

Wetlands Preservation in the United States

A Case of Fragmented Authority

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INTRODUCTION

Throughout the 1970s and 1980s, U.S. water pollution control regulators focussed on what they perceived to be their major problem: effluent being dumped into American waterways through pipes from industrial plants and public sewage treatment plants. Now that most of these point sources have been controlled, and many of the nation's rivers and lakes remain polluted, greater attention is being turned to nonpoint sources.¹ It is more difficult, if not impossible, to collect and treat nonpoint source pollutants than point source effluent.

However, there is a natural defense mechanism that does much to filter out unwanted pollutants from waterways. This defense mechanism is wetlands, which stand as a barrier between dry upland areas, which are the source of these runoffs, and the streams and lakes. Very gradually, water pollution control laws in the United States have begun to recognize the potential that these wetlands possess for remediating the effects of non-point sources on the environment. However, this process has been incremental, and Congress has never taken a comprehensive look at the issue of wetlands protection and the manner in which it relates to nonpoint source pollution of rivers and streams.

Given Government's newfound interest in the environment due to the Clinton/Gore presidency, an ideal opportunity to examine the wetlands in a comprehensive manner may now be present. In order to understand the possible directions for change, it is useful to review how wetlands protection has evolved since the early seventies.

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1. These nonpoint sources include everything being washed into waterways off the land, construction sites, urban streets and agricultural fields.

I. SOURCES OF AUTHORITY TO PROTECT WETLANDS

A. REGULATION TO FACILITATE NAVIGATION

In 1899, the U.S. Congress passed the Rivers and Harbors Act,² which authorized the U.S. Army Corps of Engineers to regulate the uses of the navigable waterways of the United States. Among other things, the Act empowered the Corps to issue permits for two purposes: 1) to construct wharves, jetties, and other structures that protrude into navigable waters;³ and 2) to dump material dredged from navigable channels in order to prevent the obstruction of commerce.⁴ Both types of activities were needed to aid navigation, the first by bringing ships in to shore in order to load and unload them, and the second by increasing the depths of channels which shipping used.⁵ Further, they each required regulation as each could impede navigation, e.g., if private piers became so large and numerous as to block channels, or dredged material were deposited in inappropriate places.

The nineteenth century congressional representatives who passed the Rivers and Harbors Act probably did not foresee its potential use to control water pollution. Yet section 13 (the Refuse Act)⁶ of the Act contained language that could, and was, for a brief interlude interpreted to authorize the Corps to intervene to stop pollution of the waterways as well.⁷ This clause reads:

It shall not be lawful to throw, discharge, or deposit . . . any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into *any navigable water* of the United States, or into *any tributary of any navigable water* from which the same shall float or be washed into such navigable water; [T]he Secretary of the Army, whenever in the judgment of the

2. 33 U.S.C. §§ 401-467(e) (1988).

3. 33 U.S.C. § 401 (1988).

4. 33 U.S.C. § 407 (1988).

5. Gary E. Parish & Michael Morgan, *History, Practice and Emerging Problems of Wetlands Regulations: Reconsidering Section 404 of the Clean Water Act*, 17 LAND & WATER L. REV. 44 (1982).

6. 33 U.S.C. § 407 (1988).

7. *United States v. Consolidation Coal Co.*, 354 F. Supp. 173 (N.D. W. Va. 1973) (noting that Congress intended that the provisions of the Refuse Act should remain as part of its overall pollution control scheme notwithstanding enactment of the Federal Water Pollution Control Act amendments of 1972).

Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned *in navigable water*, within limits to be defined and under conditions to be prescribed by him⁸

Since the Corps itself is the major dredger and contractor for dredging in the United States, it was not eager to define such activities as polluting. Traditionally, it denied permits to build or dredge only if the project would have a negative impact on the navigability of the stream or lake involved. However, in the late 1960s, under pressure from environmentalists, the Corps denied a few permits on non-navigational grounds, and it was upheld in so doing by the federal courts.⁹ For example, in 1967, pressure from neighbors of a proposed development in Florida forced the Corps to deny a permit to a developer who wished to fill part of a bay for a trailer park even though it would not block navigation in the bay. The refusal was based on objections from the Pinellas County Board, the U.S. Fish and Wildlife Service, and the Florida Board of Conservation that the development would result in ecological damage.¹⁰ When the Corps refused the permit, the developer brought suit in district court to force the Corps to grant a permit. The district court held in favor of the developer and the Corps appealed. The Fifth Circuit reversed, finding that section 10 of the Refuse Act does allow the Corps to refuse such permits for ecological reasons.¹¹

The Commerce Clause, on which the Refuse Act was based, empowers Congress to regulate private property as long as Congress believes that the activity has a substantial effect on interstate commerce. In the words of the Fifth Circuit: "The nation knows, if courts do not, that the destruction of fish and wildlife in our estuarine waters does have a substantial effect on interstate commerce."¹² The Fifth Circuit had never before been asked to adjudicate a refusal of a permit for reasons other than obstruction of navigation. The court pointed out that in both the National Environmental Policy Act (NEPA)¹³ and the Fish and Wildlife Coordination Acts (FWCA),¹⁴ the U.S. Congress had expressed a desire to conserve breeding grounds

8. 33 U.S.C. § 407 (1988) (emphasis added).

9. See, e.g., *Zabel v. Tabb*, 430 F.2d 199, 208 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971).

10. *Id.* at 202.

11. *Id.* at 201.

12. *Zabel*, 430 F.2d at 203-04.

13. 42 U.S.C. §§ 4331-35 (1988).

