

TEAR DOWN THIS WALL: ALIGNING THE CORPS’ ENVIRONMENTAL REVIEW OBLIGATIONS UNDER NEPA AND THE CLEAN WATER ACT FOR SECTION 404 WETLAND PERMITS

BY

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*Abstract*

I. INTRODUCTION

In the 1980s, the United States Army Corps of Engineers (“Corps”) was doing a little introspection, which is usually a good thing and perhaps more of us should have been doing more of it during that decade.<sup>1</sup> Specifically, the Corps was contemplating the extent of analysis of environmental impacts the agency was obligated to undertake when issuing Clean Water Act (“CWA”) Section 404 permits to fill jurisdictional wetlands. At the risk of oversimplifying the Corps’ dilemma, the agency was grappling with the question of whether the scope of its environmental review for a CWA Section 404 permit more often should be limited to portions of a non-federal project over which the Corps exercised regulatory jurisdiction (the wetlands) at one end of the spectrum; or whether the Corps could and should analyze the environmental effects of the whole project, including non-aquatic impacts, at the other end of the spectrum.<sup>2</sup>

This was not a navel-gazing exercise by the Corps; large infrastructure and development projects often require filling some federal jurisdictional wetlands, thus triggering the need for a CWA Section 404 permit.<sup>3</sup> And such projects can have significant impacts on the environment, ranging beyond impacts to aquatic resources, including upland deforestation and fragmentation,

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<sup>1</sup> See generally <https://www.cnn.com/shows/the-eighties>.

<sup>2</sup> See Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206, 41206 (Nov. 13, 1986) (discussing the Corps’ recent changes in its NEPA regulations and adopting the final rule in effect today).

<sup>3</sup> See 33 U.S.C. §1344 (2018).

growth-inducing economic impacts, effects on non-aquatic threatened and endangered species, and increasing greenhouse gas emissions. Transnational oil and gas pipelines<sup>4</sup>, overhead electrical transmission lines<sup>5</sup>, and massive marine port projects<sup>6</sup> are but a few of the types of large non-federal infrastructure projects that typically require permitting from the Corps.

From the Corps' self-reflection emerged a new regulation and a reaffirming of a pre-existing one. First was the Corps revamp of its "public interest review" regulation, which the agency originally promulgated in 1977 pursuant to its congressionally-delegated authority to administer the CWA Section 404 permit program.<sup>7</sup> On its face, the public interest review regulation is an extremely muscular interpretation of the Corps' authority to regulate effects of projects that go beyond those to aquatic resources that triggered the CWA Section 404 permit requirement, including economic impacts, impacts to wildlife values, land use, energy needs, and public safety among others.<sup>8</sup> In 1986, the Corps reiterated its commitment to its broad public interest authority.<sup>9</sup> The public interest review regulation has not been amended since.

A little more than a year later, the Corps issued brand new agency-specific National Environmental Policy Act ("NEPA") regulations<sup>10</sup> to compliment the Council on Environmental Quality's ("CEQ") general NEPA regulations. With its NEPA regulations, the Corps sought to codify some recent court decisions that had upheld the agency's discretion to limit its environmental analysis to only the portions of a private project that triggered its regulatory

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<sup>4</sup> See, e.g., *Sierra Club v. United States Army Corps of Engineers*, 990 F. Supp.2d 9 (D.D.C. 2013) (challenge to Corps-issued permit for domestic oil pipeline running 589 miles from Oklahoma to Illinois).

<sup>5</sup> See, e.g., *National Parks Conservation Association v. Semonite*, 916 F.3d 1075 (D.C. Cir. 2019) (challenge to Corps-issued permit for overhead electrical transmission line crossing the historic James River in Virginia).

<sup>6</sup> See, e.g., *Sierra Club v. Marsh*, 976 F.2d 763 (1st Cir. 1992) (challenge to Corps-issued permit for major marine port project in Maine).

<sup>7</sup> 33 C.F.R. § 320.4(a)(1) (2020).

<sup>8</sup> 33 C.F.R. § 320.4(a)(1).

<sup>9</sup> Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206, 41206 (Nov. 13, 1986)

<sup>10</sup> 33 C.F.R. § 325, Appendix B.

jurisdiction.<sup>11</sup> This dynamic is colloquially known as the “small handles” issue.<sup>12</sup> In such cases, the question arises as to which of the project’s environmental impacts legitimately fall within the purview of the action agency’s NEPA analysis and which do not.<sup>13</sup> The case law since the promulgation of its NEPA regulations suggests that the Corps, more often than not, errs on the side of narrowly defining the scope of its NEPA review associated with its issuance of CWA Section 404 permits.<sup>14</sup> Such cramped NEPA environmental reviews are inconsistent with the Corps’ broad authority under the CWA<sup>15</sup> and the agency’s obligation to ensure a proposed activity *and its intended use* are not contrary to the public interest.<sup>16</sup> The Corps should resolve this tension by taking a broader view of the scope of its NEPA analysis for CWA Section 404 permits, one that is more faithful to the plain language of the Corps’ NEPA regulations as well as aligned with its CWA public interest review, which often happens simultaneously as its NEPA analysis.

## II. THE CWA’S AND NEPA’S COMMON PURPOSE TO PROTECT THE ENVIRONMENT

First, a few basics. NEPA is the “basic national charter for protection of the environment.”<sup>17</sup> Congress recognized that “the environment” included humans and accordingly NEPA requires agencies to evaluate “major Federal actions significantly affecting the quality of the human environment.”<sup>18</sup> Such evaluation was necessary to carry out the continuing policy of

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<sup>11</sup> See 53 FR 3,120 (Feb. 3, 1988) (discussing *Winnebago Tribes of Nebraska v. Ray*, 621 F.2d 269 (8th Cir. 1980), *Save the Bay v. Corps of Engineers*, 610 F.2d 322 (5th Cir. 1980), and *Sierra Club v. Siegler*, 695 F.2d 957 (5th Cir. 1983)). This Article is primarily concerned with private (and mostly privately-funded) projects that require federal authorizations, such as CWA Section 404 permits, as opposed to federal agency projects or those that occur on federal land. For the latter, the Corps typically is not the lead agency for the federal government’s NEPA analysis but is rather a cooperating agency.

<sup>12</sup> See Patrick A. Parenteau, *Small Handles, Big Impacts: When Do Corps Permits Federalize Private Development?* 20 ENVTL L. 747 (1990).

<sup>13</sup> For an excellent discussion of the Corps’ NEPA scope of review regulations when they were published and the small handles dynamic, see our good friend Professor Pat Parenteau’s Article for a symposium marking the twentieth anniversary of NEPA. Pat Parenteau, *Small Handles, Big Impacts: When Do Corps Permits Federalize Private Development?* 20 ENVTL L. 747 (1990).

<sup>14</sup> See *infra*, at X-X.

<sup>15</sup> See 33 U.S.C. § 1344 (2020) (describing the Corps’ authority under the CWA).

<sup>16</sup> See 33 C.F.R. § 320.4(a)(1).

<sup>17</sup> 40 C.F.R. § 1500.1 (July 2020); see also *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989) (“NEPA declares a broad national commitment to protecting and promoting environmental quality.”).

<sup>18</sup> 42 U.S.C. § 4332(C) (2018).

the federal government “to use *all* practicable means and measures . . . to foster and promote *the general welfare*, to create and maintain conditions under which man and nature can exist in productive harmony, and *fulfill the social, economic, and other requirements* of present and future generations of Americans.”<sup>19</sup>

Congress intended the scope of NEPA’s environmental effects review to be broad, including ensuring that “presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations.”<sup>20</sup> To carry out this ambitious goal, Congress directed the federal government to prepare detailed statements on the environmental impacts of major federal actions, also known as Environmental Impact Statements (“EIS”).<sup>21</sup> NEPA created the Council on Environmental Quality (“CEQ”) to promulgate regulations governing how federal agencies were to carry out NEPA’s mandates.<sup>22</sup>

The CEQ NEPA implementing regulations are a bit in flux. In July 2020, the Trump administration issued the first extensive changes to CEQ’s NEPA regulations in more than 40 years.<sup>23</sup> On October 7, 2021, the Biden administration issued a Notice of Proposed Rulemaking to again revise NEPA’s implementing regulations, likely to undo many of the changes contained in the July 2020 Rule.<sup>24</sup> Most relevant for this Article is the Biden administration’s proposal to “restore the definitions of “direct” and “indirect” effects, and “cumulative impacts” from the 1978 NEPA Regulations”<sup>25</sup> “Indirect effects” are those “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”<sup>26</sup> An effect is reasonably

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<sup>19</sup> 42 U.S.C. § 4331 (declaring Congress’s national environmental policy) (emphasis added); *see also* Matthew J. Lindstrom, *Procedures Without Purpose: The Withering Away of the National Environmental Policy Act’s Substantive Law*, 20 J. LAND, RESOURCES & ENV’T L. 245, 248 (2000) (explaining the NEPA was a “culmination of efforts beginning in the late 1950s, to protect our natural environment”).

<sup>20</sup> 42 U.S.C. § 4332(B).

<sup>21</sup> 42 U.S.C. § 4332(C).

<sup>22</sup> 42 U.S.C. § 4334.

<sup>23</sup> *See* 85 Fed. Reg. 43,304 (July 16, 2020). Despite several court challenges, the July 2020 regulations remain in effect, so for the purposes of this Article, when referring to the CEQ NEPA implementing regulations we will cite to the July 2020 regulations unless otherwise noted.

