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Section 404(f) of the Clean Water Act: Trench Warfare over Maintenance of Agricultural Drainage Ditches

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SECTION 404(f) OF THE CLEAN WATER ACT: TRENCH WARFARE OVER MAINTENANCE OF AGRICULTURAL DRAINAGE DITCHES

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INTRODUCTION

A. Description of the Problem

Not so long ago, most people viewed the construction of agricultural drainage ditches as a good thing. Ditch construction meant fewer mosquito-infested swamps, more land for farming and other intangible benefits to private property owners and to society in general.[1] But times have changed. Public opinion and the laws regarding drainage and the environment either prohibit or strongly discourage new construction of drainage ditches.[2] To many, increased drainage means decreased wetlands acreage. "No new construction" seems to be the current policy.

Law, policy and public opinion are much less clear, however, when maintenance rather than construction is involved. Should a farmer who wants to repair a previously constructed drainage ditch be exempt from stringent permit requirements? How should society and the law view ditch repair or maintenance that allows more effective drainage but, in turn, adversely affects ecologically valuable wetlands—particularly wetlands that have emerged or reemerged due to heavy rains and the silting in of poorly maintained drainage ditches? How should society balance the sometimes conflicting needs of agricultural production, protection of private property rights, and conservation of wetlands?

1. Harris, *Wetlands Management Under the Clean Water Act: Checking the Balances and Balancing the Checks*, 21 ENV'T REP. (BNA) 828, 828-29 (Aug. 24, 1990). For a discussion concerning the development of agricultural drainage in Minnesota, see Hanson, *Damming Agricultural Drainage: The Effect of Wetland Preservation and Federal Regulation on Agricultural Drainage in Minnesota*, 13 WM. MITCHELL L. REV. 135, 138-48 (1987).

2. Harris, *supra* note 1, at 828-29.

Section 404(f) of the Federal Water Pollution Control Act (commonly known as the Clean Water Act)[3] attempts to address some of these difficult issues. By enacting a limited exception from the individual permit requirement under sections 404(f)(1)(C) and 404(f)(2), Congress attempted to craft a delicately balanced compromise. Farmers can maintain existing drainage ditches without going through the rigorous section 404 permit process, but they cannot "construct" new ditches or "improve" existing ditches.[4] In addition, farmers lose their "maintenance" exemption if the proposed ditch work: (1) brings an area of the navigable waters into a new use, and (2) impairs the flow or circulation or reduces the reach of the navigable waters (including wetlands).[5]

Unfortunately, trench warfare rather than ditch repair is the frequent result of this compromise. The convoluted statutory provisions and regulatory guidance lead to battles among regulators, farmers, and politicians. Frequent flare-ups over the meanings of the terms "maintenance," "construction," "improvement," "change in use," and "reemerged wetlands" unfold first in the fields and then in the courtrooms[6] and the hearing rooms.[7]

B. Importance of the Issue

The issue is not merely academic. By 1981, Minnesota had lost 53% of its wetlands which includes part of the prairie pothole region found throughout the Midwest and Canada.[8] Many farmers, other property owners, and watershed or drainage districts are looking to maintain or improve their ditches.

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3. The Federal Water Pollution Control Act (FWPCA) was enacted in 1972 to address the problem of water pollution. FWPCA, Pub. L. No. 92-500, 86 Stat. 816 (1972). It has been amended several times since its enactment.

4. FWPCA, 33 U.S.C. § 1344(f)(1)(C) (1988) ("[T]he discharge of dredged or fill material . . . for the maintenance of drainage ditches . . . is not prohibited . . . .).

5. *Id.* § 1344(f)(2). For the text of this section, see *infra* text accompanying note 17.

6. *See, e.g., infra* text accompanying notes 52-54.

7. *See, e.g., infra* text accompanying notes 98-109.

8. FISH & WILDLIFE SERV., U.S. DEP'T OF THE INTERIOR, WETLANDS OF THE UNITED STATES: CURRENT STATUS AND RECENT TRENDS 34 (Mar. 1984), *reprinted in Status of the Nation's Wetlands and Laws Related Thereto: Hearings Before the Subcomm. on Water Resources of the Comm. on Public Works and Transportation, House of Representatives*, 101st Cong., 1st & 2d Sess., at 1276 (1991). This figure includes about nine million acres of prairie potholes that had been drained in Minnesota by 1981, primarily to create additional cropland. *Id.* at 42.

Permit procedures and expensive litigation, however, may prevent them from doing either.

Ditch repair may also be part of an "infrastructure ticking time bomb." Environmental and economic goals clash as farmers seek to put more land into production while regulators try to place more land into preservation trusts or put more restrictions on development and mitigation options. If this is to be the "decade of the environment" with an emphasis on preservation, what will become of our nation's "agricultural infrastructure"—the thousands of ditches, tile lines and other structures that sustain America's farming community? Will the next decade be the "decade of ditch repair"? If not, proponents of agricultural production and private property rights will have even greater cause for concern.

While this article does not analyze the takings issue,[9] one cannot ignore its importance. Increased takings claims are likely given the expanded interpretations of the definition of "wetlands,"[10] stricter mitigation and mitigation sequencing requirements,[11] the Administration's "no net loss of wetlands" goal,[12] and the impact of recent litigation.[13]

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9. Nor does this article analyze in detail other related issues involving Nationwide Permit No. 26, Section 10 permits under the Rivers and Harbors Act of 1899, Swampbuster and Conservative Reserve Program provisions in the 1985 and 1990 Farm Bills, President Bush's goal of "no net loss of wetlands," the *Federal Manual for Identifying and Delineating Jurisdictional Wetlands* (Jan. 1989), or the *Mitigation Memorandum* dated Feb. 20, 1990. Each subject could, in its own right, generate separate articles or treatises and, in many instances, already has. *See, e.g.*, W. WANT, LAW OF WETLANDS REGULATION (1991).

10. *See* FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS (Jan. 1989). EPA, the Corps, the Fish and Wildlife Service, and the Soil Conservation Service all participated in developing the manual. *See also* text accompanying notes 124-26.

11. *See generally Memorandum of Agreement Between the United States Army Corps of Engineers and the United States Environmental Protection Agency Concerning Wetlands Mitigation Required Under Section 404 of the Clean Water Act: Hearing before the Subcomm. on Investigation and Oversight of the House Comm. on Public Works and Transportation*, 101st Cong., 2nd Sess. (Feb. 20, 1990) [hereinafter *Mitigation Memorandum*].

12. *See* U.S. FISH & WILDLIFE SERV., U.S. DEP'T OF THE INTERIOR, WETLANDS: MEETING THE PRESIDENT'S CHALLENGE 11, 16-19 (1990) [hereinafter PRESIDENT'S CHALLENGE]. *See also infra* text accompanying notes 94-97.

13. *See, e.g., Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990) (Landowner brought suit claiming regulatory taking after being denied permit to fill landowner's property in wetland area.); *Florida Rock Indus., Inc. v. United States*, 21 Cl. Ct. 161 (1990) (Landowner brought suit claiming that denial of discharge permit for limestone mining constituted a taking.).

C. Outline of the Article

This article focuses on legal and policy issues involving the Clean Water Act's sections 404(f)(1)(C) and 404(f)(2) statutory exemption provisions, particularly their application under the August 17, 1987, Regulatory Guidance Letter No. 87-7 and a St. Paul, Minnesota U.S. Army Corps' of Engineers District Policy and its "51%/51% test." Part II provides a statutory and regulatory framework and includes a discussion of the relevant policies and a memoranda of agreement between the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA). Part III analyzes some of the issues already surfacing in litigation and congressional debate regarding sections 404(f)(1)(C) and 404(f)(2) and some potential "wildcards" contained in related provisions of the Clean Water Act, such as section 307(a) and section 401.

Part IV describes political, legislative and administrative prospects and proposals impacting the drainage ditch maintenance issue. Part V offers some concluding thoughts and recommendations to Congress and the regulatory agencies.

I. Statutory and Regulatory Framework

A. Statutory Provisions

1. Generally

The substance and legislative history of sections 404(f)(1) and 404(f)(2) reveal a complicated mix of political compromises regarding wetlands and agriculture policy goals. Congress enacted section 404(f) in 1977 as part of its midcourse corrections to the Clean Water Act and in response to public reaction following the Corps' expansion of its section 404 jurisdiction in the wake of the 1975 decision, *Natural Resources Defense Council, Inc. v. Callaway*.[14] Generally, section 404(f) reflects a trade-off between "geographic jurisdiction" and "activities jurisdiction." Opponents to expanded jurisdiction succeeded in getting exemptions for certain farming, forestry and ranching activities into section 404(f), but section

14. 392 F. Supp. 685, 686 (D.D.C. 1975) (finding that Congress had intended to assert federal jurisdiction "over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution"). *See* W. Want, Law of Wetlands Regulation § 2.02[3], at 2-8 to 2-10 (1991) (Extending Jurisdiction Above Mean High Water).