14. 16 U.S.C. §§ 661-668ee (1988).

for marine life.¹⁵ It also noted that in 1969, a District Court in New York had found that the Corps of Engineers had an obligation to consider a fill project in the context of the entire expressway project of which it was a part rather than just considering the fill's effect on navigation.¹⁶

B. REGULATION TO CONTROL POLLUTION

For a brief time in the early 1970s, environmental lawyers seized upon section 10 (Refuse Act) of the 1899 Rivers and Harbors Act as a potential authority to restrict industrial and commercial pollution of American waterways.¹⁷ This clause was interpreted creatively by the nascent environmental legal movement in the 1960s to mean that the Corps could, if it chose to do so, give out permits to prevent the contamination of the rivers and lakes of the United States as well as to protect navigation.¹⁸ A federal court in the District of Columbia agreed with these environmentalists, ruling that the Refuse Act gave the Corps authority to prohibit the discharge of all industrial, commercial, and other nonpublic liquid wastes and the dumping of solid wastes into the waterways of the United States.¹⁹

The Ohio environmentalists who initiated the suit, however, worried that the Corps, with its traditional mission of aiding navigation, would be less than enthusiastic about becoming a pollution control agency.²⁰ The court agreed with the environmentalists, holding that the new 1970 National Environmental Policy Act (NEPA) required the Corps to write an environmental impact statement (EIS) for every effluent discharge permit it issued.²¹

While this court battle was going on, environmentalists had begun work in the U.S. Congress to create a more comprehensive federal program to regulate water pollution. In 1972, Congress amended the Federal Water Pollution Control Act (FWPCA) to create a new permit system under the control of the newly formed Environmental Protection Agency (EPA), in which environmentalists had more confidence.²²

15. *Zabel*, 430 F.2d at 209.

16. *Id.* at 208; see *Citizens Comm. for the Hudson Valley v. Volpe*, 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 97 (2d Cir. 1970).

17. LETTIE M. WENNER, *ONE ENVIRONMENT UNDER LAW* 2 (1972).

18. *Id.* at 73.

19. *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971).

20. *Id.* at 12.

21. *Id.* at 15.

22. 33 U.S.C. § 1251 (1988).

This eliminated the possibility that the Corps might issue blanket permits that would effectively legalize the then current state of industrial dumping into American waterways.

C. CONFLICT BETWEEN PROTECTING NAVIGATION AND POLLUTION CONTROL

The 1972 amendments to the FWPCA also included section 404, which created a new permit-granting power for discharging dredged and fill materials into navigable waters to supplement section 10 of the 1899 Rivers and Harbors Act.²³ Although the EPA was named as the administrative agency for all other aspects of the FWPCA, as chief dredger of the nation's waterways, the Corps resisted giving up its authority to issue such permits.²⁴ Congress compromised by splitting the responsibility between the Corps and EPA. The Corps retained its authority to issue 404 permits, but the EPA was given veto power over the Corps' permits.²⁵

This bifurcation of responsibility for protecting the nation's waterways created a policy rift between the two administrative agencies. The EPA, as the zealous new defender of water quality in the United States, wanted a broad definition of waterways. The Corps preferred to interpret section 404 permits to apply only to navigable waterways, "subject to the ebb and flow of the tide or were, are, or [waters that] could be made navigable in fact," as the Rivers and Harbors Act had traditionally been limited.²⁶

However, in 1975, another court forced the Corps to accept a broader definition of waterways. The District Court for the District of Columbia ruled that Congress had redefined the term navigable waters to mean "the waters of the United States, including the territorial seas," extending federal jurisdiction over all the nation's waters to the maximum extent possible under the Commerce Clause of the Constitution.²⁷ In 1975, the Corps complied by redefining "navigable waters" to include "traditionally navigable water and artificially created channels connected to navigable water, tributaries to navigable water, non-navigable interstate waters, intrastate waters

23. 33 U.S.C. § 1344 (1988).

24. Thomas Addison and Timothy Burns, *The Army Corps of Engineers and Nationwide Permit 26: Wetlands Protection or Swamp Reclamation?* 18 *ECOLOGY L. Q.* 619, 627 (1991).

25. *Id.* at 628.

26. 39 Fed. Reg. 12119 (1974) (to be codified at 33 C.F.R. § 210.1(d)); *see also* Addison & Burns, *supra* note 24, at 628.

27. *Natural Resources v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

used for interstate commerce, and *wetlands adjacent to them.*"²⁸ This was the first time that wetlands had been officially included in a definition of waters.

A decade later the Supreme Court put its seal of approval on including wetlands in the definition of navigable waters and agreed that 404 permits apply to these wetland areas.²⁹ In that dispute, the Corps prevented a developer from filling in a wetland adjacent to a lake, but which did not obtain its source of water from that lake. In 1984, a federal district court in Michigan issued an injunction against the landowner,³⁰ but the Sixth Circuit overturned the decision, holding that the area involved was not a wetland, but only a lowlying area.³¹ However, the U.S. Supreme Court unanimously overturned the Sixth Circuit and upheld the Corps' right to regulate this fill, noting that when Congress amended the FWPCA in 1977, it did not remove the Corps' authority over wetlands.³² Therefore, it logically follows that the authority which the Corps assumed in 1975 must still be valid.

D. DEFINITIONS OF WETLAND

The obvious next question to be addressed is what constitutes a wetland? This question remains unresolved, and has been the subject of much recent political debate. However, in 1977 the Corps defined wetlands to be: "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."³³ This definition has three separate elements. The first is hydrologic, for water floods wetlands either continuously, for part of the year, or daily with the rise and fall of the tides. Wetlands may be transitional areas between uplands and either the sea or inland lakes or rivers, or they may be isolated lowlands that obtain their water from rainfall or the ground water table. The second characteristic is the type of vegetation that traditionally grows there, which must be able to survive

28. 40 Fed. Reg. 31,324 (1975) (emphasis added) (to be codified at 40 C.F.R. § 230.3(b)); see also Parish & Morgan, *supra* note 5, at 48-49.

