Order Code IB97014

CRS Issue Brief for Congress
Received through the CRS Web

Wetland Issues

Updated July 18, 2003

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

CONTENTS

SUMMARY

MOST RECENT DEVELOPMENTS

BACKGROUND AND ANALYSIS
- What Is a Wetland?
- How Fast Are Wetlands Disappearing, and How Many Acres Are Left?
- Section 404 Program
  - The Permitting Process
  - Nationwide Permits
  - Judicial Proceedings Involving §404
  - Treat All Wetlands Equally
- Agriculture and Wetlands
  - Swampbuster
  - Other Agricultural Wetlands Programs
  - Agricultural Wetlands and the §404 Program
- Private Property Rights and Landowner Compensation
- Wetland Restoration and Mitigation
- Other Recent Congressional Wetlands Activities

FOR ADDITIONAL READING

Wetland Issues

SUMMARY

The 108th Congress, like earlier Congresses, may address various wetland policy topics. Protection of wetlands has been a priority of administrations for the past 20 years, generating congressional interest. The Bush Administration has made some initial pronouncements on wetlands, issuing "clarifying guidance" for mitigation policies and stating that it would be reviewing rules affecting alteration of isolated wetlands in response to a January 2001 Supreme Court ruling. It also endorsed the no-net-loss concept and emphasized related wetland protection efforts. Legislation to reverse the 2001 Court ruling has been introduced (H.R. 962, S. 473), and a subcommittee of the Senate Committee on Environment and Public Works held a hearing on the effects of this ruling on June 10, 2003.

The 107th Congress reauthorized and amended both agricultural wetland protection programs in the 2002 farm bill and a migratory waterfowl habitat protection program in the North American Wetlands Conservation Act. Even with these actions, it was less active in considering wetland topics than recent Congresses, which had examined controversies over such topics as: applying federal regulations on private lands; rates and causes of wetlands loss; acceptable rates of loss; implementing farm bill provisions; and changes to the federal permit program.

Legal decisions and administrative actions raise concerns that cause Congress to examine aspects of wetland protection efforts. Examples of such actions include: implementation of Corps of Engineers changes to the nationwide permit program (changes generally opposed by developers); a 1997 court decision that overturned the "Tulloch" rule, which had expanded regulation to include excavation; and redefining key wetlands permit regulatory terms in revised rules issued in May 2002. Reasons for frequent and intense controversy over wetland protection include their physical characteristics, the rate of loss, the ways in which federal laws currently protect them, and the fact that 75% of remaining U.S. wetlands are located on private lands.

Wetlands occur in a wide variety of physical forms throughout the country. The numerous values these areas provide, such as wildlife habitat and water storage and purification, also vary widely.

The U.S. Fish and Wildlife Service estimates that total wetland acreage in the lower 48 states has declined from more than 220 million acres 3 centuries ago to 105.5 million acres in 1997. The remaining acreage continues to be modified or disappear, although at a much slower rate, while restoration efforts have greatly expanded in recent years. Some regions reportedly are approaching the national policy goal of no-net-loss.

Instead of a single comprehensive federal wetland protection law, multiple laws provide varying levels of protection in different forms: the permit program authorized in §404 in the Clean Water Act; programs for agricultural wetlands; laws that protect specific sites, such as in National Wildlife Refuge System units; and laws that protect wetlands which perform certain functions, such as sites along migratory bird flyways. Many protection advocates view these laws and their implementation as inadequate or uncoordinated. Others, who advocate the rights of property owners and development interests, by contrast, characterize these efforts, especially the §404 permit program, as too intrusive. Numerous state and local wetland programs add to the complexity of the protection effort.

