The Case for Vetoing General Permits under Section 404(c) of the Clean Water Act

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Dredge and fill activities are an essential feature of mining projects, infrastructure construction, and coastal rehabilitation. While the U.S. Army Corps of Engineers is the largest dredge and fill operator in the United States, it is also the federal agency responsible for permitting such activities. As a check on the Corps, the Clean Water Act grants the United States Environmental Protection Agency veto power over dredge and fill permits. Over the last thirty years, however, the increased use of nationwide general permits has disrupted the balance of power between these two federal agencies. General permits authorize dredge and fill activity without individualized environmental review. Significantly, the Environmental Protection Agency has never vetoed a general permit. This Note addresses this power imbalance by arguing that statutory authority exists for an expanded application of the veto power.

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INTRODUCTION

For at least 4,000 years,[1] the Indigenous Yup'ik people of southwest Alaska have harvested salmon from the Iilgayaq.[2] To this day, those same rivers and streams that make up the Bristol Bay watershed are spawning grounds for the largest non-hatchery salmon runs in existence.[3] In 2011, the mining company Northern Dynasty Minerals proposed to develop an open pit mine in Bristol Bay.[4] The mining company would create the largest mine ever constructed in North America, conspicuously named the Pebble Mine.[5] As planned, the Pebble Mine would have required a pit nearly as deep as the Grand Canyon, along with waste rock piles and tailings impoundments spanning an area larger than Manhattan.[6] Excavation and construction for the mine would have required depositing billions of tons of dredged and fill material into the Bristol Bay watershed.[7] In 2014, after completion of three years of ecological studies analyzing the impacts of the Pebble Mine, the U.S. Environmental Protection Agency (EPA) proposed to prohibit the U.S. Army Corps of Engineers (the

1. Proposed Determination to Restrict the Use of an Area as a Disposal Site; Pebble Deposit Area, Southwest Alaska 79 Fed. Reg. 42,315 (July 21, 2014).

2. "Iilgayaq," which possibly means a place to hide, is also the name for the Nushagak River and Bay. Some informants believe the name only refers to the Nushagak Area. *See* Bristol Bay Native Corporation, *Native Place Names Project*, BRISTOL BAY ONLINE, https://bbonline.bbnc.net/placenames/ (last visited Oct. 9, 2022); *see also* STEVEN R. BRAUND & ASSOC., THE PEBBLE P'SHIP, *Chapter 22 Cultural Resources*, in PEBBLE PROJECT ENVIRONMENTAL BASELINE DOCUMENT app. 22A at 8 (2011).

3. Proposed Determination to Restrict the Use of an Area as a Disposal Site; Pebble Deposit Area, Southwest Alaska 79 Fed. Reg. at 42,315.

4. *Id.*

5. *Id.*

6. *Id.* As initially proposed, the Pebble pit covered up to 6.9 square miles (17.8 square kilometers) and was up to 0.77 miles (1.24 km) deep. *Id.* The tailings impoundments covered an additional 18.8 square miles (48.6 km^2) and waste rock piles totaled 8.7 square miles (22.6 km2). *Id.*

7. *Id.* The volume of mine tailings, and waste rock produced from the smallest proposed mine was enough to fill a professional football stadium more than 800 times, while the largest proposed mine would have done so more than 3,900 times. *Id.*

Corps) from approving the dredge and fill activities.[8] Essentially, EPA vetoed the Pebble Mine.

Large dredge and fill projects, like Pebble Mine, receive individualized environmental review from EPA. Across the United States, however, similar (if smaller) dredge and fill activities happen every day without any environmental review. Instead, the Corps pre-approves those activities through a generalized environmental review process. That process disregards the activities' specific location, and only focuses on the general class of activities proposed. The Corps may use generalized review anywhere in the country and apply it to a range of dredge and fill activities, including those relating to mooring buoys, residential developments, road crossings, wetland restoration, and commercial aquaculture.[9] If the process had been applied to Pebble Mine, the Corps could easily have authorized the dredge and fill project without accounting for the centuries of Alaska Native subsistence use connected so deeply to the Iilgayaq and the special places where land meets water.

Over time, the Corps has broadened the scope of dredge and fill activities subject to generalized environmental review. Likewise, it has employed individualized environmental review much less frequently. Despite these changes, EPA has only exercised its authority to veto Corps approval of dredge and fill activities to the few large and politically controversial projects,[10] like the Pebble Mine, that receive individualized review. Smaller projects that evade public scrutiny, but nonetheless create environmental impacts, may easily escape EPA's veto through the generalized environmental review process. This Note argues that the Clean Water Act (CWA) also authorizes EPA to prohibit the Corps from approving general dredge and fill activity. Part I describes the statutory and regulatory background for dredge and fill permits and EPA's veto. Part II establishes the statutory authority, legislative history, and practical reasons that justify EPA's veto as applied to general dredge and fill activities. This Note also proposes a new, proactive process where EPA can identify wetlands subject to the veto's protection prior to proposal of dredge and fill activities.

8. *Id.* at 42,317.

9. U.S. Army Corps of Eng'rs, *National Permit Reissuance*, U.S. ARMY CORPS OF ENG'RS HEADQUARTERS WEBSITE (Jan. 6, 2017), https://www.usace.army.mil/Media/Fact-Sheets/Fact-Sheets-View/Article/1043655/nationwide-permit-reissuance/.

10. *See* Michael C. Blumm & Elisabeth Mering, *Vetoing Wetland Permits Under Section 404(c) of the Clean Water Act A History of Inter-Federal Agency Controversy and Reform*, 33 UCLA J. ENV'T L. & POL'Y 215, 243–85 (2015); *see* Henry Fountain, *Alaska's Controversial Pebble Mine Fails to Win Critical Permit, Likely Killing It*, N.Y. TIMES (Nov. 25, 2020), https://www.nytimes.com/2020/11/25/climate/pebble-mine-permit-denied.html.

I. STATUTORY & REGULATORY BACKGROUND

The objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[11] Discharge of pollutants from stationary and mobile "point sources" like pipes and ocean vessels are a major source of water pollution.[12] Through the National Pollutant Discharge Elimination System (NPDES), the CWA prohibits discharge of pollutants from point sources unless permitted by EPA.[13] However, NPDES does not cover "nonpoint source" pollution, like municipal stormwater runoff, which the CWA leaves to state regulation.[14] Dredge and fill activities are yet another type of pollution not covered by NPDES.[15] For example, dredging for bridge construction may stir rocks and sand into a river. The CWA regulates this type of nonpoint source pollution by requiring dredge and fill permits.[16]

A. The Clean Water Act Section 404 Dredge and Fill Permitting Process

Section 404 of the CWA prohibits discharge of dredged or fill materials into "navigable waters" without a permit.[17] Under the CWA, Congress extended federal jurisdiction over "navigable waters" from "waters actually used to transport interstate"[18] to include "wetlands adjacent to traditional navigable-in-fact interstate surface bodies of water."[19] Therefore, all "waters of the United States" are subject to section 404 jurisdiction.[20] Dredged material is defined as "material that is excavated or dredged from waters of the United States,"[21] while fill material refers to a "material placed in waters of the United States where the

11. Clean Water Act, 33 U.S.C. § 1251(a).

12. *See id.* § 1362(14) (defining point source as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged").

13. *Id.* § 1342.

14. *See id.* § 1342(p) (defining the term "nonpoint source" to mean any source of water pollution that does not meet the legal definition of "point source" in section 502(14) of the Clean Water Act).

15. Karen B. Carter, *Nonpoint Source Pollution Protecting Our Investment in Clean Water*, 57 J. (WATER POLLUTION CONTROL FED'N) 104, 104 (1985); *See* Clean Water Act, 33 U.S.C. § 1344 (dredge and fill program); *see also* Clean Water Act, 33 U.S.C. § 1342 (NPDES program).

16. Clean Water Act, 33 U.S.C. § 1344; *Basic Information about Nonpoint Source (NPS) Pollution*, EPA, https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution (last updated July 8, 2021).

17. Clean Water Act, 33 U.S.C. § 1344.

18. Michael C. Blumm & D. Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act Regulatory Ambivalence, Intergovernmental Tension, and A Call for Reform*, 60 U. COLO. L. REV. 695, 703–04 (1989).

19. Steven G. Davison, *General Permits Under Section 404 of the Clean Water Act*, 26 PACE ENV'T L. REV. 35, 45 (2009). The constitutional extent of navigable waters has long been a source of dispute. *See, e.g.*, Rapanos v. United States, 547 U.S. 715, 723–29 (2006) (explaining the history of the term "waters of the United States").

20. Clean Water Act, 33 U.S.C. § 1362(7).

21. Permits for Discharges of Dredged or Fill Material into Waters of the United States, 33 C.F.R. § 323.2(c) (2021).

material has the effect of: replacing any portion of a water of the United States with dry land; or changing the bottom elevation of any portion of a water."[22] Dredge and fill activity is often associated with building projects, site development, beach renourishment, installation of intake or outfall pipes, and construction of other infrastructure such as harbors, canals, and water control projects.[23] Additionally, mining activities often require dredge and fill permits for gravel pits, holding ponds, and embankments.[24]

The Corps is the federal agency responsible for issuing dredge and fill permits.[25] Specifically, the CWA authorizes the Corps to "issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites."[26] Therefore, every permit must specify the location of a disposal site for such materials.[27] The Corps will only grant a permit after approving the specified disposal site.[28] The specification approval process includes substantive environmental and public interest review of dredge and fill activities, guided by the aim of protecting navigable waters.[29] The Corps undertakes this process differently depending on the type of permit being issued.

