

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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*Under its “public interest review” regulation, the U.S. Army Corps of Engineers (Corps) reserves to itself the power to consider a broad range of factors in determining whether it should issue Section 404 permits under the Clean Water Act (CWA). This review supplements, and is distinct from, the analysis that the Corps must engage in pursuant to the so-called “Section 404(b)(1) guidelines,” developed by the U.S. Environmental Protection Agency. The legality of the Corps’ supplemental authority is little-questioned after the Supreme Court unanimously upheld the legality of the same “public interest review” authority, in the context of the Rivers and Harbors Act, in *United States v. Alaska*.*

*The Corps has muddied these waters, though, both in its regulations and in practice. In one of its regulations under the National Environmental Policy Act (NEPA), the Corps asserts that, for private projects requiring Section 404 permits, it will only consider “those portions of [each] project over which [it] has sufficient control and responsibility to warrant Federal review.” Elsewhere in the same regulatory package, however, the Corps acknowledges that: “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.” In practice, the Corps has a long history of limiting its discussion of negative impacts under NEPA to those that are generated in the relevant waters by the dredging or filling activities themselves. On the other side of the equation, however, it considers all of the benefits of the relevant project, including job growth, etc. This results in a skewed analysis under the public interest review, where the benefits of a*

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*project are given full consideration, while some negative impacts are essentially ignored.*

*At some level, both the Corps and the courts appear to have placated themselves by drawing a distinction between what happens under NEPA versus what happens under the public interest review. But the authors argue that this makes no sense. The purpose of NEPA is to inform agencies' substantive decisions. The Corps is ignoring potentially significant effects, and thus does not have the information that it needs to appropriately engage in its public interest review process.*

*The authors conclude that the Corps should harmonize its CWA and NEPA reviews of project impacts so that whenever it relies on public interest benefits to justify issuing a permit, it must use NEPA as a tool to fully consider all of the project's negative environmental effects, which would more faithfully fulfill the goals of NEPA and the CWA, as well as the Corps' NEPA implementing regulations.*

I.	INTRODUCTION .....	396
II.	THE CWA'S AND NEPA'S COMMON PURPOSE TO PROTECT THE ENVIRONMENT.....	399
III.	THE PUBLIC INTEREST REVIEW REGULATION .....	401
IV.	THE CORPS' NEPA SCOPE OF REVIEW REGULATION .....	407
V.	THE CORPS' APPLICATION OF ITS NEPA SCOPE OF ANALYSIS REGULATION.....	411
VI.	THE CORPS' ARTIFICIAL WALL BETWEEN ITS PUBLIC INTEREST AND NEPA REVIEWS.....	414
VII.	HARMONIZING THE CORPS' NEPA REVIEW WITH THE PUBLIC INTEREST FACTORS TO ACHIEVE THE GOALS OF NEPA AND THE CLEAN WATER ACT.....	419
VIII.	CONCLUSION .....	424

## 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 the analysis of environmental impacts it was obligated to undertake when issuing Clean Water Act (CWA)<sup>2</sup> Section 404<sup>3</sup> permits to fill jurisdictional wetlands. At the risk of oversimplifying the Corps'

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<sup>1</sup> See generally AJ Willingham, *8 Bizarre Things That Actually Happened in the 1980s*, CNN (Apr. 18, 2006), <https://perma.cc/Q9LP-GC2T> (listing some examples of the biggest stories of the 1980s).

<sup>2</sup> Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1388 (2018).

<sup>3</sup> *Id.* § 1344.

dilemma, the agency was grappling with the scope of its environmental review for Section 404 permits and whether it should be: limited specifically to the portions of a private project over which the Corps exercised some regulatory jurisdiction (wetlands); or include the environmental effects of the whole project (including non-aquatic impacts).<sup>4</sup>

This was not a navel-gazing exercise by the Corps; large infrastructure and development projects often require filling federal jurisdictional wetlands, thus triggering the need for a CWA Section 404 permit.<sup>5</sup> Such projects can have significant effects on the environment beyond impacts to aquatic resources, including: upland deforestation and habitat fragmentation; growth-inducing economic impacts; effects on non-aquatic threatened and endangered species; and increased greenhouse gas emissions.<sup>6</sup> Transnational oil and gas pipelines,<sup>7</sup> overhead electrical transmission lines,<sup>8</sup> and massive marine port projects<sup>9</sup> are but a few types of large non-federal infrastructure projects that typically require permitting from the Corps.

From the Corps' self-reflection emerged a new regulation and the reaffirmation 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>10</sup> On its face, the public interest review regulation is an extremely muscular interpretation of the Corps' authority to regulate the effects of projects that reach beyond the impacted aquatic resources triggering the CWA Section 404 permit requirement. These effects include economic impacts, impacts to wildlife values, land use, energy needs, and public safety.<sup>11</sup> In 1986, the Corps reiterated its commitment to its broad

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<sup>4</sup> 51 Fed. Reg. 41,206, 41,207 (Nov. 13, 1986) (discussing the Corps' changes in its NEPA regulations and adopting the final rule in effect today).

<sup>5</sup> See 33 U.S.C. § 1344 (noting activities that require filling of jurisdictional wetlands must receive a 404 permit unless they fall under an exception listed in § 1344(f)).

<sup>6</sup> See National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23,453, 23,466 (April 20, 2022) (recognizing the "indirect and cumulative nature of many environmental effects [of federal actions], such as greenhouse gas emissions or habitat fragmentation.").

<sup>7</sup> See, e.g., *Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 13 (D.D.C. 2013) (challenging the Corps-issued permit for domestic oil pipeline running 589 miles from Oklahoma to Illinois).

<sup>8</sup> See, e.g., *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1078 (D.C. Cir. 2019) (challenging the Corps-issued permit for overhead electrical transmission line crossing the historic James River in Virginia).

<sup>9</sup> See, e.g., *Sierra Club v. Marsh (Marsh)*, 976 F.2d 763, 765 (1st Cir. 1992) (challenging the Corps-issued permit for major marine port project in Maine).

<sup>10</sup> 33 C.F.R. § 320.4(a)(1) (2020).

<sup>11</sup> *Id.*

public interest authority.<sup>12</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)<sup>13</sup> regulations<sup>14</sup> to compliment the NEPA regulations of the Council on Environmental Quality (CEQ). With these regulations, the Corps sought to codify several court decisions that upheld the agency's discretion to limit its environmental analysis to only the portions of a private project<sup>15</sup> that triggered its regulatory jurisdiction—this dynamic is colloquially known as the “small handles” issue.<sup>16</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>17</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>18</sup> Such cramped NEPA environmental reviews are inconsistent with the Corps' broad authority under the CWA<sup>19</sup> and the agency's obligation to ensure a proposed activity *and its intended use* are not contrary to the public interest.<sup>20</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.

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<sup>12</sup> Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,206 (Nov. 13, 1986) (explaining a permit will be issued “unless the district engineer determines that it will be contrary to the public interest.”).

<sup>13</sup> 42 U.S.C. §§ 4321–4370m (2018).

<sup>14</sup> See 33 C.F.R. § 325 app. B. (1987) (reserving space for future NEPA regulations); 33 C.F.R. § 325 app. B. (1988) (implementing agency-specific NEPA regulations).

<sup>15</sup> See Procedures for Implementing the National Environmental Policy Act, 53 Fed. Reg. 3,120, 3,121–22 (Feb. 3, 1988) (codified at 33 C.F.R. pts. 230, 325) (discussing *Winnebago Tribes of Neb. v. Ray (Winnebago Tribe)*, 621 F.2d 269 (8th Cir. 1980), *Save the Bay v. Corps of Eng'rs*, 610 F.2d 322 (5th Cir. 1980), and *Sierra Club v. Sigler*, 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 a cooperating agency.

<sup>16</sup> Patrick A. Parenteau, *Small Handles, Big Impacts: When Do Corps Permits Federalize Private Development?*, 20 ENV'T L. 747, 749 (1990) (describing the colloquialism). Professor Parenteau's article, written for a symposium marking the twentieth anniversary of NEPA, offers an excellent discussion of the Corps' NEPA scope of review regulations when they were published and the small handles dynamic.

<sup>17</sup> See *id.* at 749–55 (discussing the Corps' attempts to define this scope).

