RESCUING OPHELIA: *AVOYELLES SPORTSMEN'S LEAGUE* AND THE BOTTOMLAND HARDWOODS CONTROVERSY

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INTRODUCTION

The winter of 1977 it hardly rained. Spring backwaters from the Red River and a dozen bayous never came out of their banks, leaving the earth hard and forests of bottomland hardwoods tinder dry.[1] It was not long before enormous machines came in to knock them down, push them into windrows and set them on fire. Marc

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[1] *Marksville Rainfall Annual Report*, AVOYELLES J., Jan. 20, 2009. *See generally* Bruce Schultz, *Avoyelles Land Dispute Outlined*, DAILY TOWN TALK, Sept. 3, 1978, at A-1 (discussing land clearing of wetland areas).

Dupuy, an attorney who represented several landowners at the time, recalled:

> The bulldozers would start in the morning, very early, and they would line up in tandem, one behind the other, staggered. These were D-9's with cutting blades. They would walk through the timber and the timber was falling like matchsticks. And they would of course swing around and come back the other way. Later on that afternoon, they would all line up and park in a line. A crew would come in and sharpen the blades and blow out the dust and the leaves from the radiators, and refill the fuel tank. It was like a military operation. When the cutting was being done it was like Rommel's tanks across Africa. They were moving across [the tract] and dust was swirling and the trees were falling and smoke was coming up. It was an unbelievable sight.[2]

It was a scene from Dante's *Inferno*. Few would have imagined it was taking place in a wetland. Fewer still that it violated, of all things, federal water law. No one could have predicted it would lead to hard-fought litigation pitting federal agencies against each other on the ground, in a small courtroom in Alexandria, Louisiana and in government halls across Washington D.C. And, at the end of the day, recalibrate the balance of power in water resources development. The cases would be known as *Avoyelles Sportsmen's League*.[3]

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[2] Telephone Interview by Endre Szalay with Marc Dupuy, Attorney at Law, Dupuy & Didier (July 14, 2009) [hereinafter Dupuy July Interview]. Mr. Dupuy arranged federal loans for several land-clearing operations in the area and represented several landowners and banking interests in the *Avoyelles* litigation. *Id.*; Telephone Interview by Endre Szalay with Marc Dupuy, Attorney at Law, Dupuy & Didier (May 31, 2011) [hereinafter Dupuy May Interview]; Telephone Interview with Marc Dupuy, Attorney at Law, Dupuy & Didier (Oct. 31, 2011) [hereinafter Dupuy Oct. Interview].

[3] Avoyelles Sportsmen's League, Inc. v. Marsh (*ASL IV*), 786 F.2d 631 (5th Cir. 1986); Avoyelles Sportsmen's League, Inc. v. Marsh (*ASL III*), 715 F.2d 897 (5th Cir. 1983); Avoyelles Sportsmen's League, Inc. v. Alexander (*ASL II*), 511 F. Supp. 278 (W.D. La. 1981); Avoyelles Sportsmen's League v. Alexander (*ASL I*), 473 F. Supp. 525 (W.D. La. 1979).

I. AN UNUSUAL PLACE

Avoyelles Parish, Louisiana 1960–1980. Avoyelles Parish straddles a physical and cultural fault line across central Louisiana. To the north are pine and hardwood forests, and a very conservative people. Michael Osborne, who represented plaintiffs in the case, described them some years later as largely "protestant . . . sincere, [and] formal people. . . . Men in their fifties," he recalled, "call their neighbors of twenty years or more 'Mister.' They like country/western and gospel music. They are hunters and fishermen and rodeo lovers . . . and when they gather on Saturday afternoon they drink iced tea. They have names like Smith or Carpenter."[4]

To the south, the land runs more open to the Gulf of Mexico, and the residents are cut from different cloth. They are "Catholic . . . expressive, [and] open people,"[5] Osborne continued. "They dance the fais do do. They are hunters and fishermen . . . . A popular Saturday night beverage is a beer called Dixie, and they have names like Cheramie which means 'friend of mine' or (phonetically) Rowbear, spelled Robert."[6]

Notable in this description, is the obvious common denominator of these two clans: "they are hunters and fishermen." Together, Wilsons with Labordes, they would bring the *Avoyelles* case. They saw, literally, their land falling around them.

It was an unusual landscape, because it was at times under water. Spring runoff from the north and west would swell the rivers and back up the tributaries that ran into them, sending a reverse flow over all but the highest ridges on the landscape.[7] It might take weeks for the waters to recede; or it might take a month or two.[8] If you were a four-footed creature or had wings you could simply move to higher ground and wait it out, but if you were a tree, the permeating but irregular wetness presented a

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[4] Michael Osborne, Director, Southern Wetlands Project, Keynote Address to the 1981 Annual Conference of the Society of Wetland Scientists: Resource Management, Planning and Priorities in the Lower Mississippi River Valley (May 22, 1981), *in* WETLANDS: THE JOURNAL OF WETLAND SCIENTISTS, Sept. 1981, at 1.

[5] *Id.*

[6] *Id.*

[7] *See ASL II*, 511 F. Supp at 281-82.

[8] *Id.* at 282.

challenge. You would have to adapt, and that, in large part, was the point on which *Avoyelles Sportsmen's League* would ultimately turn.

When the waters did retreat, they left behind new layers of silt and nutrients that fed a chain of vegetation. The Lake Long tract bordering Lake Ophelia in Avoyelles Parish held some 20,000 acres of hardwood trees that were, in turn, a living restaurant for wildlife. Sweet gum, hawthorn, red maple, bitter pecan, and four varieties of oak provided a blanket of mast, berries, and cover for deer, bear, squirrel, ducks, and other species.[9] In old photographs taken from the sloughs and ponds of these forest systems the ducks rise like smoke.[10] Of all the ecosystems in the United States, bottomland hardwoods are a sportsmen's paradise.

They were also, by the l970s, so heavily hammered by conversion to agriculture that twenty-four million acres along the lower Mississippi had been cut to five million.[11] Those left were disappearing at a rate of some 300,000 acres per year.[12] Before-

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[9] U.S. DEP'T OF THE INTERIOR, FISH AND WILDLIFE SERV., DOCUMENTATION, CHRONOLOGY, AND FUTURE PROJECTIONS OF BOTTOMLAND HARDWOOD HABITAT LOSS IN THE LOWER MISSISSIPPI ALLUVIAL PLAIN 1 (1979).

[10] Dr. Rex Hancock, *Ducks on the Cache* (photograph) (on file with author) (showing clouds of ducks rising from Cache River/Bayou Deview bottomland hardwoods). Dr. Hancock, an avid sportsman, was instrumental in litigation over a U.S. Army Corps of Engineers project to channelize the Cache River. *See* Envtl. Def. Fund, Inc. v. Froehlke, 473 F.2d 346, 356 (8th Cir. 1972) (enjoining project); *see also* Envtl. Def. Fund, Inc. v. Hoffman, 566 F.2d 1060, 1063 (8th Cir. 1977) (lifting injunction). Shortly thereafter, Congress de-authorized the project. E-mail from James T.B. Tripp, Gen. Counsel, Envtl. Def. Fund, to author (Apr. 19, 2011, 10:36 CST) (on file with author). Mr. Tripp was lead counsel for plaintiffs in these cases, his first taste of bottomland hardwood ecosystems. *See* Telephone Interview with James T.B. Tripp, *infra* note 132.

[11] ROBERT STAVINS, ENVTL. DEF. FUND, CONVERSION OF FORESTED WETLANDS TO AGRICULTURAL USES: AN ECONOMETRIC ANALYSIS OF THE IMPACT OF FEDERAL PROGRAMS ON WETLAND DEPLETION IN THE LOWER MISSISSIPPI ALLUVIAL PLAIN 1935-1984, at 1-2 (1987). *See Bottomland Hardwoods*, U.S. ENVTL. PROT. AGENCY, http://water.epa.gov/type/wetlands/bottomland.cfm (last visited Apr. 18, 2012); *Mississippi Alluvial Plain*, THE NATURE CONSERVANCY, http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/louisiana/placesweprotect/the-nature-conservancy-in-louisiana——mississippi-river-alluvial-plai-1.xml (last visited Apr. 18, 2012); U.S. DEP'T OF THE INTERIOR, *supra* note 9.

[12] WILLIAM L. WANT, LAW OF WETLANDS REGULATION 2-4 (1990). The figure is conservative. In 1988, the U.S. General Accounting Office estimated the continuing losses at 300,000 to 500,000 acres per year. U.S. GEN. ACCOUNTING OFFICE, GAO-88-

and-after aerial images of this loss are eye-popping.[13] The lion's share of bottomlands remaining were in Louisiana, and according to U.S. Fish and Wildlife agents, the Lake Long tract in Avoyelles, now under the treads of D-9 bulldozers, was the pick of the litter.[14] Dry this particular Spring, it had been flooded three times in the l970s over all but its highest ridges.[15] In l973, Marc Dupuy went up in his small propeller plane and saw flood water topping a big yellow bus that hunters used for a camp.[16] In normal years water stood in Lake Long, Lake Ophelia, West Cut Lake, Mouillier a Yor, Mouillier Swamp, Lake Claire, Lac a Paul, Lac Bryondas Chats, Lac Volee, Lac Calebasse, Nichols Lake, Lac Barbue, Pointe Basse and the bayous in between.[17] But l977-1978 was an unusual year.

Spurred on by their sport hunting constituencies, wildlife agencies started buying up bottomland habitat as rapidly as they could before it was destroyed.[18] The race began in neighboring Mississippi, where a battle had raged for years over the Pascagoula river system . . . an early version of *Avoyelles*.[19] Drawn into the controversy by chance, The Nature Conservancy (Conservancy) made saving the Pascagoula a priority and then moved to acquire more wetland forests, capped by a purchase on the Pearl River funded by the Mississippi legislature and the St. Regis Paper Company.[20] Bottomland hardwoods, it declared, were "the most threatened ecosystem in America."[21]

110, WETLANDS: THE CORPS OF ENGINEERS' ADMINISTRATION OF THE SECTION 404 PROGRAM 2, 20 (1988), *available at* http://www.gao.gov/assets/150/146829.pdf.

[13] STAVINS, *supra* note 11, at 103.

[14] L. L. Gremillion, *Delegation Seeks Aid of Attorney General*, WKLY. NEWS, Aug. 24, 1978, at 1.

[15] *See* Avoyelles Sportsmen's League, Inc. v. Alexander (*ASL II*), 511 F. Supp. 278, 282 (W.D. La. 1981).

[16] Dupuy Oct. Interview, *supra* note 2.

[17] *See ASL II*, 511 F. Supp. at 282.

[18] Dupuy Oct. Interview, *supra* note 2; Telephone Interview with Richard Ludington, Senior Assoc., Conservation Fund (May 20, 2011) (Mr. Ludington directed the bottomland hardwood acquisition initiatives of The Nature Conservancy during the 1970s and 1980s, which largely involved advance purchases of wetland tracts before they were put into soybean production.).

[19] For a complete account of this controversy and its resolution, see DONALD G. SCHUELER, PRESERVING THE PASCAGOULA (1980).

[20] Telephone Interview with David Morine, Former Head of Acquisitions, Nature Conservancy (Apr. 18, 2011). Mr. Morine was the director of land acquisitions for The

Then there was Louisiana. The problem here was more acute because the bottomland inventories were greater and completely unprotected . . . and because potential funders did not have a great deal of confidence that the State would protect whatever lands were acquired.[22] Working with the U.S. Fish and Wildlife Service, the Conservancy was able to buy an option on the Singer tract in north Louisiana for the Tensas National Wildlife Refuge, the largest bottomland purchase to date.[23] This was one

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Nature Conservancy from 1972-87. DAVID E. MORINE, GOOD DIRT: CONFESSIONS OF A CONSERVATIONIST ix (1993). He was instrumental in the negotiations over the Pascagoula, the Tensas, and other wildlife refuges in Mississippi and Louisiana. *Id.* at 103-115. The Conservancy's modus operandi was to purchase a desirable tract, or an option to purchase, and hold it for resale to federal or state wildlife agencies, agreed upon in advance. Its corporate fundraising depended, in part, on distinguishing itself from environmental groups, whom it portrayed as the "troublemakers;" the Conservancy was the "peaceful alternative." Telephone Interview with David Morine, *supra*. At the same time, the Conservancy was often quick to call on environmental litigators to stop a particular development so that it could rush in with a purchase offer. *Id. See* Nat'l Wildlife Fed'n v. Coleman, 529 F.2d 359 (5th Cir. 1976) (enjoining highway interchange in southern Mississippi). The habitat around the interchange, via the Conservancy, is now the Mississippi Sandhill Crane National Wildlife Refuge. *See Mississippi Sandhill Crane National Wildlife Refuge*, U.S. FISH & WILDLIFE SERV. http://www.fws.gov/mississippisandhillcrane/ (last visited Apr. 21, 2012).

[21] *See* MORINE, *supra* note 20, at 104 (Questioned by the Conservancy's President, "If you would do any project, what would it be? Morine replied, "Easy . . . bottomland hardwoods. They're almost all gone but if we start now we may be able to save what's left.").

[22] Telephone Interview with David Morine, *supra* note 20 ("[W]e were looking for a reliable partner."). In fact, the Conservancy found a reliable partner in Dewey Wills of the Louisiana Department of Fish and Game, and a state game management area in his name recognizes these contributions. *See Dewey Wills*, LA. DEP'T OF WILDLIFE & FISHERIES, www.wlf.louisiana.gov/wma/2753 (last visited Apr. 21, 2012).

[23] Telephone Interview with David Morine, *supra* note 20. The Louisiana purchase came in major part from a tract owned by the Singer Sewing Machine Company, which was then acquired by the Pfizer Corporation. *Id.* Pfizer, a pharmaceutical company, was not in the land-holding business and was looking for a way to unload the asset. *Id.* When it came time for the federal payment, Louisiana Senator Bennett Johnston managed to pry it from a reluctant Army Corps of Engineers. As Morine tells it, in a small meeting with a Corps general, the Fish and Wildlife Service, and Nature Conservancy officials, the general said that he would not spend Corps money in this fashion, at which point Senator Johnston excused everyone else from the room, leaving him alone with the military. *Id.* A few minutes later the others were invited back in, Johnston announcing with a smile, "[w]e're all set." *Id.* Coincidentally, in the 1930s the Singer tract had hosted the last great stand of old-growth cypress forest in America; it was rapidly deforested to the dismay of ornithologists and others intent on saving the Ivory-Billed Woodpecker. The last confirmed sightings of this legendary bird were on

accomplishment, however, in a landscape of land clearing and so, threat-by-threat, the race continued.