29. *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985).

30. *United States v. Riverside Bayview Homes*, 21 ERC 1528 (D. Mich. 1984).

31. *United States v. Riverside Bayview Homes*, 729 F.2d 391 (6th Cir 1984).

32. *Riverside Bayview Homes*, 474 U.S. at 139.

33. 42 Fed. Reg. 37,128 (1977) (to be codified at 33 C.F.R. § 328.3 (1992)).

at least periodic or seasonal inundation. This may range from hardwood trees to floating lilies. The third type is a kind of saturated soil which can support the kinds of vegetation just described.³⁴ It is possible that one of the three characteristics can be inferred from the presence of the other two.

It has been estimated that there were 215 million acres of swamps, bogs and marshes in the contiguous United States 200 years ago. Today, less than 100 million acres remain, and they disappeared at a rate of between 300,000 to 450,000 acres per year in the fifties through the seventies.³⁵ National policy in the 19th century identified both salt marshes and freshwater bogs and swamps as noxious areas that should be eradicated as efficiently as possible because of the public health threat created by their mosquito breeding capacity.³⁶ Only in the 1960s when ecologists began convincing some policy makers that such wetlands possessed a value for society did this policy begin to change. By the 1980s, the rate of filling decreased to about 100,000 to 200,000 acres per year, as public policy gradually shifted to a more conservative mode regarding the wetlands.³⁷

At least five major functions of wetlands have been recognized as useful for human society. The first is storing floodwater which is accomplished most commonly either by the flood plains of rivers or by isolated freshwater potholes in the midwest, where flood water collects after downpours. The second is ground water recharge, whereby rainwater and floodwater percolate through the saturated zone to the aquifers below. The third is related to the second as wetlands filter pollutants out of floodwaters by removing dissolved nutrients, chemicals and disease organisms that are trapped in the vegetation in swamps rather than entering the water supply from surface or ground water. Fourth, vegetation in salt or freshwater wetlands prevents erosion along shorelines of either lakes, rivers or oceans by preventing the waves from eroding the banks. In so doing, it keeps siltation from

34. See Office of Technology Assessment, U.S. Congress, *Wetlands, Their Use and Regulation* (1984) [hereinafter *Wetlands Regulation*]; Ted Griswold, *Wetland Protection under Section 404 of the Clean Water Act: An Enforcement Paradox*, 27 SAN DIEGO L. REV. 139 (1990).

35. U.S. Department of Agriculture, *USDA Environmental Assessment for the Wetland Conservation Provisions of the Food Security Act 1985* (1986).

36. See Larry R. Bianucci & Rew R. Goodenow, *The Impact of Section 404 of the Clean Water Act on Agricultural Land Use*, 10 UCLA J. ENVTL. L. & POL'Y 41 (1991).

37. See Soil Conservation Service, *Interpretation of the Wetland Data from the 1987 National Resource Inventory* (Aug. 1990).

contaminating the water as well as keeps soil in place where it can be used to grow crops. Fifth, wetlands provide habitat and breeding grounds for many mammals, waterfowl and fish. It is this particular characteristic that first brought the destruction of wetlands to the attention of most Americans, as hunters and fishers discovered the reduction in the stock they rely on for recreation. As a result, recreation is another use of wetlands that gives some utility to preserving them.³⁸

II. IMPLEMENTING THE CLEAN WATER ACT

In 1977, the broadest changes to the FWPCA occurred, when the law's name was changed to the Clean Water Act (CWA).³⁹ Under these new amendments, Congress exempted normal farming and silviculture (tree farming) activities from the 404 permits.⁴⁰ The federal courts were once again called upon to determine the meaning of this amendment.⁴¹ In 1979, the Avoyelles Sportsmen's League in Louisiana, joined by the Environmental Defense Fund and the National Wildlife Federation, argued that a farmer should not be able to cut and fill a stand of bottomland hardwood forest as it was a wetland. The district court issued an injunction, stopping the filling.⁴² The Fifth Circuit was thus forced to grapple with the normal farming exemption as well as the problem of attempting to formulate a definition for a wetland.

The land in the above case involved 20,000 acres, of which the Corps was willing to designate 35% as wetlands.⁴³ The EPA, however, overruled the Corps, designating 80% of the land as wetlands. The district court agreed with the EPA and Sportsmen's League, designating 90% of the land as wetlands.⁴⁴ The circuit court affirmed the EPA's designation of 80% wetlands.⁴⁵ Although the owner sought to convert the wetlands to farming use, the circuit court ruled that because the land in question had not originally been used for farming,

38. See *Wetlands Regulation*, *supra* note 34, at 39-61; see also Griswold, *supra* note 34, at 143-60.

39. 33 U.S.C. § 1251 (1988).

40. "Except as provided . . . the discharge of dredged or fill material . . . from normal farming, silviculture, and ranching activities . . . is not prohibited by or otherwise subject to regulation under this section" 33 U.S.C. § 1344(f) (1988).

41. *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983).

42. *Avoyelles Sportsmen's League v. Alexander*, 473 F. Supp. 525 (W.D. LA 1979).

43. *Avoyelles Sportsmen's League*, 715 F.2d at 901.

44. *Avoyelles Sportsmen's League*, 473 F. Supp. at 530.

