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ARTICLES

BREAKING THE GOLDEN RULE: JUDICIAL REVIEW OF FEDERAL WATER PROJECT PLANNING

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The U.S. Army Corps of Engineers is one of the oldest institutions of the federal government, and its dams, levees, and waterways have changed the American landscape. It is also a conflicted organization, responding both to the President and to the Congress, and struggles between them over Corps direction date back to the age of Jackson. The economic and political stakes in these endeavors are huge. So are their impacts, which have eliminated towns, prime farmland, native reservations, wildlife species, and entire ecosystems. The law behind Corps projects is scanty and the discretion virtually unbridled, but for a single rule: the benefits, "to whomsoever they may accrue," are to exceed the costs. As modest as this requirement may appear, it has become water resource development's Golden Rule. And a field of conflict.

Over the years, a growing appetite for new Corps projects invited gross manipulations of benefits and costs to justify them. Presidential attempts to rein them in were frustrated by a Congress intent on funneling yet more Corps work back home. Starting in the l970s, local communities, sportsmen's organizations, and others then turned to the third branch of government for relief, the courts. While these plaintiffs brought several claims, the most fundamental was that the benefits did not exceed the costs, not even close. In the vanguard of these cases was a navigation canal along the Gulf Coast called Lower Atchafalaya, Bayous Chene, Boeuf, and Black.

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At issue was whether the judiciary had any right to review these matters at all. The case encapsulate the issue, which remains with us to this day.

What follows is at one level the story of the Lower Atchafalaya litigation, told as history and led by its actors to an uncertain conclusion. Behind it, however, is the nature of this remarkable institution, the Corps of Engineers, and of executive attempts to control it, leading to President Carter's proposal to kill as many as eighty Corps projects at the start of his term, again on benefit-cost grounds. Including the Lower Atchafalaya project. The two stories are wound together in time, and in this recitation as well. They will, among other things, illustrate both the power and limits of law. They will also illustrate the difficulty in rethinking institutions on which so many, for many different agendas, have come to depend.

> I am at the district offices of the Army Corps of Engineers in New Orleans, about fifty feet from the Mississippi River. No other building is allowed on the levee top for several hundred miles. The meeting, about a Corps project to the west, is tense and fueled by pots of coffee. At the break, we all head for the men's room (if the building hosts women they are not in view) and I wait my turn, as does a heavyset man who has sat all morning in the rear, saying nothing. When we finally approach the wall, staring straight ahead at the tiles, we are the last remaining in the room. Conversations are rare in these circumstances, but suddenly I hear my companion say, as if to no one, "you are arguing about the wrong project." As I say nothing, he continues, "check out Chene, Boeuf, and Black. It's a joke." It is late Spring, 1972.[1]

In 1968 the United States Congress authorized the Army Corps to dredge a large canal across 900 square miles of South Louisiana wetlands to the Gulf of Mexico.[2] The project was called Lower

1. Personal recollection, related in OLIVER A. HOUCK, DOWN ON THE BATTURE 161 (2010).

2. U.S. ARMY ENG'R DIST., NEW ORLEANS, LA., FINAL ENVIRONMENTAL STATEMENT, ATCHAFALAYA RIVER AND BAYOUS CHENE, BOEUF, AND BLACK, LOUISIANA 1 (1973) [hereinafter FES]; S. La. Envtl. Council, Inc. v. Rush, 12 Env't Rep. Cas. (BNA) 1844, 1846 (E.D. La. 1978).

Atchafalaya, Bayous Chene, Boeuf, and Black, and its benefit-to-cost ratio was said to be 1.2:1, a margin so fine that the Corps normally rejected proposals below it out of hand.[3] The impetus for the canal came from two oil rig manufacturers near Morgan City, Louisiana, that wanted to get larger platforms out to the Gulf.[4] Alternate routes existed but this would save them time, for which taxpayers would pay an estimated $33 million (over $219 million in 2012 dollars), although the costs of these projects routinely skyrocketed once approved.[5] For McDermott and Avondale shipyards, it was all gravy; they would not pay a dime.

The potential environmental effects were severe. Scientists predicted the loss of 15,000 acres of wetlands to the project, the damage spreading laterally for miles.[6] Canals like these funneled saltwater deep into the interior, destroying freshwater systems to the north.[7] At the same time they acted like a tourniquet on wetlands fronting the Gulf, which depended on the offset of fresh flows.[8] They also became entry paths for coastal storms and hurricanes that came with regularity, at times with tremendous force.[9] Perhaps most consequentially, channeling the lower river threatened the future of a delta then forming in Atchafalaya bay, the largest land gain in

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3. FES, *supra* note 2, at 1-2. For the 1.2:1 baseline, see BD. OF ENG'RS FOR RIVERS AND HARBORS, U.S. ARMY CORPS OF ENG'RS, A HISTORY OF THE BOARD OF ENGINEERS FOR RIVERS AND HARBORS 9 (June 1980). "Congress normally requires at least a 1:1 ratio; the board seldom recommends a project unless the benefit exceeds the cost by a ratio of 1.2:1 . . . because many intangibles cannot be defined. For instance, the ability to forecast the volume of freight on a river is at best theoretical; so is the life expectancy of any single project." *Id.* (quoting *The Taxpayers' Own Diggers and Builders*, FORTUNE, Apr. 1964, at 123, 129); *see also* 40 C.F.R. § 230.10 (2012).

4. *See* FES, *supra* note 2, at 23; *Rush*, 12 Env't Rep. Cas. (BNA) at 1850.

5. *See* FES, *supra* note 2, at 26-28. Correcting for inflation, the total cost of such a project in 2012 would be $218,313,017.24. US INFLATION CALCULATOR, http://www.usinflationcalculator.com/ (enter base year: 1968, amount: 33,000,000, end year: 2012; then follow "calculate" hyperlink) (last visited Jan. 7, 2013). For the routine cost overruns of these projects, beyond inflation, see *infra* text accompanying notes 34-35, 110-11, 115-20.

6. *See Rush*, 12 Env't Rep. Cas. (BNA) at 1847.

7. *See* W.B. Johnson & J.G. Gosselink, *Wetland Loss Directly Associated with Canal Dredging in the Louisiana Coastal Zone, in* PROCEEDINGS OF THE CONFERENCE ON COASTAL EROSION AND WETLAND MODIFICATION IN LOUISIANA: CAUSES, CONSEQUENCES, AND OPTIONS 60, 60 (Donald F. Boesch ed., 1982); James H. Stone et al., *Effects of Canals on Freshwater Marshes in Coastal Louisiana and Implications for Management*, *in* FRESHWATER WETLANDS: ECOLOGICAL PROCESSES AND MANAGEMENT POTENTIAL 299, 314 (Ralph E. Good et al. eds., 1978).

8. *See* Stone, *supra* note 7, at 314-15.

9. The most severe of these in recent times were Hurricanes Katrina and Rita, both of which were funneled up a similar Corps navigation canal, the Mississippi River Gulf Outlet, and into the City of New Orleans and Parish of St. Bernard. *See generally In re* Katrina Canal Breaches Consol. Litig., 647 F. Supp. 2d 644, 664-67 (E.D. La. 2009).

territorial America.[10] We had already destroyed the Mississippi River delta, exactly this way.[11]

None of which seemed to matter a great deal. The recently enacted National Environmental Policy Act ("NEPA") required that these impacts be considered, but whether it offered protection from such a dubious project remained to be seen.[12] Equally dubious about the Lower Atchafalaya project was the Corps' calculations of benefits and costs. On the debit side, Corps planners tallied up its construction bill and then, for environmental damage, added in money lost to fishers and trappers (which came to a few dollars an acre).[13] End of story. The protection from hurricanes that these wetlands provided remained unquantified, as was their uptake of pollutants like sewage and industrial wastes that otherwise slid into the Gulf, as were the many species not hunted or fished that summered, wintered, and migrated through these wetlands.[14]

If the project costs were shortchanged, however, the alleged benefits bordered on fraud. However felicitous the savings for McDermott and Avondale in shipping time, they would not top the $30-plus million price tag, so other benefits had to be identified. They were found in the proposition that Gulf oil rigs, come hurricane time, would be unhooked from the sea floor and be towed to the protection of on-shore wetlands,[15] which stood perhaps two feet high, facing storm surges at twenty feet and more.[16] The Corps knew these benefits to be chimera well before it began turning the first scoop of marsh into spoil.[17] Yet it went forward.

The Lower Atchafalaya lawsuit that followed was important for its environmental consequences, but it raised larger issues as well. The first was exactly who among three competing powerhouses—the Corps, the Congress, and the President—was responsible for the decision. The second and related issue was whether the crux of the

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10. Affidavit of Sherwood M. Gagliano, Ph.D. at 10, S. La. Envtl. Council v. Hunt, Civ. No. 74-698 (E.D. La. 1974) [hereinafter Gagliano affidavit].

11. The Mississippi delta has been destroyed both by large navigation canals and by subsidiary oil and gas canals, the effects of which are identical. *See* Johnson & Gosselink, *supra* note 7, at 60-68; *see also* Oliver A. Houck, *Land Loss in Coastal Louisiana: Causes, Consequences, and Remedies*, 58 TUL. L. REV. 3, 40-41 (1983) (discussing canal effects on plant life, and in turn, the coast).

12. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370f (2006). For the reach of this statute's protections, see the discussion of *Strycker's Bay*, *infra* text accompanying notes 308-14 (rejecting the substantive force of NEPA).

13. FES, *supra* note 2, at 22-25; S. La. Envtl. Council, Inc. v. Rush, 12 Env't Rep. Cas. (BNA) 1844, 1854 (E.D. La. 1978).

14. *See* FES, *supra* note 2, at 24-25; *Rush*, 12 Env't Rep. Cas. (BNA) at 1854-55.

15. *Rush*, 12 Env't Rep. Cas. (BNA) at 1850.

16. *In re* Katrina Canal Breaches Consol. Litig., 647 F. Supp. 2d 644, 666-67, 676-77, 692, 696 (E.D. La. 2009) (describing storm surges).

17. *See Rush*, 12 Env't Rep. Cas. (BNA) at 1850-51.

decision, a highly flawed cost-benefit determination, was subject to judicial review. The answers to these questions, so fundamental to water resources development in the United States, are as contentious and unresolved as they were nearly two centuries earlier when they first arose. In the 1970s, this case and others began challenging water projects so doubtful that they were difficult to defend on any ground, this time under a President with no use for Corps manipulations. They became an open war.

This is the story of that project, and that war.

1. "ESSAYONS!" (LET US TRY)

> *President Truman . . . was strong enough to fire General Douglas MacArthur but, so far, the Army Engineers have successfully defied him. . . . A small, powerful and exclusive clique of about two hundred Army officers controls some fifty thousand civilian employees. . . . No more lawless or irresponsible Federal group than the Corps of Army Engineers has ever attempted to operate in the United States, either outside of or within the law.*
>
> *Harold L. Ickes, U.S. Secretary of the Interior, 1951*[18]

Similar frustration has been expressed by nearly every President back to Andrew Jackson. To begin with, there is the question of what the U.S. Army is doing building canals for local oil rig manufacturers, to which the only answer is mission creep. Military engineers first appeared during the Revolutionary War as land animals, cutting trenches and building fortifications against the British.[19] In 1802, the Corps of Engineers was formally established, with West Point training its cadre, and it was at hand in 1808 when the Secretary of the Treasury issued a report calling for the development of the nation's roads and canals.[20] Corps engineers went west with the land surveys, Indian wars, and railroads that opened the continent, but western congressmen were already pulling them toward waterways, starting with snag removal (blowing things up was already in their repertoire) and then channel work (so was digging trenches), which greatly expanded on the Mississippi River.[21] By the end of the nineteenth century, navigation had become its

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18. Oliver A. Houck, *New Roles for the Old Dam Builder?*, NAT'L WILDLIFE, Aug.-Sept. 1975, at 13, 13 (internal quotation marks omitted).

19. *See* Todd Shallat, *Water and Bureaucracy: Origins of the Federal Responsibility for Water Resources, 1787-1838*, 32 NAT. RESOURCES J. 5, 9-16 (1992); A. Dan Tarlock, *A First Look at a Modern Legal Regime for a "Post-Modern" United States Army Corps of Engineers*, 52 U. KAN. L. REV. 1285, 1300-01 (2004) (discussing the early history of the Corps of Engineers).

20. Tarlock, *supra* note 19, at 1300; *see also* MARTIN REUSS, U.S. ARMY CORPS OF ENG'RS, RESHAPING NATIONAL WATER POLITICS: THE EMERGENCE OF THE WATER RESOURCES DEVELOPMENT ACT OF 1986, at 3-4 (1991).

21. Tarlock, *supra* note 19, at 1301; REUSS, *supra* note 20, at 4-6.

reason-to-be.

The Corps civil works program is an institution unlike any in America.[22] Largely civilian, it is directed by the Army and nominally part of the executive branch of government.[23] Its "military patina" serves to communicate professionalism and independence,[24] but as a practical matter its activities have always been tied to a Congress with its own view about big construction projects that send money back home. Corps West Pointers, further, have been deeply trained in obedience and a damn-the-torpedoes ethic captured in 1921 by the trade journal *Military Engineer* as: "'*the power to resist the temptation to temporize and delay while searching for the ideally perfect course,*'" and "'*the determination to abide by decisions previously made.*'"[25] Put more simply, thirty years later in *Soldiers and Scholars*, "[The West Point officer] is able to examine a situation, *come to a quick decision, and stick to it.*"[26] Undeniably admirable qualities in warfare, they would become obvious handicaps in planning and managing the largest water projects in the world. To say nothing of responding to their environmental impacts, which became increasingly apparent over time.

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22. To begin with, the program is enormous. As of 2009, the approximately $10.5 billion per year program, headquartered in Washington, D.C., supervised eight regional engineer divisions, thirty-eight districts nationwide, and a $125 billion water infrastructure including more than 600 dams, 920 harbors, and 11,000 miles of inland waterways. *See* MELISSA SAMET, AM. RIVERS AND NAT'L WILDLIFE FED'N, A CITIZEN'S GUIDE TO THE CORPS OF ENGINEERS 6, 9, 24 (2009), *available at* http://www.americanrivers.org/assets/pdfs/reports-and-publications/citizens-guide-to-the-corp.pdf; *see also President's Fiscal Year 2009 Budget for U.S. Army Corps of Engineers' Civil Works Released*, U.S. ARMY CORPS OF ENGINEERS (Feb. 4, 2008), http://www.spn.usace.army.mil/newsrelease/newsrelease_02_04_08.html.

23. As of 2009, the program housed 650 military personnel out of more than 35,000 employees, not counting a large number of private company contractors. SAMET, *supra* note 22, at 10.

24. Elizabeth B. Drew, *Dam Outrage: The Story of the Army Engineers*, THE ATLANTIC, Apr. 1970, at 53. The article continues: "The Corps has mastered the art of convincing people that its projects are desirable, and so the projects are not examined very closely. Corps engineers are impressive in their command of details that non-engineers cannot understand, assiduous in publishing books that show what the Corps has done for each state, and punctilious about seeing that all the right politicians are invited to each dedication of a dam." *Id.*

25. ARTHUR E. MORGAN, DAMS AND OTHER DISASTERS: A CENTURY OF THE ARMY CORPS OF ENGINEERS IN CIVIL WORKS 37-38 (1971) (quoting Gilbert A. Youngberg, *The Civil Activities of the Corps of Engineers: Their Value as Military Training, and Their Relation to the National Defense*, 13 MIL. ENGINEER 73, 76 (1921)). Mr. Morgan was the first Chairman of the Tennessee Valley Authority, and worked in hydraulics, engineering systems, and water management throughout his career. Harry Wiersema, *Forward* to *id.*, at xiv-xvii. The thesis of his book is that "the training of the Corps of Engineers is of a kind unsuited for civil engineering needs," which has led to a record of "consistent and disastrous failures." *Id,* at xxiii.

26. *Id.* at 38 (emphasis added).

The Corps threw itself into the mission with messianic gusto.[27] According to an official history:

> They were the pathfinders sent out by a determined government at Washington. . . . "[T]he last segment of the great Western Empire was soon annexed. These things were all accomplished by the application of America's greatest power. That is the power of Engineering Character, Engineering Leadership, and Engineering Knowledge. All employed to fulfill our destiny."[28]

The vision was an exalted one. As early as 1825 the Chief of Engineers promoted construction of the Chesapeake and Ohio Canal in the following terms: "When a nation undertakes a work of great public utility . . . the revenue is not the essential object to take into consideration: its view are of a more elevated order."[29] Alas, within a few decades the Canal, still incomplete, was overtaken by a railroad line and sought bankruptcy.[30] This and similar outcomes changed Corps' destiny not a whit, however, and what emerged in the twentieth century was an organization with a fixed purpose, a string of engineering achievements, an ego to match them, and widespread popularity with a Congress whose members wanted more.[31] It was a heady cocktail.

Not everyone bought in. Strict constructionists in Congress, following the footsteps of Jefferson, feared the intrusion of the federal government in state and regional affairs (the very legality of this intrusion was a live issue for decades),[32] and fiscal conservatives became apoplectic when the actual bills came due.[33] As early as 1836, at a time when almost all Corps work was in navigation, the House Ways and Means Committee found twenty-five project budgets rife with "useless" and "fallacious" estimates, and cost overruns approaching 300%.[34] "Unfortunately for the public treasury," it wrote with ill-concealed irony, "some accident has interposed, some foundation stone in the edifice has been displaced—some unexpected change in the current of surrounding waters has

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27. *See* Shallat, *supra* note 19, at 19; Drew, *supra* note 24, at 52-53 (describing the Corps' sense of "destiny").

28. Drew, *supra* note 24, at 52 (quoting Corps' official history).

29. Shallat, *supra* note 19, at 18. For a virtually identical Corps' statement in 1839 concerning a Delaware project, see *id*. at 17.

30. *See id.* at 18.

31. *See* Drew, *supra* note 24, at 62.

32. Shallat, *supra* note 19, at 22. The constitutional authority of the federal government to construct public works was an acute question in the early 1800s. *See* ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON 19 (1946) ("Madison . . . while refusing to concede the constitutionality of internal improvements, he urged their importance, and, like Jefferson himself, advised amending the Constitution in order to sanctify them.").

33. *See* Shallat, *supra* note 19, at 18.

34. *Id.* at 21.

been detected, or some pelting violence of wind or ice, or other resistless power has occurred," to require yet greater expenditures, or even doom the enterprise.[35] It was to be a recurrent phenomenon. Not far from the Lower Atchafalaya project, a Corps navigation canal on the Pearl River of Louisiana, once completed, was then abandoned because a promised throng of shippers never materialized.[36] Who could have predicted such a thing?

In l837 President Jackson took up the cry, inveighing against "unconstitutional expenditure, corrupt influence, and unidentified powerful interests."[37] The following year the Corps Chief of Engineers was indicted for fraud and Congress, in a rare mood, suspended funding for all rivers and harbors projects.[38] It was to be a high-water mark for the presidency in the three-way tug-of-war over water resource decision making.

What happened next was also unplanned, but inevitable. Congress began extending the Corps' mission to other favored projects to include, over time, flood control, hydroelectric power, beach erosion prevention, recreation, and even pollution control by flushing wastes downstream.[39] Two conflicting dramas accompanied this expansion. On the one hand were White House efforts to structure a planning process that would separate the wheat from the chaff and justify the call on the public fisc.[40] On the other hand was resistance by Congress to any meddling into what it considered to be its exclusive prerogative: delivering water projects to constituents back home.[41] This conflict spilled over into the twentieth century like a pair of brawling cats, leading to a major showdown in 1936 and the emergence of the rule that would, ostensibly, control the decision on the Lower Atchafalaya project and a myriad like it all over

35. *Id*. at 21-22 (internal quotation marks omitted).