At this juncture, the Lake Long clearing began. Within a forty minute drive lay one federal wildlife refuge and a half-dozen state game management areas with names like Grassy Lake, Three Rivers, Pomme de Terre, Grand Cote, and Spring Bayou.[24] Lake Ophelia and the Lake Long tract, however, remained unprotected. Both the State of Louisiana and the U.S. Fish and Wildlife Service had made purchase offers, but they were rejected.[25] "We thought we were going to get it but everything fell through,"[26] said a U.S. wildlife agent. "The next thing we knew the bulldozers moved in."[27]

There was more money to be made in planting beans.

II. AN UNUSUAL MARRIAGE

Washington, D.C., 1971–1972. Meanwhile, a thousand miles away, a power play was erupting in the nation's capital over what was happening to wetlands across America. One side wanted to regulate their development under the new and still ill-defined Clean Water Act of l972. The other side did not want it regulated at all.

By the early 1970's, the U.S. Army Corps of Engineers (Corps) had exercised exclusive jurisdiction over the nation's waters for 150 years, and was thoroughly committed by statute, training, and worldview to development.[28] The Environmental Protection Agency (EPA), newly minted, had little experience in wetlands or anything else, and an enormously ambitious charge to clean up the nation's air and water. And so, in l972, Congress coupled an agency exclusively directed to protect the environment

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the Singer tract in l943, shortly before a tree containing nest and eggs came down. GEORGE HINES LOWERY, LOUISIANA BIRDS 415-16 (1955).

[24] Area Surrounding Marksville, LA, GOOGLE MAPS, http://maps.google.com/maps (search "Marksville, LA"; then zoom out to 50%).

[25] Dupuy Oct. Interview, *supra* note 2.

[26] *Id.*

[27] *Id.* (quoting Mike Dawson of the real estate office of the U.S. Department of Fish and Wildlife).

[28] For a history of the Corps and its emerging regulatory functions, see Garrett Power, *The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers*, 63 VA. L. REV. 503, 504-09 (1977).

with a partner to whom the environment was something that got in the way. That they would quarrel and, truth be told, not like each other very much was understandable, even inevitable. The question, which would erupt at every bend in the road, was who called the shots. *Avoyelles Sportsmen's League* presented this question in capital letters.

The Corps was no stranger to regulating activities in and around water. By historical accident, it had morphed from a small military command clearing snags from rivers to an elephantine department with over 22,000 civilian employees engaged in a wide range of dam building, levee raising, canal dredging, pump drainage and other projects that, often by design, eliminated the wetland base of the country for navigation, agriculture, energy, real estate development, and similar pursuits.[29] If Corps intervention made money for someone, it became their job.[30]

Buried in the Corps's authority, however, was a second mission it inherited in the l890s to protect these same waterways from the discharge of wastes and "refuse."[31] Which meant most obviously things that would impede navigation. And continued to mean that until a pair of Supreme Court decisions in the l960s shocked American industry by finding that its pollution discharges (in these cases, metal tailings and spilled oil) were "refuse" within the meaning of the law.[32] Justice William O.

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[29] *See* U.S. ARMY CORPS OF ENG'RS, CIVIL WORKS PROGRAM-SPECIFIC AGENCY RECOVERY ACT PLANS 3 (2010), *available at* http://www.usace.army.mil/Portals/2/docs/recovery/ARRAUSACEAgencyPlanAug2010.pdf (noting that there are 22,600 civilian employees at the Civil Works Program). Perhaps the most trenchant history of this development, its politics, and its conflicts with the environment is contained in a series of articles by Michael Grunwald in the Washington Post. *See, e.g.*, Michael Grunwald, *An Agency of Unchecked Clout*, WASH. POST, Sept. 10, 2000, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/05/12/AR2006051201550.html.

[30] *See* 33 U.S.C. § 701(a) (2006) (providing for Corps action wherever "the benefits, to whomsoever they may accrue, are in excess of the estimated costs").

[31] Rivers and Harbors Appropriation Act, 33 U.S.C. § 403 (2006) (obstructions); *Id.* § 407 (refuse). This Act expanded on earlier jurisdiction conferred in the Act of September 19, 1890, ch. 907, 26 Stat. 426.

[32] United States v. Standard Oil Co., 384 U.S. 224, 230 (1966); United States v. Republic Steel Corp., 362 U.S. 482, 489-91 (1960). For a review of these cases and their consequences, see Oliver A. Houck, *The Water, the Trees and the Land: Three Nearly Forgotten Cases that Changed the American Landscape*, 70 TUL. L. REV. 2279 (1996); and William C. Steffin, Note, *The Refuse Act of 1899: New Tasks for an Old Law*, 22 HASTINGS L.J. 782 (1971).

Douglas, adverting to the "crisis that we face" in water pollution, found the term "refuse" to be "comprehensive," and that was the "common sense of the matter."[33] It was a new day. Pollution was suddenly the subject of federal prohibition. Under a statute that, to a near certainty, did not have pollution in its sights when it was written some seventy years before. The law evolves.

At this same evolutionary moment, the Corps was responding to heavy pressure from the U.S. Department of the Interior (Interior), the closest thing to a federal environmental agency at the time, to implement fish and wildlife laws by jointly consulting on its activities,[34] leading in turn to a new Corps process of "public interest review" that included consideration of the surrounding environment.[35] Shortly thereafter, in l970, this commitment was put to the test in Florida, where the Corps, quite unexpectedly, denied a real estate developer named Zabell permission to fill a sizeable chunk of Boca Ciega Bay.[36] There was no claimed impediment to navigation; rather, the development, in conjunction with similar projects, would have unacceptable impacts on fisheries and water quality. Zabell could not believe the denial and sued, his brief arguing for the rights of private property over "the love life of little fishes."[37] The denial was upheld by a federal appellate court which declared that "[the Corps] was entitled, if not required, to consider ecological factors" quite apart from

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[33] *See Standard Oil*, 384 U.S. at 225, 229-30.

[34] *See* Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-67 (2006) (requiring "equal consideration" of fish and wildlife values and Corps consultation with the Department of the Interior in water resources development); Memorandum of Agreement Between the Secretary of the Interior and the Secretary of the Army from July 13, 1967, 33 Fed. Reg. 18,670, 18,672-73 (Dec. 18, 1968); *see also* WANT, *supra* note 12, at 2-6 to 2-10; 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, 700-05 (1989).

[35] *See* 33 C.F.R. § 320.4(a) (1986).

[36] Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970). According to Lester Edelman, who was counsel to the House of Representatives Committee on Public Works at the time, *see infra* text accompanying note 227, he suggested that the Corps rely on the newly-enacted National Environmental Policy Act, 43 U.S.C. § 4321 (2006), for its denial—which it did. Telephone Interview with Lester Edelman (Oct. 3, 2011).

[37] *See* CRAIG PITTMAN & MATTHEW WAITE, PAVING PARADISE: FLORIDA'S VANISHING WETLANDS AND THE FAILURE OF NO NET LOSS 23 (2009) (describing the *Zabel* case and its appeal).

navigation,[38] cracking open a very large door. The Corps was now at least one-toe-in-the-water into regulating the environmental impacts of dredge and fill projects.

Meanwhile, the recent Supreme Court decisions were making the Corps's life untenable. Overnight, it was tasked with issuing discharge permits for thousands of industries about whose processes and impacts it did not have the faintest idea.[39] Young federal prosecutors and fledgling environmental lawyers began filing lawsuits against these industries for unpermitted discharges.[40] Scrambling to catch up, President Nixon devised a two-part permit system under Corps authority, but based on water quality impacts as determined by near equally-untrained personnel from Interior.[41] It was an obvious stop-gap measure, but it planted the seed of dual-agency management.

At which point, Congress had to act. The existing water pollution control program was in chaos, rivers smelled bad, some were catching fire, Lake Erie was pronounced dead, one Florida lake recorded a die-off of twenty-five million fish, and these phenomena were out in plain view.[42] Congress acted boldly, replacing a state-based laissez-faire approach with a remarkably strong program led by the EPA, which would set pollution discharge standards, issue permits based on them, and enforce them in court.[43] Leaders of both parties placed the legislation on a high moral plane: Senator Howard Baker (R-Tenn.), stating that if we could not enjoy our water resources "what other comforts can life offer us?"; was matched by his colleague Edmund Muskie (D-

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[38] *See Zabel*, 430 F.2d at 201.

[39] *See* Houck, *supra* note 32 at 2289-91; William H. Rodgers, Jr., *Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. PA. L. REV. 761, 811-19 (1971).

[40] Rodgers, *supra* note 39, at 792-93. Inter alia, some 400 criminal indictments were issued in the following four years. *Id.* at 792.

[41] Power, *supra* note 28, at 512; Steffin, *supra* note 32, at 788. Adding to the confusion, the Corps's permit program was soon invalidated by a federal district court. Kalur v. Resor, 335 F. Supp. 1 (D.D.C. 1971).

[42] *See* PITTMAN & WAITE, *supra* note 37, at 18 (listing additional examples, including twenty-six million dead fish at Lake Thonotosassa); Houck, *supra* note 32, at 2,280 n.6, 2,286 n.34 (Lake Erie, the Cuyahoga River, etc.).

[43] Originally enacted as the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, the statute has been renamed the Clean Water Act, 33 U.S.C. §§ 1251-74 (2006).

Me.) "Can we afford clean water? Can we afford rivers and lakes and streams and oceans which continue to make possible life on this planet? Can we afford life itself?"[44]

The bill passed the Senate unanimously. When President Nixon, at a peak of popularity that would result in his landslide reelection a few months hence, signed a veto instead, the Senate overrode him 52-12, the House by 247-23.[45] Such was the strength of the Clean Water Act of l972.

With one hitch. While all members of Congress recognized the urgency of pollution control, they broke ranks over who should control one piece of the problem, dredge and fill activities that were the main game of the Army Corps of Engineers and the grits and grease of development in the American South.[46] The two Corps dredges plying the lower Mississippi River were named after the two senior members of the Louisiana delegation, Allan Ellender and Russell Long.[47] To Senators Baker and Muskie, it made sense to consolidate all water permitting in a single agency, and one dedicated to cleaning up the environment.[48] To House Public Works Committee members, however, the EPA could pose a huge threat to the status quo ante and, besides, they pointed out, the Corps was already regulating dredge and fill.[49] Months of argument changed no minds (the same argument persists today) and, facing the failure of the entire bill, § 404 finally emerged as a compromise.[50] It is an extraordinary pas-de-deux which empowered the Corps to issue the permits (round one for the House),[51] but under guidelines developed by the EPA (this round

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[44] *See* PITTMAN AND WAITE, *supra* note 37, at 25; 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, S. Rep. No. 1, 93d Cong., 1st Sess. 164 (1973) (Senator Muskie).

[45] *See* PITTMAN & WAITE, *supra* note 37, at 25.

[46] *Id.* at 35-36; WANT, *supra* note 12, at 2-7.

[47] Telephone Interview with William Fontenot, Former Exec. Dir., La. Wildlife Fed'n (Aug. 22, 2011) (Mr. Fontenot was a former executive director of the Louisiana Wildlife Federation and subsequently served in the Louisiana Office of the Attorney General until his retirement.).

[48] *See* Power, *supra* note 28, at 523. The discussion of the enactment that follows is taken primarily from these sources.

[49] *See* Rivers and Harbors Appropriation Act, 33 U.S.C. §§ 403, 407 (2006).

[50] 33 U.S.C. § 1344 (2006).

[51] 33 U.S.C. § 1344(a).

for the Senate),[52] which could also veto disposal sites if the impacts were sufficiently severe.[53]

Few expected warm camaraderie from such an arrangement. Both sides felt, however, that they'd made the best of a bad deal. The best hope was for a creative "pluralism" that would arrive at moderate outcomes.[54] This hope would soon be put to the test.

III. A GOOD DEAL ON BEANS

Avoyelles Parish, Louisiana 1960–1980. The issue was soybeans, which in the l960s were riding a global bubble.[55] Catching the wave, the U.S. Department of Agriculture developed a program to stimulate bean production by converting what it referred to as "trash lands"—agriculture-speak for parts of the environment not dedicated to crops or farm animals.[56] More than any other ecosystem, it targeted bottomland hardwood wetlands.

Agriculture had always been particularly unkind to wetlands, which for most of history were considered a nuisance and the very antithesis of productivity. George Washington himself, surveying the Great Dismal Swamp of Virginia, declared it a "glorious paradise," and then joined a land venture to drain it with slaves for farms.[57] The great bulk of the country's (dramatic) wetland losses over the past century were to inland, freshwater systems.[58] Some ninety percent of these went to agricultural development,[59] aided and abetted by flood control and drainage structures of the Army Corps of Engineers. A 1987 study by economists of the Environmental Defense Fund concluded that twenty-five percent of all bottomland conversion along the lower Mississippi was due "exclusively" to federal projects, chiefly those of the Corps.[60]

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[52] 33 U.S.C. § 1344(b).

[53] 33 U.S.C. § 1344(c).

[54] *See* 1 U.S. SENATE, COMM. ON PUB. WORKS, A LEGISLATIVE HISTORY OF THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 250 (1973).

[55] Telephone Interview with Richard Ludington, *supra* note 18.

[56] *Id*.

[57] PITTMAN & WAITE, *supra* note 37, at 7.

[58] WANT, *supra* note 12, at 2-4 (citing OFFICE OF TECHNOLOGY ASSESSMENT, WETLANDS: THEIR USE AND REGULATION (1984)); Osborne, *supra* note 4, at 3 (summary report at 7).

[59] WANT, *supra* note 12, at 2-4 (citing U.S. GEN. ACCOUNTING OFFICE, *supra* note 12, at 2, 20).

[60] *See* STAVINS, *supra* note 11, at xv.

Which, of course, was the agency now responsible for § 404 permitting under the Clean Water Act. Presenting a rather stark conflict of allegiance.

The Department of Agriculture's soybean initiative was either brilliant or egregious, depending on where you stood. From a development standpoint it was a no-lose proposition. The Department created "land banks" that made government loans to land purchasers at $200 per acre, no money down.[61] In Louisiana, the lands available were marginal for row crops, flooding about every two or three years.[62] Given the federal subsidies, however, this fact of nature did not change the economics a great deal. The buyer would cut down the commercial timber and sell it, which might pay off half of his loan. That first year he would bulldoze, level, and drain the land, and even throw out a crop of beans to seed. The second year he would harvest a crop, making at least another hundred dollars an acre, usually more. If for some reason the market fell, the government would buy up his crops instead. If, over time, repeated high water made farming untenable he would look to unload it. But at that point the sale was all profit.