45. *Avoyelles Sportmen's League*, 715 F.2d at 918.

the wetlands were protected despite the CWA's exemption for normal farming and silviculture.⁴⁶

Subsequently, the Seventh Circuit ruled that a farmer in Wisconsin could not change from growing cranberries, a normal bog crop, over to growing soybeans, an annual dry land crop.⁴⁷ Regardless of the fact that the farmer had been cropping the cranberries, conversion to another type of crop is not part of the normal farming exemption.⁴⁸ Likewise, the Ninth Circuit agreed that normal farming activities do not extend to changing wetlands by diking water in order to establish dry land crops.⁴⁹ This is not part of an ongoing farming operation.⁵⁰

A. NATIONWIDE PERMITS

The Corps of Engineers has coped with its increased responsibility for wetlands protection by creating nationwide permits (NWP) which it issues to most private property owners seeking permission to dredge and fill wetlands.⁵¹ Under the NWP process, only the largest and most ecologically significant fills must be individually permitted. Examples of NWPs are as follows: NWP 12 for backfill or bedding for utility lines;⁵² NWP 13 for bank stabilization activities;⁵³ and NWP 14 for minor road crossing fills.⁵⁴ NWP 26 is reserved not for a particular use, but for all isolated lakes, rivers and streams above the headwaters and any wetland under ten acres in size.⁵⁵ It is NWP 26 that most developers rely on to exempt themselves from careful investigation, as it authorizes filling a whole category of wetlands, rather than for a particular use.⁵⁶

There is no legal requirement that owners report to Corps personnel before they fill potholes under an acre. Fills from one to ten

46. Kevin S. O'Hagan, *Pumping with Intent to Kill: Evading Wetlands Jurisdiction under Section 404 of the Clean Water Act through Draining*, 40 DEPAUL L. REV. 1071 (1991).

47. *United States v. Huebner*, 752 F.2d 1235 (7th Cir. 1985) *cert. denied*, 474 U.S. 817 (1985).

48. *Id.*

49. *United States v. Akers*, 785 F.2d 814, 823 (9th Cir. 1986), *cert. denied*, 479 U.S. 828 (1986).

50. *Id.*

51. 33 C.F.R. § 320.2 (1992).

52. 33 C.F.R. § 330 app. A(12) (1992).

53. 33 C.F.R. § 330 app. A(13) (1992).

54. 33 C.F.R. § 330 app. A(14) (1992).

55. "Headwaters" are the point on a non-tidal stream above which the average annual flow is less than five cubic feet per second. 33 C.F.R. § 330.2(d) (1992). "Isolated waters" are non-tidal waters not part of a surface tributary system to interstate or navigable waters of the United States. 33 C.F.R. § 330.2(e).

56. See Addison & Burns, *supra* note 24, at 633-36.

acres are supposed to be preceded by a predischage notification (PDN) sent to the relevant district office.⁵⁷ If the owner receives no reply from the Corps within twenty days, he may proceed at will. In this short time frame, the Corps must notify the other agencies that may be interested, and allow them to intervene.⁵⁸ Many rural landholders are unaware of this requirement, and most fills that come to the attention of the regulatory agencies do so through the complaints of others. However, farmers are unlikely to report their neighbors because they have an interest in filling their own low spots for additional farmable land. Further, even if a report is made, the Corps is likely to issue the landowner a permit after the fact, categorizing the permit under NWP 26.⁵⁹

Most of the nation's freshwater wetlands fit into the category of isolated lakes and prairie potholes under ten acres in size. When these freshwater wetlands are filled, it generally goes unnoticed by the Corps due to its limited resources. The Corps' entire regulatory branch consists of only 2500 people with an annual budget of about \$70 million.⁶⁰ There is no way for the Corps, with such a limited budget, to oversee all the wetlands in the United States. However, the division engineer does have the power to impose conditions under NWPs to ensure that the project has minimal adverse environmental effects on the aquatic environment.⁶¹

B. IMPLEMENTING INDIVIDUAL PERMITS

Only if a project does not fit into one of the exemptions or qualify for one of the NWPs does the Corps of Engineers consider it for an individualized permit. Developers are obligated to notify the district engineer whenever they wish to apply for a permit. In reality, the Corps has little staff to monitor all fill activity, and instead relies on voluntary reporting by developers and complaints by sportsmen and conservation groups as well as the Fish and Wildlife Service at both the state and federal levels. Within fifteen days of receiving an application, the district engineer must issue notice that the public may comment on the proposal.⁶² If there is no objection within thirty days

57. *Id.* at 634.

58. *Id.*

59. *Id.* at 649.

60. *Id.* at 656.

61. "The activity must comply with any regional conditions which may have been added by the division engineer" 33 C.F.R. § 330 app. A(c)(6) (1992).

62. 33 U.S.C. § 1344(a) (1982). *See also* Andrew H. Ernst & Wade W. Herring, *Water, Water Everywhere, Better Call the Corps: Section 404 Regulation of Wetlands*, 41 MERCER L. REV. 843, 852 (1990).

of the notice, the Corps presumes that no one objects to the project.⁶³

Corps regulations require that unnecessary alteration or destruction of wetlands "should be discouraged as contrary to the public interest."⁶⁴ Even though one project may have a minimal impact itself, "the cumulative effect of numerous piecemeal changes can result in a major impairment of wetland resources."⁶⁵ Generally, federal courts have upheld the Corps' decisions to refuse permits to fill for individual projects.⁶⁶ The reason for this may be that the Corps rarely exercises its authority of refusal. In 1984, the Office of Technology Assessment (OTA) estimated that about 300,000 acres of wetlands are lost in the United States each year.⁶⁷ Using Corps information from 1980 to 1981, OTA found that wetland acreage protected in those years was less than 50,000 acres.⁶⁸ Another study by the General Accounting Office (GAO) in 1988 revealed that while the Corps issued about 10,500 individual permits in Fiscal Year (FY) 1986, 3,000 applications were canceled or withdrawn, and the Corps denied an estimated 500 applications.⁶⁹

The Corps is obligated under the CWA to consult with other government units when considering permit applications.⁷⁰ The main agencies that participate are the U.S. Fish and Wildlife Service (FWS) in the Department of Interior, the National Marine Fisheries Service (NMFS) in the Commerce Department, and the individual state agencies responsible for fish and wildlife.⁷¹ The Corps need only utilize these other agencies in an advisory capacity, and in fact the Corps continues to issue permits over the objections of agencies 37% of the time.⁷² The EPA, however, does have the authority to veto a Corps permit.⁷³ Generally, the Corps does not deny a permit unless there is community pressure to do so and there are alternative project sites

63. Ernst & Herring, *supra* note 62, at 852.

64. *Id.* at 854.

