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Introduction

For most of this nation's history, wetlands such as marshes, swamps, and bogs were considered to be nothing more than worthless breeding grounds for mosquitoes.[1] Federal policy dictated that wetlands were to be drained and filled to make dry land suitable for agricultural, industrial, and residential development.[2] Between 1781 and 1990, the federal government granted 64,920,000 acres of land to the states for swamp reclamation.[3] Many of the wetlands in the contiguous forty-eight states are found near large population centers, ripe for development, and about seventy-five percent are privately owned.[4] The use of private wetlands was virtually unregulated until about twenty years ago.

Wetlands have more recently become the focus of concern for many environmentalists. Wetlands serve as the transition between water and dry land, and are credited with performing many important functions, such as mitigating flood damage by absorbing excess rainwater, reducing soil erosion, and filtering pollutants from the water supply.[5] Wetlands provide a home for countless species of birds, fish, reptiles, insects, and plants, including many endangered species.[6] Responding to environmental constraint, these species have adapted to the conditions of their unique habitat by evolving, through natural selection, into their present forms.[7]

Similarly, federal policy, laws, and regulations have responded to political pressures and evolved, through legislative, administrative, and judicial action, into protective measures for wetlands. But as with evolution in nature, the process has often been chaotic. Many attempts at reform were unfit for the rigors of political debate. Others thrived only in their particular niches, resulting in a patchwork of federal statutes, executive orders and regulations, and court decisions at all levels, coexisting with state and local law in many areas.

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1. "If there is any fact which may be supposed to be known by everybody, and therefore by courts, it is that swamps and stagnant waters are the cause of malarial and malignant fevers, and that the police power is never more legitimately exercised than in removing such nuisances." Leovy v. United States, 177 U.S. 621, 636 (1899).

2. Curtis C. Bohlen, *Wetlands Politics From a Landscape Perspective*, 4 MD. J. CONTEMP. LEGAL ISSUES 1, 1-2 (1992).

3. THE WORLD ALMANAC 454 (125th ed. 1993). "[T]he reclamation of swamp and overflowed lands was not only not forbidden, but was recognized as the duty of the state, in consideration of the grant of the public lands." *Leovy*, 177 U.S. at 636.

4. *Hearings on S. 1195 Before the Subcomm. on Clean Water, Fisheries and Wildlife of the Senate Comm. on Environment and Public Works*, 103d Cong., 1st Sess. (Sept. 15, 1993) (statement of National Ass'n of State Dep'ts of Agric.) [hereinafter *NASDA Statement*].

5. UNITED STATES GENERAL ACCOUNTING OFFICE, WETLANDS—THE CORPS OF ENGINEERS' ADMINISTRATION OF THE SECTION 404 PROGRAM at 8 (1988) [hereinafter GAO REPORT].

6. One estimate is that 35% of all rare, threatened, and endangered species of animals are dependent on wetland ecosystems. 16 U.S.C. § 4401(a)(3) (1993).

7. CHARLES DARWIN, ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION (John Murray 1859).

One recent attempt is the Wetlands Reform Act of 1993,[8] introduced by Congressman Don Edwards and Senator Barbara Boxer, both California Democrats. The bill is intended to increase the protection of wetlands by amending the Clean Water Act of 1972,[9] the primary source of federal authority over wetlands. "We believe that the fundamental building blocks to achieve these goals exist within the framework of the current program," Edwards said.[10] "Radical overhaul of the system is not needed. Rather, we support strategic improvements to key portions of the law."[11]

Part I of this article reviews the history of federal policy toward wetlands and shows how the law has evolved to provide protection for wetlands. Part II explains the proposed changes to federal law under the Wetlands Reform Act of 1993 and how these changes could affect the interests of environmentalists, landowners, developers, and the public, concerning wetlands. Part III considers issues the bill neglects to address. Finally, this article concludes that the bill should not be passed in its present form. While it contains several valuable provisions, it also contains others that frustrate its purpose, and it leaves several important issues unresolved.

I. Background

A. *Early Legislation*

The Commerce Clause of the Constitution[12] gives the federal government the power to regulate the means of interstate commerce, including waterways used for commercial purposes.[13] This power was exercised by section 10 of the Rivers and Harbors Act of 1899,[14]

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8. H.R. 350, 103d Cong., 1st Sess. (1993) and S. 1195, 103d Cong., 1st Sess. (1993). Rep. Edwards originally introduced the bill as the Wetlands Reform Act of 1992, H.R. 4255, 102d Cong., 2d Sess. (1992), but it was not passed before the end of the session. He and 22 co-sponsors reintroduced the bill on Jan. 5, 1993, and later added 63 additional co-sponsors at various times during the session. Sen. Boxer introduced a substantially similar version, except for minor cosmetic changes in language, into the Senate on July 1, 1993. H.R. 350 is currently before the House Committees on Merchant Marine and Fisheries, Public Works and Transportation, and Ways and Means, while S. 1195 is before the Senate Committee on Environment and Public Works.

9. 33 U.S.C. §§ 1251-1376 (1993).

10. *Hearings on S. 1195 Before the Subcomm. on Clean Water, Fisheries and Wildlife of the Senate Comm. on Environment and Public Works*, 103d Cong., 1st Sess. (Sept. 16, 1993) (statement of Rep. Edwards) [hereinafter *Edwards Subcommittee Statement*].

11. *Id.*

12. U.S. CONST. art. I, § 8(3).

13. "Since much of the interstate commerce of the 19th century was water borne, it was early held that the commerce power necessarily included the power to regulate navigation." United States v. Holland, 373 F. Supp. 665, 669 (M.D. Fla. 1974).

14. 33 U.S.C. § 403 (1993).

which prohibits dredging, filling, or obstructing navigable waters[15] without a permit from the Army Corps of Engineers.[16] The Corps' jurisdiction included waters up to the mean high water line[17] and did not expressly include wetlands,[18] which are often found outside the line.[19] The Corps was not required to consider environmental protection when examining the merits of permit applications.[20]

This continued until 1958, when the growing environmental movement pressured Congress into passing the Fish and Wildlife Coordination Act,[21] which requires the Corps to consider a project's effects on the environment before approving its permit. The reversal of the long-standing federal policy of draining and filling wetlands for development had begun, although wetlands were not yet specifically protected.[22]

Shortly thereafter, Congress passed the National Environmental Policy Act of 1969

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15. In *Leovy*, 177 U.S. at 632, the Supreme Court stated:

> It is a safe inference . . . that the term, "navigable waters of the United States," has reference to commerce of a substantial and permanent character to be conducted thereon. The power of Congress to regulate such waters is not expressly granted in the Constitution, but is a power incidental to the express "power to regulate commerce with foreign nations, and among the several states. . . ."

Leovy limited the definition of "navigable waters" to those waters that were "navigable in fact." *Id.* at 631. However, "[s]ince Congress had clearly limited the Rivers and Harbors Act to navigation, any subsequent judicial broadening of jurisdiction under the statute of necessity had to be in the form of expanding the definition of 'navigability.'" *Holland*, 373 F. Supp. at 669-70.

The Supreme Court expanded the definition of "navigability" to include waters that are, have been, or could be used for commercial navigation. *See* Economy Light & Power Co. v. United States, 256 U.S. 113, 122 (1921) (past history of water body made it navigable despite subsequent changes that prevented present use for commerce); United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407-8 (1940) (waterway is navigable-in-fact if "reasonable improvements" would make it so). 33 C.F.R. § 329.9 (1993) was enacted to incorporate these interpretations into the jurisdiction of the Clean Water Act, to be discussed *infra*.

16. Buttrey v. United States, 690 F.2d 1186, 1189 (5th Cir. 1982) (Army is permitted to regulate civilian navigation because its power derives from the Commerce Clause, not the War Powers Clause, and this does not infringe on any other provision of the Constitution).

17. The mean high water line is the average of all high tides, preferably over a long period of time. 40 Fed. Reg. 31,320, 31,325 (1975). *See Holland*, 373 F. Supp. at 670, which states:

> Since the Rivers and Harbors Act was passed at a time when interstate commerce was thought of in a geographical sense, and since the Act was designed primarily to keep the navigable waters free of physical impediments, it was natural to draw on the property-line concept of the mean high water line to limit the scope of jurisdiction in tidal water areas.

18. *See* United States v. Cannon, 363 F. Supp. 1045, 1050 (D. Del. 1973).

19. 42 Fed. Reg. 37,122, 37,123 (1977). *See* Steven L. Dickerson, *The Evolving Federal Wetland Program*, 44 Sw. L.J. 1473, 1476-77 (1991).

20. Dickerson, *supra* note 19 at 1477.

21. 16 U.S.C. § 662 (1993).

22. "Between the mid-1950's and the mid-1970's about 9 million acres of wetland were lost. Annual wetland losses averaged 458,000 acres, an area about half the size of Rhode Island." SECRETARY OF THE INTERIOR, THE IMPACT OF FEDERAL PROGRAMS ON WETLANDS VOLUME I: THE LOWER MISSISSIPPI ALLUVIAL PLAIN AND THE PRAIRIE POTHOLE REGION at 1 (1988) [hereinafter INTERIOR REPORT]. During this time period, agricultural development accounted for 87% of all lost wetlands, urban development for 8%, and other development for 5%. *Id.*

(NEPA).[23] The purpose of this Act is as follows:

> To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation. . . .[24]

In accordance with the NEPA, President Richard Nixon created the Environmental Protection Agency (EPA) and transferred to it the appropriate powers and duties from various executive departments.[25] The Army Corps of Engineers continued to be responsible for the permit program created by the Rivers and Harbors Act.

The Water Bank Act of 1970[26] was the first federal attempt to specifically protect wetlands. This Act authorizes the Secretary of Agriculture to lease easements in wetlands from private owners for ten-year periods in exchange for promises "not to drain, burn, fill, or otherwise destroy the wetland character of such areas, nor to use such areas for agricultural purposes. . . ."[27] The annual payment is greater if the owner allows public access to the wetlands for outdoor activities such as hunting, trapping, fishing, and hiking.[28] Violation of the agreement or transfer of the wetlands to another party who refuses to honor the terms of the lease results in forfeiture of all money already paid or still owed for the ten-year period.[29]

This program is popular among landowners because of its voluntary nature. If landowners do not think they would be adequately compensated, they are not forced to lease their wetlands. For this reason, the Water Bank Act does not provide the degree of protection to the amount of wetlands[30] desired by many environmentalists.[31]

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23. 42 U.S.C. §§ 4321-26 (1993).

24. 42 U.S.C. § 4321 (1993).

25. Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (1970); *reprinted in* 42 U.S.C. § 4321 (1993).

26. 16 U.S.C. §§ 1301-11 (1993).

27. 16 U.S.C. § 1303(2) (1993).

28. 16 U.S.C. § 1304 (1993).

29. 16 U.S.C. § 1303(4)-(5) (1993).

30. As of April 1987, only about 150,000 acres of wetlands were protected by lease and the program has received less funding in recent years. Ron Schara, *Wetlands Drainage Has Outrun Restoration*, MINNEAPOLIS STAR TRIB., Dec. 17, 1989, at 19A.

