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Wetland Issues

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SUMMARY

The 109th Congress, like earlier ones, may consider various wetland policy topics, especially since the Bush Administration stated shortly after the 2004 election that restoration of 3 million wetland acres would be a priority. It had first announced this goal on Earth Day in 2004; and this is the most recent iteration of administration policies for the past 20 years to protect wetlands. These policies have generated ongoing congressional interest.

The 108th Congress was less active in wetlands issues than recent Congresses, and no major bills were enacted. Earlier Congresses had reauthorized and amended many wetland programs and examined controversies over such topics as applying federal regulations on private lands; documenting rates of wetlands loss; implementing farm bill provisions; and examining proposed changes to the federal permit program.

Congress has also been involved at the program level, responding to legal decisions and administrative actions by examining aspects of wetland protection efforts. Examples include implementation of Corps of Engineers changes to the nationwide permit program (changes generally opposed by developers); a 1997 court decision that overturned a rule which had expanded regulation to include excavation; redefining key wetlands permit regulatory terms in revised rules issued in 2002; and a 2001 Supreme Court ruling (called the *SWANCC* case) that narrowed federal regulatory jurisdiction over certain isolated wetlands. Hearings on man y of these topics were held, and some legislation was introduced, but none has been enacted. Legislation to reverse the *SWANCC* ruling also has been introduced in the 109th Congress (H.R. 1356, the Clean Water Authority Restoration Act).

Wetland protection efforts engender intense controversy over issues of science and policy. Controversial topics include the rate and pattern of loss, whether all wetlands should be protected in a single fashion, the ways in which federal laws currently protect them, and the fact that 75% of remaining U.S. wetlands are located on private lands.

One reason for these controversies is that wetlands occur in a wide variety of physical forms, and the numerous values they provide, such as wildlife habitat and water purification, also vary widely. A second reason is that the total wetland acreage in the lower 48 states is estimated to have declined from more than 220 million acres three centuries ago to 105.5 million acres in 1997. The remaining acreage continues to be modified or disappear, although at a much slower rate, as restoration efforts have greatly expanded. Some regions reportedly are approaching the national policy goal of no-net-loss. A third reason is that wetlands are protected in different ways by multiple laws, including the permit program in §404 of the Clean Water Act; programs for agricultural wetlands; laws that protect specific sites; and laws that protect wetlands which perform certain functions.

Many protection advocates view these laws as inadequate or uncoordinated. Others, who advocate the rights of property owners and development interests, characterize them, especially the §404 program, as too intrusive. Numerous state and local wetland programs add to the complexity of the protection effort.

MOST RECENT DEVELOPMENTS

In the 109th Congress, legislation to reverse a controversial 2001 Supreme Court ruling concerning isolated wetlands, the *SWANCC* case, has been introduced (H.R. 1356, the Clean Water Authority Restoration Act). Almost two dozen bills focusing on some aspect of wetland topics were introduced during the 108th Congress, but no significant wetlands legislation was enacted; some of these bills may be reintroduced. In addition, several wetland topics attracted some congressional interest: implementation of provisions enacted in the North American Wetlands Conservation Act (P.L. 107-304) and the 2002 farm bill (P.L. 107-171); large-scale restoration efforts involving wetlands (the Everglades and coastal Louisiana, for example); and appropriations for wetland programs.

Shortly after his reelection, President Bush reiterated the policy initiative goal he first announced on Earth Day 2004, to create, improve, and protect at least 3 million wetland acres as a priority of his second term. When the President initially announced this goal, he urged Congress to pass his FY2005 budget request for wetland and other conservation programs, and endorsed efforts to both provide better tracking of wetland programs and enhance local collaboration on cooperative conservation activities. During the fall of 2004, the Department of Agriculture announced new initiatives to restore additional wetlands in agricultural areas. In acting on the FY2005 budget, Congress did not enact increases for the two wetland conservation programs for which the President had sought additional funds.

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 federal 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 issued guidance on mitigation policies and regulatory program jurisdiction; the latter has raised controversy with some groups (see discussion below).