65. 33 C.F.R. § 320.4(3)(b) (1992); Ernst & Herring, *supra* note 62, at 854.

66. *See e.g.*, *Buttrey v. U.S.*, 690 F.2d. 1170 (5th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983).

67. *Wetlands Regulation*, *supra* note 34, at 3; *see also* Griswold, *supra* note 34, at 141.

68. *See* Griswold, *supra* note 34, at 141.

69. U.S. General Accounting Office, Report to the Chairman, Subcommittee on Investigations and Oversight: Comm. on Pub. Works and Transportation, House of Rep., *Wetlands: the Corps of Engineers' Administration of the Section 404 Permit*, Washington, D.C.: Government Printing Office (1988) [hereinafter *Wetlands*].

70. 33 C.F.R. § 320.4(b)(3) (1992).

71. *Id.*

72. *See Wetlands*, *supra* note 69.

73. 33 U.S.C. § 1344(c) (1992).

available to the applicant. The EPA, on the other hand, has issued guidelines that the Corps is obliged to follow that urge that no project be allowed in a wetland if it is not water dependent.⁷⁴

The EPA has vetoed very few Corps wetland fill permits — seven during the 1980s.⁷⁵ The federal courts have generally upheld such vetoes. For example, in 1983 the Pyramid Companies proposed to develop a shopping mall by filling 32 acres in Massachusetts, and creating 36 acres of replacement wetlands.⁷⁶ The Corps agreed with the EPA and FWS that Pyramid should apply for an individual 404 permit rather than qualifying under NWP 26. However, they still agreed to issue the permit in the face of strong opposition from the local community. In November of 1984, the EPA recommended denial of this permit because Pyramid had failed to show that there were no less environmentally damaging alternative sites. The Division Engineer of the New England Army Corps recommended that Pyramid's application be rejected, but the Director of Civil Works at Corps headquarters in Washington overruled him. Finally in 1985, the EPA's Regional Administrator for New England overruled the Corps by vetoing the permit.⁷⁷

Pyramid brought suit against the EPA and lost at both the district and circuit court levels.⁷⁸ The Second Circuit agreed that the EPA could veto a permit on the grounds that the applicant had not considered all practicable alternatives and could have sited its shopping mall elsewhere.⁷⁹ The district court had afforded the EPA considerable discretion and embraced its "market entry theory" reading of the CWA to mean that a developer should consider other alternatives when it plans a project, and should not restrict its options to the alternatives available to it at the time it applies for a permit.⁸⁰ There are other manners in which a person can go about obtaining a permit for the filling of wetlands.

74. Water dependent means that the facility requires access to an aquatic site to fulfill its basic purpose, such as would be the case with a marina. 40 C.F.R. § 230.10 (1992); see also Griswold, *supra* note 34, at 146. Bhavani Prasad V. Nerikar, *This Wetland is Your Land, This Wetland is My Land: Section 404 of the Clean Water Act and Its Impact on the Private Development of Wetlands*, 4 ADMIN. L. J. 197, 211 (1990).

75. See Griswold, *supra* note 34, at 139.

76. See Nerikar, *supra* note 74, at 215-18.

77. *Id.*

78. *Bersani v. EPA*, 850 F.2d 36 (2d Cir. 1988), *cert. denied*, 109 S.Ct. 1556 (1989).

79. *Bersani*, 850 F.2d at 36.

80. *Bersani*, 674 F. Supp. at 405.

C. MITIGATION OF DAMAGE

One method used to facilitate obtaining both NWP 26 and individual permits is for the owner to mitigate the destruction of wetlands.⁸¹ This involves a still unproven technique whereby the developer tries to create, restore, or enhance wetlands in an area near the site that is to be developed. This is done either by excavating uplands and transplanting organic soils and wetland vegetation from donor marshes or by depositing dredged materials in open waters.⁸² The success of these mitigation schemes remains problematic. Some of the proposals that are made by developers are never carried out; others fail to sustain the same kinds of flora and fauna that were found in the original areas. In most cases, there is a considerable time interval between the destruction of the original wetlands and the creation of substitutes. Expert estimates of the time it takes for wetlands to become established vary from two to five years.⁸³

One major problem of the above mentioned program is that it has encouraged the Corps to issue permits for projects that are not dependent on water. These projects could have found alternative sites on dry land. The rationale for approval of these permits was that the lost wetlands would be replaced.⁸⁴ However, the EPA and FWS take the view that wetland replacement should be a last resort, and permits should be refused for those projects for which there are viable upland sites available.⁸⁵ There have been a number of memoranda of agreement (MOAs) between the Corps and resource agencies, especially FWS and EPA. These have generally compromised the FWS/EPA stand against the issuance of permits based on the idea that new wetlands would be created.⁸⁶

One example of a project that was halted despite proposed mitigation was the Two Forks Dam. The Denver Water Board proposed to dam the South Platte River to supply water to Denver and in so doing, eradicated wetlands which constituted critical habitats for many deer, elk, and endangered nesting cranes.⁸⁷ The Water Board

81. John D. Brady, *Mitigation of Damage to Wetlands in Regulatory Programs and Water Resources Projects*, 41 *MERCER L. REV.* 893 (1990).