404's broad geographic jurisdiction was maintained.[15]

The resulting provisions in section 404(f) set up a two-part test for whether an applicant can avoid the often lengthy individual permit review process. Step one is to determine whether the activity falls within any one of six narrowly construed categories. Section 404(f)(1) embodies this test, stating:

> Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material [from activities specified in (A) through (F)] is not prohibited by or otherwise subject to regulation under this section or section [301(a)] or [402] of this [Act] (except for effluent standards or prohibitions under section [307] of this [Act]).[16]

Step two is to make sure the section 404(f)(1) exemption is not lost because of section 404(f)(2), commonly known as the "recapture clause," which states:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.[17]

The legislative history of section 404(f)(1) and the section 404(f)(2) recapture clause indicates a congressional intent to limit the applicability and environmental impacts of the section 404(f)(1) permit exemptions. Senator Muskie, a leading player in the final conference committee, asserts that the "[n]ew subsection 404(f) provides that Federal permits will

15. W. WANT, LAW OF WETLANDS REGULATION § 2.02[3], at 2-8 to 2-10 (1991); *The Move to Amend § 404 of FWPCA: House Passes Bill Limiting Federal Authority Over Dredge-and-Fill Activities*, 7 Envtl. L. Rep. (Envtl. L. Inst.) 10082, 10083 (May 1977).

In 1976 and 1977, the House passed amendments to the Clean Water Act restricting the geographic jurisdiction under section 404 to traditional navigable waters and adjacent wetlands. House negotiators failed to retain these provisions in conference with the Senate. However, members who opposed expanded jurisdiction prevailed in keeping permit exemptions for certain farming, silvicultural, and ranching activities. Thus, from these negotiations came the section 404(f) exemptions, now commonly known as the "normal farming" exemptions but covering far more than normal farming. They include minor drainage, construction and maintenance of various structures, Best Management Practices, and the maintenance of drainage ditches—the subject of this article. *See* W. WANT, LAW OF WETLANDS REGULATION § 2.02[3], at 2-8 to 2-10 (1991).

16. 33 U.S.C. § 1344(f)(1) (1988).

17. *Id.* § 1344(f)(2).

not be required for those narrowly defined activities that cause little or no adverse effects either individually or cumulatively."[18]

2. *Section 404(f)(1)*

Section 404(f)(1) exempts from the permit process only those activities listed in paragraphs (A) through (F). This includes, among other things, "normal farming" and "minor drainage" in (A), maintenance of certain currently serviceable structures in (B), construction or maintenance of certain ditches—the focus of this article—in (C), construction of temporary sediment basins in (D), construction and maintenance—in accordance with Best Management Practices—of certain farm or forest roads in (E), and certain activities in accordance with state-approved area-wide waste treatment plans pursuant to section 208(b) in (F).[19] Even if an activity fits within one of the six categories, however, its exempt status can be lost under section 404(f)(1) if the discharge includes toxic pollutants identified under section 307(a).[20]

Two of the more controversial categories are sections 404(f)(1)(A) and 404(f)(1)(C). Section 404(f)(1)(A) lists discharges of dredged or fill material "from normal farming, silviculture, and ranching activities, . . . minor drainage, harvesting . . . , or upland soil or water conservation practices."[21] Section 404(f)(1)(C) provides an exemption only for the "construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches."[22]

3. *Section 404(f)(2)*

The section 404(f)(2) recapture clause has two basic requirements: one regarding "new use" and the other regarding reduction in reach or the impairment of flow or circulation. While both must be met to trigger the recapture clause, the new use requirement provides the most problems and controversies—particularly in the context of section 404(f)(1)(C) drainage ditch maintenance. Courts have narrowly construed

18. CONG. REC. S19654 (daily ed. Dec. 15, 1977) (statement of Sen. Muskie).
19. 33 U.S.C. § 1344(f)(1)(A)-(F) (1988).
20. *Id.* § 1344(f)(1).
21. *Id.* § 1344(f)(1)(A).
22. *Id.* § 1344(f)(1)(C).

the section 404(f)(1) exemptions by finding proposed activities to be "new" under section 404(f)(2) rather than "normal" or continuing.[23]

B. *Regulations and Policies*

1. *Sections 404(f)(1) and 404(f)(2)*

Regulations regarding permissible discharges under section 404(f)(1), such as the normal farming and minor drainage exemption under section 404(f)(1)(a)[24] and regulations regarding recapture under section 404(f)(2),[25] supplement the statutory framework. However, detailed regulations under section 404(f)(1)(C), at least for drainage ditch maintenance, do not exist. Instead, section 404(f)(1)(C) regulations focus on the exemption for construction or maintenance of irrigation ditches.[26]

Corps and EPA regulations elaborate on the statutory exemptions set forth in section 404(f)(1)(A) through (F), focusing primarily on the controversial exemption for normal farming and minor drainage contained in section 404(f)(1)(A). The regulations interpreting section 404(f)(1)(A) require that eligible farming activities be part of established (i.e., ongoing) operations. The regulations' definition of minor drainage indicates that the minor drainage exemptions were not meant to apply to ditch maintenance activities covered by section 404(f)(1)(C).[27]

Although the regulations define "maintenance" and "emergency reconstruction," they do so only for purposes of section 404(f)(1)(B)'s exemption on currently serviceable structures.[28] Regulations pertaining to section 404(f)(1)(C) merely restate the statutory language and then include a few clarifying remarks on irrigation ditches. Importantly, these regulations—unlike the regulations pertaining to section 404(f)(1)(A)—do not contain an "ongoing" requirement. Thus, for drainage ditches, the inquiry regarding "ongoing maintenance" is rele-

23. *See, e.g., United States v. Akers*, 785 F.2d. 814, 819 (9th Cir.) ("We cannot view Akers' plowing, discing and seeding in isolation."), *cert. denied*, 479 U.S. 828 (1986). *See also* W. WANT, LAW OF WETLANDS REGULATION § 5.02[3], at 5-3 to 5-4 (1991).

24. 33 C.F.R. pt. 323 (1990) (Army Corps of Engineers' regulations).

25. 40 C.F.R. pt. 232 (1990) (EPA regulations).

26. 33 C.F.R. § 323.4(a)(1) (1990).

27. *Id.* § 323.4(a)(1)(iii)(C).

28. *Id.* § 323.4(a)(2).

vant only for purposes of the section 404(f)(2) change-in-use requirement.[29]

The regulations also elaborate on the section 404(f)(1) provision regarding toxic pollutants listed under section 307 of the Act. As described below, this seemingly little-used "toxics recapture provision" has the potential to become as controversial as the section 404(f)(2) recapture clause, depending on the size and character of section 307's list of toxic pollutants.

Finally, the regulations provide additional guidance regarding section 404(f)(2)'s own recapture clause. "Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration."[30]

2. *Regulatory Guidance Letter No. 87-7*

In Regulatory Guidance Letter No. 87-7 (RGL 87-7) dated August 17, 1987, EPA and the Corps provide more detailed guidance with respect to the section 404(f)(1)(C) and section 404(f)(2) drainage ditch maintenance issue. This joint effort between the two agencies[31] forms the backbone of their current regulatory approach.

RGL 87-7 provides important interpretations of key statutory and regulatory terms. However, even with subsequent guidance from the Corps, RGL 87-7 has not resolved the issues. Instead, it has prompted more litigation.[32]

RGL 87-7 interprets the term "maintenance" to mean the "physical preservation of the original, as built configuration of

29. U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 87-7 para. 5(c) (Aug. 17, 1987) [hereinafter RGL 87-7] (Section 404(f)(1)(C) Statutory Exemption for Drainage Ditch Maintenance) (on file at the *William Mitchell Law Review* office).

30. 33 C.F.R. § 323.4(c) (1990).

31. EPA and Corps of Engineers staff and officials in Washington spent several months ironing out the details of RGL 87-7. EPA Region 5 and the Corps' St. Paul District were also significantly involved in the dispute which, by some accounts, first arose in December 1985. Rep. Arlan Stangeland (R-MN), whose congressional district includes an abundance of drainage ditches, wetlands and prairie potholes, also played a key role. Discussions and redrafts of the RGL centered on (1) defining "maintenance" under section 404(f)(1)(C) by referring to either the ditch's original drainage capacity or its physical dimensions, (2) defining change in use, ongoing maintenance, and reestablished wetlands under section 404(f)(3) addressing evidentiary and burden of proof issues.

