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IS CONGRESS PROTECTING OUR WATER? THE CONTROVERSY OVER SECTION 404, FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

LEE EVAN CAPLIN*

In 1976 both Houses of the 94th Congress passed amendments to section 404 of the Federal Water Pollution Control Act. However, the Joint Committee of the House and Senate was unable to write a compromise amendment, leaving the issue to be resolved during the present Congress. The author discusses the environmental interests and political forces which led to the deadlock, and presents the merits of the various proposals which were considered. Moreover, by analyzing the competing economic and ecological policies, the author suggests a course of action for the 95th Congress to take in its re-evaluation of the section 404 program.

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I. INTRODUCTION

On June 3, 1976, by almost a two to one margin, the United States House of Representatives passed section 16 of H.R. 9560,¹ a

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1. H. R. 9560, 94th Cong., 2d Sess., § 16, 122 CONG. REC. H5,280 (daily ed. June 3, 1976).

far-reaching amendment of section 404,² which had been added to the Federal Water Pollution Control Act (FWPCA)³ in 1972. Thus began a critical chapter in a unique environmental struggle. The irony of this overwhelming vote lay in the fact that most of those who voted on the bill did not know the full impact of their action: there had been no hearings to inform Congress of the critical environmental issues at stake, because this amendment was offered during consideration of the bill by the whole House. Furthermore, at that time the section 404 program was less than one year old; thus, there had not been sufficient time to gather meaningful data on the program's operation. When the Senate considered this amendment it was narrowly defeated, and in its place a proposal was passed which was radically different both in approach and scope.⁴ Because of the sensitive nature of the subject matter, and the unwillingness of the House and Senate to compromise, the 94th Congress ended without a resolution of the controversy.

The objective of FWPCA is found in section 101: "[T]o restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁵ To advance this objective, FWPCA section 301 declares that "the discharge of any pollutant by any person shall be unlawful."⁶ There are two exceptions to this proviso: section 402, which provides for a National Pollutant Discharge Elimination System (NPDES) to regulate the phased reduction of point source discharges of pollutants by permit, and section 404,⁷ which establishes a permit system to control the discharge of dredged or fill material into navigable waters. Section 404, by not requiring such phased

2. 33 U.S.C. § 1344 (Supp. V 1975).

3. 33 U.S.C. §§ 1151-75 (1970).

4. S. 2710, 94th Cong., 2d Sess., 122 CONG. REC. S15,166-68 (daily ed. Sept. 1, 1976).

5. Section 101(a), 33 U.S.C. § 1251(a) (Supp. V 1975). All reference to FWPCA will hereinafter be to the sections in the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972), as enacted over President Nixon's veto on October 18, 1972.

6. Section 301(a), 33 U.S.C. § 1311(a) (Supp. V 1975). Section 502(12), 33 U.S.C. § 1362(12) (Supp. V 1975), defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source" Section 502(6) lists within its definition of "pollutant," dredged spoil, rock, sand, and cellar dirt. Section 502(5) defines "person" as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body," but does not mention the federal government. Section 502(7) defines "navigable waters" as "the waters of the United States, including the territorial seas."

7. 33 U.S.C. § 1344 (Supp. V 1975). For a general discussion of the section 404 program, see 28 HASTINGS L.J. 223 (1976).

reduction as is found in section 402, stands out as the single exception to a consistent statutory scheme for eliminating by 1985 all discharges of pollutants into the nation's waters. Behind this exception are extraordinary political and environmental considerations.

II. SECTION 404

The Federal Water Pollution Control Act Amendments of 1972 give the responsibility for administering its provisions to the Environmental Protection Agency. Section 404, however, which was included among these amendments, places the United States Army Corps of Engineers in charge of the permit system for the discharge of dredged or fill material into navigable waters.⁸ Disposal sites are to be specified using guidelines prepared by EPA in conjunction with the Secretary of the Army acting through the Corps.⁹ If the guidelines alone dictate prohibition or modification of the use of a particular site, the Corps can still issue a permit for the discharge if it finds that denial has a negative economic impact on navigation and anchorage.¹⁰ But even in such a case, permits can ultimately be denied, or issued with qualifications, if the EPA Administrator finds that the proposed discharge has an unacceptable adverse effect on the environment.¹¹

The legislative history of section 404 shows that dredged and fill material were singled out by Congress for special treatment.¹² Part

8. Section 404 (a), 33 U.S.C. § 1344(a) (Supp. V 1975). The Corps issues permits to all "persons" and federal facilities. For its own projects, however, it issues itself a "statement of findings." 33 C.F.R. § 209.145(f) (vii).

9. Section 404(b)(1), 33 U.S.C. § 1344(b)(1) (Supp. V 1975).

10. Section 404(b)(2), 33 U.S.C. § 1344(b)(2) (Supp. V 1975).

11. Section 404(c), 33 U.S.C. § 1344(c) (Supp. V 1975) states:

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas. . . . Before making such determination, the Administrator shall consult with the Secretary of the Army. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

To date this "environmental veto" has never been exercised by the Administrator. One of the reasons for this is the difficulty in defining "unacceptable adverse effect."

12. H.R. 11896, reported by the House Public Works Committee in H.R. REP. No. 92-911, 92d Cong., 2d Sess. (1972), established a separate regulatory program for discharges of

of the rationale was recognition of the Corps' historic role in maintaining the waterways of the United States open to navigation. Another reason was the desire of the dredging industry to have its activities regulated by the government agency responsible for initiating most of the dredging projects. The result was a permit system operated by the Corps rather than EPA, and no statutory requirement that the discharge of dredged or fill material ever be completely eliminated.¹³

dredged and fill material under the auspices of the Corps. Senate bill 2770, reported by the Senate Public Works Committee in S. REP. No. 92-414, 92d Cong., 1st Sess. (1971), provided no such special treatment for dredged or fill material and included discharges of such material within the overall NPDES permit system under section 402. In Senate debate on the Committee bill, a compromise was reached, producing a floor amendment which added to the overall NPDES system a special provision for certification by the Corps that a designated disposal site was the only site reasonably available. An NPDES permit for such discharge would be issued upon such certification unless the Administrator made a finding that the material to be disposed of will "adversely affect municipal water supplies, shellfish beds, wildlife, fisheries (including spawning and breeding areas) or recreation area . . ." The Conference Committee reverted to the approach set forth in the House bill which exempted discharges of dredged and fill material from the NPDES permit system and established a separate permitting process, administered by the Corps, for such material, subject to the veto of the Administrator. See ENVIRONMENTAL POLICY DIVISION OF THE CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS, 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 324 (1973) [hereinafter cited as LEGISLATIVE HISTORY].

13. Section 301 requires that in order to carry out the objectives of FWPCA there shall be achieved

Not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology [BPT] currently available, [and] not later than July 1, 1983, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (ii) shall require application of the best available technology economically achievable for such category or class [BAT], which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314 (b)(2) of this title [section 304 (b)(2) of this Act]

Sections 301 (b)(1)(A), (2)(A), 33 U.S.C. §§ 1311 (b)(1)(A), (2)(A) (Supp. V 1975). The categories and classes of point sources to which BPT and BAT apply, are listed in section 306, "National Standards of Performance," and do not specifically include any activity which consists of discharging dredged or fill material, although the list is by no means exclusive. Section 306(b)(1)(A), 33 U.S.C. § 1316(b)(1)(A) (Supp. V 1975). All the activities so listed have an end-of-pipe pollutant discharge. Hence, the application of certain technologies to such discharge would filter out or recycle pollutants to a point where they would no longer be discharged into the water. Since the very nature of discharging dredged or fill material involves activity which has, as part of its operation, the placement of the physical materials "dredged spoil" or "fill material" in water, elimination of the discharge would mean elimination of what could be considered a necessary activity. Therefore a permit system was devised which would control the potential environmental damage of the discharge of dredged or fill material.

Dredged material and fill material differ from other pollutants defined in FWPCA, since the effects of their discharge are both chemical and physical. While chemicals contained in dredged or fill material are recognized as needing regulation, the physical effects—the smothering of benthic life and the displacement of water with dry lands—are not readily appreciated.¹⁴

III. HISTORIAL BACKGROUND

Until 1975, the controversy over the jurisdiction of the section 404 program revolved around the term “navigable waters.” “Navigable waters” is defined in FWPCA section 502(7)¹⁵ as the “waters of the United States.” The Corps, however, interpreted this term consistently with the meaning given to the term in the Corps’ enabling legislation, the Rivers and Harbors Appropriations Act of 1899:¹⁶ that is, navigable waters are those waters which are subject to the ebb and flow of the tide or were,¹⁷ are,¹⁸ or could be made¹⁹ navigable in fact. EPA, on the other hand, pointed to the legislative history of FWPCA to support its position that the section 502(7) definition was specifically intended to replace the traditional definition with one which would grant the broad jurisdiction necessary to achieve effective pollution control. The report of the Senate Public Works Committee indicates recognition of the need for the expanded definition by stating that: “Through a narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited. Water moves in hydrologic cy-

14. 40 C.F.R. § 230.4-1(a). See K. MACKENTHUN, TOWARD A CLEANER AQUATIC ENVIRONMENT 43, 45 (1973).

Dredged spoil and fill material often contain pollutants such as lead, cadmium, arsenic, Kepone or DDT. See EPA, 2 *Hearings In the Matter of Proposed Pollutant Standards for Aldrin, Dieldrin, Endrin, and Toxaphene* 307-09, 313-18 (July 27, 1976) (Testimony of Dr. Leonard G. Guarraia).

The Governors of Virginia and Maryland have asked EPA to remove the pesticide Kepone from the James River to prevent its further spread into the Chesapeake Bay. Dredging has been suggested as one possible method. However, Virginia’s Governor suggests that dredging might have an adverse downstream impact on aquatic life. Wash. Post, Aug. 31, 1976, § D, at 1, col. 5.

15. 33 U.S.C. § 1362(7) (Supp. V 1975).

16. 33 U.S.C. §§ 401-66 (1970).

17. *Economy Light & Power Co. v. United States*, 256 U.S. 113, 123 (1921). This is the “historical test” of navigability.

18. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

19. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-09 (1940).

cles and it is essential that discharge of pollutants be controlled at the source."²⁰

Several federal courts have adopted EPA's broader approach.²¹ In *United States Co. v. Ashland Oils Transportation Co.*, the United States Court of Appeals for the Sixth Circuit found the Little Cypress Creek to be "navigable waters" although it was not navigable in fact. The court held that FWPCA applies to "waters of the United States," and not just to classical "navigable waters of the United States."²² Addressing itself directly to section 404, the United States District Court for the District of Columbia in *N.R.D.C., Inc. v. Callaway* declared that Congress, by defining the term "navigable waters" in FWPCA section 502(7) to mean waters of the United States including the territorial seas, "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution" and that the term is "not limited to the traditional tests of navigability."²³ It also ordered that the Corps revoke all of its regulations which limited its jurisdiction under section 404 to less than "the waters of the United States" and to publish regulations clearly recognizing the full regulatory mandate of FWPCA.

In response to this order the Corps issued a press release on May 6, 1975 stating that the district court's decision greatly expanded federal authority to regulate the disposal of dredged or fill material in the waters of the United States, so as to possibly require

20. S. REP. NO. 92-414, 92D CONG., 1ST SESS. 77 (1971). For a historical overview, see Ablard & O'Neill, *Wetland Protection and Section 404 of the Federal Water Pollution Control Act Amendments of 1972: A Corps of Engineers Renaissance*, 1 VT. L. REV. 51 (1976).

21. *P.F.Z. Properties, Inc. v. Train*, 393 F. Supp. 1370 (D.D.C. 1975) (mangrove swamp connected to historically navigable canal connected to ocean is navigable water); *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181 (D. Ariz. 1975) (FWPCA control extends to any waterway where any water which might flow therein could end up in a body of water in which the public has interest, including underground waters—here, a dry arroyo); *Sun Enterprises, Ltd. v. Train*, 7 E.R.C. 2110 (S.D.N.Y. 1975) (non-navigable-in-fact brook is navigable water under FWPCA); *United States v. Smith*, 7 E.R.C. 1937 (E.D. Va. 1975) (FWPCA jurisdiction extends well beyond mean high water mark to periodically inundated marsh wetlands); *Leslie Salt Co. v. Froehle*, 403 F. Supp. 1292 (N.D. Cal. 1974) (mean high water line test under Rivers and Harbor Act does not limit Federal regulatory power under FWPCA); *United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974) (mosquito canals and mangrove wetlands connected to bayou connected to Tampa Bay are navigable waters). *But see United States v. Tull*, Civ. No. 75-319-N (E.D. Va. Nov. 13, 1975) (land flooded two to three hours per month is not "periodically" flooded enough to be within "waters of the United States").

22. 504 F.2d 1317, 1320, 1323-27 (6th Cir. 1974), *aff'g* 364 F. Supp. 349 (W.D. Ky. 1973).

23. 392 F.Supp. 685, 686 (D.D.C. 1975).

federal permits from "the rancher who wants to enlarge his stock pond, or the farmer who wants to deepen an irrigation ditch or plow a field, or the mountaineer who wants to protect his land against stream erosion." Shortly before this press release the Corps had issued proposed regulations and EPA issued proposed guidelines for the section 404 program.²⁴ The proposed Corps regulations presented four jurisdictional alternatives to the public for comment. These alternatives were variations on a broad versus a traditional (restricted) jurisdictional approach. The proposal also included alternatives as to the extent of state participation in the processing of permits for the disposal of dredged or fill material in waters other than those traditionally recognized as being navigable, but now possibly within the jurisdiction of section 404.²⁵ The ostensible purpose behind proposing these alternatives was to sound out the general feeling about broad federal regulatory control and to determine whether increased state participation would mollify the anticipated adverse reaction. However, the appearance in the *Federal Register* of an all-inclusive jurisdictional choice merely added to the confusion and the fears of the public since few understood the nature and scope of section 404.