<sup>18</sup> See discussion *infra* Part V.

<sup>19</sup> See 33 U.S.C. § 1344 (2018) (describing the Corps' authority under the CWA).

<sup>20</sup> See 33 C.F.R. § 320.4(a)(1) (2020) (“The decision whether to issue a permit will be based on an evaluation of the probable impacts . . . of the proposed activity and its intended use on the public interest.”).

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

First, a few basics. NEPA has been described as the country's "basic national charter for protection of the environment."<sup>21</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>22</sup> Such evaluation was necessary to carry out the continuing policy of 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>23</sup>

Congress intended the scope of NEPA's environmental effects review to be broad and to include ensuring that "presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking [sic] along with economic and technical considerations."<sup>24</sup> To carry out this ambitious goal, Congress directed the federal government to prepare detailed statements on the environmental impacts of major federal actions—known as Environmental Impact Statements (EISs).<sup>25</sup> NEPA created the CEQ to promulgate regulations governing how federal agencies were to carry out NEPA's mandates.<sup>26</sup>

The CEQ's NEPA-implementing regulations have been 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>27</sup> However, the Biden administration moved quickly to undo some of the changes made by the previous administration. On April 20, 2022, CEQ issued a final rule that became effective on May 20, 2022, amending certain provisions of its NEPA implementing regulations with the goal of "restor[ing] provisions that were in effect for decades before being modified in 2020."<sup>28</sup> Most relevant for this Article is the Biden

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<sup>21</sup> N. Idaho Cmty. Action Network v. U.S. Dep't of Transp., 545 F.3d 1147, 1153 (9th Cir. 2008); see also Robertson v. Methow Valley Citizens Council (*Methow Valley Citizens Council*), 490 U.S. 332, 348 (1989) ("NEPA declares a broad national commitment to protecting and promoting environmental quality.").

<sup>22</sup> 42 U.S.C. § 4332(C) (2018).

<sup>23</sup> 42 U.S.C. § 4331 (emphasis added) (declaring Congress's national environmental policy); see also Matthew J. Lindstrom, *Procedures Without Purpose: The Withering Away of the National Environmental Policy Act's Substantive Law*, 20 J. LAND RES. & ENV'T L. 245, 245, 248–50 (2000) (internal citations omitted) (explaining the development of NEPA as a culmination of efforts beginning in the late 1950s to protect the natural environment).

<sup>24</sup> 42 U.S.C. § 4332(B).

<sup>25</sup> *Id.* § 4332(C).

<sup>26</sup> *Id.* § 4342.

<sup>27</sup> See 85 Fed. Reg. 43,304, 43,304 (July 16, 2020) (noting CEQ's final rule comprehensively updates, for the first time since 1978, CEQ's NEPA regulations).

<sup>28</sup> 87 Fed. Reg. 23,453, 23,453 (Apr. 20, 2022).

administration's rule change to "restore the definitions of 'direct' and 'indirect' effects, and 'cumulative impacts' from the 1978 NEPA Regulations."<sup>29</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>30</sup> An effect is reasonably foreseeable if it is "sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision."<sup>31</sup> Cumulative effects are those "that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions."<sup>32</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>33</sup> Rather, NEPA is concerned with preventing "uninformed—rather than unwise—agency action."<sup>34</sup> Public participation in the NEPA process is thus a critical component of the statutory scheme.<sup>35</sup>

The CWA was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>36</sup> Among other prohibitions, the CWA prohibits the discharge of dredged or fill material into the waters of the United States without a permit issued by the Corps pursuant to Section 404 of the CWA.<sup>37</sup> The Corps adopted regulations, known as the "public interest" factors, to implement its permitting authority.<sup>38</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>39</sup> Only when a proposed

<sup>29</sup> *Id.* at 23,462–467 (explaining the regulatory history and proposed changes to the definition of "effects" or "impacts" in 40 C.F.R. § 1508.1(g), summarizing comments on the Notice of Proposed Rulemaking, and providing the rationale for the final rule).

<sup>30</sup> 40 C.F.R. § 1508.1(g)(2) (2022).

<sup>31</sup> *Id.* § 1508.1(aa); *see also* *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1286 (1st Cir. 1996) (internal quotes omitted).

<sup>32</sup> 40 C.F.R. § 1508.1(g)(3) ("Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time.").

<sup>33</sup> *Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

<sup>34</sup> *Id.*

<sup>35</sup> *See* *WildEarth Guardians v. U.S. 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 Citizens Council*, 490 U.S. at 349); *see also* 87 Fed. Reg. 23,453, 23,454 (Apr. 20, 2022) (confirming NEPA's recognition "that the public may have important ideas and information on how Federal actions can occur in a manner that reduces potential harms and enhances ecological, social, and economic well-being.").

<sup>36</sup> 33 U.S.C. § 1251(a) (2018).

<sup>37</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>38</sup> 33 C.F.R. § 320 (2020).

<sup>39</sup> 33 U.S.C. § 1344(b)(1); *see also* 40 C.F.R. § 230 (2020) (stating 404(b)(1) guidelines were "developed by the Administrator of the Environmental Protection Agency" and apply

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 interest."<sup>40</sup> The regulation codified a broad set of factors the Corps must consider when evaluating CWA Section 404 permit applications.<sup>41</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>42</sup>

The Corps made some minor changes to the regulation in an interim rule issued in 1982; the most notable being elevation of the importance of analyzing cumulative effects of the proposed project and its intended use.<sup>43</sup> The Corps also expanded the list of factors to be considered when evaluating a project proposal.<sup>44</sup> In 1984, to comply with a settlement agreement reached in *National Wildlife Federation v. Marsh*,<sup>45</sup> the Corps issued a final rule with revisions to the public interest review regulation.<sup>46</sup> The 1984 Rule included a reference to the Environmental Protection Agency's 404(b)(1) guidelines, which had been published in 1980.<sup>47</sup> Non-compliance with the 404(b)(1) guidelines would

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to the Corps' 404 permitting of "discharges of dredged or fill material into waters of the United States.")

<sup>40</sup> Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,122, 37,136 (July 19, 1977) (codified at 33 C.F.R. pt. 320.4(a)(1)) (emphasis added); 33 C.F.R. § 320.4(a)(1) (1978).

<sup>41</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." 33 C.F.R. § 320.4(a)(1) (1978).

<sup>42</sup> *Id.*

<sup>43</sup> See 33 C.F.R. § 320.4(a)(2)(iv) (1982) (referencing "cumulative effects"); see also 33 C.F.R. § 320.4(a)(1) (1983) (moving the reference to "cumulative effects" from (a)(2)(iv), as appeared in the 1982 version of the regulation, up to the first sentence of (a)(1) in the 1983 version of the regulation).

<sup>44</sup> See 33 C.F.R. § 320.4(a)(1) (1982) (providing that factors to be considered include "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"); see also 33 C.F.R. § 320.4(a)(1) (1983) (adding wetlands, shore erosion and accretion, water conservation, fiber production, and mineral needs).

<sup>45</sup> See *Nat'l Wildlife Fed'n v. Marsh*, 14 ENV'T L. REP. 20262, 20263 (1984), <https://perma.cc/A7EA-GYPS> (announcing settlement between the parties).

<sup>46</sup> See 49 Fed. Reg. 39,478, 39,482 (Oct. 5, 1984) (codified at 33 C.F.R. pt. 320.4) (amending 33 C.F.R. § 320.4(a)(1)).

<sup>47</sup> 40 C.F.R. § 230 (1984); 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).

be cause for permit denial.<sup>48</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.<sup>49</sup> While the original regulation stated "[n]o permit will be granted unless its issuance is found to be in the public interest," the 1984 version changed the regulation to state "a permit will be granted unless the district engineer determines that it would be *contrary* to the public interest."<sup>50</sup> In issuing the rule the Corps clarified: "The responsibility for weighing the benefits of a proposed activity against the detriments has always been and remains vested in the Corps."<sup>51</sup> The current version of the regulation, promulgated in 1986, included a provision discussing how the agency should weigh the public interest factors.<sup>52</sup> Since 1977, and 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.<sup>53</sup>

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<sup>48</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>49</sup> 49 Fed. Reg. 39,478, 39,478 (Oct. 5, 1984) (noting commenters' concern that the changed wording shifted the burden of proof regarding the public interest balancing from the applicant to the Corps).