<sup>24</sup> *See* 86 Fed. Reg. 55,757 (Oct. 7, 2021).

<sup>25</sup> *Id.* at 55,762.

<sup>26</sup> *Id.*

foreseeable if it “is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.”<sup>27</sup> Public participation in the NEPA process is a critical component of the statutory scheme.<sup>28</sup> Finally, NEPA is a procedural statute, which means while federal agencies must consider the environmental impacts of their actions, NEPA does not mandate a particular outcome.<sup>29</sup> Rather, NEPA is concerned with preventing uninformed—rather than unwise—agency action.<sup>30</sup>

The Clean Water Act (“CWA”)<sup>31</sup> was enacted to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>32</sup> Among other prohibitions, the CWA prohibits the discharge of pollutants, including dredged or fill material, into the waters of the United States without a permit issued by Corps pursuant to Section 404 of the CWA.<sup>33</sup> The Corps adopted regulations, known as the “public interest” factors, to implement its permitting authority.<sup>34</sup> In addition to its public interest review, the Corps must evaluate a proposed CWA Section 404 permit under environmental criteria promulgated by the Environmental Protection Agency known as the 404(b)(1) Guidelines.<sup>35</sup> Only when a proposed project satisfies the 404(b)(1) Guidelines and the Corps determines it is not contrary to the public interest will the Corps issue the requested CWA Section 404 permit.

### III. THE PUBLIC INTEREST REVIEW REGULATION

First adopted on July 19, 1977, the Corps’ public interest review regulation required “evaluation of the probable impact of the proposed activity *and its intended use* on the public

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<sup>27</sup> *Dubois v. U.S. Dept. of Agric.*, 102 F.3d 1273, 1286 (1st Cir. 1996) (internal quotes omitted).

<sup>28</sup> See *WildEarth Guardians v. United States Bureau of Land Mgmt.*, 870 F.3d 1222, 1237 (10th Cir. 2017) (“NEPA has two purposes: prevent uninformed agency decisions and provide adequate disclosure to allow public participation in those decisions.”) (citing *Methow Valley*, 490 U.S. at 349).

<sup>29</sup> *Methow Valley Citizens Council*, 490 U.S. at 351.

<sup>30</sup> *Id.*

<sup>31</sup> 33 U.S.C. § 1251 et seq.

<sup>32</sup> *Id.* § 1251(a).

<sup>33</sup> *Id.* §§ 1311(a), 1344. There are limited exemptions from the CWA Section 404 permit requirement for certain farming and forest activities. *Id.* § 1344(f)(1).

<sup>34</sup> 33 C.F.R. § 320.

<sup>35</sup> 33 U.S.C. § 1344(b)(1); see also 40 C.F.R. § 230.

interest.”<sup>36</sup> The regulation codified a broad set of factors the Corps must consider when evaluating CWA Section 404 permit applications.<sup>37</sup> The regulation prohibited the granting of a CWA Section 404 permit, unless the Corps found the permit to be in the public interest.<sup>38</sup>

The Corps made some minor changes to the regulation in issuing an interim rule in 1982, the most notable being elevating the importance of analyzing cumulative effects of the proposed activity and its intended use.<sup>39</sup> The Corps also added some additional factors to the list of those to be considered when evaluating a project proposal.<sup>40</sup> In 1984, to comply with a settlement agreement reached in *National Wildlife Federation v. Marsh* in 1982, the Corps issued a final rule with revisions to the public interest review regulation.<sup>41</sup> The 1984 Rule included a reference to the Environmental Protection Agency’s 404(b)(1) Guidelines, which had been published in 1980.<sup>42</sup> Non-compliance with the 404(b)(1) Guidelines would be another reason for permit denial.<sup>43</sup> The Corps also made a subtle change to the regulation’s language that appeared to some commenters to shift the presumption on the public interest determination. While the original regulation stated “No permit will be granted unless its issuance is found to be in the public interest,” the 1984 version changed to “a permit will be granted unless the district engineer determines that it would be *contrary* to the public interest.”<sup>44</sup> In issuing the rule, the Corps clarified “[t]he responsibility for weighing the benefits of a proposed activity against the detriments has always been and remains

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<sup>36</sup> 42 Fed. Reg. 37,122 (July 19, 1977); 33 C.F.R. § 320.4(a)(1) (1978) (emphasis added).

<sup>37</sup> The non-exclusive list of factors included: “conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood damage prevention, land use, navigation, recreation, water supply, water quality, energy needs, safety, food production, and, in general, the needs and welfare of the people.” *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See 33 C.F.R. § 320.4(a)(1) (1982) (moving the reference to “cumulative effects” from (a)(2)(iv) up to the first sentence of (a)(1)).

<sup>40</sup> See *id.* (adding wetlands, shore erosion and accretion, water conservation, fiber production, and mineral needs).

<sup>41</sup> See 49 Fed. Reg. 39,478 (Oct. 5, 1984).

<sup>42</sup> 40 C.F.R. § 230; see *Guidelines for Specification of Disposal Sites for Dredged or Fill Material*, 45 Fed. Reg. 85,336 (Dec. 24, 1980) (final rule establishing the 404(b)(1) Guidelines).

<sup>43</sup> 33 C.F.R. § 320.4(a)(1) (1986) (“For activities involving 404 discharges, a permit will be denied if the discharge that would be authorized by such permit would not comply with the Environmental Protection Agency’s 404(b)(1) guidelines.”).

<sup>44</sup> Compare 33 C.F.R. § 320.4(a)(1) (1978) with 33 C.F.R. § 320.4(a)(1) (1986).

vested in the Corps”).<sup>45</sup> The current version of the regulation, promulgated in 1986, included a provision discussing how the agency should weigh the public interest factors.<sup>46</sup> Throughout all of these revisions, the Corps’ broad authority to consider a wide variety of public interest factors when deciding whether to grant a CWA Section 404 permit has remained alive and well since 1977.<sup>47</sup>

The basis for the Corps’ ability to take into account the general public interest rests on the CWA’s statutory language granting the Corps broad discretion when deciding whether or not to issue a CWA Section 404 permit: “The Secretary *may* issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.”<sup>48</sup> Because the statute does not require the Corps to approve a CWA Section 404 permit if it meets certain minimum criteria (use of the word “may”), the logic is the Corps is free to ensure the permits it does grant are not contrary to the public interest, irrespective of the project’s impacts on aquatic resources. In other words, the Corps’ discretion to deny CWA Section 404 permits allows for the agency to pursue a path short of denial, such as granting the permit after a public interest review that may, and often does, result in permit conditions unrelated to the fill activity.

The Corps has not relied on its public interest review to deny CWA Section 404 permits very often, and the results when those decisions end up in court are mixed. In *Fox Bay Partners v.*

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<sup>45</sup> See 49 Fed. Reg. at 39,478 (noting commenters’ concern that the changed wording shifted the burden of proof regarding the public interest balancing from the applicant to the Corps).

<sup>46</sup> 40 C.F.R. 320.4(a)(1) (1986) (“The specific weight of each factor is determined by its importance and relevance to the particular proposal. Accordingly, how important a factor is and how much consideration it deserves will vary with each proposal. A specific factor may be given great weight on one proposal, while it may not be present or as important on another.”). For a critique of the Corp’s 1986 public interest review regulation that argues it gives the Corps too much discretion to ignore environmental impacts of CWA Section 404 permits, see Ellen K. Lawson, *The Corps of Engineers’ Public Interest Review Under Section 404 of the Clean Water Act: Broad Discretion Leaves Wetlands Vulnerable to Unnecessary Destruction*, 34 Wash. U. J. Urb. & Contemp. L. 203 (1988).

<sup>47</sup> The Corps considers its public interest review mandatory for CWA Section 404 permits, but at least one court has said it is not. See *Bersani v. U.S. Env’t Prot. Agency*, 850 F.2d 36, 40 (2d Cir. 1988).

<sup>48</sup> 33 U.S.C. § 1344(a) (emphasis added). See also *Deltona Corp. v. Alexander*, 682 F.2d 888, 892 (11th Cir. 1982) (“The act of granting a s 404 permit is unquestionably an exercise of the government’s sovereign power to protect the public interest.”) (citing S.Rep.No.92-414, 92d Cong. 2d Sess. (1971) reprinted in (1972) U.S.Code Cong. & Ad.News 3668, 3669-75).

*U.S. Corps of Engineers*,<sup>49</sup> the Corps denied a permit application for a 512-slip private recreational for-profit marina on the Fox River in Illinois.<sup>50</sup> After its public interest review, the Corps concluded the project would “contribute to severe overcrowding of recreational boats on the Fox River and Chain–O–Lakes.”<sup>51</sup> Fox Bay Partners challenged that finding as going beyond the Corps’ authority and violating the CWA “by denying the permit application based on the consequences of the entire marina project, rather than the immediate effects of the proposed discharge of dredged or fill material.”<sup>52</sup> The district court upheld the Corps’ decision to deny the permit but did not delve far into the Corps’ underlying authority to do so. Rather it focused on the Corps’ “impressive array of factual findings” that showed the project would have “adverse effects on the physical and biological integrity of the Fox River, [and cause] the potential worsening of already oversaturated boating conditions on the river,” as a sufficient basis for the Corps’ conclusion that the project was contrary to the public interest.<sup>53</sup>

The Corps was not as successful in asserting its broad authority under its public interest regulation in the Second Circuit. There, defendants in a CWA criminal prosecution argued that the Corps went beyond its authority in including in the defendants’ CWA Section 404 permit conditions that were not directly related to the discharge.<sup>54</sup> The district court agreed and dismissed several counts in the indictment.<sup>55</sup> On appeal, the Corps put forth two bases for the validity of its permit conditions: first, that under the CWA 404(b)(1) Guidelines, the conditions are valid if they directly or indirectly relate to the discharge, and second, that its public interest regulation allows the Corps to set conditions related to the entire project associated with the discharge. The Second

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<sup>49</sup> 831 F. Supp. 605, (N.D. Ill. 1993).