31. "With the overwhelming majority of the remaining wetlands in private hands, it is unrealistic to expect acquisition and easement programs alone to solve the problem of conserving environmentally important wetlands." INTERIOR REPORT, *supra* note 22, at 2.

B. The Clean Water Act of 1972

Despite federal efforts to protect the environment, wetlands continued to be developed. Although estimates vary as to how many acres of wetlands have been developed, some place the loss as high as half of the original wetlands of the United States, with hundreds of thousands of acres disappearing yearly.[32] According to the Interior Department, about 221 million acres of wetlands existed in the contiguous forty-eight states at the time of the nation's settlement. Today, less than 104 million acres remain, about forty-seven percent of the original wetland acreage.[33]

1. Purpose

Congress passed the Clean Water Act of 1972 (CWA),[34] which amended the Federal Water Pollution Control Act of 1948,[35] "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[36] In addition to regulating water quality,[37] the CWA affirms the Corps' responsibility for issuing permits for the discharge of dredged or fill material into navigable waters.[38] The CWA 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.[39]

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32. 16 U.S.C. §§ 3901(a)(7), 4401(a)(7) (1993).

33. Telephone Interview with Jon H. Goldstein, Project Director for the INTERIOR REPORT (Dec. 27, 1993). Between the mid-1970s and mid-1980s, 290,000 acres were lost per year, a rate less than that for the preceding two decades. Agricultural development accounted for 54% of lost acreage, urban development for 5%, and other development for 41%. "Other development" includes land that has been cleared and drained but has not been put to an identifiable use, much of which is found in rural areas. While development ratios may have changed in recent years, see note 22 *supra*, Goldstein said the figures can be misleading. "Although agricultural uses are probably down, they're not as down as they appear." *Id.*

34. 33 U.S.C. §§ 1251-1376 (1993). Many other bills had been considered along with this one. The Senate Subcommittee on Air and Water Pollution reviewed 13 water pollution control bills during the second session of the 91st Congress, and 19 during the first session of the 92d Congress, before approving the Clean Water Act. *See* S. REP. No. 92-414, 92th Cong., 2d Sess., app. A & B (1972), *reprinted in* 1972 U.S.C.C.A.N. 3768-76.

35. The 1948 Act assigned control of water pollution to state governors, while the federal government was authorized only to support water pollution research, new technology projects, and loan programs to finance treatment plants. "The States shall lead the national effort to prevent, control and abate water pollution. As a corollary, the Federal role has been limited to support of, and assistance to, the States." S. REP. No. 92-414, 92th Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3669.

36. 33 U.S.C. § 1251 (1993).

37. 33 U.S.C. § 1311 (1993).

38. Clean Water Act § 404, 33 U.S.C. § 1344 (1993). *See Buttrey*, 690 F.2d at 1190, which states, "We refuse to ignore the unique nature of the Corps, described . . . as the civil arm of a military agency, and the expertise of the Corps developed in its performance of civil functions relating to the preservation and development of the nation's water resources for over 150 years."

39. 33 U.S.C. § 1344(f)(2) (1993).

In evaluating permit applications, the Corps must apply guidelines developed by the Administrator of the EPA.[40] The EPA adopted regulations that define the term "fill material" as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody."[41] "Discharge of fill material" means "the addition of fill material into waters of the United States," including fill necessary for construction of structures such as buildings, dams, roads, and artificial islands.[42]

2. Jurisdiction

Under the CWA, the EPA can veto dredge-and-fill permits approved by the Corps if a project is found to have an "unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas."[43] Again, wetlands were not expressly protected, although the term "navigable waters" was redefined as "waters of the United States, including the territorial seas."[44] There is evidence that Congress intended this language to include wetlands, or that its members knew the protection of wetlands would be a reasonable extension of existing federal authority.[45]

Despite this argument, the Corps continued to limit its authority to the same navigable waters covered by the Rivers and Harbors Act.[46] But in *United States v. Holland,*[47] a district court did away with limits based on the mean high water line.[48] One year later, in *Natural Resources Defense Council, Inc. v. Callaway,*[49] another district court expressly expanded the Corps' jurisdiction, which "is not limited to the traditional tests of navigability."[50] Soon after, in *American Dredging Co. v. Dutchyshyn,*[51] the court stated:

> Although there is disputed evidence as to whether the land [in question] would come within the definition of "navigable waters" under the Rivers and Harbors Act, it is

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40. 33 U.S.C. § 1344(b)(1) (1993).

41. 33 C.F.R. § 323.2(e) (1993).

42. 33 C.F.R. § 323.2(f) (1993).

43. 33 U.S.C. § 1344(c) (1993); 33 C.F.R. §§ 320.2, 336.1(b)(5) (1993).

44. 33 U.S.C. § 1362(7) (1993).

45. "The conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. CONF. REP. No. 92-1236, 92th Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3822.

46. 42 Fed. Reg. at 37,123.

47. 373 F. Supp. 665 (M.D. Fla. 1974).

48. *Id.* at 676.

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

50. *Id.* at 686.

51. 480 F. Supp. 957 (E.D. Pa.), *aff'd,* 614 F.2d 769 (3d Cir. 1979).

> clear that under the Federal Water Pollution Control Act, the Corps of Engineers has the right to control the disposal of dredged material upon freshwater wetlands.[52]

In response to these decisions, federal regulations were amended to define "waters of the United States" to include interstate wetlands, intrastate wetlands that could affect interstate commerce, and wetlands adjacent to waters subject to Corps' jurisdiction.[53] Wetlands are "those areas that are inundated or saturated by surface or ground water at a frequency or duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."[54] The mean high water line was eliminated as a boundary to federal authority concerning wetlands and those wetlands adjacent to other waters,[55] complying with *Holland*.[56]

Other courts expanded the concept of "adjacent wetlands" to include those separated from other waters by natural barriers,[57] man-made barriers,[58] or barriers that are later removed, subjecting the wetlands to inundation.[59] Artificial wetlands are also subject to federal jurisdiction.[60]

In *United States v. Riverside Bayview Homes, Inc.*,[61] developers challenged the new regulations as going beyond congressional intent. The Supreme Court ruled:

> An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress. . . . In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps'

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52. *Id.* at 96.

53. 33 C.F.R. § 328.3(a)(2)-(3), (7) (1993); 40 C.F.R. § 230.3(s)(2)-(3), (7) (1992).

54. 42 Fed. Reg. at 37,128; 33 C.F.R. § 328.3(b) (1993); 40 C.F.R. § 230.3(t) (1992).

55. 42 Fed. Reg. at 37,128; 33 C.F.R. § 328.4(c)(2)-(3) (1993).

56. *Holland*, 373 F. Supp. at 676.

57. United States v. Malibu Beach, Inc., 711 F. Supp. 1301, 1312 (D.N.J. 1989) (permit is required when wetlands are separated from navigable waterway "only by beach dunes and sand").

58. United States v. Ciampitti, 583 F. Supp. 483, 494 (D.N.J. 1984); 33 C.F.R. § 328.3(c) (1993); 40 C.F.R. § 230.3(b) (1992).

59. Leslie Salt Co. v. United States, 896 F.2d 354, 357-58 (9th Cir. 1990) (Corps has jurisdiction even when its own action caused the wetland to be inundated, despite fears that Corps attempted "to expand its own jurisdiction by creating some wetland conditions where none existed before").

60. *Ciampitti*, 583 F. Supp. at 494, stating, "This court finds that federal jurisdiction is determined by whether the site is presently wetlands and not by how it came to be wetlands." *See Holland*, 373 F. Supp. at 673; Track 12, Inc. v. District Engineer, U.S. Army Corps of Engineers, 618 F. Supp. 448, 450-51 (D. Minn. 1985); United States v. Akers, 651 F. Supp. 320, 322-23 (E.D. Cal. 1987).

61. 474 U.S. 121 (1985).

ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.[62]

Although the Court decided that wetlands that are not the result of flooding or permeation by adjacent bodies of open water may be regulated,[63] it refused to address whether the Corps has the authority to regulate isolated wetlands that are not adjacent to other waters.[64] But in a later decision,[65] the Ninth Circuit ruled that the Corps could regulate isolated wetlands that provide a habitat for migratory birds.[66]

The "Reasonable Bird Rule,"[67] as it is sometimes known, was used in *Hoffman Homes, Inc. v. United States Environmental Protection Agency*[68] to subject isolated wetlands to regulation.[69] However, a court is required to accept an agency's factual findings when supported by "substantial evidence,"[70] and the *Hoffman* court found that the EPA had no evidence that migratory birds had ever used one of the tracts in question.[71]

3. *Regulated Activities*

Unlike the Water Bank Act and subsequent acts,[72] the CWA regulates only the discharge of pollutants[73] and dredged or fill material.[74] Many activities that are harmful, such as draining

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62. *Id.* at 131-34. *See also* Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 910 (5th Cir. 1983).

63. *Riverside*, 474 U.S. at 134. *See also* United States v. Cumberland Farms of Conn., Inc., 826 F.2d 1151 (1st Cir. 1987).

64. *Riverside*, 474 U.S. at 131 n.8.

65. Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990).

66. "The commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species." *Id.* at 360.

67. Dwight H. Merriam & Catherine Lin, *Wetland Regulation, in* HANDLING LAND USE AND ENVIRONMENTAL PROBLEMS OF REAL ESTATE 1991, at 119 (PLI Real Est. L. & Practice Course Handbook Series No. N4-4550, 1991).

68. 999 F.2d 256 (7th Cir. 1993).

69. "[T]he regulation covers waters whose connection to interstate commerce may be potential rather than actual, minimal rather than substantial. . . . [I]t is reasonable to interpret the regulation as allowing migratory birds to be that connection between a wetland and interstate commerce." *Id.* at 260.

70. *Id.* at 261. *See* Arkansas v. Oklahoma, — U.S. —, 112 S. Ct. 1046 (1992).

71. "The migratory birds are better judges of what is suitable for their welfare than are we. . . . After April showers not every temporary wet spot necessarily becomes subject to government control." *Hoffman*, 999 F.2d at 262.

72. The Endangered Species Act of 1973, 16 U.S.C. §§ 1531-43; the Food Security Act of 1985, 16 U.S.C. §§ 3801-62; the Emergency Wetlands Resources Act of 1986, 16 U.S.C. §§ 3901-56; and the North American Wetlands Conservation Act, 16 U.S.C. §§ 4401-13.

73. 33 U.S.C. § 1311.

