Order Code IB97014

CRS Issue Brief for Congress

Received through the CRS Web

Wetland Issues

Updated September 1, 2000

Jeffrey A. Zinn and Claudia Copeland
Resources, Science, and Industry Division

CONTENTS

Wetland Issues

SUMMARY

Wetlands, in a wide variety of forms, are found throughout the country. The various values of these areas have been increasingly recognized in recent years, but the remaining acreage has been disappearing rapidly. When European settlers first arrived, total wetland acreage was more than 220 million acres in the lower 48 states, according to estimates by the U.S. Fish and Wildlife Service. By 1980, total wetland acreage was estimated to be 104 million acres. Losses continue, although the rate of loss has slowed considerably during the past decade. Recent losses have been concentrated in the lower Mississippi River Valley, the upper Midwest, and the Southeast.

Several laws provide varying levels of protection under different circumstances: Section 404 in the Clean Water Act; the swampbuster and other programs in the federal farm bill; the Fish and Wildlife Coordination Act; and the numerous enactments that have established National Wildlife Refuge System units. Although the rate of wetland loss has apparently slowed in recent years, these laws and their implementation are viewed by many protection advocates as inadequate. Others, who advocate the rights of property owners and development interests, by contrast, characterize these same efforts as overzealous and too extensive. Numerous state and local wetland programs increase the complexity of the protection effort.

The Bush and Clinton Administrations have made wetland protection a priority. The Clinton Administration announced its policies in August 1993: they include using the best available science to define and delineate wetlands; improving the regulatory program and encouraging non-regulatory options; and expanding partnerships in wetland protection.

Dozens of wetland bills have been introduced since 1990 either to implement these policies or to initiate alternative approaches. Numerous hearings were held but with the exception of the Federal Agricultural Improvement and Reform Act of 1996 (P.L. 104-127), better known as the 1996 farm act, no major wetland legislation has been enacted.

Since 1996, wetlands issues have involved continuing efforts to reauthorize the Clean Water Act and other wetland legislation, implementation of farm bill provisions, and specific actions that raise concerns about changes in wetlands programs. Two examples of specific actions that attracted congressional attention were implementation of Corps of Engineers changes to a nationwide permit (changes that are generally opposed by the development community), and a U.S. District Court decision that overturned the so-called "Tulloch" rule, which had expanded regulated actions to include excavation.

In February 1998 the Administration announced a Clean Water Action Plan intended to address the nation's remaining water quality challenges. Restoring and protecting wetlands is a key feature of the plan. It calls for a coordinated strategy involving more than a dozen action items to achieve a net gain of as many as 100,000 acres of wetlands annually by the year 2005.

Many wetland issues may be revisited during the 106th Congress, although there appears to be less interest in addressing them than in recent Congresses.

MOST RECENT DEVELOPMENTS

The 106th Congress may address wetland issues, some of which were considered, but not resolved, during the 105th Congress. These issues involved continuing efforts to reauthorize the Clean Water Act and other wetland legislation; implementation of farm bill provisions; and oversight of administration and court actions that raise concerns about changes in wetlands programs, including reissuing nationwide permits and responding to a court decision that would limit the activities covered under the Section 404 program. On March 6, 2000, the Army Corps of Engineers finalized changes to several nationwide permits that are intended to strengthen protection of aquatic environments, but the changes are opposed by developer groups. Controversies over the permits could draw congressional attention.

The Administration's Clean Water Action Plan, released in February 1998, also may help to shape the wetland debate in the future as it includes a number of items for protecting and restoring wetlands. For FY2000, appropriations bills provided $2.2 billion to fund the entire Plan, about 13% less than the Administration had requested. For FY2001, the Administration requested $2.8 billion, a 27% increase above FY2000 funding.

BACKGROUND AND ANALYSIS

Wetlands, in a variety of forms, are found throughout the country. They are known in different regions as swamps, marshes, fens, potholes, playa lakes, or bogs. While these places can differ greatly, they all have distinctive plant and animal assemblages because of the wetness of the soil. Some wetland areas may be continuously inundated by water, while other areas may not be flooded at all. In coastal areas, flooding may occur on a daily basis as tides rise and fall.

Functional values, both ecological and economic, at each wetland depend on its location, size, and relationship to adjacent land and water areas. Many of these values have been recognized only recently. Historically, many federal programs encouraged wetlands to be drained or altered because they were seen as having little value as wetlands. Wetland values can include:

- habitat for aquatic birds and other animals and plants, including numerous threatened and endangered species;
- production of fish and shellfish;
- water storage, including mitigating the effects of floods and droughts;
- water purification;
- recreation;
- timber production;
- food production;
- education and research;
- and open space and aesthetic values.

Usually wetlands provide some composite of these values; no single wetland in most instances provides all these values. The composite value typically declines when wetlands are altered. In addition, the effects of alteration often extend well beyond the immediate area because wetlands are usually part of a larger water system. In Western states, for example, many reservoirs and water projects (often inundating former wetlands) are used to regulate water flows, affecting downstream wetlands. Throughout the country, conversion of wetlands to urban uses has increased flood damages; this value is receiving considerable attention because of flooding in the upper Midwest in 1993.