Meanwhile, EPA, in order to preserve broad jurisdiction under section 404, developed three principal approaches to clarify the

24. 40 Fed. Reg. 19,766 (1975).

25. *Alternative 1.* The Corps' jurisdiction would extend to virtually all coastal and inland artificial or natural waters. It would include all navigable waters up to their headwaters, all tributaries of navigable waters up to their headwaters and all natural or artificial interstate or intrastate waters utilized in interstate commerce. It would also include all coastal and estuarine waters shoreward to the aquatic vegetation line. No Corps permit would be issued without the state certification required by section 401 of FWPCA and even though a state certification has been given, a Corps permit could still be denied.

Alternative 2. The Corps' jurisdiction would include all navigable waters of the United States up to their headwaters and all primary tributaries of such waters up to their headwaters. It would also include coastal waters shoreward to the mean high water mark or the salt water vegetation line, whichever extends further shoreward. This would be a more limited definition of waters of the United States than in Alternative 1. The procedures relating to state certification would be the same as Alternative 1.

Alternative 3. The broad definition of waters of the United States contained in Alternative 1 would be retained, but greater weight given to the state certification requirement: where a state certification has been given, the permit would be issued unless overriding national public interest factors were demonstrated.

Alternative 4. (favored by the Corps). This alternative would combine the limited definition of navigable waters contained in Alternative 2 and the greater weight given the state certification under Alternative 3.

See H.R. REP. No. 94-1107, 94th Cong., 2d Sess. 20-21 (1976).

scope of the program: (1) identification and clarification of those activities which do not involve a section 404-type discharge; (2) further clarification of the statutory definition of jurisdiction ("waters of the United States"); and (3) evaluation of alternative methods of regulating those discharge activities which do fall within the scope of section 404.

During this same period of time the Assistant Secretary of the Army for Civil Works launched an effort to establish the Corps as protector of all endangered wetlands, streams, and lakes from filling for development. At oversight hearings held on July 15, 1975 by the Subcommittee on Water Resources of the House Public Works Committee, the Assistant Secretary gave a status report on the development of new regulations by the Corps of Engineers implementing section 404. He stated that "the Department of the Army will continue to maintain its commitment to protect nationwide environmental concerns and to comply with the directions of Congress as interpreted by the judiciary."²⁶

Having thus gone on public record in support of close cooperation with EPA in the section 404 program effort, the Army, with EPA's help, was able to develop and publish on July 25, 1975 an updated version of the Corps regulations governing its responsibilities for issuing permits in navigable waters.²⁷ These "interim final" regulations provide the means for achieving a manageable program under section 404 in five basic ways.

First, definitions have been clarified so as to specify those areas and activities which are regulated by section 404. "Navigable waters," in which individual or general permits are routinely required, are defined so as to include natural lakes of greater than five acres, streams and rivers below their headwaters, and stock ponds and settling ponds which are entirely man made; "the discharge of dredged material" and "the discharge of fill material" do not include normal farming, forestry, and ranching activities, and the maintenance and emergency repair of existing fills such as dikes,

26. *Hearings on the Development of New Regulations by the Corps of Engineers before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 94th Cong., 1st Sess. 2 (July 15, 16, 22, 1975); see News Release, Dep't of the Army, Office of the Chief of Engineers, July 15, 1975.

27. 33 C.F.R. § 209.120 (1976). The Corps is now preparing to publish the regulations in final form.

dams, levees, riprap, causeways and bridge abutments or approaches.²⁸

Second, phasing over a three-year period is used to implement full jurisdiction over "navigable waters" ("waters of the United States"). Phase I, operating through July 1, 1976 (extended until September 1, 1976 by Presidential order), regulates discharges of dredged or fill material into coastal waters and their contiguous or adjacent wetlands, and inland traditional navigable waters and their contiguous or adjacent wetlands. Phase II, operating from July 1, 1976, (changed to September 1, 1976 by presidential order) to July 1, 1977, additionally regulates discharges of dredged or fill material into primary tributaries of traditional navigable waters and their contiguous or adjacent wetlands, and also regulates such discharges into lakes. Phase III, operating after July 1, 1977, regulates discharges of dredged or fill material into any "navigable waters."²⁹

Third, grandfather clauses "permit" and "authorize" certain 404-type discharges either not covered by phasing or already completed.³⁰

Fourth, state participation in the section 404 permitting process is significantly increased.³¹

Fifth, general or categorical permit procedures are authorized for types or sizes of dredged or fill material discharges which should not require a case by case review at the federal level.³²

28. 33 C.F.R. § 209.120(d) (1976).

29. 33 C.F.R. § 209.120(2) (1976).

30. Discharges not covered by the phasing schedule and which meet, where necessary, certain environmental standards (e.g. FWPCA) § 401 state certification; Coastal Zone Management Act of 1972 requirements, 16 U.S.C. § 1456(c)(3) (Supp. V 1975); the Endangered Species Act of 1973 provisions, Pub. L. 93-205, 87 Stat. 884 (codified in scattered sections of 7, 16 U.S.C.) are "permitted." Discharges in the new jurisdiction (landward of the Corps' traditional jurisdiction) of less than five hundred cubic yards which: (1) are part of an activity commenced before July 25, 1975; (2) will be completed by January 25, 1976; (3) involve a single and complete project; and (4) meet, where necessary, certain environmental standards, are "authorized." "Bulkhead and fill" discharges which: (1) are less than five hundred feet in length; (2) are for property protection; (3) involve less than an average of one cubic yard per running foot; (4) do not need to be generally permitted; and (5) meet, where necessary, certain environmental standards, are "permitted." 33 C.F.R. §§ 209.120 (e)(2)(ii)-(iv) (1976).

31. State certification is a requirement for proposed section 404-type work, and denial of certification will prevent a permit from being issued. State land-use classifications and policies and local interest factors will be considered. Joint Army/state permit processing and evaluation may be provided for, including joint public notices and hearings, and subsequent review and analysis of information gathered thereby, even though each agency must reach an independent decision. 33 C.F.R. § 209.120(f)(3) (1976).

32. Clearly described categories of structures or work of the type regulated either by

A few months later, EPA "in conjunction with"³³ the Corps, published interim final guidelines to complement the Corps' regulations.³⁴ But by this time the United States Department of Agriculture had spread the word that the Corps' new dredge and fill regulations would impose the threat of cumbersome, time-consuming procedures on farmers and rancher's every time they cleaned a ditch or built a pond. Assistant Agriculture Secretary Long declared the Corps' regulations to be "like the legendary Hydra—you cut off one head and two grow back in its place."³⁵ EPA participated with the Corps in a series of national hearings designed to explain the nature of the section 404 program, and to allay the still-present fears engendered by the Corps' original press release of May 6, 1975. Additionally, EPA and the Corps pursued research projects designed to identify the physical boundaries encompassed by the term "navigable waters."³⁶

IV. THE PRESENT CONTROVERSY: WETLANDS

The controversy over the section 404 program includes both its jurisdictional reach and the scope of its coverage. There are many farming and forestry groups who eschew any government regulation regardless of where the jurisdictional boundaries lie. Thus, it became necessary for EPA to first justify the broad jurisdictional approach in environmental terms, and then to explain the limited nature of the intended scope of coverage.

section 10 of the 1899 Act or section 404 of FWPCA which are substantially similar in nature, and that cause minimal environmental harm when performed separately or cumulatively may be generally permitted. Such permits may be revoked, and individual category members specifically permitted, if the cumulative environmental effect of the activities in a category will have an "adverse impact on the public interest." 33 C.F.R. § 209.120(i)(2)(ix)(d) (1976). The legal basis for general permits was a statement in the Conference Report on FWPCA that "[t]he Secretary is also encouraged to use general dredging permits to maintain such non-Federal facilities where the work is in the same general area and the character of the work is similar." LEGISLATIVE HISTORY, *supra* note 12, at 325.

33. The statutory requirement that EPA develop guidelines "in conjunction with" the Secretary of the Army was interpreted to mean that both agencies would participate equally in negotiating and drafting the guidelines, but that the Administrator would be the sole signer.

34. 40 C.F.R. § 230 (1976).

35. News Release, Dep't of Agriculture, August 18, 1975.

36. For a description of wetlands, methodology for identifying wetlands, wetland types of the Mid-Atlantic region, and common wetland plants of the Mid-Atlantic region, see W. QUEEN, MID-ATLANTIC WETLANDS, ECOLOGICAL EFFECTS DIV., OFFICE OF RESEARCH AND DEV., EPA (contract No. P5-01-2091-A, Harold Kibby, Project Officer).

Effective pollution control necessitates regulating pollution at its source. From a purely ecological point of view, the introduction of pollutants into any body of water, no matter how small, not only affects that water body, but also affects larger bodies of water downstream.³⁷ From the time section 404 was added to FWPCA in 1972 the body of scientific knowledge of hydrology has increased enormously; it is now apparent that almost all parts of the aquatic ecosystem are interconnected. Congress in 1972 knew that "water moves in hydrologic cycles," but it was not aware of the extent of those cycles, nor of the importance of those elements of the aquatic ecosystem known as wetlands.

Wetlands, whether they are coastal or inland, are aquatic zones between identifiable water bodies and dry land. The Fish and Wildlife Service of the United States Department of the Interior has identified twenty types of wetlands including fresh and salt water marshes, bogs, swamps, and low-lying flats and flood plains containing moist soil conditions and supporting aquatic vegetation.³⁸ The value of these areas varies from place to place, but it is generally agreed that wetlands are a priceless, multi-use resource, and that in addition to their economic value, they perform many biological services including: (1) high yield food source for aquatic animals; (2) spawning and nursery areas for commercial and sport fish; (3) natural treatment of waterborne and airborne pollutants; (4) recharging ground water for water supplies; (5) natural protection from floods and storms; and (6) essential nesting and wintering areas for water fowl.³⁹ However, because these areas interface with

37. The toxic pollutant Kepone was discharged into Gravelly Run, a Virginia stream, which emptied into a wetland. The wetland drained into the James River. Traces of Kepone have been found in Chesapeake Bay. It is evident that the wetland filtered out most of the Kepone, thus preventing a disaster of even greater proportions.

38. The classification scheme is based primarily upon the following factors: location, depth, permanence and salinity of water, and vegetation types. See W. QUEEN, *supra* note 36; S. SHAW & C. FREDINE, *WETLANDS OF THE UNITED STATES* (United States Dept. of the Interior, Fish and Wildlife Service Circular 39 1956). Other wetlands studies are listed in *Hearings on the Dev. of New Regulations by the Corps of Engineers before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 94th Cong., 1st Sess., No. 94-18, at 189 (1975). The definition of "wetlands" for the purposes of FWPCA is presently being revised to include those areas that are inundated and/or recharged by surface or ground water with a frequency sufficient to support, under normal circumstances, a prevalence of vegetation that grows and reproduces in these areas in saturated soil conditions.

39. J. Gosselink, E. Odum, & R. Pope, *The Value of the Tidal Marsh*, (May 1, 1973) (Work Paper No. 3, Urban and Regional Development Center, University of Florida); S. SHAW, *supra* note 38. See also 33 C.F.R. § 209.120(g)(3) (Corps regulations).

dry land, they also provide attractive sites on which to build and farm. The public interest in long term ecological and economic productivity often conflicts with short term economic gain; moreover, disregarding the long term effects may cause irreversible environmental destruction. This controversy has led to an ongoing reassessment by Congress of its original intent in drafting section 404. In 1972 Congress may not have conceived its declaration of objectives and policy in section 101—"to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"—as providing protection for the entire aquatic resource. It may have been led by cost/benefit analyses, which did not consider all of the benefits of wetlands, to support protection of only selected parts of the aquatic ecosystem.⁴⁰ It is also possible that in 1972, Congress perceived wetlands as having little, if any, value. Unfortunately, this approach conflicts with biological reality. Part of an aquatic ecosystem cannot be degraded or destroyed without adversely affecting the remaining parts of that system. Nevertheless, Congress was reluctant to let FWPCA be used to protect certain segments of the aquatic ecosystem, despite growing scientific evidence of the interdependence of all aquatic elements.

Wetlands have increasingly become the focal point in the EPA's efforts to define the jurisdiction and scope of coverage of the section 404 regulatory program.⁴¹ As a result of intense educational

40. The attempts to place dollar value figures on wetlands merely focus on their ability to provide various immediate commodities and services to human beings, such as fish, fur-bearing animals, and filtration of ground water. See, e.g., Delorme & Wood, *Savannah River Improvement and Environmental Preservation*, 50 LAND ECON. 284 (10,000 acres of wetlands near Savannah valued as waste treatment facility for river water and for underground aquifer). This approach ignores the long term value that each portion of the aquatic ecosystem holds for the entire system including the food chain. A good case could be made for the proposition that total wetlands destruction would ultimately mean destruction of the human race.