B. Individual Permits

Individual permits are required for dredge and fill activities with potentially significant impacts.[30] The Corps reviews individual permits on a case-by-case basis under two sets of criteria.[31] First, the Corps evaluates whether the individual permit complies with disposal site specification requirements.[32] The disposal site is the location where the discharge of dredged and fill material will occur.[33] To specify the disposal site, the Corps evaluates substantive environmental criteria enumerated under section 404(b)(1) of the CWA.[34] These provisions provide the Corps with comprehensive environmental review standards and procedures for reviewing individual permits.[35] All permits,

22. *Id.* § 323.2(e)(1).
23. *See* 40 CFR § 232.2.
24. *Id.*
25. Clean Water Act, 33 U.S.C. § 1344(a).
26. *Id.*
27. Trout Unlimited v. Pirzadeh, 1 F.4th 738, 744 (9th Cir. 2021).
28. *Id.*
29. Blumm. & Zaleha, *supra* note 18, at 710; *See* Gary E. Parish & J. Michael Morgan, *History, Practice and Emerging Problems of Wetlands Regulation Reconsidering Section 404 of the Clean Water Act*, 17 LAND & WATER L. REV. 43, 64, 67 (1982).
30. Travis O. Brandon, *Nationwide Permit 13, Shoreline Armoring, and the Important Role of the U.S. Army Corps of Engineers in Coastal Climate Change Adaptation*, 46 ENV'T L. 537, 546 (2016).
31. *Id.*
32. Clean Water Act, 33 U.S.C. § 1344(b)(1).
33. Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 C.F.R. § 230.3(f) (2015).
34. *Id.*
35. *Id.*

including both individual and general, must comply with the Specification Guidelines (the Guidelines); however, the compliance process differs for each.[36]

EPA implements section 404(b)(1) by promulgating the Guidelines through the federal rulemaking process.[37] These guidelines require the Corps to produce "factual determinations" that predict the "potential impacts" of dredge and fill activity on the physical and chemical characteristics of the aquatic ecosystem,[38] as well as biological characteristics,[39] special aquatic sites,[40] and human use.[41] The Guidelines also require consideration of practicable alternatives[42] and mitigation measures.[43] The Corps has final responsibility for making these factual findings.[44] Interested agencies, like EPA and the U.S. Fish & Wildlife Service, may "raise concerns" about an individual permit application that the Corps must "fully consider."[45] But the Corps is not required to take any specific actions raised by interested agencies. After making its factual determinations, the Corps cannot approve a dredge and fill permit application if the proposed activity would violate state water quality standards, exceed toxic effluent standards, threaten endangered species or marine sanctuaries, or contribute to significant degradation of waters of the United States.[46]

For the second criteria, after the Corps approves specification of the disposal site for the individual permit application, the permit goes through public interest review.[47] The public interest review is a balancing process in which the Corps considers a multitude of factors to determine the cumulative costs and benefits of the proposed activity.[48] The Corps must weigh these factors and determine the relative extent of the public and private need for the proposed activity and whether there are unresolved conflicts over resource use.[49] The

36. *Id.* § 230.7.
37. *Id.* § 230.
38. *Id.* § 230.20–25.
39. *Id.* § 230.30–32.
40. *Id.* § 230.40–45.
41. *Id.* § 230.50–54.
42. *Id.* § 230.10(a).
43. *Id.* § 230.91–98.
44. *See* Brandon, *supra* note 30, at 547.
45. Blumm & Mering, *supra* note 10, at 241.
46. Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 C.F.R. § 230.5(k) (2015); Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 C.F.R. §§ 230.10(b)(1)–(4) (2015).
47. Permits for Discharges of Dredged or Fill Material into Waters of the United States, 33 C.F.R. § 320.4(a)(1) (2021).
48. *Id.* (including consideration of factor, such as "conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people").
49. *Id.* § 320.4(a)(2).

Corps may decide to deny an individual permit during public interest review, even if the permit complies with the Guidelines under section 404(b)(1).[50]

In addition to these review requirements, fifteen days after an applicant submits a permit for evaluation, the Corps must provide notice and opportunity for public hearings through publication in the Federal Register.[51] Environmental groups, affected neighbors, and federal agencies can comment on the proposed permit application, and the Corps must respond.[52]

Only after the Corps determines that an individual permit application complies with the Guidelines, finds that the activity is in the public interest, and provides public notice may it issue an individual dredge and fill permit.[53] If the action will have a significant effect on the quality of the human environment, the permit application may also trigger an Environmental Impact Statement under the process established by the National Environmental Policy Act.[54] As such, the individual permit application review process is expensive and time consuming for permit applicants and the Corps.[55]

C. General Permits

General permits are a less intensive alternative to individual permits. The CWA authorizes the Corps to grant general permits for dredge and fill activities that are substantially similar in nature and cause only minimal individual and cumulative environmental impacts.[56] As will be shown later in this Note, the rapid growth in general permits may be causing an outsized environmental impact because these permits can be used without individualized environmental review, obscuring the full extent of their environmental impacts.[57]

The Corps issues three types of general permits. The first of these are regional permits, which authorize activities in a particular geographic region, usually corresponding to a state, group of states, or Corps division or district.[58] The second, programmatic permits, authorize the activities of a state, local, or

50. Blumm & Mering, *supra* note 10, at 238; *See* Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 C.F.R. § 230.10 (2015) (noting that because of the applicability of other laws and regulations, "a discharge complying with the requirement of these Guidelines will not automatically receive a permit.").

51. Clean Water Act, 33 U.S.C. § 1344(a).

52. *See* Blumm & Zaleha, *supra* note 18, at 729; see 33 C.F.R. § 325 3(d).

53. 33 C.F.R. § 320.4(a)(1) (2021).

54. *Id.*; *see* 33 C.F.R. § 320.4(j)(4) ("In the absence of overriding national factors of the public interest that may be revealed during the evaluation of the permit application, a permit will generally be issued following receipt of a favorable state determination provided, . . . the applicable statutes have been considered and followed: e.g., the National Environmental Policy Act.").

55. Brandon, *supra* note 30, at 547.

56. 33 U.S.C. § 1344(e).

57. *See* Brandon, *supra* note 30, at 549.

58. *U.S. Army Corps of Engineers Permitting Process Informatio*n, U.S. ARMY CORPS OF ENG'RS, https://www.lrl.usace.army.mil/Portals/64/docs/regulatory/Permitting/PermittingProcessInformation.pdf (last visited Nov. 26, 2021).

federal agency program.[59] For the Corps division or district, Corps engineers may issue regional and programmatic general permits within their geographic jurisdiction.[60] Finally, nationwide permits (NWPs) authorize activities on a nationwide basis for a permitted time of no more than five years.[61]

NWPs are the most common type of general permit and the most used permit for all types of dredge and fill projects.[62] According to the Corps, NWPs are "designed to regulate with little, if any, delay or paperwork certain activities having minimal impacts."[63] The Corps creates NWPs through the federal rulemaking process.[64] The Corps develops NWPs under the same Guidelines as for individual permits.[65] NWPs are also subject to public interest review, public notice, and comment through publication in the Federal Register.[66] As part of the NWP issuance process, the Corps determines what "general conditions" to place on use of the permit, like maximum acreage, equipment requirements, and mitigation.[67] Likewise, prior to authorized use of an NWP, a prospective dredge and fill operator must comply with its general conditions.[68]

A common general condition is for "pre-construction notification" (PCN), which requires that the applicant provide advance notice of their intent to use a specific NWP to a Corps District Engineer, who determines whether the proposed activity qualifies for NWP authorization.[69] PCN also requires a description of the proposed activity, the purpose, the location, any known impacts, known wetlands, critical habitat, and designated protected areas.[70] Alternatively, many NWPs do not require PCN, so compliance with the general conditions authorizes the permit automatically and without any Corps review.[71] In those cases, the permitted party self-determines if they qualify for the permit.[72] If an activity qualifies for an NWP, a Corps District Engineer may still

59. *Id.*

60. *Id.*

61. U.S. ARMY CORPS OF ENG'RS, NATIONWIDE PERMIT REISSUANCE (2022), https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll7/id/19764 (last visited Oct. 4, 2022).

62. *See* NICOLE T. CARTER, CONG. RSCH. SERV., 97–223, THE ARMY CORPS OF ENGINEERS' NATIONWIDE PERMITS PROGRAM: ISSUES AND REGULATORY DEVELOPMENTS 2 (2017), https://crsreports.congress.gov/product/pdf/RL/97-223/26.

63. 33 C.F.R. § 330.1 (2021).

64. *See U.S. Army Corps of Engineers Permitting Process Information*, *supra* note 58.

65. Davison, *supra* note 19, at 36–37.

66. Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 C.F.R. § 230.7 (2015).

67. *2017 Nationwide Permits, General Conditions, District Engineer's Decision, Further Information, and Definitions*, U.S. ARMY CORPS OF ENG'RS, 28–39, https://www.swl.usace.army.mil/Portals/50/docs/regulatory/2017%20NWP%20Listing%20with%20Conditions.pdf (last visited Nov. 26, 2021).

