ENVIRONMENTAL LAW

*by Frank F. Skillern**

The Fifth Circuit dealt with several recurring issues of interpretation and application of environmental statutes during the survey period. The cases involved application of the National Historic Preservation Act (NHPA),[1] the National Environmental Policy Act of 1969 (NEPA),[2] and the Clean Water Act (CWA).[3]

The historic preservation cases provide guidance to agencies concerning their responsibilities under NHPA. Those cases also concerned claims under NEPA and show the interaction between the NHPA requirements and the environmental impact statement (EIS) requirement of NEPA.[4] Another NEPA case arose in the context of a section 404 dredge and fill permit determination[5] by the Corps of Engineers. In each of the three NEPA cases the court sustained the agency's determination that an EIS was not required. Those determinations were sustained under the "hard look" standard of review.[6]

The cases under the CWA concern dredge and fill permits under section 404[7] and the liability of third parties under section 1321 for

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1. 16 U.S.C. §§ 470-470w-5 (1982).

2. 42 U.S.C. §§ 4321-4370 (1982). For a detailed discussion of NEPA, *see* SKILLERN, ENVIRONMENTAL PROTECTION: THE LEGAL FRAMEWORK §§ 2.01-.60 (1981 and 1984 Supp.).

3. 33 U.S.C. §§ 1251-1376 (1982).

4. 42 U.S.C. § 4332(2)(C) (1982).

5. 33 U.S.C. § 1344 (1982). For detailed discussion of the section 404 program *see* SKILLERN, *supra* note 2, at 4.20. *See also*, Blumm, *The Clear Water Acts Section 404 Permit Program Enters Its Adolesence: An Institutional and Programmatic Perspective*, 8 ECOLOGY L.Q. 409 (1980).

6. The "hard look" standard was first noted in an environmental case before the Supreme Court in Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976). In that footnote, the Court said "the only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences . . . ." *Id.* More recently the Supreme Court has stated that agencies should "take a 'hard look' at the environmental consequences before taking a major action." Baltimore Gas and Elec. Co. v. Natural Resources Defense Council, 103 S. Ct. 2246, 2253 (1983).

7. 33 U.S.C. § 1344 (1982).

the costs incurred by the government in cleaning up oil spills.[8] One section 404 case, *Avoyelles Sportsmen's League, Inc. v. Marsh*,[9] required interpretation of the Corps of Engineers' so-called wetlands regulations,[10] the respective roles of the Corp and the Environmental Protection Agency (EPA) in making wetlands determinations under section 404, and what types of activities require a section 404 permit. The other section 404 case, *Save Our Wetlands, Inc. v. Sands*,[11] provides a contrast with *Marsh* which attempts to clarify the nature of activities in wetlands for which a permit is required under the CWA.

The third CWA case before the Fifth Circuit involved the issue of third party liability for expenses incurred by the government in cleaning up an oil spill. The Fifth Circuit essentially was asked to reconsider two earlier decisions involving the same vessel.[12] The Fifth Circuit adhered to its earlier decisions and held that a nondischarging, negligent vessel is liable for the full amount of the clean up costs without the benefit of the statutory limitation on liability provided in section 1321(h) of the CWA.

One case from the United States Supreme Court also will be discussed. It was decided late in the Court's term and will have important ramifications nationwide. *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*[13] upheld the EPA's so-called bubble policy as applied in nonattainment areas[14] under the Clean Air Act (CAA). This decision should provide greater flexibility to the states in selecting appropriate strategies for attaining national ambient air quality standards in nonattainment areas. It also will allow owners of new sources or plants undergoing major modifications in those areas greater discretion to achieve tradeoffs of emissions.

I. NATIONAL HISTORIC PRESERVATION ACT

The NHPA establishes a means to identify and preserve build-

8. 33 U.S.C. § 1321 (1982).

9. 715 F.2d 897 (5th Cir. Sept. 1983).

10. 40 C.F.R. pts. 320, 321, and 230.

11. 711 F.2d 634 (5th Cir. Aug. 1983).

12. United States v. M/V Big Sam, 681 F.2d 432 (5th Cir. 1982) and United States v. M/V Big Sam, 693 F.2d 451 (5th Cir. 1982). Both opinions in *Big Sam* were discussed in last year's survey. *See Survey, Environmental Law, Fifth Circuit Symposium*, 15 TEX. TECH L. REV. 234-40 (1984).

13. 104 S. Ct. 2778 (1984).

14. 42 U.S.C. § 7501 (1982).

ings, landmarks, or districts of historical or cultural significance.[15] Under NHPA, a site or district may be registered through the Department of Interior by listing it in the National Register of Historic Sites.[16] Once registered, the building or district is maintained and preserved, in part, by restricting federal agencies from funding or taking actions which would be detrimental to registered sites.[17] The Vieux Carre area in New Orleans has been registered as a national landmark district.[18]

In *Vieux Carre Property Owners, Residents and Associates, Inc. v. Pierce*,[19] the Fifth Circuit had to determine whether the appropriate historic preservation review had been completed by the Department of Housing and Urban Development (HUD) before granting federal funds under an Urban Development Action Grant (UDAG).[20] New Orleans qualified for a UDAG under the applicable statute.[21] The city had applied for UDAG funds to implement public improvements associated with a hotel, retail shopping mall, and parking complex in the downtown area adjacent to the Vieux Carre Historic District.[22] The project initially was to be conducted in five phases. Phase I consisted of a thirty-two story office building which had been completed in 1979.[23] At issue were funds for Phase II.

