Wetlands and Environmental Legislation Issues

Roy R. Carriker*

Abstract

The federal government program for wetlands regulation is administered by the United States Army Corps of Engineers pursuant to Section 404 of the Clean Water Act. Proposals for amending and/or reforming the Section 404 program are included in Congressional deliberations regarding Clean Water Act reauthorization. Specific issues of public policy include the definition of "waters of the United States", criteria for delineation of jurisdictional wetlands, definition of activities exempt from regulation, mitigation and classification of wetlands, and issues of property rights.

Key Words: wetlands regulation, wetlands delineation, wetlands mitigation, wetlands classification, property rights, wetlands policy

Introduction

Agriculture has been criticized for degradation of wetlands, water quality, and critical habitat. Agricultural groups consider existing and proposed environmental regulatory programs to be unnecessarily and unfairly restrictive, costly, and burdensome to agriculture. Necessity and fairness are relative concepts, however, and contending factions in the policymaking arena are sharply divided as to the desired goals of policy and as to the preferred means of attaining those goals. These issues will be addressed by the 103rd Congress as it considers reauthorization of the Clean Water Act and the Endangered Species Act.

This paper addresses Federal wetlands legislation issues in the context of "societal constraints on agriculture." It focuses specifically on what is referred to as the Section 404 regulatory program and the Clean Water Act. Federal programs for the protection of water quality and endangered species engender similar issues and are also the subject of reauthorization debates in Congress. Many of the concerns of farmers, landowners, and environmentalists with respect to the wetlands regulatory program carry over to the deliberations on water quality and endangered species.

Wetlands Protection and the Clean Water Act

For most of this nation's history, wetlands were not looked upon as a valuable resource. More often they were regarded as wastelands or as a nuisance, and official government policy encouraged and subsidized the ditching, diking, and drainage that converted wetlands into agricultural land or building sites (Johnson, 300). In more recent years, scientists, environmentalists and policymakers have come to see wetlands in their natural state as a valuable natural resource. Wetlands are now appreciated to the extent that they provide flood protection, shoreline stabilization, streamflow maintenance; improved water quality through sediment trapping, chemical detoxification, and

*Roy R. Carriker is a professor of food and resource economics at the University of Florida. The author acknowledges the assistance of Mohammad Rahmani in the preparation of this manuscript, and helpful reviews by John Gordon, Lawrence Libby, Michael Olexa and Michael Ouart.

J. Agr. and Applied Econ. 26 (1), July, 1994: 80-89

nutrient removal; wildlife habitat; and scenic recreational sites (Estevez et al., 92; Williams, 13; Theis, 2).

The U. S. Fish and Wildlife Service estimated in 1990 that, out of 221 million acres of wetlands originally in the forty-eight conterminous states, only about 104 million acres survived as of the 1980s (Dahl, 5). A large portion of wetland losses has been attributed to conversion of wetlands to agricultural uses (Johnson, 299). The U. S. Fish and Wildlife Service has estimated that eighty-seven percent of wetland losses between the mid-1950s and the mid-1970s, and fifty-four percent of wetland losses between the mid-1970s and the mid 1980s resulted from conversion to agricultural use (Dahl, Johnson, and Frayer; 2).

The main Federal government program for wetlands protection is known as the Section 404 permit program. It was created in 1972 when Congress passed P.L. 92-500, making extensive amendments to the Federal Water Pollution Control Act [now referred to as the Clean Water Act (CWA)]. The overall objective of the CWA (as amended) is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters [33 U.S.C. Section 1251(a)(1991)]." The basis for the federal regulatory programs for wetlands can be found in Section 301 of the CWA (Babcock, 318). Section 301 makes it unlawful to discharge any pollutant into the waters of the United States except pursuant to the standard-setting and permitting provisions of the Act. One of these permitting provisions is located in Section 404 of the Act (33 U.S.C. Section 1344). Section 404 gives the Secretary of the Army the discretion to issue permits for the discharge of dredged or fill material into navigable waters. The CWA defines "navigable waters" as "waters of the United states [C.W.A. Section 502(7); 33 U.S.C. Section 1362(7)]." The Secretary's authority has been delegated through the Assistant Secretary (Civil Works) to the United States Army Corps of Engineers.