41. Federal regulation over every body of water, however small, is unlikely in view of public resistance to broad federal control. Hence, the executive branch apparently made a value judgement as to what parts of the aquatic ecosystem must, at a minimum, be protected. The wetlands portion of the aquatic ecosystem unquestionably fell into this category; federal wetlands policies are articulated in the following: Coastal Zone Management Act of 1972, § 303, 16 U.S.C. § 1452 (Supp. V 1975); 16 U.S.C. § 1221 (1970); FWPCA of 1972, § 101(a), 33 U.S.C. § 1251(a) (Supp. V 1975); 33 C.F.R. § 230.5(b)(8) (1976) (EPA wetlands policy); 33 C.F.R. § 209.120(g)(3) (1976) (Corps regulations); HOUSE COMM. ON GOV'T OPERATIONS, OUR WATERS AND WETLANDS: HOW THE CORPS OF ENGINEERS CAN HELP PREVENT THEIR DESTRUCTION AND POLLUTION, H.R. REP. NO. 917, 91st Cong., 2d Sess., (1970); MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A PROGRAM FOR ENVIRONMENTAL PROTECTION, H.R. DOC.

efforts by the scientific community, environmental lobbying groups, and concerned federal agencies, Congress has begun to recognize the value of protecting much of the coastal wetlands portion of the aquatic ecosystem lying within the boundaries of traditional "navigable waters." Since this portion of the aquatic system is within traditional boundaries of the Corps of Engineers' regulatory responsibilities, federal environmental regulation under FWPCA has generally been accepted. However, when such federal regulatory control extends to aquatic areas which reach further than traditional concepts of "water," cries are frequently raised of federal control of private land use.

V. THE BREAUX AMENDMENT

The House Public Works Committee, during hearings on H.R. 9560 (a bill to provide authorizations under FWPCA), approved an amendment offered by Congressman John Breaux of Louisiana to redefine the term "navigable waters" as used in section 404, to mean all waters which are or could reasonably be made navigable-in-fact "as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark (mean higher high water mark on the west coast)."⁴² The amendment also would legalize the discharge of dredged or fill material in all other waters (including wetlands) above the mean high water mark, under all of FWPCA, and sections 9, 10, and 13 of the Rivers and Harbors Act of 1899. In sending H.R. 9560 to the Committee of the Whole House, the Public Works Committee referred to the four alternatives proposed by the Corps in its May 1975

No. 247, 92d Cong., 2d Sess. 9 (1972); NATIONAL WATER COMM'N, *NEW DIRECTIONS IN U.S. WATER POLICY* (1973).

42. FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1976, REPORT OF THE COMM. ON PUBLIC WORKS AND TRANSPORTATION, H.R. REP. NO. 1107, 94th Cong., 2d Sess. 63 (1976).

Section 404 was amended by adding subsections (d) and (e) as follows:

(d) The term "navigable waters" as used in this section shall mean all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark (mean higher high water mark on the west coast).

(e) The discharge of dredged or fill material in waters other than navigable waters is not prohibited by or otherwise subject to regulation under this Act, or Section 9, Section 10, or Section 13 of the Act of March 3, 1899.

regulations as having aroused "substantial controversy."⁴³ The Committee then expressed concern that the program would be impossible to effectively administer (citing what they thought were Corps estimates of permit applications—up to 50,000 by 1978),⁴⁴ that the Corps would be in a position of managing a "too-large program poorly," and that the expanded section 404 program would "discourage the states from exercising their present responsibilities in protecting water and wetland areas."⁴⁵ In the Committee's view, comprehensive planning and regulatory responsibilities are needed for protection of wetland areas, not a limited case by case approach under the expanded section 404 program. An implication of this position was that regulating the discharge of dredged or fill material might better be a part of the comprehensive areawide pollution management programs under FWPCA.

By eliminating the historical test of navigability as part of the basis of federal jurisdiction for water pollution control, the Committee's proposed section 404 amendment would reduce the scope of federal regulatory control over aquatic pollution. The Committee expressed the strong feeling that "if a water is not susceptible for use of the transport of interstate or foreign commerce in its present condition or with reasonable improvement, then it should not be considered a 'navigable water of the United States' for the purpose of exercising this federal regulatory jurisdiction."⁴⁶

Opposition to the Breaux amendment was widespread.⁴⁷ EPA Deputy Administrator John Quarles, in a letter to the Chairman of the House Public Works Committee, expressed the agency's "rather serious concerns [that the Breaux amendment] would remove any federal regulation over the filling of vast acreages of coastal and

43. H.R. REP. NO. 1107, *supra* note 42, at 21.

44. *Id.* at 22. It is interesting to note that according to Corps figures of almost 22,000 permits said to be requested of the Corps during Phase I of the existing section 404 program (scheduled to end July 1, 1976 but extended by the President until September 1, 1976) less than seven hundred actually involve only section 404. The bulk of the remaining 20,000 permits was not affected by the reduced jurisdiction prescribed by H.R. 9560, section 16, since they involve permits required in all events by the Rivers and Harbors Authorizations Act of 1899.

45. *Id.*

46. *Id.* at 24.

47. The Environmental Study Conference, chaired by Representative Ottinger, had a "Special Alert" briefing for members and their staffs on the purposed cutback in the section 404 program, on May 24, 1976. See also 122 CONG. REC. E2434 (daily ed. May 7, 1976) (extension of remarks of Rep. Edgar).

inland wetlands, [which are] the most important elements of vital natural aquatic systems." The letter stated that on June 1, 1976, the Administrator met with President Ford and representatives of other agencies to discuss the section 404 permit program. Following that meeting, the Administration voiced its support of an amendment later to be offered on the floor of the House by Congressmen Cleveland and Harsha as a substitute for the Breaux amendment.

The Cleveland-Harsha amendment provided for clarification of the exclusion for "normal farming, silviculture, and ranching activities," and for the authority of the Secretary of the Army, acting through the Chief of Engineers, to issue general permits for discharges of dredged or fill material "where such activities are similar in nature, cause only minimal adverse environmental impact when performed separately, and will have only a minimal adverse cumulative effect on the environment." The amendment complemented EPA/Corps administrative efforts already taken to avoid overregulation and affirmed that general permits are consistent with the intent of Congress.⁴⁸ By the specific exclusion of certain activities,

48. 122 CONG. REC. H5266 (daily ed. June 3, 1976) (remarks of Rep. Cleveland). The amendment would alter section 404 as follows:

(d) no permit shall be required under this section, or section 402 of this Act, for discharges of dredged or fill material.

(1) resulting from normal farming, silviculture, and ranching activities, such as plowing, cultivating, seeding, and harvesting, for the production of food, fiber, and forest products;

(2) placed for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently servicable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures; or

(3) placed with the purpose of construction or maintenance of farm and stock ponds and irrigation ditches and the maintenance of drainage ditches.

(e)(1) Consistent with the requirement of subsections (a)-(c) of this section the Secretary of the Army acting through the Chief of Engineers may issue general permits for discharges of dredged or fill material where such activities are similar in nature, cause only minimal adverse environmental impact when performed separately, and will have only a minimal adverse cumulative effect on the environment. Such permits shall contain such conditions as necessary to achieve the purposes of this Act and shall be for a maximum period of five years. A general permit may be revoked or modified if it is determined that the cumulative affects of the permitted activities are such that individual permit treatment is required: *Provided*, That no general permit shall be revoked or substantially modified without opportunity for public hearings.

(e)(2) The Secretary shall distribute through normal public notice procedures, notice of all categories of activities proposed for processing by means of general permits.

the amendment also was designed to allay fears that the *N.R.D.C., Inc. v. Callaway*⁴⁹ decision would result in unwarranted expansion of the Corps' jurisdiction beyond the presumed intent of Congress. Despite the introduction of the Cleveland-Harsha amendment, the Breaux amendment was referred to the whole House as part of H.R. 9560.

VI. THE WRIGHT AMENDMENT

During debate on H.R. 9560, the Breaux amendment was modified by Congressman James Wright from Texas. Reading from a "Ballad of Magna Carta" addressed to King John,⁵⁰ Congressman Wright compared the so-called governmental overreaching of the section 404 program with the governmental abuses leading to the confrontation at Runnymede, and suggested that private citizens would be monitored and harassed by members of the United States Army under the present section 404 program. Following this emotional appeal, the Wright amendment passed the House by a vote of 234 to 121.⁵¹

(f) The Secretary shall submit a detailed report to the Congress, on or before December 31, 1977, on the implementation to such date by the Department of the Army of the provisions of this section. This report, which shall be prepared in conjunction with the Administrator of the Environmental Protection Agency, shall detail the progress made in implementing the requirements of this section and the objectives of this act.

49. 392 F. Supp. 685 (D.D.C. 1975).

50. Now all who speak in English in city, farm, or town, Refuse to recognize a law unless it's written down.

Because the law is not a law when it's ruling made by a king or executive, arrived at by a commission or a committee, drawn by a secret board or council

.....

122 CONG. REC. H5267 (daily ed. June 3, 1976) (remarks of Rep. Wright).

51. *Id.* The Wright amendment would alter section 404 as follows:

Sec. 17(a) Subsection (a) of Section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344) is amended by adding immediately after "navigable waters" the following: "and adjacent wetlands."

(b) Such Section 404 is further amended by adding at the end thereof the following new subsection:

"(d)(1) the term 'navigable waters' as used in this section shall mean all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark (mean higher high water mark on the west coast).

"(2) the term 'adjacent wetlands' as used in this section shall mean (A) those coastal wetlands, mudflats, swamps, marshes, shallows, and those areas periodi-

cally inundated by saline or brackish waters that are normally characterized by the prevalence of salt or brackish water vegetation capable of growth and reproduction, which are contiguous or adjacent to navigable waters subject to the ebb and flow of the tide, and (B) those freshwater wetlands including marshes, shallows, swamps and similar areas that are contiguous or adjacent to other navigable waters, that support freshwater vegetation and that are periodically inundated and are normally characterized by prevalence of vegetation that requires saturated soil conditions for growth and reproduction.

“(e) Except as provided in subsection (f) of this section, the discharge of dredged or fill material in waters other than navigable waters or adjacent wetlands is not prohibited by or otherwise subject to regulation under this Act, or section 9, section 10, or section 13 of the Act of March 3, 1899.

“(f) If the Secretary of the Army, acting through the Chief of Engineers, and the Governor of a State, enter into a joint agreement that the discharge of dredged or fill material in waters other than navigable waters or adjacent wetlands of such States should be regulated because of the ecological and environmental importance of such waters, the Secretary, acting through the Chief of Engineers, may regulate such discharge pursuant to the provisions of this section. Any joint agreement entered into pursuant to this subsection may be revoked, in whole or in part, by the Governor of the State who entered into such joint agreement or by the Secretary of the Army, acting through the Chief of Engineers.

“(g) in carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary of the Army, acting through the Chief of Engineers is authorized to issue those general permits which he determines to be in the public interest.

“(h) the discharge of dredged or fill material—

“(1) from normal farming, silviculture, and ranching activities, including, but not limited to, plowing, terracing, cultivating, seeding, and harvesting for the production of food, fiber, and forest products;

“(2) for the purpose of maintenance of currently servicable structures, including, but not limited to, dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments and approaches, and other transportation structures (including emergency reconstruction); or

“(3) for the purpose of construction or maintenance of farm or stock ponds and irrigation ditches,

is not prohibited by or otherwise subject to regulation under this Act.

“(i) the discharge of dredged or fill material as part of the construction, alteration, or repair of a Federal or federally assisted project authorized by Congress is not prohibited by or otherwise subject to regulation under this Act if the effects of such discharge have been included in an environmental impact statement or environmental assessment for such project pursuant to the provision of the National Environmental Policy Act of 1969 and such environmental impact statement or environmental assessment has been submitted to Congress in connection with the authorization or funding of such project.

“(j) The Secretary of the Army acting through the Chief of Engineers, is authorized to delegate to a State upon its request all or any part of those functions vested in him by this section relating to the adjacent wetlands, in the State if he determines (A) that such state has the authority, responsibility, and capability to carry out such functions, (B) that such delegation is in the public interest. Any such delegation shall be subject to such terms and conditions as the Secretary deems necessary, including, but not limited to, suspension and revocation for cause of such a delegation.”

This new section 16 of H.R. 9560 (redesignated as section 16 of S. 2710) would, if made law, radically alter the existing section 404 program. The amendment changes section 404(a) by limiting regulatory jurisdiction of discharges of dredged or fill material only to "navigable waters and adjacent wetlands."⁵² By distinguishing between "wetlands" and "navigable waters," this change lays the groundwork for "wetlands" not being considered a part of "navigable waters" at all, and perhaps not even a part of the aquatic ecosystems inherent in the term "navigable waters." Since no regulatory jurisdiction would be given over the vast wetlands areas not adjacent or contiguous to navigable waters as narrowly defined in the Wright amendment, discharges into such areas would not be illegal under section 301(a) and there would be no need to get a discharge permit under section 404; no enforcement action could be brought for harmful discharges under section 309, and no citizen's suit to stop such actions could be brought under section 505.

"Navigable waters" would also be redefined to include even less than the traditional concept of that term, through the elimination of the historical test of navigability.⁵³ While reducing section 404 jurisdiction and drawing an artificial line through aquatic ecosystems for the purpose of regulating discharges of dredged or fill material, the Corps of Engineer's traditional jurisdiction in regulating structures and withdrawal of water in historically navigable waters under the Rivers and Harbors Act would be left intact.⁵⁴

"Adjacent wetlands" is defined in the Wright bill as coastal wetlands periodically inundated by saline or brackish water and contiguous or adjacent to navigable waters subject to tidal influence, and as freshwater wetlands contiguous or adjacent to "other navigable waters."⁵⁵ Omitted from this definition and, hence, from regulation under section 404, are all coastal wetlands inundated by fresh water, coastal wetlands not contiguous or adjacent to tidally-

52. *Id.* at (a).