The plaintiffs argued that adequate historic preservation review had not been conducted for Phase II.[24] They further argued that a master plan had been developed for all five phases which represented the whole project.[25] Hence, according to the plaintiffs, HUD must conduct an environmental and historic review of the impact of the remaining four phases, not merely Phase II.[26]

Under the Housing and Community Development Act of 1974, HUD can delegate to a UDAG applicant the task of conducting the

15. *See supra* note 1. *See also* SKILLERN, *supra* note 2, at § 6.11 (reviewing the National Historic Preservation Act of 1966).

16. 16 U.S.C. § 470a(1)(A)-(B) (1982).

17. *See id.* § 470a(2).

18. Vieux Carre Property Owners, Residents and Associates, Inc., v. Pierce, 719 F.2d 1272, 1275 (5th Cir. Nov. 1983).

19. *Id.* at 1272.

20. *See id.* at 1276.

21. *Id.* at 1274.

22. *Id.*

23. *Id.* at 1274-75.

24. *Id.* at 1276.

25. *Id.* at 1275.

26. *Id.* at 1275 n.1.

environmental review and decision-making for the project.[27] The city's Planning Commission had undertaken the necessary study and review to prepare an environmental assessment for decision and action.[28] It had consulted with local groups, the Vieux Carre Commission, the state historic preservation officer, as well as the private developer, and had sought opinions about the impact of Phase II on the adjacent Vieux Carre district.[29] The completed historic and environmental review was adopted formally as a comprehensive final environmental assessment.[30]

The plaintiffs challenged this final environmental assessment primarily on the grounds that it should have considered Phases III through V of the project.[31] The Fifth Circuit agreed with the trial court that the environmental and historic review did not have to consider the other proposed phases.[32] The court examined the record and testimony and concluded that undertaking Phases III through V was at best speculative.[33] At this time there was inadequate funding and no prospect of either private or federal funds for carrying out those phases. Moreover, no major tenant had been identified for the office buildings in the other phases.[34] The court concluded that, under those circumstances, the city properly limited its review to Phase II for which the UDAG funds were sought.[35]

The court also rejected the argument that excluding review of Phases III through V limited considerations of less intrusive alternatives.[36] Since those phases were at best speculative, they were not deemed viable alternatives that the agency had to consider. Hence, the city's decision to limit its review to Phase II was reasonable.[37]

Because Phase II was located in a National Historic Landmark District listed on the National Register and was adjacent to the Vieux Carre National Historic Landmark, NHPA required the agency to " 'take into account the effect of the [project],' on historic properties and to afford the Advisory Council on the Historic Preservation an

27. 42 U.S.C. § 5304(h) (1982).
28. 719 F.2d at 1275.
29. *Id.* at 1275-76.
30. *Id.* at 1276.
31. *Id.*
32. *Id.* at 1278-79.
33. *Id.*
34. *Id.* at 1278.
35. *Id.* at 1279.
36. *Id.* at 1278.
37. *Id.*

opportunity to comment on the project before approving the expenditure of federal funds."[38]

The city undertook its historic review early in the planning process for Phase II. It consulted with the Vieux Carre Historic Commission and the State Historic Preservation Officer.[39] The state official made site investigations and, in written comments, concluded that, with the height restrictions, the project would not adversely impact Vieux Carre.[40] In addition, the city submitted its recommendations to the Advisory Council for its consideration. The Advisory Council issued findings and recommended approval of the UDAG.[41]

The only other NHPA case decided during the survey period involved the issue of whether an agency's failure to comply with NHPA could be a defense by a landowner in a condemnation action.[42] In *United States v. 162.20 Acres of Land*,[43] the government sought to condemn property on which "Cedar Oaks," an antebellum home, was located.[44] The land would be used in the Tennessee-Tombigbee Waterway Project.[45] The Barton Townsite, which was within the area being condemned, as well as Cedar Oaks, were listed in the National Register of Historic Places.[46] The landowners contended that the government must conduct the appropriate historic review under NHPA.[47] Previously, a panel of the Fifth Circuit had affirmed the district court's striking of the landowners' defense to the condemnation suit based on noncompliance with NHPA.[48]

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38. *Id.* at 1280 (citing U.S.C. § 470f (1982)). Under the 1980 amendments to NHPA the agency is also required to "undertake such planning and action as may be necessary to minimize harm to such landmark" to the maximum extent possible. *Id.*

39. 719 F.2d at 1281.

40. *Id.*

41. *Id.*

42. *See infra* notes 43-45 and accompanying text. 16 U.S.C. § 470f requires the head of an agency with jurisdiction over a proposed project:

> prior to the approval of the expenditure of any Federal funds on the undertaking . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Section 470i and Section 470t of this title, a reasonable opportunity to comment with regard to such undertaking.

Id.

43. 733 F.2d 377 (5th Cir. June 1984).

44. *Id.* at 378.

45. *Id.*

46. *Id.*

47. *Id.*

48. United States v. 162.20 Acres of Land, 639 F.2d 299, 304 (5th Cir. 1981).

The Fifth Circuit refused to reconsider the prior panel's holding. The court adhered to its own "firm rule that one panel cannot disregard the precedent set by a prior panel even though it perceives error in the precedent."[49]

The court rejected the landowners' effort to invoke *Massachusetts v. Watt*.[50] In that case, the government was enjoined from auctioning oil and gas leases before complying with NEPA.[51] In *Watt*, the First Circuit emphasized that NEPA is an integral part of the decision-making process and that the environmental review must be conducted before taking steps which would have a snowball or domino effect with respect to the ultimate decision to be made.[52]

The Fifth Circuit distinguished *Watt* from the condemnation case.[53] It noted the prior panel's conclusion that the vesting of title in the government was a neutral act. The prior panel had found that condemnation would vest title in the Untied States but would not excuse the government from compliance with NHPA or NEPA.[54] Before the government could make use of the land being condemned, it would have to conduct the appropriate review under those statutes.[55] Hence, failure to comply with NHPA before deciding to condemn is not a defense in a condemnation proceeding.[56]

II. THE NATIONAL ENVIRONMENTAL POLICY ACT

NEPA also was involved in two cases concerning the NHPA. In both, the court affirmed the agency's determination that an EIS was not necessary. An important "action-forcing" part of the National Environmental Policy Act is the environmental impact statement which must be developed prior to the participation of any agency in a major federal project.[57] If it is preliminarily determined that the proposed project will not have a significant environmental impact, the agency may decide not to file an EIS.

