WETLANDS CLASSIFICATION: A TOOL FOR PROTECTION OR ABANDONMENT?

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INTRODUCTION

Wetlands — and wetlands classification in particular — are hot topics in the nation's capital this year. Congress is debating these issues as it creeps toward reauthorization of the Clean Water Act in 1992 ("CWA"). President Bush is wrestling with his 1988 election promise to protect wetlands as he prepares for his 1992 reelection campaign. The focus of the debate is section 404 of the Clean Water Act.[1] The CWA is intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[2] Section 404 contributes to this goal by requiring a permit from the US Army Corps of Engineers ("Corps") for any discharge of dredged or fill material into waters of the United States, including wetlands. The Corps must issue or deny such permits based upon the "Section 404(b)(1) Guidelines," the regulations promulgated by the Environmental Protection Agency ("EPA") in conjunction with the Corps.[3]

The section 404 permit program has been controversial since its enactment in 1972. Wetlands advocates have argued from the outset that section 404 does not adequately protect wetlands and other aquatic areas because the Corps interprets section 404 too narrowly and administers section 404 with little commitment to environmental protection. In 1988 and 1989, largely in response to President Bush's "No Net Loss of Wetlands" rhetoric,[4] the Corps and EPA moved to strengthen the program. In early 1989 they, along with the Soil Conservation Service ("SCS") and the Fish and Wildlife Service ("FWS"), adopted a new joint methodology for delineating wetlands, the 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands.[5] In early 1990 they adopted a joint mitigation policy, the 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, ("Mitigation MOA").[6] Almost immediately, agriculture, real estate, oil and gas, and transportation interests rallied in opposition, claiming that section 404 restricted private property rights and stymied economic development.

The regulated community's desired "fix" for section 404 is to try to remove from section 404 regulation as many wetlands as possible, and then to weaken the regulations that apply to the remaining wetlands. One way to achieve this goal is to redefine "wetlands" to exclude many areas that meet the current definition. In 1991 the Bush Administration proposed drastic changes in the Federal Wetlands Manual that would accomplish this end.[7] Several bills in Congress propose to legislate the same result.[8]

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Once this narrowing of wetlands jurisdiction is accomplished, *additional* wetlands could be removed from regulation through a system of wetlands "classification." The term "classification" as used here is actually a misnomer. The intention is not merely to classify wetlands according to their physical, chemical, and biological characteristics, but to *rank* wetlands according to some measure of value, requiring strict regulation of the "highest quality" wetlands — and no regulation of the lowest. This way, many wetlands would be excluded from regulation simply because they are ranked too low to warrant protection. Additionally, the wetlands in the "middle class" would be subjected to broader exemptions and weaker regulatory standards than at present, ensuring their continued loss to other land uses. In the 1991 session the Louisiana delegation has introduced this type of classification in both houses of Congress, in Senate Bill 1463 and House Bill 1330.[9] It is also the type of classification system that the Bush Administration is at least tacitly supporting.[10]

This article will describe the ranking system already provided in section 404 and compare it to the ranking system proposed in S 1463 and HR 1330; it concludes that the existing section 404 permit program already provides a realistic and useful ranking system based upon known wetland functions and values. The key to a wetlands classification system that *protects* — rather than *destroys* — wetlands is not more legislation, but gathering more scientific information and evaluating the functions and values of wetlands in a watershed or drainage basin context.

Wetland protection advocates have a strong aversion to ranking wetlands, and with good reason. The FWS National Wetlands Inventory ("NWI") estimates that over fifty percent of the nation's wetlands have been destroyed since the late 1700s, and that approximately 300,000 additional wetland acres are lost each year.[11]

These wetland losses have already resulted in dramatic declines in waterfowl and shorebird populations and increases in flooding and water pollution. The view is widespread that we must not only protect what remains, but that we must reverse the trend and restore many of the wetlands destroyed in the past.[12] So why, the wetlands advocates ask, are we *ranking* wetlands for protection when the protection of *all* remaining wetlands is warranted?

