-07, *supra* note 87.

The memorandum also defined "prior converted croplands" and "farmed wetlands." In contrast to "farmed wetlands," "prior converted wetlands" have generally undergone extensive physical hydrological modifications and alteration of hydrophytic vegetation to such an extent that their use as agricultural land constitutes "normal circumstances."[90] As a result, "prior converted cropland" is not subject to the section 404 requirements if converted prior to the 1985 cut-off date.[91] Land converted after this date is still subject to the regulations.

The Corps now takes the position that if the converted area is abandoned and the wetland conditions return, then the "prior converted cropland" will be subject to the regulations of section 404.[92] Basically, a converted area will be considered abandoned if "for five consecutive years there has been no cropping, management or maintenance activities related to agricultural production."[93] However, positive indicators of the wetland criteria, including wetland vegetation, must be observable on the abandoned area.[94]

Several questions have been raised by the issuance of RGL 90-07. In response to these inquiries, the Corps and EPA issued a Memorandum of Questions and Answers on January 14, 1991, that addressed frequently raised issues concerning RGL 90-07.[95] This memo neither alters the guidance of RGL 90-07 nor affects the agricultural exemptions under the CWA; rather, it clarifies the impact of RGL 90-07 on ranchers and farmers.[96]

In order to avoid abandonment of prior converted wetlands,[97] the area "must be used for the production of an agricultural commodity

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90. *Id.*

91. *Id.* The Corps will accept Soil Conservation Service designations of areas as prior converted cropland unless there is evidence contradicting those designations. RGL 90-07, *supra* note 87.

92. *Id.*

93. *Id.*

94. *Id.*

95. Joint Memorandum from Environmental Protection Agency and Army Corps of Engineers on Questions and Answers on Regulatory Guidance Letter 90-07: Clarification of the Phrase "Normal Circumstances" As It Pertains to Cropped Wetlands. January 14, 1991 [hereinafter Question and Answer Memo].

96. *Id.*

97. *Id.* at 4:

> Wetlands that were hydrologically modified but not cleared of woody vegetation, including stumps, prior to December 23, 1985, do not meet the definition of prior converted cropland, unless the Agricultural Stabilization and Conservation Service (ASCS) determines the wetland conversion to have been commenced before December 23, 1985, and actively pursued after that date.

at least once every five years,"[98] and the area must have been used for the production of an agricultural commodity before December 23, 1985.[99] One problematic aspect of this interpretation is that hay and alfalfa are not considered agricultural commodities.[100] Agricultural commodities are defined as "any annual crop planted by the tilling of the soil, or sugarcane."[101] This includes such items as corn, tomatoes, potatoes, peanuts, wheat and broccoli.[102] On the other hand, perennial crops are not considered agricultural commodities.[103] This latter category includes such crops as "grass hay, alfalfa hay, turf (sod), cranberries, blueberries, and apples and other trees."[104] "For the purposes of RGL 90-07, land used exclusively for pasture or hay is not prior converted cropland."[105] Thus, land that is used for the production of an agricultural commodity and, at other times, used for other agricultural crops, is considered to be in use for the production of an agricultural commodity if the land is tilled and planted with an annual crop at least once every five years.[106]

The current position of the Corps and EPA thus fails to recognize the importance of pasture hay and alfalfa hay as crops. Land used exclusively for pasture and hay is not considered production of an agricultural commodity, and, if such crops are produced on prior converted cropland, then that land will be subject to wetlands regulation. As to agricultural commodities, the best rule of thumb is the "85-05" rule: prior converted croplands must have been used for the production of an agricultural commodity prior to December 23, 1985, and the land must have been used for the production of an agricultural commodity at least one year out of every five years thereafter.[107]

98. *Id.* at 2. "Cropping means the use of the area for the production of an agricultural commodity . . . but also includes the use of the area for aquaculture, grasses, or legumes, or pasture production in a commonly used rotation related to the production of an agricultural commodity." *See also id.* at 5-6 (answer to question 7).

99. *Id.* at 5. There is an exception for areas where an agricultural commodity could have been produced without additional manipulations after December 23, 1985.