74. 33 U.S.C. § 1344.

wetlands, continued to be unregulated for the most part.[75] In *Orleans Audubon Society v. Lee*,[76] the plaintiff sued the Corps' district engineer for allowing the installation of drainage culverts adjacent to wetlands without requiring a permit. The court affirmed the Corps' decision because draining a wetland did not involve a discharge regulated by the CWA.[77]

But in *Save Our Community v. United States Environmental Protection Agency*,[78] the court held that draining is regulated when it threatens to significantly alter or destroy a wetland.[79] Although the narrow interpretation of federal authority found in *Orleans* was supported by the EPA and the Corps,[80] the minority opinion of *Save Our Community* seems to correspond with the spirit of the EPA's own regulations that prohibit "the unnecessary alteration or destruction" of wetlands "as contrary to the public interest."[81]

The definition of "discharge of dredged or fill material"[82] has occasionally been stretched by the courts in unusual circumstances to cover activities not ordinarily regulated by the CWA. In *Avoyelles Sportsmen's League, Inc. v. Marsh*,[83] the court ruled that clearing wetlands, which the landowner was free to do under the circumstances,[84] invoked CWA authority when the vegetation was buried on site.[85] The court stated:

> The word "addition," as used in the definition of the term "discharge," may reasonably be understood to include "redeposit." . . . Since the landclearing activities involved the redeposit of materials, rather than their mere removal, we need not determine today whether mere removal may constitute a discharge under the CWA. Any suggestion made by the district court that the term "discharge" does cover removal is pure dicta.[86]

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75. GAO REPORT, *supra* note 5, at 3.

76. 742 F.2d 901 (5th Cir. 1984).

77. *Id.* at 910-11.

78. 741 F. Supp. 605 (N.D. Tex. 1990).

79. *Id.* at 615.

80. Kevin O'Hagan, *Pumping With the Intent To Kill: Evading Wetlands Jurisdiction Under Section 404 of the Clean Water Act Through Draining*, 40 DEPAUL L. REV. 1059, 1081-82 (1991).

81. 33 C.F.R. § 320.4(b)(1) (1993). Wetlands important to the public interest include those that: serve significant natural biological functions; provide drainage, water purification, and flooding and erosion protection; are scarce in the area; and were set aside as sanctuaries or to be studied. 33 C.F.R. § 320.4(b)(2)(i)-(viii) (1993).

82. 33 C.F.R. § 323.2(e)-(f) (1993).

83. 715 F.2d 897 (5th Cir. 1983).

84. The CWA was amended in 1977 to exempt certain activities, such as ongoing agriculture or silviculture, from regulation, which is discussed *infra*.

85. *Avoyelles*, 715 F.2d at 923.

86. *Id.*

In response to *Avoyelles* and similar cases, the EPA and the Corps recently revised their regulations[87] to include the addition or redeposit of dredged material resulting from activities such as mechanized landclearing, digging ditches or channels, placing pilings, or excavation, that would "destroy or degrade" wetlands.[88] Draining wetlands is still unregulated in most jurisdictions, except for those following the opinion in *Save Our Community.*

4. Citizen Suits

The CWA includes a provision that allows a party having an interest that is or may be adversely affected by a wetlands project to commence a civil action in federal court, regardless of amount in controversy or citizenship of the parties.[89] The plaintiff can sue any "person,"[90] including the United States or any federal agency, who allegedly violates an effluent standard or limitation or an EPA or state order concerning them. The Administrator of the EPA can also be sued for failure to perform non-discretionary duties.

C. The 1977 Amendments to the CWA

The Clear Water Act of 1977[91] was passed in response to objections to the 1972 Act and the regulations created under it.[92] By passing the 1977 Amendments, Congress intended to affirm the federal commitment to wetlands protection.[93]

The Amendments give the Agriculture Department's Soil Conservation Service (SCS) and the Interior Department's Fish and Wildlife Service (FWS) advisory roles in the permit process.[94] The Amendments allow for the use of general permits, issued for up to five years, to speed up the administrative process for activities that would have a *de minimis* effect on the environment.[95] These general permits, granted on a regional or nationwide basis, exempt

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87. This change was required by the settlement agreement in North Carolina Wildlife Federation v. Tulloch, Civil No. C90-713-CIV-5-BO (E.D.N.C. 1992).

88. 58 Fed. Reg. 45,008 (1993). Several industry groups have challenged this new rule in American Mining Congress v. Army Corps of Engineers and EPA, No. 93-1754 (D.C. 1993).

89. 33 U.S.C. § 1365(a) (1993).

90. 33 U.S.C. § 1362(5) (1993) states, "The term 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body."

91. Pub. L. No. 95-217, 91 Stat. 1566 (1977).

92. "Their implementation has been uneven, often contrary to congressional intent, and, frequently more the result of judicial order than administrative initiative." S. REP. No. 95-370, 95th Cong., 1st Sess. 1 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4327.

93. "The objective of the 1972 act is to protect the physical, chemical, and biological integrity of the Nation's waters. Restriction of jurisdiction to those relatively few waterways that are used or are susceptible to use for navigation would render this purpose impossible to achieve." S. REP. No. 95-370, 95th Cong., 1st Sess. 75 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4400.

94. 33 U.S.C. § 1344(m) (1993).

95. 33 U.S.C. § 1344(e) (1993); 33 C.F.R. § 325.2(e)(2) (1993).

specified activities from further administrative review.[96] The Amendments also provide the states[97] with the opportunity to assume responsibility for the permit program if they submit action plans to the EPA for approval.[98]

In attempting to rein in regulatory authority, the Amendments exempt from regulation the discharge of dredged or fill material resulting from certain activities, such as: farming; silviculture; ranching; maintenance of water-controlling structures and drainage ditches; and construction and maintenance of farm or stock ponds, irrigation ditches, and temporary sedimentation basins and farm or forest roads.[99] The Amendments also clarify congressional intent that the CWA coexists with, rather than preempts, state and local law regulating navigable waters within their jurisdictions.[100]

Under federal regulations developed after passage of the Amendments, a permit cannot be obtained "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences."[101] Practicable alternatives are presumed to be available unless proven otherwise, and include projects that do not require engaging in regulated activities or those that can be moved to a different site where the activities would have

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96. 33 C.F.R. § 330 (1993). Currently, there are two general permits that affect wetlands. Permit No. 26, "Headwaters and Isolated Waters Discharges," allows discharges of dredged or fill material that do not cause the loss of more than 10 acres of headwaters or isolated waters. The district engineer must be notified (*see* 33 C.F.R. § 330.1(e) (1993)) if more than one acre of water will be lost. For discharges in wetlands, notification must include a wetlands delineation. Permit No. 27, "Wetland and Riparian Restoration and Creation Activities," allows unhindered wetlands creation, which may be reversed by discharge of dredged or fill material within five years. Both permits are found under 33 C.F.R. § 330.6 (1993).

97. Federal regulations treat Native American tribes as states for purposes of permit program assumption. 58 Fed. Reg. 8172 (1993).

98. 33 U.S.C. § 1344(g) (1993). So far, only Michigan has assumed responsibility for the permitting program, but "they recently warned in testimony before the Senate that they may withdraw as the federal program has become unworkable." *NASDA Statement, supra* note 4.

99. 33 U.S.C § 1344(f)(1) (1993). The silviculture exception applies to normal harvesting of timber, not to clearing timber "to permanently change the area from wetlands into a non-wetland agricultural tract for row crop cultivation." Save Our Wetlands, Inc. v. Sands, 711 F.2d 634, 647 (5th Cir. 1983) (citing Avoyelles Sportsmen's League v. Alexander, 473 F. Supp. 525 (W.D. La. 1979)); United States v. Larkins, 852 F.2d 189, 192 (6th Cir. 1988) (quoting Avoyelles Sportsmen's League v. Marsh, 715 F.2d at 926 n.46). But in *Save Our Wetlands,* the court found that wooded swampland cleared and replanted with shrubs, grasses, and other low growth did not significantly change the character of the wetlands. *Save Our Wetlands,* 711 F. Supp. at 647.

33 C.F.R. § 323.4(a)(1) (1993) states that farming, silviculture, or ranching must be part of an established, ongoing operation to be exempt from requiring a permit. An operation ceases to be "established" when the area is converted to another use or has been unused "for so long that modifications to the hydrological regime are necessary to resume operations." *Id.* at 323.4(a)(1)(ii). However, prior converted cropland that had been wetlands before Dec. 23, 1985 is not considered by the regulations to be "waters of the United States." 58 Fed. Reg. 45,008 (1993).

100. 33 U.S.C. §§ 1251(b), 1344(t) (1993); *See* Bartell v. State, 284 N.W.2d 834, 837 (Minn. 1979) (CWA requires federal government and states to exercise concurrent jurisdiction over dredging and filling of wetlands). All coastal states have statutes protecting wetlands and 18 inland states protect freshwater wetlands. More than 5,000 communities protect wetlands with local ordinances and zoning laws. *See NASDA Statement, supra* note 4.

101. 40 C.F.R. § 230.10(a) (1992). A similar policy was applied to projects on federal lands and federal projects on non-federal lands by Executive Order 11990, 42 Fed. Reg. 26961 (1977), *reprinted in* 42 U.S.C. § 4321 (1993).

a lesser impact on the environment.[102] Availability, cost, existing technology, and logistics in light of the project's overall purposes are taken into account when determining if an alternative is practicable.[103] Permit applicants must prove that no practicable alternatives existed at the time they began looking for a site (the "market entry" approach), not when the application was filed.[104]

D. Other Means of Regulating Wetlands

1. The Wetlands Delineation Manuals

Once wetlands were protected by federal law, the question remained, "what is a wetland?" This question required an answer, considering the weight courts give to agency determinations. In *Avoyelles,* the court stated that as long as an agency determination is not "arbitrary and capricious," judicial responsibility is served by affirming the agency's decision, because "[t]he determination itself, which requires an analysis of the types of vegetation, soil and water conditions that would indicate the existence of wetlands, is the kind of scientific decision normally accorded significant deference by the courts."[105]

Wetlands are defined in statutes binding the Agriculture[106] and Interior[107] departments. The CWA does not define wetlands, even though it has served as the basis for federal authority over dredge-and-fill activities since its enactment.[108] Instead, it authorizes the EPA to develop the means to identify wetlands. But the EPA, the Corps, the SCS, and the FWS, as well as more than half the states, have developed different criteria for determining "jurisdictional wetlands."[109] To varying degrees, these definitions include three parameters: hydrology, or amount of water present; hydrophytic vegetation, which requires a wetland environment; and hydric soils,

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102. 40 C.F.R. § 230.10(a)(1) (1992). "Some Corps and resource agency officials believe that the mere existence of the program and its requirements for getting approval to fill wetlands deter landowners and developers from proceeding directly with projects involving wetlands prior to considering other alternatives." GAO REPORT, *supra* note 5, at 22.

103. 40 C.F.R. § 230.10(a)(2) (1992). "The EPA officials view practicable alternatives from an environmental standpoint even when such alternatives are more costly to the applicants, whereas the Corps places more emphasis on the economic impact from the applicant's standpoint, EPA officials said." GAO REPORT, *supra* note 5, at 27.

104. Bersani v. United States EPA, 850 F.2d 36 (2d Cir. 1988), *cert. denied,* 489 U.S. 1089 (1989), in which the court affirmed the EPA's interpretation of its own regulations.

105. *Avoyelles,* 715 F.2d at 906.

106. The Food Security Act, 16 U.S.C. § 3822(e) (1993).

107. The Emergency Wetland Resources Act, 16 U.S.C. § 3902(5) (1993).

108. *See* 33 U.S.C. § 1362 (1993).

