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NEW USES FOR OLD STRUCTURES:
IMPROVING THE QUALITY OF THE HUMAN
AND NATURAL ENVIRONMENT

Elliott H. Levitas†
and J. Vance Hughes††

INTRODUCTION

The ecological and legal confrontation between the dual human
interests of protecting the environment and fulfilling human needs
is not limited to situations involving the natural environment and

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proposals for its modification. These two important interests also require accommodation in the previously developed urban environment. The desirable locations and economic potential of many existing structures make them an increasingly attractive focus for both environmentalists and developers. Accordingly, the legal and regulatory framework to protect the environment and fulfill human needs in this previously modified environment has become increasingly important. Because of the effect of history and geography, much of the previously built environment exists in or adjacent to rivers, lakes, bays, and wetlands. Much of the interest in redevelopment, therefore, involves new uses for old structures that could affect the nation’s waters.

The narrow purpose of this Article is to review the legal basis for regulating existing structures in or adjacent to waters, and the procedural problems and substantive standards facing parties that propose to change the use for which a structure was originally authorized. Examples illustrating new uses for old structures are followed by an outline of the regulatory process facing project proponents. Finally, suggestions for rationalizing and streamlining the regulatory process are provided.

I. REGULATORY FRAMEWORK

Any proposed development or change in use which affects navigable waters of the United States is subject to regulation under both the Rivers and Harbors Act of 1899 (RHA) and the dredged or fill material permit program under section 404 of the Clean Water Act (CWA). Under the RHA, the U.S. Army Corps of Engineers (COE) has jurisdiction over navigable waters of the United States. Section 10 of the RHA forbids excavation or construction in navigable waters without authorization of the Secretary of the


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Army, whose authority in this area has been delegated to the COE. With certain exceptions, a COE permit is required "for structures and/or work in or affecting navigable waters of the United States." Section 404 was enacted when the 1972 amendments to the Federal Water Pollution Control Act (FWPCA) created a comprehensive federal program directly regulating the discharge of pollutants into the nation's waters. Dredged spoil, rock, and sand were included within the FWPCA definition of pollutants, and section 404 established a separate permit program for discharges of such material. As a result, filling in navigable waters would be considered both a discharge requiring a section 404 permit and a construction activity requiring a section 10 permit under the RHA. To avoid duplication and overlap with the COE's existing regulatory program under section 10 of the RHA, the COE was charged with implementing section 404, and the Environmental Protection Agency (EPA) was given authority for administering the bulk of the FWPCA. To further simplify the process, the COE exercises its jurisdiction under section 10 and section 404 through joint proceedings and joint permits to the extent that both statutes apply.

3. 33 U.S.C. § 403 (1982). Section 10 makes it unlawful "to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures" in navigable waters, or to "excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of" navigable waters, unless the structure or the work has been authorized by the COE. Id.

4. 33 C.F.R. § 322.3 (1987). Exceptions are "activities that were commenced or completed shoreward of established Federal harbor lines before May 27, 1970," and construction of wharves or piers in any solely intrastate waterbody that is navigable only because it historically was used to transport interstate commerce. 33 C.F.R. § 322.4 (1987). See also 33 C.F.R. § 320.4(o) (1987).


9. See 33 C.F.R. part 325 app. A (1987). The COE's regulations for implementing § 404 are contained, with those for the § 10 program, in 33 C.F.R. §§ 320.1—330.12 (1987). Although the COE was charged with implementing the § 404 permit program, it was also required to do so in accordance with guidelines developed by EPA. 33 U.S.C. § 1344(b)(1) (1982). The § 404(b)(1) guidelines issued by EPA, and codified at 40 C.F.R. §§ 230.1—230.80 (1987), require the COE to consider the effects of proposed discharges on water quality, wildlife, recreation, and a number of other environmental
The COE's jurisdiction under section 404, however, is much broader than its jurisdiction under section 10. Under the RHA, the COE has jurisdiction to regulate activities in "navigable water[s] of the United States."\textsuperscript{10} Even before the enactment of the RHA, the Supreme Court had confirmed federal regulatory authority over navigable waterways.\textsuperscript{11} According to the Court, because Congress' power over waterways derived from the commerce clause of the United States Constitution that power extended to those waters that might carry interstate or foreign commerce.\textsuperscript{12} Consistent with this power and with navigation perils of the day, the legislative concern underlying the RHA was the promotion and protection of navigation.\textsuperscript{13} The general definition employed by the COE for section 10 RHA jurisdiction defines "[n]avigable waters of the United States [as] those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce."\textsuperscript{14}

The term "navigable waters" was given much broader meaning in section 404 of the CWA, which prohibits the discharge of dredged or fill material into such waters without a permit.\textsuperscript{15} The COE originally interpreted this jurisdiction narrowly, exercising its authority only over waters that met the traditional RHA definition of navigability.\textsuperscript{16} In 1975, however, in \textit{Natural Resources Defense

\textsuperscript{10} 33 U.S.C. § 1344(c) (1982). \textit{See also} 33 C.F.R. § 323.6 (1987).
\textsuperscript{12} \textit{The Daniel Ball}, 77 U.S. (10 Wall.) 557 (1870).
\textsuperscript{13} \textit{Id. at} 563.
\textsuperscript{15} 33 C.F.R. § 329.4 (1987).
\textsuperscript{16} The COE's narrow construction was not altered in response to the earliest judicial decisions that extended CWA jurisdiction over virtually all of the nation's waters. \textit{See, e.g.}, \textit{United States v. Ashland Oil & Transp. Co.}, 504 F.2d 1317 (6th Cir. 1974); \textit{United States v. Holland}, 373 F. Supp. 665 (M.D. Fla. 1974).
Council, Inc. v. Callaway, the District Court for the District of Columbia held that Congress intended in the FWPCA to assert jurisdiction over the nation’s waters to the maximum extent allowable under the commerce clause and directed the COE to modify its regulations accordingly. Anchored in the considerably expanded scope of the commerce clause which has evolved since 1899, this decision forced the COE to expand the section 404 program to cover all “waters of the United States,” whether traditionally navigable or not. As a consequence, the COE’s jurisdiction under section 404 is much broader than its jurisdiction under section 10 of the RHA.