Most Recent Developments

The 108th Congress may address various wetland policy topics. Congress may be interested in implementation of wetland provisions enacted in the 2002 farm bill (P.L. 107-171) and in the North American Wetlands Conservation Act (P.L. 107-304), in large-scale restoration efforts involving wetlands (the Everglades, for example), and in appropriations for wetland programs. Other events that have recently attracted public and congressional attention include Administration issuance of revised guidance regarding mitigation policies and announcement of possible rule changes in response to a January 2001 Supreme Court decision limiting which wetlands are regulated. These actions have been criticized by wetland protection advocates, and legislation to reverse the 2001 Supreme Court ruling was introduced February 27 (H.R. 962, S. 473). The Subcommittee on Fisheries, Wildlife, and Water of the Senate Environment and Public Works Committee held a hearing to learn more about Administration efforts in response to this ruling on June 10, 2003.

Background and Analysis

Wetlands, with a variety of physical characteristics, are found throughout the country. They are known in different regions as swamps, marshes, fens, potholes, playa lakes, or bogs. Although 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. For example, conversion of wetlands to urban uses has increased flood damages; this value is receiving considerable attention as natural disaster costs have mounted through the 1990s.

Federal laws that affect wetlands have changed since the mid 1980s as the values of wetlands have been recognized in different ways in numerous national policies. 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, §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 may 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; those who do not receive these benefits have no reason to participate. Several acquisition and incentive programs complete the current protection effort.

Although numerous wetland protection bills have been introduced in recent Congresses, the only major new wetlands legislation to be enacted has been in the two most recent farm bills, in 1996 and 2002. During this period, Congress also reauthorized several wetlands programs, mostly setting higher appropriations ceilings, without making significant shifts in policy. President Bush endorsed wetland protection in signing the farm bill and the North American Wetlands Conservation Act reauthorization in 2002. The Bush Administration has recently issued guidance on mitigation policies and regulatory program jurisdiction; the latter has raised controversy with some groups (see discussion below). It has also endorsed the no-net-loss concept.

Congress has provided a forum in numerous hearings where conflicting interests in wetland issues have been debated. The conflicts are between:

- Environmental interests and wetland protection advocates who have been pressing for greater wetlands protection as multiple values have been more widely recognized, by improving coordination and consistency among agencies and levels of governments, and strengthened programs; and
- Others, including landowners, farmers, and small businessmen, who counter that protection efforts have gone too far, and that privately owned wet areas that provide few wetland values 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 §404 program in an overzealous and inflexible manner.

Wetland issues revolve around disparate scientific and programmatic 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 declines and losses, and the importance of these physical changes. Federal program questions include; the administration of programs to protect, restore, or mitigate wetland resources (especially the §404 program); relationships between agriculture and wetlands; whether all wetlands should be treated the same in federal programs and which wetlands should be subject to regulation; federal funding of wetland programs; and is protecting wetland by acres a good proxy for protecting wetlands based on the functions they perform and the values they provide. In addition, private property questions are raised because almost three-quarters of the remaining wetlands are located on private lands, and some property owners believe they

should be compensated when federal programs limit how they can use their land, and thereby diminish its value.

What Is a Wetland?

There is general agreement that scientists can determine the presence of a wetland by a combination of soils, plants, and hydrology. The only definition of wetlands in law, in the swampbuster provisions of farm legislation (P.L. 99-198) and reproduced in the Emergency Wetlands Resources Act of 1986 (P.L. 99-645), lists those three components but does not include more specific criteria, such as what conditions must be present and for how long. Controversies are exacerbated when many sites that have those three components, including sites that have wetland characteristics only some portion of the time, do not look like what many people visualize as wetlands.

Wetlands subject to federal regulation are a large subset of all places that the scientific community would call a wetlands. These regulated wetlands, under the §404 program discussed below, are currently identified using technical criteria in a wetland delineation manual issued by the Corps in 1987. 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)). The manual provides guidance and field-level consistency among the agencies that have roles in wetland regulatory protection. (A second and slightly different manual, agreed to by the Corps and the Natural Resources Conservation Service, is used for delineating agricultural lands.) While the agencies try to improve the objectivity and consistency of wetland identification and delineation, judgement continues to play a role and can lead to site-specific controversies. Cases discussed below (see "Judicial Proceedings Involving §404") are efforts to exclude certain types of wetlands or activities affecting them from the regulatory program.