Federal laws that affect wetlands have changed during the past 15 years as the value of wetlands has been recognized. Previously, some laws, such as selected provisions in the federal tax code, public works legislation, and farm programs, encouraged destruction of wetland areas. Federal laws now either encourage wetland protection, or prohibit or do not support their destruction. These laws, however, do not add up to a fully consistent or comprehensive national approach. The central federal regulatory program, Section 404 of the Clean Water Act, requires permits for the discharge of dredged or fill materials into many but not all wetland areas; however, other activities that adversely affect wetlands do not require permits. An agricultural program, swampbuster, is a disincentive program that indirectly protects wetlands by making farmers who drain wetlands ineligible for federal farm program benefits. Several acquisition and incentive programs fill out the protection effort.

During each of the past three Congresses, more than 75 bills with wetland provisions were introduced. In the 103rd Congress, wetlands were a major component of the Clean Water Act reauthorization debate and were one of the reasons that no legislation was enacted. Under new leadership, the 104th Congress considered wetland issues in ways that differed from recent Congresses (for example, the House Resources Committee organized a task force on wetland issues, reform proposals more favorable to landowners' rights that had been blocked in previous Congresses were viewed more favorably, and initiatives favored by environmental organizations received less attention). These changed views were reflected in legislative provisions that the House passed on regulatory reform and protection of private property rights (H.R. 9) and reauthorization of the Clean Water Act (H.R. 961). However, none of these proposals was enacted.

The Clinton Administration has taken a strong interest in the wetlands debate. On August 24, 1993, it announced new federal policies in an effort to reconcile conflicting interests in wetland issues. These conflicts are between:

- Environmental interests and wetland protection advocates who have been pressing the Administration to more fully protect wetlands by improving coordination and consistency among agencies and levels of governments, and strengthened programs; and
- Others, including large landowners, farmers, small businessmen, and individuals who own small parcels of land, who counter that protection efforts have gone too far, and that wet areas that provide few of the values associated with wetlands have been aggressively protected. They have been especially critical of the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) for administering the Section 404 program in an overzealous and inflexible manner.

The Clinton Administration policies embodied five principles: 1) supporting no overall net loss of the Nation's remaining wetlands together with increasing the quality and quantity of wetlands as a long-term goal; 2) making regulatory programs fair, flexible, and predictable; 3) encouraging options to regulatory programs; 4) expanding partnerships to protect and restore wetlands in an ecosystem/watershed context; and 5) basing wetland policies on the best scientific information available. Administration progress in implementing these policies has been mixed.

Wetland issues revolve around disparate scientific and federal program questions, and conflicting views of the role of government where private property is involved. Scientific questions include how to define wetlands, the current rate and pattern of wetland losses, and the importance of these losses. Federal program questions include the operation of the federal regulatory program and other programs to protect, restore, or mitigate wetland resources; relationships between agriculture and wetlands; whether all wetlands should be treated the same in federal programs; and federal funding of wetland programs. In addition, private property questions are raised because almost three-quarters of the remaining wetlands are located on private lands, and some property owners view federal programs that limit land use as diminishing its value, real and potential.

What is a Wetland?

There is general agreement that the presence of a wetland can be determined by a combination of soils, plants, and hydrology. The only definition of wetlands in law, in the swampbuster provisions of farm legislation, lists those three components but does not include more specific criteria, such as what conditions must be present, for how long, and during what portion of the year. Controversies are exacerbated when many sites that have those three components do not look like what many people visualize as wetlands.

Wetlands subject to federal regulation are a large subset of all places that are judged to be wetlands according to criteria used in the scientific community. These regulated wetlands, under the Section 404 program discussed below, are currently identified using technical criteria in a wetland delineation manual issued by the Corps in 1987. The Corps applies the manual in making about 25,000 cases each year to determine if an area is subject to the jurisdiction of the 404 program. The purpose of the manual is to provide guidance and field-level consistency among the agencies that have roles in wetland regulatory protection. It was prepared jointly and is used by all federal agencies to carry out their responsibilities under this program (the Corps, EPA, FWS, and the National Marine Fisheries Service (NMFS)).

Congress responded to controversy stimulated by Bush Administration proposals to revise the 1987 manual and thus change the areas regulated as wetlands by authorizing funding for the National Academy of Sciences (NAS) to report on the science of identifying and delineating wetlands (P.L. 102-389). This study, released in May 1995, recommended using a reference definition that could serve as a standard against which regulatory definitions and actions could be assessed. Other findings in the report include the need to recognize regional differences in wetlands, the importance of better training for wetland delineators, and the need for more research on the functions and values of wetlands. The NAS committee preparing this report concluded that implementing its findings may improve the objectivity and consistency of wetland identification and delineation. However, it also recognized that judgement will continue to play a role in delineating some wetlands.

How Fast are Wetlands Disappearing, and How Many Acres are Left?

It has been estimated that when European settlers first arrived, wetland acreage in the area that would become the 48 states was more than 220 million acres, or about 5% of the total land area. By 1995, total wetland acreage was estimated to be 124 million acres, with about 97 million acres converted to other uses, according to a recent summary by the Department of Agriculture's Economic Research Service. Data compiled by the Department of Agriculture and the Fish and Wildlife Service (FWS) in separate surveys and using different methodologies show that the annual loss rate has been dropping from almost 500,000 acres annually between 1954 and 1974 to less than 100,000 annually since the mid 1980s. One point of contention between these surveys is that the Department of Agriculture's study estimates that agriculture is responsible for less than 25% of the loss, while FWS estimates that agricultural activities are responsible for almost 80% of the losses.