36. *See* U.S. ARMY CORPS OF ENG'RS, PEARL RIVER BASIN 97 (undated) [hereinafter PEARL RIVER BASIN], *available at* http://www.mvn.usace.army.mil/pao/bro/wat_res98/WaterRes98_8of16.pdf.

37. Shallat, *supra* note 19, at 22. An anonymous but apparently widely read pamphlet of the time warned against the "monarchial" influence of "a privileged order of the very worst kind—a military aristocracy." *Id.* at 21 (quoting EDGAR DENTON, THE FORMATIVE YEARS OF THE UNITED STATES MILITARY ACADEMY, 1775-1833, at 246 (1964)).

38. *Id.* at 22 (General Charles Gratiot was the Corps Chief of Engineers under indictment).

39. Drew, *supra* note 24, at 53.

40. *See* REUSS, *supra* note 20, at 6-15 (describing tug-of-war between Congress and the White House up to the Flood Control Act of 1936); JOSEPH L. ARNOLD, OFFICE OF HISTORY, U.S. ARMY CORPS OF ENG'RS, THE EVOLUTION OF THE 1936 FLOOD CONTROL ACT 1-10 (1988); BEATRICE HORT HOLMES, A HISTORY OF FEDERAL WATER RESOURCES PROGRAMS, 1800-1960, at 4-11 (1972).

41. *See* REUSS, *supra* note 20, at 6-15; ARNOLD, *supra* note 40, at 5-9; HOLMES, *supra* note 40, at 4-11.

America, waiting for their signal to proceed. The rule was simple: benefits were to exceed costs.

2. THE GOLDEN RULE

> *It is a ritualistic farce . . . . I always thought of my organization as being like the Catholic Church. I always envisioned them coming down the aisle, swinging their incense, carrying the Corps colors, chanting Benefit-Cost.*
>
> *Col. Edwin R. Decker*
> *District Engineer*
> *U.S. Army Corps of Engineers*[42]

Both Presidents Roosevelt believed strongly in a federal role to develop the resources of the country on a planned, heroic plane. Theodore Roosevelt, over great opposition, launched federal management programs for forests and wildlife;[43] he proposed an "Inland Waterways Commission" ("IWC") to plan water development as well, but Congress, smelling a rat, had none of it.[44] Twenty years later Franklin Delano Roosevelt ("FDR"), prompted by the Dust Bowl and Great Depression, launched sweeping programs in agriculture and soil conservation to save the American breadbasket, and saw the same need for water projects, marching randomly forward without standards or a process to link them to national goals.[45] This was the era of welfare economics and "rational" development, which was exactly what water development seemed to lack.[46] FDR created a "National Resources Committee" ("NRC") to perform the same functions intended by Theodore with his IWC.[47] It met a similar reception on Capitol Hill.[48]

Since the early nineteen hundreds, meanwhile, feeling increased pressure from Congress to build patently unjustified projects, the Corps itself proposed a review mechanism to determine which projects were deserving.[49] At least for a time, its Board of Rivers and

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42. Bruce Ingersoll, *The Battle for Illinois Rivers*, CHI. SUN-TIMES, Apr. 23, 1972, at 16 (internal quotation marks omitted).

43. STEWART L. UDALL, THE QUIET CRISIS 117, 142-48 (1963) (describing the President's initiatives in setting aside the first national forests and national wildlife refuges).

44. ARNOLD, *supra* note 40, at 12; HOLMES, *supra* note 40, at 7-8 (finally authorized in 1917, no members were appointed and the IWC was deauthorized soon afterward in 1920).

45. *See* UDALL, *supra* note 43, at 152-57.

46. Tarlock, *supra* note 19, at 1302; *see also* Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 167-169 (1999).

47. ARNOLD, *supra* note 40, at 27, 39, 83.

48. Ultimately, as it had the IWC, Congress abolished the NRC in 1943. *See id.* at 92.

49. *See* BD. OF ENG'RS FOR RIVERS AND HARBORS, U.S. ARMY CORPS OF ENG'RS, A HISTORY OF THE BOARD OF ENGINEERS FOR RIVERS AND HARBORS 9 (June 1980)

Harbors performed this function with vigor, turning back shoddy proposals that arose from the ranks.[50] Executive efforts both to develop more formal standards and to impose even modest user fees on the beneficiaries of these projects, however, went nowhere.[51] Whatever the President or the Corps might propose, Congress held the trump cards in the game. No project could be authorized without congressional action, and, in reverse, Congress could authorize and fund anything it wanted simply by passing a bill. By this time in history, members of Congress were hooked at the mouth to water projects and the Corps was delivering them.[52] Water resources legislation proposed in 1935 was so riddled with "pork" that a congressman from California suggested adding "a dam around the United States Treasury to protect the taxpayers."[53]

FDR remained skeptical and resistant to any expansion of the Corps mission to satisfy yet more congressional appetites.[54] Believing strongly that flood damage stemmed largely from poor conservation practices, he opposed a wholesale plunge of federal monies into flood control structures, which seemed an uncontrollable crevasse of their own.[55] In 1927, unprecedented losses along the Mississippi (when prior structures failed) had injected the Corps into aggressive protection schemes along its lower stretches, but there had to be an endpoint.[56] Even through the terrible early years of the Depression, FDR remained negative, until another run of floods across America's midsection made further resistance futile.[57] Not

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[hereinafter BD. OF ENG'RS]. The Board was first appointed by the Chief of Engineers in July l902. ARNOLD, *supra* note 40, at 12-13.

50. For its early track record in rejecting projects, see BD. OF ENG'RS, *supra* note 49, at 48.

51. For the Board's early conflicts with Corps and congressional authority, see *id.* at 47-67. Congressman Rainey of Illinois spoke for many colleagues when he stated that "a great committee of this House has not the moral right to surrender its functions to a purely executive board." *Id.* at 58. For congressional overrides of the Board, see *id*. at 28-29 (authorizing major navigation work in the Arkansas River Basin that the Board found unjustified).

52. REUSS, *supra* note 20, at 6-9; ARNOLD, *supra* note 40, at 27-57.

53. ARNOLD, *supra* note 40, at 54 (quoting Representative Hoeppel of California).

54. *Id.* at 50-54.

55. *Id.* at 25-27.

56. The Flood Control Act of 1917, Pub. L. No. 64-367, 39 Stat. 948 (codified as 33 U.S.C. §§ 701-703) and the Flood Control Act of 1928, Pub. L. No. 70-391, 45 Stat. 534 (codified as 33 U.S.C. §§ 702a-702m, 704) each followed disastrous floods along the Lower Mississippi, thrust the Corps into the flood control business in that region. ARNOLD, *supra* note 40, at 13, 14, 20-22.

57. Floods in 1934 sparked congressional pressure to extend the Corps work to flood control; the pressure was also stoked by early competition with the Soviet Union, which had "completed the world's first 'major' dam in 1932," leading a later Senator to orate: "Can ruthless atheists mobilize and harness their treasures of God-given wealth to defeat and stifle freedom-loving peoples everywhere?" Christine A. Klein, *On Dams*

without a pound of flesh, however.

On its own for several decades, the Board of Rivers and Harbors had been prioritizing project proposals based upon their benefit-to-cost ratios.[58] As the Chief of Engineers testified before Congress in 1936:

> Many, many thousands of these flood-control projects throughout the country cannot be figured—by us, at least—to show a benefit that would stand up against the cost. We therefore attempted to submit to the committee, at the second session, those things from the very voluminous records that showed the cost-benefit ratio as being at or better than 1 to 1, and put aside—which is what you call rejection—those that did not meet that standard.[59]

To which he quickly and diplomatically added: "Of course, we are not rejecting anything. The committee has to do that."[60]

From this and the surrounding colloquy, two things became apparent. The Corps recognized what it had to recognize: the ultimate go/no-go call was for the Congress to make. But Congress, several times, also recognized that it was neither capable of, nor interested in, delving into the economics behind the call. As Senator Maloney remarked, "I do not think the members of this committee or the Flood Control Committee should devise a list of the national federal flood control projects worthy of federal expenditure, and that this list should rely mainly on the Corp's previous recommendations."[61] The Chairman echoed his colleague: "We have to decide whether we are going to leave them in or throw them out [and] I do not know how we can do that any better than by getting a report from the Army Engineers."[62] To which, Senator Copeland went one better: "I am unwilling to have included in the bill any project which has not been given the endorsement of the Army Engineers."[63] In short, Congress might be the ultimate decider but it

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and Democracy, 78 OR. L. REV. 641, 647 (1999); *see also* ARNOLD, *supra* note 40, at 59-96 (floods of '34, '35, and '36).

58. *See* BD. OF ENG'RS, *supra* note 49, at 47-50.

59. *Flood Control Act of 1936: Hearings on H.R. 8455 Before the S. Comm. on Commerce*, 74th Cong. 197 (1936) [hereinafter *Hearings on H.R. 8455*] (statement of Major Gen. Edward M. Markham, Chief of Eng'rs, U.S. Army).

60. *Id*.

61. *Hearings Before the Committee on Flood Control on H.R. 6803: A Bill to Authorize Funds for the Prosecution of Works for Flood Control and Protection Against Flood Disasters*, 76 Cong. 4895 (1935) (statement of Sen. Francis Maloney).

62. *Hearings on H.R. 8455*, *supra* note 59, at 195 (statement of Sen. Royal S. Copeland, Chairman, S. Comm. on Commerce).

63. ARNOLD, *supra* note 40, at 78. By the time the Lower Atchafalaya project came around, the hands-off policy had become explicit. *See* THEODORE M. PORTER, TRUST IN NUMBERS: THE PURSUIT OF OBJECTIVITY IN SCIENCE AND PUBLIC LIFE 157 (1995) (the powerful Chair of the Senate Committee on Rivers and Harbors stated, "These are the finest graduates of West Point, he thundered, and it would be 'presumptuous' to

would not gainsay the calculations of the Army Engineers.

When the dust had settled, Congress had passed the Flood Control Act of 1936 authorizing the Corps to proceed with hundreds of new projects for flood control and related purposes, with the caveat that "the benefits to whomsoever they may accrue are in excess of the estimated costs."[64] Over time, the benefit-to-cost standard was embellished upon in a 1962 congressional report referred to as Senate Document 97,[65] and in a set of Principles and Standards adopted by the executive branch in 1973.[66] Ever more elaborate in its calculation, the ratio was enshrined as the Golden Rule for water project development, guided by an executive branch Water Resources Council.[67] The Council and its Principles and Standards were part of a grand and aspirational scheme, but it would bump headfirst into the equally grand aspirations of congressmen with their own notions about water projects, and those of the Army Engineers whose budget and future now depended on them. Intended as a shield against low-end proposals, the benefit-cost standard confronted the Corps distressingly often with two options: catering to the wishes of

challenge their calculations." (quoting JOHN A. FEREJOHN, PORK BARREL POLITICS: RIVERS AND HARBORS LEGISLATION, 1947-1968, at 21 (1974))).

64. 33 U.S.C.A. § 701a (1936); *see also* REUSS, *supra* note 20, at 17 (authorizing the construction of over 200 projects). A water resources expert characterized the 1936 Act as a "confused and confusing piece of legislation." ARNOLD, *supra* note 40, at vii (quoting Robert de Roos & Arthur A. Maass, *The Lobby that Can't be Licked*, HARPERS, Aug. 1949, at 23). A "prominent historian of the New Deal" called it "ill conceived and wretchedly drafted." *Id.* (quoting WILLIAM E. LEUCHTENBURG, FLOOD CONTROL POLITICS: THE CONNECTICUT RIVER VALLEY PROBLEM, 1927-1950, at 96-105 (1953)). Nonetheless, the lasting legacies of that Act were (1) the thrust of the Corps into flood control and related purposes, and (2) the benefit-cost rule. The benefit-cost approach has since become a standard evaluation technique for all government proposals and a subject of considerable commentary and controversy. For a taste of the scholarship, see Adler & Posner, *supra* note 46, at 167 ("The reputation of cost-benefit analysis (CBA) among American academics has never been as poor as it is today, while its popularity among [government] agencies . . . has never been greater."). For its continuing political volatility, see Emily Yehle, *Sunstein Calls Proposed Moratorium 'A Nuclear Bomb,'* E&E PUBLISHING, LLC (Sept. 14, 2011), http://www.eenews.net/public/eenewspm/2011/09/14/2.

65. PRESIDENT'S WATER RES. COUNCIL, POLICIES, STANDARDS, AND PROCEDURES IN THE FORMULATION, EVALUATION, AND REVIEW OF PLANS FOR USE AND DEVELOPMENT OF WATER AND RELATED LAND RESOURCES, S. DOC. NO. 87-97 (2d Sess. 1962).

66. *See* Water and Related Land Resources: Establishment of Principles and Standards for Planning, 38 Fed. Reg. 24,777 (Sept. 10, 1973).

67. *Id.* at 24,778. The Council launched auspiciously under the direction of Henry P. Caulfield, a political scientist and deep believer in progressive economics and rational governmental decision making. *See* Henry P. Caulfield, Jr., *Early Federal Guidelines for Water Resource Evaluation*, 116 J. CONTEMP. WATER RES. & EDUC. 14, 14-17 (2000), *available at* http://opensiuc.lib.siu.edu/cgi/viewcontent.cgi?article=1190&context=jcwre. Always an unwanted stepchild to the water construction agencies, the Council faced the same hostility from Congress as the similar efforts of the Roosevelts, and was abolished by President Reagan in 1982. *See* REUSS, *supra* note 20, at 87.

Congress, or speaking truth to it. In a marginal case like the Lower Atchafalaya, Bayous Chene, Boeuf, and Black, speaking truth lost out. In this, it was hardly alone.

3. THE OPENING CAST

> *The small plane gave a lurch and then righted itself above a carpet of grass stretching to the horizon, chopped into grids by pipeline and navigation canals. Behind the pilot an odd trio of passengers peered out the small windows, a druggist from Houma, a civil rights lawyer from New Orleans, and a biologist from an upstream Corps District, not a common calling at the time. The plane sat down on pontoons and coasted to an oyster reef, a few feet above the water. The group made its way toward a shack on the far end where it was greeted by a facsimile of Robinson Crusoe, a gray-bearded trapper squinting into the sun. From his roof hung the pelts of muskrat, nutria and other less identifiable animals, along with a torn shirt stained dark with what appeared to be blood. The druggist introduced his guests and asked, "Cousin, les animaux?" Obligingly, the trapper identified the skins.*
>
> *"Et, cher, la chemise?" the druggist went on.*
>
> *"Oh, dat shirt," said the trapper, thumbing his knife, "the Army engineer he come by here last year . . . too bad."*
>
> *Cajun humor, not even the crack of a smile. This was not a set-up. The Corps' reputation down in the marsh had preceded them.*[68]

Stanley Halpin, living in New Orleans, was getting his first look at his lawsuit. Donald Landry, owner of Landry's Drug Store in Houma and a member of the Terrebonne Parish Police Jury, was showing him the lay of the land. Halpin knew little about wetlands but it was plain to the eye where salinity had surged up the navigation canals and killed out the cypress, thousands of acres of open water, and dying trees. Still, this was an odd case for him to be asked to take on, as he would soon learn. Environmental litigation, new to nearly everyone who encountered it in 1974, was in a league of its own. Which would affect outcomes.

Halpin had graduated from law school at Tulane in 1965, surrounded by the civil rights movement and opposition to the Vietnam War, where government was perceived as part of the problem, if not the problem itself. After taking a doctorate in Washington, D.C., he returned to New Orleans with a civil rights organization focused on getting protesters out of jail, and then advancing an integration agenda. By the early 1970s, he was in private practice with a docket of discrimination cases against

68. Interview with Stanley A. Halpin Jr., Kendall Vick Endowed Professor of Pub. Law, S. Univ. Law Ctr., in New Orleans, La. (Oct. 11, 2011) [hereinafter Halpin interview] (on file with author). The description of Halpin's background that follows is taken from this interview.

restaurants, bowling alleys and, as fate would have it, several institutions in Terrebonne Parish, including the police jury itself. He happened to win these cases, which brought him to mind when Donald Landry, of the same jury, decided to take on the Lower Atchafalaya project. Halpin was used to trying federal lawsuits. This was a federal lawsuit. He seemed a natural.

Landry, like thousands of local politicians and entrepreneurs across coastal Louisiana, had one foot in the out-of-doors at all times.[69] He was born to the marsh, spent time in the marsh, and when he was not out there, could usually be found thinking about being out there. As his daughter, now a biologist, explains, "He found his peace in nature, rather than in a church."[70] Landry started a small group of like-minded people in the parish back when his children were young, calling it the South Louisiana Environmental Council. They held meetings, took kids out-of-doors, and collected petitions on local issues (which mortified his children); it was a genuine organization.[71] According to a friend, he embraced facts, dug into them, and armed with them "took on the biggest assholes in the world."[72] During one very hot controversy, he took his family out in "the middle of nowhere" for several days in order to keep them safe. But he wouldn't change his stance.[73]

Like the trapper on the oyster reef and an increasing number of South Louisiana outdoorsmen, Landry had come to regard Corps canals as an invading army destroying his heritage.[74] The Lower Atchafalaya project, projecting south from Morgan City less than fifty miles away, was just one more attack from which his parish would suffer the consequences. Dynamic and popular, Landry would organize a coalition of Terrebonne powers to challenge it in court, but it would be led by the South Louisiana Environmental Council, in effect his offspring. He was about to meet a third party from a quite different background, however, who held the trumps in this matter—Judge Morey Sear.

Sear, like Halpin, was a Tulane law graduate, but from an

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69. *Id.*; *see also* Telephone Interview with Jane-Clair Kerin, daughter of Donald Landry (Oct. 20, 2011) [hereinafter Kerin interview]; Telephone Interview with Jerry Hermann, friend of Donald Landry (Oct. 24, 2011) [hereinafter Hermann interview] (on file with author); Interview with Edgar Viellon, Exec. Comm. Member, La. Wildlife Fed'n, in New Orleans, La. (Oct. 5, 2011) [hereinafter Viellon interview] (on file with author). Viellon, who worked together with Landry in the Louisiana Wildlife Federation, described him as "smart, totally focused, totally honest . . . [with a] great sense of humor." Viellon interview, *supra*.

70. Kerin interview, *supra* note 69.

71. *Id.*

72. Hermann interview, *supra* note 69.

73. *Id.*

74. Halpin interview, *supra* note 68; Kerin interview, *supra* note 69.

earlier time, class of 1950, and what a difference a decade makes.[75] Government and industry back then had won the war together, were now winning the peace together, and were the answer, not the problem. To the affluent white community there were indeed few problems at all beyond advancing one's career and, more distantly, keeping Communism at bay. The notion of racial, environmental, gender, or other civil rights was not taught in law school nor practiced; the concepts themselves barely existed. The subject of suing the government was barely mentioned, except on behalf of private clients for monetary gain. This was the establishment generation, and it produced excellent establishment lawyers.

Sear's career was one of achievement; he wore his Marine Corps service pin proudly, rose quickly in the ranks of a legal community fueled by oil and gas development, included government institutions among his clients, counted conservative Chief Justice Rehnquist of the Supreme Court among his close acquaintances, and came to the federal bench first as magistrate, later as judge.[76] He would later be appointed Chief Judge of the Panama Canal Zone, which had been the heartland of the Army Corps of Engineers for nearly a century.[77] Colleagues called him a "lawyer's lawyer"[78] and his work ethic "prodigious;" in the words of a fellow judge, "he insisted that no stone go unturned."[79] His written opinion in the Lower Atchafalaya case would reflect this diligence. Having "turned the stone," what he actually saw beneath it would be the question.