Osborne would write of the scheme:

> No welfare recipient standing in line waiting for food stamps would dare claim that he was just participating in the free enterprise system. But with corporations receiving millions in federal benefits and subsidies, the universal claim seems to be that the decision to convert hardwood bottomlands is a free market decision. Welfare recipients don't complain when they find out that there are strings attached to their food stamps— they can't buy whiskey or auto parts with them. But the corporation whose property was swamp, under water for most of the time before

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[61] The description that follows of the Department of Agriculture initiative and the economics of soybean production are taken largely from interviews with Richard Ludington and William Fontenot. Telephone Interview with Richard Ludington, *supra* note 18; Telephone Interview with William Fontenot, *supra* note 47. The Louisiana Land Bank's website states, "Not only can we finance that farm or ranch land you've been wanting, we can help you fund improvements for your existing property. We offer loans for clearing or leveling land; improving pastureland, irrigation systems, water wells and fences . . . ." *Loan Products*, LOUISIANA LAND BANK, http://www.louisianalandbank.com/loans.htm (last visited Apr. 21, 2012). The program, apparently, continues.

[62] Telephone Interview with Richard Ludington, *supra* note 18.

> government money, complains bitterly when he finds out there's such a thing as wetland regulation. Then they call the industry lobbyist. It's not a partnership of God and farmer; it's a partnership of government subsidy and agribusiness.[63]

There was yet more money on the table. The soybean ventures were also fueled by major insurance companies . . . Travelers, Prudential, Aetna . . . who saw a sure-fire place to park premium payments, making fortunes for entrepreneurs from Louisiana upriver to southern Illinois.[64] The purchaser of the Lake Long tract, a Frenchman named Albert Prevot, had nothing against bottomland hardwoods or the hunting community in his neck of the woods. It was simply that the government was giving away soybean money, and the insurance companies would back the rest. A self-professed "wheeler-dealer" (which he pronounced "willer-diller"), Prevot apparently did not have much respect for the law; according to Dupuy, "he did what the hell he wanted to," which would bring him real trouble in the end.[65]

For all of their power, however, soybeans were not the only trump card in *Avoyelles*. Practically everyone living there fished and hunted, and looked forward to it year-round. The private landscape was divvied up among hunting clubs, and while their leases were usually "brother-in-law" affairs, a public bid for a bottomland hardwoods lease at the time ran to $26.87 per acre, for a single season.[66] Nearly in sight of the Lake Long property sat the Grand Lake Hunting Club, whose members included several "big shots" of the Parish, and a young attorney named Don Wilson

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[63] Osborne, *supra* note 4, at 4.

[64] Telephone Interview with Richard Ludington, *supra* note 18; Telephone Interview with William Fontenot, *supra* note 47. Mr. Fontenot worked for the Louisiana Office of the Attorney General in the 1970s and was asked to investigate land clearing on the Lake Long tract. *See infra* text accompanying note 124.

[65] According to Donald Wilson, Prevot referred to himself as a "wheeler and dealer," which he pronounced "willer and diller," to Wilson's amusement. Telephone Interview by Endre Szalay with Donald Wilson, Attorney at Law, Landowners Abstract & Title (May 24, 2011). Wilson represented the Avoyelles Sportsmen's League in the coming litigation. Dupuy Oct. Interview, *supra* note 2. According to Dupuy, Joe Elder picked up the Long tract for $10 per acre and was looking for a buyer; Prevot made the purchase at about $100 per acre. *Id.*

[66] Osborne, *supra* note 4, at 2.

who would go on to lead the Avoyelles Sportsmen's League.[67] They were taken by surprise.

Albert Prevot's land clearing split the community. He had bought the property only recently,[68] but private property rights in this region ranked at the right hand of God.[69] This was Prevot's land, period; you wanted to save bottomland hardwoods then buy them. This happened to be Mark Dupuy's point of view, and he in fact, as a former state wildlife commissioner had devoted considerable energy to purchasing game management areas.[70] Many in the hunting community, however, saw more to it than that. Only ten years earlier the State had bought the highly-prized Spring Bayou Wildlife Management Area, with excellent bottomland habitat and considered top-of-the-line for bass fishing.[71] As the soybean operations came on, the area degraded steadily from erosion and other pollution.[72] The hunting turned poor, the bass disappeared. Per one news report there was "nothing left but a mud hole."[73]

It was not just the mud. The runoff was hard-core. A sampling of fish in the East Franklin-Bonnet Idee watershed showed seventy-five percent of its fish contaminated by agricultural chemicals.[74] Lake Providence in East Carroll Parrish, a major body of water, was closed due to high levels of toxaphene, a carcinogenic row-crop pesticide.[75] Whereupon Louisiana's Commissioner of Agriculture, Gil Dozier, reassured the press that there was "no problem for public health" so long as fishing was banned.[76] There would be no help from this quarter.

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[67] Telephone Interview by Endre Szalay with Donald Wilson, Attorney at Law, Landowners Abstract & Title (Dec. 14, 2010).

[68] Schultz, *supra* note 1, at A-1; Dupuy Oct. Interview, *supra* note 2.

[69] This perspective dominated even the State Office of Forestry. *See* Sam Hanna, *The Wetlands Controversy*, FORESTS & PEOPLE 11 (1980). The article begins with the quote "Where have our freedoms of ownership gone?" *Id.* at 9.

[70] Dupuy Oct. Interview, *supra* note 2.

[71] Adras LaBorde, *Public Versus Private Interest: I*, ALEXANDRIA DAILY TOWN TALK, Aug. 27, 1978 (on file with Author); Telephone Interview with Donald Wilson, *supra* note 67.

[72] L. L. Gremillion, *The Boiling Point*, WKLY. NEWS, Aug. 17, 1978, at 2.

[73] LaBorde, *supra* note 71.

[74] Osborne, *supra* note 4, at 2.

[75] *Dozier Supports Sacrificing Lake to Use Pesticide*, MORNING ADVOC., May 25, 1979, at B-1.

[76] *Id.*

As Wilson and his friends saw it, were the Lake Long tract cleared and put into beans, the same fate would await nearby Grassy Lake. The damage to Spring Bayou had been irreparable. Here it was time to draw the line. Locals who had never protested a thing in their lives began to post signs along the road to the Lake Long tract that read, "Stop the Dozers."[77] One man who helped post them told a newspaper reporter, "They're raping the country; that's what it amounts to."[78]

This, in one of the most conservative precincts in America.

IV. THE MARRIAGE IMPLODES

Washington, D.C., 1973–1977. During this same time Congress's hopes for a cooperative wetlands program were dashed almost immediately over a basic issue: how far it would reach. To the Corps, the answer was simple: the act said that it reached what was "navigable" and the Corps had been interpreting that term for over a century to mean below the mean high water line and mean high tide.[79] Even the Boca Ciega Bay case, stretching Corps authority, took place in a body of water that floated boats. To the EPA, however, the Clean Water Act required more; in fact it defined navigable as including all "waters of the United States."[80] House of Representatives leaders like John Dingle, Jr. (D-Mich.) had stated that "no longer [were] the old, narrow definitions of navigability . . . going to govern,"[81] while a Senate report explained that it extended the concept of navigability because water "moves in hydrological cycles and it is essential that the discharge of pollutants be controlled at the source."[82] It all seemed rather obvious. Pollution ran downstream. The great

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[77] Schultz, *supra* note 1, at A-4.

[78] *Id.*

[79] *See* Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974) (Corps definition).

[80] *See* OFFICE OF THE GEN. COUNSEL, U.S. ENVTL. PROT. AGENCY, MEANING OF THE TERM "NAVIGABLE WATERS," 1973 WL 21937 (1973).

[81] 118 CONG. REC. 33,756-77 (daily ed. Oct. 4, 1972) (statement of Rep. Dingle). His remarks were supported by the Conference Report intending that "navigable waters" be given "the broadest possible interpretation," "unencumbered" by prior policies. S. REP. NO. 92-1236, at 144 (1972) (Conf. Rep.). This language, too, would reappear in the *Avoyelles* litigation.

[82] S. REP. NO. 92-414, at 77 (1971).

majority of the nation's waters were inland and upland, and the Corps approach left them unprotected from assault.

The Department of Interior, and later attorneys from the Department of Justice (DOJ), weighed in on the EPA's side, to no avail.[83] The Corps—out of fear of the unknown perhaps, or a historic affinity with development interests, or simply an unwillingness to accede to its new EPA partner—was sticking with what it knew.[84] These same gut instincts would resurface in the *Avoyelles* litigation.

By retaining the word "navigability" in the statute, however "redefined," Congress had left an apparent loophole. Which would not stay unfilled for long. In an ad hoc fashion, the EPA led the counterattack with a pair of enforcement actions expanding federal jurisdiction under the Act.[85] The first was the prosecution of an oil spill into a tiny creek in Kentucky, obviously not navigable, leading to a holding that the law reached upstream to the middle of the country.[86] Shortly thereafter, the same EPA attorney teamed up with a federal prosecutor in Florida to challenge a wetland development above the line of mean high tide.[87] The trial judge, whose pro-development ruling in the Boca Ciega case had been overturned on appeal, may have had that in mind in ruling for the government this time, holding that pollutants had been discharged into "waters of the United States" and that "the mean high water mark cannot be used to create a barrier behind which such activities can be excused."[88] Goodbye, navigation test. Greatly pleased by the opinion, the EPA administrator wrote his clean water partner, the chief of engineers, to urge that he follow it.[89] The Corps would have none of it. It was time for Plan B.

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[83] *See infra* note 85.

[84] *See* Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. at 12,115 (Corps rationale).

[85] Telephone Interview with Vance Hughes, Attorney, Envtl. Prot. Agency (May 18, 2011). Mr. Hughes, an attorney in EPA's Region IV Office of Counsel, participated in the cases that follow. *See also* PITTMAN & WAITE, *supra* note 37, at 36-37.

[86] United States v. Ashland Oil & Transp. Co., 504 F.2d 1317, 1326-28 (6th Cir. 1974).

[87] United States v. Holland, 373 F. Supp. 665, 667, 670-76 (M.D. Fla. 1974).

[88] *Id.* at 675-76.

[89] PITTMAN & WAITE, *supra* note 37, at 37.

In disputes between federal agencies, Plan B often looks to outside parties to vindicate a point of view. We have, it is said, a "unitary government," which means that one agency of government does not sue another. If the EPA had a beef with the Corps's interpretation of law, it would have to go elsewhere. In this case, without official imprimatur, it went to the Natural Resources Defense Council (NRDC) in Washington, D.C., a budding and soon to be premiere environmental law firm that specialized in EPA regulatory programs.[90] NRDC attorneys, schooled by EPA lawyers who had handled the earlier cases,[91] and backed up by National Wildlife Federation attorneys who had the lobbying power of that organization behind them,[92] should the case make waves, brought a lawsuit against Secretary of the Army Howard Callaway, challenging the Corps's narrow interpretation of § 404.[93]

It was an unusual case, because the Department of Justice is charged with defending federal agencies, which means that if an agency has a plausible argument then the DOJ will advance it to the court.[94] Its representation becomes more problematic when other agencies have different, legitimate interpretations, which was the case here with the EPA and the Interior. At which point the DOJ had to decide between them. In their case, the DOJ not only sided with the EPA but wrote the Corps a letter saying so and giving its reasons.[95] Which later ended up, of all places, as an attachment to the NRDC complaint.[96] At the trial, the Corps's argument was made not by DOJ, but by counsel to the secretary of the army, another unusual sight, but it seemed to make little

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[90] *About Us*, NATURAL RES. DEF. COUNCIL, http://www.nrdc.org/about/ (last visited Apr. 22, 2012).

[91] *Id.* at 36; Telephone Interview with Vance Hughes, *supra* note 85.

[92] The author was general counsel to the National Wildlife Federation during this time.

[93] Natural Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975).

[94] Telephone Interview with James W. Moorman, Former Assistant Attorney Gen., Dep't of Justice (May 17, 2011) (Mr. Moorman headed the Environment and Natural Resources Division of the U.S. Department of Justice during this time.).

[95] WANT, *supra* note 12, at 2-9 n.44 (citing Complaint, Natural Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975) (No. 74-1242)).

[96] *Id.*

difference in the end.[97] The case went before a no-nonsense judge in the District of Columbia who, in a curt opinion, overruled the Corps's regulation and directed the agency to expand its coverage in accordance with the law.[98] "The easiest lawsuit I ever won," the NRDC attorney later reflected.[99]

The Corps was shocked. This proud and powerful agency, as confident and immutable in its domain as the Atomic Energy Commission at the time, historically beyond the touch of courts and even the executive branch,[100] was already reeling from early lawsuits under the National Environmental Policy Act[101] and, now, from the explosion of its water resources jurisdiction into places and issues it was loathe to go, in its view a "backdoor land use planning" of America.[102] Within days of the opinion, a Corps Civil Works general and the public relations office issued one of the most imprudent federal press releases in modern times.[103] Under the misguided *Callaway* opinion, went the statement, federal permission would be required for "the rancher who wants to enlarge his stock pond," "the farmer who wants to deepen an irrigation ditch or plow a field," or "the mountaineer who wants to

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[97] The Corps was represented by Brian O'Neill from its Office of Counsel; Mr. O'Neill is better known for his subsequent representation of the plaintiffs in the Exxon Valdez oil spill litigation. E-mail from Brian B. O'Neill, Partner, Faegre Baker Daniels, to author (May 20, 2011, 10:17 CST) (on file with author); *see* DAVID LEBEDOFF, CLEANING UP: THE STORY BEHIND THE BIGGEST LEGAL BONANZA OF OUR TIME (1997). During this litigation, the Corps complained about the representation of its position by DOJ counsel. WANT, *supra* note 12, at 2-9 n.44 (citing Letter from Charles D. Ablard, Gen. Counsel, Corps of Eng'rs, to Wallace H. Johnson, Assistant Attorney Gen., Dep't of Justice (Mar. 25, 1975)).

[98] *Callaway*, 392 F. Supp. at 686.

[99] PITTMAN & WAITE, *supra* note 37, at 40.

[100] Oliver Houck, *New Roles for the Old Dam Builder?*, NAT'L WILDLIFE, Aug.-Sept. 1975, at 13 ("President Truman . . . was strong enough to fire General Douglas MacArthur but, so far, the Army Engineers have successfully defied him . . . . No more lawless or irresponsible Federal group than the Corps of Engineers has ever attempted to operate in the United States, either outside of or within the law." (quoting U.S. Interior Secretary Harold L. Ickes in 1951)).

[101] *See* Envtl. Def. Fund, Inc. v. Hoffman, 421 F. Supp. 1083, 1088-89 (E.D. Ark. 1976) (Cache River project); Envtl. Def. Fund, Inc. v. Corps of Eng'rs, 324 F. Supp. 878, 881-82 (D.D.C. 1971) (Cross-Florida barge canal). Both projects were eventually cancelled.