In March 1998, FWS and the Natural Resources Conservation Service (NRCS) in the Department of Agriculture announced that future assessments of wetlands loss will be coordinated and be based on data collected by the NRCS every 5 years in the Natural Resources Inventory (NRI). The Administration believes that using a single source in the future will end a "battle of the numbers" that has obscured other wetland protection issues. This battle was explored in a July 1998 General Accounting Office report titled *Wetlands Overview: Problems with Acreage Data Persist*. These data will first be used in 2000.

NRCS has released some wetlands data compiled from the 1997 NRI. It covers only cropland, pastureland, and land enrolled in the Conservation Reserve, a large cropland retirement program. These data show a net wetlands loss rate of 24,000 acres per year between 1992 and 1997, which is a decline from the annual average of 27,000 acres per year between 1982 and 1992.

The numerous major shifts in federal policies since 1985 (and changes in economic conditions as well) strongly influence wetland loss patterns, but the composite effects remain unmeasured. Further, these data only measure acres, and do not provide any insights into changes in the quality of remaining wetlands as measured by the values they provide.

Section 404 Program

The principal federal program that provides regulatory protection for wetlands is found in Section 404 of the Clean Water Act (CWA). Its intent is to protect water and adjacent wetland areas from adverse environmental effects due to discharges of dredged or fill material. Established in 1972, Section 404 requires landowners or developers to obtain permits from the Corps of Engineers to carry out activities involving disposal of dredged or fill materials into waters of the United States, including wetlands.

The Corps has long had regulatory jurisdiction over dredging and filling, starting with the River and Harbor Act of 1899. The Corps and EPA share responsibility for administering the Section 404 program. Other federal agencies, including NRCS, FWS, and NMFS, also have roles in this process. In the 1970s, legal decisions in key cases led the Corps to revise this program to incorporate broad jurisdictional definitions in terms of both regulated waters and adjacent wetlands. Section 404 was last significantly amended by Congress in 1977.

This judicial/regulatory/administrative evolution of the 404 program has generally pleased those who view it as a critical tool in wetland protection, but dismayed others who would prefer more limited Corps jurisdiction or who see the expanded regulatory program as intruding on private land-use decisions and treating wetlands of widely varying value similarly. Underlying this debate is the more general question of whether Section 404 is the best approach to federal wetland protection.

Some wetland protection advocates have proposed that it be replaced or greatly altered. First, they point out that it governs only the discharge of dredged or fill material, while not regulating other acts that drain, flood, or otherwise reduce functional values. Second, because of exemptions provided in 1977 amendments to Section 404, major categories of activities are not required to obtain permits. These include normal, ongoing farming, ranching, and silvicultural (forestry) activities. Further, permits generally are not required for activities which drain wetlands (only for those that fill wetlands), which excludes a large number of actions with potential to alter wetlands. Third, approximately 20% of the Nation's wetlands are excluded from the regulatory program because of small size or not being linked to a tributary water system. Fourth, in the view of protection advocates, the multiple values that wetlands can provide (e.g., fish and wildlife habitat, flood control) are not effectively recognized through a statutory approach based principally on water quality, despite the broad objectives of the Clean Water Act.

The Permitting Process. The Corps' regulatory process involves both general permits for actions by private landowners that are similar in nature and will likely have a minor effect on wetlands and individual permits for more significant actions. According to program data compiled by the Corps, the agency received an average of 74,500 Section 404 permit requests annually from FY1996 to FY1999. Of those, more than 84% were authorized under a general permit, and the average length of time for action was 14 days. A general permit, which can apply regionally or nationwide, is essentially a permit by rule for activities with minor impact; most do not require pre-notification or prior approval. About 7% were required to go through the more detailed evaluation for an individual permit, which may involve complex proposals or sensitive environmental issues. The average time to complete review of these applications was 107; only 0.3% of applications for individual permits were denied. In FY1999, Corps-issued permits authorized a total of 21,556 acres of wetland impact (30% less than in FY1998), while those permits required that 46,433 acres of wetlands be restored, created, enhanced, or preserved as mitigation for the losses authorized.

Regulatory procedures on individual permits allow for interagency review and comment, a coordination process that can generate delays and an uncertain outcome, especially for environmentally controversial projects. EPA is the only federal agency having veto power over a proposed Corps permit; EPA has used its veto authority 11 times since the program began. Critics have charged that implied threats of delay by the FWS and others practically amount to the same thing. Reforms during the Reagan, Bush, and Clinton Administrations streamlined certain of these procedures, with the intent of speeding up and clarifying the Corps' full regulatory program, but concerns continue over both process and program goals.

Nationwide Permits. Nationwide permits are a key means by which the Corps minimizes the burden of its regulatory program. These general permits authorize activities that are similar in nature and are judged to cause only minimal adverse effect on the environment. General permits minimize the burden of the Corps' regulatory program by

authorizing landowners to proceed without having to obtain individual permits in advance. They are issued for 5-year periods and thereafter must be renewed by the Corps. In December 1996 the Corps reissued the 37 existing nationwide permits (including modification of some) and 2 new permits for additional activities believed to have minimal environmental effects.

In the 1996 revisions, the Corps made changes to strengthen the environmental restrictions of nationwide permit 26 (NWP 26), which has been particularly controversial because of concern that it results in significant unmonitored wetlands losses. The changes to NWP 26 pleased wetland protection advocates but displeased development and commercial interests who contend that permitting will now be more burdensome. At the same time, the Corps announced it would replace NWP 26 in 2 years with activity-based permits that will be more specific than the previous permit.