Acting pursuant to its jurisdiction under both the CWA and the RHA, the COE has issued literally thousands of permits for fills


18. See 33 C.F.R. § 328.3(a) (1987). This broad view of the COE’s jurisdiction under the CWA has evolved under vigorous judicial scrutiny. See, e.g., Aboyelles Sportsmen’s League, Inc. v. Alexander, 511 F. Supp. 278 (W.D. La. 1981), aff’d in part and rev’d in part, 715 F.2d 897 (5th Cir. 1983) (upholding § 404 jurisdiction based on presence of wetlands vegetation); United States v. Carter, 18 Env’t Rep. Cas. (BNA) 1804 (S.D. Fla. Feb. 25, 1982) (holding that the presence of transitional plant species among wetlands species does not remove a wetland from § 404 jurisdiction); United States v. Tilton, 705 F.2d 429 (11th Cir. 1983) (finding that a swamp and pasture were adjacent wetlands under § 404 jurisdiction even though a berm and roadway separated them from a river).


19. See Want, Federal Wetlands Law: The Cases and the Problems, 8 HARV. ENVTL. L. REV. 1 (1984) (a review of the cases discussing § 10 and § 404 jurisdiction, the scope of the COE’s review of § 404 permit applications, and the scope and standard of judicial review of COE permit decisions). See also Orleans Audubon Soc’y v. Lee, 742 F.2d 901 (5th Cir. 1984) (The appeals court declined to disturb the COE’s decision not to require a permit as long as the COE’s interpretation of its regulations exempting the project was not arbitrary or capricious.).
and other structures in traditionally navigable waters and for fills in nonnavigable waters of the United States.\textsuperscript{20} Changes in use, sometimes involving significant physical modifications, are eventually proposed for many of these authorized structures. Such new uses may require evaluation through the permit process.

II. Proposals to Change the Use of Authorized Structures

In numerous instances, owners or operators have changed the use of structures in navigable waters. Campgrounds have been changed to parking lots, restaurants to gift shops, and marinas to restaurants. As commercial navigation patterns have changed over the years, commercial piers have been converted into warehouses. With the recent flurry of development activity to rehabilitate deteriorating waterfront areas of many cities, commercial piers and warehouses are being converted to museums, retail shops, restaurants, marinas, offices, and housing.

It is likely that most of the simpler changes in the use of existing structures occur without notice to the appropriate federal or state regulatory agencies, and that such agencies generally ignore these changes in favor of expending resources on new permit applications or more serious changes involving existing permits. Before proceeding without providing notice to the regulatory authorities, however, a developer should consider the consequences of illegal development. Both the COE and the EPA have authority to take enforcement action against unauthorized development.\textsuperscript{21} Violations are punishable by fines and imprisonment.\textsuperscript{22} The regulators may also enforce the permit programs by issuing compliance orders and by seeking permanent or temporary injunctions against violators.\textsuperscript{23} Furthermore, a violator may be ordered to remove any unautho-

\textsuperscript{20} See Note, supra note 8, at 236. In 1981, 10,000 permit applications were received. The Corps denied fewer than three percent. Approximately one-third of the permits were issued with the condition that modifications be made to reduce negative effect on wetlands. Id. (citing Congressional Office of Technology Assessment, Wetlands: Their Use and Regulation at 143-44 (1984). Under general permits, about 90,000 discharges are authorized annually in addition to those authorized under individual permits. Id. (citing Plaintiff's Complaint, National Wildlife Fed'n v. Marsh, 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,261 (D.D.C. Feb. 10, 1984).
\textsuperscript{23} 33 U.S.C. § 1344(a) (1982).
rized structures or fill and restore the affected area.\textsuperscript{24} Finally, the fact that a developer has engaged in unauthorized activity may be held against him when he subsequently applies for a permit.\textsuperscript{25}

Given the consequences of illegal development, the prudent developer may seek a decision on whether a permit is required prior to undertaking the project. However, the question whether a permit is required for a particular conversion or modification is not always easily answered. If the owner or operator of a structure in navigable waters intends to modify or rehabilitate the structure without a change in use, the regulator is likely to suggest that no new regulatory review, public comment, or approval is required unless the modifications are extensive or more intrusive to the water body. In fact, the project owner has an affirmative obligation to maintain the sound condition of the structure. Allowing deterioration of such a structure can lead to enforcement action to protect navigation from floating debris or other obstructions.\textsuperscript{26}