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

The U.S. Fish and Wildlife Service has 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 1997, total wetland acreage was estimated to be 105.5 million acres, according to data it compiled in the National Wetlands Inventory (NWI). Data compiled by the NRCS and the FWS in separate surveys and using different methodologies has yielded different results. Although both show that the annual loss rate dropping from almost 500,000 acres annually nearly three decades ago to less than 100,000 annually, the FWS survey estimated the average annual loss rate was 58,500 acres between 1986 and 1997, while NRCS (using its Natural Resources Inventory (NRI) of privately-owned lands) estimated that the average annual loss rate was 32,600 acres between 1992 and 1997.

This difference in loss statistics has led to disagreements over the actual rate of loss and the effectiveness of current policies. The Clinton Administration announced in March 1998 that future assessments of wetlands loss would be based on data collected by the NRCS every 5 years in the NRI. It sought to end this "battle of the numbers" that was obscuring other wetland protection issues. This battle was explored in a July 1998 General Accounting

Office report titled *Wetlands Overview: Problems with Acreage Data Persist*. Recent statements by the two agencies over whether a single statistically reliable report on wetlands gains and losses can be completed indicate that the battle continues.

Numerous shifts in federal policies since 1985 (and changes in economic conditions as well) strongly influence wetland loss patterns, but the composite effects remain unmeasured. There is a large time lag from changes in policy to release of data that measure these changes. 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 §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, §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 §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 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 §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 §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. Recently, controversy over this issue has centered particularly on excavation activities and whether they are subject to regulation. Third, 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 receives an average of 81,000 permit requests annually. Of those, more than 90% are authorized under a general permit. 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 9% are required to go through the more detailed evaluation for an individual permit, which may involve complex proposals or sensitive environmental issues and can take 120 days or longer for a decision. Less than 0.2% of permits are denied; most other individual permits are modified or conditioned before issuance. In FY2002, Corps-issued permits authorized activities having a total of 24,650 acres of wetland impact, while those permits required that 57,820 acres of wetlands be restored, created, or enhanced 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 in the 30 years 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, earlier 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.

Controversy also surrounds revised regulations issued by EPA and the Corps in May 2002, which redefine two key terms in the 404 program, "fill material" and "discharge of fill material." The agencies say that the revisions are intended to clarify certain confusion in their joint administration of the program due to previous differences in how the two agencies defined those terms, but environmental groups contend that the changes allow for less restrictive and inadequate regulation of certain disposal activities, including disposal of coal mining waste, which could be harmful to aquatic life in streams. The Senate Environment and Public Works Committee held a hearing in June 2002 to review these issues, and legislation to reverse the agencies' action was introduced in the 107th Congress (H.R. 4683), but no further action occurred. (For additional information, see CRS Report RL31411, *Controversies over Redefining "Fill Material" Under the Clean Water Act*.) Similar legislation has been introduced in the 108th Congress (H.R. 738).

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 and two new permits. 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 cumulative unmonitored wetlands losses. The changes to NWP 26 pleased wetland protection advocates but displeased development and commercial interests who contended that permitting would now be more burdensome. At the same time, the Corps announced it would replace NWP 26 in 2 years with more specific activity-based permits.

Fulfilling that pledge, the Corps issued final replacement permits for NWP 26 in March 2000; these permits took effect June 7, 2000. In contrast to NWP 26, which authorized activities in certain categories of waters, the replacement permits authorize projects for five specific types of 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 believed 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. 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 said 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 it believes that these impacts will be less severe than developer groups contend and will be outweighed by the additional resource protection that the permits will provide. (For more information, see CRS Report 97-223, *Nationwide Permits for Wetlands Projects: Regulatory Developments and Current Issues*.)