Countervailing considerations include the recognition that sometimes we can protect wetlands only at the expense of needed economic development, and that wetlands protection on private lands will sometimes unduly restrict individual private property rights and require government compensation. In addition, federal wetlands programs are understaffed and underfunded, so logically they should focus their protection efforts to achieve the greatest ecological gain for the nation's waters.

In light of these considerations, environmentalists, government regulators, and the regulated community generally agree in principle that *some* ranking of wetlands for differing levels of protection is necessary. However, ranking wetlands is fraught with complex value judgments. Wetlands are extremely diverse, varying in flora and fauna, water level, water flow, soil, and ecological function. Even wetlands of the same basic ecotype may function differently depending upon their location within a watershed, their location vis-a-vis particular land uses, and the extent to which they have already been degraded.

Salt marshes, for example, are basically complexes of reeds and grasses, subject to tidal flow, that provide the transition between coastal upland and estuarine

waters. These marshes buffer the land and prevent soil erosion. They also provide the food, energy and shelter that produce most of the Atlantic and Gulf Coast commercial and sport fisheries.[13]

Prairie potholes, playas, and vernal pools, by contrast, are typically inland depressions, surrounded by upland, that do not hold water year-round. The wetland vegetation is usually disturbed, often by agricultural practices. Despite these conditions, these areas are extremely important on a seasonal basis. Potholes and playas provide essential habitat for migratory waterfowl. Vernal pools provide critical habitat for amphibians and a variety of rare plants.[14]

Each of these wetland types can help to maintain water quality in nearby surface and groundwater systems, depending upon such variables as their location with respect to other water systems, their acreage and abundance, and their ecological health. An in-depth evaluation of a given wetland's functions and values can consume enormous amounts of agency staff time and program funds. Depending upon the complexity and size of the wetland and the agency resources available, wetlands functional assessments can take thousands of dollars and many months to complete.

Even with such detailed analysis, how does one rank a bottomland hardwood wetland that retains a river's flood waters vis-a-vis an isolated vernal pool wetland that provides an essential spring habitat for an endangered salamander? How does one value a highly degraded salt marsh? Is a wetland's value assigned according to its existing minimal function, or according to its much higher *potential* productivity when it is restored to its natural condition? Even assuming those complex valuations are possible, what happens to the wetlands once they are ranked? Will the middle and low class wetlands be protected, or will they be sacrificed in the interest of short-term economic gain? As these questions suggest, advocates differ strongly as to whether wetlands *can* be ranked in a scientifically credible manner, whether they *will* be ranked in a scientifically credible manner, and whether the wetlands — once ranked — should be subject to protection . . . or abandonment.

THE SECTION 404 PERMIT PROGRAM ALREADY "RANKS" WETLANDS

A. The Section 404(b)(1) Guidelines

The Section 404(b)(1) Guidelines provide the environmental criteria upon which section 404 permit decisions must be made. Those regulations contain four primary restrictions on discharges of dredged or fill material. Three of these allow the Corps and EPA to regulate a discharge in proportion to the wetland functions and values it destroys. These three are the focus of this discussion.

The first restriction is that no discharge shall be permitted if:

> (a) . . . 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 . . . [(1) omitted].
>
> (2) An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.[15]

Thus defined, the term "practicable" strongly suggests a weighing of costs and benefits — economic and

environmental — in determining whether an alternative exists to a given discharge. Logically, one factor in determining the practicability of an alternative project location or design is the benefit it provides in terms of wetland values and functions preserved. An alternative location that adds considerable cost to a project and is logistically difficult to implement may not be practicable if the wetland losses avoided by the alternative are minimal in comparison.