On the other hand, if the proponent of a project involving only a minor change in the use of a previously authorized structure seeks

\begin{footnotes}
\footnotetext{24. 33 U.S.C. § 406 (1982). See, e.g., United States v. Tull, 615 F. Supp. 610 (D. Va. 1983), in which a developer who deposited fill in navigable waters of the United States without first obtaining a COE permit was fined $5000 for each mobile home lot created by filling and $250,000 for filling in a navigable waterway, and was ordered to restore two lots to wetlands as partial mitigation for lots unlawfully filled. Payment of the $250,000 fine was to be suspended on the condition that the developer restore the navigable waterway to its former condition.}

[Pursuant to its public interest review], when considering an application for a new permit or for an extension of an old permit, the Corps must take into account whether the applicant has at any time engaged in operations which required a permit but for which the applicant did not procure a permit. Dredging and filling beyond the scope of a permit or in violation of an issued permit as documented by the Corps or as proved to the Corps by any interested party during the permit application procedure, is conduct which the Corps must consider under its guidelines. Such a finding should weigh heavily against the issuance of a permit extension or may warrant the attaching of conditions necessary to protect the public interest.

Id. at 353.}
\footnotetext{26. See, e.g., Peoples Natural Gas Co. v. Ashland Oil, Inc., 604 F. Supp. 1517 (W.D. Pa. 1985) (duty to maintain navigable channel breached when a structure not initially an obstruction becomes one through improper maintenance); Norfolk & W. Co. v. United States, 641 F.2d 1201 (6th Cir. 1980) (collapsed dock constituted obstruction to capacity of navigable water in violation of § 10); United States v. Illinois Terminal R.R., 501 F. Supp. 18 (E.D. Mo. 1980) (government would be permitted to show that abandoned piers in channel, though originally authorized in 1906, had become an obstruction in violation of § 10).}
\end{footnotes}
a preliminary ruling on whether the proposal requires approval, obtaining an official response may require submission of documentation to allow consideration of whether the proposed changes are in the public interest. 27 Under the COE regulations, "[t]he decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest." 28 This public interest review also applies to proposed changes in the use of previously authorized structures. 29 Thus, the likelihood that a development project will attract serious interest from the regulators increases substantially when the plan includes converting authorized structures to a use that is not water related or water dependent, and when the project involves substantial modification or rehabilitation of previously authorized structures.

One example of a change from water related to nonwater related use would be the conversion of fishing piers or wharves to piers supporting over-the-water residential or office buildings. A less pronounced change, and one likely to draw less resistance from regulators, would be the conversion of fishing piers or wharves to nonwater dependent commercial enterprises such as restaurants, boardwalks, museums, or aquaria, a change that would make the structures accessible to the general public. Even if the former use of now deteriorated structures was nonwater related, such as ware-

27. See COE regulations at 33 C.F.R. § 320.4 (1987), setting forth the COE's policies for evaluating permit applications. Although additional policies applicable to specific kinds of permits are identified elsewhere in the regulations (e.g., 33 C.F.R. § 323 identifies special policies relating to § 404 permits), the core of the COE's evaluation process is its "public interest review."


Congress has placed responsibility for allocating the use of the Nation's waterways with the Corps of Engineers. . . . [The COE] must consider a number of factors to arrive at a decision as to whether the authorization of a new use is a better social arrangement than the preexisting use of that waterway [citing the public interest review factors and criteria now given in major part at 33 C.F.R. § 320.4(a) (1987)].

. . . Within the range of alternatives presented to it, the Corps must weigh all the factors mentioned above, and make a determination as to which arrangement would be most advantageous. It may maintain the present use by denying a permit; it may institute a new use by granting a permit; or it may put conditions on a permit which make the two uses compatible. This decision is ultimately reviewable by the courts under the appropriate scope and nature of review . . . .

Id. at 354-55.
housing, some regulators may be reluctant to allow conversion to a new nonwater related use. This position arises from concern that approval of the new use dedicates the water frontage and over-the-water area to a nonwater dependent use, thereby precluding future water dependent activities. Because there is a finite amount of water frontage and accessible water areas that can be utilized without adversely affecting navigability or aquatic resources, such dedication of a portion of the waterfront could eventually force a more desirable, water dependent structure to be located in a previously undeveloped area, causing otherwise avoidable adverse effects on navigability and the aquatic environment.

Developers almost invariably express surprise and outrage when advised by counsel or by regulators that approval is necessary to convert vacant commercial piers and warehouses into new uses that are beneficial to the community. An understanding of the legal basis for continued regulation does little to assuage their irritation.

III. Legal Basis for Continued Regulation

A developer's surprise and outrage at the prospect of government and public meddling in an already risky redevelopment proposition may be due to the developer’s misunderstanding of the property rights acquired upon purchasing a structure in navigable waters. The nature of those property rights and the esoteric property law concepts involved are too complex for treatment here. Generally speaking, however, such property is burdened with a servitude which favors protection of the public’s waterways no matter what private investment may be jeopardized. To this end, Congress has vested the COE with responsibility and authority to regulate all construction in the navigable waters of the United States. More recently, Congress has provided the COE and the EPA with responsibility and authority to regulate discharges of dredged or fill material in all the nation’s waters.