<sup>50</sup> Compare 33 C.F.R. § 320.4(a)(1) (1978), with 33 C.F.R. § 320.4(a)(1) (1986) (emphasis added).

<sup>51</sup> 49 Fed. Reg. at 39,478.

<sup>52</sup> 33 C.F.R. § 320.4(a)(3) (2020):

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 Corps' 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) (arguing that a problem with public interest review is that it gives the Corps too much authority and that the combination of the balancing process being excessively discretionary—with over twenty areas of environmental concerns for the Corps to consider—and the difficulty of quantifying the maximum acreage of wetlands or the number of fish possibly affected by a dredge and fill permit should be solved by requiring the Corps to make two separate conclusions in its public interest review before making a permit decision. The first finding would deal solely with the economic costs and benefits of the proposed activity. The Corps would then make a separate conclusion explaining the environmental effects of the project. The Corps could then weigh those two conclusions against one another with more weight given to the environmental considerations to emphasize their importance under the statute). *Id.* at 227–228.

<sup>53</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) (stating that "[i]n addition to following the 404(b)(1) guidelines, the Corps may conduct a 'public interest review,'" but that this public interest review is "not mandatory under § 404, unlike consideration of the 404(b) guidelines.").

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>54</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 results in permit conditions unrelated to the fill activity.<sup>55</sup>

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. U.S. Corps of Engineers*<sup>56</sup> the Corps denied a permit application for a 512-slip private recreational for-profit marina on the Fox River in Illinois.<sup>57</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>58</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>59</sup> The district court upheld the Corps' decision to deny the permit but did not delve far into the Corps' underlying authority to

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<sup>54</sup> 33 U.S.C. § 1344(a) (2018) (emphasis added); *See also* *Deltona Corp. v. Alexander*, 682 F.2d 888, 892 (11th Cir. 1982) ("The act of granting a § 404 permit is unquestionably an exercise of the government's sovereign power to protect the public interest.") (referencing S. Rep. No. 92-414 (1971) *reprinted in* 1972 U.S.C.C.A.N. 3668, 3669–75).

<sup>55</sup> A recent example of this is the Corps' recent grant of a permit for an electrical transmission line project in Maine. *See, e.g.*, Brief for Petitioners at 20, *Sierra Club v. U.S. Army Corps of Eng'rs*, 997 F.3d 395 (1st Cir. 2021) (No. 20-2195) 2021 WL 398033, at \*20 ("Indeed the Permit includes conditions unrelated to aquatic resources."); *see also* Reply Brief for Appellants at 5–6, *Sierra Club v. Army Corps of Eng'rs*, 997 F.3d 395 (1st Cir. 2021) (No. 20-2195) 2021 WL 777336, at \*5–6 ("And the 'consultations' resulted in enforceable Permit conditions for corridor constructions and *ongoing maintenance* activities not related to aquatic impacts. *See e.g.*, APP-633-40 (special conditions 9, 17, 20, 23(d), and 25, imposing restrictions not related to waters).") (emphasis in original)).

<sup>56</sup> 831 F. Supp. 605 (N.D. Ill. 1993).

<sup>57</sup> *Id.* at 606.

<sup>58</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.*, Michael Verdon, *40 Years of Ups and Downs*, SOUNDINGS TRADE ONLY (June 1, 2019), <https://perma.cc/592M-PNUE> (naming Don Johnson of the blockbuster 1980s TV show *Miami Vice* the "poster child for the fast, exciting boating lifestyle of the 1980s.").

<sup>59</sup> *Fox Bay Partners*, 831 F. Supp. at 608–09.

do so.<sup>60</sup> 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>61</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 exceeded its authority by imposing conditions not directly related to the discharge permitted under CWA Section 404.<sup>62</sup> The district court agreed and dismissed several counts in the indictment.<sup>63</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.<sup>64</sup> The Second Circuit agreed with the Corps' first argument but, in a footnote with no legal analysis, rejected the Corps' public interest argument saying: "Although the regulation refers to the 'proposed activity,' the activity the Secretary permits pursuant to Section 1344 is the discharge."<sup>65</sup> Interestingly and conveniently, the Second Circuit omitted the phrase that immediately follows "the proposed activity" in the regulation, which is "and its intended use."<sup>66</sup> This phrase alone shows the Corps intended, as the agency argued in *United States v. Mango*, that its review include environmental impacts beyond the discharge itself in determining whether a proposed project was contrary to the public interest.<sup>67</sup>

Not surprisingly, the Corps in *Mango*—justifying its exercise of broad authority under the public interest regulations—relied heavily on *United States v. Alaska*,<sup>68</sup> a case under the Rivers and Harbors Act of

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<sup>60</sup> *Id.* at 610.

<sup>61</sup> *Id.* 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.* (outlining the basis for the Corps' decision).

<sup>62</sup> *United States v. Mango*, 199 F.3d 85, 92–94 (2d Cir. 1999).

<sup>63</sup> *Id.* at 88.

<sup>64</sup> *Id.* at 93.

<sup>65</sup> *Id.* 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>66</sup> *Compare id.* at 93 n.7, with 33 C.F.R. § 320.4(a)(1) (2020) ("The 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.").

<sup>67</sup> *Mango*, 199 F.3d at 93. *See also* *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs (CBD)*, 941 F.3d 1288, 1315 (11th Cir. 2019) (Martin, J., concurring in part and dissenting in part) (emphasizing the import of the phrase "and its intended use").

<sup>68</sup> 503 U.S. 569 (1992).

1899 (RHA),<sup>69</sup> in which the Supreme Court established the Corps' authority to regulate aspects of a private project beyond the strict confines of its statutory, and regulatory, jurisdiction.<sup>70</sup> In *United States v. Alaska*, the state of Alaska challenged the Corps' decision to include a condition in a Section 10 permit under the RHA that was unrelated to navigation, which is the basis of the Corps' jurisdiction under the RHA.<sup>71</sup> The city of Nome, Alaska sought the RHA permit to build port facilities extending into Norton Sound.<sup>72</sup> 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 since "the state-federal boundary, as well as international boundaries, are measured from the coastline or baseline."<sup>73</sup> To address this issue, the Corps included a condition in Nome's RHA permit requiring Alaska to submit a disclaimer of rights to any submerged lands that Alaska could claim as a result of the extended coastline.<sup>74</sup> Alaska agreed to the disclaimer so construction could move forward; but, it reserved the right to challenge the permit condition should there be a dispute over the accreted submerged lands in the future.<sup>75</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>76</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>77</sup> Pursuant to principles laid out in *Chevron U.S.A Inc. v. Natural Resources Defense Council Inc.*,<sup>78</sup> 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>79</sup> The Court found that the plain language of Section 10 was "quite broad" and flatly prohibited any obstruction to navigation in

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<sup>69</sup> 33 U.S.C. §§ 401–467n (2018).

<sup>70</sup> *Alaska*, 503 U.S. at 590, 592–93; *see generally* Brief for the United States, *Mango*, 199 F.3d 85 (2d Cir. 1999) (No. 98-1215), 1998 WL 34079879 (June 26, 1998) (explaining the United States' argument for whether the Secretary of the Army may delegate the task of issuing CWA Section 404 permits to District Engineers and can impose permit conditions not directly related to the discharge of dredged or fill material). 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.

<sup>71</sup> *Alaska*, 503 U.S. at 574–76.

<sup>72</sup> *Id.* at 572.

<sup>73</sup> *Id.* at 572–73.

<sup>74</sup> *Id.* at 573.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 574–75.

<sup>77</sup> *Id.* at 590.

<sup>78</sup> 467 U.S. 837, 842 (1984).

<sup>79</sup> *Id.* at 575.

waters of the United States without an RHA permit from the Corps; the court also found that the plain language provided no criteria to govern the Corps' permit decision.<sup>80</sup> Accordingly, the Court held that the RHA gave the Corps unlimited discretion to grant or deny a permit for a navigation-obstructing structure.<sup>81</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>82</sup> And, like RHA Section 10, CWA Section 404 uses the discretionary language "may issue permits" to describe the Corps' authority.<sup>83</sup> However, unlike RHA Section 10, CWA Section 404 does contain some criteria that inform the Corps' discretion: the 404(b) guidelines.<sup>84</sup> Despite the presence of the 404(b) guidelines, the Corps has consistently 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>85</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>86</sup>

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<sup>80</sup> *Id.* at 576.