A key developer group, the National Association of Home Builders, challenged the replacement NWPs in a lawsuit filed 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. These cases are still pending.

Nationwide permits are issued for periods of no longer than 5 years. Thus, in August 2001, the Corps proposed to re-issue all 43 nationwide permits (including those issued in 2000), most of which were last re-issued in 1996. EPA and environmental groups object to some revisions that the Corps proposes in order to add flexibility, including relaxation of certain permit conditions, fearing that they would result in a net loss of wetland acres. Industry groups favored flexibility in the proposal, but say that some requirements for case-by-case review could nullify the positive aspects. The Corps received more than 2,100 public comments and modified some aspects of the proposal when it issued final permits January 15, 2002. The re-issued permits became effective March 18, 2002. Reactions to the final permits were mixed, much like the August 2001 proposal: environmental advocates contend that, even with modifications, the re-issued permits are not adequately protective of water quality, while developer groups argue that the overall program continues to focus on arbitrary regulatory thresholds that result in undue burden on developers and the Corps.

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 because of statutory limits on waters that states could regulate as reasons for not joining these two states. Efforts (both administrative and legislative) continue towards encouraging more states to assume program responsibility.

Judicial Proceedings Involving §404. The §404 program has been the focus of a number of lawsuits, most of which have sought to narrow the geographic scope of the regulatory program. 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 court ruled that incidental fallback is not pollution and, thus, the agencies had exceeded their authority under the Clean Water Act. In January 2001, the Clinton Administration issued a regulation to close what the government viewed as a "loophole" resulting from the Tulloch case, which it estimated to have resulted in conversion of 20,000 acres of wetlands. The regulation sought to clarify circumstances in which mechanized landclearing or excavation activity in waters of the U.S. will result in discharges which are subject to CWA regulation. After reviewing this new rule, the Bush Administration announced in April 2001 that it would allow the regulation to take effect without modification. Regulated industries are displeased with the new rule, and two groups filed lawsuits challenging it.

In December 1997, the U.S. 4th Circuit Court of Appeals ruled in favor of a Maryland developer, finding that the Corps had 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 affected Corps districts covered by the 4th Circuit (Virginia, West Virginia, Maryland, and the Carolinas). The government 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.

U.S. v. Wilson is one recent example of long-standing controversy over whether isolated waters are properly within the jurisdiction of §404. Isolated waters that are wetlands which are not physically adjacent to navigable surface waters often appear to provide few of the values for which wetlands are protected, even if they meet the technical definition of a wetland. In January 2001, the Supreme Court ruled on the question of whether the CWA provides the Corps and EPA with authority over isolated waters. The Court's 5-4 ruling in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers* (No. 99-1178) held that the Corps' denial of a §404 permit for a disposal site on isolated wetlands solely on the basis that migratory birds use the site exceeds the authority provided in the Act. The full extent of retraction of the regulatory program resulting from this decision is unclear for now. Environmentalists believe that the Court misinterpreted congressional intent on the matter, while industry and landowner groups welcomed the ruling.