68. *Id.*

69. Brandon, *supra* note 30, at 549.

70. *2017 Nationwide Permits, General Conditions, District Engineer's Decision, Further Information, and Definitions*, *supra* note 67, at 37 (describing the contents of pre-construction notification).

71. Davison, *supra* note 19, at 67.

72. Brandon, *supra* note 30, at 549.

revoke the use of an NWP in a state or geographic region or for a specific project.[73]

The Corps modified and reissued NWPs twice in 2021.[74] In January, the Corps reissued twelve existing NWPs and removed a rule requiring PCN for activities that impact more than 300 linear feet of stream beds.[75] At that time, the Corps also issued four new NWPs.[76] Two were a direct response to a federal district court decision vacating NWP 12, which had authorized utility line activities as specifically applied to the Keystone Pipeline.[77] Then in December, the Corps reissued the additional forty outstanding 2017 NWPs and added a single new NWP for water reclamation and reuse facilities.[78] Unlike the earlier reissuance, which began under the Trump administration, the second reissuance was led by the Corps under the Biden administration. Experts anticipate the Corps to revisit NWPs later in the Biden administration.[79] The Biden administration may seek to align general permits with Executive Order 13990, which directs agencies to review and act to prioritize environmental justice.[80]

Over the years, the number of NWPs has increased dramatically, while the use of individual permits has decreased. Under one estimate, the number of activities using general permits increased from 39,583 to 78,336 between 1988 and 2005, while the number of individual permits decreased from 17,864 to 11,180.[81] One commentor noted that, "ninety-four percent of the estimated 58,000 permits issued in a recent fiscal year [2017] were general permits. . . Roughly 3,000 permits were individual permits."[82] The Congressional Research

73. *2017 Nationwide Permits, General Conditions, District Engineer's Decision, Further Information, and Definitions*, *supra* note 67, at 32.

74. Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 2,744 (Jan. 13, 2021).

75. *Id.* (reissuing permits, including: NWP 21 for Surface Coal Mine Activity, NWP 29 for Residential Developments, NWP 39 for Commercial and Institutional Developments, NWP 40 for Agricultural Activities, NWP 42 for Recreational Facilities, NWP 43 for Stormwater Management Facilities, NWP 44 for Mining Activities, NWP 48 for Commercial Shellfish Mariculture Activities, NWP 50 for Underground Coal Mining Activities, NWP 51 for Land-Based Renewable Energy Generation Facilities, and NWP 52 for Water-Based Renewable Energy Generation Pilot Projects).

76. *Id.* (two of the new NWPs are for mariculture, NWP 55 for Seaweed Mariculture Activities and NWP 56 for Finfish Mariculture Activities. The other two new NWPs modify the existing NWP 12, which was previously for Utility Line Activities. Now, NWP 12 is specifically for Oil or Natural Gas Pipeline Activities, and the newly created NWPs 57 and 58 are for Electric Utility Line and Telecommunications Activities and Utility Line Activities for Water and Other Substances, respectively).

77. *See* N. Plains Res. Council v. U.S. Army Corps of Eng'rs, 454 F. Supp. 3d 985, 987 (D. Mont. 2020).

78. *See, e.g.*, Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 73,522 (Dec. 27, 2021).

79. Lisa M. Bruderly & Evan M. Baylor, *Corps Reissues Certain Nationwide Permits with Plan to Reevaluate All NWPS in 2022 Environmental Alert*, BABST & CALLAND (Jan. 11, 2022), https://www.babstcalland.com/news-article/corps-reissues-certain-nationwide-permits-with-plan-to-reevaluate-all-nwps-in-2022/.

80. *Id.*; Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 20, 2021).

81. Travis O. Brandon, *A Wall Impervious to Facts Seawalls, Living Shorelines, and the U.S. Army Corps of Engineers' Continuing Authorization of Hard Coastal Armoring in the Face of Sea Level Rise*, 93 TUL. L. REV. 557, 570 (2019).

82. Daniel R. Mandelker, *Practicable Alternatives for Wetlands Development Under the Clean Water Act*, 48 ENV'T L. REP. NEWS & ANALYSIS, 10,894, 10,898 (2018).

Service cites an even larger number. It reports that the Corps "evaluates more than 85,000 permit requests annually. Of those, more than 95% are authorized under a general permit."[83]

Minimal processing time and limited regulatory requirements likely account for the growth in general permits. These two attributes increase administrative efficiency for both the Corps and the permit applicant. On average, individual permit decisions take two to three months, while general permits require only three weeks.[84] Therefore, permit processing for NWPs typically results in less delay-related cost. Additionally, the Corps estimates that 40 percent of NWPs require no reporting at all.[85] Many general permits, specifically those with no PCN requirement, entail no regulatory oversight because the Corps does not evaluate the application for compliance with the NWP's general conditions.[86] Timeliness and reduced regulatory oversight reduce the applicant's costs by almost 50 percent.[87] Additionally, the Corps does not engage in individualized fact finding for NWPs, which reduces its own costs, as well.[88]

The persistent growth of NWPs is starting to draw attention and criticism. Professors J.B. Ruhl and James Salzman describe the transition from individual to general permits as a form of "regulatory exit," which allows the Corps to "minimize the burden and delay of its regulatory program."[89] The trend has also caught the eye of the Natural Resources Defense Council, which recently criticized a pipeline authorized under an NWP as "a short-cut around thorough environmental review, [] without public notice or public comment on the particular project."[90] In a past Note about the use of NWPs in coal mining, Lucy Allen argued that "courts can and should apply greater scrutiny to the Corps' decisions to issue general permits that rely on mitigation."[91] Although the issue of NWPs is becoming salient, there is no indication of it stopping anytime soon.

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83. CLAUDIA COPELAND, CONG. RSCH. SERV., RL33483, WETLANDS: AN OVERVIEW OF ISSUES 7 (Jan. 5, 2017).

84. *Id.* at 8 ("According to Corps data, in FY2015, nationwide and other general permits that required Corps approval entailed average processing time of 59 days, in contrast with standard individual permits, which, on average, took 291 days of processing and evaluation, once an application was completed.").

85. *Nationwide Permit Reissuance*, U.S. ARMY CORPS OF ENG'RS (Jan. 2021), https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll7/id/16919 ("The NWPs authorize approximately 35,000 reported activities per year, as well as approximately 30,000 activities that do not require reporting to USACE districts.").

86. Brandon, *supra* note 86, at 549.

87. David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RES. J. 59, 75 (2002) ("We find that preparation costs for these projects that would switch from NWP to IP [individual permit] would roughly double (from $28,915 to $59,719, a difference of $30,804).").

88. Brandon, *supra* note 30, at 550.

89. J.B. Ruhl & James Salzman, *Regulatory Exit*, 68 VAND. L. REV. 1295, 1331 (2015).

90. Amy Mall, *The Rubber Stamp Allowing Pipelines to Pollute Clean Water*, NAT. RES. DEF. COUNCIL (June 21, 2021), https://www.nrdc.org/experts/amy-mall/rubber-stamp-allowing-pipelines-pollute-clean-water.

91. Lucy Allen, *Making Molehills Out of Mountaintop Removal Mitigated "Minimal" Adverse Effects in Nationwide Permits*, 41 ECOLOGY L. Q. 181, 181 (2014).

The relaxed PCN requirements for stream bed impacts in the 2021 NWP reissuance suggests that the trend of the Corps favoring reduced regulatory oversight for NWPs is likely to continue.[92]

Undoubtedly, general permits and NWPs streamline the review process for dredge and fill activities. However, striking the balance between administrative efficiency and environmental protection has proven controversial.[93] Professor Travis O. Brandon describes the trajectory of general permits as "a movement within the administration of section 404 away from intensive individual review of permits and toward more cursory or even non-existent environmental review."[94] The lack of environmental review combined with the growth of general permits suggests that environmental impacts are likely going unaddressed.[95] While the general permit program indeed has fewer environmental review requirements, the Corps relies on general permits to ease the administrative burdens of managing the large and complex dredge and fill permitting program under section 404 of the CWA.

D. EPA's Veto under Section 404(c)

Under section 404(c), the EPA Administrator may "prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site," or restrict the use of such a site.[96] Essentially, the EPA Administrator can use section 404(c) to veto the Corps' decision to issue a dredge and fill permit. EPA has used its veto to permanently prohibit dredge and fill activity.[97] Alternatively, EPA has a history of withdrawing vetoes from dredge and fill permits when applicants modify their applications to incorporate environmental mitigation.[98] This power has only ever been applied to individual permits, and EPA has never attempted to veto a general permit.[99] Under section 404(c), the EPA Administrator must determine that the discharge of dredged or

92. *See* Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 2,744 (Jan. 13, 2021).

93. The views of industry and environmental advocacy groups diverge greatly on whether the NWP program meets its objectives. Industry groups generally support the NWP program, but argue that NWPs have become increasingly restrictive and complex to the point that they faintly resemble the streamlined permitting process Congress envisioned. Environmental groups argue that permitted activities are having more than minimal impacts on the environment and criticize what they view as inconsistent and inadequate PCN requirements. *See* COPELAND, *supra* note 83, at Summary.