In 2002 the Bush Administration endorsed the concept of "no-net-loss" of wetlands — a goal declared by President George H.W. Bush in 1988 and also embraced by President Clinton to balance wetlands losses and gains in the short term and achieve net gains in the long term. On Earth Day 2004, the President announced a new national goal, moving beyond no-net-loss, of achieving an overall increase of wetlands (see [http://www.whitehouse.gov/news/releases/2004/04/20040422-1.html].) The goal is to create, improve, and protect at least 3 million wetland acres over the next five years in order to increase overall wetland acres and quality. (By comparison, the Clinton Administration in 1998 announced policies intended to achieve overall wetland increases of 200,000 acres per year by 2005.) To meet the new goal, President Bush urged Congress to pass his FY2005 budget request for conservation programs, and he focused on the FY2005 request for two wetlands programs, the Wetlands Reserve Program (WRP) and the North American Wetlands Conservation Act Grants Program (NAWCP). The FY2005 budget request, $349 million, was 10% more than FY2004 levels for those two programs. (However, Congress disagreed, providing level funding for the NAWCP and an 18% reduction for the WRP.) The President's strategy also calls for better tracking of wetland programs and enhanced local and private sector collaboration.

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 issues 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, and that there was an average annual gain of 26,000 acres between 1997 and 2002. NRCS cautioned against making precise claims of net increases because of statistical uncertainties.

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 beyond these raw numbers. There is a large time lag from the announcement and implementation of changes in policy to collection and release of data that measure how these changes affect loss rates. Also, it is often very difficult to distinguish the role that policy changes play from other factors, such as agricultural markets and development pressures.

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. Nevertheless, in his Earth Day 2004 wetlands announcement (discussed above), President Bush said that as the nation is nearing the goal of no-net-loss, it is appropriate to move towards policies to increase wetlands acres and quality.

The Clean Water Act 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 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 the Corps, it evaluates an average of 85,000 permit requests annually. Of those, more than 90% are authorized under a general permit, which can apply regionally or nationwide, and 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 (the most recent year for which data are available), 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. Eight-eight percent of all actions were authorized in less than 60 days, and of those requiring individual permits, 61% were completed within 120 days.

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 surrounded 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 said that the revisions were 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 contended 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 (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 was introduced in the 108th Congress (H.R. 738), but also saw no consideration.

Nationwide Permits. Nationwide permits are a key means by which the Corps minimizes the burden of its regulatory program. A nationwide permit is a form of general permit which authorizes a category of activities throughout the nation and is valid only if the conditions applicable to the permit are met. 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.

The current program has few strong supporters, for differing reasons. Developers say that it is too complex and burdened with arbitrary restrictions. Environmentalists say that it does not adequately protect aquatic resources. At issue is whether the program has become so complex and expansive that it cannot either protect aquatic resources or provide for a fair regulatory system, which are its dual objectives.

Nationwide permits are issued for periods of no longer than five years and thereafter must be reissued by the Corps. The most recent reissuance, in January 2002, included some changes, including relaxation of certain permit conditions, intended by the Corps to add flexibility. Reactions to the permits were mixed: environmental advocates contend that the re-issued permits are not adequately protective of water quality and will result in a net loss of wetland acres, 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. (For more information, see CRS Report 97-223, *Nationwide Permits for Wetlands Projects: Regulatory Developments and Current Issues*.) In December 2003, a federal district court dismissed a lawsuit brought by developers that had challenged the validity of activity-based nationwide permits.

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 continue towards encouraging more states to assume program responsibility.

Judicial Proceedings Involving §404. The §404 program has been the focus of numerous lawsuits, most of which have sought to narrow the geographic scope of the regulatory program. One such case overturned rules issued by the Corps and EPA in 1993

that had extended the scope of regulation to include certain landclearing and excavation activities. Those regulations, called the Tulloch Rule, were issued as part of the settlement of a lawsuit brought by environmental groups over the agencies' failure to regulate discharges associated with excavation. At issue was whether "fallback" from dredging activities constituted pollution, under the CWA. The ruling, upheld on appeal, said that incidental fallback is not pollution and, thus, the agencies had exceeded their authority under the Clean Water Act (*National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1339 (D.C.Cir. 1998)). 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 criticized the rule, but a lawsuit challenging it was dismissed by a federal court in March 2004, saying the case is not ripe for review because the rule has not been applied to a specific situation.