32. *See, e.g., infra* notes 52-54 and accompanying text.

the ditch."[33] The RGL also indicates that the District may consider issuing a general permit for sideslope alterations in order to allow Best Management Practices for water quality purposes.[34] The contemplated general permit would allow for construction of two foot to one foot (2:1) sideslopes as an environmental improvement over existing one foot to one foot (1:1) sideslopes.

Regarding section 404(f)(2), RGL 87-7 states that abandonment and new use determinations depend on case-by-case assessments which apply a "rule of reason" to the facts:

> For example, if an area has been farmed following ditch construction and an effort has been made to farm the land within the originally constructed ditch drainage area on a regular but not necessarily continuous basis, the fact that wetland vegetation has temporarily reestablished does not mean that a continuation of farming after ditch maintenance will result in bringing the area under a new use. That is, the temporary establishment of wetland vegetation within an area benefited by original ditch construction does not automatically mean that the use to which the area was previously subject should be considered "wetland." On the other hand, a discharge which results in the farming of wetlands for which there is no reasonable evidence that they were ever farmed or where farming was abandoned following original ditch construction, will be considered a new use even where such land was within the original drainage area. For the purposes of this paragraph, an area will not be considered abandoned where farming has occurred on a regular but not necessarily continuous basis.[35]

3. 51%/51% Test

The Corps' St. Paul, Minnesota District, in the "front line" of the "trench warfare" over drainage ditches, provided further guidance on RGL 87-7's maintenance and recapture issues in a District Policy issued in November 1987.[36] The

33. RGL 87-7, *supra* note 29, para. 5(a).

34. *Id.*

35. *Id.* para. 7(b).

36. St. Paul District, U.S. Army Corps of Engineers, District Policy on Section 404(f)(1)(c) Exemption (Nov. 19, 1987) [hereinafter District Policy] (on file at the *William Mitchell Law Review* office). This policy statement defines the scope and extent of the Corps' exemption for cleanout of ditches. The policy statement implements RGL 87-7, which was issued jointly by EPA and the Corps. *Id.*

guidance statement includes the so-called 51%/51% test for determining whether an area "has been subject to 'farming' on a '*regular* but *not continuous*' basis"—the RGL's key terms concerning the section 404(f)(2) new use classification.[37]

According to the District Policy, if credible evidence establishes that 51% of the current wetlands within the project area have been used for normal row cropping 51% of the time since construction of the original ditch, the project qualifies for the "maintenance" exemption and avoids the section 404(f)(2) abandonment classification.[38] The wetlands considered to be within the project area are all wetlands contiguous to and having a natural surface connection with the ditch system proposed for maintenance, including the wetland in which the project originates.[39]

The District Policy also clarifies that the section 404(f)(1)(C) "maintenance" exemption is applicable to all ditches—not just to ditches associated with agricultural, silvicultural or mining activities.[40] In addition, the Policy reaffirms that "maintenance" means "the physical rehabilitation or restoration of the ditch back to the original, 'as built' configuration" and that "[a]ll dimensions (bottom width and depth, top width and sideslopes) must be the same as when originally constructed."[41]

The District Policy also addresses the potential impacts of the statutory and regulatory provisions relating to toxic pollutants.[42] Given the current absence of an adequate data base identifying bodies of water containing toxic pollutants regulated by section 307(a) of the Clean Water Act, the District will presume that such pollutants do not exist and that the section 404(f)(1)(C) exemption is not overridden.[43] The District warns, however, that EPA may rebut the presumption and that the policy may change as bodies of water containing section 307(a) toxic pollutants are identified pursuant to the Water Quality Act of 1987.[44] Finally, according to the District Policy,

37. *Id.* para. 2(c) (emphasis in original); RGL 87-7, *supra* note 29, para. 7(b).
38. District Policy, *supra* note 36, para. 2(c).
39. *Id.*
40. *Id.* para. 2(a).
41. *Id.* para. 2(b).
42. *Id.* para. 4 (discussing the potential impacts of 33 C.F.R. § 323.4(b) (1990)).
43. *Id.* para. 4(a)(1).
44. *Id.* para. 4(a)(2).

the District will not test for the presence of toxic sediments at each ditch proposed for maintenance unless certain types of evidence establish a strong probability of toxic concentrations in the ditch or stream.[45]

4. *Geographic Jurisdiction and the Application of Section 404(f) Exemptions*

United States Attorney General Benjamin Civiletti issued an opinion in 1979 stating that the Administrator of the EPA has ultimate authority under the Clean Water Act to determine the geographic/jurisdictional scope of section 404 waters and to determine the application of section 404(f) exemptions.[46] A January 19, 1989, Memorandum of Agreement (MOA) between EPA and the Corps, while continuing to recognize EPA's status as lead agency, allocated various responsibilities between the two agencies for implementation of section 404(f).[47]

According to the MOA, the Corps, as the agency administering the section 404 permit program, would continue to perform the majority of section 404(f) determinations. However, EPA is to develop—with input from the Corps—all future guidance, interpretations, and regulations regarding exemptions.[48] The MOA also provides specific procedures regarding "special 404(f) matters"—circumstances where the EPA Regional Administrator rather than the Corps District Engineer is to make the final call in exemption determinations because "significant issues or technical difficulties" exist and "clarifying guidance is likely to be needed."[49]

II. Analysis

To determine whether a farmer is required to obtain a permit before repairing drainage ditches or whether a "maintenance" exemption applies, one must rely primarily on section

45. *Id.* para. 4(b).

46. Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act, 43 Op. Att'y Gen. 15 (1979).

47. Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act (Jan. 19, 1989) [hereinafter Geographic Jurisdiction] (on file at the *William Mitchell Law Review* office).

48. *Id.* at 1-2.

49. *Id.* at 2.

404(f)'s statutory and regulatory framework. Other Clean Water Act provisions, such as section 307[50] concerning toxic pollutants or section 401[51] concerning state water quality certifications, may also come into play.

Without further legislative, administrative, or judicial clarification, most questions will center on what the term "maintenance," found in section 404(f)(1)(C), means and on what constitutes a "change in use" according to section 404(f)(2). Both issues involve a complicated mix of legal, scientific and political considerations.

A. Section 404(f)(1)(C) Maintenance Issues

When is proposed work on a drainage ditch "maintenance" as opposed to "construction" or "improvement"? If the project involves constructing a new drainage ditch or expanding (i.e. improving) an existing ditch, the "maintenance" exemption does not apply and the project proponent must apply for a section 404 permit.

Even if the original depth and configuration of a ditch can be documented, should work qualify as "maintenance" if it returns the ditch to its original depth and bottom width but modifies the dimensions of the ditch's sideslopes? If 2:1 sideslopes, rather than a ditch's original 1:1 sideslopes, would result in less ditch bank erosion and siltation-loading downstream, should the law—as a matter of policy—encourage such work by either allowing it to qualify as "maintenance" or "quasi-maintenance" or by providing for an expedited review under some type of general permit? And, as a factual matter, would 2:1 sideslopes increase a ditch's drainage capacity so as to trigger the section 404(f)(2) recapture clause?

These questions raise scientific and evidentiary problems, legal and policy considerations.

1. Original, As Built Configuration

Section 404(f)(1)(C) and RGL 87-7 generate as many battles among water engineers, hydrologists and historians as they do among legal scholars. For example, two recent lawsuits, *United States v. County of Stearns*[52] and *United States v. Sargent County*

50. 33 U.S.C. § 1317 (1988) (Toxic and pretreatment effluent standards).
51. *Id.* § 1341 (Certification).
52. Civ. 3-89-616 (D. Minn. filed Sept. 20, 1989). The United States filed suit

Water Resource District,[53] center, to a large extent, on whether work completed on drainage ditches returned those ditches to their original dimensions. Both suits also involve the related determinations of whether the modifications increased the ditches' drainage capacity, an issue particularly relevant to section 404(f)(2) recapture clause inquiries.[54]

2. *Residesloping*

Residesloping proposals raise difficult policy and factual issues. A proposal to modify a drainage ditch by changing its existing sideslope from 1:1 to 2:1 would appear to involve construction or improvement rather than "maintenance." Such work would certainly change the ditch's physical dimensions. But would sideslope modification increase the drainage capacity of the ditch? Should the law encourage sideslope modification if it will reduce soil erosion and downstream water quality problems?