In *Vieux Carre Property Owners, Residents and Associates, Inc. v.*

49. 733 F.2d at 379 (citing Ruiz v. Estelle, 666 F.2d 854, 857 n.5 (5th Cir. 1982)).
50. 716 F.2d 946 (1st Cir. 1983).
51. *Id.* at 953.
52. *Id.* at 952-53.
53. 733 F.2d at 379.
54. *Id.*
55. *Id.*
56. *Id.* at 380.
57. 42 U.S.C. § 4332(2)(C) (1982).

Pierce,[58] the environmental group argued that Phase II consisted of a hotel and business complex which would have significant environmental impacts in the Vieux Carre Landmark District where it was to be built, as well as on the adjacent Vieux Carre area.[59] The district court found that the Planning Commission had considered design, traffic, parking, and related problems.[60] In addition, it noted that the hotel would be built in the central business area which already had hotels larger than the one planned for Phase II.[61] Moreover, the area was zoned for the proposed buildings.[62] Other testimony indicated that Phase II buildings would not be visible from the Vieux Carre area except possibly at its fringe.[63]

On this evidence the Fifth Circuit concluded that the district court properly upheld the negative determination by HUD. It concluded that the agency had taken a "hard look" at the environmental implications of the project, and the city's decision was reasonable.[64]

The environmental groups also argued that the city had not adequately considered mitigation measures and alternatives to Phase II as required under NEPA's EIS provisions.[65] The Fifth Circuit reviewed the different measures which had been taken to allow an aesthetically harmonious transition from the historic district to Phase II building. These included a restriction in height requirements placed on buildings immediately across the street from the district and a facade compatible with that used within the district.[66] Moreover, the Planning Commission proposed new traffic routes which would have the vehicular traffic going around the historic district rather than through it.[67] According to the court, "[t]hese measures clearly satisfy the requirements of NEPA. The measures will not only mitigate any potential adverse impacts but will also enhance an area that was formerly a picture of urban blight and badly in need of the stimulus for restoration that Canal Place will provide."[68]

Last, the Fifth Circuit rejected the contention that the city had

58. 719 F.2d 1272 (5th Cir. Nov. 1983).
59. *Id.* at 1274-76.
60. *Id.* at 1279-80.
61. *Id.* at 1279.
62. *Id.*
63. *Id.*
64. *Id.* at 1279-80.
65. *Id.* at 1280.
66. *Id.*
67. *Id.*
68. *Id.*

not taken the appropriate "hard look" at environmental and historic factors. The court reviewed the record and concluded that the plaintiffs had ample opportunity to present their comments and positions.[69] The city had responded to their points through various mitigation measures and changes in the project. The city's environmental assessment was "extremely thorough and resulted in a document much akin to a detailed environmental impact statement. . . . [T]he City took a 'hard look' at the project's environmental consequences and none of the City's conclusions are unreasonable."[70] Hence, the court affirmed the district court's judgment upholding the approval of the UDAG for Phase II.[71]

NEPA was also involved in *United States v. 162.20 Acres of Land*.[72] The landowners contended that the Corps had not complied with NEPA because it did not prepare a site specific EIS.[73] As in *Vieux Carre*, the Fifth Circuit affirmed the district court's upholding of the agency's decision not to prepare an EIS.[74]

In the condemnation case the Corps had prepared a programmatic EIS which covered the Barton Ferry Recreation Area.[75] In a supplemental EIS, the Corps considered impacts on the waterway, although it did not consider impacts on the Barton Ferry Recreation Area separately.[76]

The Fifth Circuit concluded that separate treatment was not necessary. The court held that the agency may decide whether to do a program or site specific EIS. Either will be sufficient as long as the requisite environmental analysis is included.[77] The court reviewed the supplemental EIS and found that it covered the environmental effects of the project, addressed mitigation measures, and required mitigation alternatives on the project. Moreover, the supplemental EIS incorporated by reference exhaustive studies on the archaeological and architectural resources in the district and the historical sites.[78] The Corps

69. *Id.* at 1282.

70. *Id.* (citing Environmental Defense Fund v. Marsh, 651 F.2d 983 (5th Cir. 1981)).

71. 719 F.2d at 1282.

72. 733 F.2d 377 (5th Cir. June 1984).

73. *Id.* at 380. *See also* SKILLERN, *supra* note 2, at §§ 2.34-.36 (discussion of when a program as opposed to a site-specific EIS is required).

74. 733 F.2d at 381.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

was therefore not required to prepare a site specific EIS.[79]

The third NEPA case, *Save Our Wetlands, Inc. v. Sands*,[80] also upheld the Corps' decision not to prepare an EIS. In *Sands*, however, the district engineer did not prepare or sign a formal environmental assessment seemingly required under the Corps' regulations.[81] An environmental assessment had been prepared by an outside consultant employed by one of the project proponents.[82] Instead of preparing and signing an environmental assessment, the district engineer reviewed "the environmental assessment compiled by [the consultant], public comments and materials in its [the Corps'] file, and filed a finding of fact and a preliminary statement that no environmental impact statement was required."[83] Save Our Wetlands argued that the agency had failed to adhere to its own procedures.[84]

The Fifth Circuit held that the district engineer had not acted contrary to the Corps' regulations.[85] It interpreted those regulations to require the engineer to make his own determination concerning the need for an EIS. That determination should be placed in the administrative file as his environmental assessment.[86] The court concluded that it was sufficient if the determination was in the form of a statement, rather than a formal, signed document.[87]