100. *Id.* at 3 (answer to question 3).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

C. *Irrigation Sustaining Wetlands*

According to a Corps memorandum dated August 24, 1988, "any area exhibiting wetland characteristics which is sustained solely by application of irrigation water is not regulated under Section 404 of the Clean Water Act."[108] In order for this irrigation exemption to be truly viable, however, "the property owner must be able to eliminate the water source without the discharge of dredged or fill material in 'waters' or wetlands . . . ."[109]

Unfortunately, the circumstances of irrigated fields may raise substantial questions as to their wetlands character. "Hydrophytic vegetation can be established and maintained solely by irrigation practices. Hydric soils are developed over a long period of time, and can exhibit hydric soil indicators even if the hydrology has been removed . . . ."[110] According to the Irrigation Memo, the following procedures are used to determine jurisdiction of irrigated areas:

> a. Obtain information from the Soil Conservation Service Soil Survey that covers the area of interest (if available) . . . .
>
> b. Check with Federal, State and local agencies to determine if any surface or ground water records are available for the property.
>
> c. Obtain information from the landowner, his neighbors or others who may have knowledge of the hydrologic characteristics of the property.
>
> d. Conduct an on-site wetland determination of the property.[111]

Once a determination procedure has been completed, the Sacramento District makes one of the following findings: (1) the area is not a jurisdictional wetland; (2) the area is a jurisdictional wetland; or (3) there are positive soils and vegetation indicators but the relative importance of the irrigation versus natural hydrology/groundwater in maintaining the wetland cannot be determined.[112] Under the last finding, if the landowner is unable or unwilling to "provide convincing information that the area is wet due solely to irrigation, the area will be regulated under section 404."[113]

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108. Memorandum from Department of the Army, Sacramento District, Corps of Engineers, "Regulatory Jurisdiction in Irrigated Areas," 1 (August 24, 1988) (on file with the UCLA Journal of Environmental Law and Policy) [hereinafter Irrigation Memo].

109. *Id.*

110. *Id.*

111. *Id.* at 2.

112. *Id.* at 2-3.

113. *Id.* at 3.

D. *Federal Court Interpretation of the Agricultural Exemption*

Although several courts have addressed the agricultural exemption, this article focuses primarily on recent decisions in the Ninth Circuit. In the Seventh Circuit case of *United States v. Huebner*,[114] the court addressed the agricultural exemption and its application to cranberry farmers in Wisconsin. The Huebners had purchased a 5,000 acre farm which was part of the largest continuous area of wetlands in Wisconsin.[115] The Huebners intended to expand the cranberry operations of the newly purchased farm and use a portion of the same farm for growing vegetables and other upland crops.[116]

The *Huebner* court reviewed the legislative history of the agricultural exemptions and concluded that Congress had intended that section 404 exemptions to apply to narrowly-defined activities which have little or no adverse effects, whether individually or cumulatively, on waters and wetlands of the United States.[117] The court also noted that the Fifth Circuit had previously construed the section 404 exemptions narrowly.[118] The *Huebner* court stated that the Congressional enactment of the agricultural exemptions was an attempt to delicately balance the protection of wetlands against the farmers' interests with a small number of exceptions which permitted routine activities to continue unimpeded.[119] The court quoted Senator Muskie from the legislative history, and recited the availability of drainage exemptions for the benefit of poorly drained farmland:

> The drainages exemption is very clearly intended to put to rest, once and for all, the fears that permits are required for draining poorly drained farm or forest land of which millions of acres exist. No permits are required for such drainage. Permits are required only where ditches or channels are dredged in a swamp, marsh, bog, or other truly aquatic area.[120]

In addition, when answering Senator Dole's question as to whether a permit would be necessary to dig a small ditch to drain a low-lying area to improve the production of crops, Senator Muskie stated that the Corps' definition "requires a prevalence of aquatic

114. 752 F.2d 1235 (7th Cir. 1985), *cert. denied*, 474 U.S. 817 (1985).

115. *Id.* at 1237.

116. *Id.*

117. *Id.* at 1241 (quoting 3 A Legislative History of the Water Pollution Control Act Amendments of 1972 at 420 (Comm. Print 1973)) [hereinafter Legislative History].

118. *See* Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 925 n.44 (5th Cir. 1983).

119. *Huebner*, 752 F.2d at 1241.