[102] PITTMAN & WAITE, *supra* note 37, at 37.

[103] Press Release, Dep't of the Army, Office of Chief of Eng'rs (May 6, 1975) (on file with author).

protect his land against stream erosion."[104] Indeed, housewives who cast wash water out of the back door might be implicated. The U.S. Department of Agriculture chimed in by characterizing the new reach of the program as including anything "that is capable of floating a two-by-ten inch plank after a rainstorm."[105] Although lamely defended by Corps personnel as an attempt to clarify the situation,[106] the agency was sending a clear signal to its development constituencies and Congress: Change the law.[107]

The next two years were § 404 of the Clean Water Act's moment of truth. Everything about the program was on the table, from its geographic jurisdiction to its management standards, its managing agency, and the continued existence of the program at all.[108] The lobbying in Congress was fierce, and it fell upon members who had voted a few years earlier for a feel-good pollution control bill but had little idea about the details, less yet about dredging and filling wetlands. EPA pollution permits might number in the hundreds for industrial plants . . . well and good . . . but, § 404 would eventually reach private landowners, farmers, timber companies, highways, marinas, shopping malls, real estate developers, virtually anyone who did anything in any place wet, some 10,000 individual permit applications a year.[109] The South, as could be expected, led the blowback, Congressman Jim Wright, Jr. (D-Tex.) of Texas accusing § 404 of the kinds of "abuses leading

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[104] *Id.*

[105] *Agriculture Urges Legislative Action Limiting Scope of Corps Regulations*, [Current Developments] Env't Rep. (BNA) 643, 644 (1975).

[106] Jeffrey K. Stine, *Regulating Wetlands in the 1970s: U.S. Army Corps of Engineers and the Environmental Organizations*, 27 J. FOREST HIST. 60, 67-70 (1983).

[107] Not all in the Corps felt this way. Some Corps and army counsel worked to resist an appeal of the opinion and to implement it against the coming backfire. Email from Brian B. O'Neill to Oliver A. Houck, *supra* note 97. For Mr. O'Neill's participation in the *Callaway* case, see *supra* note 97.

[108] The Corps, insisting that the cost and manpower would be overwhelming, prepared a thirteen-volume set of proposed changes to the regulations, involving "navigable waters concept, land use planning, phasing, general permitting, state versus Corps jurisdiction, state delegation, and . . . agricultural activities." *EPA Subcommittee on Dredge and Fill Hears Overview of Regs at First Meeting*, [Current Developments] Env't Rep. (BNA) 1963 (1976). For a full description of the two-year legislative battle, see Lee Evan Caplin, *Is Congress Protecting Our Water? The Controversy over Section 404, Federal Water Pollution Control Amendments of 1972*, 31 U. MIAMI L. REV. 445 (1977).

[109] PITTMAN & WAITE, *supra* note 37, at 41 (11,000 applications).

to the . . . Magna Carta."[110] His Senate colleague, John Tower (R-Tex.), greeted committee staffers suspected of favoring the *Callaway* opinion with the question, "OK, Jim, what is a wetland and why the hell should I care? Is that all that mud down in south Texas that they been trying to get rid of since I was a boy?"[111]

By another coincidence, "Jim" was Jim Range, who had prosecuted Clean Water Act jurisdiction cases in Florida with EPA attorneys and was now the Senate staff attorney charged with drafting the new bill and, less officially charged by Senator Baker with keeping § 404 together.[112] For a full year the action stalled, the parties were too far apart, the House insisting, as it had a few years earlier in the enactment process, on returning jurisdiction to mean high water and to the safe hands of the Army Engineers.[113] The Senate, for its part, with a more ecological goal in mind, wanted to keep the expansive jurisdiction and eliminate the Engineers.

After a second year of debate and compromise, both sides won something but the Senate largely prevailed. The Act's expanded jurisdiction remained unchanged. As did the tenuous Corps-EPA partnership based on permits, guidelines, and veto.[114] Exceptions were made for those farmers, timber operators, and stockowners made famous by the Corps's flaming press release; they would be granted exemptions for normal practices that did not include putting more wetlands into crops or pasture.[115] This exception, too, would be put to the test in the *Avoyelles* litigation.

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[110] Caplin, *supra* note 108, at 460-66 (describing Wright's bill that reduced § 404 to navigable waters and exclusive Corps jurisdiction, and passed the House in June 1976).

[111] PITTMAN & WAITE, *supra* note 37, at 29.

[112] *Id.*

[113] Caplin, *supra* note 108, at 480-89.

[114] *See supra* notes 49-51.

[115] 33 U.S.C. § 1344(f) (2006). General permits could be issued for minor actions, and a state could even take over a program if it wanted the responsibility, and the heat, for this kind of decision-making. To date, only Michigan and New Jersey have opted to do so. *Michigan*, ASS'N OF STATE WETLAND MANAGERS (Aug. 8, 2005), http://www.aswm.org/state-summaries/771-michigan; *New Jersey*, ASS'N OF STATE WETLAND MANAGERS (Nov. 12, 2004), http://www.aswm.org/state-summaries/779-new-jersey. The heat is hot, and the rewards are small. *See* Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242, 1244-87 (1995).

While this drama was playing out, the Corps was obliged by the *Callaway* decision to issue new regulations on the scope of its jurisdiction which ultimately sent the § 404 program far upstream, to tributaries of navigable waters, to all waters that led in any fashion to navigable waters, and to their associated wetlands.[116] This is where the *Avoyelles* case came in. The Lake Long tract bordered Bayou Jeansonne in the Bayou Natchitoches basin. Importantly, this is *when* the *Avoyelles* case came in . . . in the wake of a bruising, multi-year battle between the Corps and the EPA with the wounds hardly sutured and by no means healed.

V. THE GATHERING

Avoyelles Parish, Louisiana, 1977–1978. Avoyelles Sportsmen's League (League) arose from several sources, but the first was the League itself. Ironically, there had been a previous Avoyelles Sportsmen's League, led by coincidence by Marc Dupuy, but it soon ran its course.[117] When the Prevot clearing began, Don Wilson, just a few years out of Louisiana State University Law School, reclaimed the name for those who wanted to take more affirmative action.[118] He was backed at every turn by Lyle Gremillion, a fellow member of the Grand Lake Hunting Club who was also a reporter with *The Weekly News*, and by a felicitous coincidence, the son of its owner and publisher.[119]

Gremillion went on the warpath in August l977 with an editorial called "The Boiling Point."[120] Declaring it time to stop this "crime against nature," it challenged the readers with: "IS IT THAT YOU DON'T KNOW OR IS IT LIKE THE PRICE OF EGGS IN CHINA; YOU JUST DON'T GIVE A HANG!"[121] The beat rolled on, fed by letters such as one from the board of directors of the League that began, "Keep boiling!" and continued:

> This clearing of land is going on all over Avoyelles Parish. So we will have to move quickly, or before we know it, our

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[116] WANT, *supra* note 12, at 2-9, 2-10. Jurisdiction was extended in two phases, ending in 1977. *Id.*

[117] Dupuy Oct. Interview, *supra* note 2.

[118] Telephone Interview with Donald Wilson, *supra* note 65.

[119] *Id.*

[120] Gremillion, *supra* note 72, at 2.

[121] *Id.*

> streams will be trickles of poisoned water, sans ducks, sans fish, and all other aquatic life, and our squirrels, our deer, and all other wildlife will be lying DEAD ON BARE GROUND, with nobody but the alligators to mourn their passing.[122]

The board, in the heat of the moment, might be forgiven for its allusion to the alligators, which would of course be among the first to go. In a bit of foreshadowing, though, the letter concluded: "We need to . . . get the FEDERAL ENVIRONMENTAL PROTECTION AGENCY, and the ARMY CORPS OF ENGINEERS in here!! IT IS TIME FOR THE FREE STATE OF AVOYELLES TO JOIN THE UNION!!!!!![123] This, from one of the last parts of the South to cede to the Union.

The League did not turn immediately to law. In August l977, with the bulldozers rolling and a third of the Lake Long tract already leveled and burning, it sent a delegation to meet with the state attorney general, who sent some representatives up to look at the operation but would not pull the trigger.[124] It is not certain he saw a trigger. The delegation included Avoyelles state representative Raymond Laborde, but he was in a no-win position; he could side with the money or the hunters.[125] Both voted. Wilson describes politics in the region as tough, "but in Avoyelles Parish it was a blood sport."[126]

When it did turn to the law, the League's first thoughts were in the Louisiana Civil Code, more particularly a well-known provision stating that, although a landowner may do whatever he pleases with his estate, "still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him."[127] This is a heightened form of the common law action of nuisance. In fact, just such a nuisance action had been brought against some large soybean operations that drained into the Saline Larto Complex,

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[122] Letter from Rhea & Aubrey N. (Bob) Aden, Bd. of Dirs., Avoyelles Sportsman's League, to L. L. Gremillion, Reporter, Wkly. News (Aug. 18, 1978) (on file with author).

[123] *Id.*

[124] Telephone Interview with William Fontenot, *supra* note 47; Telephone Interview with Donald Wilson, *supra* note 65.

[125] Telephone Interview with Donald Wilson, *supra* note 67.

[126] *Id.*

[127] LA. CIV. CODE ANN. art. 667 (1996).

yet another state management area north of Spring Bayou.[128] Once again, the land clearing and farm runoff were highly destructive to Saline Larto, but here local hunters secured a state court injunction requiring the farmers to manage their pollution.[129] The lawsuit had come too late to save the hardwood bottomlands, but still, it was something. In fact, it was all Don Wilson and the Avoyelles Sportsmen's League could think of.

There were, however, two other lawyers about to appear, each with litigating experience under the Clean Water Act and its most controversial provision, § 404. The first was James T.B. Tripp of the Environmental Defense Fund in New York City, who had a few years before helped stop a Corps dredging project on the Cache River in Arkansas, with a boost from a newly-invigorated EPA regional office in Dallas.[130] This lawsuit and another against the Tennessee Tombigbee Waterway in Alabama[131] opened Tripp's eyes to this largely secret ecosystem, bottomland hardwoods, so fast disappearing from the American landscape.[132] Tripp had started out as a federal prosecutor in southern New York bringing Refuse Act cases against industrial dischargers, the front edge of environmental law at the time.[133] An unusual combination of litigator and intellectual, he had an appetite for working long hours and a passion for science that became almost mandatory as the *Avoyelles* case came on.[134] At which point he was calling the hardwood bottomlands "the soul of the South." When he got a call from Don Wilson about the Lake Long tract clearing he thought, if we are going to save this ecosystem, this is the place.

Osborne was the other attorney, at that time representing the National Wildlife Federation from a field office in New Orleans focused on wetland loss, and he was an entirely different

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128 Telephone Interview with Donald Wilson, *supra* note 67.

129 *Id.*

130 *See* Envtl. Def. Fund, Inc. v. Hoffman, 421 F. Supp. 1083 (E.D. Ark. 1976).

131 Envtl. Def. Fund, Inc. v. Alexander, 467 F. Supp. 885 (N.D. Miss. 1979).

132 Telephone Interview by Endre Szalay with James T.B. Tripp, Gen. Counsel, Envtl. Def. Fund (May 27, 2009) (Mr. Tripp is currently General Counsel to the Environmental Defense Fund in New York City.). The biographical information that follows is taken from this interview.

133 *James T.B. Tripp*, ENVTL. DEF. FUND, http://www.edf.org/people/james-tb-tripp (last visited Apr. 21, 2012).

134 The biographical information of Mr. Osborne that follows is taken from personal conversations with the author during the 1970s.

human being.[135] Born and raised in Louisiana, he spoke with an easy accent and a kind of time delay between question and answer that took the edge off of even difficult conversations. He spoke simply, as seen with his description of the people of the Lake Long region that opened this article, and with examples, even parables. His background was in the daily grind of private civil law, a practice that found him representing all manner of people on all manner of difficulties; oil rig workers, discharged employees, and his skill was in relating to them and relating them to judges and juries. Although not a hunter, Osborne took to the outdoors at every opportunity and his idea of the good life was a campfire, by a river, with a strong cigar. The cigar could drive his colleagues crazy.

The Avoyelles landowners were represented by local counsel including Marc Dupuy and Joseph LeBlanc of a major firm in New Orleans. As the case heated up, Walter Conrad from a Houston firm joined the team and effectively took the lead. Conrad was an accomplished lawyer, but he would stumble over the culture and witnesses as the litigation proceeded.[136] As in many federal cases, the government was first defended by the local U.S. attorney, but its brief would soon be assumed by Fred Disheroon of the Department of Justice. Disheroon had served as counsel to the Corps in the first days of its wetlands enforcement actions and now faced the unusually difficult task of reconciling two clients,[137] the Corps and the EPA, who had become quite un-reconciled in Washington. As might be imagined, they had two very different views of the case.

From the Cache River lawsuit and yet another in south Louisiana in which, of all coincidences, Conrad was also on the other side, both Tripp and Osborne were aware of the power of §

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[135] Telephone Interview with Donald Wilson, *supra* note 67; *see infra* note 282 and accompanying text.

[136] E-mail from Fred Disheroon, Special Litigation Counsel, U.S. Dep't of Justice, to Oliver A. Houck, Professor of Law, Tulane Univ. Law Sch. (May 19, 2011, 13:04 CST) (on file with author); Telephone Interview with Fred Disheroon, Special Litigation Counsel, U.S. Dep't of Justice (May 5, 2011). He also faced the challenge of understanding the local witnesses whose Cajun accents left the Washington lawyers, and there were many from the agencies, scratching their heads and murmuring, "what'd he say?" Telephone Interview with Fred Disheroon, *supra.*

[137] S. La. Envtl. Council, Inc. v. Sand, 629 F.2d 1005 (5th Cir. 1980).

404 of the Clean Water Act.[138] It was Tripp's idea to make *Avoyelles* a § 404 case. Don Wilson, who had re-created the Avoyelles Sportsmen's League and considered suing under Louisiana law, recalls "not knowing we even had a Clean Water Act," much less anything about the torturous journey of its wetland protection provisions.[139] Nor did the presiding judge, who turned out to be the biggest surprise of the proceedings.