Policy implications of how much the decision restricts federal regulation depend on how broadly or narrowly the opinion is applied, and since the 2001 Court decision, other federal courts have issued a number of rulings that have reached varying conclusions. The government's current view on this key question came in EPA-Corps guidance issued on January 15, 2003. It provides a legal interpretation essentially based on a narrow reading of the Court's decision, thus allowing federal regulation of some isolated waters to continue. Administration press releases say that the guidance demonstrates the government's commitment to "no-net-loss" wetlands policy. However, it is apparent that the issues remain under discussion within the Administration and elsewhere, because at the same time, the Administration issued an advance notice of proposed rulemaking (ANPRM) seeking comment on how to define waters that are under jurisdiction of the regulatory program. The government received more than 115,000 comments on the ANPRM, and the Corps and EPA are now considering next steps. Environmentalists oppose changing any rules, saying that the law and previous court rulings call for the broadest possible interpretation of the Clean Water Act, but developers are seeking changes to clarify interpretation of the *SWANCC* ruling. While it likely will take some time to assess how regulatory protection of wetlands will be affected as a result of the decision and other possible changes, the remaining responsibility to protect affected wetlands falls on states and localities. Whether states will act to fill in the gap left by removal of some federal jurisdiction is unclear, but a few states (Wisconsin and Ohio, for example) have passed new laws or amended regulations to do so. (For additional information, see CRS Report RL30849, *The Supreme Court Addresses Corps of Engineers Jurisdiction Over 'Isolated Waters': The SWANCC Decision.*) Legislation to reverse the *SWANCC* decision was introduced in the 107th Congress, but no further action occurred. Similar legislation was introduced in the 108th Congress on February 27 (H.R. 962, S. 473). The legislation would provide a broad statutory definition of "waters of the United States;" clarify that the CWA is intended to protect U.S. waters from pollution, not just maintain their navigability; and include a set of findings to assert constitutional authority over waters and wetlands.

Treat All Wetlands Equally. Under the §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. The Corps and EPA issued guidance to field staff emphasizing the flexibility that currently exists in the §404 program to apply less vigorous permit review to small projects with minor environmental impacts.

Three questions arise: (1)What are the implications of implementing a classification program, (2) How clearly can a line separating each wetland category be defined, and (3) Are there regions where wetlands should be treated differently? 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 who view protection efforts as excessive, would seek the reverse.

Locating the boundary line can be 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 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 states have far more wetlands than others. Different treatment has been proposed for Alaska because about one third of the state is designated as wetlands, yet a very small portion has been converted. Legislative proposals have been made to exempt it from the §404 program until 1% of its wetlands have been lost. Some types of wetlands are already 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 almost two decades ago indicated that agricultural activities had been responsible for about 80% of wetland loss in the preceding decades, making this topic a focus for policymakers. Congress responded by creating programs in farm legislation starting in 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's Farmed Wetlands Option and Conservation Reserve Enhancement Programs are also being used to protect wetlands. Recent wetland loss surveys conducted by NRCS and by FWS indicate that agriculture is now responsible for between 25% and 30% of conversions, and that the total number of acres lost also has plunged.

Swampbuster. Swampbuster, enacted in 1985, uses disincentives rather than regulations to protect wetlands on agricultural lands. It remains 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 1995, the NRCS has made wetland determinations only in response to requests because of uncertainty over whether changes in regulation or law would modify 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 may eventually be required.

Swampbuster was amended in the 1996 farm bill (P.L. 104-127) and the 2002 farm bill (P.L. 107-171). Amendments in 1996 granted producers greater flexibility by making changes such as: exempting swampbuster penalties when wetlands are voluntarily restored; providing that prior converted wetlands are not be considered "abandoned" if they remain in agricultural use; and granting good-faith exemptions. They also encourage mitigation, establish a mitigation banking pilot program, and repeal required consultation with the U.S. Fish and Wildlife Service. The 2002 farm bill made a single amendment that should not affect either the acres that are protected or the characteristics of the protection effort.

Other Agricultural Wetlands Programs. Under the Wetland Reserve Program (WRP), enacted in 1990, landowners receive payments for placing easements on farmed wetlands. All easements were permanent until provisions in the 1996 farm bill, requiring temporary easements and multi-year agreements as well, were implemented. The 1996 law made the WRP an entitlement, extended its authorization through 2002, and capped enrollment at 975,000 acres. The 2002 farm bill reauthorized the program through FY2007. It increased the enrollment cap to 2,275,000 acres, with 250,000 acres to be enrolled annually. The Natural Resources Conservation Service issued regulations implementing these provisions on June 7, 2002.