<sup>81</sup> *Id.*; see also *United States v. Penn. Indus. Chemical Corp.*, 411 U.S. 655, 656 n.1 (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 (2018)).

<sup>82</sup> CWA, 33 U.S.C. § 1311(a) (2018).

<sup>83</sup> *Id.* § 1344(a).

<sup>84</sup> *Id.* § 1344(b); 40 C.F.R. § 230 (2020) (delineating 404(b) Guidelines).

<sup>85</sup> In 1988, after the Federal Court for the District of Massachusetts decided *Mall Properties, Inc. v. Marsh*, 672 F. Supp. 561, 563 (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. U.S. ARMY CORPS OF ENG'RS, REGULATORY GUIDANCE LETTER 88-11: NEPA SCOPE OF ANALYSIS; *MALL PROPERTIES, INC. VS. MARSH 2* (Aug. 22, 1988) [hereinafter RGL]. 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," but that it should be mindful of how it weighed the factors. *Id.* at 1. ("More strongly related indirect impacts should be given heavy consideration, while more 'attenuated' impacts should be considered, but less heavily."). *Id.* at 1-2.

<sup>86</sup> See, e.g., *White Oak Realty, LLC v. U.S. Army Corps of Eng'rs*, 746 F. App'x. 294, 297-98 (5th Cir. 2018) ("The record indicates that the Corps promulgated the mitigation requirements pursuant to these procedures. Accordingly, the district court properly afforded the Corps' decisions *Chevron* deference.").

## 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>87</sup> When does the Corps have sufficient control and responsibility over a portion of a private project that expands 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>88</sup> This is sometimes referred to as the Corps "federalizing" a project, or the project being "federalized,"<sup>89</sup> which inevitably for private projects (and perhaps for courts) carries a negative connotation.<sup>90</sup> In reality, it simply means that the environmental effects of those portions of the project subject to federal control and responsibility that rise to the level of "sufficient" in the Corps' mind must be analyzed pursuant to the agency's NEPA obligations.<sup>91</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 (e.g., wetland fill) requiring a permit.<sup>92</sup>

The regulations then set forth four factors typically used to determine which portions of the project (or potentially the entire project) meet the sufficient control and responsibility standard: (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 Corps jurisdiction"; and (4) "[t]he extent of cumulative Federal control and responsibility."<sup>93</sup> Under the fourth factor, the Corps is supposed to analyze the involvement of other federal agencies to determine if cumulatively "the environmental consequences

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<sup>87</sup> 33 C.F.R. § 325 app. B(7)(b)(1) (2020).

<sup>88</sup> *Id.* § 325 app. B(7)(b)(2).

<sup>89</sup> *See, e.g., City of Boston v. Volpe*, 464 F.2d 254, 259 (1st Cir. 1972) (noting that "a tentative allocation, followed by an application for airport development aid, does not so federalize a project that all work must stop until a satisfactory environmental impact statement has been issued").

<sup>90</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 that do not necessarily involve impacts to aquatic resources.

<sup>91</sup> 33 C.F.R. § 325 app. B(7)(b)(1).

<sup>92</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, Inc. v. U.S. Army Corps of Eng'rs*, 31 F. Supp. 3d 571, 588, 590 (S.D.N.Y. 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>93</sup> 33 C.F.R. § 325 app. B(7)(b)(2).

of the additional portions of the projects are essentially products of Federal financing, assistance, direction, regulation, or approval.”<sup>94</sup> The Corps is also supposed to examine whether other federal agencies are required to take action under separate environmental review laws such as the Endangered Species Act<sup>95</sup> or the National Historic Preservation Act.<sup>96</sup>

Following the four factors, the Corps provides some examples for when the 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 for linear transmission projects.<sup>97</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>98</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>99</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<sup>100</sup>—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>101</sup> However, in its NEPA

<sup>94</sup> *Id.* § 325 app. B(7)(b)(2)(iv)(A).

<sup>95</sup> 16 U.S.C. §§ 1531–1544 (2018).

<sup>96</sup> 54 U.S.C. §§ 300101–307108 (2018); *see* 33 C.F.R. § 325 app. B(7)(b)(2)(iv)(B) (“[T]he district engineer should consider whether other Federal agencies are required to take Federal action under” other environmental review laws and executive orders).

<sup>97</sup> 33 C.F.R. § 325 app. B(7)(b)(3).

<sup>98</sup> The case that established the “merely a link” principle was *Winnebago Tribe*, 621 F.2d 269, 270 (8th Cir. 1980), which involved a single river crossing of a transmission line that stretched 67 miles. *See* 53 Fed. Reg. 3,120, 3,122 (Feb. 3, 1988) (discussing the Corps’ replacement of regulations and instead adopting the “merely a link” approach 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 Corp of Eng’rs*, 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>99</sup> 33 C.F.R. § 325 app. 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>100</sup> *See* 40 C.F.R. § 1502.14(b) (2022) (requiring a detailed discussion of each project alternative, including a no action alternative “so that reviewers may evaluate their comparative merits.”).

<sup>101</sup> *Id.* § 320.4(a)(1).

reviews, the Corps appears to pretend this sentence does not exist. Few courts have addressed this provision, so judicial interpretation is limited.<sup>102</sup> For the purposes of this Article we will refer to it as the “forgotten sentence.”<sup>103</sup>

The forgotten sentence derives from a Fifth Circuit case, *Sierra Club v. Sigler (Sigler)*,<sup>104</sup> so that case is instructive for discerning the Corps’ intent.<sup>105</sup> *Sigler* involved the private construction of a deepwater port and crude oil distribution system in Texas.<sup>106</sup> After producing an EIS, the Corps issued five permits authorizing work on the project, including a CWA Section 404 permit.<sup>107</sup> The Sierra Club argued that 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>108</sup> Some of the bulk commodities benefits the Corps touted in the EIS included, among others:

[G]rowth 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>109</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>110</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.<sup>111</sup> In doing so, the court noted: “The [EIS] is not deficient because it includes economic benefits, *but because it*

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<sup>102</sup> See, e.g., *Nat. Res. Def. Council, Inc. v. U.S. Army Corp of Eng’rs*, 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>103</sup> Cf., e.g., Lance Wood, *Proposed Revisions to Improve and Modernize CEQ’s NEPA Regulations*, 49 ENV’T L. REP. NEWS & ANALYSIS 10529 (2019) (discussing the Corps’ NEPA regulations and scope of analysis without discussing this sentence).

<sup>104</sup> 695 F.2d 957, 982 (5th Cir. 1983).

<sup>105</sup> *Id.* at 975; see also *Procedures for Implementing the National Environmental Policy Act* 53 Fed. Reg. 3120, 3122 (Feb. 3, 1988) (characterizing the provision as an “important requirement”).

<sup>106</sup> *Sigler*, 695 F.2d at 961.

<sup>107</sup> *Id.* at 963.

<sup>108</sup> *Id.* at 975.

<sup>109</sup> *Id.* at 976.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 984.

*excludes environmental costs.* That exclusion strikes at the heart of NEPA.”<sup>112</sup>

Based on this decision—in which the Circuit Court criticized 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 later.<sup>113</sup> At least one commenter at the time was prescient about the intersection of the forgotten sentence 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>114</sup>

As the analysis of NEPA litigation over CWA Section 404 permits below shows, Corps District Engineers are not completing more EISs.<sup>115</sup> Given the *Sigler* 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.

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<sup>112</sup> *Id.* at 980 (emphasis added) (citing *Chelsea Neighborhood Ass’n v. U.S. Postal Serv.*, 516 F.2d 378 (2d Cir. 1975)).

<sup>113</sup> 53 Fed. Reg. 3120, 3122 (Feb. 3, 1988).

<sup>114</sup> Parenteau, *supra* note 16, at 754 (emphasis added) (citations omitted).