Dredge and fill permits issued by the Corps must be consistent with environmental guidelines issued by the Environmental Protection Agency (EPA) [C.W.A. Section 404(b)(1); 33 U.S.C. Section 1344(b)(1); see, also, Babcock, 318]. These regulations are commonly known as the 404(b)(1) guidelines. EPA also has the authority to veto and comment on permits issued by the Corps and to delegate the program to qualified states. The EPA and the Corps share the enforcement responsibilities under the Act. Federal resource agencies, including the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, share the right to comment on permits issued by the Corps with the EPA.

The Corps of Engineers processes about 15,000 individual permits each year. About 10,000 permits are issued, 500 denied, and the remaining 4,500 are canceled by the Corps, withdrawn by the applicant, or qualify for a general permit (Zinn and Copeland, 6).

Section 404: Issues of Implementation and Public Policy

Several broad issues have persisted over the years as the Corps and the EPA have attempted to implement the Section 404 program. One broad issue has to do with establishing the *geographic extent of jurisdiction* of the Corps in applying the provisions of Section 404. A part of this issue relates to the definition of "waters of the United States". A second part relates to criteria for delineating the extent of wetlands for regulatory purposes.

A second set of broad issues involves identifying *activities to be regulated* under Section 404. Included are issues about what activities constitute "dredging" and "filling", about statutory exemptions of "normal" farming activities, and about landclearing and drainage activities that damage wetlands but do not constitute dredging and\or filling.

A third set of issues involve the subjects of *mitigation and mitigation banking*--terms that refer to wetlands creation, restoration, or enhancement projects undertaken by developers not only to compensate for wetland impacts from a project, but also to act as a bank with credits to compensate for future wetland impacts.

These issues of implementation have been controversial because their resolution usually

requires trade-offs between the historical prerogatives associated with private property ownership, on the one hand, and the need for the protection of wetlands functions on the other. Some critics view the 404 program as an unprecedented federal intrusion into the traditionally local concern of land use regulation, while other critics argue that the program has been largely ineffective in protecting wetlands.

Jurisdiction: Defining Waters of the United States

Under the Clean Water Act, Congress prohibited the discharge of any pollutant into navigable waters without a permit. Congress defined "navigable waters" broadly, as the "waters of the United States [33 U.S.C. Section 1362(7)(1991); see, also, Theis, 14]." Thus, a decision as to whether a particular acreage falls within the jurisdiction of Section 404 of the CWA requires a determination of whether that acreage falls within the regulatory definition of "waters of the United States."

Authority for federal government regulation of discharges into waters of the United States is derived from the Commerce Clause of the Constitution (U.S. Constitution. Article I, Section 8, Clause 3). The courts have interpreted the geographic jurisdiction of the Clean Water Act broadly. The Corps and EPA have identical definitions of the term "waters of the United States", and those definitions include "[a]ll interstate waters including interstate wetlands", and "[w]etlands adjacent to waters...identified in [this section] [33 C.F.R. Section 328.2(a)(1993); 40 C.F.R. Section 230.3(s)(1992); see, also, Theis, 15]."

The EPA and the Corps have, in turn, defined wetlands, in legal terms, as

> "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions[33 C.F.R. Section 328.3(b)(1993); 40 C.F.R. Section 230.3(t)(1992); see, also, Theis, 15]."

The Supreme Court has found this definition of wetlands consistent with the terms and intent of the Clean Water Act and has upheld the Corps' regulatory authority under Section 404 over wetlands adjacent to navigable waters and their tributaries (Theis, 15).

Still unresolved, however, are issues related to "non-adjacent" wetlands--wetlands in areas isolated geographically and/or hydrologically from other waters. The EPA has argued that an isolated wetland is within CWA jurisdiction if it could be used as a habitat by migratory birds. As one analyst put it, "... [A]ny wetland, whether isolated or adjacent, can meet this interstate commerce test (Theis, 20)."