Even if the developer understands that the property is subject to continued scrutiny to protect the navigation servitude, it is much less clear why the public interest may require continuation of the original, now antiquated, use when more public and private benefit could result from modifying the property and changing its use. The

31. See supra notes 1-9 and accompanying text.
basis for this continued regulation of structure usage rests on the reasons for the initial authorization of the structure. Only those structures that are found to be in the public interest are granted the privilege of encroaching upon navigation and the conservation of aquatic resources. Thus, a change in the originally authorized use may not provide the same value to the public as the original use that justified the private encroachment on the public's right, and consequently the proposed change must be evaluated and may be disallowed. Even if the new use is acceptable, the permit or

32. No § 404 permit can be issued unless it complies with the § 404(b)(1) guidelines. 40 C.F.R. § 230.7 (1987). See also National Wildlife Fed'n, 14 Envtl. L. Rep. at 20,264 (requiring the COE to recognize the guidelines as mandatory). The permit applicant bears the burden of demonstrating his proposed project's compliance with the § 404(b)(1) guidelines. The guidelines begin with a presumption against discharges:

Fundamental to these Guidelines is the precept that dredged 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. 40 C.F.R. § 230.1(c) (1987). Furthermore, the § 404(b)(1) guidelines provide that "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," unless the alternative also has other significant adverse impacts on the environment. 40 C.F.R. § 230.10(a) (1987). If a proposed project is not water dependent, practicable alternatives to filling are presumed to exist, and the project proponent bears the burden of demonstrating that there is no practicable alternative to the proposed discharge of dredged or fill material. 40 C.F.R. § 230.10(a)(3) (1987). However, the determination of "practicability" does take into account the alternative's "cost, existing technology, and logistics in light of overall project purposes." 40 C.F.R. § 230.10(a)(2) (1987).

Once it is shown that the proposed project will comply with the § 404(b)(1) guidelines, the project must still pass the COE's public interest review, as well as consideration by the COE of any comments received from government agencies and the public. However, the COE's public interest review, which is the starting point for a § 10 permit application, imposes a presumption in favor of permit issuance: "[A] permit will be granted unless the district engineer determines that it would be contrary to the public interest." 33 C.F.R. § 320.4(a)(1) (1987). This presumption is a significant change from the original regulation, which provided that "[a] permit will be granted unless its issuance is found to be in the public interest." 33 C.F.R. § 320.4(a)(1) (1987). See 49 Fed. Reg. 30,478 (1984) (proposed in May 1983 and adopted in the COE's final regulation in October 1984).

33. The COE's public interest review of a permit application requires a "weighing of all those factors which become relevant in each particular case. . . . The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process." 33 C.F.R. § 320.4(a)(1) (1987). Moreover, "[t]he specific weight of each factor is determined by its importance and relevance to the particular proposal." 33 C.F.R. § 320.4(a)(3) (1987). Thus, changes in one of the originally considered factors, such as usage of the proposed structure, could change the overall balance in this weighing process.
other authorization may impose conditions on the project to assure that the new activity does not harm navigation or the environment.\textsuperscript{34}

In short, the fact that a previously authorized structure is already present does not necessarily mean that the structure can be modified and its use changed.

IV. PROCEDURAL PROBLEMS IN OBTAINING APPROVAL FOR NEW USES OF EXISTING STRUCTURES

Any developer recognizing the problem outlined above is faced with several questions. Under what circumstances will the COE assert its authority to require formal review of a new use for an old structure? What is the procedural process for obtaining the approval? How long will such an approval process take? What will the permit review process cost?

Formal review of relatively inconsequential changes may be avoided through consultation with the COE regulatory staff, as previously discussed. In addition, the regulations may not require individual permits for certain aspects of waterfront redevelopment projects. For example, a project can avoid the section 404 permit process, including scrutiny under the section 404(b) guidelines,\textsuperscript{35} if the existing structures can be modified for the new use without any discharge of dredged or fill material.\textsuperscript{36} Even if the proposed project requires some discharge activity, it might nevertheless be exempt from section 404 permitting. The 1977 amendments to the FWPCA specifically exempted several activities from regulation under section 404.\textsuperscript{37} For example, the discharge of dredged or fill material is not prohibited or subject to regulation if it is "for the purpose of maintenance, including emergency reconstruction of re-

\begin{footnotesize}
34. Conditions that may be imposed on a project to mitigate its effects are important considerations in the balancing process. See supra note 33. See also 33 C.F.R. § 320.4(r)(1)(iii) (1987) ("Mitigation measures . . . may be required as a result of the public interest review process.").
35. See supra note 9.
36. For § 404 jurisdiction to exist, there must be a discharge of dredged or fill material. To fall within the § 404 definition, such a discharge must be more than "\textit{de minimis}, incidental soil movement occurring during normal dredging operations." 33 C.F.R. § 323.2(d) (1987). This interpretation is consistent with the opinion in United States v. Lambert, 18 Env't Rep. Cas. (BNA) 1294 (M.D. Fla. June 3, 1981), aff'd, 695 F.2d 536 (11th Cir. 1983), in which the court held that it did "not consider such back-spill [from a dredge line] to constitute the discharge of a pollutant . . . when the dredged spoil simply falls back into the area from which it has just been taken." Lambert, 18 Env't Rep. Cas. at 1296.
\end{footnotesize}
cently damaged parts, of currently serviceable\textsuperscript{38} structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures.\textsuperscript{39}

The COE regulations caution that “[m]aintenance does not include any modification that changes the character, scope, or size of the original fill design.”\textsuperscript{40} In addition, the regulation provides:

- [An otherwise exempt activity] must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may [sic] be impaired or the reach of such waters reduced.\textsuperscript{41}

The regulation explains that such nonexempt activities include converting a wetland to a nonwetland or elevating the bottom of waters of the United States even though the fill does not change the affected area to dry land.\textsuperscript{42}

Conceivably, a project could be planned in which the necessary maintenance filling activity would be limited to a portion of the project not entailing a change in use within the meaning of the statute—thus not requiring a section 404 permit—while at the same time the changes in structure usage would be planned for portions of the project that would not require filling activity. A specific example is the repair of and filling behind existing bulkheads in which the filled area would continue to be used for its existing or current function, along with the repair, rehabilitation, and conversion in use of existing structures, such as piers and wharves in which no filling would be involved.