94. Brandon, *supra* note 30, at 550.

95. *See generally* Jared Margolis, Ctr. for Biological Diversity, Comment Letter Re: 60-Day Notice of Intent to Sue: Violations of the Endangered Species Act Regarding the Nationwide Permit Program 24 (Feb. 8, 2021) ("Even though CWA Section 404 states that general permits may only be issued for activities that 'will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment,' the Corps has failed to keep adequate records to ensure that this threshold is being met for the NWPs. Absent such records, or an adequate analysis of the cumulative and total impacts of the NWPs, the Corps cannot determine that their issuance will have only minimal cumulative adverse effect on the environment.").

96. Clean Water Act, 33 U.S.C. § 1344(c).

97. *See generally* Blumm & Mering, *supra* note 10.

98. *Id.*

99. Blumm & Mering, *supra* note 10, at 236–37.

fill material "will have an unacceptable adverse effect" on environmental resources.[100] Historically, EPA uses the factual determinations gathered under the Guidelines as the substantive basis for its veto.[101] Additionally, section 404(c) requires the EPA Administrator to provide "notice and opportunity for public hearings," and to issue a public, written explanation for any section 404(c) determination.[102]

In 1979, EPA promulgated regulations implementing section 404(c). These regulations provide a detailed process the agency must follow before prohibiting specification of a disposal site.[103] First, the EPA Regional Administrator notifies the Corps District Engineer and other interested parties of intent to limit specification under section 404(c).[104] Second, they must publish notice of a proposed determination in the Federal Register.[105] Third, they must consider public comments regarding "whether the proposed determination should become the final determination and corrective action that could be taken to reduce the adverse impact of the discharge."[106] Fourth, a record clerk must maintain an administrative record.[107] Fifth, the Regional Administrator must "either withdraw the proposed determination or prepare a recommended determination to prohibit or withdraw specification, or to deny, restrict, or withdraw the use for specification."[108] Finally, the Regional Administrator forwards the recommendation to the EPA Administrator in Washington D.C. for a final determination and publication.[109]

While EPA has used its veto sparingly since the creation of section 404(c), the agency has applied it to a variety of activities and at different phases in the permitting process. EPA initiated the section 404(c) process thirteen times across ten different states.[110] Past section 404(c) vetoes have ranged drastically from 32 to 7,600 acres.[111] EPA has cited a variety of "unacceptable adverse effects" to justify its veto, including harms to shellfish fisheries, wildlife, recreation, and wetlands ecosystem services.[112] It has withdrawn a proposed section 404(c) determination only twice.[113] The first time, EPA withdrew a proposed designation because the public comment process spurred changes to the permit.[114] In that case, the applicant voluntarily revised the project to create

100. Clean Water Act, 33 U.S.C. § 1344(c).
101. *See generally* Blumm & Mering, *supra* note 10.
102. Clean Water Act, 33 U.S.C. § 1344(c).
103. 40 C.F.R. § 231 (2021).
104. *Id.* §§ 231.3(a)(1)–(2).
105. *Id.* § 231.3(d).
106. *Id.* § 231.4(a).
107. *Id.* § 231.4(g).
108. *Id.* § 231.5(a).
109. *Id.* § 231.5(b).
110. *See generally* Blumm & Mering, *supra* note 10.
111. *Id.* at 244.
112. *Id.* at 247.
113. Trout Unlimited v. Pirzadeh, 1 F.4th 738, 758 (9th Cir. 2021).
114. *Id.* at 747.

fewer environmental impacts, so the Corps modified the dredge and fill permit and EPA withdrew its veto.[115]

The second withdrawal concerned the proposed determination for Pebble Mine.[116] In 2019, EPA published an eight-page notice in the Federal Register stating that the 2014 proposed determination had "effectively grown stale" because Northern Dynasty Minerals altered its permit application in 2017.[117] Environmental organizations sued, alleging that EPA's withdrawal violated of the CWA, EPA's own regulations, and the Administrative Procedures Act.[118] In 2021, the Ninth Circuit held in *Trout Unlimited v. Pirzadeh* that EPA could withdraw a proposed determination only when unacceptable adverse effects on specified environmental resources were not likely.[119] EPA reversed its withdrawal of the proposed determination three months later, which Alaska's federal district court approved.[120]

II. THE CASE FOR EPA'S POWER TO VETO GENERAL PERMITS

EPA has consistently prevailed against legal challenges to its veto powers. Indeed, a line of caselaw suggests that EPA has wide discretion to choose when, where, and how to veto dredge and fill permits issued by the Corps. In *Trout Unlimited v. Pirzadeh*, the U.S. Supreme Court held that section 404(c) "clearly conveys broad discretion on the [EPA] Administrator," to veto a permit, "whenever he determines that adverse effects will result, not whenever it can be shown that adverse effects will result."[121] The "defined area" in which EPA may exercise its veto power under section 404(c) "is limitless, suggesting that the agency retains discretion to choose among areas of infinite variation."[122] In *Mingo Logan Coal Co. v. EPA*, the D.C. Circuit held that EPA may veto a permit at any time "before a permit application has been filed, while a permit application is pending, or even after the Corps has issued a permit."[123] That decision separated the permit application from the veto power, broadening the scope of section 404(c).[124] Therefore, as was the case with Pebble Mine, EPA can veto a dredge and fill project before it gets started, even absent a permit application.[125]

115. *Id.*
116. *Id.* at 747.
117. *Id.* at 749.
118. *Id.* at 749–50.
119. *Id.* at 744.
120. *See* Dac Collins, *Trout Unlimited Lawsuit Is a Win for Salmon, Deals Another Blow to Pebble Mine*, OUTDOOR LIFE (Nov. 5, 2021), https://www.outdoorlife.com/conservation/trout-unlimited-lawsuit-pebble-mine/.
121. *Trout Unlimited*, 1 F.4th at 747.
122. *Id.*
123. *Id.* (citing Mingo Logan Coal Co. v. EPA, 714 F.3d 608, 612–16, 613 n.3 (D.C. Cir. 2013), which held that the statute's use of the phrases "whenever" and "including the withdrawal of specification" suggest Congress intended to allow the EPA to use its § 404(c) authority after a permit issues).
124. *See id.*
125. *Id.* at 752.

A. The Need for the Veto of General Permits

The growth of NWPs and the reduction of individual permits suggests that the full extent of the environmental impacts associated with dredge and fill activities is unknown. Since dredge and fill activity occurs without environmental review, it is likely that some environmental harms go unnoticed by the Corps and EPA. The ability to veto general permits would give EPA a tool for cracking down on such activities.

Environmental groups have complained of the impacts of NWPs on wetlands, protected species, and the broader environment. For instance, the Center for Biological Diversity identified a series of harms associated with a variety of NWPs.[126] Citing research from the National Marine Fisheries Service, the group reports how NWP 36 (Boat Ramps) harms marine mammals through boat collisions, how NWP 51 (Land-Based Renewable Energy Generation Facilities) harms birds through the creation of wind farms, and how NWP 44 (Mining Activities) harms aquatic life by increasing sediment loads in rivers.[127] Although the research concludes that the NWP program does not jeopardize the continued existence of listed species, this determination is based off the assumption that the Corps has the information necessary to implement mitigation measures, which is simply untrue for NWP permits that are not subject to PCN.[128] If EPA could veto general permits, there would be a check to ensure that the mitigation measures suggested by the National Marine Fisheries Service are actually being implemented and monitored.

Likewise, NWPs are not subject to individualized review, meaning that there is no opportunity for public notice and comment.[129] And for NWPs with no PCN, NWP users are not required to inform local communities that dredge and fill activities are occurring.[130] Unfortunately, dredge and fill activity associated with mining, construction, and aquaculture often occurs near communities historically failed by environmental laws.[131] Environmental justice requires that local communities be involved in decisions about development of natural resources.[132] The use of NWPs, however, sidesteps this foundational aspect of environmental justice by allowing development to proceed without opportunity for public notice or comment. But public notice and comment are

126. Jared M. Margolis, Ctr. for Biological Diversity, Comments on Proposal to Reissue and Modify Nationwide Permits 57 (November 16, 2020).

127. *See* Margolis, Comment Letter Re: 60-Day Notice of Intent to Sue: Violations of the Endangered Species Act Regarding the Nationwide Permit Program, *supra* note 95, at 9, 10.

128. BIOLOGICAL OPINION, NAT. MARINE FISHERIES SERV. 354 (2014), https://www.huntonak.com/files/upload/NMFS_2014_reinitiated_biologicl_opinion_on_NWP_program.pdf.

129. Davison, *supra* note 19, at 67.

130. *Id.*

131. For an example of the impacts of dredge and fill activities on environmental justice, see Barry E. Hill & Nicholas Targ, *The Link Between Protecting Natural Resources and the Issue of Environmental Justice*, 28 B.C. ENV'T AFFS. L. REV. 1 (2000).

132. *Id.*

required under section 404(c).[133] Therefore, expanding the veto to general permits would provide local communities an opportunity to influence dredge and fill activity.