In March 1974, the Army Corps began work on the Lower Atchafalaya project, beginning at the bottom end, cutting through the delta forming in Atchafalaya Bay.[80] From an environmental point of view, this was the most sensitive section of all, threatening both the delta and interior marshes.[81] For this reason, Landry et al. filed suit immediately before Judge Mitchell in Terrebonne Parish, asking for a temporary restraining order and an expedited hearing on a preliminary injunction. This was, Halpin explains, standard fare in federal civil rights litigation; even were the restraining order

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75. Phillip A. Wittmann, Remarks at the Memorial Service in Honor of Former Chief Judge Morey L. Sear, *in* ADVOCATE (Fed. Bar Ass'n, New Orleans Chapter, New Orleans, LA), Fall 2004, at 1, *available at* http://www.nofba.org/nofba/files/fall04.pdf.

76. *Id*. at 4.

77. *Id*.

78. *Id.*

79. Joseph C. Wilkinson, Jr., Magistrate Judge, Remarks at the Memorial Service in Honor of Former Chief Judge Morey L. Sear, *in* ADVOCATE, *supra* note 75, at 1, 3.

80. S. La. Envtl. Council, Inc. v. Rush, 12 Env't Rep. Cas. (BNA) 1844, 1845 (E.D. La. 1978); U.S. ARMY CORPS OF ENG'RS, ATCHAFALYA RIVER BASIN 59 (undated), *available at* http://www.mvn.usace.army.mil/pao/bro/wat_res98/waterres98_4of16.pdf.

81. Interview with Dr. Sherwood "Woody" Gagliano, CEO, Coastal Env'ts, Inc., in New Orleans, La. (Oct. 26, 2011) [hereinafter Gagliano interview] (on file with author).

denied one usually received an accelerated hearing on the injunction.[82] Either way, he was, in his words, "jumping on them out of the trees," taking charge.[83]

After a brief meeting in chambers, the Judge did as expected, denying the temporary halt but scheduling an early hearing. He then took an unexpected turn. He proposed referring the hearing to a new magistrate, Judge Morey Sear, instead. Halpin knew Judge Mitchell and had tried cases before him. He found him a "careening cannon" at times, but ultimately fair, willing even to find against the government in local civil rights cases, which showed a certain independence of mind. One might speculate that, like many judges of the era, Mitchell felt uncomfortable with the newness and complexity of environmental cases and was looking for a way out. For his part, Halpin knew nothing about Sear, which was worrisome. In retrospect, he reflects he made "the mistake of [his] life" in agreeing to the referral. On the other hand, by opposing it, he could only offend Sear were Mitchell to order the transfer anyway. He felt boxed in either way.

In this posture, then, the principal players in the first phase of the Lower Atchafalaya litigation took the stage: a civil rights lawyer, a wetlands populist, and an establishment magistrate. Each spoke good English and lived in South Louisiana but, beyond that, they were from different worlds.

4. LIARS POKER

> *Their basic position is that they have to cook the books for this boondoggle the same way they cook the books for all the other boondoggles. . . . It really makes you wonder about this agency.*
>
> *John Williams, Retired Engineer,*
> *Dupont Corporation, 2000*[84]

The 1936 Act unleashed a flood of Corps activity.[85] Over the next twenty years, however, the major works for which the Corps is known and credited—converting river systems the size of the Colorado, Columbia, and Missouri into staircases of dams, locks, and navigation canals—were well underway or completed.[86] Meanwhile,

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82. Halpin interview, *supra* note 68.

83. *Id.* The description of the TRO disposition and the transfer to Sear that follows is taken from this interview.

84. Michael Grunwald, *A Race to the Bottom*, WASH. POST, Sept. 12, 2000, at A1. Mr. Williams was part of a civilian team investigating the Chesapeake and Delaware Canal project.

85. *See* Robert W. Page, *Forward* to ARNOLD, *supra* note 40, at iii.

86. *See generally* LELAND R. JOHNSON, THE FALLS CITY ENGINGEERS: A HISTORY OF THE LOUISVILLE DISTRICT CORPS OF ENGINEERS UNITES STATES ARMY 255 (1974), *available at* http://publications.usace.army.mil/publications/misc/un22/c-15.pdf ("By 1956 the Louisville District had completed 43 local-protection projects and had 13

the agency had boomed into the largest construction operation in the world, at which point it could continue to grow, or begin to die. The latter was as unthinkable to this proud organization as it was to many members of Congress, who had only begun to get their share of the pie. The only possible hitch was the Act's section 701a, which required that the benefits, to whomsoever they may accrue, exceed the costs.[87]

The rush to find benefits and beneficiaries was on. Within a very short time, the Corps was converted from an agency, basically in control of its own agenda, into a Queen Bee from whom everyone wanted an egg. Port directors, aspiring directors of nonexistent ports, dredging and construction companies, barge and shipping companies, waterway operators, waterside industries, wheat combines, corn cooperatives, soybean farmers, coal-fired power plants, nuclear plants, land speculators, real estate developers, irrigation, drainage, hydropower, beach nourishment, and municipal water schemes—all who fit within 701a's "whomsoever they may accrue"[88] category (indeed, anyone who stood to make a dollar fit the category)—beat a path to the Corps' door, boosted by watershed associations, the National Rivers, and Harbors Congress (of which all members of Congress were ex officio members), and lobby firms staffed by former congressmen and Corps officials.[89] The District Office in New Orleans, commanding nearly half of the civil works budget, formalized the asking process in regal fashion by organizing biennial high-water and low-water Mississippi River cruises, to which all major water interests were invited to present their plans and aspirations, food and drinks on the house.[90] When the Lower Atchafalaya project was cast in doubt, one of its chief boosters flew in by seaplane and taxied to the cruise barge to join the activities.[91]

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under construction."); WILLIAM F. WILLINGHAM, ARMY ENGINEERS AND THE DEVELOPMENT OF OREGON: A HISTORY OF THE PORTLAND DISTRICT U.S. ARMY CORPS OF ENGINEERS 167 (1983), *available at* http://publications.usace.army.mil/publications/misc/un24/c-12.pdf ("The Portland District completed Lookout Point and Dexter Dams in 1954 at a cost of $88 million . . . .").

87. 33 U.S.C.A. § 701a (1936).

88. *Id.*

89. *See* Ann Pelham, *Water Policy: Battle Over Benefits*, 36 CONG. Q. 565, 573-74 (1978) (local interests); BEATRICE HORT HOLMES, U.S. DEP'T OF AGRIC., HISTORY OF FEDERAL WATER RESOURCES PROGRAMS AND POLICIES, 1961-1970, at 12 (1979) (local interests, Waterway Associations, and National Congress); Juliet Eilperin, *Ex-Lawmaker's Edge is Access; Flourishing Class of Lobbyists Capitalizing on Privileges*, WASH. POST, Sept. 13, 2003, at A1 (mentioning how a former congressman lobbied a current member for a water project in the House of Representatives gymnasium, which is off-limits to members of the public).

90. *See* JOHN MCPHEE, THE CONTROL OF NATURE 16-18 (1989) (describing one high-water excursion).

91. Personal observation by author, who was in attendance on the high-water excursion. The late-arriving guest was Ed Kyle of Morgan City, Louisiana, a major

The "whomsoevers" were at hand.

So was the Congress, for which each project was major campaign material, leaving well-heeled and grateful beneficiaries in its wake. Corps projects became the currency of congressional power in entire regions of the country, particularly in the South, and woe be to the member who questioned a project in the district of another.[92] Committee chairmen commanded a lion's share of the largesse,[93] and senior members might even get a lock, dam, or even a major waterway named in their honor.[94] Presidents of both parties traded Corps water projects for votes on the budget, foreign aid, whatever was of pressing concern.[95] Local newspapers like the New Orleans *Times-Picayune* trumpeted new projects and their expenditures as they came off the line, heaping praise on those who delivered them;[96] when its own congressman, then head of the House Appropriations Committee, resigned due to a sex scandal, the media neither

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proponent of the Lower Atchafalaya project; indeed, the Morgan City Port Authority became the project's major voice in the Lower Atchafalaya litigation to come. *See* discussion *infra* accompanying notes 167-73.

92. *See* MARK REISNER, CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER 309-20 (rev. ed. 1993) (describing "courtesy" or "buddy" system, and the revenge of one Committee Chairman to a dissenting member: "One guy had a good project—I thought it was good—in the 1978 appropriations bill, but Ray Roberts yanked it out because he was upset over a couple of votes the guy had cast. He had the poor Congressman crawling up to him on his hands and knees for a year . . . . Ray jerked him around like a beaten dog."). Congressmen who questioned Corps proposals were vilified on the House floor and a "Pinocchio" award was proposed for the member who stuck his nose unwontedly into another's project. Ward Sinclair, *Meddling Members of Congress Warned Off Others' Pet Projects*, WASH. POST, June 16, 1979, at A9. The system was so entrenched that the Chair of the Senate Appropriations Committee rationalized funding a dam in Oregon called a "sham" by its own Representative in the House, saying, "That's the way the system works . . . . I can't help it that I'm chairman of the Appropriations Committee." Howie Kurtz, *Congress' Budget Cutters Protect the Home Folks; Budget Cutting Doesn't Mean Saying 'Sorry' Back Home*, WASH. POST, Jan. 25, 1982, at A1.

93. Michael Grunwald, *Big Projects Flow to Hill's Powers*, WASH. POST, Sept. 11, 2000, at A14 ("Congress has authorized nearly $1 billion in projects—nearly half of them last year—with the vast majority in the districts of Capitol Hill power players.").

94. *See* Michael Grunwald, *Working to Please Hill Commanders; In Miss. and Elsewhere, Lawmakers Call Shots*, WASH. POST, Sept. 11, 2000, at A1; *see also infra* text accompanying notes 121-22.

95. For one high-profile example, see President Carter's trade on Tellico Dam for approval of his treaty ending American occupation of the Panama Canal Zone. REISNER, *supra* note 92, at 328-29.

96. *See* Assoc. Press, *Water Resources Bill Approved: La. Projects Ok'd*, TIMES-PICAYUNE (New Orleans), Oct. 18, 1986, at A1 (lead headline, front page); Gayle Ashton, *La. Leads in Water Projects*, TIMES-PICAYUNE (New Orleans), Jan. 5, 1987, at B1; Bruce Alpert, *House OK's Bill to Finance La. Water Projects*, TIMES-PICAYUNE (New Orleans), June 20, 1990, at B1; Bruce Alpert, *La. Water Projects Survive House Cuts*, TIMES-PICAYUNE (New Orleans), July 13, 1995, at A5 [hereinafter Alpert, *La. Water Projects Survive House Cuts*].

lamented the affair nor the loss of a statesman but, rather, the loss of federal water money.[97] There was no endpoint; the congressional pressure on the Corps to deliver yet more projects—although by the 1960s it had nearly 500 authorized and in the wings—intensified.[98] A *Washington Post* article describing this pressure was entitled, "What does the Army Corps of Engineers do in Mississippi?: Generally, whatever Senate Majority Leader Trent Lott and Senate Agriculture Committee Chairman Thad Cochran want it to do."[99] When they said "[j]ump," observed one state senator, the only question was "[h]ow high?"[100]

The answer is, very high. What transpired is, by now, the subject of political science texts, government studies, committee reports, and a running drumbeat of investigative journalism going back fifty years.[101] In order to satisfy an appetite on Capitol Hill that

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97. Congressman Livingston, who had been spearheading the call for President Clinton's impeachment during the Monica Lewinski sex scandal, was then discovered to be conducting an affair with a Washington, D.C. lobbyist;. Livingston was, at the time, the Chair of the all-powerful House Appropriations Committee, which he directed towards heavy cost cutting except for Louisiana water projects. *See* Alpert, *La. Water Projects Survive House Cuts*, *supra* note 96; Deborah J. Paltrey, *Hustler Says it Revealed Senator's Link to Escort Service*, CNN.COM (July 10, 2007), http://www.cnn.com/2007/POLITICS/07/10/vitter.madam/index.html.

98. Letter from Major General Charles I. McGinnis, Dir. of Civil Works, U.S. Army Corps of Eng'rs, to Patrick A. Parenteau, Nat'l Wildlife Fed'n (Mar. 22, 1978) (on file with author) (indicating 445 authorized projects for which construction was not then complete).

99. Grunwald, *supra* note 94.

100. *Id.* (quoting Mississippi state Senator Debbie Dawkins). In the same article a former Corps official in Vicksburg, home of the powerful Mississippi Valley Division, described the Corps as "a congressional Tinkertoy." *Id.*

101. *See* Drew, *supra* note 24; *see also* Howie Kurtz, *In Lean Budget, Funds for Back Home*, WASH. POST, Jan. 24, 1982, at A1 (in the 1980s, the first of a multi-series reportage focused largely on projects of the Army Corps of Engineers.); Michael Grunwald, *An Agency of Unchecked Clout; Water Projects Roll Past Economic Environmental* Concerns, WASH. POST, Sept. 10, 2000, at A01 [hereinafter Grunwald, *Unchecked Clout*] (the first of a mammoth, five-part series exclusively on the politics, misrepresentations, and performance of Corps projects involving more than one thousand interviews and thousands of pages of documents); Interview with Michael Grunwald, Reporter, Washington PostOnline (Sept. 11, 2000)) (transcript on file with author); Michael Grunwald, *Par for the Corps; A Flood of Bad Projects*, WASH. POST, May 14 2006, at B1 [hereinafter Grunwald, *Par for the Corps*] (finding little had changed by 2005). For academic critiques, see ARTHUR MAASS, MUDDY WATERS: THE ARMY ENGINEERS AND THE NATION'S RIVERS (1951); FEREJOHN, *supra* note 63; John A. Hird, *The Political Economy of Pork: Project Selection at the U.S. Army Corps of Engineers*, 85 AM. POL. SCI. REV. 429 (1991). For other governmental and nongovernmental critiques, see the U.S. Government Accounting Office, Inspector General and National Academy of Sciences reports cited in *Experts Blast Corps Projects, Planning Process*, ENVTL. DEF. FUND (July 12, 2002) (on file with author) and Jeff Stein et al., TAXPAYERS FOR COMMON SENSE & NAT'L WILDLIFE FED'N, TROUBLED WATERS: CONGRESS, THE CORPS OF ENGINEERS, AND WASTEFUL WATER PROJECTS (Jeff Stein et al. eds., 2000) [hereinafter TROUBLED WATERS], *available at* http://www.water

could be slaked but never sated, the Corps began to play with the data. Every account has its stories, and no summary can do them justice, but they include waterways to nowhere,[102] beach renewal projects that washed out in months,[103] dams that drowned as much productive farmland (belonging to Native Americans) as they purported to benefit (belonging to whites),[104] and drainage for crops the government was paying people not to produce;[105] they include dams justified by water recreation benefits,[106] by "scenic" benefits (which turned out to be guests at the visitors center),[107] and by the "aquaculture industry" (which turned out to be a catfish farm);[108] they include navigation to putative ports 400 miles inland,[109] on a canal that Congress had ordered closed,[110] to serve a single coal

protectionnetwork.org/sitepages/dwnloads/ToolsandResources-Reports/CRN-trRpt-TroubledWaters.pdf. Other books and reports are cited throughout this article, see for example PORTER, *supra* note 63. Leading national and local newspapers have also lamented water project "pork." *See* Editorial, *Pork Power*, WASH. POST, Jan. 29, 1982; *Tenn-Tom's Problems,* TIMES-PICAYUNE (New Orleans), Apr. 10, 1986, at A18 (actual traffic using the waterway was less than five percent of that predicted).

102. *See* PEARL RIVER BASIN, *supra* note 36, at 96-98.

103. *See* TROUBLED WATERS, *supra* note 101, at 25-26 (the New Jersey project cost an estimated $60 million per mile; the Long Island project, equally expensive, and an "interim" solution). For a poster child of expensive and "interim" solutions, see the description of Corps efforts on Grand Isle, Louisiana, spanning decades, in Oliver A. Houck, *More Unfinished Stories: Lucas, Atlanta Coalition, and Palila/Sweet Home*, 75 U. COLO. L. REV. 331, 361 n.200 (2004).

104. *See* REISNER, *supra* note 92, at 188, 191 (describing the Garrison Dam flooding: "All of the bottom lands and all of the bench lands on this [Native American] reservation," the resulting impoundment with "malevolent inspiration" to be called "Lake Sacajawea" (internal quotation marks omitted)); *id.* at 192 (describing the same project taking 220,000 acres of Indian lands for canals and reservoirs, to serve some 250,000 acres downstream). For a fuller and more heartbreaking description, see MORGAN, *supra* note 25, at 40-63.

105. *See* Bruce Hannon & Julie Cannon, *The Corps Out-Engineered*, *in* THE POLITICS OF ECOSUICIDE 220, 224 (Leslie L. Roos, Jr. ed., 1971) ("[T]he Corps' claim of flood damage on the lower Sangamon was exaggerated by about 5 to 1, that crop losses occur about one year in 20, and that much of the flooded farmland is now in the federal idle-acres program."); *see also* Envtl. Def. Fund, Inc. v. Hoffman, 566 F.2d 1060, 1067-68 (8th Cir. 1977) (not finding "that the groundwater discussion in the [environmental impact statement] is fatally deficient because of its failure to consider cumulative secondary impacts on groundwater and because the Corps did not wait to include the U.S. Geological Survey study in the [environmental impact study]").

106. *See* Cape Henry Bird Club v. Laird, 359 F. Supp. 404, 415-17 (W.D. Va. 1973).

107. *See* Sierra Club v. Froehlke, 534 F.2d 1289, 1291 (8th Cir. 1976).

108. *See Carter-Opposed Water Bill Headed for a Veto*, WAS. RESOURCE REP., Sept. 1978, at 7 ("70 percent of [Lukfata Dam's] water supply would benefit a single catfish farm . . . ."). The Lukfata Dam in Oklahoma, projected at $34 million. *Broomfield Calls Projects Wasteful*, S. LYON HERALD, Aug. 9, 1978, at 6D.

109. *See* Drew, *supra* note 24, at 52.

110. Holy Cross Neighborhood Ass'n v. U.S. Army Corps of Eng'rs, No. 03-370, 2011 WL 4015694, at *9 (E.D. La. 2011) ("On its face this seems to be the proverbial bridge to nowhere; namely, constructing a deep-draft lock which will never be used by deep-

company,[111] and in such dribbles that it failed to pay even maintenance costs;[112] they include cost overruns in the order of 184%, 185%, 359%, and 391%[113] before one even arrived at environmental costs, which were rarely quantified at all.

The manipulations were stunning. They began with a conscious understatement of the value of money, frozen by Congress at two and three percent when actual rates were three times that and higher, skewing both costs and benefits.[114] Artificially low rates turned dogs into queens. From sixty to eighty percent of Corps authorizations for the year 1962 would have failed to reach parity using existing market rates at the time.[115] Three years later, over half the projects in the 1965 bill would have suffered the same fate.[116] And we have only begun.

Having opened with serious economic fiction, the Corps compounded the error by low-balling construction estimates so blatantly as to provoke the Chair of the House Appropriations Committee in 1959 into the following remarkable outburst:

> The crowds of applicants for appropriations which came in such numbers that it was sometimes impossible to get them all in the committee room, was preceded by the Corps of Engineers, who were invariably in favor of the largest expenditures the committee could be prevailed upon to make. Much of their testimony was wholly unreliable. When they were consulted on the cost of a proposed

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draft traffic.").