The Corps has chosen to limit the breadth of its 404 jurisdiction through a mechanism known as "Corps Nationwide Permit 26", or "NWP 26" [33 C.F.R. Section 330.5(a)(1993); see, also, Theis, 19]. Under NWP 26, discharges into isolated wetlands or adjacent wetlands located above the headwaters of non-tidal rivers or streams as the result of agricultural conversion activities can still be exempted from the 404 permitting requirements if the area affected is less than ten acres in size. The Corps has been criticized for its NWP 26 program by conservationists who argue that the Corps does not enforce NWP 26 conditions and rarely requires mitigation of wetlands lost through this exemption, with the result that "thousands of acres of wetlands are needlessly lost each year (Theis, 20)."

Jurisdiction: Delineating Jurisdictional Wetlands

Although the Corps and the EPA have both adopted the same official definition of wetlands, this definition is broad and requires more specific delineation guidance for application to particular wetlands (Kusler, March 1992, 7-37). In the mid-1970s, the Corps used the concepts of plant community and ecology to define jurisdictional wetlands (*National Wetlands Newsletter*, 10). The idea of this approach was that certain plants will inhabit soils that are periodically inundated or saturated. Low oxygen conditions in the soil caused by the presence of water would limit the vegetation

that is capable of surviving there. Thus, wetland determination was based on relative hydrology, soil type, and vegetation unique to wetland areas.

Since 1972, changes in political orientation and philosophy from one presidential administration to the next have led to sharply contrasting approaches to the Section 404 program (Kusler, March 1992, 10). Conflict among agencies became a problem. A collaboration among agencies during the Bush administration produced what came to be known as the *1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands*. This was the first attempt to develop nationwide wetlands delineation criteria by all four federal agencies with principal responsibility for wetlands. These agencies include the EPA, the Corps, the Fish and Wildlife Service, and the Soil Conservation Service. Prior to this time, each agency had used its own criteria.

The *1989 Manual*, whatever its merits, soon ran into political problems (Kusler, March 1992, 11). Landowners and developers complained that the manual's new definition of "normal circumstances" had the effect of delineating relatively dry and previously altered areas as jurisdictional wetlands that were not previously designated as such, including many agricultural and forestry lands. Landowners and developers also charged that the manual had been developed without consideration of the impacts of the regulatory policies on the regulated interests. They were especially concerned about the time-consuming and costly nature of permitting procedures.

In response to this firestorm of criticism, the Bush administration (after some high-level political teamwork), released a proposed new *Federal Manual for Identifying and Delineating Jurisdictional Wetlands* in 1991. The release of the proposed revision set off another firestorm of criticism, this time primarily from environmentalists and scientists to the effect that the delineation criteria were unsound and would remove protection for up to one half of the wetlands then subject to some federal protection (Kusler, March 1992, 29).

The Energy and Water Appropriations Bill for FY1992 contained language which specifically prohibited the Corps from using the 1989 Manual (and, by extension, the 1991 proposed amendments to it). Congress extended the moratorium on use of the 1989 Manual in the FY1993 Energy and Water Appropriations Bill which requires continued use of an earlier (1987) delineation manual. Also the same bill directed the National Academy of Sciences to study wetlands science issues with the hope that the study will lead to a delineation manual that is "based on good science rather than politics."

The controversy that has prevented the development and adoption of uniform, agreed-upon criteria for delineation of jurisdictional wetlands stems largely from the fact that conservationists and landowners have different concerns. To property owners, the designation of their lands as wetlands implies the possibility of federal jurisdiction over their property and regulatory interference with private decisionmaking. For conservationists, failure to bring wetlands under a protective regulatory umbrella is cause for grave concern because unprotected wetlands are vulnerable to conversion with attendant loss of wetlands functions. Therefore, criticism of the Section 404 wetlands program extends to concerns over the criteria used to define and delineate wetlands.