120. *Id.* (quoting 4 Legislative History 1042 (Statement of Senator Muskie)).

vegetation and is intended to describe only the true swamps and marshes that are part of the aquatic ecosystem."[121] Senator Muskie further responded by saying that the drainage described by Senator Dole could be performed in areas that are "not true marshes or swamps intended to be protected by Section 404."[122]

The remarks quoted by the Court appear to enlarge the exemption rather than narrow it. Senator Muskie specifically stated several times that section 404 jurisdiction was intended to apply only to true swamps and marshes. His comments, which were intended to placate Senator Dole, imply that normal farming operations were not intended to be curtailed in the extensive fashion that has evolved from the application of the CWA. Nevertheless, the *Huebner* court affirmed the district court's holding that agricultural exemptions were intended to exempt only those operations which had a minimal effect on wetlands and other waters.[123]

The wetlands issue was also litigated in a long running standoff between a California farmer (Akers) and the Corps in two separate Ninth Circuit cases.[124] Akers' troubles began after he purchased a California ranch of approximately 9,600 acres, of which 2,899 acres were wetlands. Akers constructed two long dikes, a ditch, and a series of roads, and he leveled some of the wetlands in the ensuing years. Akers' actions were a result of his doubting the application of section 404 to his farming operation. After being enjoined from pursuing further dredge and fill activities on his property, Akers appealed.[125]

Akers' farming plan entailed extensive grading, leveling, drainage and water diversion in order to convert the wetlands to farmland suitable for growing upland crops.[126] The Ninth Circuit first reviewed the limited exceptions under the permit requirements. Relying on the earlier decisions of *Avoyelles* and *Huebner*, which had construed the agricultural exemptions narrowly, and the legislative history of the CWA, the *Akers* court also concluded that Akers' activities were not part of an established ongoing operation.[127] Although Akers claimed that the wetlands had been farmed since 1887, the court found that the upland farming operation was not

121. 752 F.2d at 1241 n.10 (quoting 4 Legislative History 1042-43).
122. *Id.*
123. *Huebner*, 752 F.2d at 1240.
124. United States v. Akers, 651 F. Supp. 320 (E.D. Cal. 1987), United States v. Akers, 785 F.2d 814 (9th Cir. 1986), *cert. denied*, 479 U.S. 828 (1986).
125. *Akers*, 785 F.2d at 817.
126. *Id.* at 816.
127. *Id.* at 819.

pursued on a regular basis.[128] Therefore, the court determined Akers' current upland farming to be a new activity in the wetlands area.[129]

The *Akers* opinion further stated that even if Akers' activities constituted normal farming activities, they were unlikely to avoid the recapture provision of section 404(f)(2).[130] In reaching this decision, the Ninth Circuit adopted the conclusions of the district court regarding the significant impact of Akers' activities on the wetlands area.[131] In reaching its decision, the district court directed its attention to the consequences of Akers' activities. This examination left little doubt that Akers' plan of operations was a major conversion of the area to non-wetlands for his farming purposes.[132] The appellate court stated: "While the exemptions and regulations do not distinguish major and minor changes, the intent of Congress in enacting the . . . [CWA] was to prevent conversion of wetlands to dry land."[133]

In affirming the preliminary injunction, the court held that Akers' activities were not exempt from permit requirements given the contemplated conversion of wetlands to dry lands.[134] The court relied on Akers' inability to satisfy the exemption requirement and avoid the application of the recapture provision. Not only were Akers' activities not part of an ongoing operation in the converted area, his activities were a major conversion of a wetlands area to dry land.

The decision provided two interesting aspects. First, in deciding that Akers' activities necessitated a Corps permit, the court assumed that the Corps would not act arbitrarily when it ruled on Akers' future permit applications.[135] Second, during oral argument, the government advocated the position that farmers should have to obtain a section 404 permit before switching to another type of wetland crop. The Ninth Circuit summarily rejected this argument.[136] The court specifically found that Congress did not intend to burden farmers with such a regulation when they merely "change

128. *Id.*
129. *Id.*
130. *Id.* at 822.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 823.
135. *Id.*
136. *Id.* at 820.

from one wetland crop to another."[137]

In *United States v. Larkins*,[138] the Larkins purchased a farm in 1976 lying along the Obion Creek in Kentucky. In order to put more land into production, the Larkins constructed earthen dikes and levees on adjacent wetlands.[139] The end result was that the Larkins gradually replaced wetland trees with row crops.[140] In defense of their activities, the Larkins claimed that the activities were a "normal" part of their farming operation and were exempt from the section 404 permit requirements.[141] The district court disagreed and found them in violation of the CWA.[142]

First, the court noted that the construction of dikes and levees brought the area under cultivation, "a use to which the site was not previously subject."[143] Second, the clearing and cultivating of the wetlands acreage "reduced the reach of the wetlands, thereby reducing the reach of the navigable waters of the United States."[144] Therefore, the Larkins not only failed to qualify under the agricultural exemption of section 404(f)(1), but they also exceeded the limits of the recapture provision found in section 404(f)(2).[145]