Data released in the FY2004 budget submission show more than 1,275,000 acres enrolled by the end of FY2002. Almost 35% of the enrollment is in three 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. Prior to enactment of the 2002 farm bill, farmer interest had exceeded available funding, which may be one of the reasons why Congress raised the enrollment ceiling.

The 2002 farm bill also expanded the 500,000-acre Farmable Wetlands Pilot Program within the Conservation Reserve Program. This program had been enacted in the FY2001 Agriculture Appropriations to enroll farmed wetlands smaller than 5 acres in six North Central states. It is now a national program of 1 million acres, with no state being able to enroll more than 100,000 acres. Only wetland areas that are smaller than 10 acres that are not adjacent to larger streams and rivers are eligible. This program may become more important to overall protection efforts in the wake of the *SWANCC* decision, discussed above, which limited to reach of the §404 permit program so that it does not apply to many small wetlands that are isolated from navigable waterways. Through May 2003, almost 85,000 acres had been enrolled.

Several other conservation programs, including the Environmental Quality Incentives Program and the Wildlife Habitat Incentive Program, were also amended in the 2002 farm bill in ways that may have incidental protection benefits for wetlands, both because of much higher funding levels and because of program changes. Finally, some new programs could less directly help protect wetlands, including the Conservation Security Program, which would provide payments to install and maintain practices on working agricultural lands, a Surface and Groundwater Conservation Program (funded through the Environmental Quality Incentive Program), a new program to retire wetlands that are part of a cranberry operation; and several programs to better manage water resources. (For more information on these provisions, see CRS Report RL31486, *Resource Conservation Title of the 2002 Farm Bill: A Comparison of New Law with Bills Passed by the House and Senate, and Prior Law*; and for the status of implementation, see the 2002 farm bill implementation subsection of CRS Issue Brief IB96030, *Soil and Water Conservation Issues*.)

Agricultural Wetlands and the §404 Program. The §404 program applies to qualified wetlands in all locations, including agricultural lands. But the Corps and EPA exempt "prior converted lands" (wetlands modified for agricultural purposes before 1985) from §404 permit requirements under a memorandum of agreement (MOA), and since 1977 the Clean Water Act has exempted "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 the §404 program on agricultural lands. These

determinations are made under §404 rules and procedures. The January 2001 Supreme Court *SWANCC* decision, discussed above, apparently will exempt certain isolated wetlands from Corps jurisdiction; NRCS has estimated that about 8 million acres in agricultural locations might be exempted by this decision, but all could be affected by rulemaking changes that the EPA and Corps are considering (discussed above). Most recently, on December 16, 2002, the Supreme Court affirmed a lower court decision, without comment, that deep ripping to prepare wetland soils for planting was more than a "normal farming activity" and therefore subject to §404 requirements.

While these exemptions and the MOA have displeased some protection advocates, they have probably dampened some of the criticism from farming interests over federal regulation of private lands. On the other hand, how NRCS responds to the Supreme Court decision on isolated wetlands could cause that criticism to rise. The Corps and NRCS have been unsuccessful in revising the MOA since 1996. There has been no official comment on how additional changes in the 2002 farm bill will affect interagency cooperation. Some of the wetlands that fall outside §404 requirements as a result of the *SWANCC* decision can now be protected if landowners decide to enroll them into the revised farmable wetlands program.

Private Property Rights and Landowner Compensation

An estimated 74% of all remaining wetlands in the coterminous states are on private 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. In June 2002, the Supreme Court held that a Rhode Island man who had acquired property after the state enacted wetlands regulation affecting the parcel is not automatically prevented from bringing an action to recover compensation from the state, but ruled that the state's action had not taken all economic value of the property into account *(Palazzolo v. Rhode Island*, U.S. No. 99-2047).