Critics of the Section 404 program also have complained about the uncertain criteria, the lack of federal regulatory maps, delays in permitting, a lack of administrative appeals, and varied interpretations of permitting criteria (Kusler, March 1992, 29). Most of these complaints relate directly to the manner in which delineation criteria are drawn and applied. Federal wetland delineation criteria and procedures are the only official method for determining whether land is or is not wetland for federal regulatory purposes (Kusler, March 1992, 29-30). Federal wetland regulatory maps do not exist. In those parts of the country that do not have adequate federal regulatory staff, private landowners must conduct the technical surveys or hire consultants to determine wetland boundaries. Each permit application is evaluated on its merits by a broad balancing process with only modest guidance provided in the regulations for most individual activities and types of areas. Because it involves case-by-case evaluation of every permit with the application of broad standards, the Section 404 program is subject to varying interpretation by individual regulators.

> From a landowner's perspective, the impact of having one's land designated as wetland depends not only upon the ultimate uses possible for land with and without regulation but also on the cost of wetland delineation (if a consultant is hired), the cost of permitting, and the cost of complying with various permit conditions, such as wetland restoration requirements (Kusler, March 1992, 29).

The term "wetlands" can be applied to about 5 percent of the land in the 48 lower states (Kusler, March 1992, 29). Approximately 75 percent, or 77 million acres, of wetlands are privately owned. Representatives of farming and development interests favor revised federal wetland delineation criteria to achieve two principal objectives: 1) confining the jurisdiction of the federal Section 404 regulatory program to limited areas, and 2) providing more certain and less costly wetland delineation procedures than those now in effect. The American Farm Bureau Federation has testified that the specific concerns of landowners, as well as the overriding issue of what land ought to be regulated, are all outside the scope of the National Academy of Sciences study. "Any resolution of these problems will only come from the Congress and originate within the Public Works Committee. Reform of Section 404 must be part of the reauthorization of the Clean Water Act...(Farm Bureau, 8)."

On the other hand, many scientists and environmentalists favor broad delineation criteria, ones that would include as jurisdictional wetlands many of the areas that landowners and developers want to exclude from federal jurisdiction (Kusler, March 1992, 32). They argue that the functions and values of a variety of lands termed "wetlands" are increasingly well-documented from a scientific perspective, including those associated with so-called drier-end systems, altered wetlands, managed wetlands, and artificial wetlands, all of which landowner groups would like to see exempted.

Those favoring broad wetland delineation criteria argue that hopes of protecting the nation's remaining wetlands cannot be fulfilled without protection, restoration, and management of the full range of wetland systems. Many scientists and state and local government officials feel that the narrow delineation criteria reflect landowner concerns at the expense of the broader public interest in preserving wetlands functions. They object to a decisionmaking process which they view as "a closed, politically dominated process with little input from the scientific community", and they favor "an open process based upon science and with input from scientists, state agencies, and others (Kusler, March 1992, 33)." They look forward to the pending report of the National Academy of Sciences on wetlands delineation with hopes that it will provide a much-needed scientific consensus in support of broad delineation criteria.

Jurisdiction: Proscribed and Exempted Activities

Unless an activity involves a discharge of dredged or fill material from a point source, it is arguably not regulated under section 404. There are some activities that degrade wetlands for which there are no identifiable point source discharges and which are, accordingly, outside the scope of the 404 program. Examples include land clearing and drainage. This aspect of the Section 404 program reflects the fact that the program had its origins as a water quality program and is tied to the general statutory scheme of the Clean Water Act, rather than to the logic of protecting wetlands functions.

Moreover, Section 404 expressly exempts discharges associated with certain normal farming activities provided they do not result in the conversion of wetlands to uplands [C.W.A. Section 404(f)(1)-(2), 33 U.S.C. Section 1344(f)(1)-(2)(1991)]. The statute and the Corps and EPA rules interpreting the 404(f)(1) exemptions include such "normal farming activities" as plowing, seeding, cultivating, minor drainage, and harvesting as exempt from the 404 permit requirements (Theis, 30).