To date, no consensus has emerged in response to these questions. A recent proposal by the Corps' St. Paul District to issue a residesloping general permit—as suggested in RGL 87-7—generated so much controversy that the Corps decided to withdraw the proposal.[55] In addition, Judge Magnuson, in his March 15, 1990, memorandum and order in *County of Stearns*,

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against Stearns County, Minnesota, two excavation and engineering companies, and the State of Minnesota over alleged violations of sections 301 and 404 of the Clean Water Act. The case focuses on the applicability of section 404(f)(1)(C)'s ditch maintenance exemption and section 404(f)(2)'s recapture clause. Specifically, the United States alleges that defendants, without obtaining a permit, "reconstructed"—rather than maintained and repaired—a public drainage ditch with the purpose of bringing wetlands into a new use, adversely affecting 1300 acres of adjacent wetlands. Complaint at 6-7.

53. Civ. No. A3-88-175 (D.N.D. filed Oct. 4, 1988). In its Complaint against a North Dakota water resource district, the United States contends that the defendant "substantially reconstructed" a drainage ditch without a permit, thus violating section 301 and section 404. Complaint at 4-7. In its Answer, the defendant contends its activities qualified as maintenance under section 404(f)(1)(C). Answer at 4.

54. *See* Memorandum and Order at 11-13, United States v. County of Stearns, Civ. 3-89-616 (D. Minn. March 15, 1990) [hereinafter Order] (denying defendant's motion for summary judgment); Answer at 5-6, United States v. Sargent County, Civ. No. A3-88-175 (D.N.D. filed Oct. 4, 1988).

55. St. Paul District, U.S. Army Corps of Engineers, Cancellation of Proposed General Permit for the Alteration of Sideslopes During the Maintenance of Drainage Ditches (Mar. 31, 1988) (Public Notice CENCS-CO-RF) (on file at the *William Mitchell Law Review* office) (suspending staff review of general permit "[b]ecause of the apparent limited use of the general permit and the controversy generated in attempting to design suitable conditions").

concluded that 2:1 resideloping *did* fall within the section 404(f)(1)(C) definition of "maintenance," provided such work did not increase the ditch's drainage capacity.[56] Judge Magnuson cited improvements to water quality and the definition of "maintenance" under state law as bases for his decision.[57]

3. Relation to Sections 404(f)(1)(A) and 404(f)(1)(B)

To determine the meaning of "maintenance," the relationships among section 404(f)(1)(A), section 404(f)(1)(B), and section 404(f)(1)(C) must be examined. Neither the Corps' nor EPA's regulations on drainage ditches specifically defines "maintenance" or "ongoing farming" for purposes of section 404(f)(1)(C). Instead, the section 404(f)(1)(B) regulations provide a lengthy definition section[58] with a specific definition of "maintenance" for purposes of the currently serviceable structures exemption.[59]

The temptation to borrow various terms from sections 404(f)(1)(A) and 404(f)(1)(B) to define "maintenance" under 404(f)(1)(C) is great. For example, the section 404(f)(1)(A) regulations state that "[a]n operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrologic regime are necessary to resume operations."[60] And yet section 404(f)(1)(C) does not even contemplate an ongoing "maintenance" requirement. The question then is whether section 404(f)(1)(A)'s language becomes relevant for section 404(f)(2) recapture questions regarding section 404(f)(1)(C).

The section 404(f)(1)(B) regulations, which the United States relied upon in recent litigation,[61] state that "[m]aintenance does not include any modification that changes the character, scope, or size of the original fill de-

56. Order, *supra* note 54, at 12.

57. *Id.* at 11-13.

58. 33 C.F.R. § 323.4(a)(1)(iii) (1990).

59. *Id.* § 323.4(a)(2).

60. *Id.* § 323.4(a)(1)(ii).

61. *See* Reply Brief of Stearns County at 10-13, United States v. County of Stearns, Civ. 3-89-616 (D. Minn. filed Sept. 20, 1989) [hereinafter Reply Brief] (alleging that the United States misinterpreted and misapplied § 404(f)(1)(B)).

sign."[62] The defendant in *County of Stearns*, however, argues that such reliance is misplaced because the statute and the regulations clearly distinguish between the activities covered in section 404(f)(1)(B) and section 404(f)(1)(C).[63]

B. Section 404(f)(2) "Recapture" Issues

1. Change in Use, Abandonment and Reemerged Wetlands

Perhaps the most difficult and contentious aspect of the drainage ditch exemption is the determination of when to "cut-off" a property owner's ability to maintain or repair a ditch without a permit when wetlands have reemerged. Judge Magnuson, in *County of Stearns*, recognized this as a critical issue not yet addressed by any case law.[64]

Judge Magnuson was also critical of the United States's interpretation of the maintenance and recapture provisions:

> The United States would have the court read into the statute a doctrine analogous to the equitable doctrine of laches where the benefited landowners have not in fact disregarded their rights under state drainage law. Such an interpretation would, in effect, require frequent repair dredging with costs likely exceeding benefits. The only reasonable interpretation of the statute is that the county can restore an existing ditch to its original drainage capacity according to the latest and most environmentally sound methods.
>
> . . . .
>
> The court, in sum, concludes that the current EPA and Corps interpretation of the drainage ditch maintenance and recapture provisions are [sic] unsupported by cases interpreting other exemptions and, indeed, are [sic] so restrictive as to constitute the virtual administrative repeal of the ditch-maintenance exemption.[65]

The St. Paul District's 51%/51% test for section 404(f)(2) recapture has also received much criticism. In *County of Stearns*, Judge Magnuson states: "By focusing only on contiguous wetlands, it conflicts with [RGL 87-7's] command to focus on the previous and intended future use of the entire drained area."[66] Applicants seeking to meet the 51%/51% test are more likely

62. 33 C.F.R. § 323.4(a)(2) (1990).
63. Reply Brief, *supra* note 61, at 10-13.
64. Order, *supra* note 54, at 7.
65. *Id.* at 13, 18.
66. *Id.* at 13.

than not to fail because the area scrutinized does not include land throughout the drainage area, but is restricted to wetlands contiguous to the drainage ditch.

2. *Reduction in Reach, Impaired Circulation or Flow*

As with the section 404(f)(1)(C) determination on original ditch dimensions, the reduction in reach, impaired circulation or flow requirement of section 404(f)(2) depends largely on factual and historical documentation. Both this component and the change-in-use component must be met in order to trigger section 404(f)(2)'s recapture clause. However, the change-in-use aspect is far more controversial.[67]

3. *Purpose vs. Result*

A rarely addressed issue involves the section 404(f)(2) requirement that, to trigger the recapture clause, the *purpose* of the proposed activity must be to bring an area of the navigable waters into a new use. Apparently, both EPA and the Corps apply a *result*-oriented test rather than a purpose-oriented one. Instead of inquiring about the actual or constructive intent of the exemption applicant, the agencies look to the impacts of the proposed project.[68]

This approach seems logical given that the whole thrust of section 404(f)(2) is to restrict the section 404(f)(1) exemptions where unacceptable impacts to wetlands would occur. However, the statutory language expressly states that the inquiry is of the proposed activity's *purpose*—not its *effect*. Without further legislative guidance or change, one would expect that permit exemption applicants might contend that their proposed maintenance work is not intended to change any use of the navigable waters and that the agencies' result-oriented test is not supported by statutory language. Indeed, by focusing in its reply on the purpose of its proposed repair work, Stearns County, the defendant in *County of Stearns*, may be opening the

67. *See generally Status of the Nation's Wetlands and Laws Related Thereto: Hearings Before the Subcomm. on Water Resources of the Comm. on Public Works and Transportation, House of Representatives*, 101st Cong., 1st & 2d Sess. (1991) (Proceedings of Apr. 14, 1989 (St. Cloud, Minn.)).

68. *See* RGL 87-7, *supra* note 29, at para. 7 ("The discharge need only be 'incidental to' or 'part of' an activity that is intended to or *will foreseeably bring about that result.*" (emphasis added)).

door for further use of this type of argument.[69]

4. *Burden of Proof*

Apparently, some confusion exists under regulatory guidance and case law as to whether the government or the exemption applicant has the burden of proving the applicability of the section 404(f)(2) recapture provision, as well as the section 404(f)(1)(C) "maintenance" exemption. In *United States v. Larkins*,[70] the court stated clearly that the burden of proving a section 404(f) exemption shifts to the exemption applicant once the government has established a prima facie violation of section 301(a).[71] In a footnote, the court stated: "Although no court has ruled on which party bears the burden of proof when an exemption is claimed under 33 C.F.R. § 323.4, a review of federal cases reveals that the burden of proving an exemption to a regulatory statute is consistently placed on the party who claims the exemption."[72] The court then concluded: "Given the limited access [the government's] experts had to the Larkins's property and acknowledging the remedial nature of the Clean Water Act[,] . . . the burden of proving an exemption must fall on the defendants."[73]

However, in RGL 87-7, the Corps indicates a more complicated, middle-ground approach:

> In situations where the potential applicability of a proposed discharge to the exemption under Section 404(f)(1)(C) has been raised to the District, and where the District cannot make a determination due to a lack of pertinent factual information, it is incumbent on those seeking an exemption to provide the documentation necessary to establish the facts on a case-by-case basis.[74]

While RGL 87-7 makes clear that the ultimate burden of persuasion is on the exemption applicant, the RGL implies that the Corps District may have the initial burden of production—or at least that the Corps should make an initial effort to look

69. Reply Brief, *supra* note 61, at 20 (submitting "in the record testimony establishing that the *purpose* of the project is to maintain previous land use").