53. *Id.* at (d)(1). The use of the historical test was vital in the Government's successful defense in *PFZ Properties, Inc. v. Train*, 393 F.Supp. 1370 (D.D.C. 1975), where the court found an extensive mangrove swamp subject to federal jurisdiction. See notes 16-19 *supra* and accompanying text for the definition of "historical test" of navigability.

54. Of the almost 22,000 permits said to be requested of the Corps during Phase I of the existing section 404 program (ending July 1, 1976 but extended by the President until September 1, 1976), over 21,000 involved permits under the Rivers and Harbors Act of 1899 and would be unaffected by this legislation. See note 44, *supra*.

55. Proposed § 404(d)(2), *supra* note 51.

influenced navigable waters, freshwater wetlands not contiguous or adjacent to "other navigable waters," and nontidal saline and brackish water wetlands. The omission of these types of wetlands is environmentally inconsistent, because they provide the same biological services⁵⁶ as wetlands which are included. In the Wright amendment, discharges of dredged or fill material in all waters other than traditional "navigable waters" are not subject to regulation under the FWPCA and under sections 9, 10 and 13 of the Rivers and Harbors Act, unless there is a state/Army joint agreement providing for such regulation.⁵⁷ This change would create serious interpretative problems with FWPCA sections 208 (Areawide Waste Treatment Management), 303 (Water Quality Standards and Implementation Plans), 311 (Oil and Hazardous Substance Liability), 401 (State Certification), and 402 (National Pollutant Discharge Elimination System). For example, Congressman Breaux, in discussing this amendment stated that:

If a dredge of fill material contains pollutants as determined by an environmental protection agency, clearly this would be authority to come in and regulate the discharge under Section 402 of the act which covers the discharging of pollutants if it is determined that it is a discharge of pollutants.⁵⁸

However, it is not at all clear how the discharge of dredged spoil or fill material could be regulated under section 402, even as a discharge of a pollutant, if such a discharge is, in the words of proposed section 404(e) under the Wright amendment, "not prohibited by or otherwise subject to regulation under this act" It is even questionable under this amendment whether the Administrator could promulgate an effluent standard or prohibition for toxic materials and for pretreatment of such pollutants under section 307 of FWPCA, and include any disposal of dredged material in the regulated category.⁵⁹

56. For example, these omitted wetlands can serve as nesting areas for waterfowl or recharge areas for ground water supplies, regardless of the fact that they might not be connected to tidally influenced or other navigable waters, or not support saline or brackish water vegetation.

57. Proposed § 404(e), *supra* note 51.

58. 122 CONG. REC. H5272 (daily ed. June 3, 1976)(remarks of Rep. Breaux).

59. Section 307(a)(1), 33 U.S.C. § 1317 (a)(1) (Supp. V 1975), states that the Administrator shall publish a list, which includes any toxic pollutants, for which a prohibition or an effluent standard be established. The Administrator, in publishing such a list, shall take into account the "toxicity of the pollutant, its persistence, degradability, the usual or potential

As an exception to the legalization of discharges of dredged or fill material in all waters other than "navigable waters," the Wright amendment provides that the Corps and the governor of a state may jointly agree that the Corps shall regulate the discharge of dredged or fill material in any water other than "navigable waters."⁶⁰ It further provides that the state standard for so agreeing is the "ecological and environmental importance of such waters." While the Corps would then be bound by the guidelines and regulations under section 404, there is no requirement that the Corps assume the state's regulatory burden. Moreover, this arrangement would produce a lack of uniformity among the states, because waters other than traditional "navigable waters" could be regulated by either the Corps or the states, with different standards perhaps governing an aquatic ecosystem which extends across state lines.⁶¹

The Wright amendment provides that the Corps can issue general permits to regulate certain discharges of dredged or fill material.⁶² However, the standard is whether the permit would be "in the public interest." This open-ended focus on "public interest" could ignore critical environmental considerations and result in general permitting of regular discharges which might otherwise require closer environmental scrutiny.⁶³ Therefore, the standard needs to be more precisely articulated. For example, a general permit could be granted for only those discharges which would have a "*de minimis* effect when individually or cumulatively imposed on the environment."

Excluded from regulation under section 404 by the Wright amendment are "normal" farming, forestry, and ranching activities, maintenance of "currently serviceable structures" (including emergency reconstruction), and construction or maintenance of

presence of the affected organism in any waters, the importance of the affected organisms and the nature and extent of the affect of the toxic pollutant on such organisms." Subsection (a)(5) states that when the Administrator proposes or promulgates any effluent standard (or prohibition), he shall "designate the category or categories of sources to which the effluent standard (or prohibition) shall apply." Such a category of sources may include any disposal of dredged material after "consultation with the Secretary of the Army."

60. Proposed § 404(f), *supra* note 51.

61. Due to poor drafting of proposed section 404(f), it is arguable that the only one who could revoke the Corps/state agreement is the same governor of the state who entered into such joint agreement, since the governor, rather than the state, was specified as the agreeing party.

62. Proposed § 404 (g), *supra* note 51.

63. *See, e.g.*, 122 CONG. REC. H5270-71 (daily ed. June 3, 1976) (remarks of Rep. Breaux.)

“farm or stock ponds and irrigation ditches.”⁶⁴ These exclusions, coupled with the contemporaneous legislative history, give the strong impression that all farming activities have been excluded from section 404 by this amendment.⁶⁵ Obviously there are environmental questions raised by allowing the deregulation of all discharges of dredged or fill material connected with farming activities, if those discharges are into aquatic areas.

Also excluded from regulation under section 404 by the Wright amendment are all discharges of dredged or fill material made in connection with federal or federally assisted projects authorized by Congress. The only environmental requirement is that the effects of such discharges must have been included in an environmental impact statement or assessment pursuant to the National Environmental Policy Act of 1969 (NEPA),⁶⁶ and submitted to Congress “in connection with” the authorization.⁶⁷ The scope of such an exclusion is extensive. For example, one could argue that 404-type discharges of housing projects assisted by loans or grants made pursuant to the Disaster Relief Act of 1974⁶⁸ would not be subject to section 404. It is probable that the environmental impact statement or assessment for such projects would be submitted in general to Congress before the specific disposal sites were designated; it would be difficult to accomplish a meaningful environmental review in this manner, and the projects would proceed virtually unregulated.

Congressman Wright’s amendment provides that the Corps can delegate to a state, upon request, any or all of the Corps’ section 404 functions.⁶⁹ The prerequisite for such delegation is that the state have the “authority, responsibility, and capability” to carry out

64. Proposed § 404(h), *supra* note 51.

65. Mr. Wright stated that “all those things that are related to agricultural, harvesting and agricultural cultivating and production” are excluded. 122 CONG. REC. H5268 (daily ed. June 3, 1976). Mr. Breaux stated that proposed section 404(h), “specifically exempts normal farming operations.” *Id.* at H5270-71.

66. 42 U.S.C. §§ 4331-47 (1970).

67. Proposed § 404(i), *supra* note 51.

68. 42 U.S.C. § 3233 (Supp. V 1975) authorizes the President to provide funds to any recovery planning council (state, local, public, or private) to make loans for acquiring or developing land and improvements for public works, public service or development facility usage, and the “acquisition, construction, rehabilitation, alteration, expansion, or improvement” of such facilities. *Id.* at (a)(1). In fact this Act could be construed as a federal subsidy for flood plain development and it would seem important to preserve an adequate opportunity for environmental scrutiny. *Id.* at 3234.

69. Proposed § 404(j), *supra* note 51. However, the Wright amendment does not provide for additional funding of such a state program under section 106.

such functions and that such delegation is "in the public interest." Congressman Edgar, in referring to this section, noted that there are "no standards or criteria for program adequacy . . . no standards for adequacy of state issued permits, for procedures for review of them [and] no requirements that the states have any capability to enforce their permits."⁷⁰ Further, under this amendment the Corps would have the responsibility to promulgate state delegation regulations with almost no guidance to assist states in structuring adequate environmental criteria. The Corps would have the power of "suspension and revocation for cause"⁷¹ of a state's program, but this does not even suggest a standard, and the Corp's section 404 regulations have themselves been criticized by Congress.⁷² Moreover, EPA has no role in the delegation procedure. This conflicts with the agency's responsibilities for insuring adequate state criteria under sections 106⁷³ and 402⁷⁴ of FWPCA. For example, in order for there to be environmentally sound state participation in the section 404 program, there would seem to be a need for coordinating the states' 404 "capabilities" with its "methods, systems, and procedures necessary to monitor, and compile and analyze data on . . . the quality of navigable waters," required by FWPCA section 106(e)(1).

VII. THE ADMINISTRATION'S PROPOSED BILL

Following passage of H.R. 9560, redesignated as S. 2710,⁷⁵ twenty Senators wrote the President asking him to direct the Corps

70. 122 CONG. REC. H5279 (daily ed. June 3, 1976) (remarks of Rep. Edgar).

71. See proposed § 404 (i), *supra* note 51.

72. 122 CONG. REC. H5268 (remarks of Rep. Wright).

73. Section 106(e)(1), 33 U.S.C. § 1256 (e)(i) (1970), states that the Administrator shall not make any grants for pollution control programs to any state which has not provided or is not carrying out as part of its program "the establishment and operation of appropriate devices, methods, systems, and procedures necessary to monitor, and to compile and analyze data on (including classification according to eutrophic condition), the quality of navigable waters and to the extent practicable, groundwaters, including biological monitoring" Section 106(f)(3) states that grants will be made on the condition that "such state (or interstate agency) submits . . . for the Administrator's approval its program for the prevention, reduction, and elimination of pollution in accordance with purposes and provisions of this Act in such form and content as the Administrator may prescribe."

74. Under section 402(a)(5), 33 U.S.C. § 1342 (a)(5) (Supp. V 1975) the Administrator "shall authorize a state, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharge into the navigable waters within the jurisdiction of such state."

75. S. 2710, 94th Cong., 2d Sess. (1976).

to delay implementation and enforcement of Phase II of the section 404 program.⁷⁶ The Senators felt that “[i]n the history of federal environmental legislation, there has never been an issue that has so inflamed the sensitivities of such a wide group of Americans as the proposed regulations dealing with section 404 of the Federal Water Pollution Control Act,” and that

to go forward with implementation of these regulations, in the face of clear Congressional action [the House vote on H.R. 9560] would be to cause massive dislocations in the private sector because of the requirement that the regulations be complied with, if only for a short period of time before they are negated by Congress.

The President responded to this request, and on July 2, 1976 directed the Secretary of the Army to defer for sixty days implementation of Phase II of the Corps of Engineers section 404 program. The President took this action, to “give the Congress additional time to consider the section 404 program” and to “avoid the possibility that those being regulated under the program would be subject to rules which changed three times over a relatively short period.”⁷⁷

Shortly thereafter the Office of Management and Budget (OMB) requested that EPA, the Department of the Army, and the Counsel on Environmental Quality (CEQ), along with the Departments of Justice, Interior, and Agriculture, develop the Administration’s legislative options for defining the jurisdiction of the section 404 program. The basic options considered were: (1) delineation of activities to be exempt from the program (the Cleveland-Harsha amendment); and (2) restriction of the jurisdiction by redefinition of the term “navigable waters” (the Wright amendment). From

76. Letter from 20 United States Senators to the President, June 10, 1976. The twenty senators were: John Tower, Robert Dole, James O. Eastland, Paul Fannin, Lloyd Bentsen, Mike Mansfield, Carl T. Curtis, Clifford P. Hansen, Jesse Helms, Jake Garn, Russell B. Long, Paul Laxalt, Gale McGee, Milton R. Young, Storm Thurmond, Dewey F. Bartlett, Henry Bellmon, J. Glenn Beall, J. Bennett Johnston, Jr., and Ted Stevens.

77. Notice to the Press Office of the White House Press Secretary, July 2, 1976. The sixty-day moratorium was effective immediately, subject to the following conditions imposed by the Corps: (1) applications for discharges of dredged or fill material into Phase II waters were accepted but were not processed; (2) district engineers monitored all discharges of dredged or fill material into all waters and were instructed to take appropriate administrative enforcement action with respect to any activity that will have “serious impacts on water quality”; and (3) general permits were continued to be processed. THE COORDINATOR, REGULATORY FUNCTIONS INFORMATION EXCHANGE BULLETIN (Inst. for Water Resources Vol. 1, No. 3, 1976).

these an Administration proposal was fashioned.

The Senate Public Works Committee held oversight hearings on July 27, 1976. During those hearings, the Administration announced its position in favor of broad jurisdiction in regulating the discharge of dredged or fill material with the added suggestion that "all agricultural activities be excluded from the program in areas currently in agriculture use."⁷⁸ Two days later, President Ford wrote the Secretary of Agriculture, informing him that the Administration would "urge the Congress, in reconsidering this program, to provide an exemption for all lands currently used for farming, ranching and forestry as long as such use continues." The President stated that such an exemption "provides an appropriate balance between the need to protect the Nation's waters and wetlands and the need for production of food, fiber and forest products."

OMB again met with EPA, the Army, Agriculture, and Commerce, to prepare the Administration's legislative proposal for transmittal to the Speaker of the House and the President of the Senate. The proposed bill would modify section 404 in six basic ways.⁷⁹

78. *Hearings on Section 404 of the FWPCA Before the Senate Comm. on Public Works*, 94th Cong., 2d Sess. (1976) (statement of Victor V. Veysey, Assistant Secretary of the Army); see *N.Y. Times*, July 29, 1976, at 9, col. 1.