Deciding what constitutes regulated dredge and fill activity, and deciding what should be allowed as "normal farming activity" are questions that engender controversy and litigation. Conservationists cite evidence that 290,000 acres of wetlands continue to be lost annually, and they point to farming activities as the cause for the majority of these wetlands losses (Dahl, et al., 1;

also, see, Theis, 53). In the view of conservationists, wetlands losses continue because Section 404 regulates only point source discharges of dredged or fill material and does not regulate other activities, such as land clearing, drainage, and flooding, that can result in damage to wetlands. They criticize the Corps and the EPA for exempting millions of acres of prior converted wetlands from regulation, instead of trying to expand their regulation over the conversion of wetlands to agricultural uses. Conservationists call for congressional action to amend Section 404 to make the protection of wetlands an express national policy and the avoidance of wetlands losses an explicit goal under the Clean Water Act (Theis, 52). They also want Congress to broaden the scope of Section 404 to protect wetlands from all types of degradation and conversion, not just point source discharges of dredged or fill material.

Representatives for farming and ranching interests argue that farmers and ranchers have been significantly (and adversely) effected by the current wetland regulation program (Farm Bureau, 8). Most of the problems, in their view, stem from an excessively broad federal definition that encompasses land exhibiting few if any true wetland characteristics. Farming interests also complain that regulators frequently cite normal and routine farming operations as requiring federal permits, "[d]espite a clear statement of intent from Congress in Section 404(f) that normal and routine farming and ranching practices are not subject to individual permit requirements...(Farm Bureau, 9)." Farming interests feel Congress should amend Section 404 to make the exclusion of prior converted wetlands an explicit part of the language of the Clean Water Act, and should restate and further clarify its intent with respect to exemption of normal farming activities.

Mitigation, Sequencing, and Classification of Wetlands

The term "mitigation" refers to a wetland creation, restoration, or enhancement project undertaken by a developer to offset the biological and other functions that are lost when natural wetlands are destroyed during the process of development (Kusler, January/February 1992, 4; and Redmond, 5). The EPA's 404(b)(1) guidelines require that the adverse environmental impacts of the issuance of a Section 404 permit be mitigated through avoidance of adverse impacts to the extent possible, minimization of those impacts that are not avoidable, and compensation for unavoidable impacts (Babcock, 330). The mitigation concept originated with regulations promulgated by the Council on Environmental Quality in 1978, implementing the National Environmental Policy Act of 1969. The guidelines introduced the concept of "sequencing" the various elements of mitigation by beginning with "avoidance" and ending with "compensation."

Under the Section 404 program, there is a perception that all jurisdictional wetlands are treated the same, regardless of size, functions, or values (Farm Bureau, 10). The sequencing and mitigation rules, with few exceptions, require that all activities not deemed to be water-dependent must avoid wetlands, no matter how degraded the wetlands, or no matter how isolated they are from a larger watershed. Critics identify situations where a wetland has little functional value as a wetland, but the landowner is prevented from developing the land, or must modify plans to use the land. This approach levies an implicit tax on land development, since all wetlands development bears a compensation cost for the wetlands functions lost (Shabman, 4-7). It pays a greater cost if the permit is denied, since some share of the development value is lost.

Classifications

Critics call for a tiered approach for regulating wetlands, based on three wetlands classifications. These classifications would be based on criteria that reflect the relative ecological (or other) functional value of the wetland, difficulty of replicating those values, and the likely value of the parcel in a developed (non-wetland) use. Great regulatory protection would be afforded those wetlands areas that have the highest functional value, while those with little value as wetlands would be, perhaps, available for development in return for a fixed fee to be applied to mitigation projects (Shabman).

Conservationists acknowledge that there are some situations where a wetland designation with total protection is not appropriate, but they fear that classification for different degrees of protection

could be the first step toward a major reduction in overall wetlands protection (Zinn and Copeland, 7). They also question the practicality of differentiating among wetlands. Locating the boundary line between categories of wetlands would be critical. Wetlands protection advocates would like to see almost all wetlands start off in the highest protection category unless experts can prove an area should receive a lesser level of protection. Critics of the current program would seek to have relatively few acres in the highest protection category and many in the lowest.

Much controversy already has revolved around determining whether an area is a wetland in the context of the current regulatory approach. It is likely that new efforts to draw lines that segment wetlands areas would add fuel to the controversy (Zinn and Copeland, 7). On the other hand, a consistent application of an agreed-on definition may lead to fewer disputes and result in more timely decisions. It is possible that the National Academy of Sciences wetlands study will provide some answers to these questions.