<sup>50</sup> *Id.* at 606.

<sup>51</sup> *Id.* at 608. The Corps and the court had good reason to be concerned. The proposal was coming on the heels of the 1980s, a decade that was the “zenith of powerboat building.” *See, e.g.*, <https://www.tradeonlytoday.com/industry-news/40-years-of-ups-and-downs> (citing Don Johnson of the blockbuster 1980s TV show *Miami Vice* as “poster child for the fast, exciting boating lifestyle of the 1980s.”).

<sup>52</sup> *Fox Bay Partners*, 831 F. Supp. at 608–609.

<sup>53</sup> *Fox Bay Partners*, 831 F. Supp. at 610. The court also apparently credited the fact that there was substantial public opposition to the project as supportive of the Corps’ negative public interest finding., although it did not cite to any authority listing public opposition as a factor the Corps should consider. *See id.*

<sup>54</sup> *United States v. Mango*, 199 F.3d 85, 92–94 (2d Cir. 1999).

<sup>55</sup> *Mango*, 199 F.3d at 88.

Circuit agreed with the Corps' first argument, but, in a footnote with no legal analysis, rejected the Corps' public interest argument, saying "[a]lthough the regulation refers to the 'proposed activity,' the activity the Secretary permits pursuant to Section 1344 is the discharge."<sup>56</sup> Interestingly, and conveniently, the Second Circuit omitted the phrase that immediately follows "the proposed activity" in the public interest regulation, which is "and its intended use." This phrase alone shows the Corps intended, as the agency argued in *Mango*, that its review include environmental impacts beyond the discharge itself in determining whether a proposed project was contrary to the public interest.<sup>57</sup>

Not surprisingly, the Corps in *Mango*, in justifying its exercise of broad authority under the public interest regulations, relied heavily on *United States v. Alaska*, a case under the Rivers and Harbors Act of 1899 ("RHA"), in which the Supreme Court established the Corps' authority to regulate aspects of a private project beyond the strict confines of its statutory/regulatory jurisdiction.<sup>58</sup> In *United States v. Alaska*, the state of Alaska challenged the Corps' decision to include a condition in Section 10 permit under the RHA that was unrelated to navigation, which is the basis of the Corps' jurisdiction under the RHA.<sup>59</sup> The city of Nome, Alaska sought the RHA permit to build port facilities extending into Norton Sound. Because the construction of the port facilities would cause an artificial accretion of the legal coastline, the Secretary of the Interior filed an objection to Nome's RHA permit because the extension of the coastline seaward would affect federal mineral leasing offshore of Alaska since "the state-federal boundary, as well as international boundaries, are measured from the coastline or baseline."<sup>60</sup> To address this issue, the Corps included a condition in Nome's RHA permit requiring Alaska to submit a disclaimer of

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<sup>56</sup> *Mango*, 199 F.3d at 93, n.7 (emphasis in original). Rather the Second Circuit took the view that CWA Section 404 permit conditions are valid if they are reasonably related to the discharge, whether directly or indirectly. *Id.* at 93.

<sup>57</sup> See also *Center for Biological Diversity v. U.S. Army Corps of Engineers*, 941 F.3d 1288, 1315 (11th Cir. 2019) (J. Martin dissenting) (emphasizing the import of the phrase "and its intended use").

<sup>58</sup> *United States v. Alaska*, 503 U.S. 569 (1992); see also generally Brief for the United States in *Mango*, 1998 WL 34079879 (June 26, 1998). It does not appear that the Corps relied on *Alaska* in *Fox Bay Partners* as it was not mentioned in the opinion, but the Supreme Court had only decided the case a year earlier than the *Fox Bay Partners* decision.

<sup>59</sup> *United States v. Alaska*, 503 U.S. at 574–75.

<sup>60</sup> *Id.* at 572–73.

rights to any submerged lands that Alaska could claim as a result of the extended coastline.<sup>61</sup> Alaska agreed to the disclaimer so the port facilities construction could move forward, but reserved its right challenge the permit condition in court should there be a dispute over the accreted submerged lands in the future.<sup>62</sup>

Four years later, a lease sale in Norton Sound included approximately 730 acres of disputed submerged lands and the parties commenced litigation over the validity of the RHA permit disclaimer condition.<sup>63</sup> The Supreme Court, in a unanimous decision, held the Corps had the authority to condition Nome's RHA permit on Alaska's disclaimer, even though the disclaimer was unrelated to issues of navigation.<sup>64</sup> Pursuant to *Chevron* principles, the Court examined the RHA's language, its prior decisions interpreting the statute's language and the Corps' "longstanding construction" of Section 10, which that agency administers.<sup>65</sup> The Court found the plain language of Section 10 was "quite broad" and flatly prohibited any obstruction to navigation in waters of the United States without a RHA permit from the Corps, and provided no criteria to govern the Corps' permit decision.<sup>66</sup> Accordingly, the Court found the RHA gave the Corps unlimited discretion to grant or deny a permit for a navigation-obstructing structure.<sup>67</sup>

Like the RHA, the CWA contains a flat prohibition on discharges into navigable waters except in compliance with the permit requirement of Section 404.<sup>68</sup> And like RHA Section 10, CWA Section 404 uses the discretionary language—"may issue permits"—to describe the Corps authority.<sup>69</sup> However, unlike RHA Section 10, CWA Section 404 does contain some criteria that

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<sup>61</sup> *Id.* at 573.

<sup>62</sup> *Id.* at 573.

<sup>63</sup> *Id.* at 574–75.

<sup>64</sup> *Id.* at 590.

<sup>65</sup> *Id.* at 575.

<sup>66</sup> *Id.* 503 U.S. at 576.

<sup>67</sup> *Id.* at 576; *see also United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655 (1973) (applying a similarly broad construction to Section 13 of the RHA, which provided that the Corps "may permit the deposit" of refuse matter "whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby") (citing 33 U.S.C. § 407).

<sup>68</sup> 33 U.S.C. § 1311(a).

<sup>69</sup> *Id.* § 1344(a).

inform the Corps' discretion, known as the 404(b) Guidelines.<sup>70</sup> Despite the presence of the 404(b) Guidelines, the Corps consistently has interpreted CWA Section 404 to provide the same basis of authority to consider a broad range of public interest factors as the Supreme Court recognized the agency had under the RHA.<sup>71</sup> As the agency authorized by Congress to administer the CWA Section 404 permit program, to the extent there is any ambiguity in the CWA statutory language, courts should afford the Corps' interpretation deference under *Chevron* principles.<sup>72</sup>

#### IV. THE CORPS' NEPA SCOPE OF REVIEW REGULATION

The Corps' NEPA scope of review regulations direct the Corps, in delineating the scope of its NEPA analysis, to determine “those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review.”<sup>73</sup> When does the Corps have sufficient control and responsibility over a portion of a private project to expand its NEPA review to that portion? According to the regulation, it is when “Federal involvement is sufficient to turn an essentially private action into a Federal action.”<sup>74</sup> This is sometimes referred to as the Corps “federalizing” a project, or the project being “federalized,”<sup>75</sup> which inevitably for private projects (and perhaps for courts) carries a negative connotation.<sup>76</sup> In reality, it simply means that the environmental effects of those portions of the project subject to federal control and

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<sup>70</sup> *Id.* § 1344(b); *see also* 40 C.F.R. § 230.

<sup>71</sup> In 1988, after the District of Massachusetts federal court decided *Mall Properties, Inc. v. Marsh*, 672 F. Supp. 561 (D. Mass. 1987), which reversed the Corps' denial of a CWA Section 404 permit based largely on socioeconomic factors, the Corps issued guidance in which the agency explained its approach to the public interest review under the RHA and CWA. *See* U.S. Army Corps of Engineers, Regulatory Guidance Letter 88-11 (August 22, 1988, expires December 31, 1990). In its RGL, the Corps explained that it considered its Section 10 authority “to allow consideration of a broad range of public interest factors, including socioeconomic factors and have similarly applied this concept to permit decisions under Section 404 of the CWA.” *Id.* at 1. Despite the district court's decision, the Corps “still believe[d] that [it] should consider a broad range of public interest factors when making permit decisions under both authorities,” *id.* at 1, but that it should be mindful of how it weighed the factors. *Id.* at 1-2 (“More strongly related indirect impacts should be given heavy consideration, while more “attenuated” impacts should be considered, but less heavily.”).

<sup>72</sup> *See, e.g., White Oak Realty, LLC v. United States Army Corps of Engineers*, 746 Fed. Appx. 294, 297-298 (5th Cir. 2018).