Additionally, in a footnote, the court clarified an interesting issue. One of the Larkins had concluded that beavers, which were reintroduced in the area by the Kentucky Department of Fish & Wildlife Resources, were responsible for the poor drainage of the converted area.[146] In post-trial briefs, the Larkins queried: "If the wetlands were cultivated or logged before beaver entered the region and upset the natural drainage of the property, do cultivation and silviculture [tree farming] constitute uses to which the land was 'previously subject'?"[147] In responding to the query, the court referred to the federal regulations which disallow an exemption for land which has lain idle so long that one must modify the hydrological regime to resume operations or said land has been converted to another use.[148] The court noted that even if the wetlands had a

137. *Id.*

138. 657 F. Supp. 76 (W.D. Ky. 1987), *aff'd*, 852 F.2d 189 (6th Cir. 1988), *cert. denied*, 489 U.S. 1016 (1989).

139. *Id.*

140. 657 F. Supp. at 79-80.

141. *Id.* at 79.

142. *Id.* at 86-87.

143. *Id.* at 85.

144. *Id.* at 86.

145. *Id.*

146. *Id.* at 79.

147. *Id.* at 85 n.23.

148. *Id.*; *see also supra* notes 90-93 and accompanying text.

history of farm use, that use was no longer established when the Larkins initiated construction of the dikes and levees and reclaimed the site.[149]

On appeal, the Sixth Circuit construed the agricultural exemption narrowly. Nevertheless, the Larkins asserted that their activities were a mere change in agricultural use, i.e., a switch from silviculture to the production of soybeans.[150] The appellate court found this argument to have no merit. It held that the section 404(f)(1)(A) exception applies to the normal harvesting of timber, not landclearing activities which create a non-wetlands agricultural tract,[151] and the court reiterated that a permit is required for "the conversion of a wetland from silviculture to agricultural use when there is a discharge . . . into the water of the United States . . . ."[152] Therefore, the *Larkins* court focused both on the change in the wetlands area and the change in the farming activity.

Once again, the Ninth Circuit was asked to rule on the far reaching effect of the CWA in *Leslie Salt Co. v. United States.*[153] Although this case does not deal with agricultural exemptions, it serves as a warning to those in the agricultural community concerning the importance of foresight and long-term planning when dealing with one's real property. The dispute revolved around a 153 acre tract of undeveloped land south of San Francisco, California.[154] The property abuts the San Francisco Natural Wildlife Refuge and is situated approximately one-quarter mile from the Newark Slough, a tidal arm of the San Francisco Bay.[155] Originally, the property was pasture land. Then, the Leslie Salt Company ("Leslie") constructed large shallow watertight basins for the production of salt.[156] Salt production was discontinued in approximately 1959.[157] During the winter rainy season, however, ponding temporarily occurs in these pits to the extent that a few fish even lived for a while in the ponds.[158] Plant life, which had been nonexistent due to the salt production, reoccurred after Leslie plowed the property in 1983 to alleviate a dust problem.[159]

149. 657 F. Supp. at 85 n.23.
150. *Larkins*, 852 F.2d at 192.
151. *Id.*
152. *Id.* at 192-93.
153. 896 F.2d 354 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 1089-90 (1991).
154. *Id.* at 355.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 355-56.

The property was substantially affected by state and federal government activities, including the construction of a sewer line and public roads on and around the property.[160] This activity connected the property to the Newark Slough.[161] Additionally, CalTrans and the federal Fish and Wildlife Service breached a levy on the adjacent refuge which allowed water to flow onto the property.[162] The effect of this government activity was the natural fostering of ecological developments which displayed wetland features.[163] Migratory birds used the pits during the winter and spring; the salt marsh harvest mouse, an endangered species, was also a resident of the newly created habitat.[164] The controversy arose when Leslie attempted to drain its land.