The Guidelines also prohibit discharges that "will cause or contribute to significant degradation of the waters of the United States."[16] Adverse environmental effects on fish, shellfish, wildlife and wetlands can result in significant degradation.[17] For example, the loss of fish and wildlife habitat and the loss of capacity to assimilate nutrients, purify water, and moderate flooding and storm damage are all adverse effects that can result in significant water degradation.[18] Thus, permit issuance or denial based upon this provision must involve an assessment of the wetland functions and values that will be destroyed as a result of the permitted discharge. The Corps would not deny a permit based on a finding of significant degradation of a wetland without strong evidence that important wetland functions would be destroyed, which would, in turn, result in considerable degradation of the nation's waters, either individually or cumulatively.

The final restriction requires that "appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem."[19] Again, the term "practicable" suggests that the costs and logistics of minimizing adverse wetland impacts must be considered in light of the functions and values of the wetland being protected. In addition, this provision requires the permittee to "compensate" for unavoidable wetland losses by restoring, creating or enhancing wetland habitat nearby.[20] This compensatory mitigation is required to offset the wetland values and functions lost. Hence, compensation requirements are more stringent for larger wetland acreages and greater wetland functions, and less stringent for small acreages and reduced functions and values.

In sum, the Section 404(b)(1) Guidelines provide stricter standards for protecting wetlands that contribute demonstrably to the chemical, physical and biological integrity of US waters than for wetlands that clearly do not.

B. The 1989 EPA/Corps Mitigation Memorandum of Agreement

The 1989 Environmental Protection Agency/Army Corps of Engineers Mitigation MOA, which is based upon the Section 404(b)(1) Guidelines, confirms that wetlands ranking is intrinsic to the section 404 permit review. It states emphatically that "[t]he determination of what level of mitigation constitutes 'appropriate' mitigation is based solely on the values and functions of the aquatic resource that will be impacted."[21]

The Mitigation MOA requires that permit decisions be made in accordance with the following mitigation sequence: first, potential adverse impacts must be *avoided* to the maximum extent practicable; second, remaining unavoidable impacts must be *minimized* to the extent "appropriate and practicable"; and finally, aquatic resource losses must be *compensated*.[22] This sequence, particularly the avoidance requirement, forms the core of the section 404 review. The thrust of the program is to avoid development of the nation's wetlands and streams whenever there is a "practicable" alternative, and to minimize that intrusion when it is unavoidable.[23]

This mitigation sequence is also at the core of the regulated community's

opposition to the section 404 program. Development interests argue that the "alternatives test" gives the Corps and EPA de facto control over their project planning — which should be outside the agencies' authority — and that the test excessively restricts economic development. They argue that the alternatives test treats all wetlands the same, regardless of function and value, and insist that it should apply — if at all — only to the most valuable wetlands.[24]

The plain language of the Mitigation MOA clearly contradicts these assertions. In discussing the sequencing requirement, the Mitigation MOA states:

> It may be appropriate to deviate from the sequence when . . . EPA and the Corps agree that the proposed discharge can reasonably be expected to result in environmental gain *or insignificant environmental losses.*
>
> In determining "appropriate and practicable" measures to offset unavoidable impacts, such measures should be appropriate to the *scope and degree of those impacts . . . .*[25]

This language suggests that if a proposed discharge will disturb a wetland that is, for example, small in acreage, highly degraded, hydrologically isolated by intensive development, or otherwise incapable of contributing to the ecological health of the aquatic ecosystem within the watershed, a strict application of the alternatives test is probably not appropriate in light of the threatened wetland's limited ecological value. It also suggests that even the "appropriate and practicable" minimization steps should be proportional to the wetland functions and values that are in jeopardy.

The Mitigation MOA also addresses the relative abundance of wetlands, providing that ". . . avoidance, minimization, and compensatory mitigation may not be practicable where there is a high proportion of land which is wetlands."[26] This provision acknowledges that wetlands replacement achieved by creating or restoring wetlands may not be practicable in areas that are already predominantly wetlands. It also implicitly devalues wetlands where they exist in great abundance, offering them less protection.