70. 657 F. Supp. 76 (W.D. Ky. 1987), *aff'd*, 852 F.2d 189 (6th Cir. 1988), *cert. denied*, 489 U.S. 1016 (1989).

71. *Id.* at 85.

72. *Id.* at 85 n.22.

73. *Id.*

74. RGL 87-7, *supra* note 29, at para. 8.

at pertinent factual information before turning to the exemption applicant. As a practical matter, in difficult cases the Corps will most likely shift the burden of proof to the exemption applicant after making an initial inquiry.

The Corps' St. Paul, Minnesota District has gone even further in placing the burden on exemption applicants. The November 19, 1987, District Policy expressly states that the exemption applicant has the responsibility of documenting the original capacity of the ditch for purposes of section 404(f)(1)(C).[75] This requirement is already generating some controversy and has surfaced as an issue in litigation.[76]

C. Other Provisions

1. Section 307(a) Toxics

The section 404(f)(1)(C) "maintenance" exemption is restricted by two recapture clauses: the most obvious in section 404(f)(2);[77] the least understood or used in section 404(f)(1) itself.[78] As described above, each of section 404(f)(l)'s six exempt categories[79] loses its special status if a prohibition in section 307 applies. The ditch work applicant may lose the otherwise applicable permit exemption if the Corps or EPA finds section 307(a) toxic pollutants present in ditch sediment or, apparently, even in downstream bodies of water.[80]

With increasing discoveries of toxic sediment contamination throughout the country, this little-known provision has the potential to block a substantial number of repair projects. The

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75. District Policy, *supra* note 36, at para. 2(b) ("Documentation of the original configuration of the ditch will be the responsibility of the applicant.").

76. *See, e.g.*, Reply Brief, *supra* note 61, at 20 ("Instead of offering testimony as to an increased capacity, the United States simply relies on the doubtful concept that Stearns County bears the burden of proof . . . .").

77. Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. § 1344(f)(2) (1988).

78. "[T]he discharge of dredged or fill material . . . is not prohibited . . . (except for effluent standards or prohibitions under section [307] of this title)." *Id.* § 1344(f)(1).

79. *See supra* text accompanying note 19.

80. *See* District Policy, *supra* note 36, para. 4 (stating, however, that "[p]resently, an adequate data base does not exist to identify those waterbodies where the presence of priority pollutants enumerated in Section 307(a) are present in ditch sediments in sufficient concentrations to disqualify the ditch maintenance exemption").

section 307 restriction will grow in importance as states become more sophisticated in their identification of section 304(*l*) toxic bodies of water,[81] in their development of section 319 nonpoint source management programs,[82] and in their responses to toxic pollutants generally.

Difficult legal and policy issues are already beginning to surface. For example, what, if any, threshold exists to determine if toxic pollutants are present? Corps' regulations on individual permits refer only to the presence of toxic pollutants.[83] Corps' regulations relating to nationwide permits,[84] however, refer to the presence of toxic pollutants in toxic amounts. Which should control?

The St. Paul District's November 1987 District Policy on the 51%/51% test[85] and other aspects of section 404(f)(1) and section 404(f)(2)[86] raises additional issues. Is the Corps acting properly by presuming an absence of toxic pollutants and by refraining from sediment testing except when "strong, credible evidence" suggests it act otherwise?[87] If the Corps finds toxic sediments downstream, will it automatically invoke the section 404(f)(1) toxics recapture clause or will it apply some type of reasonable nexus or physical proximity requirement? For example, when section 307(a) toxics appear twenty miles downstream from the ditch repair site, should that prevent the use of the section 404(f)(1)(C) exemption?

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81. *Id. See also* 33 U.S.C. § 1314(*l*) (1988).

82. 33 U.S.C. § 1329 (1988).

83. 33 C.F.R. § 323.4(b) (1990). "If any discharge of dredged or fill material . . . contains *any* toxic pollutant listed under section 307, . . . such discharge shall . . . require a Section 404 permit." *Id.* (emphasis added).

84. *Id.* § 330.5(b)(5).

> The following special conditions must be followed in order for the nationwide permits . . . to be valid:
>
> . . . .
>
> (5) That any discharge of dredged or fill material shall consist of suitable material free from toxic pollutants . . . *in toxic amounts* . . . .

Id. (emphasis added).

85. District Policy, *supra* note 36, para. 2(c). For a discussion of the 51%/51% test, see *supra* text accompanying notes 36-39.

86. For a discussion of additional issues raised by the District Policy, see *supra* text accompanying notes 40-45.

87. District Policy, *supra* note 36, para. 4 ("Pending the identification of waterbodies contaminated by Section 307(a) priority pollutants, testing of sediments will not be required . . . unless credible evidence establishes a strong probability that toxic concentrations are present . . . .").

2. State Role

States may hold an even larger "wildcard" in determining the fate of section 404(f)(1) and section 404(f)(2). State wetlands and drainage laws, such as those in Minnesota, currently play a significant role in wetlands regulation.[88] The importance of state wetlands and drainage laws can only increase as Congress and others consider and become more supportive of proposals to delegate authority for wetlands regulation to the states.[89]

Even if Congress and the states do not pursue the delegation approach, states already have substantial leverage over the section 404 program, including sections 404(f)(1) and (2), through section 401 of the Clean Water Act.[90] Section 401 provides authority for states to, in effect, veto permits or licenses by refusing to issue water quality certifications.[91] In most cases, these decisions depend heavily on the state's water quality standards.

In a handbook dated April 1989, *Wetlands and 401 Certification: Opportunities and Guidelines for States and Eligible Indian Tribes*, EPA reiterates the importance of section 401 in protecting wetlands.[92] The agency also recommends that states actively

88. *See generally*, Hanson, *supra* note 1.

89. *See, e.g.*, THE CONSERVATION FOUNDATION, PROTECTING AMERICA'S WETLANDS: AN ACTION AGENDA 5 (1988) [hereinafter PROTECTING AMERICA'S WETLANDS] (recommending delegation of "primary responsibility for all wetlands regulation to qualified states, so long as they have the authority and capability necessary to achieve the proposed wetlands protection goal and have undertaken state Wetlands Conservation Plans indicating how they will do so"). *See also* Houck, *More Net Loss of Wetlands: The Army-EPA Memorandum of Agreement on Mitigation Under the § 404 Program*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10212, 10213-14 (June 1990). Houck states that environmental and industrial/developmental members of the National Wetlands Policy Forum agreed to a compromise: "Delegation of the § 404 program to the states would be facilitated to conciliate development interests, and in return, all would agree to a national policy of no net loss of wetlands." *Id.* at 10214 (footnotes omitted). *But see* Wood, *The Forum's Proposal to Delegate § 404 to the States: A Bad Deal for Wetlands*, NAT'L WETLANDS NEWSL., July-Aug. 1989, at 2 (Delegation of the § 404 program to the states "if adopted, could seriously weaken—or largely destroy—the one federal program which now provides a substantial amount of protection for wetlands in most regions of the United States, and which can *potentially* provide highly effective wetlands protection nationwide.").

90. 33 U.S.C. § 1341 (1988) (Certification).

91. *Id.*

92. OFFICE OF WATER, U.S. ENVIRONMENTAL PROTECTION AGENCY, WETLANDS AND 401 CERTIFICATION: OPPORTUNITIES AND GUIDELINES FOR STATES AND ELIGIBLE INDIAN TRIBES 9-10 (Apr. 1989). The water quality certification process of section 401 may be the only way states without a wetlands regulatory program can protect

pursue expanded use of section 401, incorporate wetlands into the definition of state waters, and develop specific water quality standards for wetlands—just as for other bodies of water.[93]

III. Proposals and Prospects

A. Political

Any discussion of section 404 issues, including section 404(f)(1) and section 404(f)(2), should certainly address recent political developments, including President Bush's "no net loss of wetlands" goal and the August 9, 1991, press release on implementation,[94] the White House Domestic Policy Council's Interagency Task Force on Wetlands,[95] the consensus recommendations by the National Wetlands Policy Forum,[96] growing discontent among farmers and private property owners, and the twentieth anniversary of Earth Day (April 22, 1990). These developments dramatically increased public awareness of wetlands protection and contributed to the creation of a highly volatile and unpredictable regulatory climate.