Mitigation Banking

The term "mitigation bank" usually refers to a wetland creation, restoration, or enhancement project undertaken by a developer not only to compensate for wetlands impacts from a particular project, but also to act as a bank with credits to compensate for future wetland impacts (Kusler, January/February 1992, 4). The argument for using mitigation banks as a part of wetlands policy is a corollary to the argument for wetlands classification: not all wetlands are equally functional or valuable. With respect to wetlands policy objectives, one analyst observes: "...wetlands per se are not the concern. Concern is for the role wetlands play in support of watershed ecosystems (Shabman, 5)."

Advocates of mitigation banking argue that the object of wetlands policy should be to reintegrate wetlands that have been lost or degraded into ecologically optimal locations. This would require a watershed perspective instead of the current regulatory tendency to protect the status quo on a permit-by-permit basis. Mitigation banks are touted as a way to encourage the creation, restoration, and enhancement of large wetland areas, which generally have a higher success rate and lower cost per acre than smaller ones. These projects benefit from increased expertise and care in the planning process and better long-term maintenance (Kusler, January/February 1992, 4). In addition, mitigation banks allow for optimization of particular wetland functions and values through project design and location. Mitigation banking affords more flexibility for developers. Rather than having to design their own mitigation plans for each proposed project, developers can buy or use existing credits. Also, the banks usually have the primary responsibility for ensuring the success of the mitigation projects.

One objection to the concept of mitigation banks relates to location (Kusler, January/February 1992, 4). Conservationists have argued that many wetland functions are site-specific and are lost when the wetland is destroyed--mitigation projects at a new site cannot replace them. They fear that mitigation banks encourage developers to propose off-site mitigation. A second objection to mitigation banks is that they often create marshes or shrub wetlands to replace other wetland types because it is easier and less expensive to do so. Finally, critics of mitigation banking argue that local, state, and federal regulatory agencies often lack the basic statutory powers and expertise to supervise or create mitigation banks. Due to the very existence of mitigation credits, developers are able to exert considerable pressure on regulatory agencies to avoid "alternatives analysis" and impact reduction. Permit determinations, argue the critics of mitigation banking, should always be subject to sequencing restrictions and never pushed through the regulatory process.

Property Rights and Compensation of Landowners

The Fifth Amendment of the Constitution provides, among other things, that "private property [shall not] be taken for public use, without just compensation (U.S. Constitution, Amendment V)." Landowner interests believe that since wetlands are often claimed as valuable, landowners should be compensated when alternative uses are prohibited (Zinn and Copeland, 7; Farm Bureau, 10; Burling, 312-361). Many individuals purchase land with the expectation that they can alter it. If that ability is lost, the land may be greatly reduced in development value. Landowners believe that in many cases a "taking" occurs when a site is

designated a wetland. They are especially upset when they do not agree that the acreage in question qualifies as a wetland. This issue has a long history, and courts generally have sided with the regulating agency unless all reasonable uses of the land are precluded. However, several recent court decisions have seemed to modify this conclusion.

Conservationists argue that requiring agencies to conduct a "takings analysis" in conjunction with every regulatory decision would make it impossible to carry out the intent of the regulatory programs (Goldman-Carter, 3). They also argue that landowners are already adequately protected from unconstitutional takings, given their access to litigation. They add that proposals to have the Federal government buy all "high-value" wetlands would be infeasible from a budgetary standpoint. The Congressional Budget Office estimates the acquisition costs alone for the lower 48 States to range between $10 billion and $45 billion (White House Office on Environmental Policy, 13).

Recent Legislative Proposals and Administration Initiatives

Reauthorization of the Clean Water Act is a task facing the second session of the 103d Congress. Two bills introduced in the House of Representatives early in 1993 are considered to be the most likely alternative models for amending federal wetlands policy as a part of the Clean Water Act (Satterfield and McDonald, 7-8). The two bills are H.R. 350, introduced by Representative Don Edwards (D-CA), and H.R. 1330, introduced by Representative Jimmy Hayes (D-LA). They represent the two divergent paths reauthorization may follow: the Edwards bill proposes generally more stringent wetlands protection, and the Hayes bill responds to the concerns of landowner interests. Both bills have strong support among members of the House Public Works and Transportation Committee where deliberations on reauthorization of the Clean Water Act have begun.