Recent Congresses have explored these issues in numerous hearings; an example is the October 2001 hearing by the House Transportation and Infrastructure Committee, subcommittee on water resources and development. The record of this hearing is titled *The Wetland Permitting Process: Is it Working Fairly?* (H.Rept. 107-50). Recent Congresses have considered, but did not enact, property rights protection proposals, in part because the Clinton Administration had strongly hinted that it would have vetoed such legislation. The Bush Administration has not stated an official position on these types of proposals. (For more information, see CRS Report RL30423, *Wetlands Regulation and the Law of Property Rights "Takings."*)

Wetland Restoration and Mitigation

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. Examination of this record, presented in a June 2001 report from the National Research Council, found it to be wanting. The NRC report said that mitigation projects called for in permits affecting wetlands were not meeting the federal government's "no net loss" policy goal for wetlands function (*Compensating for Wetlands Losses under the Clean Water Act*). Likewise, a GAO report issued in May 2001 criticized the ability of the Corps to track the impact of in-lieu-fee projects under its current mitigation program that allows in-lieu-fee mitigation projects in exchange for issuing permits allowing wetlands development (*Wetlands Protection: Assessments Needed to Determine the Effectiveness of In-Lieu-Fee Mitigation*, GAO-01-325). 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 and the level of commitment to monitoring and maintenance. Congress has repeatedly endorsed mitigation in recent years.

Much of the attention on wetland restoration has focused on Louisiana, where an estimated 80% of the total loss of U.S. coastal wetlands has occurred (coastal wetlands are about 5% of all U.S. wetlands). In response to these losses, Congress authorized a task force, 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 FWS, almost $37 million in grants was spent by states to restore almost 6,000 acres and purchase almost 40,000 acres between FY2000 and FY2002. In the 108th Congress, Senator Landrieu successfully attached coastal impact assistance provisions during committee markup of comprehensive energy legislation (S. 14) that would provide significant new funding to wetland protection and restoration efforts. Restoration projects are also taking place in other places. In June 2002, for example, 16,500 acres of salt ponds in San Francisco Bay were purchased by the state of California and the U.S. Fish and Wildlife Service from Cargill Inc and will be restored.

Many federal agencies have been active in wetland improvement efforts in recent years. In particular, the FWS has been promoting the success of its Partners for Wildlife program. Through FY2001, the program had entered into about 27,000 agreements with landowners to protect or restore about 575,000 acres of wetlands and more than 2,000 miles of riparian and in-stream habitat (and upland habitat also).

Other programs also restore and protect domestic and international wetlands. One of these derives from the North American Wetlands Conservation Act, reauthorized through FY2007 in P.L. 107-304 with an appropriations ceiling that will increase from $55 million in FY2003 to $75 million in FY2007. The FWS has combined funding for this program with 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. According to the Department of the Interior, the U.S. and its partners had invested $1.7 billion by the end of FY2001 to improve more than 5 million acres of wetlands.

Under the Convention on Wetlands of International Importance, more commonly known as the Ramsar Convention, the United States is one of 134 nations that have agreed to slow

the rate of wetlands loss by designating important sites. These nations have designated 1,229 sites since the convention was adopted in 1971. The United States has designated 19 wetlands, encompassing 3 million acres.

Mitigation has also become an important cornerstone of the §404 program in recent years. A 1990 MOA signed by 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 §404 permit.

Some wetland protection advocates are critical of mitigation, which they view as justifying destruction of wetlands. They believe that the §404 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, even if well-designed, are not adequately monitored or maintained. Supporters of current efforts counter that they generally work as envisioned, but little data exist to support this view. Questions about implementation of the 1990 MOA and controversies over the feasibility of compensating for wetland losses further complicate the wetland protection debate. In response to criticism in the NRC and GAO reports (discussed above), in November 2001, the Corps issued new guidance to strengthen the standards on compensating for wetlands lost to development, but the guidance has been criticized by environmental groups and some Members of Congress for weakening rather than strengthening mitigation requirements and for the Corps' failure to consult with other federal agencies. In December 2002, the Corps and EPA released an action plan including 17 items that both agencies believe will improve the effectiveness of wetlands restoration efforts,