The often-cited but rarely defined "no net loss of wetlands" goal and the possibility of a commonly agreed upon definition

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state wetlands. The section 401 certification requirements may be more stringent that a state's certification requirements. The state cannot, however, use this process to limit activities which do not require a federal license or permit. *Id.*

93. *Id.* at 38.

94. *See* President's Challenge, *supra* note 12, at 11, 16-19. On August 9, 1991, President Bush also announced a comprehensive plan for wetlands acquisition, protection, and regulatory reform. Highlights include revising the 1989 *Federal Manual for Identifying and Delineating Jurisdictional Wetlands*, "streamlining" the permitting process, and establishing an interagency technical committee to pursue wetlands categorization and mitigation banking opportunities. [Pres. Docs]

95. *See Memorandum of Agreement Between the United States Army Corps of Engineers and the United States Environmental Protection Agency Concerning Wetlands Mitigation Required Under Section 404 of the Clean Water Act: Hearing Before the Subcomm. on Investigations and Oversight of the Comm. on Public Works and Transportation, House of Representatives*, 101st Cong., 2d Sess. (Feb. 20, 1990) (statement of LaJuana S. Wilcher, Asst. Admin. for Water, EPA) ("We expect the Domestic Policy Council (DPC) Interagency Task Force on Wetlands will promptly pursue the definition of a 'no net loss' policy and the development of recommendations for attainment of the goal of 'no net loss' of the Nation's wetlands.").

96. *See* Protecting America's Wetlands, *supra* note 89 (This publication is the final report of the National Wetlands Policy Forum.). *See generally Status of the Nation's Wetlands and Laws Related Thereto: Hearings Before the Subcomm. on Water Resources of the Comm. on Public Works and Transportation, House of Representatives*, 101st Cong., 1st & 2d Sess. (1991) (Proceedings of Feb. 27, 1990 (Washington, D.C.)) (discussing the National Wetlands Policy Forum recommendations).

of wetlands may be the most important variables at this point. If the President, the agencies and Congress can agree on details, the "no net loss" goal and a wetlands definition will surely become even greater driving forces, determining the fate of section 404(f) and the scope of section 404's coverage of agricultural drainage.[97]

B. Legislative

Congress has recently focused on section 404(f) and its effects on agricultural activities. This has occurred primarily in the context of the 1990 Farm Bill[98] and proposed changes to the Corps' and EPA's regulation of wetlands—particularly the section 404(f)(1)(A) normal farming exemption.[99]

Several other legislative proposals involving agricultural drainage and the section 404(f) exemptions have emerged recently. Interestingly, the Final Report of the National Wetlands Policy Forum, *Protecting America's Wetlands: An Action*

97. At the close of the 101st Congress, leaders of the House and Senate Committees and various wetlands task forces seemed to agree that comprehensive wetlands regulatory reform would be high on their agendas for the 102nd Congress. Prior to adjourning, however, the House and Senate included significant provisions on wetlands in S. 2740, the Water Resources Development Act of 1990, Pub. L. No. 101-640, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 4604. Section 307 of the Water Resources Development Act of 1990 establishes an interim goal of "no overall net loss of the Nation's remaining wetlands base" and a long term goal of "net gain." *Id.* at 4635. For the Administration's more recent plans to implement its "no net loss" goal, see *supra* note 94.

98. Food, Agricultural, Conservation and Trade Act of 1990, Pub. L. No. 101-624, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 3359 (originally known as the 1990 Farm Bill).

The 51%/51% test is not the only recent controversial proposal attempting to provide a bright-line test for wetlands protection and previous farming use. For a discussion of the 51%/51% test, see *supra* text accompanying notes 36-41. During congressional debate over Swampbuster provisions in the 1990 Farm Bill, some members championed what became known as the 6/10 year amendment. It clarified which wetlands were exempt from Swampbuster sanctions because of the "prior converted use" exception. Generally, if a property owner farmed the wetland six out of the last ten years, the wetland would continue to qualify for the prior converted use exemption and would not be subject to Swampbuster sanctions.

Like the 51%/51% test, the 6/10 year rule tried to answer difficult questions involving reemerged wetlands, "ongoing" farming or maintenance, and abandonment. Interestingly, the 6/10 year rule generated enormous controversy because of its potential, adverse impact on prairie potholes. Members in the House and Senate deleted it from their bills during Committee deliberations. One wonders if the same result might occur if members of Congress turned their attention to the Corps' internally developed 51%/51% test.

99. *See infra* test accompanying notes 111-12.

Agenda, recommended expansion of section 404 program's jurisdiction to include agricultural drainage activities while, in what appears to reflect a compromise, recommending against changing the existing section 404(f)(1) exemptions.[100] Apparently, the negotiations involved an effort to target agricultural drainage, a leading cause of wetlands' loss, while continuing to give farmers and others some limited relief from section 404's "burdensome" regulations.[101]

The 101st Congress also saw a flurry of hearings, bills, and amendments addressing section 404(f)(1)(C) and section 404(f)(2) issues. For example, the House Public Works and Transportation Committee's Subcommittee on Water Resources held a full day of hearings in St. Cloud, Minnesota, solely on the regulation of agricultural drainage ditches and section 404(f).[102] Several bills addressing the issue of agricultural drainage regulation were introduced.[103] None passed the House or Senate, but their introduction indicates an increasing momentum for change.

Representative Bill Alexander (D-AR) introduced, but was unsuccessful in passing, legislation containing expansive permit exemptions for farmers.[104] The bill would exempt from

100. PROTECTING AMERICA'S WETLANDS, *supra* note 89, at 44-47.

101. Telephone interviews with Forum participants, including David Barrows, Assistant for Regulatory Affairs, Office of the Assistant Secretary of the Army (Civil Works) (Oct. 1990).

Agriculture accounted for 87% of wetland conversions between 1954 and 1974. PRESIDENT'S CHALLENGE, *supra* note 12, at 19.

102. *See Status of the Nation's Wetlands and Laws Related Thereto: Hearings Before the Subcomm. on Water Resources of the Comm. on Public Works and Transportation, House of Representatives*, 101st Cong., 1st & 2d Sess. (1991) (Proceedings of Apr. 14, 1989 (St. Cloud, Minn.)).

103. Mitigation banking, for instance, was a controversial item in the House-Senate conference negotiations involving the House version of the Water Resources Development Act of 1990, Pub. L. No. 101-640, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 4604. Apparently some, including several environmental groups, were concerned that mitigation banking would create a loophole, allowing permit applicants to avoid section 404(b)(1) guidelines and the *Mitigation Memorandum*'s sequencing requirements by proceeding with projects while promising future off-site compensation. At the very least, some felt such a program was premature and it was omitted from the bill that was eventually signed by the President. B. Grumbles, Wetlands Legislation in the 101st and 102nd Congresses 2 (unpublished manuscript) (submitted for the 6th Annual Conference on Wetlands Law and Regulation) (on file at the *William Mitchell Law Review* office). *See also Mitigation Memorandum*, *supra* note 11.

104. Rep. Alexander offered the text of his bill, H.R. 4133, as an amendment to the Water Resources Development Act of 1990, Pub. L. No. 101-640, 1990 U.S.

the entire section 404 process the discharge of dredged or fill material into wetlands that have been used for "agricultural production" in the last two years and for at least one year since the enactment of the Clean Water Act in 1972.[105] "Agricultural production" is defined to cover a long list of activities, including all those already listed in section 404(f)(1) of the Act.[106]

The 102nd Congress is focusing even more attention on wetlands, including legislative revisions to section 404(f). On the opening day of the First Session, Representative John Paul Hammerschmidt (R-AR) introduced H.R. 404, the Wetlands Protection and Regulatory Reform Act of 1991, that, among other things, substantially expands the section 404(f)(1) exemptions and narrows the applicability of the section 404(f)(2) recapture clause.[107]

The bill clarifies that certain resideloping practices qualify as "maintenance" under section 404(f)(1)(C)'s permit exemption. The bill inserts into the statute a parenthetical phrase to clarify that "ditch maintenance" includes "minor redesign and other engineering modifications intended to minimize any adverse environmental impacts."[108] H.R. 404 provides no further definitions of or guidance on the parenthetical's terms.