79. Following is the text of the Administration's proposed § 404 amendments as transmitted to members of the Senate Public Works Committee by memo from Assistant Secretary of the Army Veysey's office on August 24, 1976:

A bill, to authorize the Secretary of the Army, acting through the Chief of Engineers, to grant permits for the discharge of dredged or fill material after consideration of water quality and fish and wildlife factors, to authorize State regulation over the discharge of dredged or fill material into certain waters of the United States, to exempt all areas currently in agricultural, ranching or silvicultural use from permit requirements, and for other purposes.

Be enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section 404, of the Federal Water Pollution Control Act, as amended, is further amended by amending subsections (a) and (b) and by adding new subsections (d) through (p), to read as follows:

"(a) The Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into navigable waters, at specified sites, and his decision to deny a permit shall be based solely upon the criteria in subsection (b)(1).

"(b)(1) Subject to subsection (c) of this section, each such site shall be specified for each such permit by the Secretary of the Army through the application of guidelines developed by the Administrator, in conjunction with the Secretary of the Army, which guidelines shall be based upon the following criteria:

"(A) the effect of discharge of dredged or fill material on water qual-

First, it specifies the environmental criteria on which the 404(b)

ity as it affects human health, including but not limited to bioaccumulation in micro-organism, fish, shellfish, and wildlife;

“(B) the effect of discharge of dredged or fill material on aquatic life and wildlife including the transfer, concentration, and dispersal of pollutants or their by-products through biological, physical, and chemical processes; possible changes in aquatic ecosystem diversity, productivity, and stability; and species and community population dynamics;

“(C) the effect of discharges of dredged or fill material on water quality as it affects water supply, fisheries resources, micro-organisms, fish, shellfish, wildlife, recreation, shoreline, and beaches;

“(D) the persistence and permanence of the effects of the discharge of dredged or fill material;

“(E) the effect of the discharge of dredged or fill material at varying rates and of particular volumes and concentrations of pollutants; and

“(F) the impact on navigation.

“(b)(2) In any case where such guidelines under this subsection alone would prohibit the specification of a site, the Secretary may issue a permit based on the consideration additionally of the economic impact of the site on navigation and anchorage and on other factors specified under Section 403 (c).”

“(d) At any time after the promulgation of the guidelines required by subsection (k) of this section, the Governor of each State that desires to administer its own permit program for the discharge of dredged or fill material into the navigable waters specified in subsection (i) of this section within its jurisdiction may submit to the Secretary of the Army a full and complete description of the program it proposes to establish and administer under State law or through an interstate compact. In addition, each State shall submit a statement from its attorney general (or the attorney for those state water pollution control agencies that have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Secretary of the Army, in consultation with the Administrator, and other Federal agencies, shall approve each such submitted program unless he determines that the program will not comply with the guidelines promulgated under subsection (k) or that adequate authority does not exist:

“(1) to issue permits which

“(A) apply, and insure compliance with, any applicable requirements of sections 301 and 404(b);

“(B) can be terminated or modified for causing including, but not limited to, the following:

“(i) violation of any condition of the permit;

“(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

“(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

“(C) shall not conflict with a plan approved pursuant to 208 (b);

“(2) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

guidelines are based so as to underscore water quality as a primary

“(3) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of permit may submit written recommendations to the permitting State, and that the permitting State will notify such affected State in writing of its failure to so accept such recommendations together with its reasons for so doing;

“(4) To insure that no permit will be issued if, in the judgment of the Secretary of the Army, acting through the Chief of Engineers, navigation would be substantially impaired thereby;

“(5) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.

“(e)(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (d) of this section, the Secretary shall suspend the issuance of permits under subsections (a) and (n) of this section as to those navigable waters subject to such programs unless he determines that the State permit program does not meet the requirements of subsection (d) of this section or does not conform to the guidelines issued under subsection (k) of this section. If the Secretary so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

“(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to subsection (k) of this section.

“(3) Compliance with a permit issued pursuant to a State program approved under subsection (d) of this section shall be deemed compliance with the permit requirements of this section.

“(f) Each State shall transmit to the Secretary of the Army such copies of permit applications received by the State and notice to the Secretary of the Army and the Administrator of such actions related to the consideration of permits including permits proposed to be issued by the State under the state permit program approved under subsection (d) of this section as and when the Secretary of the Army or the Administrator may require. In accordance with the guidelines promulgated pursuant to subsection (k), the Secretary and the Administrator are authorized to waive the requirements of this subsection for any category (including any class, type, or size within such category) of point sources within the State.

“(g) Whenever the Secretary, after consultation with the Administrator, determines after public hearing, that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Secretary shall withdraw approval of such program. The Secretary shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

“(h) No action taken by the Secretary in accordance with subsection (d), (e), (f), (g), or (k) of this section shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (83 Stat. 852).

“(i) Navigable waters that may be subject to an approved State permitting

program under subsection (d) of this section shall be all waters within the jurisdiction of the State except any coastal waters of the United States subject to the ebb and flow of the tide, including any contiguous or adjacent marshes, shallows, swamps, and mudflats, and any inland waters of the United States up to their head of navigation that have been used, are used, or are susceptible to use to transport interstate or foreign water-borne commerce, including any contiguous or adjacent marshes, shallows, swamps, and mudflats.

“(j) Funds provided to a State under Section 208(f) and Section 106(c) of this Act shall be available to the State for the establishment and administration of a State permit program established in accordance with this section.

“(k) Within one hundred and eighty days from the date of enactment of this subsection, the Secretary of the Army, in conjunction with the Administrator, and after consultation with appropriate Federal and State agencies, shall promulgate guidelines establishing the minimum procedural and other elements of any State program under this section including:

“(A) monitoring requirements;

“(B) reporting requirements (including procedures to make information available to the public);

“(C) enforcement provisions; and

“(D) funding, personnel qualifications, and manpower requirements (including a requirement that no board or body which approves permit applications or portions thereof shall include, as a member, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit).

“(l) The discharge of dredged or fill material resulting from any Congressionally authorized and Federally constructed project shall not be subject to any interstate, State, or local permitting procedures approved under subsection (d) of this section.

“(m) The Secretary, in conjunction with the Administrator, after notice and opportunity for public hearings may authorize the discharge of dredged or fill material by regulation, for those classes or categories of discharges determined: (1) to be similar in nature, (2) to have minimal adverse environmental impact when preformed separately, and (3) to have minimal adverse cumulative effect on the environment.

“(n) The Secretary of the Army, acting through the Chief of Engineers, in lieu of individual permits under subsection (a), is authorized to issue those general permits that he determines to be consistent with the guidelines promulgated pursuant to subsection (b).

“(o) The permit requirements referred to by Section 301(a) for discharges of dredged or fill material shall be deemed to be complied with, for:

“(1) normal farming, silviculture, and ranching activities, such as plowing, cultivating, seeding, and harvesting for the production of food, fiber, or forest products;

“(2) maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures; or

“(3) construction or maintenance of farm and stockponds and irrigation ditches and the maintenance of drainage ditches.

“(p) The permit requirements referred to by section 301(a) for the discharge of dredged or fill material shall be deemed to be complied with where the discharge is in navigable waters which are located within lands actively in agricul-

consideration.⁸⁰

Second, provision is made to authorize the Secretary of the Army to delegate the section 404 regulatory responsibilities to qualifying states⁸¹ for that portion of "navigable waters" lying beyond the Corps' traditional jurisdiction.⁸²

Third, the bill provides that the Secretary of the Army, in conjunction with the Administrator of EPA, can authorize certain discharges of dredged or fill material by regulation where such discharges are similar in nature, and have a minimal adverse environmental impact when performed either separately or cumulatively.⁸³

tural, silvicultural or ranching uses at the time of enactment of this subsection, provided:

"(1) that the discharge is limited to such uses as existed at the time of enactment of this subsection;

"(2) that the discharge within such lands is directly related to the sustained production of food, fiber or forest products, and does not include the development of new lands for production of food, fiber or forest products;

"(3) that any discharge for the construction of roads will continue to allow the flow and circulation of water; and further provided, that this subsection shall not be construed to authorize the discharge of toxic pollutants in harmful quantities.

80. Proposed § 404(b), *supra* note 79.

The proposed environmental criteria upon which the section 404 guidelines are based in the Administration bill adopt criteria specified under FWPCA section 403(c)(1), 33 U.S.C. § 1343(c)(1) (Supp. V 1975) (oceanic pollution discharge criteria). Section 403(c)(1) states that the guidelines for determining the degradation of the waters of the territorial seas, the contiguous zones, and the oceans shall include:

"(A) the effect of disposal of pollutants on human health or welfare, including but not limited to plankton, fish, shell-fish, wildfish, shorelines, and beaches;

"(B) the effect of disposal of pollutants on marine life including the transfer, concentration, and dispersal of pollutants or their byproducts through biological, physical, and chemical processes; changes in marine ecosystem diversity, productivity, and stability; and species and community population changes;

"(C) the effect of disposal, of pollutants on esthetic, recreation, and economic values;

"(D) the persistence and permanence of the effects of disposal of pollutants;

"(E) the effect of the disposal at varying rates of particular volumes and concentrations of pollutants;

"(F) other possible locations and method of disposal or recycling of pollutants including land-based alternatives; and

"(G) the effect on alternate uses of the oceans, such as mineral exploitation and scientific study."

See proposed §§ 404(b)(1) (A)-(F), *supra* note 79.

81. *Id.* § 404(d).

82. *Id.* § 404(i).

83. *Id.* § 404(m).

Fourth, the Secretary of the Army is given the power to issue general permits in lieu of individual permits for classes or categories of activities in a particular geographic area.⁸⁴

Fifth, the bill provides that the permit requirements referred to by section 301(a) for discharges of dredged or fill material shall be deemed to be complied with for: (1) normal farming, silviculture, and ranching activities; (2) maintenance, including emergency reconstruction of recently damaged parts of currently servicable structures; and (3) construction or maintenances of farm and stock ponds and irrigation ditches and the maintenances of drainage ditches.⁸⁵

Finally, and most importantly, the administration bill provides that the permit requirements referred to by section 301(a) for the discharge of dredged or fill material shall be deemed to be complied with where the discharge is in navigable waters which are located "within lands actively in agricultural, silvicultural, or ranching uses" at time of enactment, provided that the discharge: (1) is limited to such uses as existed at the time of enactment; (2) is directly related to the sustained production of food, fiber, or forest products, and does not include the development of new lands for production of such products; and (3) will, if used for road construction, continue to allow the flow and circulation of water. Furthermore, this exemption can not be construed to authorize the discharge of toxic pollutants in harmful quantities.⁸⁶

The OMB drafted a letter to the Speaker of the House and the President of the Senate transmitting the Administration's bill. According to the letter, the legislative proposal transmitted would accomplish the following three things: (1) clearly define federal and state roles in administration of the program; (2) strike an "appropriate balance" between the need to protect water quality and the need for the sustained production of food, fiber, and forest products (by exempting discharges within areas currently utilized for the production of food, fiber and forest products); and (3) improve program efficiency by minimizing regulation (by exempting insignificant activities from the program, and using general permits).

Under the Administration's bill, delegation of certain section

84. *Id.* § 404(n).

85. *Id.* § 404(p).

86. *Id.* §§ 404(p)(1)-(3).

404 responsibilities to qualifying states is accomplished by providing the following: (1) the governor of each state desiring to administer its own permit program for the discharge of dredged or fill material into specified navigable waters within its jurisdiction submits to the Secretary of the Army a full description of the program it proposes to establish; (2) each state must demonstrate that its laws, or an interstate compact, provide adequate authority to carry out the described program; and (3) the Secretary of the Army, in consultation with the Administrator, and other federal agencies, must approve each such submitted program unless he determines that the program will not comply with the state delegation guidelines or that adequate authority does not exist to perform certain specified functions.⁸⁷

The Administration's "state delegation" approach places primary authority for approving state programs in the Army instead of EPA. However, at the Public Works Committee hearings, July 27, 1976, Senator Muskie and others stated that only the Environmental Protection Agency was endowed with the technical expertise necessary to make critical environmental decisions.⁸⁸ Furthermore, any approval criteria for section 404 would most certainly be patterned after the already-established section 402 NPDES program developed by the states; for those states which already have NPDES programs, the basic federally-approved system is already in place, and would only necessitate certain minimal additions to qualify for regulating the discharge of dredged or fill material in specified waters. Moreover, by having the Army merely consult with the Administrator and other federal agencies, there might be a lack of consistency between those states already having smoothly functioning NPDES and section 404 programs, and those states which did not yet have the NPDES programs but managed to obtain approval from the Corps to regulate the discharge of dredged or fill material in certain waters within their boundaries. Thus, the situation might arise where the same aquatic system lying in two states would be regulated by two disparate state programs. It would be more consistent to place the duty of approving proposed state section 404 programs with EPA, or at least with the Secretary of the Army "in

87. *Id.* § 404(d).

88. *Hearings on § 404 of the FWPCA Before the Senate Comm. on Public Works*, 94th Cong., 2d Sess. (1976).

conjunction with" the Administrator.

The proposed Administration bill places oversight of the state program under the aegis of the Army and EPA.⁸⁹ However, the Secretary of the Army is only required to consult with the Administrator in deciding whether approval of a state program is to be withdrawn.⁹⁰ No provision is made for EPA to independently evaluate a state's compliance with the guidelines and to recommend action to the Secretary of the Army. Nor is recognition given to EPA's particular expertise as the designated Agency capable of making critical environmental evaluations. Thus, under the Administration's proposed state delegation mechanism, the Army has primary responsibility for approval, oversight, and corrective action, with EPA merely acting as a consultant.