<sup>73</sup> 33 C.F.R. § 325, App'x B(7)(b)(1).

<sup>74</sup> *Id.*

<sup>75</sup> *See e.g., City of Bos. v. Volpe*, 464 F.2d 254, 259 (1st Cir. 1972).

<sup>76</sup> Interestingly, the same term is not used when the Corps' public interest review goes beyond the four walls of the Corps' dredge and fill permit, even though the outcome is similar—the Corps is evaluating portions of a private project do not necessarily involve impacts to aquatic resources.

responsibility that rise to the level of “sufficient” in the Corps’ mind must be analyzed pursuant to the agency’s NEPA obligations.<sup>77</sup> If there is not sufficient federal control or responsibility, the Corps’ position is that it is free to ignore environmental effects of those portions of the project and limit its NEPA analysis to the specific activity (i.e., wetland fill) requiring the Corps permit.<sup>78</sup>

The regulations then set forth four factors to determine which portions of the project (or potentially the entire project) meet the sufficient control and responsibility test: (1) “[w]hether or not the regulated activity comprises ‘merely a link’ in a corridor type project”; (2) “[w]hether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity”; (3) “[t]he extent to which the entire project will be within the Corps jurisdiction”; and (4) “[t]he extent of cumulative Federal control and responsibility.”<sup>79</sup> Under the fourth factor the Corps is supposed to analyze the involvement of other federal agencies to determine if cumulatively, “the environmental consequences of the additional portions of the projects are essentially products of Federal financing, assistance, direction, regulation, or approval.”<sup>80</sup> The Corps also is supposed to examine whether other federal agencies were required to take action under separate environmental review laws, such as the Endangered Species Act or the National Historic Preservation Act.<sup>81</sup>

Following the four factors, the Corps provides some examples for when the Corps scope of NEPA analysis should extend to upland sites outside the Corps’ CWA regulatory boundaries, and of what the regulations mean by “merely a link” (first factor), especially in linear transmission

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<sup>77</sup> 33 C.F.R. § 325, App’x B(7)(b)(1).

<sup>78</sup> This is so even though the agency may simultaneously be reviewing such non-jurisdictional portions of the project pursuant to its CWA public interest review authority. *See e.g., Residents for Sane Trash Solutions v. COE*, 31 F.Supp.3d 571, 588, 590 (S.D.N.Y. July 10, 2014) (holding that the Corps permissibly limited the scope of its NEPA analysis to dredge and fill activities and that it properly considered environmental effects beyond dredge and fill activity in its public interest review under the CWA).

<sup>79</sup> 33 C.F.R. § 325, App’x B(7)(b)(2).

<sup>80</sup> 33 C.F.R. § 325, App’x B(7)(b)(2)(iv)(A).

<sup>81</sup> 33 C.F.R. § 325, App’x B(7)(b)(2)(iv)(B).

projects.<sup>82</sup> While these examples appear helpful at first glance, the Corps' uneven application of them has only added to the confusion around this analysis.<sup>83</sup>

Finally, almost hidden after the examples and not even given the courtesy of its own subsection number is a crucial sentence: "In all cases, the scope of analysis used for analyzing both impacts and alternatives should be the same scope of analysis used for analyzing the benefits of a proposal."<sup>84</sup> This provision is good policy—to the extent the Corps is balancing impacts and benefits, as the agency might when evaluating alternatives under NEPA, the scope of the analysis should be the same. This prevents the Corps from putting a thumb on the scale of its analysis by focusing on the project-wide benefits while only considering impacts to its narrow regulatory jurisdictional impacted areas. This sentence should sound familiar—it is almost identical to the requirement in the Corps' public interest review regulation, discussed above, which says: "The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments."<sup>85</sup> However, in the course of its NEPA reviews, the Corps appears to pretend this sentence does not exist. Few courts have addressed this provision so judicial interpretation is limited.<sup>86</sup> For the purposes of this Article, we will refer to it as "the forgotten sentence."<sup>87</sup>

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<sup>82</sup> 33 C.F.R. § 325, App'x B(7)(b)(3).

<sup>83</sup> The case that established the "merely a link" principle was *Winnebago Tribe of Nebraska v. Ray*, which involved a single river crossing of a transmission line that stretched 67 miles. 621 F.2d 269, 270 (8th Cir. 1980); *see also* 53 FR 3,120 (Feb. 3, 1988) (discussing Corps' adoption of "merely a link" based on *Winnebago*). The Corps has interpreted its own regulation to expand this single link example to encompass projects that cross hundreds of jurisdictional waters. *See, e.g., Sierra Club v. U.S. Army Corps*, 997 F.3d 395, 402–03 (1st Cir. 2021) (upholding denial of preliminary injunction involving Corps-issued CWA Section 404 permit for transmission line project that crossed hundreds of wetlands and vernal pools where environmental groups argued the Corps' scope of NEPA analysis was too narrow).

<sup>84</sup> 33 C.F.R. § 325, App'x B(7)(b)(3). Although this sentence is not an "example" it oddly appears at the end of the 7(b)(3) *Examples* subsection.

<sup>85</sup> 33 C.F.R. § 320.4(a)(1).

<sup>86</sup> *See, e.g., Nat. Res. Def. Council, Inc. v. U.S. Army Corp of Engineers*, No. 1:09 CV 588, 2010 WL 1416681, at \*6 (N.D. Ohio Mar. 31, 2010) (bifurcating public interest review and NEPA environmental effect analysis to hold that the Corps did not violate this provision even though the analysis was conducted in the same document).

<sup>87</sup> *Cf. Lance Wood, Proposed Revisions to Improve and Modernize CEQ's NEPA Regulations*, 49 *Env'tl. L. Rep. News & Analysis* 10529 (2019) (discussing the Corps' NEPA regulations and scope of analysis without discussing this sentence).

The “forgotten sentence” derives from a Fifth Circuit case, *Sierra Club v. Siegler*, so that case is instructive for discerning the Corps’ intent.<sup>88</sup> *Siegler* involved the private construction of a deepwater port and crude oil distribution system in Texas.<sup>89</sup> After producing an EIS, the Corps issued five permits authorizing work on the project, including a CWA Section 404 permit. The Sierra Club argued the scope of the EIS was too narrow because it failed to consider the environmental impacts of the bulk commodities activities associated with the channel deepening, while at the same time attributing substantial benefits to those activities.<sup>90</sup> Some of the bulk commodities benefits the Corps touted in the EIS included, among others:

growth in commodity shipments aiding U.S. agriculture; greater efficiency in handling commodities; a reduced U.S. trade deficit; higher employment during construction and operation of these projects with minimal population growth and little impact on local services, housing, and the infrastructure; income and taxes from the projects beneficial to the local economy.<sup>91</sup>

Left out of the EIS were the environmental impacts associated with the benefits listed above, including increased risk of collision and oil spill, pollution from the additional industrial development, fire and explosion hazards presented by the commodities terminals, and general socio-economic costs.<sup>92</sup> Accordingly, the Fifth Circuit remanded the EIS to the Corps to correct its deficiencies and reconsider the CWA permit in light of the modified EIS. In doing so, the court noted: “The [EIS] is not deficient because it includes economic benefits, *but because it excludes environmental costs*. That exclusion strikes at the heart of NEPA.”<sup>93</sup>

Based on this decision, in which a Circuit Court is criticizing the Corps for taking too narrow a view of the scope of its NEPA analysis when it comes to adverse impacts, the Corps decided to add the “forgotten sentence” to its NEPA scope of analysis regulations a few years

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<sup>88</sup> 695 F.2d 957 (5th Cir. 1983); *see also* 53 Fed. Reg. 3120-01, 3122 (Feb. 3, 1988) (characterizing the provision as an “important requirement”).

<sup>89</sup> *Id.* at 961.

<sup>90</sup> *Id.* at 975.

<sup>91</sup> *Id.* at 976.

<sup>92</sup> *Id.* at 976.

<sup>93</sup> *Id.* at 980 (citing *Chelsea Neighborhood Association v. U.S. Postal Service*, 516 F.2d 378 (2d Cir.1975) (emphasis added)).

later.<sup>94</sup> At least one commenter at the time was prescient about the “forgotten sentence’s” intersection with the Corps’ public interest review and what that should mean for the Corps in the future:

Finally, the provision notes that the scope of analysis should be the same for project impacts as for project benefits. This is a particularly significant requirement in the context of the Corps’ public interest review criteria for 404 permits, which require, in general terms, that the benefits to the public outweigh the costs associated with the activity permitted. Presumably, these benefits derive from the project--such as the power produced, the jobs created, the taxes paid--rather than from the pipe, dock or other facility requiring the permit. *If this reciprocity language actually means what it says, District Engineers may be preparing more EISs than the authors of Appendix B envisioned. If not, then this language must mean something other than equal consideration of benefits and impacts. But what?*<sup>95</sup>

As the analysis of NEPA litigation over CWA Section 404 permits below shows, Corps District Engineers are not doing more EISs.<sup>96</sup> Given the *Seigler* origin of the reciprocity language, it clearly means what it says. How then, have the Corps and the courts been answering Professor Parenteau’s prophetic question? First, we must briefly examine how the Corps has been applying its NEPA scope of analysis regulation.