<sup>115</sup> From 2016–2020, the Corps conducted thirty-seven, twenty-seven, thirty-five, thirty-two, and thirty-three EISs for years 2016, 2017, 2018, 2019, and 2020, respectively, while issuing an estimated 2,500 CWA Section 404 permits annually. NAT’L ASS’N OF ENV’T PROS., ANNUAL NEPA REPORT 2016 5 (Charles P. Nicholson et al. eds., 2017); NAT’L ASS’N OF ENV’T PROS., 2017 ANNUAL NEPA REPORT 5 (Charles P. Nicholson et al. eds., 2018); NAT’L ASS’N OF ENV’T PROS., 2018 ANNUAL NEPA REPORT 3 (Charles P. Nicholson et al. eds., 2019); NAT’L ASS’N OF ENV’T PROS., 2019 ANNUAL NEPA REPORT 4 (Charles P. Nicholson et al. eds., 2020); NAT’L ASS’N OF ENV’T PROS., 2020 ANNUAL NEPA REPORT 5 (Charles P. Nicholson et al. eds., 2021); Anna Wildeman et al., *Army Corps Halts Coverage Under Nationwide Permits*, ENV’T L. & POL’Y MONITOR 3 (Nov. 5, 2021).

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).<sup>116</sup> This is a less robust form of environmental review than an EIS.<sup>117</sup> Importantly, neither the CEQ regulations nor the Corps' NEPA regulations ordinarily require the Corps to publish a draft EA for public comment, while releasing a draft EIS for public comment is mandatory.<sup>118</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. EAs—even lengthy ones—are no substitute for EISs because the documents serve very different purposes.<sup>119</sup>

This is borne out in the case law. Since 1988, when the Corps promulgated its NEPA scope of analysis regulations, thirty cases appear in Westlaw analyzing the Corps' application of its regulation.<sup>120</sup> In twenty-nine cases, the Corps took a narrow view of the scope of its environmental analysis.<sup>121</sup> In twenty-eight out of the twenty-nine narrow cases, the Corps' narrow scope of analysis resulted in the agency not performing an EIS for the proposed project.<sup>122</sup> Thus, in twenty-eight

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<sup>116</sup> See, e.g., *Ohio Valley Env't Coal., Inc. v. U.S. Army Corps of Eng'rs (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>117</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 proposed project. See *Se. Alaska Conservation Council v. U.S. Forest Serv.*, 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) (“[A]n EA and an EIS serve very different purposes.”).

<sup>118</sup> Compare 40 C.F.R. § 1503.1 (2022) (mandatory public comment on draft EISs), with *id.* § 1501.5(e) (2022) (requiring agencies to involve the public “to the extent practicable” in the preparation of EAs).

<sup>119</sup> See, e.g., *Marsh*, 769 F.2d at 875 (“[T]hose outside the agency have less opportunity to comment on an EA than on an EIS.”).

<sup>120</sup> See *infra* App. A.

<sup>121</sup> *Id.*

<sup>122</sup> In most instances, the Corps issued EA/FONSIs for 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 F. App'x. 885, 888 (10th Cir. 2013) (denying a preliminary injunction to halt construction of the Gulf Coast Pipeline that was verified by the Corps to proceed under Nationwide Permit 12 with no EA nor EIS). In another case, the Corps produced an EIS, but the court found the EIS deficient due to its

out of thirty total cases the public had no opportunity to comment on the Corps' environmental analysis of projects that in some cases undoubtedly would have significant impacts on the environment.<sup>123</sup> In applying the arbitrary and capricious standard under the Administrative Procedure Act,<sup>124</sup> courts upheld the Corps' decisions to narrow its analysis in twenty out of twenty-nine cases.<sup>125</sup>

Courts' reasoning for upholding the Corps' narrow NEPA analyses varies somewhat depending on the facts of each case, but several themes have emerged. Courts seemed willing to accept the idea that the Corps' analysis should be limited to only impacts within its regulatory jurisdiction (e.g., the filling of wetlands, which are waters of the United States).<sup>126</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>127</sup> While the filling of wetlands may *trigger* 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:

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limited scope. *Sierra Club v. Van Antwerp (Van Antwerp)*, 709 F. Supp. 2d 1254, 1273 (S.D. Fla. 2009) (holding the EIS prepared by Corps did not meet NEPA's procedural requirements).

<sup>123</sup> See, e.g., *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 35–36 (D.C. Cir. 2015) (upholding Corps permitting related to a 593-mile oil pipeline project that would likely result in harm to two federally endangered species, among other environmental impacts).

<sup>124</sup> See 5 U.S.C. § 706 (2018) (“The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

<sup>125</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.*, 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 Connecticut. *Mall Properties Inc.*, 672 F. Supp. 561, 570, 573 (D. Mass. 1987); Wood, *supra* note 103, at 10536. But *Mall Properties, Inc.* is arguably an outlier case that should not drive the Corps' scope of review policy. See *infra* notes 179–181 and accompanying text (discussing how the Corps deviated from its narrowly scoped NEPA analysis).

<sup>126</sup> See, e.g., *OVEC*, 828 F.3d 316, 323 (4th Cir. 2016) (“[T]he Corps' jurisdiction relates only to fill activities associated with surface coal mining”; see also *CBD*, 941 F.3d 1288, 1295 (11th Cir. 2019) (“[I]t was sensible for the Corps to draw the line at the reaches of its own jurisdiction”).

<sup>127</sup> See, e.g., 33 C.F.R. § 325 app. B(7)(b)(2) (2020) (explaining that 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 S. Rep. No. 91-765 at 10 (1969) (Conf. Rep.), as reprinted in 1969 U.S.C.C.A.N. 2767, 2770 (NEPA legislative history explaining no agency may “utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.”).

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>128</sup>

Other courts have relied on the theory that the Corps cannot be expected to analyze extra-regulatory jurisdictional environmental impacts because those impacts are outside of the Corps' area of expertise.<sup>129</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>130</sup>

Finally, the Corps also has claimed that its narrowed scope of review is justified because other portions of a project are primarily the responsibility of other federal or state agencies.<sup>131</sup> While this argument has some merit, especially when federalism principles are considered, it

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<sup>128</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, 1039–40 (9th Cir. 2009) (distinguishing between the Corps' 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.").

<sup>129</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>130</sup> *See* NEPA, 42 U.S.C. § 4332(C) (2018) (requiring action agencies to consult with other federal agencies with "special expertise"); *see also* 40 C.F.R. § 1501.8(a) (2022) ("Upon request of the lead agency, any Federal agency with jurisdiction by law shall be a cooperating agency. In addition, upon request of the lead agency, any other Federal agency with special expertise with respect to any environmental issue may be a cooperating 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 Eng'rs*, No. 4:07-CV-01170-WRW, 2008 WL 4833113, at \*8 (E.D. Ark. 2008) (emphasizing cooperation by requiring that the Corps' Environmental Assessment consider incremental impacts of all connected actions regardless of whether a different agency actually undertakes a particular action or is needed to provide the necessary expertise).

<sup>131</sup> *See, e.g., Ohio Valley Env't Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 195 (4th Cir. 2009) (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).

does not allow the Corps to abdicate its obligations under NEPA.<sup>132</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>133</sup>

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

To fulfill its public interest review obligation, the Corps must balance “[t]he benefits which reasonably may be expected to accrue from the proposal . . . against [the proposal’s] reasonably foreseeable detriments.”<sup>134</sup> In doing so, the Corps necessarily must and always does look at the expected benefits of the completed project.<sup>135</sup> This review happens contemporaneously with the Corps’ initial NEPA obligation—an EA. The Corps’ NEPA regulations state that the EA “should normally” be combined in the same decision document with the public interest review, which the Corps often does.<sup>136</sup> And remember the forgotten sentence; the Corps’ NEPA regulations also mandate: “In *all* cases, the scope of analysis used for analyzing both impacts and

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<sup>132</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, Inc. v. U.S. Army Corps of Eng’rs*, 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>133</sup> See 33 C.F.R. § 325 app. B(7)(b)(3) (2008) (“The district engineer should, whenever practicable, incorporate by reference and rely upon the reviews of other Federal and State agencies.”).

<sup>134</sup> 33 C.F.R. § 320.4(a)(1) (2020).