Only in proposed section 404(k)—providing for promulgation of guidelines "establishing the minimum procedural and other elements of any state program"—does EPA assume a more significant role. Here, the Secretary of the Army, "in conjunction with the Administrator, and after consultation with appropriate federal and state agencies," is called upon to promulgate the guidelines. It is interesting to compare the procedure for issuing these guidelines with that followed under section 404(b) in the specification of disposal sites. In the latter instance, environmental guidance is "developed by the Administrator, in conjunction with the Secretary of the Army." Since both the federal and the state aspects of any section 404 regulatory program presumably would be based on consistent environmental criteria and guidance, and since Congress has recognized the prime importance of EPA's environmental expertise, it would only seem logical that EPA should continue to exercise the same functions in establishing the quality of environmental safeguards in both the federal and state segments of the section 404 program.

Authorization of discharges of dredged or fill material by regulation is provided for in the Administration's proposed bill in response to the clear need to simplify the section 404 program.⁹¹ Under this provision, those classes or categories of discharges which are similar in nature and have minimal adverse environmental impacts

89. Proposed § 404(f), *supra* note 79.

90. *Id.* § 404(g).

91. *Id.* § 404(m).

when performed either separately or cumulatively, would be authorized by formal rulemaking. The Army has the primary responsibility to make decisions, but must act "in conjunction with" the Administrator after notice and opportunity for public hearings.

General permits are specifically authorized by the Administration's proposed bill.⁹² General permits are presently being used, but the power to issue them is implied, rather than explicit, under the present statutes. While the proposed bill gives the Secretary of the Army the explicit authority to issue general permits in lieu of individual permits, he must apply EPA's environmental guidelines promulgated pursuant to section 404(b).

The last two subsections of the Administration's proposed bill alleviate the political pressure exerted by farming, forestry, and ranching interests. The first, proposed section 404(o), adopts the longstanding position of both EPA and the Army: that certain activities are not and never were subject to specific regulation under the section 404 program. For those activities, the "permit requirements referred to by section 301(a)⁹³ for discharges of dredged or fill material shall be deemed to be complied with."⁹⁴ The second limitation on the section 404 program, proposed section 404(p), selectively narrows regulatory jurisdiction. It does this by stating that the permit requirements referred to by section 301(a) will be deemed to be complied with when the discharge is in navigable waters located within specified lands actively in farming, forestry, or ranching uses, if the discharge is limited to such uses, is directly related to sustained production of specified products, does not include the development of new lands for production of such products, and will, if used to build roads, continue to allow the flow and circulation of water. Proposed section 404(p) finally provides that in no event shall it be construed to "authorize the discharge of toxic pollutants in harmful quantities."

These exemptions from regulation are a major departure from the "activities exemption" which seems to be the more responsible way to assure the public of reasonable environmental regulations. Exempting *all* discharges of dredged or fill material directly related

92. *Id.* § 404(n).

93. 33 U.S.C. § 1311(a) (Supp. V 1975).

94. Proposed § 404(o), *supra* note 79. Provisions other than permit requirements referred to by section 301(a) would, of course, be left intact.

to "sustained production of food, fiber, or forestry products" opens a major loophole in FWPCA's protection of the wetland portion of the aquatic environment. Liberally construed, proposed section 404(p) permits an occasionally logged hardwood swamp to be filled for the purposes of growing corn or loblolly pine. Discharges of fill directly related to farming, forestry, or ranching uses could encompass creating dry land for the construction of machinery sheds, storage facilities for harvested products, or for a wide variety of related purposes. Once such a fill project was completed, the formerly aquatic terrain would be converted over time to upland terrain, and would not be within the jurisdiction of FWPCA at all. Then, any upland activity could take place on what formerly was an aquatic area as defined in FWPCA.

At the final interagency drafting session, there were few objections to section 404(p). The view was expressed that small farmers had never been involved in such massive activities affecting wetland areas, even though this provision could conceivably be abused by land developers and corporate farming interests. OMB opposed curtailing the section 404(p) exemption through a provision that the permitted discharge be confined to the *specific* use that existed at the time of enactment. The President's commitment to avoid the appearance of land use regulation in the section 404 program was exceedingly strong and other than through a specific "activities" approach, there seemed to be no way to draft a complete exemption without creating an environmental loophole. The essence of the problem lay in the interpretation of the Administration's phrase "such use as existed at the time of enactment." A liberal interpretation would allow any prior single farming or forestry use to qualify an area for continued exemption. "Use" could be established in a marsh or swamp by the occasional harvesting of trees for fence posts, siding, or firewood or by utilizing part of the swamp for cattle grazing. It might even be urged that a zoning classification of "farmland" would be sufficient to establish the element of prior "use." Similarly, if a single farming use were established at the time of enactment, a discharge to enlarge that use, or to convert it to any ranching or forestry use, could be said to be exempt from regulation. It is unclear whether "navigable water located within lands actively in agricultural, silvicultural, or ranching uses" would include an aquatic area that has not been *directly* used for such purposes but is *surrounded* by dry land that has been so used. As drafted, this

aquatic area could be interpreted as exempt from section 404 since discharges "in navigable waters which are located within lands" being used for farming, forestry, or ranching uses are not subject to regulation.

Mitigating against such broad interpretations of the Administration's section 404(p) exemptions are specific requirements that such exempted discharges "not include the development of new lands," and that "any discharges for the construction of roads will continue to allow the flow and circulation of water."

The first phrase actually does no more than recognize that some agriculture takes place on farmlands which are "navigable waters" under FWPCA. To the uninitiated, some wetlands may at times seem to be land. An earlier attempt at developing the Administration's proposed amendment reflected this by providing that any discharge would be exempt from regulation if it was "within lands in agricultural, silvicultural, or ranching uses at the time of enactment." This would have had no effect on section 404 at all since only discharges into water are subject to regulation. Thus, "lands" was changed to "navigable waters which are located within lands." Denying the exemption to discharges into water that also have the effect of "developing new lands" arguably could protect aquatic farmland from being converted to upland terrain. However, it can also be argued that the exemption would not have been made for discharges in "navigable waters within lands" if it had not been recognized that farming, forestry, and ranching often times do take place in areas which are navigable waters as defined in FWPCA.

The second potential limitation on broad interpretation of the section 404(p) exemption (that any discharge for road construction "will continue to allow the flow and circulation of water") was drafted to provide for the continued viability of existing aquatic systems. Roadbuilding was identified as one of the more harmful common practices of farming, forestry, and ranching; and it was EPA's request that, if such harmful activities were to be imposed on an aquatic environment, precautions be taken so as not to interrupt the existing hydrologic cycles.

The wording of the above two limitations on the agriculture exemption provides a framework for the judiciary to construe the entire exemption so as to provide adequate protection for the aquatic environment.

VIII. THE BAKER AMENDMENT

The Senate Public Works Committee met briefly on August 10, 1976 to discuss the possibilities of either acting on S. 2710 (containing the Wright amendment), taking no action, or developing its own proposal to bring to conference. During that meeting, Senator Baker, who had studied the Administration's proposal, presented an outline of a proposed amendment to section 404: (1) accept broad jurisdiction as in the Cleveland-Harsha amendment; (2) provide authority for delegation of Phases II and III of the section 404 program to the states in the same manner as provided in section 402 for other pollutants; (3) specifically exempt discharges resulting from normal farming, forestry, and ranching activities (including farming and logging roads) from permit requirements; and (4) provide a statutory framework for general permits for routine activities which have only minimal impact on the environment.

According to Senator Baker's staff, his amendment would solve various problems that had been raised. For example, under the proposed amendment to exempt all normal farming, forestry, and ranching activities, there are two exceptions suggested by the Administration's proposal: (1) construction of farming and logging roads must provide for continued flow and circulation of water; and (2) construction of dikes and major filling activities to bring an area of the navigable waters into normal farming, forestry, and ranching uses would require a permit. The Baker amendment incorporates these two exceptions. Furthermore, the Baker amendment provides a mechanism for EPA to approve state programs for control of discharges of dredged or fill material in waters other than those within the Corps' traditional jurisdiction (Phase II and III waters). This is similar to the mechanism provided in section 402 for all other pollutants. The Corps would regulate these areas until delegation to states took place. Delegation could neither be in conjunction with, or separate from, delegation of the NPDES program under section 402. Finally, the Baker amendment would authorize general permits as well as exemptions for routine activities having minimal impact upon the environment. (The section 404 regulations promulgated by the EPA and the Corps provided for the same authorizations.)

The major difference of the Baker proposal from its predecessors is that it combines beneficial aspects of each. Normal agricultural, silvicultural, or ranching activities would be defined to exclude diking or major discharges of fill to bring an area of wetlands

into use. Moreover, EPA would have a role consistent with its responsibilities under FWPCA section 402.

IX. THE BAKER-RANDOLPH AMENDMENT

Although Senator Muskie expressed his desire to avoid any substantive modifications of FWPCA during the 94th Congress,⁹⁵ the Senate Public Works Committee met on August 25 and 26, 1976, to further discuss section 404. Senator Baker and Randolph presented a proposed section 404 amendment on August 26 which refined the original Baker amendment.⁹⁶ This new amendment would: (1) reduce the Corps' jurisdiction for issuing permits for disposal of dredged or fill material to its traditional jurisdiction under the Rivers and Harbors Act; (2) require that permits be obtained from EPA under section 402 of FWPCA for other point source discharges of dredged or fill material into any other navigable waters; (3) maintain the original definition of "navigable waters" and not define wetlands as a separate entity; (4) provide for exemptions from any permit requirement under sections 402 and 404 for discharges of fill in connection with certain activities (such as normal farming, forestry, and ranching practices; placement of fill in connection with all farm or stock ponds or irrigation ditches; and placement of fill in connection with farm, logging, or mining roads); (5) allow for the operation of the permit program by states which have permit program authority under section 402; and (6) provide for general

95. During the hearings before the Subcommittee on Environmental Pollution of the Committee on Public Works, regarding the allotment of water pollution funds, Senator Muskie stated:

The subcommittee has not had an opportunity to investigate [the amendment of section 404]. So we need to know whether it is essential that we deal with any of these issues this year.

[W]e have to be . . . realistic about gauging the legislative possibilities of dealing with a fairly wide range of controversial issues.

Frankly, it is my own instinct to . . . postpone the consideration of the [section 404 issue]. I am sure we will be more thorough and comprehensive next year.

Allotment of Water Pollution Control Construction Grant Funds: Hearings on S. 3037 Before the Subcomm. on Environmental Pollution of the Senate Comm. on Public Works, 94th Cong., 2d Sess. 94-H40 105-06 (1976) (opening statement of Senator Edmund S. Muskie).

96. The text of the Baker-Randolph amendment is at 122 CONG. REC. S15,166-68 (daily ed. Sept. 1, 1976).

permits for large classes of activities which have minor environmental effects.

The amendment passed by a vote of seven to six, defeating a Senate version of the Wright amendment proposed by Senator Bentsen. The Committee had already approved an alternative bill simply providing for EPA authorizations, leaving FWPCA intact in the event that the Senate rejected any substantive amendments to FWPCA.⁹⁷ Senator Muskie stated that, in the event the House and Senate failed to agree on the section 404 portion of the bill, this limited bill would serve as a backup.

The Senate passed the Baker-Randolph amendment by voice vote on September 1, 1976.⁹⁸ On the first vote the Wright amendment had been approved thirty-nine to thirty-eight but Senator Baker, who arrived late with Senator Pastore, forced reconsideration of the initial voice, resulting in its rejection.

As part of an agreement to assure passage of the Baker-Randolph amendment, proposed section 404(p) from the Administration's proposal had been recommended to Senator Randolph in a letter sent to him by the Secretary of Agriculture on August 31, 1976.⁹⁹ In this letter Secretary Butz stated that the Administration's proposed section 404(p) provided "assurances to farmers and ranchers that they will not be subject to burdensome regulation with threat of penalties" under FWPCA. The Secretary strongly urged that Senator Randolph consider the impact of "whatever language" is finally used so that undue restriction on farmers and ranchers would be avoided. Senator Huddleston offered language drafted by the Agriculture Committee to further expand the agricultural exemption. Following further debate, the Baker-Randolph amendment, as amended by Senator Huddleston, was passed.

The modified Baker-Randolph amendment as passed by the Senate provides for the amendment of section 402 of FWPCA by adding subsection one, which provides that discharges of dredged or fill material into navigable waters will have to be in compliance with section 402 except as provided in section 404. Section 402 permits for dredged or fill material discharges will have to be in compliance with, and subject to, the provisions of section 404.¹⁰⁰

97. See Wash. Post, Aug. 27, 1976, § A, at 2, col. 1.

98. 122 CONG. REC. S15,189 (daily ed. Sept. 1, 1976).

99. *Id.* at S15,178 (letter read by Sen. Tower).

100. *Id.* at S15,167.