109. *NASDA Statement, supra* note 4. "The Corps and the resource agencies sometimes delineate wetland boundaries differently, and this can result in wetlands determinations that vary by thousands of acres." GAO REPORT, *supra* note 5, at 23.

which have been depleted of oxygen by flooding or saturation.[110]

Rather than developing their own criteria to determine if a site was subject to federal jurisdiction, Corps engineers had the option of using the Corps' 1987 Delineation Manual. Independent indicators of the three wetland parameters—wetland hydrology, hydrophytic vegetation, and hydric soils—are required.[111] To establish hydrology, standing water must be observable within twelve inches of the soil surface, and surface water or saturation must be present for more than 5% of the growing season.[112] If saturation is present between 5% and 12.5% of the growing season, stronger evidence of hydrophytic vegetation is needed than if present for more than 12.5%.[113]

"Recognizing the need for a single, consistent approach for wetlands determinations," scientists from the Corps, EPA, SCS, and FWS developed the Federal Manual for Identifying and Delineating Jurisdictional Wetlands for use by the four agencies.[114] The 1989 manual was highly criticized by landowners and developers, as well as then EPA Administrator William Reilly, for adding more than 65 million acres to federal wetlands jurisdiction simply by changing delineation rules.[115] According to some estimates, half of the state of Vermont, forty percent of Maryland's Eastern Shore, and a large portion of suburban Houston would have been subject to wetlands regulations under the 1989 manual.[116]

The 1989 manual states that land could be regulated by the federal government if water was found within eighteen inches of the surface for seven consecutive days during the growing season, even if no water was ever present on the surface.[117] The manual did not require independent indicators of the three parameters, but instead each could be presumed by the presence of the other two.[118] When sufficient data on hydrology, vegetation, and soils was available from maps or photographs, a wetland determination could be made without visiting the site.[119]

In an attempt to tighten the evidence requirements of the three parameters for delineating

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110. 56 Fed. Reg. 40,446 (1991). 33 C.F.R. § 328.3(b) (1993) originally stated that vegetation used to indicate that an area was wetlands had to require saturated soil conditions. This regulation was later modified to include areas in which "a prevalence of vegetation typically adapted for life in saturated soil conditions" is present, because the earlier version had created a loophole that excluded from consideration many forms of plants prevalent in wetlands but found elsewhere as well. 42 Fed. Reg. at 37,138.

111. Carol E. Dinkins, et al., *Regulatory Obstacles to Development and Redevelopment in the U.S.: Wetlands and Other Essential Issues*, C764 ALI-ABA 467, 481-82 (1992).

112. *Id.*

113. *Id.* at 481-82

114. 56 Fed. Reg. 40,446 (1991).

115. *NASDA Statement, supra* note 4.

116. Lynn L. Bergeson, *The Debate Over the Definition of Wetlands Continues*, CORPORATE LEGAL TIMES, Sept. 1993, at 21.

117. Dinkins et al., *supra* note 111, at 477-78.

118. *Id.*

119. *Id.*

wetlands, the Bush Administration proposed revisions to the 1989 manual.[120] The revised manual required independent indicators of all three wetland parameters,[121] as well as fifteen or more consecutive days of inundation, or saturation from surface or ground water for twenty-one consecutive days during the growing season in most years, or periodic flooding by tidal waters.[122]

When the 1991 manual was opened to public comment, the EPA received more than 100,000 comments.[123] Opponents charged that the revised manual could reduce the amount of wetlands regulated in some states by up to half.[124] The resulting controversy forced the EPA and the Corps to return to the 1987 manual,[125] and the SCS to use its National Food Security Act Manual, first developed in 1988.[126]

2. *Legislation*

In addition to the CWA, other statutes have been passed that directly regulate the use of wetlands.[127] Several of them have provisions similar to the Water Bank Act that allow for the purchase of temporary and permanent easements in wetlands, as well as the wetlands themselves, for preservation purposes.[128] Often, the statutes take a dual approach of acquisition and regulation.

The Endangered Species Act of 1973[129] seeks to protect endangered, threatened, or rare species (except for certain insects judged to be pests) through various means, including "habitat acquisition and maintenance."[130] All federal departments and agencies are required to conserve endangered and threatened species when exercising their authority and cooperate with state and local agencies to resolve water resource issues.[131]

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120. 56 Fed. Reg. 40,446 (1991).

121. *Id.* at 40,451-452.

122. *Id.* at 40,452.

123. Bergeson, *supra* note 116, at 21.

124. Dinkins et al., *supra* note 111, at 480.

125. Bergeson, *supra* note 116, at 21.

126. *Studds to Introduce Bill to Reflect Clinton Wetlands Plan,* BUREAU OF NAT'L AFF., Sept. 29, 1993, at 187.

127. The Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-54 (1993); the Coastal Zone Act Reauthorization Amendments of 1990, Pub. L. No. 101-508 § 6202 (codified as amended at 16 U.S.C. §§ 1455-64 (1993)); the North American Wetlands Conservation Act of 1989, 16 U.S.C. §§ 4401-13 (1993).

128. The Endangered Species Act of 1973, 16 U.S.C. § 1534 (1993); the Food Security Act of 1985, 16 U.S.C. § 3837 (1993); the Emergency Wetlands Resources Act of 1986, 16 U.S.C. § 3922 (1993); the North American Wetlands Conservation Act of 1989, 16 U.S.C. § 4405 (1993).

129. 16 U.S.C. §§ 1531-43 (1993).

130. 16 U.S.C. §§ 1532(3), 1534 (1993).

131. 16 U.S.C. § 1531(c) (1993).

The Food Security Act of 1985[132] established a wetlands reserve program[133] and has a provision known as "Swampbuster,"[134] that makes a farmer ineligible for various federal loan and grant programs if wetlands are converted ("drained, dredged, filled, leveled or otherwise manipulated")[135] to agricultural uses after Dec. 23, 1985.[136] The SCS identifies wetlands to ensure compliance, while the FWS serves in an advisory role.[137] This law defines wetlands as having "a predominance of hydric soils," being "inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions," and supporting "a prevalence of such vegetation" under normal conditions.[138]

The Emergency Wetlands Resources Act of 1986[139] authorizes both wetlands acquisition[140] and the completion of the "national wetlands inventory project."[141] The Secretary of the Army and the FWS are to map wetlands located in the contiguous United States, including the coastal zone, floodplains of rivers, and the Prairie Pothole region, by 1998. Mapping of Alaska and noncontiguous areas are to be completed by 2000.[142] The Act raised the price of duck stamps, required for duck hunting,[143] to $12.50 in 1989 and $15 in 1990 to help pay for the above projects.[144]

In keeping with his desire to be known as the "Environmental President," George Bush announced an "interim goal of no overall net loss" and a "long-term goal to increase the quality and quantity of the Nation's wetlands, as defined by acreage and function."[145] Pursuant to the "no net loss" policy, the EPA and the Corps entered into an agreement on how the mitigation

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132. Also known as the 1985 Farm Act, 16 U.S.C. §§ 3801-62 (1993).

133. 16 U.S.C. § 3837 (1993).

134. 16 U.S.C. §§ 3821-24 (1993).

135. 16 U.S.C. § 3801(a)(4)(A) (1993).

136. This "prior converted cropland" was recently excluded from the Corps' authority by an amendment to regulations under the CWA to be consistent with Swampbuster. 58 Fed. Reg. 45,008 (1993).

137. 16 U.S.C. § 3823 (1993).

138. 16 U.S.C. § 3822(e)(1)-(3) (1993). The SCS's National Food Security Act Manual also contains this definition but excludes Alaskan permafrost with a high potential for agricultural development. 56 Fed. Reg. at 40,450.

139. 16 U.S.C. §§ 3901-56 (1993).

140. 16 U.S.C. §§ 3921-23 (1993).

141. 16 U.S.C. § 3931 (1993).

142. 16 U.S.C. § 3931(a) (1993).

143. Initially authorized by the Migratory Bird Hunting Stamp Act of 1934, 16 U.S.C. § 718b (1993). The original price of duck stamps, $2, was raised to $3 by Pub. L. No. 85-585 (1958).

144. Schara, *supra* note 30, at 19A.

145. These goals, known as Bush's "no net loss" policy, were codified at 33 U.S.C. § 2317(a)(1) (1993).

of wetlands losses would affect permit determinations under the CWA.[146] The types of acceptable mitigation agreed on, in order of preference, were avoidance,[147] minimization,[148] and compensatory mitigation.[149]

The latter, also known as "mitigation banking," is required "for unavoidable adverse impacts which remain after all appropriate and practicable minimization has been required."[150] Mitigation banking involves restoring existing degraded wetlands or creating man-made wetlands in another location to replace those being developed. Mitigation banking projects that restore functional values similar to those lost and take place in an area adjacent to the discharge site are preferable.[151] But mitigation banking is not a perfect means of obtaining a permit.[152] A permit may still be rejected when no alternatives are available if the impacts are too great, regardless of the amount of mitigation banking proposed.[153]

II. The Wetlands Reform Act of 1993

Most commentators agree that the existing system for wetlands protection needs to be amended, but few can agree on how it should be done.[154] About thirty bills with wetlands provisions were introduced into the 102d Congress.[155] During the first session of the 103d Congress, several "old" bills that failed to pass were reintroduced,[156] while others were

146. Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines (June 6, 1990), *reprinted in* 55 Fed. Reg. 9210-13 (1990).

147. 40 C.F.R. § 230.10(a) (1992); 55 Fed. Reg. at 9212.

148. 40 C.F.R. § 230.10(d) (1992); 55 Fed. Reg. at 9212.

149. In evaluating permit applications, compensatory mitigation cannot be used to reduce environmental impacts that can otherwise be avoided. 55 Fed. Reg. at 9212.

150. *Id.*

151. *Id.*

152. "There is continued uncertainty regarding the success of wetland creation or other habitat development. Therefore, in determining the nature and extent of habitat development of this type, careful consideration should be given to its likelihood of success." *Id.*

153. *Id.* at n.5.

154. *See* Renee Stone, *Wetlands Protection and Development: The Advantages of Retaining Federal Control,* 10 STAN. ENVTL. L.J. 137 (1991); Denis Collins Swords, *The Comprehensive Wetlands Conservation and Management Act of 1991: A Restructuring of Section 404 That Affords Inadequate Protection For Critical Wetlands,* 53 LA. L. REV. 163 (1992); Timothy D. Searchinger, *Wetlands Issues 1993: Challenges and a New Approach,* 4 MD. J. CONTEMP. LEGAL ISSUES 13 (1992); *NASDA Statement, supra* note 4.

155. Jeffrey A. Zinn, *Selected Wetland Proposals Introduced in the 102nd Congress,* Congressional Research Service 1 (July 15, 1992), *noted in* Swords, *supra* note 154, at n.35.