The Corps was also challenged on the ground that it had improperly delegated the authority to make the environmental assessment to the project applicant.[88] Both the trial court and the Fifth Circuit disagreed with this contention. The trial court found that the agency had made an independent and thorough review of the project. The Fifth Circuit stated that the role of a review in court was to determine that the agency had taken a "hard look" at the environmental factors related to a project. This examination by the agency can be done, according to the court, with help from other parties.[89]

Specifically, the court concluded that the agency could see the

79. *Id.*
80. 711 F.2d 634 (5th Cir. Aug. 1983).
81. *Id.* at 640-41.
82. *Id.* at 641.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 642.

applicant's environmental assessment and, if appropriate, adopt it.[90] The Fifth Circuit reviewed the evidence to determine whether an independent evaluation of the consultant's environmental assessment had been made.[91] Testimony that the district engineer had considered not only the consultant's document but also other studies, aerial photography, letters, and comments from appropriate state agencies, led the Fifth Circuit to conclude that sufficient verification and independent review had been conducted by the Corps.[92]

Next, the Fifth Circuit reviewed the agency's decision not to prepare an EIS. It noted that the appropriate standard is "whether the agency decision not to develop an impact statement is reasonable and made objectively and in good faith on a reviewable environmental record. If the decision is reasonable, 'the determination must be upheld'."[93] Applying this standard, the Fifth Circuit concluded that the Corps had acted properly in reaching its decision. The court noted that this conclusion was implicit in its earlier action sustaining the preparation of the environmental assessment. The burden was on Save Our Wetlands to show that the Corps' decision was unreasonable, and it failed to carry that burden.[94]

Save Our Wetlands next challenged the Corps' selection of a route which would destroy wetlands rather than choosing alternative routes in existing nonwetland areas.[95] Save Our Wetlands based its arguments on the Corps' regulations which required: (1) a benefit/harm analysis of the wetland resource, (2) a determination as to whether the benefits are being maximized, and (3) a finding that no feasible alternative sites are available.[96]

The court concluded that it was implicit in the Corps' decision that the benefits of the project outweighed the harm.[97] It went on to further review the materials and data relating to comparisons and feasibility of alternative routes which had been rejected due to their location.[98] One such route would go through a high-use residential and

90. *Id.*
91. *Id.*
92. *Id.* at 643.
93. *Id.* at 644 (citing Save the Bay, Inc. v. United States Corps of Eng'rs, 610 F.2d 322, 325 (5th Cir.), *cert. denied*, 449 U.S. 900 (1980)).
94. 711 F.2d at 644-45.
95. *Id.* at 645.
96. *Id.* (citing 33 C.F.R. § 320.4(b)(4) (1983)).
97. 711 F.2d at 645.
98. *Id.* at 646.

commercial area, while another was considered unaesthetic or environmentally unattractive along a new highway, and yet a third alternative route would run through a feeding area for different birds, including eagles. The route selected was chosen in consultation with the Louisiana Wildlife and Fisheries Commission as well as the United States Fish and Wildlife Service. Other state and federal agencies were consulted as well. Based on this record, the court concluded that the Corps had adequately considered alternative routes.[99]

Each of the three NEPA cases sustaining decisions not to prepare an EIS involved application of the so-called "hard look" standard of review. The Fifth Circuit has consistently required close scrutiny of an agency's determination not to prepare an EIS. The Fifth Circuit is directing the district courts to first require a reviewable record. That record must then be scrutinized to determine that an independent evaluation or environmental assessment was prepared in reaching the agency's negative determination. Furthermore, the court must review the administrative record to determine that the environmental consequences of the project have been examined objectively and in good faith by the agency. The Fifth Circuit requires sufficient evidence that the appropriate environmental factors were considered and that the decision not to prepare an EIS was reasonable.

This approach was summarized in *Sands* in which the court applied the "hard look" standard of review to an agency's finding of no significant impact. In so doing, the court relied on cases using the "hard look" standard when an EIS was required. The Fifth Circuit noted in *Sands*:

> The Supreme Court has again recently instructed that agencies 'take a hard look at the environmental consequences before taking a major action.' The role of the judiciary in such cases is 'simply to ensure that the agency had adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious.' [T]he instructions to the judiciary in those cases is apt here.[100]

Under this "hard look" standard, the Fifth Circuit is examining more closely the documentary evidence and testimony supporting the agency's decision and its underlying justifications.

The Fifth Circuit is not willing merely to defer to an agency's

99. *Id.*
100. *Id.* at 642 (citations omitted).

documents and statements to rubberstamp a negative determination. In *Sands*, the Fifth Circuit carefully avoided that result. It noted that the CEQ regulations on the implementation of NEPA expressly authorized the use of documents prepared by or on behalf of an applicant.[101] The court, however, carefully examined the administrative record and testimony by agency officials to determine that the necessary independent evaluation of the applicant's environmental assessment had been conducted by the agency. Having made an independent evaluation and verification of the document, the agency could incorporate it in whole or in part as its environmental assessment supporting its decision not to prepare an EIS. The court concluded, "Here there is a properly reviewed, verified, supplemented and adopted assessment."[102]

III. CLEAN WATER ACT

A. *Section 404 Permit Cases*

The CWA provides for regulation of the discharge of pollutants into navigable waters,[103] which are defined as the "waters of the United States, including the territorial seas."[104] Section 404 of the CWA requires a dredge and fill permit be obtained prior to the discharge of dredged or fill material into navigable waters.[105] The Army Corps of Engineers has issued regulations defining navigable waters to encompass wetlands adjacent to navigable waters, and wetlands which, if degraded, could affect interstate commerce.[106]