Importantly, the Mitigation MOA also allows for the ranking of wetlands within a targeted geographic area, such as a watershed or drainage basin, through comprehensive planning. The Mitigation MOA states:

> The [mitigation] sequence is considered satisfied where the proposed mitigation is in accordance with specific provisions of a Corps and EPA approved comprehensive plan that ensures compliance with the compensation requirements of the Section 404(b)(1) Guidelines (examples of such comprehensive plans may include Special Area Management Plans, Advanced Identification areas (Section 230.80), and State Coastal Zone Management Plans).[27]

Through the comprehensive planning process, wetlands within a targeted geographic area are inventoried and evaluated. The evaluation should provide detailed inventory and assessment data and focus on the watershed. In theory, at least, wetlands within the area can be ranked according to ecological function and value based upon an in-depth analysis of their individual and cumulative ecological contributions within the area. The importance of the wetlands as regional, national and international resources must also be considered.

Generally, this process should result in a strict prohibition against the destruction or degradation of wetlands identified as

high value. The lowest value wetlands would likely be given much less protection through Corps general permits or other expedited review. (See section D below.) However, in return for the development of these low value sites, wetlands of equal or greater value would be restored or, conceivably, created from upland sites. The medium value wetlands would likely be regulated on a case-by-case basis in accordance with the section 404 mitigation sequence.

The comprehensive planning process proposed by the Mitigation MOA thus enables a more complete understanding of wetlands functions and values and a thorough assessment of the effects of cumulative losses. This approach also promotes better definition of practicable alternatives, more knowledgeable planning of land use trade-offs, and better definition of opportunities for effective and successful wetland restoration. In theory, at least, the comprehensive planning approach provides a faster, more predictable, and more equitable process while ensuring effective wetlands protection.

C. Advanced Identification and Special Area Management Plans

As the preceding analysis explains, the Corps and EPA already have the authority and the procedures in place to rank wetlands in the context of comprehensive plans for targeted geographic areas. Under the Section 404(b)(1) Guidelines, the Corps and EPA also can identify in advance disposal sites as generally suitable or unsuitable for dredged or fill material disposal.[28] This process typically involves an inventory and assessment of individual wetland areas, the release of a public notice to solicit information, and announcement of the results of the advanced identification in the public record maintained by the permitting authority. These suitability categories are based primarily on assessment of relative ecological function and value within the targeted area. While these suitability designations do not constitute section 404 permit issuances or denials, they provide important information on aquatic area functions and values upon which the subsequent section 404 permit decision is made.

The Corps also conducts what it calls Special Area Management Plans ("SAMPs"). These comprehensive planning processes are similar to EPA's Advanced Identifications, but include definitive regulatory products, e.g., general permits for specified activities within specified wetland areas. To provide an illustration, the Corps, the City of Anchorage, Alaska, and the Alaska Coastal Zone Management Program initiated a SAMP for the City of Anchorage when that city began to outgrow its upland development sites. One of the primary goals of the SAMP was to link wetland functions and values to varying degrees of protection.[29] The SAMP identified specific wetland areas within the city limits as suitable for preservation, conservation, development or special study. The preservation sites were generally considered the highest value wetlands; the development sites were considered the lowest. The Corps and the City agreed not to issue permits for development on preservation sites. General permits were issued for discharges on development sites. Conversion on conservation sites was more restricted and required mitigation. Special study sites required case-by-case examination.[30]

At another site, the Corps, EPA, and Hackensack Meadowlands Development Commission ("HMDC") are conducting both an Advanced Identification and a SAMP to address the enormous development pressure on the wetlands of the Hackensack Meadowlands in Hackensack, New Jersey. They first conducted an Advanced Identification to inventory and assess the functions and values of wetlands within the

Meadowlands District. The three agencies are now preparing a SAMP that will tailor the level of regulatory scrutiny and preservation to wetland function and value. The agencies will likely expedite permit review of discharges in lower value wetlands and issue permits along with specific measures to minimize and compensate for adverse aquatic impacts. Higher value wetlands could be designated as off-limits to development through application of EPA's section 404(c) veto. Alternatively, they could simply be identified as unsuitable for disposal, and therefore any proposed development would be unlikely to receive a section 404 permit.