156. The Comprehensive Wetlands Conservation and Management Act, H.R. 1330, 102d Cong., 1st Sess. (1991) and S. 1463, 102d Cong., 1st Sess. (1991), was introduced by Rep. Hayes and Sen. Breaux (both D-La.). The House bill was reintroduced by Rep. Hayes and Rep. Ridge (R-Pa.) on March 11, 1993. The Wetlands Simplification Act, S. 2018, 102d Cong., 1st Sess. (1991), was introduced by Sen. Bond (R-Mo.) and reintroduced as H.R. 1089, 103d Cong., 1st Sess. (1993) and S. 824, 103d Cong., 1st Sess. (1993) by Sen. Bond and Rep. Bunning (R-Ky.).

introduced for the first time.[157]

Congressman Edwards is among those who are dissatisfied with the current system. "Much of the frustration and problems experienced by those seeking to comply with wetlands regulations arises from the lack of consistency in the system, delays in decisions concerning delineations and permit applications, and too much emphasis on a regulatory approach to protecting wetlands."[158] But despite the administrative gridlock in processing permits, many wetlands seem to slip through the cracks. Edwards claims, "under the existing system, 300,000 acres of wetlands are lost each year. That translates into 60 acres every hour, or 1 acre every minute."[159]

In response, Edwards introduced the Wetlands Reform Act[160] in the hopes of tightening regulatory control while speeding up the permit process. Greeted with a lukewarm reception by the 102d Congress, the bill has picked up support since its reintroduction into the 103d Congress and has been matched by a corresponding Senate bill. According to Edwards, several environmental groups have endorsed the bill.[161] The Senate version has been praised by fishing enthusiasts as a means of replenishing the striped bass population in San Francisco Bay.[162]

A. Amendments to the Federal Water Pollution Control Act

Much of what the bill seeks to do is amend the CWA to include elements of protection of wetlands that have been developed by the EPA and the courts over more than twenty years.[163] By codifying these elements, the bill guarantees that they will be considered in any future disputes. This should aid environmentalists and landowners alike by providing a more predictable framework under which to operate. But generally this will have little impact on the degree of wetlands protection unless the EPA or a wayward court decides to disregard current legal trends.

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157. The Wetlands Conservation and Regulatory Improvements Act, S. 1304, 103d Cong., 1st Sess. (1993), was introduced by Sen. Baucus (D-Mt.) and Sen. Chafee (R-RI) on July 28. The Wetlands Protection and Management Act, H.R. 3465, 103d Cong., 1st Sess. (1993), was introduced by Rep. Studds (D-Mass.) to encompass President Bill Clinton's plan for wetlands reform. The EPA favors the Clinton plan over the Wetlands Reform Act. Letter from John W. Meagher, Director, Wetlands Division of the United States Environmental Protection Agency, to Richard Spotts, Defenders of Wildlife (Oct. 18, 1993).

158. *Edwards Subcommittee Statement, supra* note 10.

159. 139 CONG. REC. E57-03 (daily ed. Jan. 5, 1993) (statement of Rep. Edwards) [hereinafter EDWARDS REMARKS].

160. H.R. 350, 103d Cong., 1st Sess. (1993) and S. 1195, 103d Cong., 1st Sess. (1993) [hereinafter WRA]. All quoted material is from the Senate bill, since it is the most recent version. *See* note 8 *supra.*

161. These groups include the National Wildlife Federation, the Audubon Society, the Sierra Club, the National Resources Defense Council, Friends of the Earth, Clean Water Action, the Izaak Walton League of America, Trout Unlimited, the American Oceans Campaign, and the Campaign to Save California Wetlands. EDWARDS REMARKS, *supra* note 159.

162. Glen Martin, *Laying Blame for Fish Woes Is Political,* S.F. CHRON., Sept. 2, 1993, at E10.

163. WRA §§ 101-103, 108.

1. Purpose

The bill states, "it is the national policy to preserve the quantity and quality of the wetlands of the United States and to restore those wetlands that have been degraded."[164] For the first time, the dredge-and-fill permit program regulating the use of wetlands will have an express statutory basis. Although this statement sounds much like Bush's "no net loss" policy, the language is more forceful and seems to provide less flexibility than the "interim" and "long-term" goals of the Bush policy. While this might please environmentalists, it may lead to confusion about the role of mitigation banking in permit approval, depending on how much weight the new policy is given in permit decisions.[165]

2. Jurisdiction

The bill exempts from regulation man-made wetlands such as: non-tidal drainage and irrigation ditches in uplands; artificially irrigated areas that would revert to uplands without irrigation; lakes or ponds used exclusively for watering of livestock, irrigation, or rice growing; reflecting or swimming pools or other small ornamental water bodies; and pits incidental to construction activity that have retained wetland characteristics.[166] These narrowly-defined exceptions carved from the jurisdictional reach of the courts[167] may actually increase the wetlands available for migratory birds and similar species. By removing the disincentives inherent in the CWA permit program, landowners will be able to construct these artificial wetlands on their property without fear that federal regulations will restrict their options in the future.

3. Regulated Activities

The bill regulates the "discharge of any pollutant or other alteration of navigable waters."[168] It adds a new paragraph to the definitions section of the CWA, which states:

> The term "other alteration" means draining, dredging, excavation, channelization, flooding, clearing of vegetation, driving of a piling or placement of other obstruction,

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164. WRA § 101 (to be codified at 33 U.S.C. § 1251(a)(8)).

165. *See* discussion of mitigation banking *infra*.

166. WRA § 109 (to be codified as amended at 33 U.S.C. § 1344(f)). The developer has the burden of proving that a tract qualifies under one of these exceptions. *Id.*

These artificial wetlands have many uses. In California, rice growers are increasing their reliance on artificial wetlands as trade barriers with Japan are expected to weaken. Kenneth Howe, *Rice Farmers Set to Serve Japan*, S.F. CHRON., Nov. 30, 1993, at B2. Man-made ponds near abandoned coal mines and quarries in Illinois are used for "aquaculture," the controlled harvesting of fish and other water-dwelling species for food. Susan DeGrane, *Aquaculturist's Stock Is Growing in Illinois Waters*, CHI. TRIB., Dec. 20, 1993, at C1. A man-made waterway served as the centerpiece of an award-winning landscape design. Christina K. Cosdon, *Awards*, ST. PETERSBURG TIMES, Jan. 8, 1994, at 2.

167. *See Holland*, 373 F. Supp. at 673; *Ciampitti*, 583 F. Supp. at 494; *Track 12*, 618 F. Supp at 450-51; *Akers*, 651 F. Supp. at 322-23.

168. WRA § 102(a) (to be codified as amended at 33 U.S.C. § 1311(a)).

> diversion of waters, or other activity in navigable waters that impairs the flow, reach, or circulation of surface waters, or that results in a more than minimal change in the hydrologic regime, bottom contour, or configuration of the waters, or in the type, distribution, or diversity of vegetation, fish, and wildlife that depend on the waters.[169]

Although recent changes in federal regulations might have stolen some of the "thunder" of this provision,[170] it still has the effect of transforming the CWA from a commercial to an environmental law. The provision plugs the loophole that allows activities other than the discharge of pollutants and dredged or fill material while considering a project's effects on the ecosystem.[171] If Congress had intended to protect wetlands by passing the CWA, as the Congressional Record seems to show and many courts have decided, then a comprehensive approach is necessary to meet than end.[172]

In exchange, the bill exempts from regulation continuing farming activities, such as normal plowing, seeding, cultivating, minor drainage for crop production, and harvesting, in wetlands that have been maintained as cropland for at least one growing season in the five-year period prior to the activity.[173] This codifies a previous version of federal regulations[174] that exempted prior converted cropland in a "use it or lose it" fashion, allowing the Corps to exert its authority over abandoned land that is no longer being used productively.

Nonetheless, this sensible provision is not without its problems. It gives the Corps authority over all prior converted cropland that goes unused for five years, including wetlands converted to farmland before Dec. 23, 1985. This overrules recent changes to federal regulations[175] that were intended to make the prior converted cropland exception consistent with Swampbuster.[176] Without this consistency, an owner of cropland converted before the above date who fails to use the land for five years would need a CWA permit to use the land once again. If he then used the land without a permit, he would violate the CWA but would remain eligible for federal loans and grants despite Swampbuster, since this section does not allow for the possible future revocation of "prior converted cropland" status. Ironically, the landowner could then use the federal money to pay the CWA fines.

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169. WRA § 102(d) (to be codified as amended at 33 U.S.C. § 1362(21)).

170. 58 Fed. Reg. 45,008 (1993). Although regulations currently prohibit many of the activities listed in the bill, draining wetlands would also be prohibited by the bill. *See supra* text accompanying notes 72-88.

171. *See* EDWARDS REMARKS, *supra* note 159; *Edwards Subcommittee Statement, supra* note 10; 139 CONG. REC. S8465 (daily ed. July 1, 1993) (statement of Sen. Boxer) [hereinafter BOXER STATEMENT].

172. "The result of restricting regulation to the discharge of dredged or fill material is to leave about 80% of the Nation's wetland losses uncovered by the Section 404 program." INTERIOR REPORT, *supra* note 22, at 36.

173. WRA § 109 (to be codified as amended at 33 U.S.C. § 1344(f)). The Clinton Administration estimates that 53 million acres of wetlands were converted to agricultural uses before Dec. 23, 1985, and no longer exhibit wetlands characteristics. Gerry Studds, *Finally, We Can End the Wetlands Wars By Enacting President Clinton's Plan,* Roll Call, Oct. 4, 1993, *available in* LEXIS, Nexis Library, Omni File.

174. 33 C.F.R. § 323.4(a)(1)(ii) (1993).

175. 58 Fed. Reg. 45,008 (1993).

176. 16 U.S.C. § 3821 (1993); *see supra* text accompanying notes 132-138.

4. Permit Review

The bill adds a provision that codifies federal regulations[177] prohibiting the issuance of a permit if there is "a practicable alternative to the proposed activity that would have less adverse environmental impact on navigable waters."[178] It makes no mention of when alternatives are to be considered, so the EPA will most likely continue to use its "market entry" approach.[179]

Although the EPA and the Corps retain their current duties, the bill expands the number of agencies and their roles in permit review by granting the Secretary of Commerce, acting through the Assistant Administrator of the National Marine Fisheries Service, the right to submit written comments about all permit applications and proposals for general permits.[180] The Secretary of the Army must either adopt the recommendations of the Interior and Commerce secretaries or explain in writing why he declines to do so.[181]

While this provision would provide more scrutiny over permit decisions, it is almost certain to slow down the process, which goes against the express intent of the bill's sponsors.[182] The EPA's current veto power over Corps decisions is final. But this provision would give two additional agencies "limited vetoes" that require time-consuming revisions or responses, "a prescription for increased gridlock and delay."[183]

However, giving the Secretary of Commerce a role in the process equal to that of the Secretary of the Interior may be an attempt to cling to the CWA's original basis of authority, the Commerce Clause of the Constitution. Although this may seem to contradict the spirit of the bill, which firmly converts the CWA into an environmental statute, it may be intended to defeat constitutional challenges to federal authority over wetlands. If this is the case, there might be equally valid ways of maintaining the CWA's connection with the Commerce Clause, such as codifying the "Reasonable Bird Rule" or some other tie to interstate commerce, that would be less cumbersome than granting the Commerce Secretary a "limited veto."