Senators Baucus and Chafee introduced S1304, which has been the starting point in Senate deliberations to revise the wetland regulatory program under section 404 of the Clean Water Act (Zinn, 2). S1304 pulls together many of the issues that other proposals have addressed individually. It has been characterized as a compromise proposal with some provisions that would please all interests.

The Clinton administration introduced its wetlands policy initiative at a press conference on August 24, 1993 (White House Office on Environmental Policy). The Clinton proposals, in some ways, seem to be a compromise between the views of conservationists and the landowner groups. Developed with participation of nine federal agencies, several members of Congress, and representatives of the various stakeholder interests, the Clinton administration plan is billed as a move away from gridlock and towards a balanced, common-sense approach to regulation that will make the program simpler, fairer, and better (National Wetlands Newsletter, 20).

Summary

The primary federal government program for the protection of wetlands is a regulatory program administered by the United States Army Corps of Engineers pursuant to Section 404 of the Clean Water Act. Support for government programs to protect wetlands is based on the fact that wetlands provide a variety of important environmental, ecological and economic functions. However, the program has been the focus of controversy ever since it was authorized in the Federal Water Pollution Control Act Amendments of 1972.

Conservationists have felt that the program does not adequately protect wetlands. As evidence of its inadequacy, they point to estimates of wetlands acres converted to agricultural and other uses since the program was started. They feel the language and the regulatory scheme of the Clean Water Act, which are based on water quality objectives, are not well-suited to the objectives of wetlands protection. They recognize value in the diversity of wetlands types and functions. They do not concede that some categories of wetlands are less important than others. They are generally skeptical of the efficacy of wetlands creation as a form of mitigation. They feel wetlands should be regulated in a manner that makes avoidance of wetlands impacts the first priority, allowing mitigation only when avoidance is impossible. They prefer an extensive definition of "waters of the United States" and broad criteria for delineation of

wetlands. They deplore exemptions for certain normal agricultural activities and oppose liberal use of general permits for small wetlands acreages deemed by the Corps to be of minor importance. In general they feel that lack of cooperation and coordination among the four or five federal agencies having wetlands responsibilities has been detrimental to the cause of wetlands protection. They also advocate the use of scientific criteria for defining and delineating jurisdictional wetlands and oppose the use of political and economic criteria. Conservationists tend to feel that the Corps of Engineers is mis-cast as an environmental regulator, inclined to be too sensitive to commercial interests in wetlands and not concerned enough about environmental priorities.

Landowners, farmers, and developers (usually referred to as the "regulated interests" in the context of wetlands regulation) have also criticized the Section 404 wetlands regulatory program. In general they are uncomfortable with any government program that regulates what they may do with privately owned property. (Most remaining wetlands acreages in the lower 48 states are privately owned). They argue that regulatory restrictions on their use of wetlands acreages deprives them of the development value of the property, and they feel that the federal government should compensate them for foregone economic opportunity. To do otherwise, they say, is an unconstitutional taking of their property for public purposes without compensation. Given a predisposition to oppose regulation on philosophical grounds (as well as on the basis of commercial self-interest), the regulated interests are especially irked by what they feel is a tendency of the regulatory agencies to include as jurisdictional wetlands many tracts of land that do not exhibit true wetlands characteristics. They would prefer a system that categorized wetlands according to their functional value as wetlands, reserving stringent protection for the most valuable categories. They would prefer more flexibility in the use of wetlands mitigation, creation, and restoration, and chafe under the sequencing requirements of federal rules. They deplore the lack of regulatory maps to show the location of jurisdictional wetlands. They complain of inconsistency among federal agencies in delineation criteria and in interpretation of jurisdictional guidelines. They object to the expense and aggravation associated with a permitting process that requires them to delineate jurisdictional wetlands on their property and which has often entailed long delays in getting a permit decision from the federal agencies.