Whether the proposed project would require processing of an in-

\textsuperscript{38} The term “currently serviceable” is not defined in either the CWA or the COE’s regulations, nor is it discussed in the legislative history of the 1977 amendments to the FWPCA. Its meaning was explored in one context in Orleans Audubon Soc’y v. Lee, 742 F.2d 901 (5th Cir. 1984), in which the plaintiff challenged the COE’s decision not to require a § 404 permit for levee repair performed by a residential developer. The COE had determined that the repairs could be made without a permit under the § 1344(f)(1)(B) exemption. The plaintiff maintained that the repairs did not fall within the exemption because the levee could not be characterized as “currently serviceable.” The COE took the position that the levee was currently serviceable because it filled a need for a hurricane and flood protection barrier. The appeals court found this to be a reasonable statutory and regulatory interpretation of the term. \textit{Id.} at 909.

\textsuperscript{39} 33 U.S.C. § 1344(f)(1)(B) (1982). This provision is also found in the COE’s regulations implementing § 404. See 33 C.F.R. § 323.4(a)(2) (1987).

\textsuperscript{40} 33 C.F.R. § 323.4(a)(2) (1987).

\textsuperscript{41} 33 C.F.R. § 323.4(c) (1987).

\textsuperscript{42} \textit{Id.}
individual section 10 permit under the RHA depends largely on the
details of the specific proposal.\(^4^3\) By regulation, the COE has pro-
vided that certain activities are authorized by general permits is-
suued on a nationwide or regional basis.\(^4^4\) Nationwide permits are
general permits authorizing certain categories of activities through-
out the nation.\(^4^5\) They are designed to allow specified activities to
occur with little or no paperwork or delay.\(^4^6\) However, the author-
ization to conduct an activity described in a nationwide permit is
valid only if the activity also meets the applicable conditions listed
in the COE regulations.\(^4^7\)

In addition to the twenty-six activities preauthorized by nation-
wide permits,\(^4^8\) several activities were authorized by nationwide
permits issued in 1977.\(^4^9\) On July 19, 1977, the COE issued a sec-

\(^{4^3}\) An individual COE permit, as defined by the regulation, is issued only after a
“case-by-case evaluation” and public interest review of the proposed project. 33 C.F.R.
§ 322.2(e) (1987).

\(^{4^4}\) See 33 C.F.R. § 322.2(f) (1987). The Clean Water Act granted the COE authority
to issue general § 404 permits on a state, regional, or nationwide basis for some catego-
ries of activities. 33 U.S.C. § 1344(e) (1982). Activities in each such category must be
similar in nature, cause minimal adverse effects when separately performed, and have
minimal cumulative adverse environmental effect. Id. There is no comparable language
in § 10 of the RHA. However, the COE has promulgated regulations providing for both
§ 404 and § 10 nationwide permits. Although all the nationwide permit provisions have
been combined in 33 C.F.R. §§ 330.1—330.12, the COE regulations indicate whether
each authorized activity listed is authorized pursuant to § 10 or § 404 or both. 33 C.F.R.
§ 320.5 (1987).


\(^{4^6}\) Id. See also Riverside Irrigation Dist. v. Andrews, 758 F.2d 508 (10th Cir. 1985).

“Such a permit is automatic in that if one qualifies, no application is needed before
beginning the discharge activity.” Id. at 511.

\(^{4^7}\) Fourteen conditions are listed in the COE regulations at 33 C.F.R. § 330.5(b)
(1987). One example of these requirements is the condition “[t]hat the activity will not
jeopardize a threatened or endangered species . . . or destroy or adversely modify the
critical habitat of such species.” 33 C.F.R. § 330.5(b)(3) (1987). In Riverside Irrigation
Dist., the court upheld the COE’s refusal to allow the plaintiffs to discharge dredged
material under a nationwide permit. The court ruled that “[t]he Corps has the author-
ity and duty . . . to ensure that parties seeking to proceed under a nationwide permit
meet the requirements for such action.” Riverside Irrigation Dist., 758 F.2d at 511.
The COE based its decision to require an individual permit on the fact that the condi-
tions for the nationwide permit—namely, the condition regarding endangered species
and critical habitat—were not met. The COE found that the proposed project might
“adversely modify the critical habitat of the whooping crane,” and the “plaintiffs did
not meet their burden of showing, as a matter of fact, that the discharge [would] not
have such an adverse impact.” Id. at 514.

\(^{4^8}\) All twenty-six preauthorized activities are described in 33 C.F.R. § 330.5(a)
(1987). These nationwide permits were reissued in the COE’s final regulations pub-
lished on November 13, 1987, and were effective on January 12, 1987. They will remain

\(^{4^9}\) 33 C.F.R. § 330.3 (1987)
tion 10 nationwide permit for "[s]tructures or work completed before December 18, 1968, or in waterbodies over which the district engineer had not asserted jurisdiction at the time the activity occurred provided, in both instances, there is no interference with navigation."50 This "grandfathering" provision apparently means that noninterfering structures and fills existing in navigable waters on December 18, 1968, if not already authorized by individual COE permits, became authorized structures at that time. This nationwide permit can also be understood to mean that even if the existing structures had been originally authorized by COE permit (pre-1968) for a water related use and had deviated over time in configuration and usage, the nationwide permit issued in 1977 authorized whatever configuration and functions the structures possessed as of December 18, 1968, as long as the use did not interfere with navigation. This interpretation would mean that if, for example, shipping piers were converted prior to 1968 to nonwater related functions such as restaurants or warehouses, the 1977 nationwide permit has legitimized that change in use.