The Corps and EPA have conducted numerous Advanced Identifications and SAMPs in targeted areas around the country, and they have applied the resulting wetland rankings to section 404 permitting decisions within the plan area. These plans can provide detailed wetlands inventories and assessments forming a relatively sound basis for ranking wetlands within watersheds, drainage basins, or other targeted geographic areas. The success of the plan in protecting wetlands depends on how these wetlands are regulated once they are ranked. The current section 404 ranking system will result in wetlands destruction unless the ranked wetlands are regulated in accordance with a firm "restore and maintain" standard. This standard must strictly protect high and medium value wetlands, and it must require successful restoration in return for the development of the lowest value wetlands.

D. General Permits

The Corps also uses its section 404(e) general permit program to rank certain activities as "low impact" activities, and certain wetlands as low value wetlands.[31] The most infamous and unfortunate example of this approach is the Corps' Nationwide Permit ("NWP") 26, which authorizes — with little or no scrutiny — section 404 discharges that significantly disturb or destroy up to ten acres of isolated and headwater wetlands.[32] The legal basis for this NWP is highly questionable since the statute authorizes the Corps to issue general permits only for *activities similar in nature and minimal in environmental impact* — not for variable activities in certain categories of waters.[33] Nevertheless, the Corps has made a broad-brush determination that isolated and headwater wetlands generally do not warrant protection, and the Corps is allowing wide-scale development of these wetlands by general permit.[34] Nationwide Permit 26 is, in effect, the Corps' own means of conducting wetlands deregulation. Isolated and headwater wetlands are presumed unimportant, and little opportunity is provided to rebut that presumption with detailed wetlands assessments. Moreover, these low value wetlands losses, numerous as they are, are rarely offset through compensatory mitigation.[35]

The Corps has also used its general permit authority to ease section 404 permit requirements for these presumed lower value wetlands on a regional and statewide basis. For example, through a statewide general permit with the State of Maryland, the Corps effectively removed from individual section 404 permit review many non-tidal wetlands under five acres.[36] Another "category of waters" general permit has been under consideration by the Corps' Savannah District for pine flatwood wetlands in Georgia. While this use of general permits to rank wetlands is, in the author's view, illegal, the fact remains that the Corps is already "deregulating" millions of wetland acres it deems to be of lower value on a nationwide, regional, or statewide basis.

A worthwhile refinement of the comprehensive planning and general permit approaches to ranking wetlands was recommended by the National Wetlands Policy Forum and has been incorporated into the current Bennett Bill, HR 251.[37] This bill would explicitly authorize general permits for activities in wetland areas of lowest ecological value. However, these low value areas would have to be identified in an EPA-approved State Wetlands Conservation Plan. The State Wetlands Conservation Plans would include an inventory and assessment of wetland systems within each state. These plans would provide for full replacement of lost wetland functions and values, and they would satisfy a no overall net loss of wetlands standard. Corps "category of waters" general permits that met these criteria would be much more protective of wetlands than those currently in place.

E. Summary of the Section 404 "Ranking" Approach

The current section 404 permit program already ranks wetlands for varying levels of protection through individual permit review standards, the Advanced Identification and SAMP planning processes, and the general permit process. With the unfortunate exception of NWP 26 and other "category of waters" general permits, this ranking system is generally supported by two elements which help to ensure the protection of wetlands. One element is that this system is predicated upon and limited by the CWA "restore and maintain" standard. Thus, the congressional "value judgment" underlying the section 404 ranking system is that virtually all areas that meet the Corps and EPA definition of wetlands are worthy of some base level of protection — even simple replacement of function and value through restoration or creation. The other element is that section 404 wetlands ranking must be based upon the detailed functional assessment of individual wetlands or wetland types, ideally in the context of a targeted geographic area such as a watershed or drainage basin. The Corps' general permit program is a testament to the destructive effects of wetlands ranking where these elements are ignored.