111. *See* Bruce Ingersoll, *Barge Canal to Benefit Coal Firm: Engineers Wiping Out 52 Mi. of River*, CHI. SUN-TIMES, Apr. 25, 1972, at 4 (describing a $116.7 million canal for barges to serve Peabody Coal in Southern Illinois).

112. *See* Grunwald, *supra* note 92; *see also* PEARL RIVER BASIN, *supra* note 36; *In re* Katrina Canal Breaches Consol. Litig., 647 F. Supp. 2d 644, 671 (E.D. La. 2009).

113. Drew, *supra* note 24, at 57. One Southern California flood control project was to deliver 200-year flood protection at a price tag of $28 million; it ended up costing $140 million and providing only twenty-year flood protection. *See* Grunwald, *Unchecked Clout*, *supra* note 101 (listing five other projects as well).

114. For a good summary of the role of discounting in benefit-cost calculations, see M. Michael Egan, Jr., Note, *Cost-Benefit Analysis in the Courts: Judicial Review Under NEPA*, 9 GA. L. REV. 417, 422-24 (1975) and sources cited therein. Basically, a low discount rate will benefit projects that have high front-end construction costs, and forecast long-term benefits—the very definition of Corps projects. *See also* Pelham, *supra* note 89, at 572.

115. David E. Gerard, *Federal Flood Policies: 150 Years of Environmental Mischief*, *in* DONALD LEAL AND ROGER E. MEINERS, GOVERNMENT VS ENVIRONMENT 59, 66-67 (2002) ("In the important sample examined by [economist] Krutilla, use of deliberately low rates during the period 1952-1964 overstated benefits from many projects. . . . Analyzing [the] 1962 authorizations, Fox and Herfindahl (1964) found that use of rates of 4, 6, and 8 percent (instead of the federal policy rate of 2 5/8 percent) would have produced failure to break even in 9, 64, and 80 percent of the projects respectively! In 1965 more than half of authorized projects would have failed with defensible rates . . . .").

116. *Id.* at 67.

> project they invariably underestimated the cost. In no single instance in the last several years have they given us a true figure on estimated costs. . . . It is impossible to escape the conclusion that they either were incompetent or deliberately misleading.[117]

Then came the manipulations of benefits. Two high-end projects in Chesapeake Bay had the same water flowing in opposite directions, in order to boost the ratios of each.[118] A proposal on Louisiana's Pearl River projected the instant increase in cargo from near zero to 1.5 million tons, and over two million tons within five years;[119] as noted above, a project to carry the same predicted cargo had been abandoned for lack of traffic.[120] So it went for nearly every major navigation work undertaken since the 1960s, including the Tennessee-Tombigbee (with its Senator Tom Bevil lock) (projected cost, $300 million, actual cost, $2 billion; projected cargo twenty-eight million tons, actual 1.4 million)[121] and the Red River Waterway (renamed Senator J. Bennett Johnston Waterway) ($2 billion and equally unproductive), delivering pennies on the dollar.[122] A deputy staff director of the Senate Energy and Natural Resources Committee mused, "I've computed my share, and I've faked my share, too. . . . I know how to do it without breaking the rules."[123]

Even then, benefit problems arose. A cherished billion-dollar project on the Upper Mississippi turned out to be so unmarketable that the Corps manager (after removing an economist who would not tweak the data) finally wrote:

> If the demand curves, traffic growth projects and associated variables . . . do not capture the need for navigation improvements, then we have to figure out some other way to do it. . . . We need to develop a rationale for taking this relatively more subjective approach to our analytical process. . . . The rationale should err on

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117. MORGAN, *supra* note 25, at 33 (quoting 123 CONG. REC. 9,049 (1959) (statement of Rep. Clarence Cannon).

118. *See* Grunwald, *supra* note 84.

119. HUGH PENN & MICHAEL ROLLAND, CORPS' ADMIN. RECORD, PROJECTED BENEFITS FOR THE PEARL RIVER DREDGING PROJECT (on file with author); *see also* Editorial, *West Pearl Dredging Necessary?*, TIMES-PICAYUNE (New Orleans), Mar. 21, 1993, at B6 ("The Corps has also been known to get carried away with its cost-benefit analyses, resulting in such monuments of overstated value as the Mississippi-River Gulf Outlet and the Tennessee-Tombigbee Waterway. To the list might be added the original West Pearl barge canal itself. It was supposed to have been a great idea to begin with, a sure-fire catalyst for a river bustling with commerce from Bogalusa to the Gulf. And yet it was abandoned 20 years ago.").

120. *See supra* text accompanying note 36.

121. Grunwald, *Par for the Corps, supra* note 101.

122. *See* Michael Grunwald, *A River in the Red: Channel was Tamed for Barges that Never Came*, WASH. POST, Jan. 9, 2000, at A1.

123. *See* Pelham, *supra* note 89, at 572 (quoting Dan Dreyfus, Deputy Staff Director, Senate Energy and Natural Resources Committee).

the high side.[124]

Asked if "a basic math error" boosting one Delaware project's benefit-cost ratio just over the bar was just "a typo," a Corps economist replied, "Oh, you know how the system works."[125] The system, apparently, worked many ways. When a project languished below par, explained a retired chief of the agency's Hydraulics and Hydrology Branch, and "the Congressman wants it real bad," you might ask the economists to boost the "flood damage analysis" or come to his shop to raise the flood frequency (and thereby the number of times property would be saved).[126] "Maybe the frequency curve could be adjusted," he said, "if . . . 'it's for the good of the country.'"[127]

To be sure, Corps personnel put up brave resistance from time to time, but they were often overruled by their superiors or by Congress itself.[128] Lamented one official, "In a lot of cases, we're not permitted to do what we'd like to do, or what's right."[129] On the other hand, there is abundant evidence that the Corps took the lead in the shell game behind even the most unjustifiable projects.[130] "[A]gency e-mails revealed that Corps officials . . . ordered all study managers to . . . 'not take no for an answer' and 'look for ways to get to yes as fast as possible'"[131] The Corps Divisions and Districts, in effect, were competing with each other for pieces of the pie, and in turn, bleeding

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124. Michael Grunwald, *How Corps Turned Doubt Into a Lock: In Agency Where the Answer is 'Grow,' A Questionable Project Finds Support*, WASH. POST, Feb. 13, 2000, at A01. Independent-thinking economists are not the only ones to suffer the consequences; biologists run the same risks with Corps water resources projects. *See* Bill Lambrecht, *Government Replaces Biologists Involved in Missouri River Talks*, ST. LOUIS POST-DISPATCH, Nov. 6, 2003, at A1. Conservationists expressed dismay that scientists "who have studied the river for as long as 15 years were being removed at a critical stage in the process." *Id.*

125. Grunwald, *supra* note 84.

126. Martin A. Reuss, *Probability Analysis and the Search for Hydrologic Order in the United States, 1885-1945,* 4 WATER RESOURCES IMPACT 7, 12 (2002), *available at* http://www.awra.org/impact/issues/0205impact.pdf.

127. *Id.*

128. Michael Grunwald, *Money Flowed to Questionable Projects; State Leads in Army Corps Spending, but Millions Had Nothing to do with Floods*, WASH. POST, Sept. 8, 2005, at A1 (remanding Corps, negative findings on New Iberia canal with instructions to find more benefits). Additionally, there can be no doubt that where the Corps has stuck with a negative analysis it has saved the taxpayer (and the environment). *See* Hird, *supra* note 99, at 448.

129. *Lessons*, 4 COMMON GROUND 6, 6 (1993) (on file with author).

130. *See, e.g.*, Grunwald, *supra* note 84 (quoting memorandum of the Mississippi Valley Division).

131. *Id.*; *see also* Hird, *supra* note 99, at 448 ("Given a fixed water resource budget, since each of the corps's geographic divisions is vying for a greater share of the available funds, each has an incentive to artificially inflate its own projects' benefit/cost ratio . . . .").

money from the most needed and beneficial projects.[132] Classic among these in Louisiana were the trumped-up Red River Waterway, a canal to the inland "port" of New Iberia, and the ill-fated Mississippi Gulf Outlet, which sapped out vital money from hurricane levees around New Orleans.[133] For which the region later paid a terrible price.

The benefit-cost manipulations would have mattered less, but for the fact that they implemented the only existing standard for water project authorization. It became, in the words of one observer, an "instant cliché."[134] If the cost-benefit ratio was said to be positive, that closed the question. It did for the Congress, and for everyone else.[135] For its part, Congress could be "dazzlingly uninquisitive" and deferential so long as the ratio was said to be positive.[136] "The Corps says this is a worthwhile project," said the head of a local Chamber of Commerce of the Yazoo Pump project in Mississippi (described privately by a Corps lobbyist as "an economic dud with huge environmental consequences"),[137] "[w]hat else is there to say?"[138]

Something had gone wrong. The 701a standard, enacted in 1936 as a check on wasteful, whimsical, and political decisions, had turned into a wasteful, whimsical, and political shield. Resource economists, sister agencies, state legislators, investigative journalists, fiscal conservatives, environmental groups, nearly all exposed to these shenanigans came away shaking their heads as if they had passed a moment in a UFO. The water resources director of Taxpayers for Common Sense spoke for many when he quipped: "The Corps has less credibility than a French figure-skating judge."[139] And for exactly the same reason. This was their kid on the ice.

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132. Corps districts were squeezed for money, which led to sloppy calculations and engineering decisions. *See* Bruce Ingersoll, *How Engineers Erred on 2 Dams*, CHI. SUN-TIMES, Apr. 24, 1972 ("'It's very simple,' Decker said. 'They (the St. Louis District) were broke. They got a chance to put Carlyle and Shelbyville on the line and they didn't spend the engineering money they should have spent to do the engineering they should have done.'").

133. Grunwald, *Par for the Corps*, *supra* note 101 (documenting these and other diversions of money).

134. PORTER, *supra* note 63, at 156.

135. *See Hearings on H.R. 8455*, *supra* notes 59, at 190-213; *see also* PORTER, *supra* note 63, at 56 ("'We never report a project to Congress,' announced [Senator] Whittington in 1943, 'until it has been recommended by the Board of Engineers and the Chief of Engineers stating that . . . the benefits of the project will exceed the cost.' He added that 'the ability of this committee to secure annual flood-control authorizations . . . is due largely to the fact that this yardstick has been adhered to.'").

136. PORTER, *supra* note 63, at 56.

137. Grunwald, *Par for the Corps*, *supra* note 101.

138. Grunwald, *Unchecked Clout*, *supra* note 101.

139. Michael Grunwald, *Corps Speedily Clears Way for 118 Projects: Review, Announced 3 Weeks Ago in Response to Critics, Called Window-Dressing*, WASH. POST, May 18, 2002, at A08.

Their kid, and that of the Congress. Everyone else was in the grandstands, looking on. The question was whether anyone else could get into the act, including a Governor from Georgia who had experienced a rude shock over one Corps project, which would not be novel except that he was then elected President of the United States.

5. PRELIMINARY HEARING

According to Dr. Sherwood Gagliano, Jim Tripp showed up at his door with a briefcase in his hand and a toothbrush in his pocket.[140] This was standard traveling fare for Tripp, who had already embarked on a zig-zag of litigation across the South against Corps projects and who would wind up consumed by the Louisiana coastal zone.[141] Tripp was counsel for the Environmental Defense Fund ("EDF"), then located in a small farmhouse at Stony Point, Long Island. He remembers receiving a telephone call from Halpin about the Lower Atchafalaya project and being shocked by a single statistic: the Corps was proposing to cover 8,000 acres of wetlands with dredged spoil, which seemed a significant amount. The Corps had apparently dismissed these impacts because the Louisiana marshes were themselves so large. Neither made much sense to him. He decided to accept Halpin's invitation and come down. The hearing was set a few days hence.

Halpin's principal witness would be Gagliano, who lived in Baton Rouge. Tripp called Gagliano, whom he had never met, out of the blue; could he stay the night and then go down together? It was a transformative evening. "After several hours of talking to him," Tripp recalls, "I was stunned by what was happening in the delta, fascinated by delta geology, and hooked on the problem."[142] He had also lucked onto the de facto dean of coastal science in Louisiana.

In the predawn of awareness that all might not be well along the Gulf of Mexico, Gagliano was the messenger. Soft-spoken and fact driven, his office (and house) sprouted stacks of technical studies and reports, of which a growing number were his own.[143] Born in St. Bernard Parish south of New Orleans and passionate about local cultures, Gagliano was doing graduate work at the LSU Center for Wetlands Resources in 1969 when the Corps suddenly announced a

140. *See* Gagliano interview, *supra* note 81.

141. *See* Interview with James T.B. Tripp, Senior Counsel, Envtl. Def. Fund, Inc., in New Orleans, La. (Oct. 7, 2011) [hereinafter Tripp interview](on file with author). The discussion of Tripp's experience that follows is taken from this interview.

142. *Id.*

143. *See generally* SHERWOOD M. GAGLIANO, CANALS, DREDGING, AND LAND RECLAMATION IN THE LOUISIANA COASTAL ZONE (1973); SHERWOOD M. GAGLIANO, PHILLIP LIGHT & RONALD E. BECKER, CONTROLLED DIVERSIONS IN THE MISSISSIPPI DELTA SYSTEM: AN APPROACH TO ENVIRONMENTAL MANAGEMENT (1973); *see also* sources cited *infra* notes 152-53, 171.

proposal to ship one-third of the flow of the Lower Mississippi to water-hungry Texas.[144] Might this have an impact on the coast?

The Corps contracted the Center to investigate, and went one better; it joined Gagliano with one of its sharpest minds, Fred Chatry, who ran the New Orleans District planning division at the time, and later the all-dominant engineering division. Ever a "company man," in Gagliano's words, and not one to gainsay a Corps project in public, Chatry gave the young scientist his head and, together, they conducted the first study measuring land loss in South Louisiana. "It was like I was his conscience," Gagliano later said of Chatry, "I could do and say things that he couldn't, but that he knew were correct."[145] Their results were unexpected, and astonishing: 16.5 square miles of coast were disappearing each year. Within a few years, when those rates were doubled and still growing, the estimate would seem conservative.[146]

Gagliano joined an interagency task force that published the first plan to address coastal land loss in 1974.[147] It identified canals and their adjoining levees as among the principal culprits.[148] It identified delta building as the principal remedy.[149] Along the way, Gagliano and Van Beck provided methods for quantifying sediment loads and distribution, the heart of the plan.[150] As it happened, the best opportunity for delta building in Louisiana was at mouth of Atchafalaya River where it joined the Gulf of Mexico, precisely where the Corps proposed to dig the Lower Atchafalaya channel.[151]

As it also happened, Gagliano was particularly deep into the Atchafalaya River and Terrebonne wetlands as well. He had just completed a study with the Environmental Protection Agency on the Atchafalaya Basin, including the lower river to the Gulf.[152] At the request of Landry and the Terrebonne Police Jury, he had also just finished a conservation plan for the enormous spread of wetlands east of the river that dominated the geography of the parish.[153] They

144. Gagliano interview, *supra* note 81. The description of Gagliano's early coastal work that follows, and the quotations, are taken from this interview.

145. *Id.*

146. Houck, *supra* note 11, at 68-69.

147. *See* Sherwood M. Gagliano & Johannes L. van Beek, *An Approach to Multiuse Management in the Mississippi Delta System*, *in* DELTAS, MODELS FOR EXPLORATION 223, 233 (Martha Lou Broussard ed., 2d prtg. 1981).

148. *Id.* at 227.

149. *Id.* at 235.

150. *Id.* at 230, 237.

151. *Id.* at 232.

152. SHERWOOD M. GAGLIANO & JOHANNES L. VAN BEEK, EPA-600/5-75-006, ENVIRONMENTAL BASE AND MANAGEMENT STUDY, ATCHAFALAYA BASIN, LA. (1975).

153. COASTAL ENV'TS, INC., ENVIRONMENTAL PLANNING BASE, TERREBONNE PARISH, LOUISIANA: PRELIMINARY REPORT (1974). The plan summary made four criticisms of the Lower Atchafalaya project, all based on hydrology, biology and delta building.

were at especially high risk because they were composed of rootmass and vegetation, what locals called "flotant," highly sensitive to salinity and water frequency.[154] Like a garden of flowers, if salt levels intruded, or if water levels remained high for too long, or ran off too quickly, these wetlands begin to die, their root systems unravel, and layers of flotant, accumulated like reefs over millennia, disintegrate and wash away. Pockets of water appeared, then ponds, then miles of open water; it was like the spread of cancer. Understanding these mechanics and understanding what Gagliano knew about them would be the crux of the preliminary hearing. Like many environmental cases that deal with new science and emerging issues, the hearing would depend on who educated whom.

The preliminary injunction hearing did not begin well for the Landry team. The question was whether the channel's impacts were sufficiently severe to hold up construction until they could be further developed at trial. One might think that the loss of some 15,000 acres of wetlands to the project, as the Corps' own environmental impact statement ("EIS") acknowledged,[155] would seem severe to anyone, but in the eye of the law the only impacts before this hearing were those of the particular piece underway, the lower channel. These impacts, per Gagliano, were also severe, and virtually unrecognized in the Corps' EIS: interruption of the forming delta, saltwater intrusion into the interior marshes, and backwater flooding up the canal during Gulf storms.[156] Although these phenomena have since been documented in detail,[157] some accompanied by great human loss,[158] outside of Gagliano's work there was little published at the time.[159] Compounding its newness was its apparent

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Letter from Dr. Sherwood Gagliano to Terrebonne Police Jury (June 18, 1974) (on file with author).

154. Gagliano interview, *supra* note 81. The description of salinity and water frequency that follows is taken from this interview.

155. S. La. Envtl. Council v. Rush, 12 Env't Rep. Cas. (BNA) 1844, 1847 (E.D. La. 1978).

156. *Id.*; Gagliano interview, *supra* note 81; S. La. Envtl. Council v. Hunt, No. 74-698, 18-19 (E.D. La. May 17, 1974) (denying plaintiff's application for preliminary injunction).

157. *See* NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., DRAWING LOUISIANA'S NEW MAP: ADDRESSING LAND LOSS IN COASTAL LOUISIANA 13-17 (2006).

158. *See In re* Katrina Canal Breaches Consol. Litig., 471 F. Supp. 2d 684, 687, 694-96 (E.D. La. 2007), 577 F. Supp. 2d 802, 806-11 (E.D. La. 2008), 647 F. Supp. 2d 644, 678-80 (E.D. La. 2009) (containing allegations of failure of hurricane protection system to the impacts of this canal); St. Bernard Parish v. United States, 88 Fed. Cl. 528, 532-42 (2009) (same).

159. With one significant exception: at the same time the Corps was acknowledging canal impacts where they would *support* other Corps projects. *See* U.S. DEP'T OF ARMY, NEW ORLEANS DIST. CORPS OF ENG'RS, LOUISIANA COASTAL AREA, LOUISIANA, FEASIBILITY REPORT ON FRESHWATER DIVERSION TO BARATARIA AND BRETON SOUND BASIN 13 (1984) ("Land loss has been accelerated by construction of numerous leveed,

complexity, always a challenge to plaintiffs. Good plaintiff lawyers make the complex simple, anyone can see what went wrong; good defense lawyers make the simple complex, no one can say what went wrong. Gagliano was a persuasive witness, but he needed to be guided through his testimony in a way that educated the judge, which is where the wheels began to come off.