82. *Id.* at 919.

83. MATTHEW KRUCZYNSKI, *Mitigation and the Section 404 Program: A Perspective*, 2 *ENVIRONMENTAL PROTECTION AGENCY, WETLAND CREATION AND RESTORATION: THE STATUS OF THE SCIENCE* 137 (1989).

84. See Brady, *supra* note 81, at 990.

85. *Id.* at 904.

86. *Id.*

87. *Id.* at 909-10.

proposed to replace 299 acres of wetlands lost by inundation by a process of mitigation. Clearly, the project was water dependent as it was a dam and reservoir project. Yet, the Division Engineer found the project worthy of a permit. However, EPA Administrator William Reilly prevented the EPA Rocky Mountain Regional office from approving the Two Forks Dam.⁸⁸

III. REGULATING WETLANDS DRAINAGE

Section 404 of the CWA only regulates the deposition of dredged or fill material into wetland areas.⁸⁹ It is silent regarding the destruction of wetlands through other more efficient means, such as draining them. Even if a landholder cannot convert a pothole by filling it as a result of the *Avoyelles* decision,⁹⁰ that landowner can simply drain it, kill off the vegetation, and then fill in the low area to use for farming. At least one scholar argues that the mere act of pumping is pollution as it alters the chemical, physical or biological integrity of aquatic ecosystems.⁹¹

The courts have generally agreed that section 404 does not cover acts which drain wetlands. The Fifth Circuit ruled that the Corps possessed no authority over two drainage culverts installed to dry out a tract of cypress-tupelo wetlands in Louisiana.⁹² The development corporation planned to convert the area to residential use after filling the land, and the Corps agreed that it had no authority over the project. The Audubon Society sued, and the Fifth Circuit agreed with the developer and the Corps that this type of activity did not fall under the purview of section 404.⁹³

There are, therefore, two necessary conditions that must exist before the CWA can be invoked. First there must be a wetland falling within the regulatory definition,⁹⁴ including vegetation, soil and water conditions; and second, the activity in question must constitute a discharge of a pollutant.⁹⁵ Critics of this decision, however, argue that pumping by definition pollutes a wetland because it changes the nature of its ecology, and that placing a pump or other dewatering

88. *Id.* at 918.

89. 33 U.S.C. § 1344(a) (1987).

90. *Avoyelles Sportmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983).

91. See O'Hagan, *supra* note 46, at 1071.

92. *Orleans Audubon Soc'y v. Lee*, 742 F.2d. 901 (5th Cir. 1984).

93. *Id.*

94. O'Hagan, *supra* note 46, at 1080.

95. *Id.*

device into a wetlands should be considered a regulatable action under the terms of the law.⁹⁶

Following the *Audubon* case, a federal district court in Texas made exactly the opposite decision in another case.⁹⁷ Waste Management Inc. (WMI) decided to increase the size of a landfill in Texas. In May of 1987, it inquired as to whether ponds on the site were waters of the United States, and thus covered under the CWA. When the Corps responded that these were covered by the CWA, WMI began to pump out the water in order to drain them, thus destroying all plant and animal life that depend on a wetland environment. Once the wetland ecology was destroyed, WMI planned to obtain a new determination as to whether the land was a wetland.⁹⁸ The Corps, EPA, and FWS were all aware of this project and did not act to save the ponds. A local environmental group sued and succeeded in convincing a federal district court in Texas that this action did fall under the purview of the CWA.⁹⁹ Instead of using the *Audubon* precedent, the district court judge used *Avoyelles* to argue that any activity designed to change the status of an area from a wetland to a non-wetland comes under the control of the CWA's 404 permitting requirement.¹⁰⁰ In the words of the court, "It would seem to stand logic on its head . . . to permit a landowner to avoid the § 404(b) process by completely draining a wetland and then claiming 'Permit for what wetland?'"¹⁰¹

A. CHANGING AGRICULTURAL POLICY

Agricultural uses account for between 80%-87% of the wetlands lost each year in the United States.¹⁰² Farmers, like other Americans, originally believed it was both good private economics and good public policy to clean lands of marshy spots which could breed mosquitoes and cause public health problems. For years, the U.S. Department of Agriculture (USDA) encouraged draining wetlands through its Agriculture Conservation Program (ACP) which provides farmers up to 80% of construction costs for building irrigation

96. *Id.* at 1090.

97. *Id.*

98. *Id.* at 1082.

99. *Save Our Community v. EPA*, 741 F. Supp. 605 (N.D. Texas 1990), *rev'd on other grounds*, 971 F.2d 1155 (5th Cir. 1992).

100. *Id.* at 614.

101. *Id.* at 615.