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177. 40 C.F.R. § 230.10(a) (1992).

178. WRA § 108 (to be codified at 33 U.S.C. § 1344(v)).

179. *Bersani*, 850 F.2d at 46; *see supra* text accompanying notes 101-104.

180. WRA § 104(a) (to be codified as amended at 33 U.S.C. § 1344(m)).

181. WRA § 104(b) (to be codified as amended at 33 U.S.C. § 1344(m)).

182. "[W]e believe permit processing must be streamlined to eliminate unnecessary and costly delays." *Edwards Subcommittee Statement, supra* note 10.

183. *NASDA Statement, supra* note 4. During fiscal year 1986, the Corps issued about 10,500 permits and denied about 500 applications. GAO REPORT, *supra* note 5, at 11.

5. *General Permits*

General permits, which some environmentalists oppose altogether,[184] are curtailed by the bill in a number of ways.[185] The Corps can issue general permits only with EPA approval. A general permit must include measures that allow the Corps to monitor any activities conducted under the permit. If regulations require predischarge notification before an activity can be authorized by a general permit,[186] the Corps must give the EPA, the Interior and Commerce departments, appropriate state agencies, and the public, notification and thirty days to comment. An activity that fails to receive state water quality certification[187] will not be authorized by a general permit.[188] General permits must be revised or revoked every two years, instead of the five-year time period under current law.[189]

This provision seems to frustrate the very reason why general permits exist in the first place, which is "to regulate with little, if any, delay or paperwork certain activities having minimal impacts."[190] Although state water quality certification and some degree of predischarge notification is already required by federal regulations, the other modifications increase the scrutiny over projects with *de minimis* impacts to almost the same degree to which individual permits are subjected. This would bring the permit program "to a virtual halt."[191]

6. *Expedited Review*

Within 180 days of the bill's passage, the Secretary of the Army is required to establish a "Fast Track Team" in each district office to expedite the review of "minor permits."[192] Each team will consist of up to one fourth of all officials reviewing permits, and this ratio may be increased if permits are not processed fast enough. Minor permits are to be processed within sixty days after public notice is published.[193]

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184. Searchinger, *supra* note 154, at 32-35.

185. WRA § 105 (to be codified as amended at 33 U.S.C. § 1344(e)(1)).

186. 33 C.F.R. § 330.1(e) (1993). *See* General Permit No. 26, *supra* note 96, which requires notification if more than one acre of headwaters or isolated waters will be affected.

187. 33 U.S.C. § 1341 (1993).

188. This provision codifies 33 C.F.R. § 330.4(c) (1993).

189. *See supra* text accompanying notes 95-96.

190. 33 C.F.R. § 330.1(b) (1993). *See also* 58 Fed. Reg. 45,008 (1993), which states, "The general permit program is an extremely important regulatory tool used by the Corps to regulate effectively activities with minimal impacts on the aquatic environment. The Corps does not have the resources to regulate all activities on a case-by-case individual permit basis."

191. *NASDA Statement, supra* note 4. "The bill requires an expensive and time consuming alternative analysis for even the routine matters covered by general permits, a wholly unnecessary additional requirement, given that general permits can only be used to authorize activities that have only minimal effect on the environment." *Id.*

192. WRA § 107 (to be codified as amended at 33 U.S.C. § 1344(q)).

193. 33 U.S.C. § 1344(a) (1993).

Minor permits must meet all of the following criteria: they would disturb no more than one acre of wetlands; they are not part of a larger plan or proposal that would disturb more than one acre; they are sought by an individual or private business employing no more than ten workers; they do not require an environmental impact statement;[194] they do not threaten an endangered or threatened species;[195] and they do not require additional review, at the request of the Corps, the EPA, or the Agriculture, Commerce, or Interior departments.

While the idea of expedited review may be appealing to landowners who want quick rulings on whether they can develop their land, its application under this provision is questionable. Under current law, agencies are required to review permits, "to the maximum extent practicable," within 90 days.[196] The bill speeds up the process for minor permits, but makes no mention of other permits. Although the bill includes a "pious wish" that decisions on other permits will not suffer delays, it provides no deadline for other permits and creates a shortage of personnel by diverting them to reviewing minor permits exclusively.[197]

Additionally, qualifying for "minor permit status" may be a difficult hurdle to overcome. Some commentators claim expedited review "will be available to virtually no one, and discriminates against projects that create more than ten jobs. . . . Even then, if the Corps, EPA or any other federal agency simply requests a delay, the permit cannot receive expedited review."[198] Perhaps a carefully drafted general permit under current law with a notification requirement[199] would better serve the bill's ends.

Congressman Edwards said the Fast Track is designed to protect small landowners, who often do not have the resources to endure delays,[200] but in fact the program benefits small projects.[201] A beneficiary of expedited review may in fact be an owner of a huge estate with a half acre of wetlands frustrating his plans to build a sprawling shopping mall. While there is nothing wrong with giving a break to both the wealthy and poor equally, it is wrong to claim that it is being done solely to help the downtrodden. Additionally, it is unlikely that environmentalists would support the Fast Track for small projects because they claim much of wetlands destruction occurs piecemeal, one acre at a time, and such projects are already not given enough scrutiny.

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194. Pursuant to NEPA, 42 U.S.C. §§ 4321-61 (1993).

195. Pursuant to the Endangered Species Act, 16 U.S.C. §§ 1531-43 (1993).

196. 33 U.S.C. § 1344(q) (1993).

197. Currently, 50% of about 15,000 applications received per year are processed within 60 days, 25% between 61 and 120 days, 20% between 121 days and a year, and 5% take longer than a year. Swords, *supra* note 154 (citing ENVIRONMENTAL PROTECTION AGENCY, BACKGROUNDER ON THE PROPOSED REVISED FEDERAL MANUAL FOR WETLANDS DELINEATION at 4 (1991)).

198. *NASDA Statement, supra* note 4.

199. *See* 33 C.F.R. § 330.1(e) (1993). A general permit that attempts to accomplish the goals of expedited review would be similar to Permit No. 26 but limited to projects affecting less than one acre.

200. *Edwards Subcommittee Statement, supra* note 10.

201. BOXER STATEMENT, *supra* note 171.

7. *Congressional Reports*

The bill requires the Corps, in consultation with the EPA, the Interior Department, and states that have approved permit programs, to report to Congress every two years on the effects of activities performed under individual and general permits on navigable waters.[202] These reports shall include information from individual and general permits, compliance monitoring records and maps, estimates of acreage and functions of navigable waters affected by general permits, and detailed accounts of the effects of mitigation banking. In preparing these reports, the Corps, the EPA, and the Interior Department jointly monitor approved permits to ensure compliance with the bill's wetlands policy.[203]

This provision can benefit both environmentalists and landowners by coordinating and fine-tuning the activities of these federal agencies. But there is a problem with the recipient of the reports. Congress delegated away its legislative responsibilities to the EPA, which has broad rule-making authority over the Corps permit program.[204] Now the bill's sponsors want Congress to be kept informed about the details of the program, but for what purpose? If Congress intends to regularly examine the EPA's rules and legislatively overrule them, why give the EPA rule-making power in the first place? The bill does not give Congress any official power, such as a legislative veto,[205] over permit decisions. Even if Congress could veto permits, fully-detailed reports on every permit issued would never be read, since many members do not even read legislation before casting their votes.[206]

While members of Congress may not have the time to read the entire report, they could devote special attention to any permits sought within their own districts. Presumably, this provision is designed to allow members to use their "unofficial" power to influence, or "micro-manage," the outcomes of any disputes involving their constituents.[207] Rather than solving regulatory problems with legislation, congressmen act like glorified errand boys, intervening on behalf of their constituents in exchange for votes.[208]

Other provisions in the bill that codify principles found in administrative and judicial rulings[209] should be commended as legitimate legislative actions, subjecting members of Congress to public accountability. But this provision allows congressmen to use permit

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202. WRA § 106 (to be codified at 33 U.S.C. § 1344(u)).

203. WRA § 101.

204. 33 U.S.C. § 1344(b)(1) (1993).

205. The legislative veto was declared unconstitutional in Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983), in which Justice Powell, concurring, stated, "When [Congress] decides rights of specific persons, those rights are subject to 'the tyranny of a shifting majority.'" *Id.* at 966.

206. ERIC FELTEN, THE RULING CLASS: INSIDE THE IMPERIAL CONGRESS 1-6 (abr. ed., Heritage Found. 1993).

207. *Id.* at 41-43.

208. "Backwards legislating has created an administrative state, shifting the responsibility for making laws onto the shoulders of bureaucrats and setting Congressmen up as monopoly providers of fix-it services for those injured or inconvenienced by the regulators' laws." *Id.* at 79.

209. WRA §§ 101-103, 108.

disputes for their own political advantage, by taking the side most popular with the voters, and avoid responsibility for establishing the regulations that cause the disputes.

8. Citizen Suits

The bill subjects the Secretary of the Army to all aspects of citizen suits.[210] The Secretary's orders can serve as a basis for a suit when violated. He can be sued for failing to perform his non-discretionary duties after sixty days notice. District courts can order him to enforce any standard, order, or duty. He must be given sixty days notice before any action can begin and plaintiffs must send him a copy of the complaint. Citizens cannot bring an action against a party if the Secretary has already brought one, yet he can intervene in all actions. A consent judgment cannot be entered until forty-five days after he receives a copy. Any relief, statutory and common law rights, and enforcement of effluent standards may be enforced against him. Governors may take action against him when his failure to enforce standards affects their states. Additionally, district courts can apply any civil penalties available under the CWA.[211]

Even though this provision may increase paperwork and subject citizen suits to various delays, it is beneficial because the Corps is made an equal partner with the EPA, granting the Corps all the rights and responsibilities concerning citizen suits. The Corps will be more accountable to the public for its actions and may take a more active role in resolving disputes over the CWA permit program. Since the Corps does most of the "grunt work" in making permit decisions, this is a sensible change.

B. Improvements to Permit Administration and Wetlands Delineation

Within ninety days of the bill's passage, the Comptroller General shall submit to Congress an analysis of the increased needs of the Corps and the EPA for additional staff, administrative resources, and funding.[212] These additions could offset processing delays that might result from understaffing and the Fast Track program, but would probably be difficult to obtain considering the political battle that took place over spending in the most recent federal budget.[213] The increased needs might have to be satisfied by reallocating resources from other departments in the vast federal bureaucracy.

The bill adds several items to the federal budget that will require funding each fiscal year.[214] The Corps will receive money for training and certifying individuals as wetlands delineators,[215] and will require up to $5 million to help needy landowners applying for permits to perform wetlands delineations themselves. The Corps and the EPA will improve education and outreach

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210. WRA § 110 (to be codified as amended at 33 U.S.C. § 1365).

211. *See* 33 U.S.C. § 1344(s) (1993).

212. WRA § 201(a). During fiscal year 1987, the Corps permit program cost about $56 million, with about $38 million to $40 million for permit processing. GAO REPORT, *supra* note 5, at 12.

213. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993).