Fulfilling that pledge, the Corps issued final replacement permits for NWP 26 on March 6, 2000; these permits took effect June 7, 2000 (65 *Federal Register* 12818-12899). In contrast to NWP 26, which authorized activities in certain categories of waters, the replacement permits authorize projects for five specific types of activities, including passive recreational facilities such as biking and hiking; and residential, commercial, and institutional activities, with terms and conditions to ensure that the activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. The major change that the Corps believes will strengthen protection of aquatic resources is a maximum acreage limit under the new NWPs of one-half acre, reduced from the previous maximum of three acres. In addition, most require that the Corps be notified in advance of activities impacting more than one-tenth acre, reduced from the previous notification requirement for impacts of more than one-third acre. The Corps also issued additional general conditions applicable to all nationwide permits to further ensure protection of aquatic resources, such as limitations on discharges of fill material into 100-year floodplains. Developers say the replacement permits are too restrictive of the regulated public and would require more landowners to seek individual permits, which is more costly and time-consuming for the regulated public. The Corps acknowledges that more individual permits will be required and that costs for landowners and the Corps itself will increase, as a result of the permit changes, but the Corps believes that these impacts will be less severe than developer groups contend and are outweighed by the additional resource protection that the permits will provide. (For more information, see CRS Report 97-223, *Nationwide Permits for Wetlands Projects: Permit 26 and Other Issues and Controversies*.)

A key developer group, the National Association of Home Builders, challenged the replacement NWPs in a lawsuit filed March 9, the same day the permits package was published in the *Federal Register*. The lawsuit challenges a number of details in the permits and more generally contends that the new permits are contrary to the intent of Congress that the Corps provide a streamlined process in its nationwide permitting program. Other lawsuits challenging the permits have been brought by the National Stone Association and the National Federation of Independent Business.

Section 404 authorizes states to assume many of the permitting responsibilities. Two states, Michigan (in 1984) and New Jersey (in 1992), have done this. Others have cited the complex process of assumption, the anticipated cost of running a program, and the continued involvement of federal agencies as reasons for not joining these two states. Efforts (both

administrative and legislative) continue towards encouraging more states to assume full or partial program responsibility.

Judicial Proceedings Involving Section 404. The Section 404 program has been the focus of a number of lawsuits recently. The status of aspects of the Corps' regulatory program was made uncertain by a federal court ruling in January 1997. The U.S. District Court for the District of Columbia overturned regulations issued by the Corps and EPA in 1993 that had extended the scope of regulation to include certain landclearing and excavation activities. Those regulations were issued as part of the settlement of a lawsuit brought by environmental groups over the agencies' failure to regulate discharges associated with excavation ("North Carolina Wildlife Federation et al. v. Tulloch"). At issue was whether "fallback" from dredging activities constituted pollution, under the CWA. The federal court ruled that, in issuing the rules that resolved the "Tulloch" case, incidental fallback is not pollution and, thus, the agencies had exceeded their authority under the Clean Water Act. Corps officials view the ruling as a major setback for the regulatory program, as do environmentalists. A government appeal of the ruling was rejected in June 1998 by the U.S. Court of Appeals for the D.C. Circuit, and no further appeal has been pursued.

In December 1997, the U.S. 4th Circuit Court of Appeals ruled in favor of a Maryland developer, finding that the Corps has exceeded its authority in claiming jurisdiction over isolated wetlands. The court in *U.S. v. Wilson* said that the Corps exceeded its authority in trying to regulate wetlands whose degradation or destruction could have an impact on interstate commerce. Rather, a "case-by-case" determination is necessary to decide whether an activity has an effect on a wetland and whether the effect is substantial. Environmentalists said that the ruling, if interpreted broadly, would make it harder for the federal government to justify regulating interstate wetlands. However, the ruling only affects Corps districts covered by the 4th Circuit (Virginia, West Virginia, Maryland, and the Carolinas). A U.S. request for a rehearing of the case was denied in January 1998, and the government subsequently decided not to seek Supreme Court review. In May 1998, the Corps issued guidance outlining how to address isolated wetlands in the 5 states affected by the ruling. The Corps will continue to assert jurisdiction over isolated wetlands, but only where it can show a substantial connection between the wetland and interstate commerce.

Finally, in April 1998, a federal district court in Alaska suspended a specific nationwide permit, NWP 29, which authorizes the placement of fill in waters where single family homes are being built. The court ruled that the permit was illegal for allowing more than the minimal environmental harm permitted under the Clean Water Act. The judge ordered the Corps to stop accepting applications for this permit after June 30, 1998, and to consider alternatives to it, such as reducing the size of authorized fills (now covering up to one-half acre of non-tidal wetlands) and excluding high-value waters. The Corps did not appeal the court's decision, and Corps officials believe that they can use an administrative modification to create a new environmental assessment to bring the permit into compliance with the Act.