VI. A TEMPORARY RESTRAINING ORDER

Rapides Parish, Louisiana, August 1978. The plaintiffs were in a box. Throughout the summer, bulldozers had been knocking down trees and leveling the Lake Long tract for beans. Nearly half of the bottomland hardwoods were gone, and the rest were falling fast. Which militated for requesting a temporary restraining order (TRO) from the federal court, except that this extraordinary remedy was also a risk. Ostensibly issued on the basis of whether a party would be irreversibly injured before a hearing on the merits could take place, in reality and inevitably TRO's were the judge's first opinion of a case and, as in many walks of life, first opinions become final opinions. The difficulty that the Avoyelles Sportsmen's League and the other plaintiffs faced was that the judge would be ruling without evidence, without witnesses to present the horror-show they were seeing and the manner in which the § 404 legal violations arose. It would be all hearsay and word of mouth. Adding to the difficulty was that this provision of the Clean Water Act remained relatively new and completely untried in this part of Louisiana. They would have to educate the judge in very short order, without detailed memoranda, on the fly. A TRO request vested enormous faith in the judge.

In this case, without tactical planning or premeditation (the federal court in Alexandria was the only one with jurisdiction over the matter), they landed on one of the most extraordinary judges of his place and time, Nauman S. Scott of the Western District of Louisiana. Judge Scott had been born to the profession, his father was an attorney, his grandfather a state senator, and his great uncle had served as Chief Justice of the Louisiana Supreme Court

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138 Telephone Interview with Donald Wilson, *supra* note 65.

139 *Id.*

in the early 1920s.[140] His reputation (or infamy, in some circles) did not rest on this lineage, however, but instead on his role in the Herculean task of desegregating one of the most unreconstructed parts of the American South, which is of course saying a great deal. Brother to the Ku Klux Clan, the somewhat less violent White League came out of north Louisiana,[141] as did Louisiana governors and congressmen dedicated to the suppression of civil rights for black Americans.[142] The aggression in this region against blacks and their allies in the white community equaled that anywhere,[143] and the attitude was if anything exacerbated by the Supreme Court's l954 integration decision in *Brown v. Board of Education*. It took courage for federal magistrates to order the desegregation of public facilities in Louisiana, and federal judges John Minor Wisdom and J. Skelly Wright of New Orleans are, today, widely recognized for having led the way. New Orleans, however, in the l960s was a relatively urbane environment.

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[140] *See* TED TUNNELL**,** CRUCIBLE OF RECONSTRUCTION: WAR, RADICALISM AND RACE IN LOUISIANA, 1862-1877, at 1-2 (1992) (describing slaughter of blacks and white Republicans in north Louisiana, giving rise to The White League, which a few years later would go on to rout and kill primarily black federal forces in New Orleans at the Battle of Liberty Square); *see also* William Gillette et al., *The Longest Battle: Intervention in Louisiana*, *in* RECONSTRUCTING LOUISIANA (Lawrence N. Powell ed., 2001).

[141] Louisiana Governor Murphy Foster, 1892-1900, born and raised in north Louisiana, fought to maintain white supremacy in the state by adopting the Louisiana Constitution of 1898, which sought to disenfranchise blacks. Foster was also a supporter of the Louisiana Bourbonist movement, which opposed reconstruction. *See* WILLIAM IVY HAIR, BOURBONISM AND AGRARIAN PROTEST: LOUISIANA POLITICS 1877-1900, at 23, 234-35 (1969). Foster's grandson, Murphy J. Foster, Jr., was elected to the same office in 1996, a campaign later marred by revelations that he paid well-above market rates for mailing lists for candidate David Duke, grand wizard of the Ku Klux Klan, in return for which Duke stepped out of the race. *Murphy J. Foster, Jr.*, NNDB.COM, http://www.nndb.com/people/379/000120019 (last visited Apr. 2, 2012); *see also* CHARLES S. BULLOCK III, DAVID DUKE AND THE POLITICS OF RACE IN THE SOUTH 20 (John C. Kuzenski et al. eds., 1995). One of Foster, Jr.'s first official acts was to rescind an order requiring affirmative action in state employment. *See* Exec. Order No. MJF 96-3 (Feb. 14, 1996), *available at* http://www.doa.la.gov/osr/reg/mar96/9603_001.pdf. Adding to the aroma, David Duke had been an active candidate in the previous gubernatorial election and garnered an overwhelming majority of votes in north Louisiana. *See* BULLOCK, *supra*, at 66.

[142] *See generally* LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION (2008).

[143] *See* CARL L. BANKSTON III & STEPHEN J. CALDAS, A TROUBLED DREAM: THE PROMISE AND FAILURE OF SCHOOL DESEGREGATION IN LOUISIANA 38 (2002).

Consider what it would take for a judge to do likewise in rural Louisiana 150 miles to the north. Virtually alone.

Judge Scott did. A local black minister brought the first school desegregation case in Rapides Parish back in l961, at a time when the majority of black school children lived below the poverty line and their schools were disasters.[144] Fifteen years following *Brown v. Board*, the *Rapides* facilities were still starkly divided between black and white, prompting Scott to revive the lawsuit and order a massive, cross-parish bussing plan.[145] An all-white elementary school was closed, only to be opened again by defiant parents until Scott had them evicted by federal marshals.[146] Meanwhile, another battle was raging over bussing white high school students to a just-integrated black school in Alexandria.[147] Here, parents gerrymandered the integration order by transferring custody of their children to relatives in another district, approved by state Judge Richard E. Lee. Scott reversed the approval, calling it a sham. Lee then ordered state troopers to escort the white students to a white school.[148] When Scott rescinded the order, Lee himself escorted the students, at which Scott threatened contempt of court and fines of $500 per day.[149] Lee supporters brandished bumper stickers reading, LEE IS HOT—SCOTT IS NOT. A congressman from Georgia filed an impeachment resolution against Scott, who did not give an inch, and the resolution slowly died.[150] This, then, was the judge who would preside over the first environmental case in north Louisiana, *Avoyelles Sportsmen's League.*

In November of the year, a TRO hearing was held in Judge Scott's chambers, which were barely large enough to accommodate his law clerk and the dozen or so attorneys involved even at that

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144 *Id.* at 166.

145 *Id.* at 167.

146 *Id.*

147 *Id.* at 167-68.

148 *Two Judge Clash Again in Louisiana School Dispute*, N.Y. TIMES, Jan. 3, 1981, *available at* http://www.nytimes.com/1981/01/03/us/around-the-nation-two-judges-clash-again-in-louisiana-school-dispute.html.

149 *Id.*

150 *See* A Resolution to Impeach Nauman Scott, Judge of the United States Disctrict Court for the Western District of Louisiana, H.R. Res. 61, 97th Cong. (1981) (sponsored by Rep. McDonald).

early point in the case.[151] Only Tripp was absent, away on other business. Osborne remembers being the last one to enter the room, scrambling to pull documents from his briefcase.[152] The judge looked around the room and spied him, one of the few unfamiliar faces, and asked, "Mr. Osborne, you are from New Orleans are you not?"[153] Osborne feared the worst because the cachet of New Orleans did not travel well in this neck of the woods, but instead Scott said, as if talking to a visiting colleague:

> Let me tell you that there is a nice rooming house down the road run by a lady who is a friend of mine, and we at the courthouse normally take lunch at a diner by the railroad tracks, and there is a cleaners across the way that can press your clothes daily.[154]

There was something earthy about Osborne that Scott sensed, perhaps a shade of Cherokee blood from ancestors in Oklahoma, but for whatever reason, as Don Wilson later recalled, "there was an instant rapport."[155]

Osborne had done his homework. He'd spent the previous three days with Don Wilson up on the Lake Long tract, taking notes and photographs of the clearing operations and filling him in on the Clean Water Act.[156] He had two advantages over everyone else in Judge Scott's chambers: physical evidence of the operation (the photos were brutal) and a working familiarity with § 404 that made him an authority in the room. In his accent tinged with the South, Osborne started with the facts, as you would with a jury, and then moved to the law, what it was for, how it worked, why it applied here. According to Wilson, "Mike flat charmed his britches off."[157]

The Corps and the landowners, meanwhile, rather than take the position that the Lake Long tract, bone dry that year, was not a wetland and therefore not subject to § 404 regulation at all,

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151 Telephone Interview with Donald Wilson, *supra* note 67.

152 Telephone Interview with Michael Osborne, Director, Southern Wetlands Project (May 11, 2011).

153 *Id.*

154 *Id.*

155 Telephone Interview with Donald Wilson, *supra* note 67.

156 *Id.*

157 *Id.*

argued instead that the land clearing did not constitute the discharge of dredge or fill material; they were just moving trees around. If any dirt got moved in the process it was "de minimis." The argument did not play well. Don Wilson noted:

> [Judge Scott] got tired of them telling him over and over, "Judge, this is not a dredge and fill activity," and he finally told them, "Bullshit, yes it is, you're moving dirt around, you're using bulldozers, you're leveling land, that's filling." [T]hey would say, "It's only de minimis," and he said "That's bullshit too, it's not de minimis, I can tell you I've seen bulldozers, I know what bulldozers do, you guys are moving dirt around, that's a fill activity, that's dredge and fill."[158]

The Prevot lawyers, for their part, also argued that this was private property and landowners could do what they wanted with it,[159] which cut no more ice with the court. If that position prevailed, Osborne observed, there would be no pollution control laws at all.[160]

Scott issued the restraining order. Prevot was permitted to continue operations on land he had already cleared but was enjoined from clearing any more for the next sixty days.[161] He and the Corps were shocked. The League and environmental groups had bought the time necessary to prove their case on the merits. They had also won the all-important first round. Tripp, learning of the order, also remembers being "stunned, impressed and surprised."[162] According to Wilson, Osborne won the whole lawsuit that day.[163] After that, they just "filled in the blanks" and "crossed the i's and dotted the t's."[164] That of course is a local trial lawyer speaking, reading a judge he came to know very well. But some complex and precedent-setting issues would follow, and they are where Tripp came in.

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158 *Id.*

159 *Id.*

160 *Id.*

161 *See* Avoyelles Sportsmen's League v. Alexander (*ASL I*), 473 F. Supp. 525, 536 (W.D. La. 1979).

162 Telephone Interview with James T.B. Tripp, *supra* note 132.

163 Telephone Interview with Donald Wilson, *supra* note 67.

164 *Id.*

VII. *AVOYELLES SPORTSMEN'S LEAGUE* (*ASL I*)

Alexandria courthouse, Rapides Parish, Spring 1978. The Corps, to its credit, had not been stonewalling the complaints of the League completely. In late July it had sent out notices that the clearing activities across Avoyelles Parish might require a Clean Water Act permit, particularly building levees and excavating drainage ditches . . . classic "dredge" and "fill."[165] These were activities the Corps knew well; it conducted them routinely in its own projects. The purpose of the notice was simply to make the public aware. Neither Prevot, nor anyone else apparently, applied for a permit.

Nothing more was done until, about a month later, responding to continuing complaints about the Prevot clearing, the Corps ordered the landowner to "cease and desist" until it could determine what activities were covered and how much of the tract was wetland.[166] Corps personnel then walked the tract with Prevot and, shrugging off the protests of the Fish and Wildlife Service,[167] allowed him to go back to work on all but the wettest portions of the property. The work, however, even on those wettest portions, would not require a permit unless, per the earlier notice, it involved levees or ditches.[168] The bulldozing of the bottomland hardwoods, of course, was neither. It was at this point that Wilson had called Tripp and started the litigation.

The Corps's position, then, raised two very distinct issues, the first of which was whether what Lake Long tract bulldozers were doing was the deposit of "dredge" or "fill" within the meaning of § 404,[169] and the second of which was whether these wet-again, dry-again hardwood bottomlands were covered by § 404 at all.

In January l978, the TRO expiring, the plaintiffs sought to continue the injunction in a preliminary hearing before Judge Scott. Tripp, participating this time, recalls that he had "no idea

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[165] *See supra* note 161 and accompanying text.

[166] Telephone Interview by Endre Szalay with Dale Hall, CEO, Ducks Unlimited (Dec. 20, 2010). Hall, a new biologist with the Service at the time, went on to become Director of the agency from 2005 to 2009.

[167] Avoyelles Sportsmen's League, Inc. v. Marsh (*ASL III*), 715 F.2d 897, 901 (5th Cir. 1983).

[168] 33 U.S.C. § 1344(a) (2006).

[169] Telephone Interview with James T.B. Tripp, *supra* note 132.

where Scott was coming from, but that Mike and Don seemed to have a better sense."[170] Again to his surprise, the judge required Prevot to apply for a permit for levees or ditches on land he had already cleared and continued the injunction over additional clearing on the *entire* tract.[171] He ordered further, given the confusion over how much of the tract was wetland, the government to make a final wetland determination within the next two months.[172] Meanwhile, the case would go to trial on the activity question, whether Prevot's bulldozers were discharging dredge or fill within the meaning of federal water law.

This part of the case was something of a lay-down. Judge Scott had already tipped his feelings about what bulldozing was and did. Photographs secured by the U.S. Fish and Wildlife Service,[173] which was making a stand for bottomland hardwoods of its own at Lake Long, were indisputable and convincing. Scott's analysis, however, went deep, beginning with the clearing process:

> Initially, bulldozers outfitted with shearing blades cut the timber and vegetation at or just above ground level. The shearing blades were v-shaped, had a serrated edge and flat bottom and were approximately 18–20 feet in length. . . . Although the blades were adjusted to ride on the ground's surface, they did scrape the leaf litter and humus that overlaid the soil as they moved from tree to tree.
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> . . .
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> After the shearing, windrowing and chunk raking the land was disced to prepare it for soybean cultivation. A disc is a bowl-shaped blade that cuts into the ground and fluffs the soil up. The disc's [*sic*] used on this tract were 24 inches in diameter and would cut into the ground approximately 9 inches. During discing, some soil would ride in front of the disc and would be redeposited in other areas of the tract,

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[170] *Id.*

[171] *Id.*

[172] Telephone Interview with Dale Hall, *supra* note 166; Telephone Interview with James T.B. Tripp, *supra* note 132.

[173] Avoyelles Sportsman's League v. Alexander (*ASL I*), 473 F. Supp. 525, 528 n.5 (W.D. La. 1979).

> resulting in substantial displacement and redepositing of the soil itself.[174]

The landowner had also dug a classic drainage ditch across the property and had at least four or five miles of similar ditches to go.[175] These were, after all, lands that took some degree of water every spring.

This said, the court did not restrict its conclusions to Prevot's ditches. In turning the operation loose following its temporary cease and desist order, the Corps had formally determined that "[p]lowing, discing, and raking of the sort observed on the tract so far will not require a permit."[176] That determination would not stand. In Scott's view, as he had just described, the entire operation dredged up and discharged soil; it also partially filled the sloughs on the property, many of the smaller ones entirely, which became fill activity as well. This determination, he said, followed both "the spirit as well as the letter of the law."[177] A basic function of the Clean Water Act was to protect the important functions wetlands serve, including erosion control, pollution reduction, flood storage, and the causa bellae of this case, fish and wildlife; the Act would be "emasculated" were he to conclude that the "permanent removal . . . of the wetland's vegetation" for agricultural use was not subject to § 404.[178]

The defendants had one last string to their bow. It remained to determine, they argued, that these kinds of activities had been pardoned when Congress amended § 404 only the previous year.[179] While the Corps's regulations prevailing at the time exempted "plowing, seeding, harvesting, [and] cultivation" without qualification,[180] Judge Scott found the exception overly broad as

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174 *Id.* at 528-29.