The nationwide permits issued pursuant to section 10 and section 404 preauthorize certain categories of activities, including the following:

The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or fill, or of any currently serviceable structure or fill constructed prior to the requirement for authorization, provided such repair, rehabilitation, or replacement does not result in a deviation from the plans of the original structure or fill, and further provided that the structure or fill has not been put to uses differing from uses specified for it in any permit authorizing its original construction. Minor deviations due to changes in materials or construction techniques and which are necessary to make repair, rehabilitation, or replacement are permitted.51

There appears to be no federal case law addressing the issue of how much the usage of existing structures may be modified without exceeding the parameters of the nationwide permit.52 This ab-

50. 33 C.F.R. § 330.3(b) (1987).
52. A recent case that comes close to addressing the "new usage" question is Conant v. United States, 786 F.2d 1008 (11th Cir. 1986), which involved the construction of fish farming ponds on wetlands within the jurisdiction of § 404. The plaintiff sought an injunction against enforcement of the COE's cease and desist order, claiming that the activity was exempt from permit requirements under 33 U.S.C. § 1344(f)(1)(C),
sence of case law may be the result of the COE’s choosing to ignore most of the simpler changes in use that have occurred at existing structures in favor of expending resources on litigating more serious modifications affecting the nation’s water resources. For example, even though the COE may have the authority to require a permit to change the office of an authorized marina into an ice cream parlor without material modification of the structure, it is not likely that the regulatory branch in most COE districts would require the project to undergo full permit processing. On the other hand, while some projects involving the rehabilitation and reuse of piers and wharves appear to be ignored by regulators, others undergo intense regulatory scrutiny.\textsuperscript{63}

The COE may treat similar projects differently depending on their locations. Intense scrutiny is more likely to occur if one of the projects is located in an area in which controversy surrounding development already exists.\textsuperscript{64}

The COE has the authority to “modify, suspend, or revoke nationwide permits in accordance with the relevant procedures of 33 C.F.R. 325.7.”\textsuperscript{65} This power includes the authority to revoke such permits on a case-by-case basis. The COE’s decision to modify, suspend, or revoke a permit may be at the instigation of a third party or it may result from the COE’s own re-evaluation of the

which allows “construction or maintenance of farm or stock ponds” without a § 404 permit. The court noted that the scope of this exception is limited (as are all the statutory exemptions to § 404) by 33 U.S.C. § 1344(f)(2), which requires a § 404 permit for:

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 may be impaired or the reach of such waters be reduced . . .


The \textit{Conant} court held that the “activity here involves a new use which will affect the flow of circulation within the wetlands. The plain purpose of the statute and regulations is to allow people to build ponds in connection with a previously established farming operation.” \textit{Conant}, 786 F.2d at 1010.

Because this case involves filling as a statutory exemption to jurisdiction under the CWA as opposed to structures and work under § 10 jurisdiction, it may be of limited help in predicting the limits that would be imposed on a § 10 nationwide permit.


\textsuperscript{54} \textit{Id.}

\textsuperscript{55} 33 C.F.R. § 330.5(d) (1987).
circumstances and conditions of the permit. In any event, the decision must be made pursuant to considerations of the public interest. Revocation must be preceded by suspension, and suspension is authorized only after a written determination by the COE that suspension is in the public interest. The apparent goal of these procedures is to prevent the COE from acting arbitrarily toward any permittee.

The COE also has discretionary authority "to modify nationwide permits by adding regional conditions or to override nationwide permits by requiring individual permit applications on a case-by-case basis, for a category of activities, or in specific geographic areas." This discretionary authority may be invoked "based on concerns for the aquatic environment as expressed in the guidelines published by the EPA pursuant to section 404(b)(1)" of the CWA. If a basis for such concerns can reasonably be shown to exist, the COE's discretionary authority may apparently be used to suspend or revoke a permit without following the suspension and revocation procedures intended to safeguard the permittee's rights, and the determination may be made solely on grounds of adverse aquatic impacts without the broader public interest review.

If a nationwide permit is suspended, revoked, or simply not applicable, and an individual permit is required, a myriad of questions may confront the developer that elects to go forward with the project. Who should write the permit application? Will an environmental impact statement be required? What environmental data

56. 33 C.F.R. § 325.7(a) (1987).
57. 33 C.F.R. § 325.7(c), (d) (1987).
59. Id.
60. The suspension and revocation procedures are given at 33 C.F.R. § 325.7 (1987).
61. 33 C.F.R. § 330.8 (1987). An argument can be made, however, that the discretionary authority given the COE in 33 C.F.R. § 330.8 applies only to § 404, and not § 10, permits. This conclusion is based partly on the fact that the § 404(b) guidelines have been developed pursuant to the authority of the CWA only. Furthermore, although 33 C.F.R. § 330.8 does not expressly limit itself to § 404 permits, its precursor before the merger of the nationwide permit provisions was 33 C.F.R. § 324.4-4 (1979), which dealt solely with § 404 nationwide permits. See also Orleans Audubon Soc'y v. Lee, 742 F.2d 901, 908 (5th Cir. 1984) (The court noted that 33 C.F.R. § 323.4-4 [now § 330.8] gave the COE the discretionary authority to require an individual § 404 permit "for a discharge otherwise exempted by the nationwide permits.").
62. Under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4361—-4370, federal agencies are required to prepare an Environmental Impact Statement (EIS) if a proposed major federal action will significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(c) (1982). The COE's regulations imple-
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will be requested? Will the United States Fish and Wildlife Service, the National Marine Fisheries Service, the Environmental Protection Agency, the various state natural resource agencies, public interest groups, or competitors object for environmental or other reasons? Alternatively, the developer may be able to proceed by modifying an existing permit or other authorization.