Treat All Wetlands Equally. Under the Section 404 program, there is a perception that all jurisdictional wetlands are treated equally, regardless of size, functions, or values. This has led critics to focus on situations where a wetland has little apparent value, but the landowner's proposal is not approved or the landowner is penalized for altering a wetland without a federal permit. Critics believe that one possible solution may be to have a tiered approach for regulating wetlands. Several legislative proposals introduced in recent

Congresses would establish three tiers — from highly valuable wetlands that should receive the greatest protection to the least valuable wetlands where alterations might usually be allowed. Some states (New York, for example) use such an approach for state-regulated wetlands with mixed results. The Corps and EPA issued guidance to field staff emphasizing the flexibility that exists to apply less vigorous permit review to small projects with minor environmental impacts, as part of the 1993 Clinton Administration initiative.

Two questions arise: What are the implications of implementing a classification program, and how clearly can a line separating each wetland category be defined? Regarding classification, even most wetland protection advocates 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 a first step toward a major erosion in overall wetland protection. Also, these advocates would probably like to see almost all wetlands presumed to be in the highest protection category unless experts can prove an area should receive a lesser level of protection, while critics would seek the reverse.

The second question, locating the boundary line, is controversial when the line encompasses areas that do not meet the image held by many. Controversy would likely grow if a tiered approach required that lines be drawn to segment wetland areas. On the other hand, a consistent application of an agreed-on definition may lead to fewer disputes and result in more timely decisions. Some information in the 1995 National Academy of Sciences wetland study is likely to be used in debating questions like these.

Beyond the question of individual wetlands are the composite wetlands of a region. An example is proposals to treat Alaska differently because a large portion of the state is designated as wetlands, yet a very small portion has been converted. Proposals have been made to exempt Alaska from the Section 404 program until 1% of its wetlands have been lost. Some types of wetlands are also treated differently. For example, playas and prairie potholes have somewhat different definitions under swampbuster (discussed below), and the effect is to increase the number of acres that are considered as wetlands. This differential treatment contributes to questions about federal regulatory consistency on private property.

Agriculture and Wetlands

National surveys a decade ago indicated that agricultural activities have been responsible for a large percentage of wetland loss in the preceding decades, making this topic a focus for policymakers. Congress has responded by creating programs, especially since 1985, that use disincentives and incentives to encourage landowners to protect and restore wetlands. Swampbuster and the Wetlands Reserve are the two largest efforts, but other programs such as the Conservation Reserve and Conservation Enhancement Reserve Programs (a subset of the Conservation Reserve), are also being used to protect wetlands. More recent data, compiled by the Natural Resources Conservation Service (NRCS) in a 1992 survey, indicate that the number of acres lost to agriculture has plunged, but continues.

The Section 404 program applies to agricultural lands. But the Corps and EPA exempt "prior converted lands" (wetlands modified for agricultural purposes before 1985) from Section 404 permit requirements under a memorandum of agreement (MOA), and the Clean Water Act exempts "normal farming activities." Another MOA signed in January 1994 by the NRCS, the Corps, EPA, and FWS gives NRCS the responsibility for making wetland

determinations for Section 404 on agricultural lands. However, these determinations are made under Section 404 rules and procedures. While these exemptions and the MOA have displeased some protection advocates, they have probably dampened some of the criticisms from farming interests over federal regulation of private lands. These agencies are revising the MOA to address changes made in the 1996 farm bill and to respond to problems that have emerged in implementing the original MOA. In July 1999, a lawsuit was filed by environmental groups to halt policy changes in wetland determinations that, they claim, could lead to greater wetland losses in the future. NRCS has responded to the claims raised by these groups; it has altered some procedures and is again making wetland determinations.

Swampbuster. Swampbuster is the principal wetland protection program specifically for agricultural lands. Enacted in 1985, it is designed to remove federal farm program incentives that encourage farmers to convert wetlands to agricultural production. While it is a disincentive rather than a regulatory program, it has been controversial with farmers concerned about redefining an appropriate federal role in wetland protection on agricultural lands, and with wetland protection advocates concerned about inadequate enforcement. Since March 1995, the NRCS has suspended making wetland determinations, except on request, because of controversy over wetland delineation and uncertainty as to whether legislation that redefines wetlands will be enacted, modifying boundaries that have already been delineated. NRCS estimates that more than 2.6 million wetland determinations have been made and that more than 4 million sites may eventually require a determination.

In preparation for the 1996 farm bill debate, wetland issues were discussed at several hearings. Most producer witnesses described how they had been adversely affected by the wetland protection efforts, especially agency processes for determinations and delineations. Congress responded by granting producers greater flexibility in the Federal Agricultural Improvement and Reform Act of 1996 (P.L. 104-127). Changes include:

- expanding the definition of agricultural land used in the MOA to include pasturelands, rangelands, and tree farms but not commercial forest operations;
- exempting swampbuster penalties when wetlands are voluntarily restored;
- providing that prior converted wetlands will not be considered "abandoned" so long as the land is used only for agriculture;
- giving the Secretary discretion to determine which program benefits swampbusters are ineligible for and granting good-faith exemptions;
- encouraging mitigation and establishing a mitigation banking pilot program; and
- repealing required consultation with the U.S. Fish and Wildlife Service.

An interim final rule with request for comments was issued on September 6, 1996. A final rule has not yet been issued.

Wetland Reserve Program (WRP). Under WRP, landowners can place easements on farmed wetlands in return for payments that are based on the reduction in value. All easements under this program were permanent until the 1996 farm bill and 1997 appropriations were implemented. The 1996 farm bill (P.L. 104-127) made it an entitlement, extended its authorization through 2002, and capped enrollment at 975,000 acres. The Department issued a final rule implementing these amendments on August 14, 1996.