Halpin faced several handicaps. He was as new to environmental science as he was to environmental law, and this case was turning very technical, very quickly. He was also confronted with a new opponent, the Morgan City Harbor and Terminal District, which had been granted permission to intervene in the case on the side of the Corps.[160] Morgan City was represented by Walter Conrad out of Houston, who had already tried several environmental cases and, like all good defense litigators, was skilled in flooding his opponent with objections that would derail the flow of proof. In this, he found a soul mate with Morey Sear, who had a passion for rules of procedure and was a stickler for their application.[161] Halpin, on a steep learning curve with Gagliano's work to begin with, was buffeted by a barrage of motions and objections that seemed to entertain the judge but frustrate his witnesses as well.[162] "We were just floundering," Gagliano later recalls, "we just couldn't get to the point."[163]

Tripp, attending the hearing, was in a bind of his own.[164] He had filed to intervene even before Morgan City's application, but Sear, while granting leave to the defense, had made no ruling for the environmental groups, which made Tripp, in law, no more than a bystander. On the other hand, watching the hearing unfold, he felt impelled to act. He left the hearing room in search of a telephone and called a member of his board of directors in New York, a law professor and authority on civil practice. Tripp had not yet been admitted to the case; could he question the witness anyway? "Go ahead," he was told, "and if it gets sticky we'll back you up."[165]

And so Tripp, hesitantly, not sure how Sear might react or what

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forced drainage systems and canals for navigation, drainage, and mineral exploration.").

160. S. La. Envtl. Council, Inc. v. Sand, 629 F.2d 1005, 1009 (5th Cir. 1980).

161. *See* Wilkinson, *supra* note 79, at 3. For many years Sear was an Adjunct Professor of Law at Tulane Law School, teaching Federal Civil Procedure. *See id.* Based on personal discussions by author with Tulane law students during the 1990s, he clearly enjoyed teaching Civil Procedure, but was noted for his presentation in a highly regimented fashion ("Today we will discuss Rule 7. Rule 7 says . . .").

162. Halpin interview, *supra* note 64 ("They buried me in paper.").

163. Gagliano interview, *supra* note 81.

164. Tripp interview, *supra* note 141. The discussion of Tripp's entry and participation in the injunction hearing that follows is taken from this source.

165. *Id.*

sanctions might be in store, began to question Gagliano, taking over the witness as his own. He tried to go back to the basics of delta formation, marsh formation, even Gagliano's credentials, laying the groundwork for the scientist's conclusions: that this was a critical area for delta formation, that the canal instead whisked the sediments away, and that it would also change salinity and water flows in the interior marshes. There was a lot here to explain, Tripp had only begun to learn it himself the night before, and he was before the same magistrate and opposing counsel that Halpin had been. "It felt like I had one hand tied behind my back," he later recalled.[166]

The Corps and Morgan City, which had as a practical matter taken over the litigation for the agency, presented one witness to the contrary, a young hydrologist at the New Orleans District, William Garrett. Garrett testified that the new channel would simply move sediments farther off shore, building the delta in a different place.[167] Neither Halpin, new to the material, nor Tripp, new to the case and indeed not yet admitted as counsel, had prepared for this. Gagliano wanted to reply that the water was deeper farther off shore and thus less able to build delta, and further that the near-shore delta buffered the more freshwater, inland marshes.[168] The inland effects of the channel worried him every bit as much as the deepening itself.[169] As one can see, it was technical and the temptation to see it simply as one expert's word versus another would be strong. Due deference would go to the agency.

Judge Sear went beyond mere deference however. He seemed to listen attentively with one ear. None of the plaintiff's detailed contentions about environmental impacts found favor. Indeed, they were rather a nuisance. His opening sentence on the merits begins: "Plaintiffs fire an unchoked shotgun blast across the marsh of Terrebonne Parish at the CORPS and FES not unlike the hunter who fires without aim from the duck blind in the hope of hitting something that may, by chance, be flying past."[170]

Setting aside his obvious joy in the metaphor, this is hardly the language of respect. Judge Sear dismissed Gagliano's credentials—

166. Tripp felt a sense of futility throughout the litigation, much as Halpin had. It seemed clear that Sear viewed the oil business as trumping, and Tripp's intervention as a mild form of carpet bagging. At one point in the extended pretrial proceedings, which lasted several years, Sear called a status conference of the lawyers, which Tripp left in the hands of his co-counsel, a New Orleans lawyer. Sear, incensed, stated, "Mr. Tripp, then, will not appear before me." Tripp had to call and "beg" his way back into the case, which Sear ultimately granted with the admonition "let that be a lesson to you." The vibrations were never good. *Id.*

167. *Id.*

168. Gagliano interview, *supra* note 81.

169. *Id.*

170. S. La. Envtl. Council v. Hunt, No. 74-698, 18 (E.D. La. May 17, 1974).

which included a Ph.D., over forty publications in "geology, geography, archaeology, hydrology and regional planning," leading work on the delta for nearly a decade, positions as scientific counsel to several coastal committees, research with the Corps itself on land loss and sediment transport, detailed studies for EPA and Terrebonne Parish on the very ecosystem in play, and a list of publications that established his leadership in the field at a time when very few were even aware of the processes involved[171]—because he did not have degrees in hydrology or engineering.[172] Instead, Sear found favor with Garrett, who had a bachelor's degree in "agricultural engineering" and "had special instruction in hydrology."[173] He dismissed Halpin's estimates of marsh values (up to $81,000 per acre) from LSU economist Dr. Donald Pope as "theoretical" and "unaccepted in any market place";[174] within a few years, the State would be charging that much for wetland mitigation and paying up to three times as much for restoration projects.[175] Preliminary injunction was denied.

Thus ended, for all practical purposes, the environmental aspects of the Lower Atchafalaya litigation. When trial on the merits finally took place, four years later, Sear, by this time a full judge, wrote that he had already ruled the project to have "no significant effect" on saltwater intrusion, deltaic formation, or backwater flooding.[176] Because that ruling had not been appealed, he went on, "I have considered those issues closed."[177] In the meantime, environmental and economic issues were rising in other forums, returning again to

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171. *See* Gagliano affidavit, *supra* note 10. Gagliano's affidavit begins:

> I have conducted environmental studies of the proposed Louisiana Superport for the Louisiana Superport Task Force Group in 1972; was environmental consultant for the Greater New Orleans Bridge Study Group in 1972; was Project Director for the Ecological Baseline Study of St. Bernard Parish and Impact Study of Proposed Mississippi River and Mississippi River Gulf Outlet Canal and Lock in 1972; and was technical advisor for the Louisiana Committee on Coastal and Marine Resources; and was Project Director for Environmental Base and Management Study of the Atchafalaya Basin, Louisiana in 1973 (sponsored by the U.S. Environmental Protection Agency).

Id.

172. *Hunt*, No. 74-698, at 18.

173. *Id.* at 19.

174. *Id.* at 22-23.

175. *See* R.E. Turner & M.E. Boyer, *Mississippi River Diversions, Coastal Wetland Restoration/Creation and an Economy of Scale*, 8 ECOLOGICAL ENGINEERING 117, 117 (1997) ("[T]he larger river diversion projects and most other local wetland restoration/creation projects funded by state/federal sponsored programs ($1000 to $100000/ha) on this coast.").

176. S. La. Envtl. Council, Inc. v. Rush, 12 Env't Rep. Cas. (BNA) 1844, 1846 (E.D. La. 1978).

177. *Id.*

this court only after their own tortuous journeys.

6. THE PRESIDENT

The Corps of Engineers lied to me.

Governor Jimmy Carter, 1974[178]

President Carter was a military man, a businessman, and a man of faith. A successful farmer and a graduate of the Naval Academy at Annapolis, he was trained in the truth of numbers and data and undaunted by detail. Shortly after his gubernatorial election in Georgia, the Corps had announced its intention to build a $133 million dam on one of the state's longest and most scenic rivers.[179] Lobbied by its boosters on the one hand and its critics in the environmental community on the other, Carter decided to take his own look.[180] He ordered a copy of the Corps plan, sequestered himself, read it through, and then vetted its assumptions and conclusions with academics and other experts. He was appalled. In a white-hot, eighteen-page letter to the Engineers he accused them of "computational manipulation,"[181] and went on to exercise his political prerogative to veto the dam.[182] The experience left its mark. It would go on to shape—and some would say destroy—his presidency. In one of his first acts at the White House, he took on the Corps.[183]

Carter's anger was not unique, nor uniquely environmental. In recent decades Corps projects had flooded Native American reservations, destroyed prime farmland, eliminated entire fisheries, obliterated small communities and towns, converted public resources to private ones, and transferred wealth from one state to another, from one industrial sector to another, and in many cases to a small number of individuals and corporations, many of whom made killings in the process.[184] At ever rising public cost. As Carter assumed

178. REISNER, *supra* note 92, at 308.

179. *Id.*, at 307 (Sprewrell dam on the scenic Flint River was at issue).

180. The description of Carter's involvement that follows is taken from *id.*, at 307-08, 316-318, and from REUSS, *supra* note 20, at 48.

181. REISNER, *supra* note 92, at 307-08. The President would later write, "[N]one of the [Corps'] claims was true. The report was primarily promotional literature supporting construction." REUSS, *supra* note 20, at 49 (alteration in original) (internal quotation marks and citation omitted).

182. REISNER, *supra* note 92, at 308.

183. *See id.* at 308 (discussing Carter's intention to eliminate funding for dams once President); REUSS, *supra* note 20, at 49 (detailing Carter's plan to investigate and eliminate dam projects).

184. *See supra* note 95 and accompanying text (listing various Corps projects); *see also* Pelham, *supra* note 89, at 566 (critique section). For fisheries impacts, see Oliver A. Houck, *Promises, Promises: Has Mitigation Failed?*, WATER SPECTRUM MAGAZINE, Spring 1978, at 35. For Native American impacts, see *supra* note 104 and accompanying text.. For local community impacts see *infra* text accompanying notes 232-35.

office, the cumulative federal deficit was reaching an unprecedented "trillion dollars and inflation" was into double digits, while the Corps and its sister water agencies were burning through $5 billion a year.[185]

But it was also environmental. Carter was raised in the out-of-doors, ran a farm, and came to love rivers.[186] Symbolically green, on the day of his inauguration he shunned the traditional limousine and walked from the Capitol Rotunda to the White House.[187] Environmentalists, in turn, had learned to distrust and even hate the Corps, which no lesser a figure than Justice William O. Douglas came to call "public enemy number one."[188] Environmental anger, in turn, was fueled by old-line conservationists, hunters, and fishers prominent among them, who saw ecosystems the size of the Lower Mississippi bottomlands turned into soybeans, the destruction of salmon runs in the Pacific Northwest, and the wall-to-wall drainage of Florida.[189] Emboldened by new environmental laws such as NEPA and the Clean Water Act, newly formed environmental organizations began challenging Corps projects outright. EDF, for its part, brought a series of seminal cases.[190] When Carter assumed the presidency, EDF's staff analyst for water projects, Katherine Fletcher, joined his domestic policy staff.[191] During the transition period she had already been working up a report on the least justified and most harmful

185. REISNER, *supra* note 92, at 308.

186. *Id.* at 307; *see also* JIMMY CARTER, AN OUTDOOR JOURNAL 3-61 (1988) (discussing Carter's childhood, influences, values, and outdoor activities).

187. Haynes Johnson, *Carter Is Sworn In as President, Asks 'Fresh Faith in Old Dream,'* WASH. POST, Jan. 21, 1977, at A1.

188. MICHAEL GRUNWALD, THE SWAMP: THE EVERGLADES, FLORIDA, AND THE POLITICS OF PARADISE 243 (2006) (citing William O. Douglas, *The Public Be Dammed*, PLAYBOY, July 1969, at 143). Douglas was not alone. *See* GEORGE FISHER, U.S. CORPS OF ENGINEERS COLORING BOOK (1973) (on file with author) (lampooning the Corps with cartoons, one of which depicts a Corps employee wearing a "keep busy" button gutting a fish labeled "The Beautiful Buffalo [River]" with a knife).

189. Grunwald, *supra* note 94; Houck, *supra* note 184, at 34-35 (backlog of Corps mitigation obligations along the Lower Mississippi river alone totaling nearly one million acres; uncompensated wildlife habitat loss along the Colorado River totaling another over 120,000 acres). Corps mitigation proposals have done little to halt the spectacular decline of wild salmon. *See* Michael C. Blumm, *Saving Idaho's Salmon: A History of Failure and a Dubious Future*, 28 IDAHO L. REV. 667 (1992); Clay J. Landry, *Who Drained the Everglades? The Same Folks Who Are Restoring Them*, 20 PERC REP. 3 (2002), *available at* http://www.perc.org/pdf/mar02.pdf (discussing the drainage of the Florida Everglades and the recent federal projects to restore these wetlands).

190. *See, e.g.*, Envtl. Def. Fund, Inc. v. U.S. Army Corps of Eng'rs, 324 F. Supp 878 (D.D.C. 1971) (Cross-Florida Barge Canal); Envtl. Def. Fund, Inc. v. U.S. Army Corps of Eng'rs, 325 F. Supp. 728 (E.D. Ark. 1971) (granting injunction in Gillham Dam Project), *modified*, 325 F. Supp. 749, *vacated*, 342 F. Supp. 1211 (E.D. Ark. 1972); Envtl. Def. Fund, Inc. v. Hoffman, 566 F.2d 1060 (8th Cir. 1977) (Cache River Project).

191. REISNER, *supra* note 92, at 313. The description of Fletcher's list and supporting memorandum that follows is taken from this source.

Corps projects, and a proposal to kill them. There were sixty-one of them, and some were huge.[192]

Her efforts landed on receptive ears. Too receptive, as it turned out. After reading the report—without consulting his legislative staff, without consulting his incoming Secretary of Interior, Cecil Andrus, whom he was appointing to oversee the process, without consulting the governors of states in which these projects were located, and most fatally without even consulting the leaders of his own party on Capitol Hill—the President informed congressional leaders that he would kill funding for nineteen water projects, including the Lower Atchafalaya, Bayou Boeuf, Chene, and Black Channel.[193]

The blowback was horrific. "We're not going to be satisfied . . . until we get our projects back," howled Governor Lamm of Colorado,[194] prompting Governor Brown of California to up the ante another notch: "We want to build more dams."[195] This, from democratic Governors who were ex-governor Carter's most natural allies. Reactions on Capitol Hill were equally virulent . . . Representative Udall of Arizona, one of the strongest environmentalists ever to sit in that chamber, called Carter's proposal "George Washington's Birthday Massacre," overlooking a letter he had authored to the President only days earlier supporting the President's intention to "halt the construction of unnecessary and environmentally destructive dams."[196] Which of course, Carter was now proposing to do. Udall was left to explain that "one man's vital [water] project" was another's "boondoggle."[197] As it turned out, when push came to shove, Congress saw no boondoggles at all.

What followed was a protracted, high-stakes game of chicken, a contest of power and will. Battered by outrage from all legislative quarters against his "dastardly," "infamous" and "mind-boggling" proposals,[198] the President, undeterred, ordered the Corps to conduct its own review of the identified projects.[199] At the same time, his domestic staff, simply by applying the then-existing value of money,

192. REUSS, *supra* note 20, at 49-50.

193. REISNER, supra note 92, at 317-18. Carter vested the administration of this initiative in the Secretary of Interior, Cecil Andrus, who was taken completely by surprise. *Id.* at 313-14. The following year Andrus would tell the press, "I'm not stupid . . . . If you think I'm going to walk up to the Hill with another hit list and go through the agony and heartburn I went through last year, I can only say, 'I'm not stupid.'" Pelham, *supra* note 89, at 565.

194. REISNER, *supra* note 92, at 315 (internal quotation marks omitted).

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. REUSS, *supra* note 20, at 49.

identified nearly eighty more projects that failed the benefit-cost test,[200] boosting the blowback meter to yet new heights.[201] After more back and forth, the number dropped to eighteen, the absolute dogs, the Lower Atchafalaya project still among them.[202] By the time the congressional appropriations committees were done, in a last minute compromise, nine of the eighteen were defunded for the next fiscal year, including Lower Atchafalaya, subject to further Corps review.[203]

The next year, however, Congress was back again, restoring funding for all nine of the suspended projects, at which point Carter saw no option and "vetoed the entire appropriations bill."[204] In a "Perils of Pauline" moment that went down to the wire—rescued by an insurgent, budget-cutting movement in California that was sweeping the news—the veto was upheld.[205] But this only lasted for another year. In the end, against a backdrop of more than one hundred projects that, environmental effects aside, could not even pass rudimentary economics, only a few minor projects (including the catfish farm no one was willing to own up to) were canceled.[206] The rest, including navigation projects of landscape-altering impact, were cleared to go.[207]

President Carter's great experiment, challenging the least justified of the water project lineup, failed. He did succeed in making the infirmities of the water project empires widely known, but that exposure cost him dearly for the rest of his term.[208] His related

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200. REISNER, *supra* note 92, at 317.

201. *Id.* Vice President Mondale apparently told the President that "a stand against eighty projects would be his last." *Id.* The "hit list" then vacillated between as many as sixty-one and as few as eighteen projects. REUSS, *supra* note 20, at 49-50.

202. REISNER, *supra* note 92, at 317; REUSS, *supra* note 20, at 50.

203. REISNER, *supra* note 92, at 317-21; REUSS, *supra* note 20, at 51-52.

204. REISNER, *supra* note 90, at 322.

205. *Id.* at 322-23. The taxpayer revolt in California was Proposition 19, led by Howard Jarvis, who on the eve of the vote in Congress took out a full page advertisement in the *Washington Post* against the water bill entitled *End the Waste Now*, condemning "brazen boondoggles" for "Public Works Committee members," "favors for fat cats," and the Army Corps "whose scramble-brained commandants have line[d] our shores with 'erosion control' monuments to folly." Advertisement, *Howard Jarvis: The State of the Union*, WASH. POST, Jan. 23, 1980, at A7.

206. REUSS, *supra* note 20, at 57, 64. In the end, six projects died. *Id*. at 57.

207. *Id.* at 64.

208. The exposure did have some impact, even on Congress. The Chief of Staff of the House Interior Subcommittee on Water Resources later opined, "Ten years ago they would have doubled the funds . . . just to show him . . . ." Pelham, *supra* note 89, at 574 (quoting Jim Casey). Carter's Assistant Secretary of the Interior, Guy Martin, who soldiered much of the controversy for Secretary Andrus, later reflected, "Garrison and Oahe were awful [projects]. The farmers didn't even *want* Oahe. The Tug Fork Project is so ridiculous it strains belief. I can't help believing that if Carter had focused on a few he could have eliminated them." REISNER, *supra* note 92, at 330.

initiatives to insert independent review over water projects and require beneficiaries to begin paying at least part of their costs, like those of Presidents before him, also failed.[209] But not completely. President Reagan who followed, likewise no fan of these expenditures, managed to get at least modest cost-sharing and user fees through Congress, although at the price of yet more new and dubious projects.[210] The real lesson from both Carter and Reagan was that, when it came to individual water projects, no matter how provocative their abuses of the benefit-cost standard, the President was effectively outside of the chain of command.

In the meantime, Carter's initiative, however, put the Lower Atchafalaya project on hold.