#### V. THE CORPS’ APPLICATION OF ITS NEPA SCOPE OF ANALYSIS REGULATION

The Corps’ scope of analysis determination has significant consequences for a project and the affected public and environment. When the Corps interprets its scope of analysis narrowly to only include its jurisdictional reach, the likely result under NEPA is an Environmental Assessment and a Finding of No Significant Impact (EA/FONSI) by the Corps rather than an EIS.<sup>97</sup> This is a less robust form of environmental review than an Environmental Impact Statement (“EIS”).<sup>98</sup>

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<sup>94</sup> 53 Fed. Reg. 3120-01, 3122 (Feb. 3, 1988).

<sup>95</sup> Parenteau, *supra* note 14, at 754 (emphasis added).

<sup>96</sup> Insert here # of EISs v. # of total individual 404 permits

<sup>97</sup> See, e.g., *Ohio Valley Env’t Coal., Inc. v. U. S. Army Corps of Engineers (“OVEC”)*, 828 F.3d 316, 321 (4th Cir. 2016) (finding the Corps NEPA analysis and EA/FONSI sufficient where the Corps took a narrow view of its scope of analysis).

<sup>98</sup> Among other differences between an EIS and an EA, an EIS must discuss all possible effects of the proposed project and reasonable alternatives while an EA is only required to document that there are no significant impacts for the

Importantly, neither the CEQ regulations nor the Corps' NEPA regulations require the Corps to publish a draft EA for public comment, while releasing a draft EIS for public comment is mandatory.<sup>99</sup> This means the affected public often has no opportunity to weigh in on the Corps' environmental analysis, examination of alternatives, or final mitigation determinations of a project if the Corps takes a narrow view of the scope of its NEPA review. In short, EAs, even lengthy ones, are no substitute for EISs because the documents serve very different purposes.<sup>100</sup>

This is borne out in the case law. Since 1988, when the Corps promulgated its NEPA scope of analysis regulations, 30 cases appear in Westlaw analyzing the Corps' application of its regulation.<sup>101</sup> In 29 cases, the Corps took a narrow view of the scope of its environmental analysis. In 28 out of the 29 narrow cases, the Corps' narrow scope of analysis resulted in the agency not performing an EIS for the proposed project.<sup>102</sup> Thus, in 28 out of 30 total cases, the public had no opportunity to comment on the Corps' environmental analysis of projects that, in some cases, undoubtedly were going to have significant impacts on the environment.<sup>103</sup> In applying the arbitrary and capricious standard under the Administrative Procedure Act, courts upheld the Corps' decisions to narrow its analysis in 20 out of 29 cases.<sup>104</sup>

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proposed project. *See Southeast Alaska Conservation Council v. United States Forest Service*, 443 F.Supp.3d 995, 1012–13 (D. Alaska 2020) (“An EA is meant to determine whether a proposed action will have a significant impact on the environment, such that an EIS is necessary. In contrast, an EIS must compare the environmental impacts of different alternatives, not just determine whether environmental impacts will occur.”); *see also Sierra Club v. Marsh*, 769 F.2d 868, 875 (1st Cir. 1985) (“an EA and an EIS serve very different purposes”).

<sup>99</sup> Compare 40 C.F.R. 1503.1 (mandatory public comment on draft EISs) with 40 C.F.R. 1501.5(e) (requiring agencies to involve the public “to the extent practicable” in the preparation of EAs).

<sup>100</sup> *See Sierra Club v. Marsh*, 769 F.2d at 875 (e.g., “those outside the agency have less opportunity to comment on an EA than on an EIS.”).

<sup>101</sup> NOTE for *Environmental Law* editors. The authors can provide a spreadsheet of these cases as an appendix if you think there would be value in that.

<sup>102</sup> In most instances, the Corps issued EA/FONSIs for the projects. In some cases, the Corps determined that, because the project was going forward under a Nationwide Permit rather than an individual CWA Section 404 permit, no additional NEPA analysis was necessary. *See, e.g., Sierra Club v. Bostick*, 539 Fed.Appx. 885 (10th Cir. 2013). In the one case in which the Corps produced an EIS, the court found the EIS deficient due to its limited scope. *See Sierra Club v. Van Antwerp*, 709 F.Supp.2d 1254 (S.D. Fla. 2009).

<sup>103</sup> *See, e.g., Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 35–36 (D.C. Cir. 2015) (upholding Corps' permitting related to 593-mile oil pipeline project that would likely result in harm to two federally endangered species, among other environmental impacts).

<sup>104</sup> Perhaps the Corps was smarting from a district court decision that came out just prior to its NEPA scope of analysis regulations becoming effective. In *Mall Properties, Inc. v. Marsh*, the Corps took a broad view of the scope of its NEPA analysis in evaluating a CWA Section 404 permit application related to the development of a proposed mall in

Courts' reasoning for upholding the Corps' narrow NEPA analyses varies somewhat depending on the facts of each case, but several themes have emerged. First and foremost, courts seemed willing to accept the idea that the Corps' analysis should be limited to only impacts within its regulatory jurisdiction (i.e., the filling of wetlands, which are waters of the United States).<sup>105</sup> However, neither NEPA nor CEQ's regulations implementing NEPA nor the Corps' NEPA regulations draw such a bright line. To the contrary, all of those authorities explicitly contemplate the Corps exercising its environmental review authority beyond waters of the United States in certain circumstances.<sup>106</sup> Finally, while the filling of wetlands may *trigger* the Corps' jurisdiction, the agency's public interest review regulation establishes that its regulatory jurisdiction under the CWA is far broader than the wetlands themselves. As one district court pointedly noted:

To suggest that the Corps has no jurisdiction to consider the environmental impacts of the fragmentation of the forest, even though it has jurisdiction to consider the impacts of the wetlands which co-exist underneath those very trees, is asinine on its face, and an impermissible abdication of a federal agency's duties under NEPA.<sup>107</sup>

Other courts have relied on the theory that the Corps cannot be expected to analyze extra-regulatory jurisdiction environmental impacts because those impacts are outside of the Corps' area

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Connecticut. 672 F. Supp. 561 (D. Mass. 1987); Wood, *supra* note 87 at 15036. But *Mall Properties* is arguably an outlier case, *see infra* X-X, that should not drive Corps' scope of review policy.

<sup>105</sup> *See, e.g., Ohio Valley Env. Coalition v. U.S. Army Corps of Engineers*, 828 F.3d 316 (4th Cir. 2016) ("the Corps' jurisdiction relates only to fill activities associated with surface coal mining"); *see also CBD*, 941 F.3d at 1295 ("it was sensible for the Corps to draw the line at the reaches of its own jurisdiction").

<sup>106</sup> *See, e.g.* 33 C.F.R. § 325, App'x B(7)(b)(2) (the purpose behind determining the scope of the Corps' analysis is to evaluate whether the Corps has "control and responsibility for portions of the project *beyond the limits of Corps jurisdiction*") (emphasis added); *see also* H.R.Conf.Rep. No. 91-765/H.R.Conf.Rep. No. 91-765, 91st Cong., 1st Sess. 10, reprinted in 1969 U.S.Code Cong. & Admin.News 2751, 2767, 2770 (NEPA legislative history explaining no agency may "utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.").

<sup>107</sup> *Stewart v. Potts*, 996 F.Supp. 668, 681-83 (S.D.Tex.1998); *see also Save our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1121-24 (9th Cir. 2005) (upholding district court's preliminary injunction against the Corps' issuance of a CWA 404 permit for a planned residential development when "the Corps had improperly constrained its NEPA analysis to the washes, rather than considering the development's effect on the environment as a whole."); *see also White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033 (9th Cir. 2009) (distinguishing between the Corp's jurisdiction under the CWA and the scope of its environmental analysis under NEPA noting the "scope of analysis [under NEPA] may be expanded well beyond the waters that provide the initial [CWA] jurisdictional trigger.").

of expertise.<sup>108</sup> This justification also has no basis in statutory or regulatory authorities. NEPA does not excuse action agencies from analysis of their projects' environmental impacts simply because those impacts are not sufficiently within the action agencies' expertise. Rather CEQ regulations contemplate the action agency acquiring technical information needed to evaluate the project's impacts from other agencies and/or consultants that possess such expertise.<sup>109</sup>

Finally, the Corps also has claimed that its narrowed scope of review is justified because other portions of the project are primarily the responsibility of other federal or state agencies.<sup>110</sup> While this argument has some merit, especially when federalism principles are considered, it does not allow the Corps to abdicate its obligations under NEPA.<sup>111</sup> A more appropriate approach would be for the Corps to broaden the scope of its NEPA analysis to match its CWA public interest review—especially for projects where the Corps is evaluating the benefits of the completed project as a whole—and then to rely on, but verify, environmental reviews of other federal agencies and states when appropriate.<sup>112</sup>

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<sup>108</sup> See, e.g., *CBD*, 941 F.3d at 1296 (“Because the Corps does not generally regulate phosphogypsum, it has no subject-matter expertise in that area.”); see also *Mall Properties, Inc.*, 672 F. Supp at 573 (questioning the Corps’ exercise of economics expertise).

<sup>109</sup> See 42 U.S.C. 4332(C) (requiring action agencies to consult with other federal agencies with “special expertise”); see also 40 C.F.R. § 1501.6 (“Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition, any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency.”). One district court found the Corps’ contention that its scope of analysis was properly limited because the non-jurisdictional impacts associated with the Corps’ action were “within the expertise and jurisdictions of different governmental agencies” to be baseless. See *Choate v. U.S. Army Corps of Engineers*, No. 4:07-CV-01170-WRW 2008 WL 4833113, \*8 (E.D. Ark. Nov. 5, 2008).