Data released in January 2000 show almost 785,000 acres in the program. Almost 40% of the enrollment is in 3 states, Louisiana, Mississippi, and Arkansas. Most of the land is enrolled under permanent easements, while only about 5% is enrolled under 10-year restoration agreements. When the program depended on annual appropriations, farmer interest exceeded available funding. For FY1999, Congress limited enrollment to 120,000 acres in appropriations legislation. For FY2000, the Administration proposed to enroll just under 200,000 acres, so that the program would reach its maximum permitted level two years ahead of its deadline. However, Congress responded by limiting enrollment to 150,000 acres in agriculture appropriations legislation (P.L. 106-78). Increasing annual enrollment is an important component of the Administration's Clean Water Action Plan, discussed below, and several legislative proposals. If the enrollment ceiling is not raised, total enrollment in FY2001 is estimated to be only about 50,000 acres before the ceiling is reached. (For short summaries of revisions to programs in the 1996 farm bill, see CRS Report 96-330, *Conservation Provisions in the 1996 Farm Bill: A Summary*, and for more information on agriculture programs to protect wetlands, see CRS Issue Brief 96030, *Soil and Water Conservation: Implementing the 1996 Farm Bill*.)

Private Property Rights and Landowner Compensation

An estimated 74% of all remaining wetlands in the coterminous states are on private lands, and only 13% are located on federal lands. Questions of federal regulation of private property stem from the belief that land owners should be compensated when a "taking" occurs and alternative uses are prohibited or restrictions on use are imposed to protect wetland values. The U.S. Constitution provides that property owners shall be compensated if private property is "taken" by government action. The courts generally have found that compensation is not required unless all reasonable uses are precluded. Many individuals or companies purchase land with the expectation that they can alter it. If that ability is denied, they contend, then the land is greatly reduced in value. Many argue that a taking should be recognized when a site is designated as a wetland. The 104th and 105th Congresses considered, but did not enact, property rights protection legislation, and this topic continues to be discussed in this Congress. The Administration has strongly hinted that it would have vetoed the legislative proposals that Congress had considered. (For more information, see CRS Report 95-200, *The Private Property Rights Issue*.)

Wetland Mitigation and Restoration

Federal wetland policies during the past decade have increasingly emphasized restoration of wetland areas. Much of this restoration occurs as part of efforts to mitigate the loss of wetlands at other sites. The mitigation concept has broad appeal, but implementation has left a conflicting record. Whether it is possible to restore or create wetlands with ecological and other functions equivalent to or better than those of natural wetlands that have been lost over time is a subject that both scientists and policymakers debate. Results so far seem to vary, depending on the type of wetland. Congress has repeatedly explored the potential for mitigation, most recently at a House Transportation Committee, Subcommittee on Water Resources and Environment, oversight hearing, held December 9, 1997.

Mitigation of proposed actions that would adversely affect wetlands has been a cornerstone of the Section 404 program in recent years. A 1990 MOA signed by all the agencies with regulatory responsibilities, outlines a sequence of three steps leading to

mitigation: first, activities in wetlands should be avoided when possible; second, when they can not be avoided, impacts should be minimized; and third, where minimum impacts are still unacceptable, mitigation is appropriate. It directs that mitigated wetland acreage be replaced on a one-for-one functional basis. Therefore, mitigation may be required as a condition of a Section 404 permit. The Clinton Administration endorses mitigation.

Some wetland protection advocates are critical of mitigation, claiming that it justifies destroying wetlands. They believe that the permit program should be an inducement to avoid damaging wetland areas. These critics also contend that adverse impacts on wetland values are often not fully mitigated and that mitigation measures are not adequately monitored or maintained. Supporters of current efforts counter that they generally work as envisioned, but there is little data to support this view. Questions about implementation of the MOA and controversies over the feasibility of compensating for wetland losses further complicate the wetland protection debate.

Much of the attention on this issue has focused on Louisiana; it is estimated that 80% of the total loss of coastal wetlands in the United States has taken place in this state. In response to these losses, Congress authorized a task force of federal and Louisiana officials, led by the Corps, to prepare a list of coastal wetland restoration projects in the state, and provided funding to plan and carry out restoration projects in this and other coastal states under the Coastal Wetlands Planning, Protection and Restoration Act of 1990, also known as the Breaux Act. According to the Fish and Wildlife Service, 24 coastal states received funding under this program between 1992 and 1997 for 96 projects. For the $43.3 million expended, 51,184 acres of wetlands have been protected, over 42,000 through acquisition and nearly 8,600 through restoration.

Federal agencies have started similar programs that encompass large geographic areas in other parts of the country. Known as ecosystem management or watershed management, these efforts coordinate the activities of federal, state and local interests to restore large systems. The Chesapeake Bay and South Florida are examples, and wetlands play a prominent role in almost all of these systems. What role these programs will play in the overall effort to protect wetlands, however, may not be apparent for many years. These efforts, as they affect wetlands, will be coordinated through the Clinton Administration's Clean Water Action Plan, discussed below.

These agencies have been active in wetland improvement efforts in recent years. A summary of federal wetland restoration and enhancement activities shows that 18 federal agencies "restored" or "enhanced" 1.3 million acres of wetlands with FY1988-1992 funds. In particular, the FWS has been promoting the success of its Partners in Wildlife program, which it says has grown from restoring less than 100,000 acres in 1990 under less than 6,000 agreements on private property to restoring almost 500,000 acres under more than 17,000 agreements.