7. CHECKPOINTS

> *I am at home one Sunday when I receive a telephone call from someone in the White House. Apparently there is going to be a hit list for Corps water projects. All I can think of saying is, "really?" The caller names some of the most controversial projects in the country: the Tennessee-Tombigbee Waterway, Auburn Dam, legends in their own time for environmental harm and fiscal manipulation. At the end I hear, "Atchafalaya Floodway." I say again, "really?", adding that this project, poorly designed as it is, will save New Orleans when the next flood comes; there is no way to cancel it. Maybe, I suggest, they mean the Lower Atchafalaya project instead? That one is all dog.*[211]

After the ruling on the preliminary injunction, the Lower Atchafalaya case disappeared into a morass of motions, pleadings, and discovery notices; many of them contested, some leading to briefs and further hearings . . . the full trappings of a scorched-earth defense when someone else is footing the bill.[212] Meanwhile, however, dredging on the project was stalled by unexpected developments: first, newly-enacted amendments to the Federal Water Pollution Control Act;[213] the second was the Carter hit list that, to the end, had the Lower Atchafalaya channel in its sights.

Section 404 of the amendments addressed pollution from

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209. *See* REUSS, *supra* note 20, at 59-64, 67.

210. President Reagan's actions did not happen without a prolonged fight. *See id.* at 67-92 (discussing user fees and cost-sharing).

211. Personal recollection from January 1977.

212. *See generally* Docket of S. La. Envtl. Council v. Rush, 12 Env't Rep. Cas. (BNA) 1844 (E.D. La. 1978) (No. 74-698).

213. Federal Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948). The Act was amended five times before the overhaul of 1972. *See* 2 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER § 4.1, at 10 (1986). The Act is generally referred to as the Clean Water Act. *History of the Clean Water Act*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/lawsregs/laws/cwahistory.html (last updated Aug. 23, 2012).

dredging in a new way. Basically, the Corps would permit it, which may seem odd since the Corps was the leading dredging company in the world.[214] EPA would provide guidelines for the Corps permits,[215] and could even veto particularly bad ones that slipped through the screen.[216] Clearly a shotgun marriage of two unlike agencies, it seemed limited to private activities until, to the surprise of many, a federal court in Rhode Island ruled that it applied to Corps projects as well.[217] The Corps duly incorporated this ruling in its regulations, which became the law of the land.[218] Anomalously, the engineers would now be permitting their own projects, even those that Congress had already authorized to go forward. By regulation, they would also hold public hearings on them.[219]

The chances of Corps engineers ruling against their own dredging seemed to lie somewhere between fanciful and nil, but section 404 did not stop there. The Corps had to apply EPA standards, which emphasized wetland values and required the selection of least harmful alternatives.[220] Here came the Lower Atchafalaya project proposing, among other things, to cover nearly 8,000 acres of wetlands with piles of dredged spoil.[221] There was more than gross impacts to consider here; more damage than necessary ran the risk of an EPA veto. All of a sudden for McDermott and Avondale, the two shipyards behind this project from the start, their Morgan City enthusiasts, and the Corps itself, 404 compliance became a very big deal.

Acknowledging two different public views of the project, the Corps scheduled two hearings, one in Houma and the other in Morgan City. The Houma meeting was a tame affair; the Corps described its project at length with charts and slides, proponents touted its benefits at equal length, and by the time Landry et al. presented their criticisms, late in the evening, the media and public officials had gone home.[222] It was a typical Corps hearing of the time; the public was there to hear. After protests from environmentalists

214. *See* 33 U.S.C. § 1344(a) (1976).

215. *See id.* § 1344(b).

216. *See id.* § 1344(c).

217. *See* Save Our Sound Fisheries Ass'n v. Callaway, 387 F. Supp. 292, 303 (D.R.I. 1974).

218. *See* 33 C.F.R. § 209.145(f), (g) (1975); *see also* S. La. Envtl. Council v. Rush, 12 Env't Rep. Cas. (BNA) 1844, 1847 (E.D. La. 1978). In the 1977 Amendments, Congress ratified this process exempting only Corps projects reviewed under EPA guidelines and accompanied by full environmental impact statements. 33 U.S.C. § 1344(r) (1982).

219. *Rush*, 12 Env't Rep. Cas. (BNA) at 1861.

220. For EPA guidelines see 40 C.F.R. § 230.10(a) (2011) detailing the impacts, and § 230.10(b) detailing the alternatives.

221. FES, *supra* note 2, at 18-19.

222. Tripp interview, *supra* note 141.

about coming in last, the District agreed to "shuffle the deck" for the second hearing, mixing proponents and opponents together, which became a bazaar.[223]

The Morgan City Auditorium had not seen a show this lively in years. Inside, the crowd waited expectantly, row upon row of hard hats and coveralls. Avondale and McDermott had bussed them in, and they were not expected to be quiet. A hush fell as a local priest led an invocation, asking all to pray for the project. The flashpoint came from two women with quite different belief systems. One shed a shoe as she took the podium and pounded it on the lectern, shouting, "When God made environmentalists he should have had an abortion!" The house roared its approval. Next up was a botanist from Tulane who began, "I am Ann Bradburn of the Audubon Society," which was as far as she got. The noise meter spiked with boos and catcalls. Bradburn paused, looked around the room, and then said, as if talking to a truant child, "I thought this was *America*." Instant silence. She read her statement and sat down. Two speakers later came Jim Tripp.

The issue Tripp had come down to raise was the 8,000 acres of marsh about to be buried under project spoil.[224] There had to be better alternatives, he suggested, looking directly at the EPA attorney on the dais. If a less harmful site were feasible, he continued, as if in a lecture, section 404 required it be chosen. He had reduced the hearing from shout-fest to legal challenge. As it turned out, the EPA did not have to exercise its veto authority; it simply needed to nod and the search for an alternative was on. Nor was one hard to find. The engineers could simply dump the mud in open water on the other side of the channel where it might support new wetlands instead. Glimpsing a silver lining, the Corps was quick to agree. It could even claim the new dump as offset to other losses from the project.[225] As far as Judge Sear would see, the Lower Atchafalaya project actually enhanced the environment.[226]

By late 1975, the section 404 hurdle cleared, the project was again all systems go when the second unpredictable event happened: a directive to stop the project under the President's review.[227] For Avondale, McDermott, and other sponsors, it must have seemed like one of those adventure games where goblins leap from every bend. They had paid their dues, cultivated their congressmen, prodded the Corps, brought in the lawyers, dodged a preliminary injunction, even

223. *Id.* The description of the hearing that follows is taken from the Tripp interview and from the personal observations of the author, who attended the hearing.

224. Tripp interview, *supra* note 141.

225. S. La. Envtl. Council v. Rush, 12 Env't Rep. Cas. (BNA) 1844, 1855 (E.D. La. 1978).

226. *Id.* at 1859, 1864.

227. *See supra* text accompanying notes 192-203; REISNER, *supra* note 92, at 317-18.

created some wetlands, and now came this assault, which was largely out of their hands. When the dust had last settled, the Corps itself was to review a handful of projects with the least national importance, and the least merit.[228] Under these criteria, however, they still included the Lower Atchafalaya.

The review would be cursory. As with the section 404 review just completed, the Corps itself would be conducting it, but without the check of an EPA veto, and the Corps was not in the business of eating its own children. The task of the review would fall on Colonel Thomas Sands, newly arrived to lead the New Orleans District.[229] A good soldier and a pragmatist, Sands saw the Lower Atchafalaya as a fait accompli. The most critical portion into the Gulf had been dredged three years ago, and a second piece since. Only the upper stretch remained. The decision seemed a no-brainer. He assumed that his mission was to assure that the benefits exceeded the costs, and he routed it to his staff economists for their calculations. Burned in the Carter process by the revelation that the benefits were scanty, they came up with an array of new numbers jumping the ratio from 1.2 to 2.2:1.[230] Without a qualm, Sands sent the review on to headquarters. It drew no questions. Case closed.[231]

Closed with it were the two administrative possibilities for derailing the Lower Atchafalaya project. The only recourse left was before Judge Sear in the Eastern District of New Orleans, which did not look promising; except for one good issue left to try: the benefit-cost ratio.

8. THE PRECEDENT

The Supreme Court was not encouraging. Back in the 1930s, emboldened by the Flood Control Act's great leap from navigation to flood control, the Corps had proposed a dam on the Red River bordering Oklahoma and Texas that had Texas fingerprints all over it.[232] From Oklahoma's point of view it was a raw deal. Two-thirds of the 150,000 acres inundated by the dam were on its side, occupied by small towns, schools, highways, bridges, a prison farm, and 50,000

228. *See supra* text accompanying note 4199, 203.

229. Interview with Major Gen. Thomas Sands (retired), in New Orleans, La. (Sept. 19, 2011) [hereinafter Sands interview]. The description of the review that follows is taken from this interview.

230. *Rush*, 12 Env't Rep. Cas. (BNA) at 1851-52.

231. Asked about the authorization process more generally, Sands stated that the benefit-to-cost ratio had attained unwarranted influence, and that the numbers used relied largely on industry data. That "bad" projects emerged he ascribed to "politics," and to the lack of a full review mechanism within the Corps. Sands interview, *supra* note 229.

232. *See* Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 511 (1941).

acres of oil and gas reserves.[233] The losses in ad valorem taxes would jeopardize county bonds and funding for thirty-nine school districts.[234] Some 8,000 Oklahomans resided there, the majority of them on dependably fertile soils. According to Oklahoma's complaint, the river would be diverted to "turbines located in Texas for the generation of power for sale principally in Texas."[235] None of which had anything to do with navigation *or* flood control purposes.

Oklahoma based its challenge on the Constitution, claiming a lack of interstate commerce power for the venture.[236] In effect, it claimed the project a fraud, a hydroelectric scheme in disguise.[237] Indeed, as the Court acknowledged, rather charitably, the claimed flood protections were "somewhat conjectural," leading to a 0.15 foot reduction of peak stage on the Mississippi at the latitude of New Orleans.[238] About an inch and a half. Further, Oklahoma argued, whatever flood control benefits the project could muster were outweighed by the real and present burdens it would cause; on Oklahoma in particular.[239]

In *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, a 1941 opinion, still dazzled perhaps by the promise of Progressive Era construction, Justice Douglas rejected the State's claims. "Such matters raise not constitutional issues but questions of policy," he wrote.[240] It was "for Congress alone to decide whether a particular project . . . will have such a beneficial effect on the arteries of interstate commerce as to warrant it."[241] Nor was it for the courts, he added, "to determine whether the resulting benefits to commerce . . . outweigh the costs of the undertaking."[242]

Whether the Justice Douglas of a later day, viewing the same

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233. *Id.* at 511-12.

234. *Id.* at 512.

235. *Id.* at 511-13.

236. *Id.* at 515.

237. The amended complaint read:

> That the sole and only purposes of said project are those set forth in the Authorization Act and described in the statutory scheme aforesaid for flood control and hydroelectric power, neither of which has any real or substantial relation to the improvement of navigation . . . such inconsequential and intangible benefits to navigation as may result from said project, would flow from the flood control feature thereof and not the hydroelectric feature thereof.

Reply Brief of Appellant at *5-6, Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941) (No. 832) (internal quotation marks omitted).

238. *See Guy F. Atkinson Co.*, 313 U.S. at 526.

239. *See id.* at 512.

240. *Id.* at 527.

241. *Id.*

242. *Id.* at 528.

Corps and same projects as public enemy number one,[243] would have ruled in the same fashion we will never know. What seems clear is that the case arose in an unusual way, not as a challenge to an agency benefit-cost decision under 701a, but more broadly, on Congress' power to authorize such a project at all. No mention was made of the 1936 Act's standard, only that *some* flood control and navigation benefits, however measured, were sufficient to support federal action.[244] From this narrow holding, *Oklahoma v. Atkinson* soldiered forward to shut down further judicial inquiry into alleged benefits and costs for the next three decades,[245] during which, as we have seen, the benefit-cost ratio grew to dominant importance and widespread excesses, all seemingly beyond reach.[246]

The Corps would not question them; it was performing them. Congress would not question them; it had no mechanism to examine them, no history or practice of examining them, no expertise to examine them (indeed, it had often disavowed its competence to do so),[247] nor the time, even if it had the expertise, to investigate some 200 new projects per cycle. It had, instead, an omnibus process that deflected attempts to question them, a culture that vilified any member of Congress that questioned them, and, at bottom, no institutional interest in the facts. The last thing in the world members wanted to learn was that a project they were promoting had flaws or, worse, was economically unsound. Case in point: its response to the Carter initiative.[248] Following *Oklahoma v. Atkinson* the courts would not reach them either. Then came a new law, in fact, two: the Administrative Procedure Act ("APA") and NEPA.[249]

By the 1950s, it had become clear that federal agencies created in response to an increasingly complex society had become, in fact, governments of their own, running their own agendas with minimal democratic controls.[250] The answer was the dry-sounding APA, which did several revolutionary things. It required all agencies to make their proposals open to public comment,[251] something short of a popular vote but powerfully disclosing, and it allowed any person

243. *See supra* text accompanying note 188.

244. *See Guy F. Atkinson Co.*, 313 U.S. 508.

245. *See, e.g.*, United States v. W. Va. Power Co., 122 F.2d 733, 738 (4th Cir. 1941); Yalobusha Cnty. v. Crawford, 165 F.2d 867 (5th Cir. 1947).

246. *See W. Va. Power Co.*, 122 F.2d at 738; *Crawford*, 165 F.2d at 868.

247. *See supra* text accompanying notes 61-63.

248. *See* REISNER, *supra* note 92, at 314-15 (outlining Carter's initiative to stop funding of nineteen water projects and Congress's strong opposition).

249. 5 U.S.C. §§ 551-59 (2006); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370f (2006).

250. *See* GLEN O. ROBINSON ET AL., THE ADMINISTRATIVE PROCESS 36-37 (4th ed. 1993).

251. §§ 553(b)-(c).

harmed by these proposals to sue for violations of public law,[252] turning the courts into traffic cops on the federal speedways. When, in 1972, the Supreme Court held that ordinary citizens could sue for violations harming their environmental, even aesthetic, interests, the door flew open to a new thing: environmental litigation.[253] Still, one needed a legal violation, an environmental law, and in the early days there were few around. Save one that had come into force on January 1, 1970, and would rock the federal world.

NEPA was enacted with little fanfare. It set forth a number of environmental policies and several obligations, one of which was that environmental amenities be quantified to give them adequate weight in decision making, and another that decision makers would prepare an EIS on their proposals.[254] Nothing here looked very threatening, nor, in the Corps' mind, even affected its program. After all, its projects were authorized by Congress, which entitled them to a pass. Everything in the Corps' legislative and juridical history encouraged it to believe in its exempt, indeed exalted, status. Everything in their West Point training encouraged Corps officers to put their heads down and drive forward. On the books and in motion were projects as America-altering as the Cross-Florida Barge Canal, a channel literally dividing the state, directly through the Everglades. Essayons!

NEPA unleashed decades of frustration over federal resource decisions of all kinds—highways through neighborhoods, wildcat mining, forest clear-cuts, a jetport in the Everglades—but the most immediate impact was on water projects of the Corps.[255] As one Senate staffer observed only a few years following NEPA's passage, "If Congress had appreciated what the law would do, it would not have passed. They would have seen it as screwing public

252. §§ 701-06.

253. *See* Sierra Club v. Morton, 405 U.S. 727, 739-40 (1972) (holding that administrative agencies are not insulated from judicial review designed to protect public interest). The U.S. Department of Justice reported a rise in citizen environmental suits from zero in 1968 to twenty-three in 1971, accounting for twenty-nine percent of all cases cited in the Division report. *See* RICHARD A. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH 32-33 (1976).

254. NEPA'S policies are set forth in 42 U.S.C. § 4331 (2006); its quantification requirements in 42 U.S.C. § 4332(2)(B) (2006) ("methods . . . which will insure that presently unquanitified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations"); its impact statement for "major federal actions" in 42 U.S.C. § 4332(2)(C) (2006). The latter sections provided the foothold for challenges to Corps benefit-cost calculations.

255. As of December 31, 1977, the Council on Environmental Quality ("CEQ") tallied seventy-two citizen suits against the Army Corps of Engineers over NEPA compliance, behind only the Department of Housing and Urban Development and the Federal Highway Administration. EXEC. OFFICE OF THE PRESIDENT, COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: THE NINTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 410-12 (9th ed. 1978).

works . . . ."[256] Within the first year, an EDF lawsuit stopped the Cross-Florida Barge Canal, one of the most indefensible Corps ventures in the country.[257] The court did not buy the Corps' claim of a NEPA pass; it was the agency proposing the project, it would prepare an EIS.[258] The damage of this opinion was limited, however, because all the Engineers seemed required to do is write a statement and resume their march. The actual decisions they were making, and in particular their economic determinations, still seemed secure from review.

Then, this citadel too began to tremble. A series of cases challenged Corps projects in which environmental costs had been grossly underestimated, if estimated at all. In *Alabama ex rel. Baxley v. U.S. Army Corps of Engineers*, the state Attorney General challenged a channelization project, one of many leading into the Tombigbee River.[259] Like all such projects, it would degrade water quality while pushing more floods downstream—the sad history of watershed development in America—but Alabama focused on hunting and fishing losses, a root concern of its citizens. The Corps took the position that NEPA did not compel it to put these losses in dollar terms, and, even if it did, this had been done by ascribing a $500 loss in fur trapping;[260] besides, it asserted, per *Oklahoma v. Atkinson*, the benefit-cost ratio was off limits to judicial review.[261] Not so fast, said the court. NEPA, by its very language, required these losses to be quantified, and, while *Oklahoma* might have put the Flood Control Act off limits,[262] NEPA independently required a balancing analysis of benefits and harms discovered in the EIS process.[263] The Corps was thus obliged to include the environmental costs, and the court to review their adequacy. *Alabama ex rel. Baxley* and subsequent opinions were here doing half of the hitherto unthinkable: judicial review of at least the environmental part of the benefit-cost equation.

Alabama ex rel. Baxley went only so far. While environmental losses had a strong emotional impact on many people, they had only

256. LIROFF, *supra* note 253, at 35 (internal quotation marks omitted).

257. *See* Envtl. Def. Fund, Inc. v. U.S. Army Corps of Eng'rs, 324 F. Supp. 878 (D.D.C. 1971). Some sense of the opposition to this project can be found in a contemporary MAD Magazine spoof, "A.C.E. Comics" featuring "Sergeant Silt" in "Ordeal at Okeechobee," in which the Sergeant himself is on the cover attacking a swamp rabbit with the blade of his bulldozer. SERGEANT SILT, U.S. CORPS OF ENG'RS, 'ORDEAL AT OKEECHOBEE!' (undated) (on file with author).

258. *See U.S. Army Corps of Eng'rs*, 324 F. Supp. at 880-81.

259. 411 F. Supp. 1261, 1264 (N.D. Ala. 1976).

260. *See id*. at 1269.

261. *See id*. at 1268 (holding that it is not for court to "determine whether the resulting benefits to commerce [will] outweigh the costs of the [project]").

262. *See supra* notes 240-42 and accompanying text.

263. *See supra* note 254 and accompanying text.

a small impact on Corps benefit-cost calculations.[264] Corps engineers (like all humans) were reluctant to admit to any adverse consequences, and quick to minimize them when they were too obvious to ignore. More fatally though, most environmental losses were not easily, and never fully, translated to dollars. Hence the reduction of marsh values in the Lower Atchafalaya case to the price of muskrats and nutria.[265] There was no textbook for doing more, which was fine with the Corps, and so these costs remained largely on the sidelines. As we have also seen, however, the real vulnerability of the Tennessee-Tombigbee Waterway, the Red River Waterway, the Delaware Harbor Deepening, and dozens of projects like them, was that their calculation of *economic* benefits and costs was questionable, skewed, or flatly bogus.[266] The question became whether, in a NEPA challenge to such a project, the economics could be reviewed as well. Review before an independent federal judge. No process more threatened the empire.