<sup>110</sup> See, e.g., *Ohio Valley Env. Coalition v. U.S. Army Corps of Engineers*, 828 F.3d at 195 (finding the Corps justified in not evaluating upland impacts of surface mining because Congress delegated “exclusive jurisdiction over the regulation of surface coal mining and reclamation operations” to the states in the Surface Mining Control and Reclamation Act), citing 30 U.S.C. § 1253 (2000).

<sup>111</sup> See 40 C.F.R. 1506.2(b) (requiring action agencies to cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements....); see also 33 C.F.R. § 320.1(a)(5) (2008) (“The Corps believes that state and federal regulatory programs should complement rather than duplicate one another.”); 33 C.F.R. § 337.1 (2008) (noting that, in issuing public notice for projects involving the discharge of fill material into jurisdictional waters, “[d]istrict engineers are encouraged to develop procedures to avoid unnecessary duplication of state agency procedures”). But the Corps bears the ultimate responsibility for the scope and content of its NEPA analysis, including verifying information obtained by third parties that forms the basis of its decision. See, e.g., *Save the Bay v. U.S. Army Corps of Engineers*, 610 F.2d 322, 325 (5th Cir. 1980) (“Perhaps the most basic requirement of NEPA is that all federal agencies make an Independent environmental assessment of the proposed action.”).

<sup>112</sup> See 33 C.F.R. § 325, App’x B(7)(b)(3) (“The district engineer should, whenever practicable, incorporate by reference and rely upon the reviews of other Federal and State agencies.”).

## VI. THE CORPS' ARTIFICIAL WALL BETWEEN ITS PUBLIC INTEREST AND NEPA REVIEWS

To fulfill its public interest review obligation, the Corps must balance “the benefits which reasonably may be expected from the proposal . . . against [the proposal’s] reasonably foreseeable detriments.”<sup>113</sup> In doing so, the Corps necessarily must and always does look at the expected benefits of the completed project.<sup>114</sup> This review happens contemporaneously with the Corps’ initial NEPA review—an Environmental Assessment (“EA”)—and the Corps’ NEPA regulations state the EA “should normally” be combined in the same decision document with the public interest review, which the Corps often does.<sup>115</sup> And remember the forgotten sentence—the Corps’ NEPA regulations also mandate “[i]n *all* cases, the scope of analysis for analyzing both impacts and alternatives should be the same scope of analysis used for analyzing the benefits of a proposal.”<sup>116</sup>

Despite the obvious temporal, analytical, and documentary overlap, the Corps has attempted, usually successfully when it has been challenged in court, to silo these two related reviews, which allows the Corps to keep its scope of NEPA review narrow. The more narrow NEPA review, in turn, often allows the Corps to issue a Finding of No Significant Impact (“FONSI”) after an EA rather than undertaking a more rigorous and searching EIS, which would also require more opportunities for public participation.<sup>117</sup> The irony of the Corps’ artificial wall is that the basis for its NEPA scope of analysis is that the agency’s review should not stray too far from its regulatory jurisdiction under the CWA, while at the same time it is undertaking a broader analysis of environmental effects under its public interest review regulation promulgated pursuant to its authority under the same statute.

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<sup>113</sup> 33 C.F.R. 320.4(a)(1).

<sup>114</sup> *But see* Mango, 199 F.3d at 93, n.7 (criticizing this approach). Query, however, what benefits from the isolated act of filling wetlands could ever be expected to accrue? And even if some benefits could be imagined, given the importance of preserving wetlands and their functions and values, how could those imagined benefits ever outweigh the reasonably foreseeable detriments? Thus, in order for any project to pass muster under the public interest review, the Corps must look at the expected benefits of the entire completed project, and the long list of factors unrelated to aquatic resources in the public interest review regulation confirms as much.

<sup>115</sup> 33 C.F.R. § 325 Appx. B(7)(a). *See e.g., Nat. Res. Def. Council, Inc. v. U.S. Army Corp of Engineers*, No. 1:09 CV 588, 2010 WL 1416681, at \*6 (N.D. Ohio Mar. 31, 2010).

<sup>116</sup> 33 C.F.R. § 325 Appx. B(7)(a) (emphasis added).

<sup>117</sup> *See* 40 C.F.R. 1503.1.

Environmental groups have tried pointing out the irony of the Corps' repudiation of its own reciprocity regulation to the agency, with little success in court. In a pair of cases related to surface mining the Fourth and Sixth Circuits, at the urging of the Corps, the courts adopted the Corps' narrow view of its own authority to evaluate a project's environmental effects under NEPA.<sup>118</sup> In so doing, the courts erected a wall between the Corps' NEPA review and its public interest review that is not found in *Seigler* or in the Corps' regulations.

In *Kentuckians for the Commonwealth v. U.S. Army Corps of Engineers*, the Sixth Circuit examined a CWA Section 404 permit and related NEPA analysis for a surface mining operation in Kentucky.<sup>119</sup> Plaintiffs challenged the Corps' limited scope of its NEPA analysis, and specifically that the Corps "violated its NEPA regulations by considering the positive economic impacts of the overall mining project without considering the public health impacts of the overall mining operation."<sup>120</sup> The court acknowledged the "forgotten sentence" and even cites to *Seigler*, but then provided the Corps with a convenient workaround by finding the Corps had only analyzed the positive economic impacts of the overall mining project in the CWA public interest review portion of its decision document, not the NEPA portion.<sup>121</sup> The court contended the plaintiffs were conflating the substantive decision about whether or not to grant the CWA Section 404 permit with the procedural requirements under NEPA.<sup>122</sup> But this ignores the fact that NEPA is the statute Congress passed to require federal agencies to take "a hard look" at all impacts of "major Federal actions significantly affecting the quality of the human environment,"<sup>123</sup> and therefore arguably

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<sup>118</sup> *Kentuckians for the Commonwealth v. U.S. Army Corps of Engineers*, 746 F.3d 698 (6th Cir. 2014); *Ohio Valley Environmental Coalition ("OVEC") v. U.S. Army Corps of Engineers*, 28 F.3d 316, 318 (4th 2016).

<sup>119</sup> 746 F.3d 698 (6th Cir. 2014)

<sup>120</sup> *Kentuckians*, 746 F.3d at 711.

<sup>121</sup> *Kentuckians*, 746 F.3d at 712 (finding the Corps free to "limit the scope of its review in one part and expand it in another, as each regulatory task requires").

<sup>122</sup> *Kentuckians*, 746 F.3d at 712.

<sup>123</sup> 42 U.S.C. § 4332. NEPA's plain language makes clear that the "human environment" should be interpreted broadly especially given the human race's "profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances ...." *Id.* at § 4331. For a recent criticism of how agencies and the courts have been applying an overly cramped interpretation of the "human environment" that is inconsistent with Congress's intent and NEPA's language, see Jones, *Humans Long Ignored: Revisiting NEPA's Definition of "Human Environment" in the Era of Black Lives Matter*, 32 VLELJ 1 (2021).

the scope of the Corps' review under NEPA should be *broader* than its review under the CWA. In any event, the Sixth Circuit gave no reason and cited no authority for why the distinction between an agency's procedural obligations and its substantive duties matters when it comes to the *scope* of its review, especially when the language defining that scope is almost identical.<sup>124</sup> The outcome may be different—NEPA only requires the Corps to consider the environmental consequences of its actions, but does not mandate a particular outcome, while a finding that a CWA Section 404 permit is contrary to the public interest should result in a denial of that permit—but the different outcomes should not drive the scope of the Corps' review.

In *Ohio Valley Environmental Coalition* (“OVEC”) v. *U.S. Army Corps of Engineers*, environmental groups challenged several Corps-issued CWA Section 404 permits that allowed discharge of fill into West Virginia streams in connection with surface coal mining, but did not evaluate associated health impacts to local communities.<sup>125</sup> The Fourth Circuit, relying on earlier circuit precedent,<sup>126</sup> held the Corps' narrowly-scoped NEPA review, which resulted in an EA/FONSI, was compliant because surface coal mining was primarily regulated by West Virginia pursuant to the Surface Mining Control and Reclamation Act (“SMCRA”) and the Corps had no jurisdiction to authorize surface mining.<sup>127</sup> OVEC pointed out that the Corps had failed to abide by the forgotten sentence in considering the economic benefits of the whole project while limiting its analysis of environmental effects to the CWA jurisdictional fill. In a footnote, the Fourth Circuit dismissed this argument with no analysis and citing to no authority.<sup>128</sup> Instead, like the Sixth Circuit, the Fourth Circuit adopted the Corps' artificial wall between its NEPA analysis and its public interest review.<sup>129</sup>

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<sup>124</sup> Compare 33 C.F.R. § 325, App. B with 33 C.F.R. § 320.4(a).

<sup>125</sup> 828 F.3d 316, 318 (4th 2016).

<sup>126</sup> *Ohio Valley Environmental Coalition v. Aracoma Coal Company*, 556 F.3d 177 (4th Cir. 2009).

<sup>127</sup> *OVEC*, 828 F.3d at 323.

<sup>128</sup> *OVEC*, 828 F.3d at 324, n.6.