Even with a strong wetlands protection standard, an emphasis on detailed inventories and assessment data, and a watershed focus, wetlands ranking is a subjective, complex and expensive undertaking. However, where ranking is warranted, the current section 404 program offers a realistic and useful framework.

THE BREAUX-HAYES RANKING SYSTEM PROVIDES MINIMAL WETLANDS PROTECTION

Senate Bill 1463 and House Bill 1330, introduced by Louisiana Democrats Sen. John B. Breaux and Rep. Jimmy Hayes respectively, propose a drastically different ranking system with no strict wetlands protection standard and no requirement for detailed inventory and assessment data. This proposed legislation would require the Corps to rank wetlands by function and value into high (Type A), medium (Type B), and low (Type C) categories upon application by one seeking to alter wetlands. These bills require that the ranking be accomplished within ninety days of receipt of the application. Generally, a Type A wetland would benefit from tighter restrictions, but the government would be forced to offer full compensation to the landowner and to acquire the wetland area outright. Type B wetlands would be subject to substantially diluted regulation, resulting in profound additional wetland losses. Type C wetlands would be exempt from all regulation.

Type A wetlands would include *only* those wetlands that meet *all* of the following conditions:

- the wetlands serve "critical wetland functions" including the provision of "critical" habitat for a "concentration" of avian, aquatic and terrestrial wildlife species;
- the wetlands consist of ten or more contiguous acres and have an inlet or outlet (except for prairie potholes, playa lakes, or vernal pools);
- there is a scarcity within the aquatic ecosystem of identified wetland functions such that the alteration of such wetlands would "seriously jeopardize" the availability of such functions;
- there is no "overriding public interest" in the use of the wetlands other than conservation; and
- wetland functions and values cannot be conserved through minimizing wetlands alteration and compensating for wetlands losses.[38]

The following Type C wetlands would receive no protection whatsoever:

- wetlands that serve "limited" wetland functions;
- wetlands that serve "marginal" wetlands functions, but exist in such abundance that regulation of activities in such wetlands is not necessary to conserve "important" wetland values and functions;
- wetlands that are prior converted cropland;
- wetlands that are "fastlands" (fastlands are wetlands that exist behind levees constructed to allow their use for agricultural, industrial, residential or commercial development); and
- wetlands located in "intensely developed areas" and, as a result, do not serve "significant wetlands functions."[39]

First and foremost, the Breaux-Hayes approach makes no pretense of maintaining and restoring the nation's wetlands base. These bills would eliminate millions of wetland acres by first redefining the term "wetland." The bill's ranking system would then absolutely abandon wetlands that do not demonstrate, upon a ninety day evaluation, significant wetland functions. Even those wetlands that do demonstrate significant functions, particularly Type B wetlands, would be exempt from regulation pursuant to *additional* exemptions, including exemptions for wetlands covered by a state or local land use plan, exemptions based upon state water law, and broad exemptions for farmed wetlands, mining, and cranberry growing.

Type B wetlands would be those that provide a habitat for "a significant population of avian, aquatic or wetland dependent wildlife," or provide other "significant wetlands functions."[40] They would not be protected; they could be altered as long as there were no significant losses or degradation of wetland functions and values. This determination would be based upon a broad public interest balancing test, not upon an ecological standard comparable to the Section 404(b)(1) Guidelines. The alternatives analysis now required by the Section 404(b)(1) Guidelines would be literally gutted for these remaining Type B wetlands. The alternatives analysis requirement applies only to very large acreages, and the project proponent could eliminate most available alternatives by narrowly defining the project purpose.

Compensatory mitigation would be, in many cases, no longer required for Type B wetlands. Even when it would be required, the standards and options set forth in the bills are so broad that mitigation would become little more than a wetlands destruction dues payment. This ranking system barely suggests replacement of the actual wetlands functions and values lost. Few safeguards are present in this system to ensure that compensatory mitigation will work at all, much less on a long-term basis.