Again EDF pushed the envelope. In the early 1970s it made two challenges to Corps projects in the South, a dam on the Cossatot River and a 140-mile channelization of the Cache River and Bayou DeVieu, both in Arkansas.[267] Among other claims were the allegation that, as a matter of simple economics, the alleged benefits did not in fact exceed the costs, violating both 701a and NEPA. Both trial courts and the Eighth Circuit Court of Appeals tread carefully around the issue. Seemingly bound by *Oklahoma v. Atkinson*, 701a review was unattainable. "We point out, however," the Eighth Circuit continued, "that the relief requested by the plaintiffs under § 701a is partially available under NEPA."[268] As following circuits would hold, NEPA required an overall balancing of costs and benefits and that determination, 701a-like, was indeed a proper judicial inquiry.[269] It was a limited inquiry to be sure, ensuring that all factors had been fully and rationally considered, but it was a beachhead on the final front, the economic manipulations behind the Golden Rule.[270]

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264. *See* Grunwald, *supra* note 128, at A1.

265. *See infra* note 301 and accompanying text.

266. *See* Drew, *supra* note 24, at 56; *see also* Grunwald, *supra* note 122.

267. Envtl. Def. Fund, Inc. v. U.S. Army Corps of Eng'rs, 325 F. Supp. 749, 753 (E.D. Ark. 1971), *aff'd*, 470 F.2d 289 (8th Cir. 1972); Envtl. Def. Fund, Inc. v. Froehlke, 473 F.2d 346, 348 (8th Cir. 1972).

268. *Froehlke*, 473 F.2d at 356; Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 526 (1941) ("[T]he exercise of the granted power of Congress to regulate interstate commerce may be aided by appropriate and needful control of activities and agencies which, though intrastate, affect that commerce.").

269. NEPA's "balancing analysis" requirement was first derived from 42 U.S.C. § 4332(2)(B) (2006) by the D.C. Circuit in *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1113 (D.C. Cir. 1971), and widely followed. *See* Egan, *supra* note 114, at 429-42.

270. CEQ assisted this interpretation in its 1977 NEPA regulations stating that

In 1973, one year before the Lower Atchafalaya litigation began, the Cape Henry Bird Club and national environmental organizations sued to stop a dam in southern Virginia that, although adorned with flood control and recreational benefits (motor boating on the lake), intended to "augment stream flow," i.e., flush industrial pollution downstream.[271] The benefit-cost ratio was a supposedly never-to-be-seen, 1.1:1.[272] No slighter margin is imaginable. Moreover, recent amendments to the Federal Water Pollution Control Act flatly prohibited the use of dams as "a substitute for adequate treatment or other methods of controlling waste at the source."[273] Were not this language adequately clear, early in 1973 the EPA Administrator wrote to the Chief of Engineers to state that "no downstream water quality benefits [should] be assigned to [this particular] project."[274] Which, one would think, ended the matter, but this was the Corps, and it did not agree. It could not afford to. The pollution flushing constituted forty percent of the dam's benefits,[275] and with a benefit-cost ratio virtually at parity, the hit would sink the project. So, one might think. The lawsuit followed.

The court began where *Alabama ex rel. Baxley* left off. The Corps had, not unexpectedly, low-balled environmental costs, which included drowning a state-purchased wildlife area managed for highly regarded wild turkey and deer. That disclosure alone required the Corps to recalculate its ratio.[276] The flushing benefits, however, were the key to the case and pitted two agencies, the EPA and the Corps, against each other over whether the new water act prohibition applied to ongoing projects. On this pivotal question, the court punted the ball. The Corps was within its competence to decide the applicability of the flushing ban, it held, but NEPA obligated it "to set forth opposing views," i.e., those of the EPA.[277] While the Corps' EIS had noted the EPA's position, it failed to note its effect on the benefit-cost ratio. Hence a second calculation without low flow benefits was called for.[278]

It seemed like a win for the plaintiffs, but such was not to be.

"when a cost-benefit analysis is prepared, [agencies shall] discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities." 40 C.F.R. § 1502.23 (2011).

271. Cape Henry Bird Club v. Laird, 359 F. Supp. 404, 407-20 (W.D. Va. 1973).

272. *Id*. at 413, 418-19. For the Corps' stated policy in this regard see *supra* note 3.

273. 33 U.S.C. § 1252(b)(1) (2006).

274. *Laird*, 359 F. Supp. at 418.

275. *See id*.

276. *See id*. at 419.

277. *Id.* The Court's deference to the Corps was incorrect; this was a matter of law, not Corps discretion and, further, the EPA, not the Corps, was charged with administration of the program.

278. *Id.* at 419-20.

Finding the Corps to have been acting "in good faith,"[279] no injunction was issued and the construction continued, tipping the economic and political balance in its favor more each day. By the time the ratio was recalculated, with these "sunk" costs taken off the ledger and yet new benefits discovered, the final numbers, even without the flow, soared above par.[280] Environmentalists had won the right to review both benefits and costs but, fighting both time and an obdurate bureaucracy, they lost the battle.

The next venue would appear a few months later in the Eastern District of Louisiana.

9. THE ACCOUNTING

In January 1978, nearly four years after the lawsuit had been filed and more than 230 docket entries later, the Lower Atchafalaya finally came on for trial.[281] It was like trying the Civil War after Gettysburg. Judge Sear had already ruled that the project would not have significant environmental impacts.[282] The Terrebonne Parish plaintiffs had dropped out, and the matter now rested with the national interveners.[283] Worse still, the project was nearly completed, which gave the litigation a somewhat hypothetical air. The central question was a serious one, however, and Judge Sear, though not sympathetic to it, gave it his attention.[284] It was the issue environmental plaintiffs had been asking courts to rule on throughout the 1970s: the benefits did not exceed the costs.

It was not an idle claim. The Lower Atchafalaya project had a deep flaw. As earlier described, it had been authorized a decade before with the wafer-thin benefit-to-cost ratio of 1.2:1.[285] Unable to claim anywhere close to sufficient savings for the rig manufacturers behind the project, the Corps squeezed forty percent of the benefit total from the assumption that, in times of impending storms, Gulf rigs would be uncoupled from their moorings and towed "to the safety of inland waters."[286] Even when made, the proposition was highly imaginative. Further, rig technology had since advanced to the point that large rigs could withstand hurricanes at sea.[287] As the court itself would note, "The greatest single cause of drilling structure loss

279. *Id.* at 421.

280. *See id*. at 419.

281. Docket of S. La. Envtl. Council v. Rush, *supra* note 212.

282. *See* S. La. Envtl. Council, Inc. v. Rush, 12 Env't Rep. Cas. (BNA) 1844, 1846 (E.D. La. 1978).

283. *See* S. La. Envtl. Council v. Sand, 629 F.2d 1005, 1009 (5th Cir. 1980).

284. *See Rush*, 12 Env't Rep. Cas. (BNA) at 1845.

285. *See id.* at 1851.

286. *Id.* at 1850.

287. *See id*. at 1851.

is capsize, not hurricane loss."[288] Towing, in short, was the last thing a prudent operator would want to do.

There was yet more. A Corps economist had become "suspicious" of these benefit claims and sought authority to examine them.[289] His request was denied, ostensibly because of "insufficient funds and time,"[290] although one who actually believed these reasons would have to be rather gullible. As the court pointed out, the Corps was quite ready to provide funds and time for studies jacking up project benefits.[291] As seen throughout this history, the Corps was not in seek-the-truth mode; it was in save-the-project mode.

Still other shortcomings were revealed. The Corps had cherry-picked conclusions from separate studies, the high end from each, the low end from neither, to raise the number of rigs served.[292] It had gleaned benefits from another project that was itself controversial and not yet proposed for authorization.[293] It had even obfuscated the fact that the Lower Atchafalaya project was designed to serve two local enterprises, stating instead that it benefited "companies engaged in the offshore oil and gas industry."[294]

On the other hand, the Corps had calculated virtually no environmental costs beyond minimal losses to hunting and trapping (dramatically low balled to some 350 acres), amounting to $29.84 an acre.[295] As we have seen, however, Judge Sear had already ruled testimony on higher values to be "unrealistic."[296] On the other hand, however, not adjusting for greater environmental losses in any way, the court had to acknowledge that forty-two percent of the project benefits were chimerical.[297] This would reduce a 1.2:1 benefit-cost ratio to less than 0.8:1. Now what?

On this matter, too, Judge Sear was diligent with the law, if somewhat tone deaf to its application. He began by accepting the *Alabama ex rel. Baxley* line of cases challenging the ingredients of Corps cost-benefit ratios.[298] The distinction they drew between review under the Flood Control Act Section (verboten) and NEPA

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288. *Id*. at 1850 n.32.

289. *Id*. at 1851.

290. *Id*.

291. *Id*. at 1852-53. While he found the "pattern of agency action" behind the Corps' calculations "troubling," Sear would not find them to violate the "good faith objectivity" required by law. *Id*. A charitable conclusion. Semper Fidelis.

292. *See id*. at 1851.

293. *See id*. at 1854.

294. *See id*. at 1853; FES, *supra* note 2, at 23.

295. *Rush*, 12 Env't Rep. Cas. (BNA) at 1854-55 n.59.

296. *Id*. at 1854 n.55.

297. *Id*. at 1850-51, 1854 (hurricane protection benefits at forty percent; flood control benefits at two percent).

298. *Id*. at 1849.

(required) was his premise as well. The Corps argument that its calculations were beyond review was rejected,[299] but that did not resolve the question of what happened when a review uncovered a ratio this faulty.

Ironically, Judge Sear found that the Corps was rescued by new calculations prompted by the Carter hit list drama.[300] During that process the Corps had raised the Lower Atchafalaya ratio to 1.4:1, which then led to congressional re-approval and funding.[301] Sensing, perhaps, its vulnerability to a more rigorous inquiry in court, the Corps became yet more creative with benefits and arrived at 2.2:1, still including the chimerical "hurricane refuge" claims.[302] Even with hurricane and flood control benefits now disqualified and subtracted from the equation, Sear reasoned, the ratio would still remain positive, 1.2:1, rather magically identical to that when the project was first authorized over ten years before.[303] The fact that the newfound benefits had little to do with the stated rationale for the project in the first place—protection of the oil industry in the Gulf from big storms—never appeared in the opinion. Sear, with great diligence, did the law and the numbers and, in effect, concluded that switching project purposes made no difference. This seemed to offer the plaintiffs a decent shot on appeal. Then, the Supreme Court waded back into the game.

In the 1970s the Court had been relatively receptive to environmental law,[304] and then turned cool.[305] This was particularly so with NEPA, whose advances were made by district and appellate courts that tended to be closer to the facts of a case and to the repeated spectacle of agencies ignoring the statute's rather simple commands.[306] The Supreme Court dug in its heels. For whatever reason, of the first twelve NEPA cases the Court accepted for hearing between 1970 and 1984 and the twenty-two NEPA issues presented,

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299. *See id.* 1849 n.22 ("Although the CORPS has sought to restrict judicial review of economic benefits claimed for this Project, it has elsewhere conceded the calculation of environmental harms is only possible when weighed against economic benefits.").

300. *Id.* at 1851; *see also supra* text accompanying notes 191-202.

301. *Rush*, 12 Env't Rep. Cas. (BNA) at 1851.

302. *Id*. at 1849 n.21, 1851.

303. *Id*. at 1851.

304. *See* E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 126-36 (1977) (holding the EPA has the authority under the Clean Air Act to limit effluents for particular classes of chemical plants); Train v. Natural Res. Def. Council, Inc., 421 U.S. 60, 86-87 (1975) (finding the EPA properly approved Georgia's plan for complying with federal air quality standards set forth by the Clean Air Act).

305. *See* Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 346 (1989).

306. *See id.* at 370-72.

it never once ruled for the application of the statute.[307] Environmental groups, faced with this reality, became quite cautious of seeking Court review. Which did not protect against the Court reaching out for cases on its own, and collateral fallout when the next opinion came down.

The Court was not only antipathetic to NEPA, it signaled particular antipathy to the notion that NEPA required a change in behavior.[308] In previous decisions it had diminished, but never ruled out, the possibility that a government decision could be so gross that it would fail to measure up to the statute's goals.[309] Then, with the appeal of Judge Sear's opinion pending before the Fifth Circuit, the Court dropped yet another bomb: *Strycker's Bay*.[310]

The case was provocative. The Department of Housing and Urban Development ("HUD") was, in effect, constructing a high-rise ghetto across the belly of Manhattan Island, at a time when sociologists and planners were concluding that warehousing poor people and minorities in big buildings brought very bad results.[311] Nevertheless, as seen with the Corps, government agencies wedded to one modus operandi are often the last to see another, and so HUD plowed forward, rejecting requests from several quarters that the project be rescaled and realigned. Its reasons were woodenly bureaucratic: such changes would delay construction by two years.[312] To the appeals court, this was an insufficient reason under NEPA to reject a plainly better alternative to a project of this magnitude, indelible on the city for generations to come.[313]

The Supreme Court reached out to rebuff both the appellate panel and NEPA. No matter how destructive the project was or how flimsy its rejection of better approaches, HUD needed only to "consider[]" the consequences.[314] Justice Marshall's dissent pointed

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307. *See* Richard Lazarus, *The National Environmental Policy in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1509 n.2 (2012); Levy & Glicksman, *supra* note 305, at 346.

308. The District of Columbia Circuit first suggested that review of a project's merits would be appropriate. Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1112 (D.C. Cir. 1971) ("Thus the general substantive policy of the Act is a flexible one. It leaves room for a responsible exercise of discretion and may not require particular substantive results in particular problematic instances."). "May not," of course, also implies "may."

309. *See* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 548 (1978).

310. Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980) (per curiam).

311. *See id.* at 228 (Marshall, J., dissenting). For literature on warehousing the poor, see *id.* at 230.

312. *Id.* at 226.

313. Karlen v. Harris, 590 F.2d 39, 45 (2d Cir. 1978).

314. *Strycker's Bay*, 444 U.S. at 227-28.

out the unsaid but obvious: had this been a project effecting people of greater means, the outcome might have differed.[315] The Court's discomfort level was perhaps reflected in the fact that its opinion was issued in anonymous "per curiam" form, which has traditionally meant a proposition too obvious to belabor, but has also meant, rather handily, that no justice need be identified as the author.[316]

While no one on the Court was willing to own up to *Strycker's Bay*, everyone on down had to accept its holding. Review of any "go" decision based on NEPA seemed now beyond reach, which could well include cost-benefit ratios. Joshua Schwartz, the Department of Justice attorney, had already filed the government's brief on Lower Atchafalaya to the Fifth Circuit Court of Appeals.[317] In conscience, he remembers, he could not tout the project as a good one, nor could he oppose judicial review as a matter of law; this was just not such an extreme case, he would argue, to call for it. He nevertheless expected the Circuit to reverse; the Corps' numbers, in particular its "mixing-and-matching" two separate studies, looked "cooked."[318] Then *Strycker's Bay* came down, and he was duty-bound to alert the court, attaching the opinion. It just might bail out the Corps.[319]

It did, and it didn't. The easiest thing for the Fifth Circuit to do with the Lower Atchafalaya appeal would have been to cite *Strycker's Bay* and declare NEPA review of Corps benefit-cost ratios to be a thing of the past. Instead, the appellate panel, having genuflected in the High Court's direction, declared that NEPA still permitted a "focused, indirect review of the economic assumptions underlying" a Corps project.[320] This was so, it reasoned, because NEPA still required the balancing of environmental harms and economic benefits, and the economics could be so grossly misstated as to distort "fair consideration" of the harm.[321] To be sure, Congress was the

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315. *See id.* at 228-31 (Marshall, J., dissenting). The Court reaffirmed this holding in *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 351 (1989) (famously opining that it did not matter if the project eliminated all of the wildlife species at issue).

316. BLACK'S LAW DICTIONARY 1125 (8th ed. 2004).

317. Telephone Interview with Joshua I. Schwartz, Professor of Law, George Washington Univ. Law Sch.(Nov. 3, 2011) (on file with author). The description of his thinking at the time that follows is taken from this source.

318. *Id*. Schwartz was also struck by the extent to which Sear, a literal judge and a stickler on trial procedure, held a "plenary trial" that allowed the defendants to introduce new evidence supporting the benefit-cost ratio. Here, however, the record showed significant gaps and Sear let Conrad repair them.

319. Without *Strycker's Bay* Schwartz thought that the government would lose the appeal. *Id.*

320. S. La. Envtl. Council, Inc. v. Sand, 629 F.2d 1005, 1011 (5th Cir. 1980).

321. *Id.*; *see also* Save Our Wetlands, Inc. v. Rush, 11 Env't Rep. Cas. (BNA) 1123, 1128 (E.D. La. 1977) (remanding an alleged 12:1 benefit-cost ratio when actual benefits, at best, were only a third of these claimed); S. La. Envtl. Council, Inc. v.

ultimate decision maker on this project but the court's duty was to ensure that this decision was fairly informed.[322] "Barring the extreme case," the appellate panel concluded, the call was up to Congress.[323] At the same time, however, it was reserving its option.

Having gone this far, the panel ran out of gasoline. One could imagine it going on to conclude that this was, in fact, an extreme case. After all, a project sold to Congress as saving oil exploration in the Gulf from the perils of hurricanes, when no such benefits existed, might well be seen as meriting a remand, if only, to tell Congress the truth. The environmental attorneys certainly thought so. So had, privately, the government's attorney. A key factor seemed to be the extra scrutiny the project had received from the Carter hit-list initiative, when its defects hit the fan in such a visible way. To call Congress "misled" from then on was a hard claim to make.[324] In fact, it might always be difficult to make. As we know, Congress has encouraged the Corps to dummy the deck on water projects, routinely. For its part the Corps, budget and future on the line, has usually been quite willing to comply. The Lower Atchafalaya opinion did not interrupt the game, this time. But its latent power is the declaration that, someday, it could.

10. THE ENIGMA

> *To rest upon a formula is a slumber that, prolonged, means death.*[325]
>
> *Justice Oliver Wendell Holmes*

No one knows quite what to do about civil works program of the Army Corps of Engineers, one of the most powerful institutions in the United States. No one is even sure whom it responds to. Its military reputation dates back to the founding of America and it ruled Panama for nearly a century like a monarch. It is best known, however, for this one program that has changed the nature of America and of the agency in irreversible ways.

Corps projects have powered states and regions, irrigated the desert, channeled the marsh, drained the swamps, and are now building seawalls and pumping sand along every coast from the Great Lakes to the Gulf of Mexico. They provide deep navigation

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Rush, 12 Env't Rep. Cas. (BNA) 1846, 1851 n.37 (E.D. La. 1978). The rationale, which seems persuasive, is that a distortion this dazzling encourages the decision maker to accept *any* consequences no matter how severe.

322. *Sand*, 629 F.2d at 1013.

323. *Id.* at 1015; *see also* Sands interview, *supra* note 229.

324. Although the Corps tried, as late as 1981, its Data for Testifying Officers on the Atchafalaya Project, which accompanies annual requests for appropriations, continued to list "Hurricane Refuge Benefits." Sands interview, *supra* note 229.