SWANCC. An issue of long-standing controversy is whether isolated waters are properly within the jurisdiction of §404. Isolated waters (those that lack a permanent surface outlet to downstream waters) 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 and wetlands. The Court's 5-4 ruling in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers* (531 U.S. 159) held that the denial of a §404 permit for disposal 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 remains unclear, even four years after the ruling. 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. Some federal courts have interpreted *SWANCC* narrowly, thus limiting its effect on current permit rules, while a few read the decision more broadly. However, in April 2004, the Court declined to review three cases that support a narrow interpretation of *SWANCC*. Environmentalists were pleased that the Court rejected the petitions, but attorneys for industry and developers say that the courts will remain the primary battleground for CWA jurisdiction questions, so long as neither the Administration nor Congress takes steps to define jurisdiction.

The government's current view on this key question came in EPA-Corps guidance issued on January 15, 2003 (see [http://www.epa.gov/epahome/headline2_011003.htm]). 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 (in cases where factors other than the presence of migratory birds may exist, thus allowing for assertion of federal jurisdiction), but it calls for more Headquarters review in such cases. Administration press releases say that the guidance demonstrates the government's commitment to "no-net-loss" wetlands policy. However, it was apparent that the issues remained under discussion,

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 ANPRM did not actually propose rule changes, but it indicated possible ways that Clean Water Act rules might be modified to further limit federal jurisdiction, building on *SWANCC* and some subsequent legal decisions. The government received more than 133,000 comments on the ANPRM, most of them negative, according to EPA and the Corps. Environmentalists and many states opposed changing any rules, saying that the law and previous court rulings call for the broadest possible interpretation of the Clean Water Act (and narrow interpretation of *SWANCC*), but developers sought changes to clarify interpretation of the *SWANCC* ruling.

On December 16, 2003, EPA and the Corps announced that the Administration will not pursue development of rule changes concerning federal regulatory jurisdiction over isolated wetlands. The EPA Administrator said that the Administration wanted to avoid a contentious and lengthy rulemaking debate over the issue. Environmentalists and state representatives expressed relief at the announcement. Interest groups on all sides have been critical of confusion in implementing the 2003 guidance, which constitutes the main tool for interpreting the reach of the *SWANCC* decision. Environmentalists remain concerned about diminished protection resulting from the guidance, while developers said that without a new rule, confusing and contradictory interpretations of wetland rules likely will continue. In that vein, a GAO report concludes that Corps districts differ in how they interpret and apply federal rules when determining which waters and wetlands are subject to federal jurisdiction, documenting enough differences that the Corps has decided to conduct a comprehensive survey of its district office practices to help promote greater consistency (GAO, *Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297, February 2004).

While it likely will take some time to assess how regulatory protection of wetlands will be affected as a result of the *SWANCC* decision and subsequent developments, 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 likely to be constrained by budgetary and political pressures, but a few states (Wisconsin and Ohio, for example) have passed new laws or amended regulations to do so. In comments on the ANPRM, many states said that they do not have authority or financial resources to protect their wetlands, in the absence of federal involvement. (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 has been introduced in the 109th Congress (H.R. 1356, the Clean Water Authority Restoration Act of 2005); identical legislation was introduced in the 108th Congress (H.R. 962, S. 473). It 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. Other legislation to restrict regulatory jurisdiction also was introduced in the 108th Congress (H.R. 4843). It would narrow the statutory definition of "navigable waters" and define certain isolated wetlands and other areas as not being subject to federal regulatory jurisdiction. None of these bills received further consideration in the 108th Congress. (See discussion below, "Wetlands Activities in the 108th Congress.")

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 Program are the two largest efforts, but others such as the Conservation Reserve's Farmed Wetlands Option and Conservation Reserve Enhancement Program are also being used to protect wetlands. The most recent wetland loss survey conducted by NRCS (comparing data from 1997 and 2002) indicates that there is a small annual increase, for the first time since these data have been

collected, of 26,000 acres. However, the agency warns that statistical uncertainties preclude concluding with certainty that gain is actually occurring.

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 2002 farm bill reauthorized the program through FY2007 and raised the enrollment cap to 2,275,000 acres, with 250,000 acres to be enrolled annually. In addition, in June 2004, it announced a new enhancement program on the lower Missouri River in Nebraska to enroll almost 19,000 acres at a cost of $26 million, working with several public and private partners.

Data from NRCS states that through FY2004, 8,391 projects had enrolled 1.627 million acres. 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 in that legislation.

The 2002 farm bill also expanded the 500,000-acre Farmable Wetlands Pilot Program within the Conservation Reserve Program to a 1 million acres program available nationwide. 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 the reach of the §404 permit program so that it does not apply to many small wetlands that are isolated from navigable waterways. Through January, 2005, more than 122,800 acres had been enrolled.