This ranking system lacks not only a protective standard, but also an emphasis on comprehensive knowledge of individual wetlands and wetland systems and a focus on targeted geographic areas. The process alone — forcing a ranking within ninety days — ensures haphazard and superficial case-by-case valuations in lieu of in-depth individual or regional studies. While these bills provide for an advanced identification process by FWS and the SCS, they direct the Corps to override that comprehensive ranking process on a case-by-case basis upon the application of a landowner. As a result, the time-consuming and expensive comprehensive ranking process is completely undermined, amounting to little more than wasteful window-dressing.

Without the elements of a strong and enforceable wetlands protection standard and an emphasis on detailed scientific study, the Breaux-Hayes ranking system offers all the pitfalls and none of the benefits of wetlands ranking. Certain wetland functions would be subjectively valued over others, without the benefit of detailed data reviewed in a watershed context. Consequently, this ranking system would likely undervalue some critical wetland values such as flood control, groundwater recharge, and biological diversity. With the specific exception of prairie potholes, playas, and vernal pools, isolated wetlands and wetlands under ten acres — regardless of their biological diversity, scarcity, or other ecological attributes — can never achieve the Type A level of protection under these bills. Hence, many bogs, fens, and wet prairies that often support a diversity of plant and animal life and perform important hydrological functions are ineligible for Type A classification. Moreover, even wetlands that otherwise meet this narrow litmus test of ecological value can be eliminated from Type A protection because of some undefined "overriding public interest."

Without a strong protective standard and a watershed focus, this ranking system also promotes the piecemeal destruction of one "non-significant" wetland after another. The cumulative effect of altering hundreds of such "non-significant" wetlands within a watershed will almost always have a material adverse effect on the local or downstream aquatic environment. Yet these cumulative effects can be understood and evaluated only in the context of a targeted geographic area.

Similarly, the absence of a protective standard and a watershed focus offers no incentive or impetus to restore degraded wetland areas. Without a strict compensation requirement, there is no incentive to restore degraded wetlands; without detailed watershed data there is no means of effectively identifying and prioritizing restoration opportunities.

Without these key ingredients — a strong "restore and maintain" standard, a solid foundation of detailed scientific data, and a targeted geographic focus that addresses cumulative impacts and restoration potential — the Breaux-Hayes ranking scheme establishes a framework for wetlands abandonment, not wetlands protection.

SUMMARY

Ranking wetlands according to function and value is a subjective, complex, expensive and risky proposition. Nevertheless, given limited resources and limited political will to protect wetlands, wetlands must be regulated in accordance with their perceived ecological function and social value. The section 404 permit program currently provides a realistic and useful framework for ranking wetlands where necessary. The program is consistent with the long-standing goal of the Clean Water Act: to "restore and maintain" the chemical, physical and biological integrity of the nation's waters. Wetlands ranking will only result in further wetland losses, however, unless it is based upon a strong and enforceable "restore and maintain" standard, a solid foundation of detailed scientific data, and a targeted geographic focus that addresses cumulative impacts and restoration potential.

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1. Clean Water Act, 33 USC § 1344 (1988). Reference to "section 404" throughout this article is to the Clean Water Act as adopted.

2. 33 USC § 1251.

3. See 33 USC § 1344 (b)(1); 40 CFR §§ 230.1-230.80 (1991).

4. Tom Schierholz, *Where the Candidates Stand on the Environment*, The Christian Science Monitor 3 (Oct 20, 1988).

5. Federal Manual for Identifying and Delineating Jurisdictional Wetlands: An Interagency Cooperative Publication (1989) (prepared by Federal Interagency Committee for Wetland Delineation).

6. Robert W. Page & LaJuana S. Wilcher, 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 (Feb 6, 1990) ("Mitigation MOA").

7. 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands: Proposed Revisions, 56 Fed Reg 40446-80 (1991) ("1989 Proposed Revisions").

8. See S 1463, 102d Cong, 1st Sess (July 11, 1991); HR 1330, 102d Cong, 1st Sess (Mar 7, 1991); HR 404, 102d Cong, 1st Sess (Jan 3, 1991) (all three not reprinted in Cong Rec).