In *Avoyelles Sportsmen's League, Inc. v. Marsh*,[107] the landowner was proposing the conversion of wetlands to soybean production. In so doing, the landowner had to clear all of the wetland vegetation, including trees, from an area of about 80,000 acres which were still forested.[108] The Corps had notified the landowner that it was necessary to stop the activities pending a wetlands determination. The Corps subsequently determined that approximately thirty-five percent of the land was wetlands for which a permit would be required.[109]

101. *Id.*
102. *Id.* at 644.
103. 33 U.S.C. § 1311(a) (1982).
104. *Id.* § 1362(7).
105. *Id.* § 1344(a).
106. 33 C.F.R. § 323.2(a)(1)-(5) (1983).
107. 715 F.2d 897 (5th Cir. Sept. 1983).
108. *Id.* at 901.
109. *Id.*

The landowners resumed their activities on the portion of the tract not designated a wetland.[110]

Thereafter, a number of environmental groups, as well as one interested individual, brought a citizen suit[111] to enjoin the activities which they claimed would cause the discharge of pollutant into waters without obtaining the requisite permit from either the Corps or the EPA.[112] The district court ordered the federal defendants to prepare a final wetland determination. The EPA made that determination, concluding that approximately eighty percent of the tract was wetlands.[113]

After a lengthy trial, the district court concluded that a section 404 permit would be necessary. It further concluded that the wetland determinations by the agencies were erroneous and that ninety percent of the area consituted wetlands.[114] The private defendants were thus enjoined from further activities in the absence of a section 404 permit, from which injunction the defendants appealed.[115]

The Fifth Circuit first addressed several procedural and administrative law questions, before sustaining EPA's methodology for determining wetland areas.[116] The court concluded that it was inappropriate for the district court to substitute its interpretation of a complex statute for that of the agency. The agency's determination and definition was sufficiently reasonable to preclude review by the court.[117]

The Fifth Circuit determined that the appropriate standard of review was the arbitrary and capricious standard of the Administrative Procedure Act rather than the de novo review engaged in by the district court.[118] The Fifth Circuit found that the trial court had erred in concluding the EPA's determination was wrong because there was a conflict between authorities over the nature of wetlands.

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110. *Id.*

111. *Id. See* 33 U.S.C. § 1365(a) (1982). *See also* SKILLERN, *supra* note 2, at §§ 4.21, 9.06A (detailed discussion of citizen suits and recovery of attorney fees).

112. 715 F.2d at 902.

113. *Id.* at 902-03.

114. *Id.* at 903.

115. *Id.*

116. *Id.* at 907. *See* Tucker, *Administrative Law and Procedure. Fifth Circuit Symposium*, 16 TEX. TECH L. REV. 1, 18 - 41 (1985) (discussing the administrative law questions involved).

117. *Id.*

118. *Id.* at 904. *See* 5 U.S.C. § 706(2) (1982) (the Administrative Procedure Act). *See also* Save the Bay, Inc. v. Administrator of the EPA, 556 F.2d 1282 (5th Cir. 1977) (application of the arbitrary and capricious standard).

The Fifth Circuit stated that merely because there is a difference of opinion does not mean that the agency's determination is wrong. It held that the district court erred in substituting its judgment about the character of the soils for the agency's.[119] The court held that the EPA's determination concerning the extent of flooding and scope of wetlands was within its domain and properly determined by it. Hence, its conclusions were reasonable and should not have been rejected by the district court.

Next, the court considered whether a section 404 permit would be required. The landowners argued that their activities did not constitute a "discharge of a pollutant into navigable waters" within the meaning of the CWA. Those activities included bulldozers shearing timber and vegetation at ground level. The bulldozers would then use rake blades pushing the fallen trees into windrows. The photographic evidence showed that soil and leaf litter piled up in the windrowing process. This had a leveling effect on the land. The fallen trees and vegetation were then burned and the ashes spread into and across the tract. Other parts of the burned materials were buried in pits approximately fifty feet long and six feet deep. After this work was completed, the land was prepared for soybean cultivation. A drainage ditch also had been constructed.[120]

The harder question for the court was whether the removal of vegetation was a discharge. Under the Act, a discharge is defined as the addition of pollutants into navigable water, not the removal of materials.[121] The Fifth Circuit rejected this technical reading of the Act and adhered to an opinion by the D.C. Circuit which had rejected an "overly literal and technical construction" of the Act.[122]

The Fifth Circuit opted to give greater deference to the EPA's administration of the Act, concluding that Congress had given the EPA substantial discretion with respect to wetlands determinations.[123]

The Fifth Circuit was given an easy solution to the problem. The federal defendants had changed their position in light of the district court's opinion. Originally, the EPA had objected to the conclusion that landclearing operations which did not have any redepositing of

119. 715 F.2d at 907.
120. *Id.* at 922.
121. *Id.*
122. *Id. See* National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 166 (D.C. Cir. 1982).
123. 715 F.2d at 923.

materials in the wetlands would require a permit. Since the facts of this case clearly entailed redepositing material after the landclearing, which constituted a significant change in the wetlands, the EPA agreed that these activities were covered by the Act.[124] Hence, the court concluded that "discharge" does cover redepositing materials taken from wetlands, and the landclearing activities constituted a discharge within the meaning of the Act.[125] Similarly, the material here would constitute fill, if not dredged, material within the meaning of section 404.[126]

Last, the court rejected the landowners' claim of an exemption for normal farming activities, holding that the normal farming practices are limited to ongoing agricultural activities.[127] Since the proposed soybean farming here would be a new agricultural activity, it was not within the exemption.[128]