<sup>135</sup> *But see Mango*, 199 F.3d 85, 93 n.7 (2d Cir. 1999) (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, 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>136</sup> 33 C.F.R. § 325 app. B(7)(a) (2021). See, e.g., *Nat. Res. Def. Council, Inc. v. U.S. Army Corps of Eng’rs*, No. 1:09 CV 588, 2010 WL 1416681, at \*6 (N.D. Ohio Mar. 31, 2010) (demonstrating a case in which the Corps provided a Combined Decision Document which included NEPA documents and public benefit analysis).

alternatives should be the same scope of analysis used for analyzing the benefits of a proposal.”<sup>137</sup>

Despite the obvious temporal, analytical, and documentary overlap, the Corps has attempted—usually successfully—to silo these two related reviews when challenged in court, which allows the Corps to keep its scope of NEPA review narrow.<sup>138</sup> The more narrow NEPA review, in turn, often allows the Corps to issue a FONSI after an EA rather than undertaking a more rigorous and thorough EIS which would also require more opportunities for public participation.<sup>139</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.

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.<sup>140</sup> In a pair of cases related to surface mining, the Fourth and Sixth Circuits, at the urging of the Corps, adopted the Corps’ narrow view of its own authority to evaluate a project’s environmental effects under NEPA.<sup>141</sup> In so doing, the courts erected a wall between the Corps’ NEPA review and its public interest review that is not found in *Sigler* or in 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>142</sup> Plaintiffs challenged the Corps’ limited scope of its NEPA analysis, and specifically alleged 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>143</sup> The court acknowledged the forgotten sentence and even cited to *Sigler*, 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

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<sup>137</sup> 33 C.F.R. § 325 app. B(7)(a) (emphasis added).

<sup>138</sup> See, e.g., *OVEC*, 828 F.3d 316, 318 (4th Cir. 2016) (ruling that the Corps did not violate NEPA when it failed to consider evidence that surface coal mining is associated with adverse public-health effects).

<sup>139</sup> See 40 C.F.R. § 1503 (2022) (laying out extensive commenting requirements for Environmental Impact Statements).

<sup>140</sup> See, e.g., *Kentuckians for the Commonwealth v. U.S. Army Corps of Eng’rs*, 746 F.3d 698, 701 (6th Cir. 2014) (rejecting plaintiff’s argument that limiting the scope of an environmental assessment to exclude public health impacts related to surface mining in general was an abuse of the Corps’ discretion).

<sup>141</sup> *Id.*; *OVEC*, 828 F.3d at 318.

<sup>142</sup> *Kentuckians for the Commonwealth*, 746 F.3d at 701.

<sup>143</sup> *Id.* at 711.

portion.<sup>144</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>145</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>146</sup> and therefore, arguably, 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>147</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,<sup>148</sup> while a finding that a CWA Section 404 permit is contrary to the public interest should result in a denial of that permit.<sup>149</sup> But, the different outcomes should not drive the scope of the Corps’ review.

In *Ohio Valley Environmental Coalition v. U.S. Army Corps of Engineers (OVEC)*<sup>150</sup> 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>151</sup> The Fourth Circuit, relying on earlier circuit precedent,<sup>152</sup> held the Corps’ narrowly-scoped NEPA review that resulted in an EA and a FONSI was compliant because surface coal mining was primarily regulated by West

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<sup>144</sup> *Id.* 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>145</sup> *Id.*

<sup>146</sup> 42 U.S.C. § 4332 (2018). 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(a). 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 Travis D. Jones, *Humans Long Ignored: Revisiting NEPA’s Definition of “Human Environment” in the Era of Black Lives Matter*, 32 VILL. ENV’T L.J. 1 (2021) (detailing how the definition of “human environment” needs to be expanded to properly analyze psychological and socioeconomic impacts to address environmental racism).

<sup>147</sup> Compare 33 C.F.R. § 325 app. B (2020), with *id.* § 320.4(a).

<sup>148</sup> *Methow Valley Citizens Council*, 490 U.S. 332, 333 (1989) (“[I]t is well settled that NEPA itself does not impose substantive duties mandating particular results”).

<sup>149</sup> 33 C.F.R. § 320.4(a)(1) (“[A] permit will be granted unless the district engineer determines that it would be contrary to the public interest.”).

<sup>150</sup> 828 F.3d 316 (4th Cir. 2016).

<sup>151</sup> *Id.* at 318.

<sup>152</sup> See *Ohio Valley Env’t Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 194 (4th Cir. 2009) (“[T]he Corps has no legal authority to prevent the placement of fill material in areas outside of the waters of the United States.”).

Virginia pursuant to the Surface Mining Control and Reclamation Act (SMCRA),<sup>153</sup> and the Corps had no jurisdiction to authorize surface mining.<sup>154</sup> The environmental plaintiff, 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>155</sup> Instead, like the Sixth Circuit, the Fourth Circuit adopted the Corps' artificial wall between its NEPA analysis and its public interest review.<sup>156</sup>

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>157</sup> In *CBD*, a Florida fertilizer manufacturer engaged in phosphate mining sought a CWA Section 404 permit for discharging fill into wetlands.<sup>158</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>159</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>160</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>161</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,

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<sup>153</sup> 30 U.S.C. §§ 1201–1328 (2018).

<sup>154</sup> *OVEC*, 828 F.3d at 323.

<sup>155</sup> *Id.* at 324 n.6.

<sup>156</sup> *Id.* (finding 33 C.F.R. pt. 325, app. B § 7(b)(3) (2020) “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 Fourth 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 study the effects of surface mining, an activity that the court found beyond the Corps' authority. *Id.* at 324. Notably, the Corps in its brief selectively cited to its own regulation, omitting the phrase “and its intended use” after “proposed activity.” Brief for Appellant at 31, *OVEC*, 828 F.3d 316 (No. 14–2129), 2015 WL 672420 (2015); see also *Water Works & Sewer Bd. of the City of Birmingham v. U.S. Army Corps of Eng'rs*, 983 F. Supp. 1052, 1067 (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>157</sup> 941 F.3d 1288, 1309–11 (11th Cir. 2019) (Martin, J., concurring in part and dissenting in part).

<sup>158</sup> *Id.* at 1292 (majority opinion).

<sup>159</sup> *Id.* at 1293–94.

<sup>160</sup> *Id.* at 1294.

<sup>161</sup> *Id.*

moreover, always define the scope of the agency's consideration."<sup>162</sup> In the majority's view, the Corps' discussion of its NEPA analysis about 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>163</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 reasonable scope of consideration?”<sup>164</sup> Ultimately, the majority found the Corps' forgotten sentence ambiguous and deferred to what in the court's view was the Corps' reasonable interpretation.<sup>165</sup>

By contrast, the dissent gave significance to the plain meaning of the Corps' forgotten sentence.<sup>166</sup> 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>167</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>168</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>169</sup> Finally, while acknowledging that 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>170</sup> Condoning such a process would “allow[] consideration of endless benefits without concomitant consideration of the impacts associated with those benefits” and frustrate NEPA's primary purpose of ensuring informed agency decision-making.<sup>171</sup>

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<sup>162</sup> *Id.* at 1301. *But see* 33 C.F.R. § 325 app. B(7)(b)(3) (2021) (“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.” (emphasis added)).

<sup>163</sup> *CBD*, 941 F.3d 1288, 1301 (11th Cir. 2019).

<sup>164</sup> *Id.* at 1302.

<sup>165</sup> *Id.* (citing *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414–18 (2019)).

<sup>166</sup> *Id.* at 1309–10 (Martin, J., concurring in part and dissenting in part).

<sup>167</sup> *Id.* at 1309.

<sup>168</sup> *Id.* at 1310.

<sup>169</sup> *Id.* (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 1311.

Judge Martin was right to call out the Corps' unfaithfulness to its own regulations.<sup>172</sup> The Corps should revive the forgotten sentence in its NEPA analyses and it is highly likely, given the discretion afforded the Corps in carrying out its NEPA obligations, that the courts will follow suit.<sup>173</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>174</sup> Among his proposals was one for resolving the small handles problem.<sup>175</sup>

Mr. Wood contended that the definition of "effects" in the CEQ regulations, as to the scope of the effects federal agencies must consider, was unclear.<sup>176</sup> He argued that a "clear distinction must be drawn between actual, physical causation versus 'but for' or 'legal enablement' causation."<sup>177</sup> Mr. Wood referenced *Mall Properties, Inc.* as an example

<sup>172</sup> See also *Van Antwerp*, 709 F. Supp. 2d 1254, 1258, 1264 n.19 (S.D. Fla. 2009) (noting that an agency acts arbitrarily or capriciously when it fails to comply with its own regulations); 33 C.F.R. § 325 app. B(7)(b)(3) (2021).