9. See S 1463; HR 1330 (both cited in note 8).

10. See Theresa Gorman, Memorandum for DPC Wetlands Task Force Members (Nov 12, 1991) (White House Wetlands Implementation Plan).

11. Thomas E. Dahl, Wetland Losses in the United States: 1780's to 1980's 6 (1990) (prepared for FWS, Dept of the Interior); Ralph W. Tiner, Jr., Wetlands of the United States: Current Statutes and Recent Trends (1984) (prepared for FWS, Dept of the Interior); Kathryn M. White, ed, Wetlands: Their Use and Regulation (1984) (prepared for Ofc of Technology Assessment).

12. See *Protecting America's Wetlands: An Action Agenda* (Conservation Foundation, 1988); Wetlands: Meeting the President's Challenge (1990) (prepared by FWS, Dept of the Interior); Water Resources Development Act of 1990, Pub L No 101-640, 104 Stat 4604 (1990), codified at 33 USC § 220 (1990); HR 251, 102d Cong, 1st Sess (Jan 3, 1991) ("Bennett Bill") (not reprinted in Cong Rec); HR 404 (cited in note 8); HR 2400, 102d Cong, 1st Sess (May 20, 1991) (not reprinted in Cong Rec).

13. See Tiner, Wetlands of the United States (cited in note 11); *Protecting America's Wetlands* (cited in note 12); J. Scott Feierabend & John M. Zelazny, Status Report on Our Nation's Wetlands (1987) (prepared for NWF); Michael Williams, ed, *Wetlands: A Threatened Landscape* 17-30 (Institute of British Geographers, 1990).

14. See 1989 Proposed Revisions, 56 Fed Reg at 40450-52 (cited in note 7); Arnold Van Der Valk, ed, *Northern Prairie Wetlands* 132-33 (Iowa State, 1989).

15. 40 CFR § 230.10(a).

16. 40 CFR § 230.10(c).

17. 40 CFR § 230.10(c)(1).

18. 40 CFR § 230.10(c)(3).

19. 40 CFR § 230.10(d) & §§ 230.70-230.77.

20. 40 CFR §§ 230.70-230.77.

21. Mitigation MOA at § II.B (cited in note 6).

22. Id at § II.C.

23. See id at § II.B; *Bersani v EPA*, 674 F Supp 405 (ND NY 1987), aff'd 850 F2d 36 (2d Cir 1988) (defining what is a practicable alternative and when one is available).

24. See S 1463, HR 1330, & HR 404 (all three cited in note 8).

25. Mitigation MOA at § II.C (emphasis added) (cited in note 6).

26. Id at § II.B n7.

27. Id at § II.C.

28. 40 CFR § 230.80(b).

29. Gail Bingham, et al, eds, *Issues in Wetland Protection: Background Papers Prepared for the National Wetlands Policy Forum* at 34-36 & 70-71 (Conservation Foundation, 1990).

30. Id.

31. See 33 USC § 1344(e); Dept of the Army, Final Rule for Nationwide Permit Program Regulations and Issue, Reissue, and Modify Nationwide Permits, 56 Fed Reg 59109-47 (Nov 22, 1991) (revising 33 CFR §§ 330.1-330.12).

32. 56 Fed Reg at 59143 (revising 33 CFR § 330.5(a)(26)). See 56 Fed Reg at 59135 for definitions of "isolated and headwater wetlands".

33. 33 USC § 1344(e).

34. Bernard N. Goode, *In Defense of Nationwide Permit 26*, Natl Wetlands Newsletter 4-8 (Nov-Dec 1989).

35. 33 USC §1344(e).

36. Maryland General Permit: Non-Tidal Wetlands (MDGP-1) (issued by Baltimore District, Corps of Engineers) (Jan 31, 1991).

37. See HR 251 (cited in note 12).

38. S 1463 at 7-8 (cited in note 8).

39. Id at 8-9.

40. Id at 8.