The Fifth Circuit reached a different result in *Save Our Wetlands, Inc. v. Sands*.[129] In *Sands*, the applicant company was seeking permission to construct high voltage transmission lines along a corridor adjacent to the west bank of the Mississippi River. The lines would cross 214 acres of wooded wetlands and 244 acres of nonwooded wetlands. The power company planned to cut the trees in the wetlands area with chainsaws, windrow them, and allow them to deteriorate naturally. Save Our Wetlands argued that clearing the wooded wetlands area constituted a discharge of dredged or fill materials into the navigable waters which would require a permit under section 404.[130]

The court disagreed, distinguishing the *Avoyelles* case on the basis that in *Sands* no permanent change in land use was anticipated.[131] According to the court, a key element of the *Avoyelles* decision was that the contemplated work would destroy the wetlands.[132] It reasoned:

The wooded swampland to be cleared here will be changed to

124. *Id.* n.40.
125. *Id.* at 923-24.
126. *Id.* at 924.
127. *Id.* at 925.
128. *Id.* at 926. The court supported its interpretation with the fact that § 404(f)(2) of the CWA specifically removes the exemption from situtations in which there is a change in land use.
129. 711 F.2d 634 (5th Cir. Aug. 1983).
130. *Id.* at 646.
131. *Id.* at 647.
132. *Id.*

> swampland vegetation with shrubs, grasses and other low growth. The wetlands involved here will not be converted as in *Avoyelles*. The trees and vegetation to be windrowed will not be used to 'replac[e] an aquatic area with dryland or . . . chang[e] the bottom elevation of a waterbody.' Additionally, no access roads will be built to the corridor. All work will be done from marsh buggies and helicopters.[133]

Based on that finding, the Fifth Circuit in *Sands* affirmed the Corps' decision not to require a section 404 permit.[134]

B. *Third Party Liability of a Solely Negligent, Nondischarging Vessel for Cleanup Costs Under Section 1321(g) and (h)*

The Fifth Circuit had to confront again the issue of liability for cleanup costs for oil spills under section 1321 of the CWA.[135] Previously, the Fifth Circuit had held that a negligent, discharging vessel would be liable for the cleanup costs incurred by the government under section 1321(f).[136] In that case, the court held that the negligent discharging vessel was entitled to the statutory limitations on liability provided in section 1321(f). Moreover, the government's remedy under section 1321(f) was exclusive, and it could not pursue any causes of action based on maritime tort law.

United States v. M/V Big Sam,[137] presented the Fifth Circuit with an oil spill caused by a negligent, nondischarging vessel. The liability for nondischarging third parties is set forth in section 1321(g).[138] In *Big Sam*, the Fifth Circuit concluded that the remedy under section 1321(g) was not exclusive as it was for the negligent discharging vessel under section 1321(f). The court noted that subparagraphs (f) and (g) are worded virtually identically. Nonetheless, the CWA provides additional remedies to the government against third parties in section 1321(h).[139] Subparagraph (h) provides in part that the liabilities established by the CWA " 'shall *in no way* affect any rights' that . . . the United States may have against any third party whose acts 'may *in any way* have caused or contributed to the dam-

133. *Id.*
134. *Id.*
135. 33 U.S.C. § 1321 (1982).
136. United States v. Dixie Carriers, Inc., 627 F.2d 736 (5th Cir. 1980).
137. United States v. M/V Big Sam, 681 F.2d 432 (5th Cir. 1982), *reh'g denied*, 693 F.2d 451 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 3112 (1983).
138. 33 U.S.C. § 1321(g) (1982).
139. *Id.* § 1321(h).

age.' "[140] Hence, the third party liability under subparagraph (g) is not an exclusive remedy.

In *United States v. T/B Arcadian 95*,[141] the Fifth Circuit was asked, in effect, to reconsider the earlier panel's decisions in *Big Sam* and allow the negligent, nondischarging vessel the statutory limitation on liability under section 1321(g). This the court was unwilling to do. It noted that *Big Sam* involved a strict, literal statutory construction, which, if it produces an anomalous result, is for Congress to change. Hence, the court held, "[s]ubsection (h) permits the government to seek to recover the full costs expended in cleaning up an oil spill, so long as the cause of the spill is not the discharging vessel."[142]

One last matter remained on the issue of the tug's negligence. Because the tug stipulated its negligence and relied on the statutory limitation of liability successfully in the trial court, the issue of its negligence was not litigated. Because the limitation of liability was not allowed by the Fifth Circuit, the court remanded for the tug to present evidence to rebut the presumption of negligence which arises from a moving vessel striking a nonmoving object as was the case in *Arcadian 95*.

IV. THE BUBBLE POLICY

The United States Supreme Court rendered an important decision which will have significant ramifications not only in the Fifth Circuit, but also nationwide. The case concerns the use of the so-called bubble policy in nonattainment areas. Under the 1977 amendments to the Clean Air Act (CAA),[143] Congress required states to designate areas which had not yet attained the national ambient air quality standards.[144] For those nonattainment areas, the 1977 amendments required special plans to be incorporated into the state implementation plan (SIP) under section 7410.[145] The nonattainment area

140. *Id.*, *quoted in* United States v. M/V Big Sam, 681 F.2d at 437 (emphasis in original).
141. United States v. T/B Arcadian 95, 714 F.2d 470 (5th Cir. Sept. 1983).
142. *Id.* at 474.
143. 42 U.S.C. §§ 7401-7642 (1982).
144. *Id.* § 7501.
145. *Id.* § 7410. The attainment and enforcement of the CAA was to be accomplished through implementation plans developed by each state. A plan must include the provisions set forth in § 7410 and be submitted to the EPA for its approval. If a state plan was adopted pursuant to the requirements of § 7410, the EPA had to approve it and the state had the basic responsibility for enforcement of the standards and programs under the CAA. *See* SKILLERN, *supra* note 2, at § 3.07.