214. WRA § 201(b) (to be codified at 33 U.S.C. § 1344(w)).

215. Pursuant to the Water Resources Development Act of 1990, 33 U.S.C. § 2317(e) (1993).

programs. The FWS will receive enough funds to complete its wetlands mapping program[216] within a year of the bill's enactment.[217] Again, though these programs may be beneficial, the problem will be in finding enough funds in next year's budget. Once these programs are paid for, the Corps will develop regulations that will determine whether a landowner is eligible for delineation assistance within 180 days of the bill's passing, and the FWS will update its maps at least once every fifteen years.[218]

Responding to the controversy surrounding the delineation manuals, the bill prohibits revision or clarification of any of the manuals until the National Academy of Sciences (NAS) completes its wetlands study,[219] due in November 1994,[220] and requires any subsequent revision to consider the scientific and technical recommendations of the study.[221] Freezing wetlands delineation criteria in their current form is a prudent move, considering the energy wasted during the delineation manual debate in 1989 and 1991 as landowners and environmentalists sought reclassifications with each policy change.

However, the usefulness of the study is uncertain. "Little new 'science' is likely to be added to the knowledge of wetland delineation. . . . The current debate is less a dispute over what constitutes wetlands as a scientific matter than it is a dispute over which wetlands are environmentally important enough to require federal regulation. . . ."[222] It is hoped that the NAS can develop scientifically valid and workable criteria that will balance the needs of both individual landowners and the public.

C. Wetlands Restoration Pilot Program

The bill calls for a pilot program, run by the Corps, the EPA, the FWS, and the appropriate state and local agencies, to identify suitable areas, test techniques, and develop means of evaluating the success of wetlands restoration.[223] Since present-day science is incapable of creating perfect wetlands, success in such a project could lead to fulfillment of the bill's restoration policy and ease objections to mitigation banking.

Additionally, the bill[224] seeks to fully fund wetlands reserve programs currently in

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216. Authorized by the Emergency Wetlands Resources Act of 1986, 16 U.S.C. § 3931(a) (1993).

217. WRA § 201(c). This would complete the project earlier than originally intended. *See* note 141 *supra.*

218. WRA § 201(c)(2).

219. Authorized by the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Pub. L. No. 102-389 (1992).

220. *White House Issues Wetlands Plan; Bush Proposal on Alaska Withdrawn,* BUREAU OF NAT'L AFF., Aug. 25, 1993, at 163.

221. WRA § 202.

222. *NASDA Statement, supra* note 4.

223. WRA § 301.

224. WRA § 302.

existence[225] to achieve acreage enrollment goals.[226] Since this form of wetlands protection is the least invasive of property rights and encourages public enjoyment of the wetlands, it should face little opposition. Again, the problem is the cost.

D. Tax Incentives for Wetlands Conservation

The federal government often uses a "carrot and stick" approach to taxation to manipulate public behavior.[227] Taxpayers are encouraged to do or refrain from doing certain things, without the stigma of criminal punishment, by offering effective tax breaks and penalties. Putting aside philosophical differences with the practice, it is sometimes more effective to reward a person for good behavior than to punish him for bad behavior.

The bill allows landowners to deduct from their gross income any money earned from allowing the public to use wetlands "in a compatible use." Compatible uses will be determined by the Secretary of the Interior and may include fishing, hunting, and managed haying.[228] Besides rewarding landowners for preserving wetlands, the bill encourages them to promote activities that raise money for federal conservation projects.

Revenue from the Duck Stamp Act[229] funds the wetlands reserve program,[230] along with other conservation projects, and has raised $340 million since its inception.[231] The Federal Aid in Wildlife Restoration Act of 1937[232] taxes firearms and hunting and fishing equipment up to eleven percent.[233] The money raised, $156.9 million during fiscal year 1993,[234] and more than $2.2 billion since its inception,[235] is used for wildlife and habitat conservation such as wetlands

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225. Specifically, the program under the Food Security Act of 1985, 16 U.S.C. § 3837 (1993).

226. The Food Security Act amendments, also known as the 1990 Farm Act, require that a minimum of one million acres be enrolled in the program by the end of fiscal year 1995. *See Studds, supra* note 126, at 187.

227. This is true for most economic activities, including those that affect wetlands. The Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986) (codified as amended at 26 U.S.C. § 175 (1993)), eliminated tax deductions for drainage costs unless a "conservation farm plan" is first approved by the SCS. Prior to its passing, farmers were encouraged to drain wetlands by allowing them to deduct drainage costs up to 25% of their net farm income. *See* Schara, *supra* note 30, at 19A.

228. WRA § 403 (to be codified as amended at 26 U.S.C. § 137).

229. Migratory Bird Hunting Stamp Act of 1934, 16 U.S.C. § §718-718j (1993).

230. 16 U.S.C. § 3837 (1993).

231. Paul McHugh, *Waterfowl Spectacle Is Hunters' Legacy,* S.F. CHRON., Nov. 4, 1993, at E7.

232. Also known as the Pittman-Robertson Act, 16 U.S.C. §§ 669-669i, 2904-5 (1993).

233. *North Central Region to Receive $73.4 Million for State Wildlife Projects,* PR Newswire, Feb. 22, 1993, *available in* LEXIS, Nexis Library, Omni File.

234. *Id.*

235. *Nature Notes: Wildlife Conservation,* ST. PETERSBURG TIMES, Feb. 20, 1993, at 4.

restoration projects. According to Interior Secretary Bruce Babbitt, "Hunters and fishermen continue to fund the lion's share of this Nation's conservation efforts."[236]

The bill allows nonprofit organizations to be designated as "wetlands stewardship trusts" for the acquisition and preservation of private interests in wetlands.[237] This "free market" solution is the best method of protecting wetlands because private property rights are not violated and large sums of government money are unnecessary. It allows environmentalists to "put their money where their mouths are," since the best measure of the importance of wetlands is how much money concerned citizens are personally willing to part with for wetlands protection.

The bill also gives special tax treatment to landowners who donate wetlands to a trust or to the government.[238] Donations must be protected in perpetuity and preservation cannot be required for any other reason, such as mitigation banking or a condition or limitation on the estate.[239] This will prevent landowners who donate wetlands from benefiting twice from donation of a single tract of land.

III. Issues Unresolved by the Wetlands Reform Act

A. Statutory Definition of Wetlands

In the section amending the tax code,[240] the bill codifies a definition of wetlands that is substantially similar to the one developed by federal regulations under the CWA.[241] Strangely, the bill does not include this definition in the section amending the CWA.[242] This must have been an oversight. If the drafters could decide on a definition for tax purposes, there is no reason they could not apply the same definition to the permit program, especially since the definition originated in the regulations governing the program.

By neglecting to include this definition in the CWA and to harmonize the statutory definitions used by the FWS[243] and SCS,[244] the bill fails to confront one of the biggest problems of wetlands regulation, namely the inconsistent and sometimes contradictory way in which

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236. *North Central Region, supra* note 233. Hunters may be one of the only groups in history to lobby for increasing taxes on themselves exclusively. *Id.*

237. WRA § 401. Within 180 days of the bill's passage, the Secretary of the Interior, in consultation with the Corps and the EPA, will develop regulations establishing the requirements for being designated a wetlands stewardship trust.

238. WRA § 402(a) (to be codified as amended at 26 U.S.C. § 170(e)).

239. WRA § 402(a) (to be codified as amended at 26 U.S.C. § 170(e)(6)(b)).

240. WRA § 402(a) (to be codified as amended at 26 U.S.C. § 170(e)).

241. 33 C.F.R. § 328.3(b) (1993); 40 C.F.R. § 230.3(t) (1992).

242. WRA tit. I.

243. 16 U.S.C. § 3902(5) (1993).

244. 16 U.S.C. § 3822(e) (1993).

various federal agencies perform their duties.[245] While the four federal agencies responsible for wetlands regulation are waiting for the results of the NAS study and the opportunity to draft a new delineation manual, they continue to use their own separate criteria to delineate wetlands.

It is not uncommon for one federal agency to decide a tract is a wetland and another agency to decide it is not. For example, in 1992, a Virginia man was convicted under the CWA of willfully filling in wetlands that had been designated as nonwetlands by the SCS.[246] This lack of parity between the agencies has led to considerable resentment regarding wetlands regulation. The sentiment of many who are adversely affected is often as follows: "[w]hen an honest, law abiding citizen can be severely penalized for actions taken in good faith, the federal government is acting in an absurd fashion."[247]

Ultimately, delineation will be determined by a new manual once the specific criteria are developed. But there is no telling how long the process will take, since no matter what criteria are chosen, someone will be dissatisfied and will work to change the manual or to delay its implementation. Until then, the status quo is preserved. At the very least, the statutory definitions used by the federal agencies should match so that a clear message is sent to all concerned that the agencies will respect each other's decisions and will not punish those trying to obey the law.

B. Mitigation Banking

While it can be assumed the bill allows mitigation banking, it is not expressly authorized. The bill codifies[248] the "no practicable alternative" requirement found in federal regulations.[249] Although this provision encompasses two types of mitigation—avoidance and minimization—it is silent regarding the issue of mitigation banking.

Mitigation banking is rejected by many environmentalists as an inadequate means of reducing the environmental impact of lost wetlands.[250] The bill itself takes a skeptical view of the practice[251] by requiring the Secretary of the Army, in consultation with the Administrator of the EPA, the Secretary of the Interior, and states that have approved permit programs, to report to Congress about the type and extent of mitigation banking, the number of permits demanding it, and its effects on wetlands.[252]

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245. "We believe all the resource agencies should use equivalent definitions of wetlands for regulatory purposes to maintain consistency and eliminate confusion." *Edwards Subcommittee Statement, supra* note 10.

246. *NASDA Statement, supra* note 4.

247. *Id.*

248. WRA § 108 (to be codified at 33 U.S.C. § 1344(v)).

249. 40 C.F.R. § 230.10(a) (1992).

250. Searchinger, *supra* note 154, at 38-40.

251. "[W]e are particularly concerned with the amount of emphasis that has been placed on mitigation banking. While we agree that mitigation can be a useful tool to inject greater flexibility into the regulatory process, we feel strongly that it must be viewed with caution." *Edwards Subcommittee Statement, supra* note 10.

252. WRA § 106.

The WRA's policy statement[253] might lead the EPA or the Corps to eliminate mitigation banking as a means of obtaining a permit. The statement differs from "no net loss" by subjecting the "quantity and quality" of wetlands to the "preserve," rather than the "restore," aspect of the policy.[254] Because science is unable to explain with certainty all the interspecific relationships that make up a thriving ecosystem, current technology cannot reproduce wetlands with the same quality as they are found naturally.[255] If federal policy strictly requires preservation of the quantity *and* quality of wetlands, this would effectively prohibit mitigation banking.