Interest has grown recently in creating "mitigation banks," in which wetlands are created, restored, or enhanced in advance to serve as "credits" that may be used or acquired by permit applicants when they are required to mitigate impacts of their activities. Numerous public and private banks have been established, but many believe that it is too early to assess their success. The Administration's August 1993 comprehensive wetlands proposals endorsed the use of mitigation banks. Detailed federal guidance for establishment, use, and

operation of mitigation banks was finalized by the Corps, EPA, FWS, NRCS, and NMFS in the Federal Register on November 28, 1995. Provisions in several recent laws, such as the 1996 farm bill, encourage additional use of the mitigation banking concept. (For more information, see CRS Report 97-849, *Wetland Mitigation Banking: Status and Prospects*.) In the 106th Congress, legislation to establish statutory requirements for mitigation banks resembling the 1995 guidance has been introduced (H.R. 1290).

Other programs also restore and protect domestic and international wetlands, including programs under the North American Wetlands Conservation Act. This Act was reauthorized through FY2003 in the 105th Congress (P.L. 105-312) and now authorizes appropriations of up to $30 million annually. It has been combined with funding created under several other laws to create the North American Wetlands Conservation Fund. The fund provides federal matching grants for wetland conservation projects to help implement the North American Waterfowl Management Plan. Projects are located in Canada, Mexico, and the United States. The Department of the Interior' Budget Notes that accompany the FY2001 budget request state that this program has contributed $288 million for more than 700 projects which have protected, restored, or improved nearly 9.1 million acres of wetlands in the United States and Canada. Partners have provided matching funds exceeding $727 million.

Under the Coastal Wetlands Planning, Protection, and Restoration Act (P.L. 101-646), the U.S. Fish and Wildlife Service funds competitive grants to states to acquire and protect coastal wetlands. For FY1998, 13 states received more than $10 million to acquire and restore more than 13,000 acres.

Under the Convention on Wetlands of International Importance, more commonly known as the Ramsar Convention, 108 nations have agreed to slow the rate of wetlands loss. These nations have designated more than 900 sites since the convention was adopted in 1971. The United States has designated 17 wetlands, encompassing almost 3 million acres.

Issues Addressed by the 105th Congress

The 105th Congress enacted P.L. 105-312, which reauthorized the North American Wetlands Conservation Act and the Partnership for Wildlife Act through 2003, providing $30 million per year to the former and $3 million per year to the latter. Congress also enacted transportation legislation (P.L. 105-178) which included a provision saying that mitigation banking is the preferred method for replacing wetlands lost due to highway projects. It did not address any of the more controversial wetland protection issues. For example, it held hearings, but did not enact legislation in response to the Corps' 1996 changes to nationwide permit 26, which were vigorously opposed by developers and private property rights advocates, or in response to the January 1997 federal District Court decision voiding the so-called "Tulloch" rule, which had expanded the definition of disposal of dredge and fill material to include excavation.

The Administration's Clean Water Action Plan.. In October 1997, on the 25th anniversary of the CWA, Vice President Gore announced an initiative intended to build on the environmental successes of the Act and address the nation's remaining water quality challenges. The Vice President directed EPA and USDA to coordinate the work of other federal agencies to develop an action plan to strengthen water pollution control efforts.

President Clinton and Vice President Gore released the action plan on February 19, 1998. (The text is available at [http://www.cleanwater.gov/].) Restoring and protecting wetlands is a key feature of the plan. It calls for a coordinated strategy to achieve a net gain of as many as 100,000 acres of wetlands annually by the year 2005. This is likely to be one of the more difficult elements to implement since it requires reversing current wetlands losses, which are estimated to be 80,000 to 120,000 acres annually. The Administration believes that actions such as tightening rules that apply to use of nationwide permit 26 (discussed above) will help achieve the wetlands protection goals of the Clean Water Action Plan, but that major gains will be achieved by the Wetlands Reserve Program, Conservation Reserve Program, and similar federal and non-federal programs. The plan calls for a 50% increase in wetlands restored and enhanced by the Corps of Engineers and increased enrollment of acres for wetlands restoration under USDA conservation programs. Because data on wetland acreage, especially the rate and pattern of wetland loss, are imperfect and often controversial, the plan calls for a new interagency system to more accurately track wetland loss, as well as restoration and creation.

The action plan was not accompanied by proposals or legislation to reauthorize the CWA or other laws. In Congress, it has been considered primarily through the appropriations process, although the Senate Environment and Public Works Committee held an oversight hearing on the action plan on May 13. Overall, the FY1999 appropriations bills provided less than 15% of the increased funds requested by the Administration for the entire plan. Funds for FY2000 totaled $2.2 billion, according to Administration estimates, but fell $322 million short of the 23% in increased funds that had been requested. For FY2001, the Administration requested $2.8 billion in total funding for the Clean Water Action Plan, a 27% increase above FY2000 levels. The FY2001 budget request includes several proposals that would affect wetlands protection and wetlands programs: doubling of the funding to $30 million for the North American Wetlands Conservation Fund; $15 million more for the Fish and Wildlife Service for wetlands restoration replacement of the overall WRP enrollment cap (975,000 acres) with an annual enrollment cap of 250,000 acres; and $8 million more for the Corps' wetlands regulatory program. (For further information, see CRS Report 98-745, *The Clean Water Action Plan: Budgetary Initiatives*.)