Once it is determined that the change in use will require issuance of a permit or modification of a previous authorization, it is essential that the developer seek and follow the advice of the regulators themselves. Failure to provide the information requested, no matter how useless it may seem to the project proponent, is almost

63. Under the Fish and Wildlife Coordination Act, 16 U.S.C. §§661—666c (1982), the COE district engineer is required to “consult with” the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and the state agency responsible for fish and wildlife resources, and give “full consideration” to their views in deciding whether to issue, deny, or condition individual or general COE permits. See 33 C.F.R. §320.4(e) (1987). Furthermore, the Endangered Species Act, 16 U.S.C. §§1531—1543 (1982), requires the COE to consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to ensure that any action authorized by the COE will not jeopardize the existence of endangered or threatened species or destroy or adversely modify critical habitats. See 33 C.F.R. §320.3(i) (1987). One of the fourteen conditions imposed on the nationwide permits identified in 33 C.F.R. §330.5 requires “that the activity will not jeopardize a threatened or endangered species...or destroy or adversely modify the critical habitat of such species.” 33 C.F.R. §320.5(b)(3) (1987).

64. Procedures for modifying COE permits are given at 33 C.F.R. §325.7(b) (1987). A permittee’s request for permit modification is evaluated by the COE in accordance with the public interest. Id. The permit modification may be effectuated through mutual agreement between the COE district engineer and the permittee. However, the COE must “consult with resource agencies before modifying any permit terms or conditions, that would result in greater impacts, for a project about which that agency expressed a significant interest...prior to permit issuance.” Id.
certain to result in costly delays.\textsuperscript{65} Unfortunately, some apparently meritorious proposals have become mired in the permit process for months, and even years, resulting in unnecessary increases in project costs.\textsuperscript{66} Moreover, the opportunity to effect beneficial changes in an environment that has already been degraded by previous projects may have been delayed or lost. If any chance exists that a conflict may arise over the acceptability of the new use, professional assistance should be obtained from lawyers and environmental consultants who have experience dealing with the permit process.

V. Confusion Regarding the Substantive Standards to be Applied to Changes in Use of Existing Structures

Partly because developers generally have not sought, nor have regulators required, approval for many changes in use, the substantive policy for deciding when such changes require explicit approval has not been clearly resolved. Likewise, it is difficult to predict whether the government will grant approval of new uses for old structures if asked to do so. This apparent gap in regulatory guidance may be understandable if it is recognized that only fifteen years ago the COE routinely approved virtually all permits for work in navigable waters unless there was a clear conflict with the navigation interest.\textsuperscript{67} In the ensuing years, the COE increasingly

\textsuperscript{65} COE regulations concerning the processing of permit applications are contained in 33 C.F.R. §§ 325.1—325.10 (1987). Information the applicant must provide is described in 33 C.F.R. § 325.1(d)(1)-(6) (1987). The COE may require the applicant to submit additional information, including "environmental data and information on alternatives, methods and sites," if the district engineer deems it essential for a public interest determination. 33 C.F.R. § 325.1(e) (1987). The COE regulations require the district engineer to make a determination regarding the application's completeness within fifteen days of its receipt and, if incomplete, to request more information or, if complete, to proceed with processing by issuing a public notice. 33 C.F.R. § 325.2(a)(1), (2) (1987). An applicant's failure to respond to the COE's request for information to complete the application will delay the processing of his permit. If an applicant does not respond within thirty days to the district engineer's request for information, his application will be deemed withdrawn or a final decision will be made. 33 C.F.R. § 325.2(d)(5) (1987).

\textsuperscript{66} Conference on New York Harbor, supra note 53.

\textsuperscript{67} It was not until 1968 that the COE began to interpret the RHA as authorizing it to consider more than navigational factors. In 1968, the COE expanded its regulations so that its review of permit applications included public interest factors and environmental factors in particular. See Want, supra note 19. See also Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970) (upholding the COE's application of these regulations to protect a wetland), cert. denied, 401 U.S. 910 (1971). However, the COE's geographical jurisdiction was still quite limited. See supra note 4. After the court in Natural Resources Defense Council v. Callaway, 392 F. Supp. 685 (D.D.C. 1975), ordered the COE
has become the guardian of the aquatic environment with the assistance of the Environmental Protection Agency, the Fish and Wildlife Service, the National Marine Fisheries Service, various state and local agencies, and the environmentally aware public. Environmental groups and the public itself have become more vigilant in recent years, placing increased scrutiny on government regulation. It can be anticipated that competition for scarce waterfront resources in some cities will result in strident demands for imposition of the full permit process for proposals to rehabilitate and reuse waterfront structures.