102. *See Bianucci & Goodenow, supra* note 36, at 42.

reservoirs and land leveling. Moreover, under the National Flood Insurance Program (NFIP) created in 1968, the federal government encouraged building in wetlands by using taxpayer money to subsidize flood insurance to homeowners and business located in flood prone areas.¹⁰³

B. SWAMPBUSTER PROVISION IN AGRICULTURAL LAW

Recently, attitudes about the utility of swamps and potholes have changed, and U.S. agricultural policy is gradually changing. The Food Security Act of 1985¹⁰⁴ included a conservation section that attempted to reduce soil erosion on highly erodible land (HEL) and to prevent conversion of wetlands to cropland.¹⁰⁵ Highly erodible lands are protected, either by convincing farmers not to begin cultivating HEL (sodbuster) or by using conservation plans to reduce erosion from such lands once they are planted.¹⁰⁶ The wetlands program (swampbuster) has no such provision for conservation plans. Farmers are simply discouraged from converting wetlands to cropland through drainage.¹⁰⁷

Both sodbuster and swampbuster are enforced in the same manner: by depriving farmers who will not "voluntarily" conform by withdrawing their commodity price supports and other benefits.¹⁰⁸ Unlike the CWA, which is enforced through permits and fines, soil conservation programs are enforced through reduction of privileges rather than by punishment.¹⁰⁹ It is a quasi-stick in the form of a withdrawal of a carrot. Originally, this was stated as an all-or-nothing proposition. However, in the 1990 amendments, it was fine tuned to allow discretion in reducing, rather than eliminating all price supports.¹¹⁰

The 1985 Food Security Act gave the USDA's Agricultural Stabilization and Conservation Service (ASCS) the authority to imple-

103. 42 U.S.C. §§ 4001-4128 (1992).

104. 16 U.S.C. §§ 3801-3847 (1992).

105. Linda A. Malone, *A Historical Essay on the Conservation Provisions of the 1985 Farm Bill: Sodbusting, Swampbusting, and the Conservation Reserve*, 34 KAN. L. REV. 577, 577-97 (1986).

106. 16 U.S.C. § 3830 (1992).

107. 16 U.S.C. § 3821 (1992).

108. Pub. L. No. 99-198, 16 U.S.C. §§ 3801-3862 (1992).

109. 16 U.S.C. § 3821 (1992).

110. The 1990 amendments made several grammatical changes which resulted in the statute allowing more discretion on the part of the Secretary of Agriculture. 16 U.S.C. § 3821 (1992) (History).

ment the new Swampbuster provision.¹¹¹ Since the ASCS operates through locally elected county committees who are sympathetic to farmers' needs, swampbuster provisions have yet to be enforced enthusiastically.¹¹² The situation is similar to that which occurred in the early days of the Corps of Engineers' enforcement of the 404 permits. The ASCS is the agency designated to administer and distribute benefits to a specific clientele with which it maintains a close relationship. It is difficult for ASCS to adjust its regulatory role in which it withholds the benefits it has become used to distributing so generously.

There are five exemptions written into the Food Security Act.¹¹³ First, if wetland drainage was started before December 23, 1985, there is an exception to compliance, with the ASCS granting 78% of the 5,259 requests for "commenced determinations" as of April, 1989.¹¹⁴ The other exemptions are as follows: (2) for hardship cases; (3) for landowners who in good faith drained because ASCS told them they could; and (4) for de minimis effects where the impact on wetlands is minimal or trivial.¹¹⁵ Thus, as in the 404 program, it is possible for someone to drain wetland if other wetlands are left alone or established.

C. THE ROLE OF NON-GOVERNMENT ENFORCEMENT AGENTS

Another question that has already been raised in the brief time that the 1985 farm bill has been in force is what role, if any, non-governmental, non-farm groups will be allowed to play in the implementation of the bill. The concept of a private attorney general was written into the CWA,¹¹⁶ and has been used effectively by environmental groups that take government agencies to court.¹¹⁷ This has

111. 16 U.S.C. § 3838(d) (1992).

112. Anthony N. Turrini, *Swampbuster: A Report from the Front Symposium: 1990 Agricultural Law Association Annual Conference*, 24 IND. L.J. 1507, 1513 (1991).

113. 16 U.S.C. § 3822 (1992).

114. Soil and Water Conservation Society, *Implementing the Conservation Provision of the Food Security Act 8-9* (1989).

115. See Turrini, *supra* note 112, at 1520.

116. 33 U.S.C. § 1251(e) (1992).

117. See Beverly M. Smith, *Citizen Suits*, 40 CASE W. RES. L. REV. 1 (1989); JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT A STRATEGY FOR CITIZEN ACTION* 100-107 (1970); see also *Hudson River Fisherman's Ass'n v. New York City*, 32 ERC 1862 (S.D.N.Y. 1990), *aff'g* 940 F.2d 649 (2d Cir. 1991).

occurred to the dissatisfaction of some jurisprudent and policy analysts who argue that courts should not be open to groups that wish to influence a policy, but have no economic stake in that policy.¹¹⁸

The National Wildlife Foundation (NWF) attempted to challenge one of the exemptions granted by a county committee in North Dakota, but the district court found that the NWF lacked standing to sue.¹¹⁹ However, the Eighth Circuit reversed, finding that members of sportsmen's clubs are parties that the law was designed to protect.¹²⁰ The court noted that these groups may be the only groups likely to argue in favor of the public interest of preserving marshy areas.¹²¹

It seems likely that there will be other similar suits as long as environmental groups such as NWF suspect that swampbuster provisions are unlikely to be enforced enthusiastically. This issue may eventually reach the Supreme Court, where other rulings on standing to sue have recently restricted access of environmental groups to the federal courts.¹²² This controversy may not end in the courts, as Congress could amend the agricultural law by inserting a citizen suit provision similar to that in the CWA. It seems unlikely that organizations that use citizen action suits will give up their efforts until or unless governmental administrators of the law agree with the interpretation of the interest groups that were instrumental in passing the legislation. Nor is it likely that groups that oppose their use of these laws will give up their efforts to prevent them from getting into court.

CONCLUSION

The largest loophole in the laws protecting U.S. wetlands is the lack of delineation of wetlands. Until there is a careful mapping of all swamps, marshes, bogs and potholes that qualify as wetlands, there can be no accurate count of how much wetland acreage is lost each year. The Conservation Foundation created a Wetlands Policy Forum in 1988, which recommended that there be no overall net loss of the nation's remaining wetlands as defined by acreage and func-

118. See generally DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); Nathan Glazer, *Toward An Imperial Judiciary?*, 41 *THE PUBLIC INTEREST* 104-23 (1975).