<sup>173</sup> *But see Mall Properties, Inc.*, 672 F. Supp. 561, 573–74 (D. Mass 1987) (suggesting that whatever discretion the agency may have, it is not absolute).

<sup>174</sup> Wood, *supra* note 103, at 10535. While Mr. Wood noted the Comment expressed only his personal views and did 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. 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—over the last 40 years. In other words, his opinion is relevant to discerning the official stance the Corps will take in its environmental regulations and policies.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* ("[T]he current definition of 'effects' at 40 C.F.R. §1508.8 can cause confusion.").

<sup>177</sup> *Id.* The Trump administration's 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)(2) (2020). This provision was consistent with the spirit and some of the language of Mr. Wood's proposal to narrow the scope of NEPA reviews. Wood, *supra* note 103, at 10535. However, that addition was removed by the recent CEQ final rule amending the definition of "effects." See 87 Fed. Reg. at 23,465, 23,453 (May 20, 2022) ("CEQ has reconsidered its reasoning and approach taken in the 2020 rule and does not

of when the Corps “deviated from its usual practice” of narrowly-scoped NEPA analyses and was admonished by a federal court.<sup>178</sup> But *Mall Properties, Inc.* was decided before the Corps published its NEPA regulations in 1988, and thus before the forgotten sentence. While the district court relied on proximate cause principles to hold that the Corps’ reliance on socio-economic factors to deny the CWA Section 404 permit was beyond the scope of its authority, there was no discussion in the NEPA portion of the case regarding the comparative scopes of benefits and detriments of the proposed project.<sup>179</sup>

Mr. Wood’s proposed revisions to the CEQ regulations also ignore 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 the regulation’s requirement: “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>180</sup> This omission is conspicuous because 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.<sup>181</sup> But, as Judge Martin noted, leaving this important sentence 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>182</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 (Public Citizens)*.<sup>183</sup> Mr. Wood’s, and several courts’, reliance on *Public Citizen* in the context of CWA Section 404 permits is misplaced. In *Public Citizen*, the Department of Transportation had “no ability to prevent a certain effect due to its limited statutory authority over the relevant actions,”<sup>184</sup>

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deem it useful to include the ‘reasonably close causal relationship’ and ‘but for’ language” in the definition of “effects”); *see also* 40 C.F.R. § 1508.1(g) (2022).

<sup>178</sup> Wood, *supra* note 103, at 10536.

<sup>179</sup> *See Mall Properties, Inc.*, 672 F. Supp. 561, 573 (D. Mass. 1987) (citing *Metro. Edison Co. v. Nat’l Lab. Relations Bd.*, 460 U.S. 693, 776 (1983)) (“[T]he 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. *Id.* at 564 (The district engineer stated: “[s]till weighing most heavily, however, is my concern for the socio-economic impacts this project would have on the city of New Haven.”).

<sup>180</sup> Compare Wood, *supra* note 103, at 10535, with 33 C.F.R. § 325 app. B(7)(b)(3) (2020) (emphasis added).

<sup>181</sup> Wood, *supra* note 103, at 10537.

<sup>182</sup> *CBD*, 941 F.3d 1288, 1311 (11th Cir. 2019) (Martin, J., concurring in part and dissenting in part).

<sup>183</sup> Wood, *supra* note 103, at 10536; 541 U.S. 752 (2004).

<sup>184</sup> *Public Citizen*, 541 U.S. at 770.

whereas the Corps, under the CWA plain language and its public interest review regulation, has broad discretion and authority to deny or condition a CWA Section 404 permit to prevent or minimize impacts.<sup>185</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.<sup>186</sup> Mr. Wood does not address the inherent inconsistency in the Corps' application of its scope of environmental review under 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 *CBD* dissent, 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>187</sup> Second, by doing so the Corps will more faithfully implement its own NEPA scope of analysis regulation, specifically the forgotten sentence. Third, a reliably broader scope of NEPA review is more consistent with the NEPA implementing regulations—in particular the CEQ's definition of "indirect effects."<sup>188</sup> Fourth, such an adjustment by the Corps is 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 always mandatory.<sup>189</sup>

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<sup>185</sup> See discussion *supra* Part III (discussing the Corps' broad discretion under public interest review regulation); see also *CBD*, 941 F.3d at 1312 (Martin, J., concurring in part and dissenting in part) (noting the Corps' broad discretion under its public interest review regulation as grounds for distinguishing *Public Citizen*); *Sierra Club v. Fed. Energy Regul. Comm'n*, 867 F.3d 1357, 1380 (D.C. Cir. 2017) (Brown, J., concurring in part and dissenting in part); *White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1040–42 (9th Cir. 2009) (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 U.S. 569, 579–83 (1992) (discussing the Corps' broad authority under its public interest review under the RHA).

<sup>186</sup> The Trump administration's 2020 NEPA "effects" definition also relied heavily on *Public Citizen*. See 87 Fed. Reg. 23,453, 23,464 (Apr. 20, 2022) (discussing the 2020 rule's reliance on *Public Citizen*). In reversing the 2020 Trump rule, CEQ explicitly rejected that rule's reliance on *Public Citizen*, a case that "dealt with a unique context in which an agency had no authority to direct or alter an outcome," and reaffirmed "the longstanding principle of reasonable foreseeability and the rule of reason in implementing NEPA's directives." *Id.* at 23,465.

<sup>187</sup> See *supra* notes 68–81 and accompanying text. 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>188</sup> 40 C.F.R. § 1508.1(g)(2) (2022). Notably, the broad "effects" definition recently restored by the Biden administration was the definition in effect when the Corps promulgated its NEPA implementing regulations in 1987. See *supra* note 29 and accompanying text.

<sup>189</sup> *Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

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 infrastructure projects that will undoubtedly significantly affect the human environment.<sup>190</sup> Unlike some federal agencies (e.g., United States Forest Service) which have adopted NEPA regulations mandating that draft Environmental Assessments 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;<sup>191</sup> but, since permit applications are necessarily early in the permitting process, they do not contain the same level of environmental analysis or detail as draft NEPA documents or permits, and therefore provide the public with far less of an opportunity to make informed and meaningful comments on the proposed project.<sup>192</sup>

Thus, if the Corps continues to take a narrow view of the scope of its NEPA analysis it will continue to result in EAs and 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>193</sup> Then First Circuit Judge, now retired Associate Justice of the Supreme Court of the United States, Stephen Breyer articulated this concern in *Sierra Club v. Marsh*,<sup>194</sup> which the First Circuit decided just prior to the Corps' promulgation of its NEPA scope of review regulations. The case involved the construction of a major marine port in Maine.<sup>195</sup> The Corps limited the scope of its NEPA analysis and did not consider as an indirect effect of the port construction that "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>196</sup> As a result, the Corps published an EA and FONSI rather than an EIS.<sup>197</sup>

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<sup>190</sup> See, e.g., *Sierra Club v. U.S. Army Corps of Eng'rs*, 997 F.3d 395, 400–01 (1st Cir. 2021) (discussing rules promulgated by the Corps for determining the proper scope of its NEPA analysis).

<sup>191</sup> 33 C.F.R. § 325.3 (outlining procedures for issuing public notices for CWA Section 404 permit applications).

<sup>192</sup> Cf. *Methow Valley Citizens Council*, 490 U.S. at 349 (explaining how an EIS serves a large informational role).

<sup>193</sup> See *id.* (explaining the important role the EIS requirement plays). 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) (discussing agency decision making for Forest Service proposals, which incorporates public comments).

<sup>194</sup> 769 F.2d 868 (1st Cir. 1985).

<sup>195</sup> *Id.* at 870.

<sup>196</sup> *Id.* at 877–78.

<sup>197</sup> *Id.* at 873.