The bill, however, provides additional "regulatory relief" by restricting the scope of section 404(f)(2). H.R. 404 states that the recapture clause does not apply to certain activities approved by appropriate state agencies. These activities include,

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CODE CONG. & ADMIN. NEWS (104 Stat.) 4604. Anticipating the Parliamentarian would rule his proposed regulatory change to the Act as nongermane to the Corps' water projects bill, Rep. Alexander reluctantly withdrew his amendment. 136 CONG. REC. H8139-40 (daily ed. Sept. 26, 1990) (debate on H.R. 5314).

105. H.R. 4133, 101st Cong., 2d Sess. (1990).

106. *Id.* In addition to those activities identified in section 404(f)(1), "agricultural production" includes, but is not limited to:

> production of row crops; horticulture; vintniculture; silviculture; aquaculture; mariculture; grazing; haying; apiculture; hydroponics; production of tree fruits or nuts; raising of cattle, horses, poultry, swine, sheep, goats and other livestock; storage of surface water for agricultural production; distribution of water for agricultural production; conserving uses required as a condition of enrollment in an acreage reduction program . . . and the construction, expansion, improvement, maintenance and operation of farm residences and facilities.

Id.

107. 137 CONG. REC. E55 (daily ed. Jan. 3, 1991) (statement of Rep. Hammerschmidt on introducing H.R. 404).

108. H.R. 404, 102nd Cong., 1st Sess. § 7(b) (1991).

among other things, normally accepted agricultural practices, normal crop rotation practices, and new technologies in the agricultural community, including ditch maintenance.[109]

C. *Administrative*

EPA and the Corps are either planning or have recently completed several significant initiatives which will affect the drainage ditch debate. In January 1989, for example, the Corps and EPA released two Memoranda of Agreement on jurisdiction and enforcement that specifically relate to special section 404(f) matters and that will apply to any ditch permit or violation. What remains to be seen is how the implementation provision on special section 404(f) matters will affect sections 404(f)(1)(C) and 404(f)(2). Recent congressional testimony by EPA also indicates a desire to provide increased attention to, and guidance on, the section 404(f)(1) exemptions.[110]

Prompted by proposed legislation in the Senate, EPA and the Corps jointly released a May 3, 1990, Memorandum for the Field on Section 404 and Agriculture.[111] The Memorandum clarifies "normal farming activities" under section 404(f)(1)(A) and the section 404(f)(2) recapture provision, particularly as applied to rice levees and catfish ponds.[112]

One of the most important and controversial administrative developments is the Corps' September 26, 1990, regulatory guidance letter (RGL 90-7) regarding "prior converted cropland."[113] RGL 90-7 exempts areas converted from wetland to cropland prior to December 23, 1985, from section 404 jurisdiction. The RGL distinguishes between "prior converted

109. *Id.*

110. *See generally Status of the Nation's Wetlands and Laws Related Thereto: Hearings Before the Subcomm. on Water Resources of the Comm. on Public Works and Transportation, House of Representatives*, 101st Cong., 1st & 2d Sess. (1991) (Proceedings of Apr. 12, 1989 (Washington, D.C.)) (statement and submitted written answers of William Reilly, Administrator of EPA).

111. 136 CONG. REC. S5643-44 (daily ed. May 3, 1990) (statement of Sen. Burdick announcing issuance of the memorandum).

112. EPA, Office of Water, Dep't of the Army, Memorandum for the Field (May 3, 1990) (concerning Clean Water Act Section 404 Regulatory Program and Agricultural Activities), *reprinted in* 136 CONG. REC. S5644, S5645 (daily ed. May 3, 1990).

113. U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 90-7 (Sept. 26, 1990) [hereinafter RGL 90-7] (Clarification of the Phrase "Normal Circumstances" as it Pertains to Cropped Wetlands) (on file at the *William Mitchell Law Review* office).

cropland"—now exempt from section 404 coverage—and "farmed wetland"—areas manipulated for farming purposes that still exhibit enough wetland characteristics to merit section 404 protection.[114]

RGL 90-7 relies on a five-year test used with the Swampbuster provision[115] of the Food Security Act to define "maintenance" and to determine when wetlands have reemerged. If the farmer does not maintain the cropland for five years and wetlands reemerge, the land is subject to section 404 permit requirements, unless it is used for certain activities which are exempt under section 404(f).[116]

Obviously, RGL 90-7 is significant for purposes of section 404 coverage and agricultural wetlands generally. Some estimate between twenty and sixty million acres in the United States will now fall outside the scope of section 404's protections.[117] RGL 90-7, however, may also have a profound impact on specific exemptions in section 404(f). The drainage ditch "maintenance" provisions in section 404(f)(1)(C) and section 404(f)(2) may have less importance. For example, if the area adjacent to a ditch in need of repair is now considered a prior converted cropland rather than a wetland, section 404 jurisdiction does not exist and the farmer need not go through the lengthy section 404(f)(1)(C) and section 404(f)(2) analyses.

What remains unclear, however, is the relation between the provisions in RGL 90-7 and the provisions in RGL 87-7 concerning "maintenance" and reemerged wetlands. RGL 90-7 does not explicitly extend its five-year test to the drainage ditch repair work contemplated in RGL 87-7, which has its own

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114. *Id.* para. 5(a).

The U.S. Fish and Wildlife Service pledges to work with the Soil Conservation Service "to ensure that areas that still retain wetland characteristics will not be identified as 'prior converted cropland' under section 512.15(a)(3) of the National Food Security Act Manual." *President's Challenge, supra* note 12, at 23. The Service also plans to "[e]ncourage the Department of Agriculture to modify the definition of abandonment in the National Food Security Act Manual such that if after five years no agricultural commodity is produced on an area, and the area meets the definition for wetland in the Food Security Act, then these areas should be classified as wetlands." *Id.*

115. Food Security Act of 1985, 16 U.S.C. § 3821 (1988). The Swampbuster provision eliminates Department of Agriculture financial assistance to farmers who produce agricultural products on lands that have been converted from wetlands. *Id.*

116. RGL 90-7, *supra* note 113, para. 5(e).

117. *Sixty Million Farm Acres Lose Wetlands Protection Status*, Wash. Post, Oct. 1, 1990, at A2.

test. However, increasing recognition and use of a five-year "maintenance" test may lead to the eventual demise of RGL 87-7's more complicated test. The St. Paul District's 51%/51% test seems particularly vulnerable.

Another outgrowth of the ongoing debate over agricultural wetlands may be the proliferation of statewide and regional general permits. For example, on August 9, 1990, the Corps' Little Rock, Arkansas District issued a statewide general permit for miscellaneous activities associated with normal agricultural use of "prior converted" wetlands (croplands).[118]

This general permit directly affects the already complicated relationship between Swampbuster and section 404 regulations—particularly section 404(f)(1)(A), section 404(f)(1)(C) and section 404(f)(2). The permit specifically covers activities such as "the construction and/or cleanout of drainage ditches when the ditch or ditches are located entirely on and completely surrounded by Prior Converted Cropland" and the "filling in of existing drainage or irrigation ditches on Prior Converted Cropland."[119]

The general permit, however, does not authorize any work in "farmed wetlands" or other wetland areas. The permit also prohibits construction of drainage ditches "if the ditches would cause the drainage of wetlands other than prior converted croplands."[120]

Another recent administrative proposal, calling for dramatically increased section 404 permit "user" fees, underscores the importance of the section 404(f) exemptions. On October 11, 1990, the Corps proposed to increase fees for section 404 permit evaluations and to add fees for making wetlands jurisdictional delineations, holding public hearings, and preparing or reviewing environmental impact statements (EISs).[121] Standard permit fees for commercial activities would rise from $100 to $2,000, while those for noncommercial activities would rise from $10 to $500. A thirty percent surcharge would be added in each instance for after-the-fact permits. The Corps' proposal also recommends new fees for wetlands de-

118. Little Rock District, U.S. Army Corps of Engineers, General Permit W-D-050-03-GZ (Aug. 9, 1990).

119. *Id.* at 2.

120. *Id.* at 6.

121. 55 Fed. Reg. 41,354 (1990) (to be codified at 33 C.F.R. pt. 325) (proposed Oct. 11, 1990).

lineations (on a graduated scale which could easily exceed $1500), public hearings ($1000 per hearing), and preparation or review of EISs (actual costs for Corps' review or $5000 to review an applicant's EIS).[122]

These controversial recommendations are unlikely to take effect in the near future, particularly in light of recent legislative activities.[123] Even so, they highlight the importance of the section 404(f) exemptions. The need for the Corps to give reasonable interpretations to section 404(f)(1)(C) and section 404(f)(2) becomes even greater. The stakes were already high for ditch repair applicants seeking to use the section 404(f)(1)(C) exemption. With the October 1990 fee proposal and increasing budgetary pressures, the stakes become even higher.