175 *Id.* at 529.

176 *Id.* (citing the Corps's wetland determination that followed the cease-and-desist order); *see* Telephone Interview with Donald Wilson, *supra* note 65.

177 *ASL I*, 473 F. Supp. at 532.

178 *Id.* at 534; *see also* 33 U.S.C. § 1344(f) (2006).

179 *Id.* at 535 (citing 33 U.S.C. § 1344(f)(1)(A) (2006)).

180 Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,130 (July 19, 1977) (The preface of the 1977 Corps regulations implementing the § 404 permit program states that "activities such as plowing, seeding, harvesting, [and] cultivating . . . do not involve discharge of dredged or fill material."); *see also ASL I*, 473 F. Supp. at 535.

applied to what he saw happening on the Lake Long tract. Congress had spoken of "normal" farming and silvicultural activities, and these were neither.[181] Walter Conrad, for the landowners, called an expert witness with a long background in agriculture and forestry to testify that normal silviculture included clear-cutting of "climax" (old) trees, and that replacing them with different tree species or even with soy did not make it less so when it eventually returned to forest.[182] Judge Scott was skeptical: "soybeans are trees?" he asked.[183]

Tripp picked up on the opening. He remembers his first question on cross-examination as: "In your opinion, if someone is cutting down the forest with no intention of replacing it or returning it back to forest, is that normal silviculture?"[184] The question was risky, because Tripp did not know what the answer would be, but it came back concise and unambiguous, "No."[185] At that point, he can remember thinking, "we were light years ahead."[186] Judge Scott quickly dismissed the other half of the "normal" agriculture/silviculture argument by pointing out that the § 404 exemption, in its very words, did not apply to activities bringing more wetlands into production.[187] Case closed, but for one anomaly: an amicus brief filed by the National Forest Products Association, the Forest Products Association, and the Louisiana Forestry Association which took the position that the wholesale eradication of bottomland hardwoods, the dominant forest type of this part of the world, was not restricted by the Clean Water Act.[188] One might have thought these groups favored trees.

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[181] 33 U.S.C. § 1344(f) (2006) (emphasis added) (stating that activities such as "plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices" are exempted from regulation under the Clean Water Act); *see also ASL I*, 473 F. Supp. at 535-36.

[182] Telephone Interview with Donald Wilson, *supra* note 65.

[183] *Id*.

[184] Telephone Interview with James T.B. Tripp, *supra* note 132. All quotations from the trial that follow in this article are taken from interviews with the participants, as cited.

[185] *Id*.

[186] *Id*.

[187] 33 U.S.C. § 1344(f)(2) (2006); *see also ASL I*, 473 F. Supp. at 535.

[188] *ASL I*, 473 F. Supp. at 530.

VIII. *AVOYELLES SPORTSMEN'S LEAGUE* (*ASL II*)

Alexandria courthouse, Rapides Parish, Louisiana 1979. Tripp would later say that joining the EPA with the Corps as defendants in the *Avoyelles* case was the smartest thing he did.[189] It required the government's attorney, Fred Disheroon, to present both sides of the legal issues, because there was very little on which the EPA and the Corps agreed. Ultimately, it would force the Department of Justice to make a very controversial call as to which position it would present in court as that of the United States. In the meantime, and following, the government's laundry would be aired in Judge Scott's courtroom in Alexandria, Louisiana. Tripp et al.'s challenge was to persuade the court that virtually all of the Lake Long tract was a § 404 wetland.

As we know, at the very start of the controversy the Corps had concluded that only a third of the property was under Clean Water Act jurisdiction; the rest Prevot was cleared to move on, without permit, as he wished. The Corps based its position on regulations adopted in l975, and their conservative application by a wetland scientist with impeccable credentials, which included his Ph.D. thesis on the bottomland hardwood ecosystem.[190] The 1975 regulations limited § 404 to types of vegetation that "require[d] saturated soil" for "growth and reproduction."[191] Very few tree types fell into this category, primarily the cypress and tupelo gum emblematic of deep swamp environments that were wet virtually year-round.[192] As with its insistence on limiting the Act's meaning of "navigable waters," the Corps was trying to get itself out of what it considered the "land use business."[193]

In 1977, following the *Callaway* decision sending the Corps's jurisdiction upstream, the Corps, in collaboration with the EPA this time, revised its regulations in significant ways.[194] It dropped the word "required" in favor of "adapted for life in saturated soil

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189 Telephone Interview with James T.B. Tripp, *supra* note 132.

190 *Id*.

191 Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320 (July 25, 1975); *see also* Avoyelles Sportsmen's League, Inc. v. Alexander (*ASL II*), 511 F. Supp. 278, 289 (W.D. La. 1981).

192 *ASL II*, 511 F. Supp. at 289.

193 Telephone Interview with Lester Edelman, *supra* note 36.

194 33 U.S.C. § 1362(8) (2006); 33 C.F.R. § 323.2 (2006); *see also ASL II*, 511 F. Supp. at 285-86.

conditions," which would apply to many more tree types up the chain towards high and dry terrain.[195] Judge Scott had no trouble appreciating the difference. The Corps's position in the Lake Long litigation not only ignored the language of their revision, but also gave "no consideration for the goals and purposes of the Act."[196] Scott was no more impressed by a semantic argument which would seem comical were it not so lethal to bottomland hardwoods; the government urged that he read "adapted for life" to mean that each tree type needed saturation for the entirety of its life, in effect returning to the status quo of l975.[197] Scott saw through this maneuver as well, and went one farther to flip the presumption: trees were wetland species if they were "tolerant" of saturation, excluding only the high ground, intolerant species.[198] How did he travel this far?

One explanation is that he, as had Tripp before, fell into the science of the issue and pursued it all the way. Whatever the reason, Tripp, Osborne, Wilson, Depuy, Disheroon, the EPA, the Corps, and the Interior participants all describe the proceedings that followed as a seminar in the science of hardwood bottomlands. No fewer than fourteen experts testified on the "wetlands" issue, three for the private landowners, five for the government defendants, and six for the environmental plaintiffs.[199] They included the tops of their fields. Judge Scott had begun to take their testimony at the first trial, but it soon became apparent that the government witnesses were in great disagreement. This was the point at which he recessed this line of testimony and ordered Disheroon to prepare a "final wetland determination" that reflected a consolidated government position.[200] No small task.

Two months later Disheroon reappeared with a document that, in effect, found eighty percent of the Lake Long tract to be a wetland.[201] It had been another head-busting exercise in

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195 33 C.F.R. § 323.2(c); *see also ASL II*, 511 F. Supp. at 289.

196 *ASL II*, 511 F. Supp. at 289.

197 *Id.*

198 *Id.* at 291.

199 Telephone Interview with James T.B. Tripp, *supra* note 132.

200 *ASL II*, 511 F. Supp. at 281.

201 Avoyelles Sportsmen's League, Inc. v. Marsh (*ASL III*), 715 F.2d 897, 903 (5th Cir. 1983).

Washington, D.C., only six years after the battle in Congress over § 404 jurisdiction in 1971–1972, then the *Callaway* furor of 1975–1976, and then the § 404 amendments of 1975–1977. There are allegations in a landowner's brief that the struggle this time included back-room browbeating of the Corps by the Office of Management and Budget and other, off-camera, political actors.[202] It may well have taken place, it is hard to imagine it *not* taking place with parties so often opposed to the mere idea of each other, but here we were with Corps versus EPA all over again and, when the smoke went up, the EPA had prevailed. Writ large. Disheroon and the Department of Justice not only concluded that the eighty percent figure supported by the EPA was scientifically and legally correct, but also and more dramatically, that it was within the EPA's purview to make such calls.[203]

In briefs to the Justice Department, Tripp and his team of scientists had supported a higher figure; the Department of Interior took the position that even the ridges on the tract, given their soils and hydrology, were wetlands, putting it all under § 404.[204] Disheroon had been so impressed by a few of Tripp's experts that he asked permission to borrow them to prepare the government's determination, which was of course gladly granted.[205] Even here, politics would play its part. One government expert, a soil scientist at Louisiana State University, later told Tripp that if he had gone any higher he'd have had difficulties back at the office.[206]

Now Tripp and Osborne had a tactical decision to make, whether to challenge a government determination that was quite favorable to them, or to accept and defend it. Disheroon at an earlier stage had offered Tripp et al. any arrangement they could confect to make this particular case, which came at such an unpropitious time, go away.[207] They declined. As Don Wilson recalled, "I couldn't go back home to that land clearing, they'd kill

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[202] Brief for La. Landowner's Ass'n, Avoyelles Sportsmen's League, Inc. v. Alexander (*ASL II*), 511 F. Supp. 278 (W.D. La. 1981) (No. 78-1428).

[203] *ASL III*, 715 F.2d at 903; Telephone Interview with Fred Disheroon, *supra* note 136.

[204] Telephone Interview with James T.B. Tripp, *supra* note 132.

[205] *Id.*

[206] Telephone Interview with Donald Wilson, *supra* note 67.

[207] *Id.*

me."[208] Now, the formal wetland determination delivered to the Alexandria courthouse, Prevot et al. were ready to challenge it in fact and law. Tripp et al. would support the determination with testimony that, if anything, it was under-inclusive. *Avoyelles II* was under way.

The proceedings lasted two weeks. Tripp recalls his cross-examination of the landowner's chief expert, the Corps consultant who had made the first thirty-five percent call.[209] Dr. Rhodes was perhaps the premier bottomland hardwood scholar in the country, and his doctoral thesis was a tour de force description of tree species in this terrain rising from deep swamp to high and well-drained soils. Tripp had taken the time to study it and understand that what it also described were the adaptations these particular trees made to live in an environment so capriciously wet and dry. On cross-examination ("the best I think I've ever done," he recalls), he walked Rhodes through each species, each modified root, rhizome, bark, seed, and reproduction mechanism that had evolved to in some cases require, and in all cases tolerate, periodically wet soils. It took a long time, the better part of a morning, the other attorneys dozing off as in classes in Biology 101. Towards the end, Tripp reached for the payload. "In fact Dr. Rhodes," he asked, "if these trees could not tolerate periods of saturation they couldn't live there, isn't that correct?" Yes, it was correct, indeed obvious. "And they had adapted themselves accordingly, wasn't that the point of your thesis?" Yes, again. Bang, the trap snapped shut. Rhodes had just put the entire Lake Long tract vegetative community within the "adapted for life" language of the Corps's wetland regulations.

Tripp's own witnesses included a young wildlife biologist from the U.S. Fish and Wildlife Service,[210] Dale Hall, who would go on to direct the agency some twenty years later. Hall recalls his

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[208] Telephone Interview with James T.B. Tripp, *supra* note 132. The description of this examination is based on this source, but corroborated by Wilson. *See* Telephone Interview with Donald Wilson, *supra* note 65; *see also* Telephone Interview with Harless Benthul, Office of Reg'l Counsel, Region VI, Environmental Protection Agency (May 22, 2011) (According to Benthul, an observer at the trial, Tripp's style was to proceed methodically and in great detail, and then bring it all together.).

[209] Telephone Interview with Dale Hall, *supra* note 166.

[210] *Id.*; *see also* Telephone Interview with James T.B. Tripp, *supra* note 132; Telephone Interview with Donald Wilson, *supra* note 65.

first testimony, after which Conrad began his cross-examination with "Dr. Hall, your background is in . . ."—at which point Dale interrupted. "Well sir," he said, "I don't have a Ph.D., so I'm not a doctor, just a mister." Conrad smiled and mouthed to himself, "just a mister." Hall looked up at Judge Scott and found him grinning encouragingly from ear to ear. He felt a bit uneasy nonetheless, "the government was not supposed to help sue the government," but he was doing fisheries studies on hardwood bottomlands in the Atchafalaya Basin to the south, and continued them up on the Lake Long tract.

Hall made several contributions to the case, the first of which was detailed photo images of the property and un-cleared property nearby;[211] the contrasts were perhaps unnecessary for Judge Scott, but they were dramatic. He also conducted studies of adjacent sloughs and bayous affected by bottomland clearing, and found that the operations, even offsite, reduced fish populations by some ninety-five percent.[212] Perhaps most valuable was his collection of fish samples and fish skeletons way up on the tract, on even the ridges. It was like having live victims in the room. They were displayed at the plaintiffs' end of the table throughout the proceedings.[213]

It was Don Wilson's lay witnesses, however, that seemed to capture the soul of Judge Scott, and provided the highlights of the several proceedings. Donald "Nookie" and Raymond "Cookie" Laborde lived up in Brouillette, a tiny community bordering the Lake Long tract, and while Nookie worked for a phone company Cookie had no job to speak of.[214] Wilson called them to testify that the water in nearby Lake Long was clear, and there were ducks up on the property, which would be a fair indicator for wetlands. Strong rumor had it that these were the two biggest outlaws in all of Avoyelles Parish, "spotlighted deer at night, killed and skinned alligators." Wilson asked Nookie if he hunted up on the Lake Long

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[211] Telephone Interview with Dale Hall, *supra* note 166.

[212] *Id.*

[213] *Id.*

[214] *See* Bruce Shultz, *Witness Says More Clearing Will Increase Basin Siltation*, MORNING ADVOC., Apr. 24, 1979; Telephone Interview with Donald Wilson, *supra* note 65. The description of the examination of the Laborde witnesses that follows is taken primarily from Wilson, although corroborated by cited interviews with Tripp and Hall. The Labordes apparently used their nicknames during the proceedings. *Id.*

tract, trying to establish his general knowledge of the area. There was silence in the courtroom "for about sixty seconds," Nookie looking around nervously at the assembled lawyers and government authorities. Finally he asked, slowly, "*when*?"—reluctant to admit, in Wilson's words—"that he was shooting things out there twelve months a year." "In season," his attorney added quickly, to which a relieved Nookie said, "oh yeah, when it's the season." Judge Scott smiled broadly.[215]

Nookie also testified that they knew the place well because they planted a grain crop of milo up on a ridge.[216] Wilson could see the defense counsel smiling behind him: "See? This was dry land." Wilson asked whether they made a good crop. "Pretty good crop," Nookie said. "Did they get the crop in?" Wilson asked. "Oh no," said Nookie, "but it worked out really well because when the water came up to the bottom of the grain the cows swam out and ate it off." Which sounded rather wet after all. Judge Scott could not keep from laughing.