The 106th Congress

The 106th Congress may address wetland issues that were considered, but not resolved, during the 105th Congress. These include continuing efforts to reauthorize the Clean Water Act and other wetland legislation; implementation of farm bill provisions; and oversight of administration and court actions that raise concerns about changes in wetlands programs, including nationwide permits and court rulings concerning the Tulloch Rule. While about 40 bills with wetland provisions have been introduced in the 106th Congress, congressional committees have given limited attention to wetlands issues. However, a few bills are moving through the legislative process. For example, on October 18, 1999, the House passed H.R. 2821 (H.Rept. 106-388), a bill to add two additional members to the North American Wetlands Conservation Council. On November 19, the Senate approved S. 1119 (S.Rept. 106-193), a bill to reauthorize the Coastal Wetlands Planning, Protection and Restoration Act through FY2009.

In August 1999, Congress passed the Water Resources Development Act of 1999 (P.L. 106-53), authorizing flood control, navigation, beach protection, and environmental

restoration projects of the Army Corps of Engineers. Among its provisions, the bill authorizes $200 million over 5 years to promote wetland restoration for flood control. The legislation was not used as a vehicle for general debate on wetlands policy; however, implementation of its projects and policies could affect wetlands in specific areas (such as the Florida Everglades).

Some regulatory issues were addressed in the FY2000 Energy and Water Development Appropriations bill (P.L. 106-60). The House approved two provisions in July 1999. One would have required the Corps to modify a recently-established administrative appeals process for certain Corps regulatory decisions to allow unsuccessful appellants to directly challenge the decisions in court. The Administration opposed this provision, saying that it would impose excessive burdens on the Corps and the courts, while landowner and developer groups favored it. The conference committee deleted the House language that would have made certain administrative decisions appealable to federal courts prior to a final permit decision. It included Senate language providing that $5 million in additional funds for the Corps' regulatory program in FY2000 shall be used to establish an administrative process for appeals of jurisdictional determinations by the Corps.

The House-passed bill also included a provision to require a Corps study on the workload impact and compliance costs of replacement permits for nationwide permit 26; the study was to be completed 30 days prior to publication of the final permits, but no later than Dec. 30, 1999. Landowner and developer groups supported the House-passed provision, but the Administration opposed it, saying that the study was unnecessary and, even with a December 30 deadline, would increase wetlands loss in the nation by delaying issuance of replacement permits. The final bill modified the House-passed language by directing the Corps to study the workload impacts and costs of compliance of proposed replacement permits, but dropped language that would have required submission of a report to Congress before publication of final permits.

CONGRESSIONAL HEARINGS, REPORTS, AND DOCUMENTS

U.S. Congress. House. Committee on Government Reform and Oversight. *Wetlands: Community and Individual Rights v. Unchecked Government Powers.* Hearings, 105th Congress, 1st session. June 16, 1997. 110 p. Serial No. 105-64

U.S. Congress. House. Committee on Resources, Subcommittee on Fisheries Conservation, Wildlife, and Oceans. *Hearings on H.R. 2401, CBRA Technical Corrections; and H.R. 2556, to Reauthorize the North American Wetland Conservation Act of 1989.* Hearings, 105th Congress, 1st session. October 23, 1997. 80 p. Serial No. 105-64

U.S. Congress. House. Committee on Transportation and Infrastructure. Subcommittee on Water Resources and Environment. *Recent Regulatory and Judicial Developments on Wetlands.* Hearings, 105th Congress, 1st session. April 29, 1997. 461 p. Serial No 105-36.

——. *Wetlands Protection and Mitigation Banking*. Hearings, 105th Congress, 1st session. December 9, 1997, 135 p. Serial No. 105-49

U.S. Congress. Senate. Committee on Environment and Public Works. Subcommittee on Clean Air, Wetlands, Private Property, and Nuclear Safety. *Wetlands: Review of Regulatory Changes.* Hearings, 105th Congress, 1st session. June 26th, 1997. 230 p. (S. Hrg. 105-328)

FOR ADDITIONAL READING

Association of State Wetland Managers. *State Wetland Regulation: Status of Programs and Emerging Trends*. Berne, New York, n.d. 178 p.

Kusler, Jon and Teresa Opheim. *Our National Wetland Heritage: A Protection Guide*. Environmental Law Institute. [Washington] 1996. 149 p.

National Academy of Science, National Research Council. *Wetlands: Characteristics and Boundaries*. [Washington] 1995.

Strand, Margaret N. *Wetlands Deskbook.* Environmental Law Institute. [Washington] 1993. 883 p.

U.S. Department of the Interior. *The Impact of Federal Programs on Wetlands. Vol. I.* [Washington] 1988. 114 p. and *Vol. II* [Washington] 1994. 333 p.

U.S. Department of the Interior. U.S. Geological Survey. *National Water Summary on Wetland Resources*. [Washington] 1997. 431 p. Water Supply Paper 2425

CRS Reports

CRS Report 96-330. *Conservation Provisions in the 1996 Farm Bill: A Summary*, by Jeffrey Zinn. 6 p.

CRS Report 97-223. *Nationwide Permits for Wetlands Projects: Permit 26 and Other Issues and Controversies*, by Claudia Copeland. 17 p.

CRS Report 97-849. *Wetland Mitigation Banking: Status and Prospects*, by Jeffrey Zinn. 21 p.