The concept of "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, is widely endorsed. Numerous public and private banks have been established, but many believe that it is too early to assess their success. The U.S. Army Corps of Engineers recently estimated that about 230 banks had been established by January1, 2000 through some form of agreement (although construction had not started at all those sites), and if state -approved banks are included, the total grew to 370 to 400 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 laws, such as the 1996 farm bill and the 1998 Transportation Equity Act (TEA-21), endorse the mitigation banking concept. (For more information on the early history of banking, see CRS Report 97-849, *Wetland Mitigation Banking: Status and Prospects*.)

Other Recent Congressional Wetlands Activities

The 107th Congress considered wetlands in ways other than the many activities mentioned above. The House Transportation and Infrastructure Water Resources and Environment Subcommittee held two hearings. The first, on September 20, 2001, considered H.R. 1474, a bill to promote restoration, conservation, and enhancement of wetlands by specifically authorizing a wetlands mitigation banking program to be administered by the

Corps. The second, on October 4, 2001 was an oversight hearing on enforcement of wetlands regulatory programs where witnesses presented allegations of improper treatment by federal regulators and enforcement officials.

The House Government Reform Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs held a hearing on the government's response to the *SWANCC* Supreme Court decision in September 2002 in order to press the government to clarify its interpretation of the Court case. Committee Members and public witnesses indicated that a lack of guidance has led to inconsistent regulatory decisions by Corps officials in individual regions of the country. At the hearing, Corps and EPA officials testified that efforts to develop guidance, which was released in January (see discussion above). In February 2003, House and Senate Members introduced legislation to reverse the SWANCC decision (see discussion above, "Judicial Proceedings Involving §404"). The Administration's efforts to interpret and implement the ruling were discussed at a June 10 hearing of the Senate Environment and Public Works Subcommittee on Fisheries, Wildlife, and Water. Some Members and witnesses expressed frustration over government agencies' inaction on clarifying wetlands protection rules, but agency witnesses said Congress has responsibility to clarify jurisdictional issues in the law.

Congress completed action on FY2003 appropriations in the Consolidated Appropriations Resolution, 2003 (P.L. 108-7) on February 20, 2003. It funds virtually all the federal government's wetlands-related activities. It did not make significant changes in wetlands policies and funds most major wetlands programs at or near FY2002 levels.

For Additional Reading

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

National Academy of Sciences, National Research Council. *Compensating for Wetland Losses Under the Clean Water Act*. [Washington] 2001.

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

U.S. Department of Agriculture, Economic Research Service. *Wetlands and Agriculture: Private Interests and Public Benefits*, by Ralph Heimlich, *et al*. [Washington] 2001, 123p. Agricultural Economic Report No. 765.

U.S. Department of the Interior. U.S. Fish and Wildlife Service. *Status and Trends of Wetlands in the Coterminous United States 1986 to 1997*. [Washington] 2000. 82p.

U.S. General Accounting Office. *Wetlands Protection: Assessments Needed to Determine the Effectiveness of In-Lieu-Fee Mitigation*. [Washington] May 2001. 75 p.

CRS Reports

CRS Report 97-223. *Nationwide Permits for Wetlands Projects: Regulatory Developments and Current Issues*, by Claudia Copeland.

CRS Report RL31486. *Resource Conservation Title of the 2002 Farm Bill: A Comparison of New Law with Bills Passed by the House and Senate, and Prior Law*, by Jeffrey Zinn.

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

CRS Report RL30423. *Wetlands Regulation and the Law of Property Rights "Takings",* by Robert Meltz.

CRS Report RL30849. *The Supreme Court Addresses Corps of Engineers Jurisdiction over "Isolated Waters": The SWANCC Decision*, by Robert Meltz and Claudia Copeland.