Since congressional intent has been instrumental in shaping wetlands policy under the CWA, the courts will probably look there for guidance in how strictly to apply the new policy. But congressional intent is already unclear. For example, both Congressman Edwards and Senator Boxer have said the bill will exempt artificial wetlands from regulation,[256] but the bill itself exempts only certain specified artificial wetlands.[257]

This vague intention to exempt artificial wetlands, if applied to the text of the bill, could be interpreted to include artificial wetlands other than those listed, such as those that result from mitigation banking. If so, it is unlikely that mitigation banking would be allowed if the replacement wetlands could be developed free from regulation, since this would clearly violate the goal of restoration. Taken even further, "no net loss" without the simultaneous additions and subtractions of mitigation banking and development equals "no loss," thereby becoming a substantial obstacle to all development. Although highly unlikely that the EPA or a court would come to this conclusion, especially since much of the bill expressly deals with procedures for allowing development, it is possible. Therefore, uncertainty should be avoided by making congressional intentions clear about the role of mitigation banking.

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253. WRA § 101 (to be codified at 33 U.S.C. § 1251(a)(8)).

254. *Id.*

255. 55 Fed. Reg. at 9212. *See Edwards Subcommittee Statement, supra* note 10: "We must not forget that when wetlands are destroyed, they, together with their unique functions and values, are lost forever. Rarely do replacement wetlands perform as many or even the same functions as the natural wetlands they replace."

Florida officials authorized by state law to regulate wetlands have had limited success with mitigation banking. They estimate that nearly 85% of attempts to create artificial wetlands fail. Craig Quintana, *Land Banking Rules Set Up*, ORLANDO SENTINEL, Dec. 3, 1993, at D1. Recently, the Orlando International Airport was released from its agreement with state authorities to construct and maintain 736 acres of artificial wetlands in exchange for permission to expand two runways. Many of the wetlands actually built later failed, lacked water, or were overrun with exotic weeds. *Water Managers Approve Airport's Wetlands Plan*, ORLANDO SENTINEL, Dec. 10, 1993, at D3.

Florida seems to prefer restoration of existing wetlands over creation of artificial ones, even though the methods for both are similar. The airport agreed to fulfill its obligation by purchasing and maintaining 7,500 acres of degraded wetlands instead. *Id.* Officials estimate that the cost of constructing and maintaining artificial wetlands is two to three times greater than buying and restoring degraded wetlands. *Better Way to Save Wetlands*, ORLANDO SENTINEL, Dec. 1, 1993, at A14.

256. *Edwards Subcommittee Statement, supra* note 10; BOXER STATEMENT, *supra* note 171.

257. WRA § 109, discussed *supra*.

C. *Administrative Appeals*

Under the CWA, a party objecting to a Corps' decision to grant or deny a permit can find redress only through the courts.[258] This can be expensive and time-consuming, and often only wealthy landowners and large environmental organizations can afford to litigate. Although the bill does not provide for an administrative appeal, Edwards said he supports the idea. "We agree that landowners should not have to resort to the judicial system as their only means of appealing decisions," he said.[259] "The appeal must be open to all interested parties, such as neighboring and downstream landowners, who are affected by the permit decision."[260] If the sponsors decide to amend the bill to include such an appeal, the appeal process must be quick, inexpensive, and sufficiently independent so as not to serve as a "rubber stamp" to Corps decisions.

The appeal could be administered by the EPA, since the agency is outside the Corps' chain of command and already oversees the Corps decisions, although currently it uses its veto power rarely and only to prevent the granting of permits.[261] An EPA-administered appeal process would have to operate quickly or its purpose would be defeated.[262] Those seeking an appeal may be put in a worse position if exhaustion of administrative remedies is required before turning to the courts.[263]

D. *Takings*

Whenever the government seeks to regulate the use of private property, questions are raised about whether this action violates the Takings Clause of the Constitution.[264] Physical seizure of the property is not the only way the government can interfere with a landowner's rights. "Property, in the constitutional sense, is not the physical thing itself but is rather the group of rights which the owner of the thing has with respect to it."[265]

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258. *Edwards Subcommittee Statement, supra* note 10.

259. *Id.*

260. *Id.* President Clinton's wetlands plan, the Wetlands Protection and Management Act, H.R. 3465, 103d Cong., 1st Sess. (1993), provides an administrative appeal only for permit denials. The Wetlands Conservation and Regulatory Improvements Act, S. 1304, 103d Cong., 1st Sess. (1993), allows affected parties to appeal decisions to grant or deny permits.

261. As of May 6, 1993, the EPA has used its veto against only 11 permits during the existence of the program. All of these permits would have affected wetlands to some degree, and 10 of them were vetoed primarily because of their impact on wetlands. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, SECTION 404 ELEVATED CASES ACTIVITIES, at 1-14 (1993).

262. *See* Buttrey v. United States, 690 F.2d 1170, 1176 (5th Cir. 1982), which states, "requiring trial-type hearings would do violence to the obvious congressional purpose of making section 404 processing procedures as simple as possible."

263. *See* Marshall v. El Paso Natural Gas Co., 874 F.2d 1373, 1376-77 (10th Cir. 1989), which states, "The doctrine of primary jurisdiction provides that where the law vests in an administrative agency the power to decide a controversy or treat an issue, the courts will refrain from entertaining the case until the agency has fulfilled its statutory obligation." Courts may not order plaintiffs to exhaust all available administrative remedies unless the relevant statute or agency regulations specifically require exhaustion as a prerequisite to judicial review. Darby v. Cisneros, — U.S. —, 113 S. Ct. 2539 (1993).

264. U.S. CONST. amend. V, which states, "nor shall private property be taken for public use without just compensation."

265. Claridge v. New Hampshire Wetlands Bd., 485 A.2d 287, 291 (N.H. 1984).

Landowners cannot use their property any way they please. The government is permitted to use its police power to regulate the use of private property to prevent a nuisance that may injure the public,[266] or to promote the general welfare through zoning laws.[267] But like property rights, this power is not absolute. "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."[268]

Claims of takings are generally pursued in the United States Claims Court.[269] Under the CWA,[270] a landowner may not bring suit until after the Corps denies him a permit.[271] Although many landowners have failed to prove that the CWA has amounted to a taking of their land,[272] some have been successful.[273] In *Lucas v. South Carolina Coastal Council*,[274] the Supreme Court ruled that landowners who are "called upon to sacrifice all economic beneficial uses in the name of the common good" must be compensated, unless the primary purpose is to regulate a common-law nuisance.[275]

While the courts have not decided whether the CWA is intended to prevent a nuisance, some commentators view the unregulated use of wetlands to be such a nuisance, subjecting neighbors to higher risks of flooding and loss of access to fish and wildlife for commercial use. "If environmental regulations restrict some property rights, they protect others."[276] Others suggest that the land's "ecological value" be included in the decision whether or not a landowner should be compensated.[277]

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266. Mugler v. Kansas, 123 U.S. 623 (1887).

267. Penn Central Transp. Co. v. City of N.Y., 438 U.S. 104 (1978); *Dutchyshyn*, 480 F. Supp. at 960-61.

268. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

269. The Tucker Act, 28 U.S.C. § 1491 (1993). *See Dutchyshyn*, 480 F. Supp. at 962.

270. As of May 31, 1993, 14 private property takings cases related to CWA regulation were pending before the federal claims court. Of 28 cases filed between Sept. 1976 and Sept. 1992, 13 have been decided, but only three in favor of the plaintiff. *GAO Report Details Private Property Takings Cases That Are Decided, Pending*, BUREAU OF NAT'L AFF., Aug. 13, 1993, at 155.

271. United States v. Byrd, 609 F.2d 1204, 1211 (7th Cir. 1979); *See Riverside*, 474 U.S. at 127, which states, "Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred."

272. *See* Ciampitti v. United States, 22 Cl. Ct. 310 (1991) (takings claim initiated after injunction granted that prohibited development of wetlands); Dufair v. United States, 22 Cl. Ct. 156 (1990).

273. Florida Rock Indus., Inc. v. United States, 8 Cl. Ct. 160 (1990); Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 375 (1990). *See also* Bartlett v. Zoning Comm'n of Old Lyme, 282 A.2d 907, 910 (Conn. 1971) (state statute similar to CWA resulted in "unreasonable, confiscatory and unconstitutional" taking of property despite "laudable" goal to protect wetlands).

274. — U.S. —, 112 S. Ct. 2886 (1992).

275. *Id. See* Todd D. Brody, Comment, *Examining the Nuisance Exception to the Takings Clause: Is There Life for Environmental Regulations After Lucas?*, 4 FORDHAM ENVTL. L. REP. 287 (1993).

276. Searchinger, *supra* note 154, at 43-44.

277. Alan S. Rafterman, Note, *It's Not Easy Being Green: The Judicial View of Government Takings of Private Wetlands*, 2 FORDHAM ENVTL. L. REP. 155, 163 (1991).

Many landowners, on the other hand, support the idea of a system of classifying wetlands and compensating their owners according to their value.[278] Margaret Riegle, founder of the Fairness to Landowners Committee, said that many of her group's 10,000 members have lost their life's savings because of regulation of wetlands.[279] "If [preserving wetlands] is really for the public good, then let's ask the public to share the burden," she said.[280]

While it may seem that the bill's sponsors were avoiding the issue by not addressing it, this was probably the wisest approach for now. A strict classification system would take much of the flexibility out of the permit program. Instead of prohibiting development and compensating owners, many takings problems are sidestepped by allowing development in exchange for mitigation, almost as a form of "community service." Until the delineation manual question is resolved, it is unlikely that a system of compensation can be developed that would be compatible with the purpose of the permit program.

If, and when, an administrative procedure for compensation becomes feasible, it would have to be subjected to the same criteria as the administrative appeal—quick, inexpensive, and sufficiently independent. If takings claims are not handled by an administrative law judge or by a committee of some sort with these criteria in mind, then landowners would be better off relying on the traditional method of suing in claims court.

Conclusion

The drafters of the Wetlands Reform Act of 1993 set out with a noble purpose in mind—to reform the CWA permit program to provide stronger protection for wetlands and to simplify the process for those seeking permits. While these goals may seem mutually exclusive, both are attainable with a balanced approach.

Unfortunately, the bill concentrates on the first goal and loses sight of the second. Several provisions firmly establish the nation's commitment to wetlands preservation and devise ways to reverse the trend of destruction. But the attempt to reform the process that landowners must undergo actually makes compliance more complicated and slow.[281] Also, the bill, which was meant to plug the leaks in the CWA, neglected to address some important issues, such as a statutory definition of wetlands and the role of mitigation banking. This will require more patchwork at a later date if the bill is passed.

The drafters still have time to work on the bill before they face elections. By examining the competing legislation, they may be able to salvage the valuable provisions of the bill and increase its chance of passage by fortifying its weaknesses. The bill was originally offered as a compromise between the hard-line positions of developers and environmentalists. It has a framework that can still be built upon to reach that compromise.

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278. The Comprehensive Wetlands Conservation and Management Act, H.R. 1330, 103d Cong., 1st Sess. (1993) and S. 1463, 103d Cong., 1st Sess. (1993), contains such a classification system.

279. Carol Emert, *Compensation for Wetland Owners Remains an Unsolved Problem*, UPI, May 21, 1992, *available in* LEXIS, Nexis Library, UPI File.

280. *Id.*

281. *NASDA Statement*, *supra* note 4.