plans imposed stringent requirements on new sources or sources engaging in major modifications which were located in nonattainment areas. The state plan had to show reasonable further progress toward attainment by 1982, with a possible extension until 1987.[146] In addition, the SIP had to include new source review and a permit system. New sources had to apply the strictest technology-based standards, the lowest achieveable emission rate (LAER).[147] The source's owner also had to establish that all other sources he owned in the state were in compliance with the act or under a compliance order for attainment.[148]

If a state did not adopt a nonattainment area plan and incorporate it into its SIP by July 1979, then the 1977 amendments imposed a construction moratorium in nonattainment areas.[149] Moreover, the state would be subject to loss of highway funding and sewage treatment plant funding.[150]

To avoid a no-growth policy in areas that had not met the national standards by the 1975 deadline under the 1970 amendments to the CAA, the EPA in 1975 developed its so-called offset policy.[151] This interpretative ruling would require a new source to establish that it would offset its emissions by a reduction in emissions from its own or from other sources in the nonattainment area.[152] This offset would result in a net decrease in emissions of pollutants, bringing the area closer to meeting the national standards. A new source had to establish this offset before it could commence construction in the nonattainment area.[153]

Congress, in the 1977 amendments, adopted with some modifications the offset program established by the EPA.[154] To ease the burden of the new source review and the stringent permit requirements under the offset program, the EPA developed the bubble concept.[155] It adopted a plantwide definition of "source." Under that definition, a plant could make changes to reduce emissions from its units or com-

146. 42 U.S.C. § 7502 (1982).
147. *Id.* § 7503.
148. *Id.*
149. *See id.* §§ 7410(a)(2)(I), 7502(a).
150. *See id* §§ 7506(a), 7616.
151. *See* 41 Fed. Reg. 55,524 (1976).
152. *Id.*
153. *Id.*
154. 42 U.S.C. § 7501 (1982).
155. *See*, SKILLERN, *supra* note 2, at § 3.56.

ponents which could be setoff against emission from new units so that there would be no net increase in the amount of pollution emitted.[156] In those instances, the new source review and permit process would not be applicable.[157]

Earlier, the EPA had applied the bubble policy in two other contexts. First, it had proposed the use of the bubble in conjunction with new source performance standards (NSPS) under section 7411.[158] NSPS are technology-based standards designed to control the emission of pollutants into the air.[159] Use of the bubble policy would allow a new source to offset the emissions from a new boiler or other emitting unit against reductions in other units within the plant so that the net emissions were the same as before the new source was constructed.[160]

The D.C. Circuit Court of Appeals prohibited the bubble policy for NSPS in *ASARCO Inc. v. EPA*.[161] The court reasoned that the NSPS were intended to improve the air quality by reducing emissions.[162] It concluded that the bubble concept, which would effectively maintain the same level of emissions, was incompatible with that purpose.[163]

The EPA also had proposed the bubble policy and plantwide definition of a source for clean air areas.[164] The clean air areas are those in which the air quality is below the national ambient air quality standards. In the 1977 amendments, Congress provided for the prevention of significant deterioration (PSD) program which was designed to allow controlled growth in clean air areas.[165] The growth would be according to incremental increases in emissions over a baseline concentration determined for the PSD area.[166] In no event could the increment exceed the national standards.[167]

The EPA's use of the bubble in the PSD areas was challeged in

156. 42 U.S.C. § 7411 (1982).
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. 578 F.2d 319 (D.C. Cir. 1978).
162. *Id.* at 322.
163. *Id.* at 327.
164. *See, e.g.*, Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979).
165. 42 U.S.C. § 7470 (1982).
166. *Id.*
167. *Id.*

Alabama Power Co. v. Costle.[168] This time, the D.C. Circuit approved the EPA's use of the bubble policy in PSD areas.[169] It distinguished the *ASARCO* decision on the ground that the PSD program was intended to have cost effective, controlled growth in PSD areas, whereas NSPS were intended to improve air quality by reducing emissions.[170] According to the court, the bubble policy was compatible with the objectives of the PSD program. Hence, the D.C. Circuit established a test for determining when the bubble policy would be appropriate based on whether the purpose of a particular program was to improve air quality or to maintain existing air quality.[171]

Against this background, the United States Supreme Court in July 1984 addressed the problem presented by the EPA's use of the bubble policy in nonattainment areas.[172] In *Natural Resources Defense Council, Inc. v. Gorsuch*,[173] the D.C. Circuit overturned certain EPA regulations which allowed the use of the plantwide definition of "source" in nonattainment areas.[174] The D.C. Circuit acknowledged that the 1977 amendments did not define "source" and that the legislative history was at best "contradictory" as to whether an offset by use of the bubble would be permissible.[175] The D.C. Circuit then reviewed the purpose of the nonattainment program and concluded that it was designed to improve the air quality.[176] Hence, relying on the distinction drawn in *ASARCO* and *Alabama Power* , it held that the regulations allowing use of the bubble concept in nonattainment areas were contrary to the CAA.[177]

The Supreme Court disagreed with the D.C. Circuit court's reasoning and result.[178] The Court first concluded that it was error for the circuit court to substitute a judicial definition of the term "source" when the court had concluded that Congress had not required the definition.[179] Referring to this as basic legal error, the Court noted, however, that this mistake alone would not necessarily require rever-

168. 636 F.2d 323 (D.C. Cir. 1980).
169. *Id.* at 402-03.
170. *Id.* at 402.
171. *Id.*
172. *Id.*
173. 685 F.2d 718 (D.C. Cir. 1982).
174. *Id.* at 726 n.39.
175. *Id.*
176. *Id.* at 726-27.
177. *Id.*
178. Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 104 S. Ct. 2778 (1984).
179. *Id.* at 2781.

sal of the judgment since the Court "reviews judgments, not opinions."[180] The Court had to examine whether the legal error "resulted in an erroneous judgment on the validity of the regulations."[181]