The Corps soon became aware of the activity, claimed jurisdiction over the property, and filed suit in the district court against Leslie.[165] The district court denied the Corps' claim of jurisdiction for three reasons: (1) the wetland conditions were caused by the government, not the landowner, (2) the wetlands conditions were not normal, and (3) the property was not adjacent to waters of the United States as required by the federal regulations.[166] The Ninth Circuit, like the district court, agreed that Congress intended to create a very broad jurisdictional base under the CWA.[167] However, contrary to the district court's finding that changes caused by the government do not create jurisdiction, the appellate court held that the Corps did not create the wetlands condition in an attempt to expand its own jurisdiction.[168] Relying on the Supreme Court decision of *United States v. Riverside Bayview Homes*, the Ninth Circuit stated: "If the Corps' regulations under [CWA] jurisdiction harm a landowner, her appropriate response is to seek damages through inverse condemnation proceedings, not to restrict the scope of Corps jurisdiction."[169] In *Leslie Salt*, the court held that the phrase

160. *Id.* at 356, 358.
161. *Id.* at 356.
162. *Id.* at 358.
163. *Id.* at 356.
164. *Id.*
165. *Id.*
166. *Id.* at 357.
167. *Id.* at 357-58 ("The fact that third parties, including the government, are responsible for flooding Leslie's land, is irrelevant. The Corps' jurisdiction does not depend on how the property at issue became a water of the United States. Congress intended to regulate local aquatic ecosystems regardless of their origin.").
168. *Id.* at 358.
169. *Id.* (citing United States v. Riverside Bayview Homes, 474 U.S. 121, 128 (1985)).

"under normal circumstances," is intended to exclude those areas which are not aquatic, but experience an "abnormal presence of aquatic vegetation."[170] Added the court: "The fact that these wetlands are man-made does not make them 'abnormal.' Whether the wetlands are artificially or naturally created is irrelevant to this determination."[171]

The seasonal nature of the ponding provided no obstacle to the court in finding Corps' jurisdiction. Because the federal regulations specifically enumerate intermittent streams and playa lakes as regulated waters, the seasonal ponding was similar to seasonal bodies of water found within the meaning of the regulations.[172] Additionally, the court stated: "The commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species."[173]

III.

BURDEN OF PROOF AND PENALTIES

Once the federal government has proven a *prima facie* violation of the CWA, the burden of proof shifts to the alleged violator, who must then demonstrate that his farming activities qualify for an exemption under section 404(f).[174] Although no court has specifically ruled on this issue under 33 C.F.R. § 323.4, the *Larkins* court stated that a review of federal cases indicates that a party who claims an exemption to regulatory statutes has the burden of proving the exemption's applicability.[175]

Section 309 of the Act[176] provides relief for violations of the CWA. The statutory remedies include restoration of the wetlands, injunctions to prevent further degradation, and civil penalties of up to $25,000 per day. They also include criminal penalties of not less than $2,500 nor more than $25,000 per day of violation and imprisonment of up to a year, or both.[177] The penalties increase substantially for subsequent or intentional violations.[178] In most cases,

170. *Id.* at 358 (citing 42 Fed. Reg. 37,128 (1977)).
171. 896 F.2d at 358.
172. *Id.* at 360.
173. *Id.*
174. *Larkins*, 657 F. Supp. at 85; *see* 33 U.S.C. § 1344(f) (1988).
175. 657 F. Supp. at 85 n.22.
176. 33 U.S.C. § 1319 (1988).
177. *Id*; *see also* WANT, *supra* note 1, § 12.01 (discussing injunctive relief and civil penalties).
178. *See* WANT, *supra* note 1, § 12.01.

restoration will involve substantial efforts.[179] Clearly, the best practice is to anticipate problems before attempting new farming or other land uses. However, the amorphous nature of the Corps and related agency jurisdiction under the CWA and the protean rules for making wetlands determinations make this a delphic task.

IV.
CONCLUSION

In summary, the best approach to a wetlands situation in terms of section 404, as well as elsewhere, is a forward-looking analysis. The *Leslie Salt* decision illustrates the potential, far-reaching effects of wetlands jurisdiction on private landowners. The varying interpretations of the CWA could create nightmares for landowners. With authority over isolated waters, the Corps could designate temporarily wet and artificially created low areas as "waters of the United States" and regulate them under the CWA. An owner of private property does not even have to act to encounter prohibitive uses of his property. The determination by a federal court and language of Corps memoranda have promulgated the "glancing duck" theory of jurisdiction. This theory states that if a flying duck were to look down and see standing water, or even saturated ground, then the duck might consider landing in the area, and the duck's glance would be an effect on interstate commerce. Although the commerce clause provides Congress with substantial authority to regulate interstate activities, it is questionable whether its limits have been exceeded by its use of CWA as a bootstrap to regulate potential landing areas for migratory birds. Before permitting or participating in any activity which may affect the aquatic character of their property, landowners must assess the potential section 404 ramifications. A mistake could not only restrain land use, but also evoke substantial penalties.

179. *See id.* § 12.02[3].