119. *National Wildlife Fed'n v. Agricultural Stabilization & Conservation Serv.*, No. A4-89-067 (N.D.N.D. Aug. 21, 1989).

120. *National Wildlife Fed'n v. Agricultural Stabilization & Conservation Serv.*, 901 F.2d. 673, 679 (8th Cir. 1990).

121. *Id.* at 678.

122. See *Lujan v. Defender's of Wildlife*, 112 S. Ct. 2130 (1992).

tion.¹²³ The Corps of Engineers embraced most of the Foundation's findings and agreed to a no net loss policy, but it remains to be seen how such a policy can be implemented.

During the 1988 presidential race, candidate George Bush declared his policy to be "no net loss of wetlands." In 1989, an interagency committee, consisting of the Corps of Engineers, EPA, FWS, and SCS issued a major study that defined wetlands in much greater detail than had been done in the past, increasing the amounts of land to be protected.¹²⁴ The publication of this manual created a major controversy as the development industry argued to the Council on Competitiveness that it should be re-written to reduce its coverage by about half. In August, 1991, after months of deliberation, the four agencies issued proposed revisions to the 1989 manual.¹²⁵ After considerable comments were made to these latest revisions by both industry and environmental groups, the government retreated to the situation before the interagency group issued the 1989 manual, and the Corps of Engineers reverted to use of its own 1987 manual.¹²⁶

After this impasse, Congress assigned the National Academy of Science the responsibility for devising a new definition of wetlands, which is likely to be completed in 1993. Until this occurs and the government accepts a common definition, there can be no real progress toward wetlands preservation. With the new Clinton administration promising to be more environmentally oriented, this highly controversial subject is likely to be revisited soon in the debate over new amendments to the Clean Water Act. One obvious change that needs to be made is for Congress to state clearly in the law that one of the goals of the CWA is to preserve wetlands for their own sake as well as to mitigate non-point sources of water pollution. Except for the swampbuster provision in the Food Security Act,¹²⁷ there is no official recognition of the desirability of protecting wetlands in U.S. statute law. Protection for wetlands has entered the CWA through the back door by court interpretation and agency implementation to control non-point source pollution. Because of the pressure

123. *Conservation Foundation, Protecting America's Wetlands: An Action Agenda, the Final Report of the National Wetlands Policy Forum* (1988).

124. *Fish and Wildlife Service, EPA, Department of the Army, Soil Conservation Service, Federal Manual for Identifying and Delineating Jurisdictional Wetlands* (1989).

125. 56 Fed. Reg. 40446-80 (1991) (proposed Aug. 14, 1991).

126. DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL (1987).

127. 16 U.S.C. § 3837 (1992).

of other urgent clear directives, such as the need to control toxic pollution, the EPA has never placed wetlands protection near the top of its priority list.

Another reason why wetlands protection has not received the attention it requires is the complex relationship among the various local, state, and federal agencies that are involved in this important policy area. The primary missions of several agencies are all linked to wetlands preservation: water pollution control, wildlife protection, navigation facilitation, and soil conservation. One effective way for the EPA to reduce non-point source pollution of surface and ground water is to reduce siltation and chemical runoff from urban and agricultural lands. The Fish and Wildlife Service's primary goal is preservation of the habitat of the flora and fauna that grow in wetlands. The Corps of Engineers would be assisted in its mission to keep navigable waterways open for commerce by stopping siltation at its source through erosion control thus reducing the need for continual dredging. The major mission of SCS is to keep topsoil in place on American farms, which would assist the other agencies in their missions.¹²⁸

Ironically, these reinforcing missions have only served to make implementation of wetlands preservation more difficult. Greater cooperation among federal agencies would help all four agencies achieve their goals with greater efficiency. But the typical impact of policies that overlap in this manner is to create competition for authority and programs among multiple agencies. One example occurred when the CWA created the 404 permitting system, and the Corps of Engineers kept its traditional authority despite USEPA's responsibility for administering the CWA. Today, the USDA is in the position that the Corps was in earlier, seeking to keep authority over activities that it traditionally held in the face of new legislation. The technique that was worked out by the CWA was to require a permit to fill wetlands through a shared process in which several agencies, including Corps of Engineers, EPA, FWS and state agencies all have a voice.¹²⁹ This creates a complex administrative procedure. However, it is clear that many different agencies have a legitimate role to play in this policy.

Bringing all the actors together at one stage in the process when all the requirements of several different laws can be met simultaneously, would theoretically reduce administrative delay. At that time, all agencies, with their varied missions, would have to reconcile any

128. 16 U.S.C. §§ 2001-09 (1992). See also Malone, *supra* note 105, at 577-97.

129. 33 U.S.C. §§ 1251-99 (1992).

differences they might have and present a united front to the landowner. This should cut down on the frustration often felt by citizens who face multiple and often conflicting demands of different agencies. It should also reduce the possibility for several different court cases over the same project, as illustrated by the concept of one-stop shopping often cited in land use law.¹³⁰

By implementing the solutions advocated above, our nation's wetlands will be better protected than they are at present. This would result in less pollution in our waterways, conservation of our precious topsoil, more abundant supplies of safer seafood and fish, and the preservation of many of our endangered species. Our wetlands are an important resource that we have neglected too long; they are well worth conserving.

130. See generally, FRED BOSSELMAN & DAVID CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971); FRED BOSSELMAN ET AL. *THE PERMIT EXPLOSION: COORDINATION OF THE PROLIFERATION* (1976).