On August 4, 2004, the Administration announced a new Wetland Restoration Initiative to allow enrollment of up to 250,000 acres of large wetland complexes and playa lakes located outside the 100-year floodplain in the CRP after October 1, 2004. The estimated cost of this initiative is $200 million. Participants will receive incentive payments to help pay for

restoring the hydrology of the site, as well as rental payments and cost sharing assistance to install eligible conservation practices.

Several other large conservation programs, including the Environmental Quality Incentives Program, the Farmland Protection 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." 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. In December 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 *SWANCC* 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 or under the new initiatives.

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; an example is the October 2001 hearing by the House Transportation and Infrastructure Committee, Subcommittee on Water Resources and the Environment. The record of this hearing is titled *The Wetland Permitting Process: Is It Working Fairly?* (Hearing 107-50). Recent Congresses have considered, but did not enact, property rights protection proposals, and 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 Wetland Losses under the Clean Water Act*). Likewise, a 2001 GAO report criticized the ability of the Corps to track the impact of 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). Both scientists and policymakers debate 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. 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 to 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, more than $139 million will be spent in 25 states and one territory by the end of FY2004 to restore or protect more than 167,000 acres, and according to the Corps, almost $220 million had been spent by the Corps in coastal Louisiana through July 2003, mostly under the Breaux Act.

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 FY2002, the program had entered into almost 29,000 agreements with landowners

to protect or restore about 640,000 acres of wetlands and more than 4,700 miles of riparian and in-stream habitat (and more than 1 million acres of 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 act provides grants for wetland conservation projects in Canada, Mexico, and the United States. According to the FWS FY2005 budget notes, the United States. and its partners have protected almost 7.5 million acres and restored, created, or enhanced an additional 5.4 million acres of wetlands. The FWS has combined funding for this program with several other laws into what it calls the North American Wetlands Conservation Fund.

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 (see [http://www.epa.gov/owow/wetlands /guidance/index.html#mitigation]).

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 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. 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*.) In November 2003, Congress enacted wetlands mitigation provisions as part of the FY2004 Department of Defense authorization act, P.L. 108-136, discussed below.

Wetlands Activities in the 108th Congress

The Administration's response to the *SWANCC* Supreme Court decision and subsequent related federal court rulings that have not resolved issues raised by that decision were at the center of congressional interest in the 108th Congress. A House Government Reform subcommittee held a hearing in September 2002 where 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 (Serial No. 107-230). At the hearing, Corps and EPA officials testified that efforts were underway to develop guidance, which was released in January 2003.

Legislation responding to the *SWANCC* decision was introduced (see discussion above, "*SWANCC*"). The Administration's efforts to implement the ruling were discussed at a June 2003 hearing of a Senate Environment and Public Works subcommittee (S.Hrg. 108-352). 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. Many of the same frustrations were revisited at a March 30, 2004 hearing by a subcommittee of the House Committee on Transportation and Infrastructure (Hearing 108-58) which focused on concerns over inconsistent regulatory jurisdiction determinations and issues raised in the recent GAO report (GAO-04-297, discussed above).

In P.L. 108-136, the Department of Defense FY2004 authorization act, signed in November 2003, Congress included a provision for DOD to make payments to wetland mitigation banks in instances where military construction projects would or could result in the destruction of or impacts to wetlands. Participation in such banking programs would be in lieu of mitigating wetland impact through the creation of a wetland on federal property. Proponents said the provision provides flexibility when military projects are constructed and will likely result in a net increase of wetlands from mitigation, but environmentalists who cite the failure of many mitigation projects were critical of the provision. The measure also requires the Army Corps to draft rules creating performance standards and criteria for wetlands mitigation methods.

Broader legislation in the second session of the 108th Congress contained wetland provisions. One example, the House-passed H.R. 2557, which would guide the water resources development activities of the Corps, contained provisions on mitigation banking in Section 2010; cooperative agreements to construct and restore wetlands in Section 2031; and restoration of southern Louisiana wetlands in Section 5058. In another example, Senate-passed transportation legislation (S. 1072) contained several provisions on wetlands mitigation in conjunction with transportation construction projects. (For information on the

transportation bill, see CRS Report RL32057, *Highway and Transit Program Reauthorization: Environmental Protection Issues and Legislation*.) Neither of these bills was enacted.

FOR ADDITIONAL READING

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