The COE is bound to follow its regulations for granting permits allowing activities in navigable waters. Those regulations basically provide that a section 10 permit should issue unless the work is found to be contrary to the public interest. The public interest review requires evaluation of:

The relative extent of the public and private need for the proposed structure or work;

Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and

The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited. 68

The weight given each public interest factor depends upon the facts of the particular proposal, and each proposal is reviewed for its effect on a number of factors including wetlands, fish and wildlife, water quality, historic, cultural, scenic and recreational values, and considerations regarding property ownership. 69 In addition, the COE considers the safety of the structure, its effect on water supply and conservation, environmental benefits, and impacts on navigation. 70

Because of the lack of physical or other encroachments inherent in most reuse proposals, application of the public interest review

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70. Id.
should result in approval of a broad range of changes in use including retail shops, restaurants, housing, offices, waterfront museums, and marinas. Because many of these projects will enhance the aquatic environment and reduce navigation risks, the COE should exercise its authority either to accept the improvements as consistent with previous authorizations or to approve a permit modification. For many existing pile supported structures, the effect of a use change is not measurable. When adverse effects on the aquatic environment are predicted, they usually can be prevented by the imposition of conditions regarding control of sewage, surface run-off, and the configuration and operation of water related activities such as marinas, fishing, and other aquatic recreation.

Modification, rehabilitation, and reuse of many waterfront structures could greatly benefit aquatic ecosystems in most cities by reversing the appalling deterioration that has occurred on the waterfront during the last fifty years. Unfortunately, some individuals in the natural resource agencies appear to be judging reuse and rehabilitation projects as though the structure did not already exist.71 Support for this position may be found in the congressional declaration of the goals and policies of the Clean Water Act: "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."72 Proponents of this view fear that an approach that considers the current condition of the site "opens the door to the possibility that waters already degraded as a result of pollution or other intrusions will be assessed differently for permitting purposes than waters that are more pristine."73

Although restoration is one of the stated goals of the CWA, the Act does not require permitting agencies to disregard the environmental situation of a particular location. Nor does it require the agency to evaluate a project proposal by comparing it to an improvement that may result from natural restoration if the degraded system is left undisturbed. In fact, the section 404(b)(1) guidelines direct that:

The manner in which these Guidelines are used depends on the physical, biological, and chemical nature of the proposed extraction site, the material to be discharged, and the candi-

date disposal site, including any other important components of the ecosystem being evaluated.74

Under these guidelines, the COE’s environmental impacts assessment of a proposed project would require information concerning the existing plant and animal populations, existing water quality, and the current hydrological regime. Permit decisions that consider the present condition of a proposed project site thus are not only fair, practical, and realistic, they also are in accordance with the section 404(b)(1) guidelines. When only a section 10 permit is involved, with its attendant public interest review and weighing of relevant factors, it seems apparent that the impacts evaluation of the permit application must include the degraded condition of the project site. In any event, some proposals to change the use of existing structures incorporate features that contribute to the restoration of degraded water quality. Such project features may include, for example, removal of contaminated sediments or collapsed structures to improve water circulation and flushing and removal or modification of sewage and stormwater outfalls.75

The COE often compounds the problems involved in changing the usage of existing structures by failing to adhere to the permit processing schedule outlined in its regulations.76 Such delays are leading to financial infeasibility for projects that, by any fair measure, would improve both the natural and the human environment. Frustration in the development community is leading to polarization and distrust between the regulators and the regulated.77

CONCLUSION

Some natural resource agency staff and public interest group members that oppose new uses for old structures, especially new uses that are not directly water dependent, argue that the original approval of structures should be withdrawn when such structures are no longer needed for their original purpose and the structures should be removed, returning the aquatic environment to its original condition.78 Leaving aside the debate on whether such an approach would truly benefit the aquatic environment if economi-

74. 40 C.F.R. § 230.6(a) (1987).
76. See 33 C.F.R. § 325.2(d) (1987).
78. Id.
cally feasible, it is clear that most prior authorizations did not reserve for the COE the right to have such structures removed by the private party owners, and that the COE lacks authority to order such removal unless the needs of navigation are clearly implicated and funds are provided by Congress.\textsuperscript{79} Thus, a stalemate is developing which can only be broken by deliberate, decisive action by COE district engineers. When an evaluation confirms that a proposal requiring permit modification will not harm the public interest, district engineers should act expeditiously to modify permits, incorporating whatever conditions may be useful and appropriate to protect navigation and the environment. When a new use is detrimental to the public interest, as compared to leaving the structure to deteriorate further, the proposal should be modified or the permit should be denied.

If the result recommended herein is found unsatisfactory by Congress, by the community of regulators, or by the public, the procedural requirements and substantive standards can be modified by legislation or regulation. Until the rules of the permit process are modified, however, proponents of projects to rehabilitate and reuse existing structures deserve sound technical advice from resource agencies and swift permit modifications from the COE. Indeed, the public policy of protecting the aquatic environment is likely to be furthered in most cases by the reuse of existing structures rather than the expansion of new development into presently undeveloped or underdeveloped areas.

\textsuperscript{79} The COE may order removal of structures if they become deteriorated and interfere with navigation or become a source of floating debris that hinders navigation. \textit{See supra} note 26 and accompanying text. Furthermore, the requirements that the structure or fill be properly maintained and that the authorized activity not interfere unacceptably with navigation are listed among the fourteen conditions imposed on any nationwide permit issued pursuant to 33 C.F.R. § 330.5(a) (1987). 33 C.F.R. § 330.5(b) (1987).