Judge Breyer found the Corps' narrowly-scoped EA and FONSI arbitrary and capricious and required the Corps to do an EIS.<sup>198</sup> 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 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>199</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>200</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>201</sup> In *Marsh*, for example, 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>202</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—that resulted in more EISs, the Corps would likely avoid at least some of the legal challenges to its decisions to produce EAs and FONSI. And, because NEPA is a procedural statute, the NEPA review itself would not mandate a denial of a permit application.<sup>203</sup>

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<sup>198</sup> *Id.* at 881–82.

<sup>199</sup> *Id.* at 875.

<sup>200</sup> 33 C.F.R. §§ 325 app. B(3), (8)(f)(2) (2021).

<sup>201</sup> *Id.* § 325 app. B(7)(a) ("The combined document [EA, 404(b)(1) analysis, statement of findings, FONSI] normally should not exceed 15 pages"); Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,037 (Mar. 23, 1981) ("In most cases . . . a lengthy EA indicates that an EIS is needed.").

<sup>202</sup> *Marsh*, 769 F.2d at 875.

<sup>203</sup> *Id.* at 882 (noting that NEPA's "underlying purpose" is to require agencies "to determine and assess environmental effects in a systematic way," not to reach a certain conclusion).

## 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>204</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>204</sup> C-Span, *President Ronald Regan Clip: "Tear Down this Wall,"* YOUTUBE (Jun. 6, 2012), <https://perma.cc/X8WT-MCFB>.

## APPENDIX A

Case	Corps Position (Broad/Narrow)	Upheld? (Y/N)	Includes “forgotten sentence” text of 33 C.F.R. § 325 App. B(7)(b)(3)	Type of project
Sierra Club v. U.S. Army Corps of Eng’rs, 997 F.3d 395 (1st Cir. 2021).	Narrow	Y	N	Electric Transmission Line
Ctr. for Biological Diversity v. U.S. Army Corps of Eng’rs, 941 F.3d 1288 (11th Cir. 2019).	Narrow	Y	Y	Phosphate Mining
Ohio Valley Env’t Coal. v. U.S. Army Corps of Eng’rs, 828 F.3d 316 (4th Cir. 2016).	Narrow	Y	Y – in footnote	Surface Coal Mining
Black Warrior Riverkeeper, Inc. v. Ala. Dep’t of Transp., No. 11-CV-267, 2016 WL 233672 (M.D. Ala. Jan. 19, 2016).	Narrow	Y	N	Highway Construction
Sierra Club v. U.S. Army Corps of Eng’rs, 803 F.3d 31 (D.C. Cir. 2015).	Narrow	Y	N	Oil Pipeline
Sierra Club v. Bostick, 787 F.3d 1043 (10th Cir. 2015).	Narrow	Y	N	Oil Pipeline
Residents for Sane Trash Solutions v. U.S. Army Corps of Eng’rs, 31 F. Supp. 3d 571 (S.D.N.Y. 2014).	Narrow	Y	N	Solid Waste Transportation Facility

Case	Corps Position (Broad/Narrow)	Upheld? (Y/N)	Includes “forgotten sentence” text of 33 C.F.R. § 325 App. B(7)(b)(3)	Type of project
Kentuckians for the Commonwealth v. U.S. Army Corps of Eng’rs, 746 F.3d 698 (6th Cir. 2014).	Narrow	Y	Y	Surface Coal Mining
Sierra Club v. Bostick, 539 F. App’x. 885 (10th Cir. 2013).	Narrow	Y	N	Oil Pipeline
Pres. Soc’y of Charleston v. U.S. Army Corps of Eng’rs, No. 2:12-2942-RMG 2013 WL 6488282 (D.S.C. Sept. 18, 2013).	Narrow	N	N	Cruise Ship Passenger Terminal
Sierra Club v. U.S. Army Corps of Eng’rs, No. 10-CV-564-J-25, 2012 WL 12952607 (M.D. Fla. Jan. 3, 2012).	Narrow	N	N	Phosphate Mining
Nat. Res. Def. Couns. v. U.S. Army Corps of Eng’rs, No. 09 CV 588, 2010 WL 1416681 (N.D. Ohio March 31, 2010).	Narrow	Y	Y	Coal to Liquid Powerplant
White Tanks Concerned Citizens v. Strock, 563 F.3d 1033 (9th Cir. 2009).	Narrow	N	N	Housing Development
Sierra Club v. Van Antwerp, 709 F. Supp. 2d 1254 (S.D. Fla. 2009).	Narrow	N	Y - in footnote	Limestone Mining
Stewart v. Potts, 996 F. Supp. 668 (S.D. Tex. 1998).	Narrow	N	N	Golf Course Development

Case	Corps Position (Broad/Narrow)	Upheld? (Y/N)	Includes “forgotten sentence” text of 33 C.F.R. § 325 App. B(7)(b)(3)	Type of project
Choate v. U.S. Army Corps of Eng’rs, No. 07–CV–01170, 2008 WL 4833113 (E.D. Ark. Nov. 5, 2008).	Narrow	N	N	Mall/Shopping Center
Ohio Valley Env’t Coal. v. Aracoma Coal, Inc., 556 F.3d 177 (4th Cir. 2009).	Narrow	Y	N	Surface Coal Mining
D’Olive Bay Restoration & Pres. Comm., Inc. v. U.S. Army Corps of Eng’rs, 513 F. Supp. 2d 1261 (S.D. Ala. 2007).	Narrow	Y	N	Retail Shopping Center
Sierra Club v. U.S. Army Corps of Eng’rs, 464 F. Supp. 2d 1171 (M.D. Fla. 2006).	Narrow	Y	N	General Regional Permit for Residential Developments
Montrose Parkway Alt. Coal. v. U.S. Army Corps of Eng’rs, 405 F. Supp. 2d 587 (D. Md. 2005).	Narrow	Y	N	Highway Construction
Save Our Sonoran v. Flowers, 408 F.3d 1113 (9th Cir. 2005).	Narrow	N	N	Residential Development
Water Works & Sewer Bd. of the City of Birmingham v. U.S. Army Corps of Eng’rs, 983 F. Supp. 1052 (N.D. Ala. 1997).	Narrow	Y	Y (but not discussed)	Water Intake Structure and Pipeline

Case	Corps Position (Broad/Narrow)	Upheld? (Y/N)	Includes "forgotten sentence" text of 33 C.F.R. § 325 App. B(7)(b)(3)	Type of project
Sylvester v. U.S. Army Corps of Eng'rs, 884 F.2d 394 (9th Cir. 1989).	Narrow	Y	N	Resort Complex/Golf Course
Ark. Nature All. v. U.S. Army Corps of Eng'rs, 266 F. Supp. 2d 876 (E.D. Ark. 2003).	Narrow	N	N	Bridge Modifications
Wetland Action Network v. U.S. Army Corps of Eng'rs, 222 F.3d 1105 (9th Cir. 2000) (abrogated on other grounds).	Narrow	Y	N	Construction/Real Estate Development
Fla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs, 401 F. Supp. 2d 1298 (S.D. Fla. 2005).	Narrow	N	N	Construction/Real Estate Development
Friends of the Earth v. U.S. Army Corps of Eng'rs, 109 F. Supp. 2d 30 (D.D.C. 2000).	Narrow	N	N	Floating Casino
Conservation L. Found. v. U.S. Army Corps of Eng'rs, 457 F. Supp. 3d 33 (D. N.H. 2019).	Narrow	Y	N	Underwater Cable Installation
Friends of Canyon Lake v. Brownlee, No. SA-03-CA-0993, 2004 WL 2239243 (W.D. Tex. Sept. 20, 2004).	Narrow	Y	N	Water Intake Structure

Case	Corps Position (Broad/Narrow)	Upheld? (Y/N)	Includes “forgotten sentence” text of 33 C.F.R. § 325 App. B(7)(b)(3)	Type of project
Pogliani v. U.S. Army Corps of Eng’rs, No. 01- CV-0951, 2007 WL 983549 (N.D.N.Y. Mar. 28, 2007). <sup>205</sup>	Broad	Y	N	Natural Gas Power Plant

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<sup>205</sup> The Corps adopted the narrow position in ninety-seven percent of cases and was upheld sixty-seven percent of the time. The courts only referenced the language of the Corps’ NEPA regulations in twenty percent of cases.

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