Under the Baker-Randolph amendment, states can take over the permit authority for all of their respective waters by establishing approved programs for regulating the discharge of dredged or fill material. Such programs can be either separate from or a part of an NPDES program, and can be administered either separately or as a part of an NPDES program. Thus, delays in processing a state's NPDES application will be avoided where that state's parallel section 404 program is not approved by EPA. Furthermore, the established mechanism in section 402 for state assumption of permitting authority is already in place for use in approval of permit programs for dredged or fill material; EPA only has to amend guidelines under FWPCA section 304(h)(2) to establish the delegation requirements. EPA is given the authority to approve state programs for regulating discharges of dredged or fill material in all waters, and also maintains authority to assure compliance with guidelines in the issuance and enforcement of permits and in specifying disposal sites, as well as veto authority under section 404(c). Similarly, the Corps' responsibility for protecting navigation, apart from environmental concerns, is not affected or altered.¹⁰¹

Proposed section 402(1)(3)(A) of the Baker-Randolph amendment creates certain exemptions from sections 402 and 404 of FWPCA by characterizing six specified discharges as "non-point source" discharges. The exempted categories are: (1) normal farming, forestry, and ranching activities; (2) maintenance of currently servicable structures; (3) construction or maintenance of currently farm or stock ponds or irrigation ditches, or maintenance of drainage ditches; (4) construction or maintenance of silt or sediment

101. In his opening remarks at the September 1, 1976, hearing Senator Muskie stated: [The amendment] gets the Corps of Engineers out of the business of making environmental decisions in all but those portions of the navigable waters which relate to, are adjacent to, or contiguous with traditional and historical navigation. The corps' responsibility to protect navigability is recognized. The corps' inability to make environmental decisions is recognized.

The purpose of this legislation is to keep the corps in the navigation maintenance business and keep the Environmental Protection Agency in the environmental protection business.

Id. at S15,161-62.

The implication is that Senator Muskie did not intend so-called "Phase I" waters to be subject to state delegation. However, the Committee rejected the mean high water mark boundary for Phase I as environmentally and administratively unsound. *Id.* at S15,164 (Exhibit 1: Detailed Description of Committee Amendment). Thus, it seems clear that all of a state's waters are subject to the delegation provisions in the Baker-Randolph amendment.

control impoundments associated with mining operations as long as they comply with effluent limitations and guidelines under sections 301, 304(b), 304(c), and 307(a) of FWPCA; (5) construction or maintenance of farm or forest roads, or temporary roads for moving mining equipment, as long as the roads are constructed so as to maintain existing aquatic flow, circulation patterns, and chemical and biological characteristics, as well as maintaining the reach of the navigable waters and minimizing any adverse affect on the aquatic environment; and (6) disposal of dredged material "removed in maintaining a Federally authorized navigation channel or non-Federal access channels contiguous to the authorized project, in specified, confined disposal areas where such disposal areas are landward of the mean high water mark" ¹⁰²

A limitation on these exemptions is found in exemption six, where state program approval is a condition precedent to the exemption, and pollutants in any confined disposal area must not migrate to cause water or other environmental pollution. ¹⁰³

The Committee noted that the agricultural exemption will allow changing from one crop to another in lands in intensive agricultural use, and also stated that "normal" farming activities include the erection of buildings and the enhancement of drainage. ¹⁰⁴ On the one hand, the Committee seemed to support the preservation of extensive wetland areas, but they also seemed to be framing the exemption in such a way as to allow for extensive conversion of aquatic areas to dry land. Senator Baker stated that where an aquatic area has been placed in intensive agricultural use, drainage improvements to enhance the productivity of "that use" would qualify for exemption, and suggested that the term "that use" refers to crops or cultivation characteristics that are substantially the same. Although Senator Baker stated that converting a rice field to a dry land crop area, for example, would require a permit, the language of the amendment itself does not clearly compel this result. ¹⁰⁵

The Baker-Randolph amendment provides that all such exempted activities will only be considered non-point sources subject

102. *Id.* at S15,168. These discharges would therefore be subject to section 208.

103. *Id.*

104. *Id.* at S15,164-65 (Exhibit 1: Detailed Description of Committee Amendment).

105. *Id.* at S15,175 (statement of Sen. Baker).

to regulation under FWPCA sections 208¹⁰⁶ and 303(d) and (e).¹⁰⁷ The Committee felt that section 208 can best deal with such discharges.¹⁰⁸ This view could have the effect, however, of diffusing the existing section 208 program development by utilizing section 208 funds and by adding regulatory requirements.

The Baker-Randolph amendment restricts the exempted activities by requiring a permit for any placement or discharge of dredged or fill material incidental to dike construction or conversion of the navigable waters into a new farming, forestry, or ranching use, where the flow or circulation of navigable waters may be impaired or their reach reduced; furthermore, a permit is required for placement or discharge of dredged or fill material containing toxic pollutants. Such placement or discharge is also required to comply with sections 301,¹⁰⁹ 307(a),¹¹⁰ and 404(b)(1) and (c).¹¹¹

This restriction on the exemption was the Committee's attempt at preventing severe environmental abuses. However, requiring an exempt activity to have permits if the activity results in the introduction of toxic materials is a hollow safeguard if no mechanism is established to analyze such discharges at the time they are introduced into navigable water. For example, if dredged spoil containing the pesticide Mirex were discharged on dry land, and the land were later sold, it would be almost impossible to know the chemical content of that soil if it were then earmarked as potential fill material and discharged into certain navigable waters as part of an exempted activity. It might be impractical to keep lists of all land disposal sites for toxic materials, as is kept for ocean discharges of such materials. The duty of keeping lists would probably fall on the states, and compliance would vary in the absence of a requirement that such lists be kept as a condition precedent to approval of state permit programs.

The Committee felt that this restriction on exempted activities

106. 33 U.S.C. § 1288 (Supp. V 1975), which provides for areawide waste treatment management.

107. *Id.* § 1313(d), (e) (Supp. V 1975). Section 1313 is entitled, "Water quality standards and implementation plans." The provision of the amendment which designates exempted activities as non-point sources appears at 122 CONG. REC. S15,168 (daily ed. Sept. 1, 1976).

108. *Id.* at S15,165 (Exhibit 1: Detailed Description of Committee Amendments).

109. 33 U.S.C. § 1311 (Supp. V 1975). This section governs effluent limitations.

110. *Id.* § 1317(a) (Supp. V 1975). This section governs toxic and pretreatment effluent standards.

111. 122 CONG. REC. S15,168 (daily ed. Sept. 1, 1976).

would require a permit, for example, for the conversion of a hardwood swamp to intensive timber production by means of dikes or drainage construction.¹¹² Senator Randolph reiterated this belief when he stated that permits would be required for drainage ditches used to drain extensive wetland areas.¹¹³ Nevertheless, it is difficult to square this legislative history with other statements by the Committee that crop rotation on lands in intensive agricultural or forestry use would be allowed without a permit.¹¹⁴ It is not clear that an owner of a hardwood swamp would be prevented from increasing his harvesting of trees over time so that eventually his forestry use could be characterized as intensive. And if it were intensively used, it is by no means clear that he would be required to produce a permit to begin rotating his hardwood crop to another timber species requiring dry soil conditions for growth. Certainly, this type of crop rotation could take place if the intensive use were established before enactment of the Baker-Randolph amendment into law.

The Baker-Randolph amendment provides for general permit issuance for classes or categories of dredged or fill material discharges. Such discharges must be similar in type and cause only a minimally adverse environmental impact when performed separately or cumulatively.¹¹⁵ The mechanism used for the general permit¹¹⁶ is derived from the Corps' interim final regulations.¹¹⁷ The Committee stated that it intends for general permits to be used on a statewide or regionwide basis.¹¹⁸ While general permits are currently utilized under FWPCA sections 402 and 404, the Baker-Randolph proposal would underscore their importance by making specific provision for general permits in section 404 itself.

Senator Jackson asked whether a general permit could be revoked for an activity which had already begun, or whether revocation only affects new activities, particularly where the revocation occurs because the authorized activity "may have an effect which

112. *Id.* at S15,165 (Exhibit 1: Detailed Description of Committee Amendment).

113. *Id.* at S15,170 (remarks of Sen. Randolph).

114. *Id.* at S15,164 (Exhibit 1: Detailed Description of Committee Amendment).

115. *Id.* at S15,168.

116. 33 C.F.R. § 209.120(i)(2)(ix) (1976).

117. 40 C.F.R. § 230 (1976).

118. 122 CONG. REC. S15,165 (daily ed. Sept. 1, 1976) (Exhibit 1: Detailed Description of the Committee Amendment).

is more appropriate for consideration in individual permits."¹¹⁹ Re-stated, the question seemed to address any discharge which had been earmarked for a general permit but which, over a period of time, proved to have more dangerous environmental effects than were originally thought to exist. Senator Muskie's response, that only new activities would be subject to revocation, suggest that once a category is established only failure to comply with the requirements of the general permit would be grounds for revocation or modification. For example, if it were later determined that a particular general category had a greater adverse environmental effect than had previously been suspected, it is unclear whether the general permit could be modified or revoked on that basis alone. If not, a heavy burden is placed on the issuer of general permits to ascertain whether a certain class of activity could have an adverse effect great enough to warrant the requirement of an individual permit. Even if that adverse effect would only take place after three or four years, the activity would have to be individually permitted even though a general permit might suffice for a substantial period of time.

The Huddleston amendment to the Baker-Randolph amendment added a qualification to the limitation placed on exemptions. The limitation in the Baker-Randolph amendment requires permits for any exempted activity which brought into farming, forestry, or ranching use, any part of navigable waters not "previously subject" to that use.¹²⁰ The Huddleston amendment defines "previously subject" to mean all land used for farming, forestry, or ranching at the time of enactment as long as the discharge is limited to activities directly related to producing food, fiber, and forest products and as long as the discharge within those lands does not "preclude the development of new lands" for producing such products.¹²¹ This confusing language is an attempt to rewrite the Administration's proposed section 404(p), but in so doing the drafters obfuscated the clear meaning of the exemptions, particularly because of the ambiguity of the phrase "preclude the development of new lands." The language could be construed as granting the unlimited right to develop any navigable waters for the production of any food, fiber,

119. *Id.* at S15,182 (remarks of Sen. Jackson).

120. *Id.* at S15,168.

121. *Id.* at S15,185 (amendment proposed by Sen. Huddleston).

or forest products. Conversely, it could be argued that the construction of a permanent silo and storage facility in a now filled portion of formerly navigable water would require a permit because it would preclude those lands from being developed for producing food, fiber, or forest products.

The Baker-Randolph amendment provides that the Corps of Engineers personnel and facilities shall be available to EPA for implementing the new regulation of dredged or fill material under section 402.¹²² One reason for this provision is the Corps' established expertise in operating a permit program in navigable waters. It would, therefore, only be reasonable to provide EPA with the means to effect a transition of the section 404 responsibilities for waters lying landward of the Corps' traditional jurisdiction. Another rationale underlying this proposal is that EPA should be encouraged to use existing resources to implement the program since, as Senator Muskie often states, EPA's authority under section 402 to regulate the discharge of dredged or fill material in waters other than traditional navigable waters has always existed. Certainly there would be severe administrative problems in requiring EPA to rely on personnel from another agency (the Corps) to fulfill its section 404 responsibilities. The impact Senator Muskie's view could have on future authorizations for a section 402 program so enlarged is uncertain; EPA would require additional resources to effectively regulate discharges of dredged or fill material.

The final portion of the Baker-Randolph proposal amends section 404 of FWPCA to confine the jurisdiction of the Corps of Engineers to traditional navigable waters only.¹²³

One of the problems which concerned the Committee was the scope of review of applications for dredged or fill material discharge permits. The Senate Public Works Committee agreed with the Corps' interpretation that in a permit review under section 404, the Corps would have to examine "potential secondary impacts upon land, air and economic factors extraneous to the purpose" of FWPCA in addition to water quality concerns.¹²⁴ Therefore, by eliminating the Corps from the section 404 program in all but Phase I, and by making EPA responsible for permitting discharges through

122. *Id.* at S15,168.

123. *Id.*

124. *Id.* at S15,164 (Exhibit 1: Detailed Description of Committee Amendment).

the section 402 permit system, the Committee felt that the Baker-Randolph amendment would require EPA (under Phases II and III), and the states (potentially under Phases I, II, and III) to apply only the section 404(b)(1) water quality guidelines in issuing section 402 permits for discharges of dredged or fill material since such permits issued under section 402 would not be subject to a public interest review. In so structuring the scope of review the Committee was attempting to reduce the "impossible burden on the permitting authority" of having to perform a "public interest" review.¹²⁵

On September 7, 1976, representatives of the EPA, the Army, and the Department of Agriculture met at OMB to discuss the Huddleston modification of the Baker-Randolph amendment, and to determine the Administration's position. It was generally agreed that the Huddleston amendment was so confusing as to be practically meaningless. It was also decided that the Administration would recommend the inclusion of its own proposed section 404(p) in the Baker-Randolph amendment.

The Department of the Army on September 22, 1976, sent a letter to the Chairman of the Senate Public Works Committee reaffirming the Administration's support for its August 11, 1976, proposal. The letter stated that a broad jurisdiction over discharges of dredged or fill material is necessary for effective pollution control; and it recommended the inclusion of the Administration's proposed section 404(p), exempting farmers, foresters, and ranchers from permit requirements for many types of discharges.

With regard to the Baker-Randolph amendment, the letter stated that there are "strong arguments" for continuing the administration of the section 404 program by the Corps since it has already developed the "administrative structure and expertise" necessary to fulfill the purposes of FWPCA. The letter expressed the Administration's belief that the Corps should continue to regulate Phase I waters, and that delegation to the states of Phase I is "not now appropriate."

Having already made a positive public impact by recommending broad federal jurisdiction over waters for the purpose of effective pollution control, the Administration was now beginning to erode that position in several ways: (1) by placing the Corps in charge of Phases I, II, and III, section 402 of FWPCA may not be available to

125. *Id.*

regulate discharges of dredged or fill material; (2) EPA—the agency set up by Congress to make environmental decisions—would not be in charge of making all those decisions; (3) by providing for delegation to the states of only Phases II and III waters, many situations could arise involving duplicative federal and state regulation of discharges of dredged or fill material into waters lying within both Phase I and Phase II jurisdiction; and (4) the letter suggests that since the Corps would continue regulating Phase I waters in all events, and would regulate Phases II and III waters until delegated to the states, the Corps—not EPA—would be in charge of the delegation process.