Technically, the CWA forbids general permits from being issued for activities that have more than minimal environmental impacts.[134] The lack of environmental review for NWPs, however, suggests that the true extent of their environmental impacts is not fully understood. Moreover, as will be made clear later in this Note, the magnitude of environmental impact is not necessarily reflected in how acceptable such impact is for both local communities and the needs of the natural environment.[135] Unlike the Corps, which is an engineering and development agency, EPA brings its environmental expertise to the dredge and fill process. Expanding the application of EPA's veto power is justified, then, by the risks that unchecked NWPs pose to the environment and local communities.

B. EPA Has Authority to Veto General Permits under Section 404(c)

EPA has never attempted to veto a general permit.[136] In the words of Professor Brandon, EPA's authority would depend on "whether the statutory language of section 404(c) would permit EPA to challenge a general permit."[137] This Note argues that EPA has such statutory authority under the CWA to apply the veto power to general permits—specifically, to NWPs.

1. The Statutory Text of the CWA Is Consistent with Application of Section 404(c) to General Permits

The language of the CWA and its implementing regulations does not explicitly address individual or general permits within the context of the section 404(c) veto.[138] By all indications, the operative statutory and regulatory provisions that grant EPA its established veto power over individual permits applies equally to general permits. Specifically, the Guidelines (under section 404(b)(1)) also apply to the creation of new NWPs.[139] This suggests that general permits are subject to the same level of statutory environmental protection as individual permits.[140] Likewise, section 404(c) advances environmental interests through the form of an interagency veto for the purpose of preventing unacceptable adverse effects. Therefore, a consistent interpretation of the

133. 40 C.F.R. § 231.3(d) (2021).
134. Clean Water Act, 33 U.S.C. § 1344(e).
135. *See* discussion *infra* Part II(B)(3).
136. Blumm & Mering, *supra* note 10, at 236 ("Only five percent of annual permits issued are individual permits, but all of EPA's section 404(c) actions have concerned individual permits.").
137. Brandon, *supra* note 30, at 576.
138. *See* Clean Water Act, 33 U.S.C. § 1344(c); 40 C.F.R. § 231 (2021).
139. Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 C.F.R. § 230.7 (2015).
140. 33 U.S.C. § 1344(b)(3).

environmental protection provisions of the dredge and fill permitting program under the CWA requires that section 404(c) apply equally to individual and general permits.

As an initial hurdle, Professor Brandon questions whether courts interpreting the statutory language of section 404(c) would read it as consistent with a grant of authority to EPA to veto general permits. In authorizing the EPA Administrator to prohibit or withdraw "specification" under section 404(c), the statutory language of the CWA refers to "any defined area" of a "disposal site."[141] Professor Brandon notes that these two terms may limit the scope of section 404(c) to individual permits because NWPs only consider cumulative impacts, not defined areas.[142] For example, to receive an individual permit, the applicant must specify an area to serve as a disposal site for the discharge of dredged and fill material.[143] However, NWPs authorize activities regardless of the discharge area because they apply nationwide. Therefore, if the activity complies with the NWP conditions, then that NWP is effective everywhere.

Under that line of reasoning, since NWPs do not specify disposal sites in the same manner as individual permits, EPA would have no way of defining an area to veto. However, the CWA does not define the meaning of "defined area" or "disposal site," opening the door to an expanded application of section 404(c). Likewise, courts have held that EPA can issue a veto prior to a permit application, which suggests that a disposal site is not a necessary component of a valid veto.[144] For example, before Pebble Mine applied for a dredge and fill permit, EPA conducted a watershed assessment of Bristol Bay, which found that even the smallest mine created risks for human and natural resources.[145] Using the assessment as the basis for its veto, EPA proposed to prohibit any mines within the geographical area of the Pebble deposit that would cause loss of salmon streams and wetlands or alterations to streamflow.[146] Instead of vetoing a specific disposal site, the agency conditioned the veto proposal on certain environmental impacts.[147]

Notably, "disposal site" is defined in the Guidelines that the Corps uses for implementation of section 404(b)(1).[148] Recall that although the Corps has final permitting authority, it must follow the environmental protections within the Guidelines when developing NWPs.[149] Since the Guidelines define terms that are present in section 404(c), they should be read congruently with the veto. Likewise, the regulatory procedures for issuing a veto under section 404(c) also

141. Brandon, *supra* note 30, at 546.
142. *Id.*
143. Clean Water Act, 33 U.S.C. § 1344(a).
144. *See* Mingo Logan Coal Co. v. E.P.A., 714 F.3d 608, 614 (D.C. Cir. 2013).
145. Trout Unlimited v. Pirzadeh, 1 F.4th 738, 748 (9th Cir. 2021).
146. *Id.*
147. *Id.*
148. Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 C.F.R. § 230.3(f) (2015).
149. *See supra* Part I(C).

refer to the Guidelines in its respective definitions section.[150] Meanwhile, the Guidelines, rather circularly, define "disposal site" to mean "that portion of the waters of the United States where specific disposal activities are permitted."[151] Therefore, under an NWP, the entirety of the waters of the United States are potentially subject to dredge and fill activities if the activities in question meet the general conditions of the NWP. This broad authority makes general permits effective tools for reducing administrative burdens. For NWPs, universal applicability means that "any defined area" of a disposal site could potentially encompass all navigable waters under the CWA. Therefore, for the purposes of general permits, "disposal site" necessarily has a broadened definition.

The Guidelines do not specify the meaning of "any defined area." Left open to interpretation, one way to construe "any defined area" is to consider the relationship of section 404(c) to the unacceptable adverse environmental effects that the veto is authorized to prevent. In authorizing a veto, the EPA Administrator must present "his findings and his reasons for making any determination."[152] The CWA broadly construes the types of environmental effects that the EPA Administrator may use to justify a section 404(c) withdrawal.[153] By design, the possible adverse environmental effects that could trigger an EPA veto must be broader than the adverse environmental effects that the Corps considers in its permitting review process. Otherwise, EPA would never be able to veto an approved permit. Therefore, "defined area" is likely meant to locate where the effects on resources are occurring, as identified by EPA in its findings and reasons for the veto determination. In this sense, the "defined area" of the permit reflects an area that would be subject to unacceptable environmental impacts if dredge and fill activity were to occur.

The Guidelines are the principal form of environmental review and protection for NWPs. They state that "no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem."[154] The Corps makes an individual determination of whether an individual permit application meets the Guidelines and what, if any, mitigation is required.[155] Alternatively, before issuing an NWP for a category of activities,

150. 40 C.F.R § 231.2 (2021) ("For the purposes of this part, the definitions of terms in 40 C.F.R. 230.2 shall apply.").

151. Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 C.F.R. § 230.3(f) (2015). Under the Guidelines, disposal site consists of both the "bottom surface area," as well as the "overlying volume of water." *Id.* Additionally, for wetlands on which surface water is not present, disposal site also includes the "wetland surface area." *Id.*

152. Clean Water Act, 33 U.S.C. § 1344(c).

153. *Id.* The CWA lists "municipal water supplies, shellfish beds and fishery areas [including spawning and breeding areas], wildlife, or recreational areas." *Id.* These have been broadly applied in practice. *See generally* Blumm & Mering, *supra* note 10.

154. Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 C.F.R. § 230.10(d) (2015).

155. *See supra* Part I(B).

the Corps applies the section 404(b)(1) guidelines during the creation of the permit. The Guidelines are satisfied for an NWP if the Corps determines that:

1. The activities in such category are similar in nature and similar in their impact upon water quality and the aquatic environment.
2. The activities in such category will have only minimal adverse effects when performed separately; and
3. The activities in such category will have only minimal cumulative adverse effects on water quality and the aquatic environment.[156]

In evaluating these three requirements, the Corps must provide a written explanation of the potential individual and cumulative impacts for the category of activities that the NWP permits.[157] To do this, the Corps relies on information from potential permittees as well as the public.[158] Other federal agencies can submit additional information to the Corps if they have reason to believe that a general permit will authorize activities that fail to comply with other federal environmental statutes.[159] Therefore, the Corps applies the same Guidelines to both individual permits and NWPs, even though NWPs are not individually reviewed. Since the Guidelines apply equally to both types of permits, then the veto should also apply equally. This interpretation is logically consistent because the Guidelines provide the substantive environmental considerations underlying the veto process[160] as well as both permitting programs. Additionally, while the Guidelines exempt general permits from consideration of practicable alternatives that have less environmental impacts, they provide no explicit exemption to EPA's veto.[161]

As illustrated above, the location of the dredge and fill activity has no bearing on the specification process for NWPs because NWPs are applicable everywhere. Instead, one should interpret the defined area as relative to the type of activities authorized under the NWP. Under this theory, an NWP authorizing a class of activities essentially specifies the entire waters of the United States as the defined area, but only if the activity complies with the conditions of the NWP. Programmatic general permits are issued at the Corps District level, so the defined area would be the Corps District where the program operates. Likewise, the defined area of a regional permit might encompass an entire Corps Division. These three examples represent the maximum extent of the "defined area" for the purpose of section 404(c), but EPA could choose to reduce the area in relation to the unacceptable effect of the dredge and fill activity on identified resources.

156. Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 C.F.R. § 230.7 (2015).
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* § 230.2(e).
161. *Id.*

This interpretation is consistent with existing section 404 jurisprudence, which grants EPA discretion to propose a veto at any time during the permitting process. As mentioned above, EPA vetoed dredge and fill activities in Bristol Bay before Northern Dynasty Minerals even applied for the Pebble Mine permit.[162] Likewise, the D.C. Circuit has upheld retroactive vetoes, that is, vetoes issued after the Corps had already approved the permit.[163] As applied to general permits, EPA could initiate its veto while the Corps was creating a new NWP, once an NWP was in effect, or even after reissuance. Since the text of the CWA and its implementing regulations subject the Corps to the same Guidelines for both individual and general permits, EPA veto authority is the same as well.

2. The Legislative and Regulatory History of the Dredge and Fill Permitting Program Suggests That Section 404(c) Applies to General Permits

Before the passage of the CWA, the Corps had exclusive authority to permit dredge and fill activities.[164] However, the Corps' jurisdiction was limited to regulating obstructions affecting navigation, which usually encompassed ports, harbors, and channels.[165] Gradually, public focus shifted from navigation to environmental protection and the courts expanded the Corps' authority to account for ecological considerations.[166] This transition set the stage for new legislation meant to address decades of unchecked pollution, culminating in widely publicized disasters like the burning of the Cuyahoga River in 1969.[167]

Congress enacted the modern CWA through passage of the Federal Water Pollution Control Act Amendments of 1972, which included creation of the modern dredge and fill permitting program.[168] Diverging from a historical focus on navigability, the CWA included the primarily environmental objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[169] The new law expanded the definition of navigable water to include all "waters of the United States."[170] Additionally, Congress granted the newly created EPA with authority to administer and implement the section 402 NPDES permitting program.[171] However, Congress disagreed on which agency

162. Trout Unlimited v. Pirzadeh, 1 F.4th 738, 748 (9th Cir. 2021).
163. Mingo Logan Coal Co. v. U.S. E.P.A., 714 F.3d 608, 616 (D.C. Cir. 2013).
164. River and Harbors Appropriation Act of 1899, 33 U.S.C. § 407 (1899).
165. Blumm & Mering, *supra* note 10, at 277.
166. *Id.*
167. Lorraine Boissoneault, *The Cuyahoga River Caught Fire At Least a Dozen Times, but No One Cared Until 1969*, SMITHSONIAN MAG. (June 19, 2019), https://www.smithsonianmag.com/hiyahoga-river-caught-fire-least-dozen-times-no-one-cared-until-1969-180972444/.
168. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387.
169. *Id.* at § 1251(a).
170. *See* Part I(A).
171. *Id.*

should oversee the permitting program for the discharge of dredged and fill materials.[172]

The House of Representatives argued that the Corps should issue permits under section 404, while the primary sponsor in the Senate argued for EPA control.[173] Although the Corps was historically the lead agency, the CWA's new environmental focus placed more emphasis on protection and less emphasis on navigability, thus better aligning with EPA. With pressure from the Corps and the regulated parties,[174] the Senate accepted provisions from the House proposal in conference committee.[175] Senator Edmund Muskie (D-Maine), the lead sponsor of the CWA in the Senate, famously described the compromise as follows:

> The Conferees were uniquely aware of the process by which the dredge and fill permits are presently handled and did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed. At the same time, the Committee did not believe there could be any justification for permitting the Secretary of the Army to make determination as to the environmental implications of either the site to be selected or the specific spoil to be disposed of in a site. Thus, the Conferees agreed that the administrator of the Environmental Protection Agency should have the veto over the selection of the site for dredged spoil disposal and over any specific spoil to be disposed of in any selected site.[176]

Through this compromise, EPA received veto power under section 404(c) and the power to write the Guidelines under section 404(b)(1) while the Corps received primary section 404 permitting authority.

Initially, the Corps refused to apply its new jurisdiction over navigable waters to all waters of the United States.[177] However, an expanded definition was upheld in *Natural Resource Defense Council v. Callaway*, where the Corps was ordered to rewrite its regulations to reflect the broadened interpretation of federal waters.[178] The Corps resisted the ruling, warning in a press release that "the rancher who wants to enlarge his stock pond, or the farmer who wants to deepen an irrigation ditch or plow a field, or the mountaineer who wants to protect his land against stream erosion" might be subject to the jurisdiction of section 404.[179] This warning stirred public outcry, prompting Congress to consider amending the CWA.[180]

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172. Brandon, *supra* note 30, at 545; *see also* 117 Cong. Rec. 38,852–57 (1971).

173. *See* 117 Cong. Rec. 38,852–57 (1971). The House originally introduced § 404 with the Corps having complete control.

174. Thomas Addison, *The Army Corps of Engineers and Nationwide Permit 26 Wetlands Protection or Swamp Reclamation?*, 18 ECOLOGY L.Q. 619, 627 (1991).

175. *See* 117 Cong. Rec. 38,852–57 (1971).

176. SEN. COMM. ON PUB. WORKS, 93D CONG., LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 177 (1972).

177. Blumm & Mering, *supra* note 10, at 229–30.

178. Nat. Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975).

179. Blumm & Mering, *supra* note 10, at 230 (citation omitted).

180. *Id.* at 231.

In 1977, Congress made three major changes to section 404. First, Congress exempted certain activities including farming, ranching, and forestry.[181] Second, Congress delegated states the authority to administer their own section 404 program so long as it complied with federal guidelines.[182] And third, Congress granted the Corps statutory authority to issue general permits.[183]

Earlier, in response to *Callaway*, and prior to the passage of the 1977 amendments, the Corps had preemptively created the first general permits as a way to ease the additional workload caused by the expanded jurisdiction of section 404.[184] In a 1975 rulemaking, the Corps designed procedures for the first general permits, which "would preclude the need for any further permit for similar work and would prescribe conditions to be followed in the future performance of such work."[185] The Corps' rulemaking made general permits available for "substantially similar" activities with "only minimal adverse environmental impact" when performed separately or cumulatively.[186] It also enabled public interest review and required the Corps District Engineer to provide "reporting procedures where the general permit fails to designate a specific water body."[187] Behind the scenes, the Corps might well have expected Congress to revoke the expanded jurisdiction of the section 404 program.[188] Instead, the Corps' regulation would became a prime example of "administrative innovation receiv[ing] subsequent legislative sanction."[189]

Therefore**,** in the 1977 amendments, Congress codified the Corps' regulatory developments, which adapted the agency's existing dredge and fill permitting program to fit the expanded section 404 jurisdiction from *Callaway*. In section 404(e), Congress granted the Corps statutory authority for general permit rulemaking.[190] However, Congress also limited the general permit program by restricting the term of general permits to five years. Additionally, Congress required that general permits comply with EPA's Guidelines under section 404(b)(1), and it granted EPA responsibility for approving permit programs delegated to the states under section 404(g)–(h).[191]

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181. Clean Water Act, 33 U.S.C. § 1344(f)(1).

182. *Id.* § 1344(g).

183. *Id.* § 1344(e).

184. Addison, *supra* note 174, at 630; *see* Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320, 31,335 (1975).

185. Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed Reg. 31,320, 31,322, 31,335 (July, 25 1975) ("After a general permit has been issued, individual activities falling within those categories that are authorized by such general permits do not have to be further authorized by the Procedures of this regulation unless the District Engineer determines, on a case-by-case basis, that the public interest requires.").

186. *Id.* at 31,335.

187. *Id.*

188. Addison, *supra* note 174, at 631 (describing how in the 94th Congress included some thirty bills that would have restricted the jurisdiction of the § 404 program).

189. Michael C. Blumm, *The Clean Water Act's Section 404 Permit Program Enters Its Adolescence An Institutional and Programmatic Perspective,* 8 ECOLOGY L.Q. 409, 431 (1980).

190. Clean Water Act, 33 U.S.C. § 1344(e).

191. Blumm & Zaleha, *supra* note 18, at 707.

These amendments effectively codified the existing power sharing arrangement between EPA and the Corps. Although Congress never addressed the relationship between general permits and section 404(c) or whether EPA's veto power applied to section 404(e), it did apply the existing Guidelines to general permits, suggesting that Congress intended EPA to maintain environmental review over the section 404 permitting program.[192] Moreover, general permits were included in the same subchapter as section 404(c), indicating they were meant to be read together and consistently.[193] Congress had an opportunity to exclude general permits from section 404(c), but it did not. Instead, Congress left the veto untouched.

The purpose of section 404(c) was to limit the Corps' permitting authority.[194] And even through subsequent amendments of the CWA, including the creation of general permits, this provision has remained unchanged. Its role as an environmental check is reflected in other aspects related to the CWA, which make EPA the lead agency for the purposes of regulating water pollution. For example, in 1979, U.S. Attorney General Benjamin Civiletti determined that EPA, not the Corps, possesses ultimate administrative authority to determine the reach of navigable waters under section 404.[195] Ten years later, a Memorandum of Agreement between EPA and the Corps reiterated that "EPA will be considered the lead agency and will make the final decision if the agencies disagree" on questions of general section 404 jurisdiction.[196] For a general permit, the potential "disposal site" for the purposes of section 404(c) includes all "navigable waters."[197] Since EPA possesses ultimate authority to define the jurisdictional limit of "navigable waters," EPA likely also has ultimate authority to determine the reach of its own veto powers over those same navigable waters.[198]

To summarize, Congress created EPA's veto power under section 404(c) before codifying the Corps' general permitting authority under section 404(e).[199] Because general permits were a subsequent legislative development, they should be read consistently with EPA's veto authority. This legislative history,

192. Clean Water Act, 33 U.S.C. § 1344(e)(1).

193. *See* Clean Water Act, 33 U.S.C. § 1344.