Finally, three other recent proposals deserve mention—not only for their specific impacts on drainage ditch issues but for their far-reaching effects on the entire section 404 program. One proposal, which would revise the *1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands*, has generated a firestorm of controversy.[124] Current versions of this multi-agency document would make significant changes to the 1989 manual's tests for wetlands' hydrology, hydric soils, and hydro-

122. *Id.* at 41,356-57.

123. Report language in the reconciliation submission of the Committee on Public Works and Transportation dated October 12, 1990, included a prohibition on implementation of the proposal. The provision prohibited the Corps from implementing proposed increases for fees and service charges in connection with regulatory programs under section 404 of the FWPCA. H.R. Rep. No. 881, 101st Cong., 2d Sess. 205, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 2017, 2210. The prohibition, however, did not remain in the final version of H.R. 5835 as passed by the House and Senate and enacted into law. *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 1388. The issue continues into the 102nd Congress, however. H.R. 404 contains the prohibition deleted from the Omnibus Budget Reconciliation Bill, H.R. 5835, in 1990. 137 CONG. REC. E55 (daily ed. Jan. 3, 1991) (statement of Rep. Hammerschmidt on introducing H.R. 404). For a discussion of H.R. 404, see *supra* notes 107-09 and accompanying text. More importantly, the Energy and Water Development Appropriations Act, FY 1992 Pub. L. 102-104 (enacted Aug. 17, 1991) (formerly H.R. 2427) prohibits the Corps from finalizing or implementing the 1990 regulatory fee proposal.

124. *See, e.g.*, Weisskopf, *Rewriting the Book on Wetlands*, Wash. Post, May 3, 1991, at A23, col. 1 [hereinafter Weisskopf, *Rewriting*]. "[W]hat was expected to be a technical exercise by scientists turned political earlier this year, after a White House policy group saw the revision of ther [sic] manual as a way to narrow the definition of wetlands and began to circulate various proposals that would have the effect of opening more swampy land to development." *Id.*

phytic vegetation.[125] Most observers believe these changes would decrease the number and acreage of areas to be identified and delineated as "wetlands" subject to regulation under section 404.[126]

The Corps has also recently proposed to modify its nationwide permit program. The agency would revise existing permits under the program, impose new conditions, such as mitigation duties, and add thirteen new nationwide permits.[127] The new proposed nationwide permit number 39, relating to agricultural discharges, for example, would authorize discharges for necessary agricultural, silvicultural, or aquacultural activities in "farmed wetlands."[128] The permit, however, will not authorize the filling or draining of wetlands to create upland.[129]

CONCLUSION

A. Summary

Wetlands and drainage ditches—and the laws that regulate them—are at a critical juncture. The Clean Water Act's section 404(f)(1)(C) exemption and section 404(f)(2) recapture clause are increasingly becoming the focus of litigation and legislation. Reauthorization of the Clean Water Act and the Farm Bill's Swampbuster provisions, the President's "no net loss of wetlands" goal, heightened public awareness, and increasing discontent among farmers have all combined to create an atmosphere where continued administrative changes are inevitable.

Ditch maintenance and recapture determinations under section 404(f) may soon become as difficult and controversial as the wetlands definition, delineation and mitigation determinations. RGL 87-7, the 51%/51% test, and RGL 90-7 add further complications. As a result, administrators, judges and

125. Revised Federal Manual for Identifying and Delineating Vegetated Wetlands 10-28 (Apr. 26, 1991) (Draft Copy) (on file at the *William Mitchell Law Review* office). The document is the work product of staff from the four agencies that signed the original 1989 manual—the Corps, EPA, the Fish and Wildlife Service, and the Soil Conservation Service.

126. *See, e.g.*, Weisskopf, *Rewriting*, *supra* note 124.

127. 56 Fed. Reg. 14,598 (1991) (to be codified at 33 C.F.R. pt. 330) (proposed Apr. 10, 1991).

128. *Id.* at 14,606.

129. *Id.*

legislators will have tough choices to make in potentially "no win" situations.

Wetlands regulation under section 404, particularly with regard to agricultural drainage and section 404(f)(1) farming exemptions, may—within a year or two—undergo comprehensive revision.

B. Recommendations

Congress should clarify the section 404(f)(1)(C) drainage ditch exemption and the section 404(f)(2) recapture clause. Perhaps congressional silence has forced the regulatory bureaucracy to make difficult policy calls and legal interpretations that should be made by Congress. As some critics are saying, "what we have is the regulatory tail wagging the statutory Congressional dog."[130]

The ditch "maintenance" exemption and recapture clause may be the two clearest examples where increased legislative guidance would be appropriate. In some cases, current regulatory policies may conflict with congressional intent, run counter to good public policy, and—because of the public outcry from the regulated community—hurt rather than help the wetlands protection effort in the long run. By providing increased guidance to the regulated community, Congress can restore the meaningfulness of section 404(f)(1)(C) and the acceptability of section 404(f)(2). By doing so, they can help avoid a possible onslaught of litigation.

Specifically, Congress should consider establishing a clear test to distinguish between "maintenance" and "improvement" (or construction) and to determine when "maintenance rights" are lost due to abandonment or the reemergence of wetlands. Bright line tests have drawbacks and some, such as the Corps' St. Paul District's 51%/51% test, create additional problems rather than solve the ones they were designed to address. Congress should also consider expanding the scope of the section 404(f)(1)(C) exemption to include not just "maintenance," but environmentally beneficial residesloping done in

130. *Status of the Nation's Wetlands and Laws Related Thereto: Hearings Before the Subcomm. on Water Resources of the Comm. on Public Works and Transportation, House of Representatives*, 101st Cong., 1st & 2d Sess. (1991) (Proceedings of Feb. 28, 1990 (Washington, D.C.)) (statement of Paul Kamenar, Executive Legal Director, Washington Legal Foundation).

conjunction with normal maintenance.[131]

On the administrative level, the Corps should clarify the relation between sections 404(f)(1)(A), 404(f)(1)(B) and 404(f)(1)(C). This could include the promulgation of regulations elaborating on section 404(f)(1)(C)'s "maintenance" exemption and section 404(f)(2)'s recapture clause. The Corps should also allow for more flexibility in determining whether a project involves a return to the ditch's original configuration. The burden of proof should not rest solely on the project proponent, particularly when ditch construction dates back to the turn of the century, adjacent property ownership has changed frequently, and prior cropping histories and aerial photos are impractical or exorbitantly expensive to obtain.

The Corps and EPA should also continue to pursue incentives for environmentally beneficial resideloping. This could include issuing a general permit more restrictive than the one proposed earlier and requiring documentation that 2:1 sideslopes would not increase drainage capacity and would increase downstream water quality.

Admittedly, a general permit has the potential, real or perceived, to create a new loophole in the section 404 permitting process. Yet it makes little sense to thwart improvements in ditch design by clinging to an overly restrictive interpretation of "maintenance." Providing regulatory incentives to farmers to improve the environmental features of their existing ditches makes more sense. Perhaps part of the answer is to allow for beneficial resideloping but, at the same time, require increased monitoring and mitigation requirements for potentially adverse impacts. In the end, this could contribute to a workable policy of preventing new construction while promoting environmentally preferable design improvements to existing ditches.

As for the section 404(f)(2) recapture clause, the Corps should clarify the abandonment and new use provisions to take into account the unique situations involving drainage ditch maintenance projects. Weather and economic conditions often conspire to prevent farmers from undertaking routine re-

131. H.R. 404 embodies this recommendation by including as "maintenance" certain "minor redesign" work intended "to minimize adverse environmental impacts." H.R. 404, 102nd Cong., 1st Sess. § 7(b) (1991). For a description of H.R. 404, see *supra* notes 107-09 and accompanying text.

pair projects. From a policy perspective, it makes less sense to compel farmers to more frequently clean out their ditches primarily to avoid reemergence of wetlands and loss of whatever "maintenance rights" they had under section 404(f)(1)(C). From a legal perspective, the Corps and EPA may be unduly infringing upon established private property rights, particularly in states where watershed districts assess property owners for new ditches based on their value and future use with the mistaken assumption they will be maintained.

Unless Congress or the regulatory agencies act, the "maintenance" exemption will continue to erode (in a figurative sense), just as thousands of ditch sideslopes will continue to erode (in a literal sense). If Congress, the Corps, and EPA do not reestablish the availability of the exemption, then governmental enforcement actions, citizen suits, and takings claims may one day clog the court system much like sediment and runoff currently clog ditches. The country needs a new and improved set of "ground rules" to maintain its existing infrastructure of agricultural drainage ditches.