325. OLIVER WENDELL HOLMES, *Ideals and Doubts*, *in* COLLECTED LEGAL PAPERS 303, 306 (1920).

subsidies, well below-cost water, and real estate and development bonanzas wherever they go. And the political clout thereof. They have also destroyed coastal deltas, species as important as the Pacific Salmon, and ecosystems as large as the Everglades; they have flooded farms, rivers, wildlife refuges, communities, towns, and Native American reservations, few of which make it into their benefit-cost ratios. To many in the wildlife and conservation community, they are the Devil incarnate. To their boosters, who are by and large their beneficiaries, they are Santa Claus. On this point all agree: The civil works program wags the Corps. And Congress wags the civil works program. We have a recipe for irresponsibility.[326]

One institutional result is that, in the pressure of maintaining its program, the Corps has trouble telling the truth. Say what it might, it is in the business selling its work.[327] In this process, its calculations on the benefits and costs of its projects have become a metaphor for cooked books. It will bend the rules, misstate the facts, deny the obvious, ignore the inconvenient, rely on indefensible assumptions, create chimeric data, silence the curious, and work hard to silence others. These tendencies are not anomalies; they have gone on for nearly two hundred years.[328] Nor are they mere puffery, on the periphery of the decisions themselves. In practice, they *are* the decision, and, in practice, they are made by the Corps right up through the agency chain.

The question for the last half-century, then, has been whether these agency calculations are judicially reviewable, as are those of other agencies across the board.[329] It is here that *Oklahoma v. Atkinson* meets the APA and NEPA. And it is here that the essential enigma of the Corps of Engineers rears its head again: what *is* the Corps of Engineers, an arm of the Congress staffing its authorization

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326. Indeed, neither institution displays the slightest interest once the projections are made in finding out what benefits and costs ultimately accrued. *See* Jeffrey W. Jacobs, *Broadening U.S. Water Resources Project Planning and Evaluation*, 42 NAT. RESOURCES J. 21, 30-31 (2002).

327. "We are in the business of building projects," stated one Corps project manager, "[a]nd that's the last major dam site left on the river. However, we are having a little trouble selling that dam." Timothy Egan, *Ringold Journal; A Stretch of River That Time Forgot*, N.Y. TIMES, May 3, 1989, at A16 (discussing Auburn dam). The Corps has even designed campaigns to increase its work, such as the expansionist "Program Growth Initiative." *See* Michael Grunwald, *Generals Push Huge Growth for Engineers*, WASH. POST, Feb. 24, 2000, at A01.

328. *See, e.g.*, *Delaware Deepening - Environmental and Economic Boondoggle*, DELAWARE RIVERKEEPER NETWORK, http://www.delawareriverkeeper.org/river-action/ongoing-issue-detail.aspx?Id=33 (last visited Jan. 7, 2013); *Corrupt Corps Abuses the Taxpayers*, THE PROGRESS REPORT, http://www.progress.org/archive/tcs32.htm (last visited Jan. 7, 2013).

329. *See infra* note 335.

decisions, or an executive agency subject to the basic rules of responsible agency behavior?

Without the need to gainsay the Supreme Court, its *Oklahoma v. Atkinson* opinion of some eighty years ago addressed a very different question—the lawfulness of a congressional authorization under the Commerce Clause of the Constitution—and was reached long before Congress came to grips with the phenomenon of ever-more-powerful and unaccountable federal agencies.[330] The judicial review provisions of the APA were intentionally inclusive—no agency decisions were beyond its reach save those without standards to measure them—and intended precisely to check arbitrary and capricious decisions.[331] If one accepts the proposition that benefit-exceed-cost is a standard, owned in this case by the Corps, and forms the heart of its decision to recommend a project, there seems no good reason that APA review should be denied.

The fact that Congress ultimately authorizes a project itself does not change this analysis. Indeed that Congress may authorize a project in spite of a (rare) Corps negative analysis in no way diminishes the fact that the agency has in fact made the analysis, and a decision based on it. Unless one takes the position that *no* recommendation to Congress is "final" (because Congress has yet to act),[332] these remain final *agency* actions governed by the APA. Courts stating that Congress "approves the benefit-cost ratio" are a bit remote from the game. Congress does no such thing, as we have seen, it does not even attempt such a thing. It authorizes projects, not ratios, and in so doing it relies on Corps conclusions as its reason for going forward. Far from being an *affront* to congressional authority, judicial review is more properly viewed as an *assist* to this authority, the informed exercise of legislative power. The most important aspect of the Fifth Circuit's *Lower Atchafalaya* opinion remains its retention of jurisdiction over "extreme cases."[333]

Why Corps manipulations need be "extreme" to permit judicial review remains curious. If the answer is that Corps projects have been authorized by Congress, that answer would also seem to

330. Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 510-18 (1941).

331. George B. Shepard, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1652 (1996) (calling the Act the "bill of rights for the new regulatory state," permitting "extensive government" while "avoid[ing] dictatorship").

332. See Judge Randolph's concurring opinion in *Public Citizen* concluding that no agency proposal to Congress is reviewable as "final action" under the APA. Pub. Citizen v. U.S. Trade Representative, 5 F.3d 549, 553 (D.C. Cir. 1993) (Randolph, J., concurring). His view would, of course, cut the Corps entirely loose from NEPA as well. An argument to the contrary is that the Corps proposal is final "agency" action, for which the APA provides review. The question hangs, uneasily, in the air.

333. *See* Atchafalaya Basinkeeper v. Chustz, 682 F.3d 356 (5th Cir. 2012).

preclude even NEPA review, a proposition which courts rejected from the start, even for projects then under construction. The Fifth Circuit feared a different specter—that were courts to review benefit-cost decisions, "all chaos would ensue,"[334] which seems to ignore the intense scrutiny courts apply to virtually every EPA pollution control decision, among others.[335] Courts review cost-benefit analyses all the time. It seems perverse that this review would be limited to agencies charged with the protection of public health and the environment while others in the environment damaging business run free.

Perhaps the most responsive reason is that NEPA, basically concerned with environmental impacts, is an unwieldy tool for getting at root, economic error. The Lower Atchafalaya court was reduced to an "extreme" case formulation because it felt constrained by NEPA. In this, it was correct as far as it went. The "extreme case," so gross as to dwarf environmental impacts, may be as far as NEPA goes, but it is not as far as the APA goes. Were courts willing to look at Corps decisions for what they are, how they are made, how dispositive they are, and how final they are, then black letter administrative law would lead courts to the proper exercise of the judicial functions conferred on them by the Congress in the APA, and provide review.[336] NEPA is not the ideal solution. The APA provides a more straightforward path.[337] Properly read, *Oklahoma v.*

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334. S. La. Envtl. Council, Inc. v. Sand, 629 F.2d 1005, 1014 (5th Cir. 1980).

335. *See* Oliver A. Houck, *The Regulation of Toxic Pollutants Under The Clean Water Act*, 12 ELR 10528 n.144 (listing twenty-six industry challenges to EPA technology standards, based largely on benefit-cost considerations); Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1216-30 (5th Cir. 1991) (reversing EPA safety standards for, inter alia, its benefit-costs analysis); *c.f.* W.R. Grace v. EPA, 261 F.3d 330, 343 (3d Cir. 2001) (rejecting toxic standard as not "essential").

336. A degree of scrutiny was imposed by *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971), and by the District of Columbia Circuit. *See* Harold Levanthal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV 509, 511 (1974) (a court must "study the record attentively," even "technical and specialist matters," "'penetrate to the underlying decisions,'" and require "reasonable discretion" that comports with legislative intent (quoting Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 850 (D.C. Cir. 1970)).

337. Going forward, APA review should become a more viable option because new Corps project proposals are not shielded by congressional approval; Congress has not yet acted. One would have to subscribe to the notion that these Corps decisions are only "informational" to reject review under these circumstances, although some courts have done so. *See* Sierra Club v. Froehlke, 345 F. Supp. 440, 446-47 (W.D. Wis. 1972) (benefit cost calculations are "a vague and complex process, subject to varying formulations and interpretations;" thus their determination "is generally held to be a legislative function"), *aff'd on other grounds*, 486 F. 2d 946 (7th Cir. 1974); Envtl. Def. Fund, Inc. v. Marsh, 651 F.2d 983, 1000 (5th Cir. 1981) ("The primary, and perhaps exclusive, purpose . . . is to provide the Corps and Congress with accurate data to evaluate the economic efficiency of navigation projects."). Which begs to question: if the "accurate data" is demonstrably inaccurate and of dispositive importance, what then?

Atkinson is no bar.[338]

Still, one longs for a better answer. Few other than self-interested congressmen would promote water resources development via single projects advanced by local boosters and packaged in the legislature like Christmas presents with minimal scrutiny and no connection among them or to larger goals. Presidents going back to Andrew Jackson have attempted to harness the beast, to fit it into broader questions of water use, and sustainable development, so far without success. The current project-by-project approach not only does not go there, it defeats going there. We are still managing the entire Mississippi River for particular beneficiaries, by individual projects, in individual Corps districts.[339] Attitudinally, despite the rising calamities in floodplain development, coastal erosion, and water supply that confront us, we remain as planning-averse as we were in the go-go years of the 1800s.[340] Functionally, we have tied water development to the politics of the Congress, an institution that, when member money is on the table, by the pressure of election cycles alone, is incapable of thinking ahead. Corps reform has been on many lips for decades but its chances of succeeding through improved principles and standards,[341] independent reviews, or other

338. 313 U.S. 508, 527-28 (1941).

339. *See* Christine A. Klein & Sandra B. Zellmer, *Mississippi River Stories: Lessons from A Century of Unnatural Disasters*, 60 SMU L. REV. 1471, 1534-37 (2007).

340. *See generally* Gerald E. Galloway, Jr., *Corps of Engineers Responses to the Changing National Approach to Floodplain Management Since the 1993 Midwest Flood*, 130 J. OF CONTEMP. WATER RES. & EDUC. 5 (2005) (reviewing changes in national flood policies, with special focus on Corps efforts); *Forming a Comprehensive Approach to Meeting the Water Resources Needs of Coastal Louisiana in the Wake of Hurricanes Katrina and Rita: Hearing Before the Comm. on Env't and Pub. Works*, 109th Cong. 71-72 (2005) (statement of Scott Faber, Water Resources Specialist, Environmental Defense) ("Because so many Corps flood control projects induce development in harm's way, flood damages have more than tripled in real dollars in the past 80 years—even as the Corps has spent more than $120 billion on flood control projects.").

341. Ever hopeful, and pursuant to the Water Resources Development Act of 2007, the current administration has proposed to revise the principles and standards for water projects by, inter alia, making development and environmental protection "co-equal" goals, elevating consideration of nonmonetary benefits, and prioritizing nonstructural solutions in floodplain areas. *See* COUNCIL ON ENVTL. POLICY, PROPOSED NATIONAL OBJECTIVES, PRINCIPLES AND STANDARDS FOR WATER AND RELATED RESOURCES IMPLEMENTATION STUDIES (2009), *available at* http://whitehouse.gov/sites/default/files/microsites/091203-ceq-revised-principles-guidelines-water-resources.pdf; *see also Updated Principles and Guidelines for Water and Land Related Resources Implementation Studies*, COUNCIL ON ENVTL. QUALITY, http://www.whitehouse.gov/administration/eop/ceq/initiatives/PandG (last visited Jan. 7, 2013) [hereinafter *Updated Principles and Guidelines*] (summary of proposal). A National Academy Sciences panel then found that it "lack[ed] clarity and consistency," at which point the exercise went off-radar. *See* COMM. ON IMPROVING PRINCIPLES AND GUIDELINES FOR FED. WATER RES. PROJECT PLANNING, NAT'T ACADEMIES, A REVIEW OF THE PROPOSED REVISIONS TO THE FEDERAL PRINCIPLES AND GUIDELINES WATER

mechanisms—while Congress holds the reins—are small.[342] Some have even proposed to remove the Corps entirely, devolving the game to the states, which for pure balkanization and politics-based decision making would be hard to top.[343] That the proposal originates from Louisiana seems no surprise.

In the meantime, the checks and balances necessary for more sustainable approaches will lie largely with citizen groups and courts of law. For courts to exercise their responsibilities here, they will need to throw off the misperceived shackles of *Oklahoma v. Atkinson*.[344] Their abstention has unleashed an unsavory game that diminishes the Corps, the Congress, and trust in government. And that fools no one. The mere knowledge that courts are ready to review will go a long way towards checking the abuses, as it does with many others.

As for the Lower Atchafalaya project, it was of course completed and the region is still coping with its effects. The oil industry this project served has enjoyed cycles of boom and bust that will continue for a few more decades until the oil runs out and the industry departs, leaving coastal communities to their fate. Current estimates for coastal restoration in Louisiana alone reach $100 billion.[345] The

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RESOURCES PLANNING DOCUMENT 1 (2010).

342. For a sampling of "Corps reform" initiatives see Michael Grunwald, *Army Corps Aims to Mend Itself; Civil Works Boss Calls for Better Planning*, WASH. POST, July 18, 2002, at A27 ("The embattled leaders of the Army Corps of Engineers have concluded that their analyses of potential water projects have eroded to 'unacceptable levels' . . . ."); Michael Grunwald, *In Everglades, a Chance for Redemption; Can Agency Reverse the Damage It Has Done?*, WASH. POST, Sept. 14, 2000, at A01 (reforms suggested by certain members of Congress include transfer of the civil works program to the Department of Interior, independent reviews of projects over $25 million, and the requirement of a 2:1 cost-benefit ratio); and Susan Bruninga, *Reforms Needed in New Bill Authorizing Corps Projects, Witnesses Tell House Panel*, BNA ENVTL. REP., Apr. 12, 2002, at 806-07. For the latest proposal, see *Updated Principles and Guidelines*, *supra* note 339. None have passed, and none seem imminent.

343. Sen. David Vitter, *Don't Let the Corps Go Back to its Old Ways: A Guest Column by Sen. David Vitter*, TIMES-PICAYUNE (New Orleans) (Dec. 11, 2011, 6:14 AM), http://www.nola.com/opinions/index.ssf/2011/12/dont_let_the_corps_go_back_to.html. At the same time, when the Corps has proposed initiatives to protect coastal wetlands, Vitter has been quick to attack them. Assoc. Press, *Vitter Blasts Corps Over New Wetland Mitigation*, WBRZ NEWS 2 LA. (Mar. 31, 2012, 1:04 PM), http://www.wbrz.com/news/vitter-blasts-corps-over-new-wetlands-mitigation.

344. 313 U.S. 508 (1941) (demonstrating how the court confined its inquiry to constitutional issues and refused to analyze costs and benefits of proposed plans).

345. COASTAL PROT. AND RESTORATION AUTH. OF LA., INTEGRATED ECOSYSTEM RESTORATION AND HURRICANE PROTECTION: LOUISIANA'S COMPREHENSIVE MASTER PLAN FOR SUSTAINABLE COAST 34-36, *available at* http://www.lacpra.org/assets/docs/2012%20Master%20Plan/Final%20Plan/2012%20Coastal%20Master%20Plan.pdf (describing a basic plan which costs $50 billion and an extended plan costing $100 billion).

rates of coastal collapse in Terrebonne Parish are phenomenal.[346] At the same time, the parishes are pushing, with congressional support, for yet more and bigger canals like this one, each vying to become the super-port of the region.[347] The Avondale Shipyard in Morgan City, a prime mover behind the Lower Atchafalaya project, has been closed for years, and the company itself absorbed by another enterprise.[348] McDermott rocks between rumors of imminent closure and the promise of a new boom.[349] The trapper on the oyster reef who opened this Article is also gone. In fact, his reef is gone, consumed by tidal storms and rising seas. By the time the Lower Atchafalaya case got to trial, the project was for all intents and purposes history, as was his abode and his way of life. South Louisiana, meanwhile, under the banner of "a working coast,"[350] continues to advance coastal canals, levees, and pipelines with an all-of-the-above vigor that undercuts any real prospect of staying afloat and will, too, be part of its history.[351]

Both the Corps and South Louisiana are at a crossroads. They

346. *See* Coastal Wetlands Planning, Protection and Restoration Act, *The Terrebonne Basin*, LACOAST.GOV, http://lacoast.gov/new/About/Basin_data/te/Default.aspx (last visited Jan. 7, 2013) (projecting, for example, that the Timbalier sub-basin "will become 75 percent (or more) open water" in the next fifty years).

347. *See* Cara Bayles, *Port Director Sees New Growth at Fourchon*, HOUMATODAY.COM (Oct. 31, 2011, 11:21 AM), http://www.houmatoday.com/article/20111031/ARTICLES/111039954?Title=Port-director-sees-new-growth-at-Fourchon (quoting Port Director, "[t]he whole mindset has been grow, grow, grow").

348. Avondale was bought out by Huntington Ingalls Industries, a subsidiary of Northrop Grumman, and, as of 2010, was planning to wind down all work in Louisiana, including its New Orleans area shipyard, by 2013. *See* Mathew Albright, *Northrop Grumman Will Close Avondale Shipyard in 2013*, TIMES-PICAYUNE (New Orleans) (July 14, 2010, 2:52 AM), http://www.nola.com/business/index.ssf/2010/07/northrop_grumman_will_close_av.html.

349. *See McDermott International's CEO Discusses Q1 2011 Results - Earnings Call Transcript*, SEEKING ALPHA (May 11, 2011, 10:00 AM), http://seekingalpha.com/article/269406-mcdermott-international-s-ceo-discuss-q1-2011-results-earnings-call-transcript ("Revenues were very strong at nearly $900 million . . . ."); Cara Bayles, *Could McDermott Close Morgan City Yard?*, HOUMATODAY.COM (Nov. 15 2011, 11:30 AM), www.houmatoday.com/article/20111114/hurblog/111119740 (rumors of closure).

350. The phrase is used freely throughout the Louisiana Coastal Restoration Plan. *See* COASTAL PROT. AND RESTORATION AUTH. OF LA., *supra* note 343, at 20, 42, 43, 46, 170, 172, 176.

351. One very costly project in the Plan is not restoration at all but, rather, a levee system to support expanded development. *See May 2012 Coastal Scuttlebutt*, LACOASTPOST (May 15, 2012), http://lacoastpost.com/blog/?p=41280&lang-en ("The total cost of 33 structural projects considered for the $50 billion plan is estimated at $11.5 billion, or 23% of the total. The $4 billion MTTG project is far and away the most expensive of these projects, accounting for 34.8% of the structural projects and 8% of the entire plan."). By the following year, the cost of the MTTG levee had risen to $12.9 billon, more than twenty-five percent of the entire plan. *See* Amy Wold, *Morganza to Gulf Levee Project Swells to $12.9B*, THE ADVOC. (Jan. 7, 2012), http://theadvocate.com /home/4839743-125/report-says-morganza-to-the.

came to this pass together, and will have to get out of it together as well. Recent economic recession has stalled much new Corps work, the good as well as the bad, more effectively than any review process.[352] The rules of game, however, remain largely the same, which is a cause of concern, and an opportunity for the judiciary to recover its accustomed role in ensuring that future agency decisions are rationally grounded. Including the Corps benefit-cost ratio.

352. *See* Paul Quinlan, *Senate Subcommittee Approves $31.6B for 2012, Energy and Water Measure*, NAT'L COUNCIL FOR SCI. AND THE ENV'T (Sept. 12, 2011), http://www.ncseonline.org/senate-panel-approves-316b-2012-energy-water-spending (Senators Landrieu and Feinstein called it "just plain wrong" that water project funding continues to be cut; the Army Corps would receive no money for "new start" water infrastructure projects . . . despite a backlog of $60 billion); Paul Quinlan, *As Another WRDA Bid Runs Aground, Project Developers Look Elsewhere for Cash*, E&E NEWS (Mar. 30, 2012) (on file with author). At the present time, Louisiana is banking on multibillion dollar payouts from the BP Macando blowout to fund its future coastal projects, both economic and environmental. *See* Assoc. Press, *BP Oil Spill: Fines from Clean Water Act Will Go to Restoration*, THE HUFFINGTON POST (Mar. 8, 2012, 4:17 PM), http://www.huffingtonpost.com/2012/03/09/bp-oil-spill-fines-restoration_n_1333019.html.