The Supreme Court next reviewed the reasoning of the circuit court. It noted that the appropriate test for a reviewing court, when the statute does not define a term and the legislative history is ambiguous, was to determine whether the agency's definition was reasonable.[182] Noting that a reviewing court should give deference to an agency's construction of the statute and recognizing that Congress has delegated the authority to determine conflicting policies, the court stated that the agency's interpretation should be given great weight.[183] A reviewing court should not attempt to substitute its view for that of the agency. Here the Court held that the circuit court had misconceived its role in reviewing the EPA regulations.[184]

The Supreme Court held that when the reviewing court decided, based on a review of the legislative history, that Congress had no specific intent concerning the use of the bubble policy in nonattainment areas, it was not up to the reviewing court to determine what was an appropriate policy for the nonattainment program.[185] Rather, the reviewing court should examine the EPA's determination that the bubble concept is appropriate in the nonattainment area program and determine whether that conclusion was reasonable.[186]

The Court then reviewed the history of the bubble policy. It examined the EPA's initial interpretative offset ruling and the legislative history behind the 1977 CAA Amendments.[187] It examined the language of the Act and concluded that the term "source" as used in the nonattainment area program was not specifically defined.[188] Moreover, the statute and legislative history reflected no particular intent on the part of Congress concerning the use of the bubble policy.[189]

The Court further noted that the EPA's justifications for use of the bubble policy were reasonable. The EPA sought to avoid a dual

180. *Id.*
181. *Id.*
182. *Id.* at 2782.
183. *Id.* 2782-83.
184. *Id.* at 2783.
185. *Id.*
186. *Id.* at 2782-83.
187. *Id.* at 2786-92.
188. *Id.* at 2790-91.
189. *Id.* at 2791-92.

definition for PSD and nonattainment which would operate as a disincentive to modify existing sources.[190] Moreover, use of the bubble policy would simplify administration of the PSD and nonattainment area programs since they would have the same plantwide definition for source. The bubble policy, as applied, also allows greater flexibility to the sources in determining how to meet the applicable standards.[191]

Based on these factors, the Supreme Court reversed the D.C. Circuit's decision. It concluded that the EPA's determination allowing the use of the bubble policy in nonattainment areas was reasonable for that program.[192]

Over the years the bubble policy has been highly controversial. The Supreme Court's decision is significant because it provides far greater flexibility to stationary sources to avoid the new source review under the nonattainment area plans. A source may now make major modifications in some components of a plant while reducing emissions from other units so that there is no net increase in the emission of pollution from the source. In those instances, the modifications or construction would not be subject to the new source review or LAER standards. The bubble policy also enables the plant to make its own determination of what is the most cost effective way to cut back on pollution either through retrofitting or upgrading existing components of a plant or by using new pollution control technology on the modified or new unit.

V. CONCLUSION

During the survey period, the Fifth Circuit did not break any new ground in interpreting or applying environmental statutes. It did make some important contributions to existing case law involving recurring problems in the environmental law area. Notably, the Fifth Circuit continues to adhere to the hard look standard of review in NEPA cases. This is not applied as a pro forma review of an administrative record; rather, the court engages in a close examination of the documentary evidence and testimony to ensure that environmental factors have been adequately considered. This close scrutiny at least assures that an agency will develop a more thorough record of its

190. *Id.* at 2789.
191. *Id.* at 2788-89.
192. *Id.* at 2793-94.

environmental review at a time when other circuits are moving toward a superficial, perfunctory review, ostensibly under the hard look standard.[193]

The Fifth Circuit also continues to be embroiled in questions concerning application of the Corps' wetlands regulations and the section 404 permit under the CAA. The Fifth Circuit continues the trend it began in *Zabel v. Tabb*,[194] by giving an expansive reading to the Corps' section 404 permit jurisdiction and emphasizing the need to preserve and protect wetlands. With its determination in the *Avoyelles* case that redepositing material in wetlands and changing the wetlands system constitutes a discharge of a pollutant into navigable water necessitating a section 404 permit, the court continues this preservation trend. The result in *Sands*, however, illustrates that the Fifth Circuit is not mechanical in holding that all activities affecting a wetland necessarily will require a permit. As long as there is no permanent change in land use or no discharge in the form of filling the wetland, nor redepositing of vegetation in the wetlands, or otherwise changing the wetlands character, a section 404 permit is not required.

Along with the Ninth and Second Circuits,[195] the Fifth strictly interprets section 1321(f), (g), and (h) as imposing liability on a negligent discharging vessel which is entitled to the statutory limitation on liability. A negligent nondischarging vessel, however, is subject to liability for the full costs of clean up without any limitation of liability because of the causes of action against third parties reserved to the government under subsection (h).[196]

In short, the decisions of the Fifth Circuit this past year should provide clarification and guidance in applying statutes to situations regularly confronting district courts. Wetlands determinations, as well as the application of the section 404 permit, are particularly recurring problems in the Fifth Circuit. The cases decided may help resolve some situations without litigation and should provide aid in resolving those situations which are taken to court.

193. Citizens Against the Refineries Effect v. EPA, 643 F.2d 183 (4th Cir. 1981).

194. Zabel v. Tabb, 430 F.2d 199 (5th Cir.), *cert. denied*, 401 U.S. 910 (1970).

195. United States v. City of Redwood City, 640 F.2d 963 (9th Cir. 1981). *In re* Oswego Barge Corp., 673 F.2d 47 (2d Cir. 1982).

196. *See* United States v. M/V Big Sam, 693 F.2d 451, 453 n.4 (5th Cir. 1982) (Limitation of Liability Act may apply to claims based on maritime tort principles). *See also* 46 U.S.C. § 183a (1982) (Limitation of Liability Act).