<sup>129</sup> *OVEC*, 828 F.3d at 324, n.6 (finding 33 C.F.R. pt. 325, App. B., § 7(b)(3) “inapplicable because the Corps' discussion of economic benefits occurred not in its NEPA analysis, but rather as part of its section 404 public interest review.”) (internal quotations omitted). The Sixth Circuit also rejected, albeit citing no authority, OVEC's argument that the Corps was required to evaluate public health effects beyond the discharge of fill material, for the same reason—that it required the Corps to regulate surface mining. 28 F.3d at 324. Notably, the Corps in its brief selectively

The most thorough analysis, however,—and best example of the ongoing tension the Corps has created—of the Corps’ “forgotten sentence” appears in *Center for Biological Diversity v. U.S. Army Corps of Engineers* (“*CBD*”).<sup>130</sup> In *CBD*, a Florida fertilizer manufacturer engaged in phosphate mining sought a CWA Section 404 permit for discharging fill into wetlands.<sup>131</sup> Once the phosphate ore was extracted, it was transported to a fertilizer plant for processing. That process generated a radioactive byproduct waste called phosphogypsum.<sup>132</sup> Due to its radioactivity, phosphogypsum “must be stored and left to ‘weather’ in . . . large open-air ‘stacks’ that are hundreds of acres wide and hundreds of feet tall.”<sup>133</sup> The Corps, taking the narrow view of its scope of NEPA review, did not analyze the “downstream” environmental effects of phosphogypsum production and storage.<sup>134</sup>

In upholding the Corps’ scope of NEPA review, the Eleventh Circuit’s majority opinion acknowledged “the forgotten sentence” but then ignored its plain meaning: “The scope of the benefit of a project cannot moreover, always define the scope of the agency’s consideration.”<sup>135</sup> In the majority’s view, the Corps’ discussion of its NEPA analysis of one of the benefits of the project—the export of finished phosphate products and fertilizer through the Port of Tampa each year—was simply an explanation of “why phosphate ore is mined in the first place.”<sup>136</sup> The majority expressed a slippery slope concern: “how would the Corps explain the project or consider its public benefit without having to consider all manner of downstream effects way beyond the

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cited to its own regulation, omitting the phrase “and its intended use” after “proposed activity.” 2015 WL 672420 (C.A.4) (Appellate Brief), at \*31; see also *Water Works & Sewer Board of City of Birmingham v. U.S. Army Corps of Engineers*, 983 F. Supp 1052, 1607 (N.D. Ala. 1997) (emphasizing “proposed activity” but not “its intended use” when quoting the public interest review regulation to support a narrow interpretation of the scope of that review).

<sup>130</sup> 941 F.3d 1288, 1309–11 (11th Cir. 2019).

<sup>131</sup> *CBD*, 941 F.3d at 1292.

<sup>132</sup> *CBD*, 941 F.3d at 1293–94.

<sup>133</sup> *CBD*, 941 F.3d at 1294.

<sup>134</sup> *CBD*, 941 F.3d at 1294.

<sup>135</sup> *CBD*, 941 F.3d at 1301. *But see* 33 C.F.R. § 325 Appx. B(7)(a) (“[i]n all cases, the scope of analysis for analyzing both impacts and alternatives should be the same scope of analysis used for analyzing the benefits of a proposal.”) (emphasis added).

<sup>136</sup> *CBD*, 941 F.3d at 1301.

reasonable scope of consideration?”<sup>137</sup> Ultimately, the majority apparently found the Corps’ “forgotten sentence” ambiguous and deferred to what in the court’s view was the Corps’ reasonable interpretation.<sup>138</sup>

By contrast, the dissent gave meaning to the plain meaning of the Corps’ “forgotten sentence.” Judge Martin found that in its NEPA analysis, the Corps “sang the praises of the fertilizer industry as a reason to award [the manufacturer] a § 404 permit, yet it failed to consider the industry’s known environmental impacts—like phosphogypsum.”<sup>139</sup> The dissent reasoned, based on the Corps’ NEPA scope of analysis regulation, that the Corps “cannot consider the broad downstream economic benefits of mining and fertilizer production, and then ignore the environmental impacts associated with those benefits.”<sup>140</sup> In the dissent’s view, the Corps did not deserve the deference the majority accorded it because the agency “gave no official interpretation of its own regulations that would warrant this deference.”<sup>141</sup> Finally, while acknowledging the Corps’ regulation does not require it to analyze impacts of activities over which it lacks “sufficient control and responsibility,” the dissent was unwilling to let the Corps have it both ways—the Corps was “not free to disregard the impacts of activities over which it has no control when it chooses to count the benefits of those same activities.”<sup>142</sup> Condoning such a process would “allow[] consideration of endless benefits without concomitant consideration of the impacts associated with those benefits,” which would frustrate NEPA’s primary purpose of ensuring informed agency decision-making.<sup>143</sup>

Judge Martin was right to call out the Corps’ unfaithfulness to its own regulations.<sup>144</sup> The Corps should revive the “forgotten sentence” in its NEPA analyses and it is highly likely, given

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<sup>137</sup> *CBD*, 941 F.3d at 1302.

<sup>138</sup> *CBD*, 941 F.3d at 1302 (citing *Kisor*, 139 S.Ct. at 414-18).

<sup>139</sup> *CBD*, 941 F.3d at 1309.

<sup>140</sup> *CBD*, 941 F.3d at 1310.

<sup>141</sup> *CBD*, 941 F.3d at 1310 (citing *Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 911, 137 L.Ed.2d 79 (1997)).

<sup>142</sup> *CBD*, 941 F.3d at 1310.

<sup>143</sup> *CBD*, 941 F.3d at 1310–11 (citing *Marsh*, 490 U.S. at 371, 109 S. Ct. at 1858)).

<sup>144</sup> See also *Sierra Club v. Van Antwerp*, 709 F.Supp.2d 1254, 1264, n.19 (S.D. Fla. 2009).

the discretion afforded the Corps in carrying out its NEPA obligations, that the courts will follow suit.<sup>145</sup>

## VII. HARMONIZING THE CORPS' NEPA REVIEW WITH THE PUBLIC INTEREST FACTORS TO ACHIEVE THE GOALS OF NEPA AND THE CLEAN WATER ACT

The court cases indicate the Corps is not backing away from the tension it has created through its interpretation and application of its NEPA scope of review and CWA public interest regulations. In fact, the agency may be doubling down. In 2019, Lance D. Wood, Senior Counsel for Environmental Law and Regulatory Programs for the Corps, suggested in a published Comment proposed revisions to CEQ's NEPA regulations.<sup>146</sup> Among his proposals was one for "resolving" the small handles problem.<sup>147</sup>

Mr. Wood contended that the definition of "effects" in the CEQ regulations as to the scope of the effects federal agencies must consider and he argued that "[a] clear distinction must be drawn between actual, physical causation versus "but for" or "legal enablement" causation."<sup>148</sup> Mr. Wood referenced *Mall Properties, Inc.* as an example of when the Corps "deviated from its usual practice" of narrowly-scoped NEPA analyses and had been admonished by a federal court.<sup>149</sup> But *Mall Properties, Inc.*, was decided before the Corps' published its NEPA regulations in 1988,

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<sup>145</sup> *But see Mall Properties, Inc. v. Marsh*, 672 F. Supp. 561.

<sup>146</sup> Wood, *supra* note 87. While Mr. Wood noted the Comment expressed only his personal views, and does not necessarily reflect any official positions of the U.S. Army Corps of Engineers or the U.S. Department of the Army, Mr. Wood has worked as an environmental lawyer for the Corps since 1976. However, Mr. Wood is the most senior environmental attorney at the Corps and has had a hand in all of the Corps major environmental regulations, including the two discussed in this Article, of the last 40 years. In other words, his opinion matters to discerning the official stance the Corps will take in its environmental regulations and policies.

<sup>147</sup> Wood, *supra* note 87 at 10535–537.

<sup>148</sup> Wood, *supra* note 87 at 15035. The July 2020 CEQ NEPA implementing regulations added the following provision to its definition of "Effects":

A "but for" causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. Effects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain. Effects do not include those effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action.

40 C.F.R. § 1508.1(g). This provision is consistent with the spirit and some of the language of Mr. Wood's proposal to narrow the scope of NEPA reviews. Wood *supra* note 81 at 15035.