Wilson had also queried Cookie Laborde about the ducks. "There were ducks," he said. Conrad rose to cross-examine, and asked him first to look at a map and point out where he lived.[217] "I can't read no maps," Cookie said. Conrad bore in, "Well just look over here and just tell me where you live," and Cookie said again, "I don' read no maps." Judge Scott had had enough. He looked down and said, "Mr. Conrad, the witness has told you he can't read maps. Move on." Conrad might have gotten the message.

Instead, as Tripp recalled it, Conrad went at it with Cookie Laborde for three and one half hours. It was like watching someone losing money at the casino and doubling his bets. Cookie, under pressure, described the Lake Long terrain with hand gestures that proved eloquent and a sincerity that could not be

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[215] The poaching problem, to which the Labordes doubtlessly contributed, was a sore point with state wildlife officials and perhaps contributed to their reluctance to weigh in on the *Avoyelles* controversy. *See* Tommy Couvillion, WKLY. NEWS, Mar. 9, 1972, at B1, 2 (describing problem).

[216] Telephone Interview with Donald Wilson, *supra* note 65 (Wilson's examination that follows is taken from this source, corroborated by Tripp.).

[217] Telephone Interview with James T.B. Tripp, *supra* note 132 (The Conrad examination is taken from this source.).

shaken.[218] Towards the end, Conrad came back to the ducks. They'd said there were ducks up there, but exactly how many ducks would that be? Cookie was silent. Then he said, slowly, "plenna ducks." Which seemed definitive. At last, Conrad went for his closer: would Cookie (or any other sane person) say he lived in a *wetland*? Cookie was silent again, and the courtroom suddenly alert. "Waal," he replied, "I guess you could say so."

Cookie Laborde had just summed up ten days of scientific testimony in *Avoyelles II*.

In March 1981, the delay reflecting the novelty and complexity of the case, Judge Scott issued his ruling on the wetlands issue. He found the evidence to show no substantial disagreement among the various experts that "*all* of the [plant] species which appear in prevalence on the Lake Long tract are tolerant species."[219] As they also appeared in a "wetland environment of soils and hydrology," the entire tract, with the exception of two circumscribed ridgelines, was "therefore wetlands."[220] A permit to clear them would be required. He appended a detailed map.[221]

The ruling was a surprise to all sides. It went beyond the eighty percent figure proposed in the government's final wetlands determination, to something more like ninety percent. This was of course the position favored by the Department of Interior, and consistent with Tripp et al.'s witnesses, most of whose assessments reached into the ninety-plus percents.[222] Judge Scott had in effect made his own wetland determination, which would present a sore point on appeal.

Meanwhile, land clearing on the Lake Long tract went into a prolonged hold.

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[218] Cookie Laborde also testified that, on the dredge and fill issue, he saw a backhoe on the Prevot property digging a large hole, "the logs they wouldn't burn they would bury with a backhoe." Shultz, *supra* note 214.

[219] Avoyelles Sportsmen's League, Inc. v. Alexander (*ASL II*), 511 F. Supp. 278, 291 (W.D. La. 1981) (emphasis added).

[220] *Id.*

[221] *Id.* at 293.

[222] Telephone Interview with James T.B. Tripp, *supra* note 132.

IX. THE CIVILETTI OPINION

Washington D.C., 1979. The Corps was furious. It had felt itself underrepresented in the *Avoyelles* case from the outset, first by an assistant U.S. attorney with no familiarity with the § 404 program, and then by Disheroon from the DOJ who seemed to be siding not only with the plaintiffs but, worse, with its bete-noire, the EPA. At one point in *Avoyelles I*, with confusion reigning over the government's position, Judge Scott asked Disheroon his own position on the matter.[223] As Disheroon recalls it, he no sooner began to reply than an attorney whom he cannot recall called out, "He's testifying! Put him under oath!" This, Judge Scott proceeded to do, but as Disheroon again began to state his position, which did not favor that taken by the Corps, the Vicksburg district's district engineer, combat medals on his uniform jacket, shouted from a front row seat in the audience, "[h]e's lying!" Such were the passions at play.

They were if anything heightened in Washington, and heightened again by the required final wetlands determination which had been jerry-rigged, as the Corps may have seen it by Disheroon at DOJ after some back-room maneuvering.[224] Deciding to elevate the problem, the Corps's Chief Counsel Lester Edelman arranged a meeting with Disheroon's boss, James Moorman, who directed the Lands and Natural Resources Division at the DOJ.[225] According to Moorman, who does not mince words, Edelman came in on a tear, "pissed that Justice was siding with EPA."[226] Edelman had considerable experience in the game. He had been counsel to the House Public Works Committee, which had never favored the EPA, during the bruising § 404 legislative battles, and

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[223] Telephone Interview with Fred Disheroon, *supra* note 136 (The description of the events following is taken from this interview.).

[224] Certainly the landowners whom the Corps was supporting felt this way. *See* Brief for La. Landowner's Ass'n, Avoyelles Sportsmen's League, Inc. v. Alexander (*ASL II*), 511 F. Supp. 278 (W.D. La. 1981) (No. 78-1428).

[225] Interview with James R. Moorman, Former Assistant Attorney Gen., Dep't of Justice, in Washington D.C. (May 17, 2011). Formerly known as the Lands Division, it has since been renamed the Environment and Natural Resources Division. *Id.* The description of the meeting with Mr. Edelman and the approach to the Attorney General is taken from this source. *Id.*

[226] *Id.*

had formed his own view on what was enacted and why.[227] As could also be recalled, the House position did not prevail . . . yet another wound.

Moorman was both deeply green and deeply rational. He was the first executive director of The Sierra Club Legal Defense Fund,[228] and brought a pioneering environmental lawsuit against the Trans Alaska Pipeline.[229] He had authored a memorandum detailing obstacles and opportunities in environmental law that became an early Bible in the field.[230] He was very much a lawyer, and, while his instincts told him that the Corps had the weaker argument ("the Corps didn't want the jurisdiction and they didn't want anyone else to have it either"), he saw Edelman's protest as a no-win proposition; whichever agency he favored would cause continuing trouble down the line. Musing aloud, he asked Edelman, why not seek an opinion of the attorney general?

He had opened a side door. Attorney general opinions are written by the Office of Legal Counsel, a unique office within the DOJ that serves as an independent advisor to DOJ and other agencies on request.[231] While the Office of Legal Counsel seeks the views of all affected parties, including DOJ attorneys, it is functionally separate from any of its front-line divisions. The analyses it prepares are its own, and the resulting opinions, although not binding law, are widely respected and cited as such. It could provide the perfect cover here; no one would take the hit.

Moorman recalls that he saw a light go on in Edelman's mind. Corps counsel, doubtless, were under great pressure from the Corps's brass and saw this as a way to get a free second

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[227] *Lester Edelman*, DAWSON & ASSOCS., www.dawsonassociates.com/ourteam/edelman.html (last visited Apr. 22, 2012); *see also* Email from Lester Edelman, Senior Counsel/Senior Advocate, Dawson & Assocs., to author (Aug. 29, 2011, 2:14 CST) (on file with author). Among other disagreements, he viewed the EPA's exercise of § 404 authority over individual Corps permits to be ultra vires. *Id.*

[228] Since renamed the EarthJustice Legal Defense Fund. *See Our History*, EARTHJUSTICE, http://earthjustice.org/about/our_history (last visited Apr. 22, 2012).

[229] Wilderness Soc'y v. Morton, 479 F.2d 842 (D.C. Cir. 1973). The pipeline case led to an injunction under National Environmental Policy Act, 42 U.S.C. § 4321 (2006), opening the courthouse door to a wave of similar lawsuits.

[230] James W. Moorman, *Primer for the Practice of Environmental Law*, 1 ENVTL. L. REP. 5001 (1971).

[231] *Office of Legal Counsel*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/olc (last visited Apr. 22, 2012).

opinion. Edelman agreed.[232] The secretary of the army would request a written opinion of the U.S. attorney general. He would ask two questions: As between the Corps and the EPA, which agency had the ultimate authority to determine the reach of "navigability" under § 404, and which to interpret its agricultural exemptions?[233] In effect, the Corps was appealing *Avoyelles Sportsmen's League*.

Moorman felt confident that the opinion would be based on the merits.[234] The newly appointed Attorney General, Benjamin Civiletti, was grounded in general practice and seemed interested in environmental issues; in fact, he had wanted to head the Environment and Natural Resources Division himself.[235] He was not likely to bend to political pressure from the Corps or Capitol Hill.

As it turned out, from the Corps's point of view, Civiletti ruled the wrong way on both issues. It is not a lengthy memorandum. It cites little precedent. Instead, it reasons from the structure of the overall Clean Water Act which is explicitly conferred on the EPA, and which contains several programs, including the all-important National Pollution Discharge Elimination Program, which depend entirely on EPA interpretation and administration.[236] Nothing in the statute contemplated that "a water body would have one set of boundaries for purposes of dredge and fill permits" and "a different set for purposes of the other pollution control measures."[237] Waters for one had to be waters for all, and since the EPA had the call on most activities in most waters, that was where the call lay. Almost

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[232] In retrospect, Edelman considers acquiescing in an attorney general's opinion to have been a mistake; he would have had a better chance with the Office of Management and Budget. Telephone Interview with Lester Edelman, *supra* note 36. If the landowner's brief earlier cited is correct, however, OMB was also on EPA's side. *See* Brief for La. Landowner's Ass'n, Avoyelles Sportsmen's League, Inc. v. Alexander (*ASL II*), 511 F. Supp. 278 (W.D. La. 1981) (No. 78-1428).

[233] Admin. Auth. to Construe § 404 of the Fed. Water Pollution Control Act, 43 Op. Att'y Gen. 197 (1979) [hereinafter Civiletti Memorandum].

[234] Telephone Interview with James W. Moorman, *supra* note 94.

[235] *Id.*

[236] Civiletti Memorandum, *supra* note 233, at 220.

[237] *Id.* at 201.

as an afterthought, the opinion concluded that the agriculture exemption should be interpreted similarly.[238]

Here, then, was a first consequence of *Avoyelles Sportsmen's League*. To this limited extent, in a program for which the Corps still exercised the enormous power-of-the-permit, no matter what a subsequent reviewing court my do to the *Avoyelles* opinions, the EPA was placed first in the saddle on how far the § 404 program would go. Which was large.

Meanwhile, however, the case itself had to survive on appeal.

X. THE APPEAL

New Orleans, Louisiana, 1983. By the time of the appeal, several political heavyweights were on hand to support the private defendants, and sub rosa the Corps, including the Louisiana Landowner's Association, the Louisiana Department of Agriculture, and even a brief from the Chamber of Commerce, but to small avail.[239] The federal government presented a single, consolidated argument that everything Judge Scott had done was correct, save in rejecting its final wetlands determination in favor of making his own, and in some dicta about whether removing vegetation alone constituted dredge and fill.[240]

The appellate court did not deny Judge Scott's right to review the government's determination, and to find it arbitrary and capricious (i.e., crazy) if the record supported him, but here he had wrongly substituted his own conclusions for those of the expert agencies.[241] At which point, given that the case had gone on so long, the appellate bench went on to make the review itself and find the determination supported by evidence, hence lawful.[242] Given the fact that all but one of the government's experts placed

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[238] *Id.* at 202.

[239] As might be expected, the Louisiana Department of Natural Resources had earlier intervened on the side of the defendants, a position Osborne described as "nauseating." Bob Anderson, *State Agency Intervenes in Suit Over Land Clearing in Avoyelles*, MORNING ADVOC., Apr. 13, 1979, at 9-B. In addition, and somewhat surprisingly, the State of Florida Department of Environmental Protection submitted a brief in favor of the EPA/DOJ position. *Id.*

[240] Avoyelles Sportsmen's League, Inc. v. Marsh (*ASL III*), 715 F.2d 897, 904 (5th Cir. 1983).

[241] *Id.*

[242] *Id.* at 907.

the Lake Long tract at ninety to ninety-eight percent wetlands, the bench's approval of the determination's eighty percent figure was a conservative call. Nonetheless, neither the environmental attack on it nor that of the landowners would prevail.

The bench also scrubbed Judge Scott's conclusions about the land clearing with equal attention, and found them reasonable. The bulldozers were pushing real dirt around, and that was dredge and that was fill.[243] That Scott also talked about mere removal of vegetation as fill as well was immaterial; the facts showed a great deal more than mere vegetation removal.[244]

And so, the case was closed. Judge Scott had done his homework in fact and law. If he went a tad overboard on his wetland conclusions, the appellate bench might have too had it seen the photographs and heard the experts. Bottomland hardwoods are in fact wet lands. After *Avoyelles,* in law as well.

XI. OPHELIA RESCUED

Prevot never did clear the other half of the Lake Long tract, nor did the Louisiana Landowners Association or anyone else. In the immediate term, Prevot and others were checked by the need for the Corps's permits.[245] Then, the backwater flooding so absent in the l977–1978 season came back with a vengeance in l979, and again in l982 and l983. Landowners who bought portions of the Lake Long tract never made a crop.[246] By that time as well, the world-wide soybean bubble had burst, countries around the world had ramped up production and the heady boom was over.[247] Facing this reality, the Department of Agriculture found other crops to bet on, with mixed results. Over the last decade, federal

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[243] *Id.* at 921-22. The defendants were left with a set of unpersuasive procedural arguments, perhaps the least of which was that Dr. Hans Van Biek was unqualified as an expert in hydrology because he had been educated in the Netherlands, a country renowned for its expertise in hydrology. *Id.* at 918 n.36. Although testifying in his own right, Van Biek also played a "summary witness" role in the case, relied on by the court to reconcile and summarize the testimony of other witnesses. Telephone Interview with Harless Benthul, *supra* note 208.

[244] *Id.* at 920-22.

[245] *See* Robert Morgan, *Court Opinion Could Tighten Land Clearing Control*, TOWN TALK, Nov. 7, 1979, at A-1.

[246] Telephone Interview with Donald Wilson, *supra* note 65.

[247] Telephone Interview with Richard Luddington, *supra* note 18.

subsidies for corn production to make biofuels for automobiles have replaced the soybean craze in subsidies and impacts,[248] which include draining every stream-side marsh and pothole in corn country, and soaring pollution loads downstream.[249] Farm state wetlands are getting hammered these days, the bottomland hardwoods of the lower Mississippi Valley less so. Economics remain the driver, largely fueled by government interventions. The most environmental litigation can do here is buy time for things to change. As it did in *Avoyelles*.