Many of these arguments will be heard by the 103d Congress as it deliberates reauthorization of the Clean Water Act during 1994. The reauthorization process will be contentious as those who perceive a vital interest in wetlands policy push for their respective proposals.

References

Babcock, Hope. "Federal Wetlands Regulatory Policy: Up to Its Ears in Alligators." *Pace Environmental Law Review*. 8-2(Spring 1991). 307-353.

Burling, James S. "Property Rights, Endangered Species, Wetlands and Other Critters--Is It Against Nature to Pay For a Taking?" *Land and Water Law Review*. 27-2(1992). 310-362.

Dahl, Thomas E. *Wetlands Losses in the United States 1970s to 1980s*. U. S. Department of the Interior, Fish and Wildlife Service, Washington, D. C., 1990.

Dahl, Thomas E., Craig E. Johnson, and W. E. Frayer. *Wetlands Status and Trends in the Conterminous United States, Mid-1970s to Mid-1980s*. First update of the National Wetlands Status Report. U. S. Department of the Interior, Fish and Wildlife Service, 1991.

Estevez, Ernest D.; Bradley J. Hartman, Randy Kautz, and Elizabeth D. Purdum. "Ecosystems of Surface Waters," in Edward A. Fernald and Donald J. Patton, eds., *Water Resources Atlas of Florida*. Tallahassee: Florida State University, Institute of Science and Public Affairs, 1984. 92-107.

Goldman-Carter, Jan. "Letters: Taking Wetlands Regulation Seriously." *National Wetlands Newsletter.* 13-6(November/December 1991). 3.

Johnson, Dalana W. "Saving the Wetlands From Agriculture: an Examination of Section 404 of the Clean Water Act and the Conservation Provisions of the 1985 and 1990 Farm Bills." *Journal of Land Use and Environmental Law.* 7(Spring 1992). 299-319.

Kusler, Jon. "The Mitigation Banking Debate." *National Wetlands Newsletter.* 14-1(January/February 1992). 4.

Kusler, Jon. "Wetlands Delineation: An Issue of Science or Politics?" *Environment.* 34-2(March 1992). 7-37.

National Wetlands Newsletter. 13-6(November/December 1991).

National Wetlands Newsletter. "Clinton's Plan For Wetlands." 15-5(September/October 1993). 20.

Office of Technology Assessment. Congress of the United States. *Wetlands: Their Use and Regulation.* 1984.

Satterfield, James E. and Moira McDonald. "In Congress: Hayes and Edwards Face Off." *National Wetlands Newsletter.* 15-3(May/June 1993). 7-8.

Shabman, Leonard. "Wetlands Valuation: Clarifying Classification." *National Wetlands Newsletter.* 15-1(January/February 1993). 4-7.

Statement of the American Farm Bureau Federation to the House Public Works and Transportation Subcommittee on Water Resources and Environment Regarding Clean Water Act Reauthorization. Presented by Keith W. Eckel, President, Pennsylvania Farm Bureau and American Farm Bureau Federation Board Member. April 22, 1993.

Theis, Joseph G. "Wetlands Loss and Agriculture: The Failed Federal Regulation of Farming Activities Under Section 404 of the Clean Water Act." *Pace Environmental Law Review.* 9-1(Fall 1991). 1-54.

Tiner, Ralph W., Jr. *Wetlands of the United States: Current Status and Recent Trends.* U. S. Department of the Interior, Fish and Wildlife Service, March 1984.

White House Office on Environmental Policy. *Protecting America's Wetlands: A Fair, Flexible, and Effective Approach.* August 24, 1993.

Williams, Michael. "Understanding Wetlands." *A Threatened Landscape.* The Institute of British Geographers, 1990.

Zinn, Jeffrey A. "Comparisons of Selected Wetlands Proposals in the 103rd Congress and the Clinton Administration August 24, 1993, Announcement." (Memorandum). Congressional Research Service, The Library of Congress, Washington, D. C. September 16, 1993.

Zinn, Jeffrey A., and Claudia Copeland. "Wetlands Issues in the 103rd Congress." *CRS Issue Brief. IB93025.* Congressional Research Service, the Library of Congress, updated November 22, 1993.