<sup>149</sup> Wood, *supra* note 87 at 15036.

and thus, before the “forgotten sentence.” While the district court relies on proximate cause principles to hold the Corps’ reliance on socio-economic factors to deny the CWA Section 404 permit was beyond the scope of its authority, there is no discussion in the NEPA portion of the case regarding the comparative scopes of benefits and detriments of the proposed project.<sup>150</sup>

Mr. Wood’s proposed revisions to the CEQ regulations also ignores the forgotten sentence. While Mr. Wood discusses the Corps’ NEPA scope of analysis regulation and its “sufficient [federal] control and responsibility” standard, he does not mention regulation’s requirement “[i]n *all* cases, the scope of analysis for analyzing both impacts and alternatives should be the same scope of analysis used for analyzing the benefits of a proposal.” This omission is conspicuous by its absence since Mr. Wood proposed amending the CEQ’s definition of “Scope,” to which the forgotten sentence is directly relevant, but he did not propose adding the forgotten sentence as part of his proposed amendment.<sup>151</sup> But as Judge Martin noted leaving this important sentence in the Corps’ regulation out of the NEPA review equation “allows consideration of endless benefits without concomitant consideration of the impacts associated with those benefits,” which thwarts NEPA’s purpose.<sup>152</sup>

Mr. Wood, as the Corps often does in opposing expanding the scope of its NEPA review in litigation, relies on the Supreme Court’s decision in *Department of Transportation v. Public Citizen*.<sup>153</sup> Mr. Wood’s and several courts’ reliance on *Public Citizen* is misplaced. In *Public Citizen*, however, the Department of Transportation had “no ability to prevent a certain effect due to its limited statutory authority over the relevant actions,”<sup>154</sup> whereas the Corps, under the CWA plain language and its public interest review regulation, has broad discretion and authority to deny

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<sup>150</sup> See *Mall Properties, Inc.*, 672 F. Supp. at 573 (citing *Metropolitan Edison*, 460 U.S. at 776: “the scope of the agency’s inquiries must remain manageable if NEPA’s goal of ‘insur[ing] a fully informed and well-considered decision’ is to be accomplished.”). However, keeping agencies’ inquiries manageable cuts both ways. Also, while the court clearly based its opinion on proximate cause principles, the case arguably turned more on how the Corps weighed the factors it considered rather than the scope of its inquiry. See *id.* (the district engineer stating “[w]eighing most heavily, however, is my concern for the socio-economic impacts this project would have on the city of New Haven.”).

<sup>151</sup> Wood, *supra* note 87 at 10537.

<sup>152</sup> *CBD*, 941 F.3d at 1311.

<sup>153</sup> 541 U.S. 752 (2004).

<sup>154</sup> *Public Citizen*, 541 U.S. at 770.

or condition the Permit to prevent or minimize impacts.<sup>155</sup> Accordingly, *Public Citizen* is inapplicable to the Corps' NEPA scope of review for CWA Section 404 permits, by the terms of the Corps' own regulation. Mr. Wood does not address the inherent inconsistency in the Corps' application of its scope of environmental review under the CWA and NEPA, preferring to maintain the artificial wall erected between the two regulations.

With all respect to Mr. Wood, it should come as no surprise that the authors of this Article believe Judge Martin got the analysis correct in his dissent in *CBD*, and the Corps should adjust its scope of NEPA review for CWA Section 404 permits for several reasons. First, it will align the Corps' NEPA analysis with its public interest review, both of which occur *simultaneously and are published in the same document* for CWA Section 404 permits.<sup>156</sup> Second, by doing so, the Corps will be more faithfully implementing its own NEPA scope of analysis regulation, specifically the “forgotten sentence.” Third, a consistently broader scope of NEPA review is more consistent with the pre-July 2020 NEPA implementing regulations, in particular the CEQ's definition of “indirect effects.”<sup>157</sup> Fourth, such an adjustment by the Corps is also more consistent with NEPA's overall purpose of allowing federal agencies to make informed decisions with input from the public because it likely will lead to more EISs, for which notice and comment are mandatory.

This last point deserves some additional commentary because, whether intentional or not, the Corps' consistent attempts to narrow the scope of its NEPA review for CWA Section 404 permits has the effect of severely reducing the opportunity for public comment on large

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<sup>155</sup> See *supra* notes 43–45 and accompanying text (discussing Corps' broad discretion under public interest review regulation); see also *CBD*, 941 F.3d at 1312 (J. Martin dissenting) (noting the Corps' broad discretion under its public interest review regulation as grounds for distinguishing *Public Citizen*); *Sabal Trail*, 867 F.3d at 1380 (Brown, J., concurring in part and dissenting in part); *White Tanks*, 563 F.3d at 1040–42 (distinguishing *Public Citizen* and holding “[b]ecause this project's viability is founded on the Corps' issuance of a [CWA] permit, the entire project is within the Corps' purview”); cf. *United States v. Alaska*, 503 at 579–83 (discussing the Corps' broad authority under its public interest review under the RHA).

<sup>156</sup> See *supra*, at X-X. The Supreme Court's decision in *U.S. v. Alaska* should give the Corps a level of legal comfort in exerting its authority in this way.

<sup>157</sup> 40 C.F.R. 1508.8 (1978). The pre-July 2020 NEPA regulations were the ones in effect when the Corps promulgated its NEPA regulations, and there is every reason to believe that many of the changes introduced in the July 2020 Rule will be reversed by the Biden administration. See *supra* note 25.

infrastructure projects that will undoubtedly significantly affect the human environment.<sup>158</sup> Unlike some federal agencies (i.e., United States Forest Service), which have adopted NEPA regulations mandating that draft Environmental Assessment be published for public comment in all circumstances, the Corps has not. CWA regulations require the Corps to publish the permit *application* for public comment, but permit applications are necessarily early in the permitting process, do not contain the level of environmental analysis or detail that draft NEPA documents or draft permits do, and therefore provide the public with far less of an opportunity to make informed and meaningful comments on the proposed project.

Thus, if the Corps continues to take a narrow view of the scope of its NEPA analysis, it will continue to result in EA/FONSI rather than EISs, which means the public will be largely shut out of participating in the Corps' environmental review process. This is antithetical to NEPA's purpose of federal agency informed decision-making.<sup>159</sup> Then First Circuit Judge—now retiring Justice—Stephen Breyer articulated this concern in *Sierra Club v. Marsh*, which the First Circuit decided just prior to the Corps' promulgation of its NEPA scope of review regulations.<sup>160</sup> The case involved the construction of a major marine port in Maine. The Corps limited the scope of its NEPA analysis and did not consider as an indirect effect of the port construction that the “building a port and causeway may lead to the further industrial development of Sears Island, and that further development will significantly affect the environment.”<sup>161</sup> As a result, the Corps published an EA/FONSI rather than an EIS.

Judge Breyer found the Corps' narrowly-scoped EA/FONIS arbitrary and capricious and required the Corps to do an EIS. In so holding, he noted that EAs and EISs serve very different purposes and highlighted the consequences of an agency producing an EA rather than an EIS both to the public and within the agency: “For one thing, those outside the agency have less opportunity

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<sup>158</sup> See, e.g., *Sierra Club v Corp of Engineers*, 997 F.3d 395, 400–01 (1st Cir. 2021).

<sup>159</sup> *Methow Valley*, 490 U.S. 332. 349 (1989). In fact, the Corps should amend its regulations to provide the public the opportunity to comment on draft EAs as some other federal agencies do. See, e.g., 36 C.F.R. § 220.4 (2020).

<sup>160</sup> 769 F.2d 868 (1st Cir. 1985).

<sup>161</sup> *Marsh*, 769 F.2d at 877–78.

to comment on an EA than on an EIS. . . . For another thing, those inside the agency might pay less attention to environmental effects when described in an EA than when described in an EIS.”<sup>162</sup> The preclusion of input from the affected public is even more troubling when considering that the Corps works closely with project proponents throughout the permitting process, often allowing the private companies that are seeking the CWA Section 404 permit (and therefore have the most to gain financially) to draft the NEPA analysis.<sup>163</sup> This creates an inherent imbalance of influence on the Corps’ analysis and decision-making, often to the detriment of the public affected by the project. If one assumes that if the Corps took a broader view of the scope of its NEPA analysis, it would result in more EISs because the environmental impacts more often would be significant, the influence imbalance would be remedied to some degree due to the additional opportunities an EIS affords for public participation.

In at least some cases, broadening the scope of its NEPA analysis and producing an EIS would not impose much of an additional burden on the Corps, if any. Despite regulations indicating EAs should be no more than 15 pages, the Corps occasionally produces lengthy EAs that are more akin to EISs in terms of their analysis.<sup>164</sup> In *Marsh*, the EA was 350 pages. Judge Breyer noted that in such a case, the Corps would “not find it difficult to comply with the additional procedural EIS requirements that NEPA imposes,” mainly offering the opportunity for public comment.<sup>165</sup>

Finally, if the Corps decided to take a broader view of the scope of its NEPA review—a view that would be consistent with its NEPA regulations—and that resulted in more EISs, the Corps would likely avoid at least some of the legal challenges to its decisions to produce EA/FONSI. And because NEPA is a procedural statute, the NEPA review itself would not mandate a denial of a permit application.

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<sup>162</sup> *Marsh*, 769 F.2d at 875.

<sup>163</sup> 33 C.F.R. §§ 325, App. B(3); 325, App. B(8)(f)(2).

<sup>164</sup> See 33 C.F.R. § 325 Appx. B(7)(a) (“The combined document [EA, 404(b)(1) analysis, statement of findings, FONSI] normally should not exceed 15 pages”); see also 46 Fed. Reg. 18,026, 18,037 (March 23, 1981) (“[i]n most cases...., a lengthy EA indicates that an EIS is needed.”).

<sup>165</sup> *Marsh*, 769 F.2d at 875.

## VIII. CONCLUSION

To paraphrase a famous line from the 1980s, it is time to tear down the wall between the Corps' NEPA analysis and its public interest review for a single CWA Section 404 permit.<sup>166</sup> In so doing, the Corps would breathe life into the forgotten sentence and thus bring its simultaneous environmental reviews of CWA Section 404 permits into alignment. This may require the Corps to do more Environmental Impact Statements, which will result in more input from the public. If that is the case, so be it. Sometimes complying with environmental laws is inconvenient for federal agencies, but that does not make it any less important.

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<sup>166</sup> See <https://www.youtube.com/watch?v=WX00QkvK-mQ>.