194. Addison, *supra* note 174, at 627.

195. This was known as the "Civiletti Memorandum." Benjamin R. Civiletti, *Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act,* 43 OP. ATT'Y GEN. 197 (1979) ("I, therefore conclude that the structure and intent of the [CWA] support an interpretation of § 404 that gives the Administrator (of the EPA) the final administrative responsibility for construing the term 'navigable waters.'").

196. Robert W. Page & Rebecca W. Hanmer, *Memorandum of Agreement Determination of Geographic Jurisdiction of the Section 404 Program and Application of Exemptions Under CWA Section 404(f)*, EPA, (Jan. 19, 1989) https://www.epa.gov/cwa-404/memorandum-agreement-determination-geographic-jurisdiction-section-404-program-and.

197. Clean Water Act, 33 U.S.C. § 1362(7).

198. *See* Blumm & Zaleha, *supra* note 18, at 741 n.308.

199. Blumm, *supra* note 189, at 431. § 404(c) was created as part of the original CWA in 1972, while § 404(e) was added in 1977. *Id.*

supported by the dredge and fill program's regulatory history, thus indicates that EPA's 404(c) veto power should apply to general permits.

3. Applying the EPA Veto to General Permits Would Further the Purpose of Section 404(c)

Simultaneously, the Corps is the nation's largest dredger and the federal agency responsible for maintaining navigable waterways and harbors.[200] The dual role that the Corps plays as both permitter and permittee contributed to Congress's willingness to grant it permitting authority under section 404.[201] From this authorization, however, arose concerns of self-regulation over the Corps' own activities.[202] By statutory design, section 404(c) serves as a check for the purpose of maintaining the balance of power between EPA and the Corps. In response to the Corps' increased use of NWPs, EPA needs an expanded application of section 404 to general permits to ensure equity between the agencies.

EPA's veto power limits the adverse incentives caused by self-regulation. Interestingly, while passing the CWA, Congress hailed the Corps for its expertise, but did not appear concerned about the potential for abuse of power.[203] This may be because many of the Corps' own activities include construction of large projects directly authorized by congressional statute. In theory, when the Corps is permitting activities performed by a third party, it would not be self-interested. In both cases, the veto power prevents the Corps from exercising complete control over dredge and fill activity by injecting a second actor. Each agency has an individually substantive role. Yet, throughout the CWA, section 404 is the only permitting program where one agency has a direct veto power against the permitting decisions of a separate agency.[204]One commentator described the partnership between EPA and the Corps as "perhaps the most critical component of the operation of the 404 program"[205] and the "chief characteristic of the 404 program."[206] Professor William H. Rodgers, Jr. famously remarked that this relationship exemplified "multiple loci of decisional power."[207]

200. Blumm & Zaleha, *supra* note 18, at 741.

201. Addison, *supra* note 174, at 666; *see also* Blumm & Zaleha, *supra* note 18, at 703 n.39. ("Congress gave no indication that it was concerned about the potential conflict of interest between the Corps' role as the nation's largest dredger and its role in regulating discharges of dredged spoil.").

202. *See* Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 861 (2009) (defining self-regulation as "an agency action to limit its own discretion when no source of authority [such as a statute] requires the agency to act.").

203. Blumm & Zaleha, *supra* note 18, at 703 n.39. ("Congress gave no indication that it was concerned about the potential conflict of interest between the Corps' role as the nation's largest dredger and its role in regulating discharges of dredged spoil.").

204. Blumm & Mering, *supra* note 10, at 226 (describing § 404(c) as a "unique check").

205. Blumm, *supra* note 189, at 437.

206. Blumm & Zaleha, *supra* note 18, at 700.

207. *Id.* at 699 (quoting WILLIAM RODGERS, JR. & ELIZABETH BURLESON, ENV'T LAW: AIR AND WATER 185 (2d ed. 1986)).

The interagency relationship between EPA and the Corps creates two dynamics. The first dynamic is one of increased cooperation. EPA's veto power draws the Corps to the negotiation table to resolve permitting disagreements and to prevent the administrative costs of a prolonged veto process. Professor Blumm described the veto as "a statutory provision which encouraged two federal agencies to work together in pursuit of a mission of ecological protection."[208] Through an interagency notice provision, the section 404(c) regulations grant the Corps an opportunity to persuade EPA, before it issues a final veto determination, that specification will not create adverse environmental effects.[209] Under a second, opposite, dynamic, the veto power might increase interagency conflict. EPA has wide discretion over when and where to use its veto. Since the agencies are charged with different missions, they often disagree about priorities. Unlike EPA, whose aim is to protect the environment, the Corps primary mission is to build critical infrastructure.[210] Furthermore, in its public interest review process, the Corps weighs economic considerations more heavily than ecological impacts.[211] Under this dynamic, the veto represents a potential source for bureaucratic infighting over priorities and methods, and acts as an obstacle that the Corps must overcome to fulfill its mission.

Under either dynamic, section 404(c) represents a form of agency oversight for the limited purpose of preventing "unacceptable environmental effect[s]" as determined by EPA.[212] Therefore, the veto power should be interpreted as a place-based protection for specific locations of superior ecological significance.[213] When EPA decides to issue a veto, it necessarily makes a value judgment about what resources it is protecting, which could be based on the fragility of the habitat, the value of the land for ecosystem services, recreation, or aesthetics. The list of resources under section 404(c)[214] suggests that certain locations may warrant additional protection, while others may not. For instance, section 404(c) allows EPA to consider whether dredging farmland-adjacent wetlands warrants similar protection as dredging wetlands near streams where salmon spawn. While EPA may be willing to accept adverse environmental

208. *Id.* at 308.

209. *See* Part I(D); *see also* 40 C.F.R. § 231.3(a) (2021) (requiring EPA to provide the Corps notice of a proposed § 404(c) action and allowing the Corps to "take corrective action to prevent an unacceptable adverse effect satisfactory to the Regional Administrator [of the EPA].").

210. *Mission & Vision,* U.S. ARMY CORPS OF ENG'RS, http://www.usace.army.mil/About/MissionandVision.aspx (last visited Nov. 30, 2021). The Corps' mission is to: "Deliver vital engineering solutions, in collaboration with our partners, to secure our Nation, energize our economy, and reduce disaster risk." *Id.*

211. Blumm & Mering, *supra* note 10, at 304 ("The congressional decision to split jurisdiction [between EPA and the Corps] in this manner may reflect the fact that the Corps' primary mission is not to protect the environment, or that its decision-making litmus—the public interest review—allows economics to outweigh ecological concerns, inconsistent with the CWA's purpose to 'restore and maintain chemical, physical, and biological integrity of the Nation's waters.'") (internal citations omitted).

212. Clean Water Act, 33 U.S.C. § 1344(c).

213. *Id.*

214. *See id.* The statute lists specific resources including, "municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." *Id.*

effects in one location, it may find the exact same impact unacceptable at a different location. This value judgment does not depend on whether an individual permit disposal site specifies a defined area, or whether an NWP is applicable to the entire water of the United States. The purpose of the veto, which is primarily a place-based environmental protection, is related to value of the resources and not the class of activity.[215] Under section 404(c), EPA has the discretion to decide what places have value, and are therefore worth protecting.

Because section 404(c) is grounded in place-based decision making, EPA's discretion to protect certain ecological resources from unacceptable adverse effects applies equally to general permits and to individual permits.[216] Under a place-based theory, the location of the environmental impact matters more than the magnitude because the impacts are relative to the resources at the specific location and how the people around those resources respond to environmental change.[217] A mere hundred yards of dredging in the Klamath River is likely more harmful than dredging on the paved Los Angeles River, but the two activities could feasibly rely on the same NWP.[218] Therefore, differentiation between individual and general permits does not serve the purpose of section 404(c), which is ultimately about providing EPA with a final say. Since a section 404(c) designation hinges on whether the adverse effect is "unacceptable," not whether it is minimal or significant, EPA must consider the relationship of the adverse effect to the environmental resources at the specific place. Put another way, section 404(c) grants EPA authority to determine that minimal adverse environmental effects are unacceptable. This is unlike general permits, where the significance determination involves a one-size-fits-all calculus. Through section 404(c), EPA has a mechanism for considering impacts on recreation, aesthetics, and local communities. Therefore, the limitation on general permits to creating only minimal environmental impacts does not substantively limit the application of section 404(c) to general permits because the purpose of section 404(c) includes consideration of place, not just activity.

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215. Here, the "value of the resources" means the harms identified by EPA in their threshold finding of "unacceptable environmental effects." *Id*. Additionally, "class of activity" refers to either general or individual permit. *Id.*

216. *See, e.g.*, Holly Doremus, *The Rhetoric and Reality of Nature Protection Toward a New Discourse*, 57 WASH. & LEE L. REV. 11 (2000).; Mark Sagoff, *Settling America or the Concept of Place in Environmental Ethics*, 12 J. ENERGY, NAT. RES., & ENV'T L. 349 (1992).

217. *See* Bryan G. Norton & Bruce Hannon, *Environmental Values A Place-Based Theory*, 19 ENV'T ETHICS 227, 227 (1997).