One healthy offset has been the emergence of several Agriculture programs to encourage farmers not to drain and plough marginal croplands,[250] which in a band stretching upriver from central Louisiana has led to the purchase of old, failed soybean fields and their conversion back to hardwood forests.[251] In 2009, the U.S. Fish and Wildlife Service announced that some 16,000 acres of drained soybean lands along the Ouachita River were about to be restored to bottomland hardwoods and managed as a refuge.[252] The Nature Conservancy, the Fish and Wildlife Service, state wildlife agencies, and even monies from the Corps to mitigate the manifold damage from their dams, pump stations, and levees are also at work here.[253] More to the point of this story, the Lake Long tract is now part of the Lake Ophelia National

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[248] *See* COMM. ON WATER IMPLICATIONS OF BIOFUELS PROD. IN THE UNITED STATES, WATER IMPLICATIONS OF BIOFUELS PROD. IN THE UNITED STATES (Nat'l Acad. Press 2008), *available at* http://books.nap.edu/openbook.php?record_id=12039&page=R1.

[249] *Id.*

[250] 16 U.S.C. § 3821 (2006). These monies have, at least for a time, encouraged a shift in land management within the agricultural community. *See* Press Release, U.S. Fish and Wildlife Serv., Louisiana Farmer Wins 2002 National Wetlands Conservation Award (July 1, 2003).

[251] Telephone Interview with Richard Luddington, *supra* note 18; *see also Louisiana*, U.S. FISH & WILDLIFE SERV., http://www.fws.gov/southeast/es/partners/StateFactSheets/La_longv.pdf (last visited Apr. 22, 2012); THE CONSERVATION FUND, RESTORING A FOREST LEGACY AT GRAND COTE AND LAKE OPHELIA NATIONAL WILDLIFE REFUGES (2010), *available at* http://www.fws.gov/lakeophelia/pdf/CCBAApplication.pdf.

[252] *See* Cornelia Dean, *Levee Busters Plan to Restore La. Floodplain*, TIMES-PICAYUNE, June 21, 2009, at A-16.

[253] *See* Mohr & Byrd, *infra* note 257; *see also* THE CONSERVATION FUND, *supra* note 251 (discussing The Conservation Fund's "Go Zero Program Bottomland Hardwoods Restoration Initiative.").

Wildlife Refuge, established in l985.[254] Small steps toward recovery.

Another emerging offset is the growing realization that the value of bottomland hardwoods is not simply in black bear and mallard ducks . . . as dear as they may be to the hearts of this region . . . but as well to store high spring floodwater, before it all comes down at once on heads and houses miles below. Back in l973, a flood of greater danger than any seen since the monster of l927 came down the Mississippi, topping local levees and causing the Corps to implement a worst-case contingency plan in Louisiana.[255] It worked, but it was harrowing. Equally harrowing was a report in *Science* magazine concluding that, yes, the rainfall had been heavy, but not a once-in-a-lifetime event; rather, due to the river's constriction and development of the upstream flood plain, the flood of l973 was "man-made."[256] In 2011, another "record" flood came down the Mississippi River[257] and it seems predictable that someone will do a similar study and arrive at the same conclusion. The backwater hollows, lakes, sloughs, swales, marshes, sumps, and forests of the lower Mississippi basin are the best possible antidote to downstream disaster. They will hold water and save lives.

XII. THE CONTINUING MARRIAGE

It remains a difficult marriage. There have been few quiet moments, save those where federal administrations have simply silenced the Environmental Protection Agency altogether. The two agencies have continued to differ at all levels, at times bitterly,

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[254] *Lake Ophelia National Wildlife Refuge*, U.S. FISH & WILDLIFE SERV., http://www.fws.gov/lakeophelia/ (last visited Apr. 22, 2012).

[255] *See* Raphael G. Kazmann & David B. Johnson, *If the Old River Control Structure Fails? (The Physical and Economic Consequences)*, 12 LA. WATER RESOURCES RES. INST. 10, 10-12 (1980).

[256] C. B. Belt, Jr., *The 1973 Flood and Man's Constriction of the Mississippi River*, 189 SCI. 681, 684 (1975); *see also* Robert E. Criss, *Increased Flooding of Large and Small Watersheds of the Central USA and the Consequences for Flood Frequency Predictions*, *in* FINDING THE BALANCE BETWEEN FLOODS, FLOOD PROTECTION, AND RIVER NAVIGATION 16 (Robert E. Criss & Timothy M. Kusky eds., 2009), *available at* http://www.ces.slu.edu/annualreport/FloodForum_Book_final.pdf.

[257] *See* Holbrook Mohr & Shelia Byrd, *Mississippi Delta Braces for Historic River Flooding*, NOLA.COM (May 10, 2011, 4:50 PM), *available at* http://www.nola.com/weather/index.ssf/2011/05/mississippi_delta_braces_for_h.html.

over the geographic reach of § 404,[258] a scientific manual for determining wetlands species and characteristics,[259] the wording of the EPA's guidelines for permit decisions,[260] their application and binding effect,[261] the consideration of particular impacts,[262] the consideration of cumulative impacts,[263] the scope of alternatives,[264] the role of mitigation in permit decisions,[265] the measurement and rules for mitigation,[266] the EPA's veto authority,[267] and the responsibility for enforcement and subsequent enforcement decisions.[268] Have we left anything out? Every day is wetland fight day somewhere in America.

It is consequential. On the outcomes of this "pluralistic" governance hang resource decisions the size of mountaintop mining in the Appalachians,[269] western water reservoirs,[270]

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[258] The delineation of upstream jurisdiction has been a chronic issue, including the concept of adjacent wetlands. The Corps has made expansive interpretations at times, only to be rebuked by slim and conservative majorities of the Supreme Court. *See* Rapanos v. United States, 547 U.S. 715 (2006); Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001).

[259] *See* U.S. FISH AND WILDLIFE SERV. ET AL., FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS: AN INTERAGENCY COOPERATIVE PUBLICATION (1989), *available at* www.wetlands.com/pdf/89manv3b.pdf.

[260] *See* Lawrence R. Liebesman, *The Role of EPA's Guidelines in the Clean Water Act § 404 Permit Program—Judicial Interpretation and Administrative Application*, 14 ENVTL. L. REP. 10,272, 10,275-76 (1984).

[261] Oliver A. Houck, *Hard Choices: The Analysis of Alternatives Under Section 404 of the Clean Water Act and Similar Environmental Laws*, 60 U. COLO. L. REV. 773, 775-89 (1989).

[262] *Id.* at 784-87.

[263] *See* Nat'l Wildlife Fed'n v. Norton, 332. F. Supp. 2d 170 (D.D.C. 2004) (Florida panther).

[264] Bersani v. EPA, 674 F. Supp. 405 (N.D.N.Y. 1987) *aff'd*, 850 F.2d 36 (2d. Cir. l988); *see also* Houck, *supra* note 261, at 775-89.

[265] *See* Memorandum of Agreement between the Dep't of the Army and the Envtl. Protection Agency, The Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines (Feb. 6, 1990), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/mitigate.CFM; *see also* Oliver A. Houck, *More Net Loss of Wetlands: The Army-EPA Memorandum of Agreement on Mitigation Under the Sec. 404 Program*, 20 ENVTL. L. REP. 10,212 (1990); WANT, *supra* note 12, at 6-24 to -26.

[266] *See* 33 C.F.R. § 332.3 (2008).

[267] *See* 33 U.S.C. § 1344(c) (2006) (veto authority); *see also infra* text accompanying notes 269, 273, 274.

[268] Blumm & Zaleha, *supra* note 34, at 709-10.

[269] Daniel Malloy, *EPA Vetoes Mining Permit in West Virginia*, PITT. POST-GAZETTE, Jan. 14, 2011, *available at* http://www.post-gazette.com/pg/11014/1117862-113.stm.

Canadian tar sands pipelines,[271] the disposal of mining slurries,[272] oil and gas exploration across the Alaska tundra,[273] gold mining at the mouth of Bristol Bay,[274] and, last but not least, the continuing drainage of Mississippi bottomland forests.[275] The mindsets have not fundamentally changed. The Corps remains at heart a construction company, and the EPA remains a green police force, underfunded and politically outgunned, feeling its way.

The § 404 program has had, nonetheless, a profound impact on the Corps. Having inherited the portfolio it has had to staff, and after the *Callaway* case, one began seeing wildlife biologists, plant and fisheries specialists, soil scientists, resource economists, and others who could perform the required analyses. While not always the case, this new cadre, including environmental lawyers, tended to be greener than the traditional run of engineers. They have now been in place for several decades. They have moved up the grade scale, and assumed larger functions. Neither they nor the EPA may win every permit decision, or even most of them, but these people, on the ground, in permitting and enforcement, trying to do their best, do better than anything seen before.

Decisions like *Avoyelles* empower them.

XIII. REQUIEM

One of the phenomena of this case was the depth in which its presiding magistrate dug into it, facts and law, and made them his own. What would lead him to do so? It seems to have been, at

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[270] Keith Schneider, *Colorado Dam Would Ruin Wildlife Area, an E.P.A. Official Says*, N.Y. TIMES, Aug. 30, 1989, *available at* http://www.nytimes.com/1989/08/30/us/colorado-dam-would-ruin-wildlife-area-an-epa-official-says.html.

[271] Elana Schor, *EPA Seeks Expanded Review of Proposed Oil Sands Pipeline*, N.Y. TIMES, June 7, 2011, *available at* http://www.nytimes.com/gwire/2011/06/07/07greenwire-epa-seeks-expanded-review-of-proposed-oil-sand-60126.html (A link to a PDF copy of the EPA's comments is available at the bottom of the article.).

[272] Coeur Alaska v. Se. Alaska Conservation Council, 557 U.S. 261 (2009).

[273] *See* E-mail from Vicki Clark, Legal Director, Trustees for Alaska, to author (Feb. 20, 2012) (on file with author) (describing conflicts between the Corps over oilfield development in Alaska).

[274] *See* Manuel Quinones, *Foes of Alaska Mine Go to Bat for EPA Veto Power*, SAVE BRISTOL BAY, July 21, 2011, *available at* http://www.savebristolbay.org/for-the-press/news-archive/water-policy-foes-of-alaska-mine-go-to-bat-for-epa-veto-power-energy-and-.

[275] Bd. of Miss. Levee Comm'n v. EPA, No. 11-60302, 2012 WL 695844 (5th Cir., Mar. 6, 2012) (upholding EPA veto of Corps Yazoo Area Pump Project).

least, an awareness of place and what he saw around him. He took the time to look out the window. Wilson recalls a down moment in chambers, early on in the trial, where Judge Scott mused about driving from Alexandria to Baton Rouge.[276] Just a few years back it was all swamp, tupelo gum, cypress, and hardwood trees. The next day it was soybean fields. "Judge Scott was like, how did they do that?"[277] When a judge actually feels what a case is about, plaintiffs are usually well on their way.

He was also in the same way aware of the human impacts, evident from his treatment of several *Avoyelles* witnesses, which, while perhaps part of his DNA, may also have been heightened by his experience with the desegregation cases. Here, again, were people being shrugged off by a government that was going to great pains to avoid doing what the law intended it do.[278]

Judge Scott took senior status on the federal bench in l984, and was still serving, although quite ill, until his death in 2002. They say that the best requiem for any human being is the opinion of other people on how they did. While the *Avoyelles* case was hardly the biggest or most controversial one he ever handled, it seems clear that he developed a passion for it and, on that journey, earned a level of respect rarely expressed by the lawyers and witnesses involved.

Fred Disheroon, U.S. Department of Justice:

> I really liked Judge Scott, thought he was a terrific judge . . . historically, you wouldn't have thought one from Louisiana

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[276] Telephone Interview with Donald Wilson, *supra* note 65.

[277] *Id.*

[278] Coincidence or no, several of the seminal environmental opinions in American law were authored by judges who had fought their way through segregation; Justice Thurgood Marshall directed the litigation strategy of the NAACP, Judge Skelly Wright's anti-segregation opinions in New Orleans led to his transfer to Washington, D.C. lest he be assaulted or killed. Reading the opening lines of their opinions, e.g., *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) (Justice Marshall writing); and *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971) (Justice Wright writing), one finds a direct path from civil rights to environmental rights, a transition that continues today on a world-wide stage. *See* OLIVER A. HOUCK, TAKING BACK EDEN: EIGHT ENVIRONMENTAL CASES THAT CHANGED THE WORLD (2010) (describing the transition from civil to environmental rights in, inter alia, India, the Philippines, and Chile).

> would be so progressive.[279] As for the errors on appeal: He was in unchartered territory with these [wetland] determinations, no real guidance on how exactly to go about it. So it wasn't surprising that he would make his own. He saw that as his job.[280]

James T.B. Tripp, Environmental Defense Fund:

> When I first met him he struck me as being a kind old gentleman . . . but boy was he well grounded. He saw through the expert witnesses for good or bad. He was willing and able to be educated on these complicated wetland systems. He was a first-rate, practical thinker, and his opinions were very thorough.[281]

Michael Osborne, National Wildlife Federation:

> He was a gentleman through and through. And he worked as hard as any judge I ever knew. This was the only case I had before him, and I regret that.[282]

Don Wilson, Avoyelles Sportsmen's League:

> He was an old curmudgeon, but he had handled all the big desegregation cases in Rapides [Parish], Avoyelles, and Point Coupe, maybe they make you that way. He was bright and absolutely fearless . . . wouldn't let anyone blow smoke up his ass. I tried and lost cases before him, but he was always fair.[283]

Dale Hall, U.S. Fish and Wildlife Service:

> In all the cases I have been involved in, no judge has ever risen to the level of professionalism that Nauman Scott had. He was clear and concise in his rulings. He wanted to understand. If there was something he didn't understand in the case he would stop the attorney and say, say that again,

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279 Telephone Interview with Fred Disheroon, *supra* note 136.
280 *Id.*
281 Telephone Interview with James T.B. Tripp, *supra* note 132.
282 Telephone Interview with Michael Osborne, *supra* note 152.
283 Telephone Interview with Donald Wilson, *supra* note 65.

> or what did you mean there. He was very courteous with everybody. He showed a great deal of compassion.[284]

And, in dissent, Marc Dupuy, for the landowners:

> [Scott's ruling was] stupid . . . an absurdity . . . so far out in left field that others wouldn't follow it.[285]

Technically, as a matter of ninety percent wetland versus eighty percent wetland, Dupuy was of course correct. But the language is sour. Then again, he did not win the case.

Overall, the consensus is quite strong.

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[284] Telephone Interview with Dale Hall, *supra* note 166.

[285] Dupuy Oct. Interview, *supra* note 2. When the Lake Long clearing was enjoined, a bank owned by Albert Prevot went into bankruptcy. An audit performed by federal regulators revealed that Prevot had engaged in bank fraud, moving mortgages from bank to bank and apparently profiting from each transfer, for which he was criminally convicted. Telephone Interview with Donald Wilson, *supra* note 65.