These anomalous results would undo the carefully constructed Baker-Randolph delegation scheme which utilized the section 402 NPDES permit mechanism as a possible tool and would result in the Corps performing a “public interest” review. It would be unrealistic to assume that delegation of the NPDES and section 404 regulatory programs could easily be accomplished when two federal agencies would be applying two sets of standards in evaluating program acceptability. The Army’s letter was not accurate in giving assurances that the EPA’s role in developing guidelines for permit issuance and in holding a veto power over the specification of disposal sites fulfills its responsibilities of environmental leadership, since ongoing regulation of section 404-type discharges and selective delegation of that responsibility to the states determine in large part the extent of environmental degradation that will take place.

X. CONFERENCE COMMITTEE DEADLOCK

On September 22, 1976, the Senate and House met in conference to discuss section 404 and the Baker-Randolph and Wright bills passed by their respective bodies. Congressman Wright set the tone by stating that since his bill had received such an overwhelming vote, he would not compromise its provisions. In order to avoid holding up the entire bill, he suggested a moratorium on Phases II and III of the section 404 program. The Senate conferees counterproposed a one year moratorium with residual authority in the Administrator to seek injunctions for discharges that contain toxic materials or that would have an unacceptable effect on water quality.

When the conferees met the following day, Congressman Wright insisted on an indefinite moratorium with residual authority

for injunctions to stop discharges containing toxic materials. This was untenable to the Senate conferees, and no further consideration was given to amending section 404 during the 94th session of Congress.

XI. OUTLOOK AND RECOMMENDATIONS

The 95th Congress will undertake a massive revision of FWPCA. The most prudent course of action concerning section 404 would be to defer any substantive amendment until a time when full public hearings can be held. It would be advisable to give the section 404 program an opportunity to function longer than merely one year, so Congress will not find itself bound by the heretofore widely varying estimates of how burdensome the program might be.

EPA has spent much time questioning various farming, forestry, and ranching interest groups to identify their concerns. It is evident that the Administration's and others' proposals go much further than is necessary. The section 404 system would be rendered as manageable as any federal regulatory effort can be, by: (1) clarifying in section 404 what is and what is not a discharge of dredged or fill material (*i.e.*, specify those categories which always were exempt); (2) providing for general permits of *de minimis* discharges; and (3) providing that certain discharges of dredged or fill material be authorized by regulation. The Administrator has stated on numerous occasions that normal farming and ranching activities are not, and were never meant to be, regulated by section 404. The fears articulated by farmers and ranchers themselves have focused on their desires to freely perform these same nonincluded activities without regulation. The problem would seem to be solved. Where then, lies the controversy?

One problem area is the large corporate farm, whose activities often involve conversion of farmland to land for commercial or residential development. Although section 404 does not regulate "farmlands" as that term is generally understood, reclamation of wetlands into farmlands which then are developed into homesites is not an uncommon practice. The Department of Agriculture represents that its farming constituents are not involved in the types of large conversions which environmentalists fear would take place if the Administration's proposed bill were made law. EPA's enforcement experience, particularly in the Southeastern United States,

strongly suggests that rising land costs militate in favor of turning agricultural lands into homesites.¹²⁶

The recognized objective of Congress in the implementation of section 404 is to maintain broad jurisdiction to control pollution at its source and to limit the scope of regulatory coverage to activities that only significantly affect the environment. Therefore, it is unwise to extend exemptions beyond specific activities because this would release from regulation many types of discharges only vaguely connected with farming, forestry, or ranching practices. One might ask why a blanket exemption extended to such practices should not also be extended to land developers as well. Senator Dole has recommended including certain practices of other industries, such as the construction and beef cattle industries, in a clearly defined list of exempt activities.¹²⁷ Certainly one could argue that a builder of homes or condominiums is providing as beneficial a service as a producer of lumber for those buildings or a producer of food for the buildings' occupants; arguably, all of those activities would deserve equal protection from the requirements of federal regulations. Thus, the exemptions could eventually be construed to release from regulation those very activities which FWPCA was created to control.

Any lasting legislative solution to the problems in regulating discharges of dredged or fill material should focus on several key concepts. The first is that effective control of pollution can only be accomplished by going to the source of that pollution wherever it may be. Second, protection of our water must include more than protection of just that water where boats can float, or protection of just that water which has a visible flow and an obvious connection to interstate commerce. Since water moves in hydrologic cycles, real protection of water must include protection of the complete aquatic system. It is vital to recognize wetlands as "water" for the purposes

126. See *Need land? Then Take a Look at Marshland*, HOUSE AND HOME, April 1, 1958, at 146-52. On the potential of wetlands, this article states: "some of these are in areas close to towns that have been passed over while higher land all around has skyrocketed in price. Yet the marshy land can sometimes be bought and filled in for much less than the cost of surrounding land." *Id.* at 146. For a discussion of the effects of such construction, see OFFICE OF RESEARCH AND DEV., EPA, ECOLOGICAL RESEARCH SERIES, IMPACTS OF CONSTRUCTION ACTIVITIES IN WETLANDS OF THE UNITED STATES (EPA Doc. No. 600/3-76-045, 1976).

127. *Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Public Works, 94th Cong., 2d Sess. 34-35 (1976)* (statement of Sen. Dole).

of FWPCA. Such a legislative decision means that the ability to provide broad environmental safeguards exists if found to be necessary. As long as activities having *de minimis* effect on the environment can be identified, legislative and administrative means can be developed to allow them to continue without undue federal interference.¹²⁸

It is important to provide for appropriate state participation in regulating section 404-type discharges; however, a state delegation scheme should specify EPA as the agency responsible for program evaluation. Preliminary studies suggest that of those states which would seek to have a section 404 program only a small number would be equipped to operate one that is environmentally acceptable.¹²⁹ Moreover, many states with NPDES programs might be re-

128. Senator Bentsen has suggested that wetlands be protected as an entity separate from "waters" in a wetlands act.

129. ICWP/SSAC TASK FORCE ON NAVIGABLE WATERS, CORPS OF ENGINEERS INTERIOR SUMMARY REPORT OF THRESHOLD TESTS OF STATE REGULATORY PROGRAM (1976). This report was an effort to give early presentation of preliminary findings of a task force on navigable waters; the study is being conducted under contract with the Corps of Engineers. An interagency questionnaire was developed with two threshold tests to evaluate state responses. It was assumed that state programs can be considered similar to the Corps' program under section 404 if they meet the following criteria consisting of both thresholds:

- (1) program authorization has been derived from state legislation;
- (2) water quality is a major objective;
- (3) state program covers:
 - (A) in coastal states:
 - (a) salt water coastal areas,
 - (b) fresh water coastal areas,
 - (c) marshes, swamps, bogs, etc., and
 - (d) tidal wetlands.
 - (B) in Great Lakes states:
 - (a) fresh water coastal areas and
 - (b) marshes, swamps, bogs, etc.
 - (C) in non-Great Lakes and non-ocean states:
 - (a) marshes, swamps, bogs, etc.
- (4) the program's authority includes:
 - (a) issuance of denial of state permits with conditions or special limits, and
 - (b) detection of unauthorized activities, and
 - (c) enforcement of state permits.
- (5) the state considers the following factors in processing permit applications:
 - (a) water quality needs,
 - (b) cumulative environmental effects of similar and anticipated application request, and
 - (c) nine of the remaining factors as enumerated in the questionnaire -
 - (d) Item 13, "state coastal management plan federal approved or not" has also not been considered.

sistant to suggestions that they create another separate program for federal approval, or that they further burden their existing environmental resources by taking on new responsibilities. Nevertheless, state delegation criteria and standards should not be relaxed merely to make delegation more attractive or feasible.

In lieu of delegating section 404 responsibilities to all states, the municipal, county, and state governments should be urged to use their police powers to protect environmentally sensitive areas as an adjunct to federal regulatory control over discharges of dredged or fill material. In the case of wetlands, the establishment of wetland ordinances or wetland conservancy districts can limit intensive uses of those waters so as to minimize the impact of development, and can restrict the discharge of dredged or fill material.¹³⁰ Creation of buffer zones adjacent to wetlands also is a viable approach.¹³¹ State participation in protecting our water need not be at the expense of responsible environmental regulation.

Of all the proposals to alter the section 404 program, the Baker-Randolph bill is the most environmentally responsible. This proposal is sound because it: (1) recognizes the need for broad jurisdiction; (2) provides authority for delegation by EPA to the states all

- (6) public input should have been obtained through:
 - (a) required or discretionary public hearings, and
 - (b) public notices.
- (7) permits should be enforced by:
 - (a) permit processing agency, or
 - (b) other state agency, or
 - (c) local law enforcement agency.
- (8) the state defines criteria for placement of fill material.
- (9) wetlands have been defined for regulatory programs. (Threshold I consists of 1-7, and Threshold II consists of 1-9 above).

Out of all fifty states, the range of states meeting all nine requirements, which would give them programs considered similar to the Corps' program under section 404 is between six and eighteen. Of the twenty-six Coastal States, between nine and eleven would be so equipped. Of the eight Great Lakes States, five would be so equipped. The data is only preliminary, but it indicates that state delegation of the section 404 program will be difficult to achieve and will have to be carefully monitored by the EPA.

130. OFFICE OF RESEARCH AND DEV., EPA, SOCIOECONOMIC STUDIES SERIES, PERFORMANCE CONTROLS FOR SENSITIVE LANDS: A PRACTICAL GUIDE FOR LOCAL ADMINISTRATORS 193-95 (EPA Doc. No. 600/5-75-005, 1975).

131. *Id.* at 206-08. This concept may become particularly important since federal lands have been determined exempt from coverage in coastal zone management plans and regulatory processes. See letter from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, United States Department of Justice to William C. Brewer, Jr., General Counsel, National Oceanic and Atmospheric Administration, August 10, 1976.

those waters lying within their respective jurisdictions, with guidelines for such delegation paralleling the existing delegation scheme in FWPCA; (3) grants a limited exemption from permit requirements of various widespread but relatively harmless activities; and (4) provides for the general permitting of *de minimis* routine activities.

It can be argued that EPA is the appropriate federal agency to regulate dredged or fill material discharges since Congress has designated it as the protector of the environment. Moreover, if the Corps and Senate Public Works Committee are correct in assuming that Corps operation of the section 404 program requires a larger scope of review for permit application, Congress may have, in its own words, imposed an "impossible burden" on the Corps that could lead to what some legislators and environmentalists would perceive as ineffective environmental protection. One way for Congress to alleviate this "impossible burden" would be to give EPA the specific authority and resources to regulate dredged or fill material discharges under section 402. Furthermore, the NPDES permit and delegation scheme should be utilized because this would take advantage of an existing, effective system and also enhance the coordination of delegating both programs to the states. It is more likely that a state will seek to develop a responsible section 404-type program if there is the option to simply add dredged and fill material to the pollutants regulated under that states' section 402 program; the unique nature of dredged and fill material discharges could be incorporated in a section 402 permit procedure paralleling the existing section 404 scheme. Conversely, states which already have, or are seeking EPA approval of their NPDES program can avoid having to apply to the Corps for approval of their section 404 programs since state refusal to certify any discharge of dredged or fill material under FWPCA section 401 constitutes an effective veto. If the state program would, as suggested by the Administration's proposal, only encompass Phase II and III waters, the likelihood of states desiring the program would be further diminished. Furthermore, it is not difficult to imagine cases where one proposed discharge would take place in waters lying in both Phase I and Phase II, thereby creating administrative problems.

The concept of exempting activities from regulation under section 404 should be based on the effects that those activities have on water. Attempts to grant exemptions to all activities of specified

industries will certainly come under attack for violating the equal protection provision of the Constitution, and it would be difficult to justify such a blanket exemption in terms of the environmental impact of an industry's entire range of activities. If an industry has an activity that can be identified as having *de minimis* environmental effects, it either should be granted an authorization for that activity by regulation or granted a general permit for those relatively harmless activities. Corrections could be made any time activities are identified as belonging either within or without the authorized or generally permitted activity category.

Congress took a giant step forward when it enacted the body of environmental laws which are now in force. It has been said that Congress did not know what it wrote when it drafted FWPCA. In fact, several draftsmen themselves have stated in casual remarks that they never dreamed such interpretations would be given to the more limited meanings they had ascribed to their words. Nevertheless, environmental laws should have sufficient flexibility to accommodate expanding human knowledge and awareness. Short of unauthorized delegation of the legislative process, EPA has the necessary expertise to interpret these laws to make that accommodation possible. Section 404 itself was devised as an exception to an otherwise logical and consistent statutory scheme. By drafting exceptions to this exception, Congress and the Administration further risk creating a law that is neither realistic in design nor possible to administer.¹³² Using the general format mentioned above as a starting block, however, Congress could amend section 404 of FWPCA to be responsive to two necessary parts of the environment—people and water.

132. During this present congressional session, Senator Tower and Congressman Roberts have separately introduced virtually identical bills to amend FWPCA section 404. (S. 381, 95th Cong., 1st Sess., 123 CONG. REC. S1088-89 (daily ed. Jan. 19, 1977); H.R. 3199, 95th Cong., 1st Sess. § 16, 123 CONG. REC. H940 (daily ed. Feb. 7, 1977)). These bills closely parallel the Wright amendment, which was passed by the House during the 94th Congress. For an analysis of the provisions of the Wright amendment, see part VI of this article *supra*. The Roberts' bill was passed by the House on April 5, 1977.