218. The Klamath River is habitat for several anadromous fish species. At 286 miles long, it is the longest designated Wild and Scenic River in California, and spans a watershed as large as Massachusetts and Connecticut combined. *See Klamath River,* AMERICAN RIVERS, https://www.americanrivers.org/river/klamath-river/ (last visited April 18, 2022). Nearly the entire riverbed of the fifty-mile-long Los Angeles River is paved. The last known native anadromous fish caught there was a steelhead trout in 1940. *See* Louis Shangun, *Steelhead trout in the L.A. River? These experts envision a fish passage through downtown*, L.A. TIMES, https://www.latimes.com/environment/story/2020-10-05/conservationists-want-to-build-a-fish-passage-through-downtown-los-angeles-for-steelhead-trout (last visited April 18, 2022).

C. Issues and Application

1. EPA Should Consider Timing, Technical Challenges, and the Burden on the Corps Before Making a Veto of a General Permit

EPA will likely need to develop new regulatory strategies if it wants to effectively and efficiently enforce its veto power over general permits. One thing EPA must consider is timing. At what point should EPA exercise its veto powers? Since courts have held that EPA can veto an individual permit at any time, we can assume that EPA could veto an NWP at any time as well.[219] The textual and historical justifications cited by the court in *Mingo Logan* for individual permits apply equally to general permits.[220] The *Mingo Logan* court also rejected the argument that compliance with a general permit could shield a party from the authority of section 404(c).[221]

Theoretically, EPA could veto categories of activities from inclusion in an NWP prior to the Corps rulemaking. It could also issue the veto afterwards, during the public notice and comment period. Or it could wait until the Corps has responded to public comments, supplying EPA with a public record from which it could base its veto decision. EPA could even wait until the Corps published its final rule. With a final version of the rule on record, EPA would have the best evidence for its veto. Overall, the longer EPA decides to wait, the more evidence it can gather. However, during this time the Corps is spending resources on the federal rulemaking process. Therefore, EPA should consider the costs to the Corps when deciding when to issue a veto, as well as its own costs and goals.

A second consideration is the technical challenge of identifying the environmental harms associated with the NWP. To issue a veto, EPA must determine that the dredge and fill activity creates an "unacceptable adverse effect" on specified environmental resources.[222] However, the Corps can only authorize an NWP for activities substantially similar in nature and causing only minimal individual and cumulative environmental impacts.[223] Therefore, to present findings of "unacceptable adverse effect," EPA would likely need to identify environmental harms that the Corps did not consider. EPA could gather its own information to supplement the Corps findings. But engaging in factfinding is time consuming and costly. Alternatively, EPA could argue that any minimal impacts identified by the Corps are unacceptable for the purposes

219. *See* Mingo Logan Coal Co. v. EPA, 714 F.3d 608, 613 (D.C. Cir. 2013) (holding that, "Using the expansive conjunction 'whenever,' the Congress made plain its intent to grant the Administrator authority to prohibit/deny/restrict/withdraw a specification at any time.").

220. *Id.* at 615. The court reasoned that "subsection 404(c) was enacted in 1972 and its plain meaning did not change when 404(p) was enacted five years later." *Id.* Similarly, 404(e), which authorized general permits, was adopted five years later in the 1977 amendment to the CWA. Blumm, *supra* note 189, at 431.

221. *Id.* at 614–15.

222. Clean Water Act, 33 U.S.C. § 1344(c).

223. *See* Part I(C), *supra*.

of supporting a veto. Since EPA has discretion to determine which harms are unacceptable, even minimal harms, like those included in the administrative record, could justify the veto. However, waiting for the Corps to prepare the record raises the costs associated with the timing issues discussed above.

Finally, EPA should consider the additional administrative burden that vetoing an NWP would place on the Corps. Many dredge and fill activities can occur under a single NWP.[224] Therefore, the practical impact of vetoing an NWP is multitudes greater than the initial veto. Each veto of an NWP would spawn thousands of new individual permits that the Corps would need to review. In turn, those individual permits would require case-by-case application of the Guidelines to the disposal sites associated with the permit. The additional caseload would increase the cost of permit review and likely result in temporary staffing shortages and permitting delays. Congress would need to increase the Corps' funding to cover the additional costs associated with the increased number of individual permits or else risk those delays becoming permanent.

2. EPA Should Use a Wetlands Inventories System to Implement a General Permit Veto

To implement its veto power effectively, EPA should proactively create a wetlands inventory that identifies areas where dredge and fill activities are likely to cause unacceptable environmental effects. This idea was first proposed by Professor Blumm, who proposed that EPA solicit nominations for advanced section 404(c) determination from other federal agencies, the states, and the public.[225] Writing a mere thirteen years after Congress codified general permits in the CWA, Professor Blumm noted that section 404(c) does not tie EPA's veto to the permit process.[226] Since then, the courts have affirmed his understanding and have repeatedly held that a veto can take place at any time and need not relate to a specific permit or permit application.[227] As Professor Blumm articulated, EPA should "infuse[] the 404 program with a badly needed prospective component" by determining in advance which areas merit 404(c) protection based on information collected by the National Wetlands Inventory.[228] EPA

224. For example, the Corps estimated that the prior version of NWP 12 was used on average approximately 14,000 times per year on a national basis between 2005 and 2017, resulting in impacts to approximately 1,750 acres of waters of the United States, including wetlands that are regulated under the CWA. All these activities occurred under on NWP. Nicole T. Carter, CONG. RSCH. SERV., 97-223, THE ARMY CORPS OF ENGINEERS' NATIONWIDE PERMITS PROGRAM: ISSUES AND REGULATORY DEVELOPMENTS 8 (Jan. 12, 2017), https://crsreports.congress.gov/product/pdf/RL/97-223/26.

225. Blumm, *supra* note 189, at 439.

226. *Id.*

227. Trout Unlimited v. Pirzadeh, 1 F.4th 738, 745 (9th Cir. 2021).

228. Blumm, *supra* note 189, at 440.

should also solicit nominations from other federal agencies and the public to build upon this inventory.[229] However, EPA never used this strategy.[230]

Applied to general permits, a wetlands inventory could identify specific locations where section 404(c) applies prior to the beginning of any dredge and fill activities. In effect, EPA would veto the use of some, or all, NWPs as applied to the area identified in the wetlands inventory. Currently, the U.S. Fish and Wildlife Service maintains the National Wetlands Inventory that could be used as the basis for creating the inventory of advance veto determinations.[231] But EPA could work with other interested parties, including the Corps, state environmental agencies, and coastal zone management authorities, to broaden the wetlands inventory for the specific purpose of identifying sensitive areas where activity under an NWP would likely create unacceptable adverse effects on environmental resources. Using that information, EPA could veto NWPs that lack conditions limiting dredge and fill activity within the wetlands inventory. Alternatively, EPA could veto NWPs that fail to require PCN within the wetlands inventory. EPA could also issue advance determinations that any dredge and fill activity within the wetlands inventory could be subject to section 404(c).

Implementation of a wetlands inventory should accommodate existing practices and expectations. For example, perhaps the most curious feature of section 404(c) is that EPA has used it so sparingly.[232] Yet, the threat of the veto can carry as much weight as the action itself, but only if there is the potential that it will be realized.[233] Therefore, with a wetlands inventory, EPA should use its expert discretion in determining where to limit NWPs and which NWPs to prohibit. If EPA were to begin vetoing general permits, it should use its power only when it would make the largest impact. Selective application of the veto may help increase cooperation between EPA and the Corps and prevent the threat of interagency conflict.[234] For example, a general permit veto might incentivize the Corps to add new general conditions during the specification process for new NWPs.[235] Likewise, a wetlands inventory system would balance administrative efficiency with environmental protection by providing the Corps and interested parties advance notice that dredge and fill activity in certain areas may be subject to section 404(c).

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229. *Id*

230. This may be because EPA has historically used section 404(c) very sparingly. *See supra* Part I(D). Therefore, it did not want to create a new program for a seldom used tool. However, the recent rise of general permits, and NWPs specifically, suggests that there is now a need for a programmatic approach to making advanced determinations.

231. *National Wetlands Inventory*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/program/national-wetlands-inventory (last visited Nov. 30, 2021). The Emergency Wetlands Resources Act of 1986 requires the Secretary of the Interior, through the Director of the Fish and Wildlife Service, to map and digitize wetlands of the U.S. *Id.*

232. *See supra* Part I(D).

233. Blumm & Mering, *supra* note 10, at 306.

234. *See supra* discussion Part II(C)(1).

235. *See supra* discussion Part I(C).

CONCLUSION

This Note conceives of section 404(c) as an option of last resort that EPA should invoke only when all other options for compromise have failed. However, the Corps is currently sidestepping a foundational compromise of the CWA. The explosion of NWPs suggests that the Corps is acting unchecked when it comes to general permits. Through the veto, EPA has the tool it needs to assert its position as a co-equal agency. The CWA provides EPA with statutory authority to veto general permits under section 404(c). Likewise, the legislative history and purpose of the CWA make clear that the veto power was meant to check the Corps by protecting environmental resources in special places. The first veto will take time, resources, and new strategies. Nevertheless, applying section 404(c) to general permits has the potential to bring much needed balance to the dredge and fill permitting program.