

# REAUTHORIZING THE FEDERAL WATER POLLUTION CONTROL ACT

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The existing Federal Water Pollution Control Act has its origin in major amendments passed in 1972. It was reauthorized and amended in 1977, 1981, and 1987, and is presently up for reauthorization again. It should be noted that when we speak of reauthorization we speak of continuing authorizations of appropriations for such things as grant assistance, which traditionally are authorized for periods of five or six years. The basic provisions of the Act do not expire, and remain in effect. The authorizations in the Act have expired over the last two years, but no disruption in the programs has occurred because funds have continued to be appropriated.

## Legislative History

The first comprehensive Federal legislation addressing the problems of water pollution was the Water Pollution Control Act enacted in 1948. That Act authorized the Surgeon General to assist in and encourage state studies and plans, interstate compacts, and creation of uniform state laws to control pollution. It authorized the Department of Justice to bring suits to require the cessation of practices leading to pollution, but only after notice and hearing and with the consent of the state. The Act also provided limited funding for low interest loans for the construction of sewage treatment plants and grants to states for pollution studies and the drafting of construction plans for sewage treatment works.

In 1956 amendments to the Act provided for Federal participation in a wide variety of activities, including Federal-state cooperation in developing comprehensive programs, increased technical assistance, broadened research, additional grants to assist states in the preparation of plans for pollution control, and grants to help communities build treatment plants. Further amendments were enacted in 1961, vesting administration of the program in the Secretary of Health, Education and

Welfare, increasing grant assistance for the construction of sewage treatment plants, and broadening the pollution abatement and enforcement provisions of the Act.

The Water Quality Act of 1965 and The Clean Waters Restoration Act of 1966 presaged the existing water pollution control program. States were given the initial opportunity to develop water quality standards for interstate waters, and plans to implement and enforce those standards, for approval of the Secretary of the Interior as Federal standards (the program was transferred to the Secretary in 1966). If a state failed to adopt standards, the Secretary was authorized to initiate Federal action to establish standards. In addition, substantial increases in grants for construction of sewage treatment plants were authorized.

In 1970 the Act was further amended with the addition of provisions relating to oil pollution from vessels and onshore and offshore facilities, Federal permits and licenses, and the discharge of hazardous substances.

The Federal Water Pollution Control Act was completely rewritten in 1972. Grant assistance for the construction of sewage treatment plants was vastly increased. Municipalities were required to achieve secondary treatment of sewage. Industry was required to install the best practicable pollution control technology followed by the best available treatment technology economically achievable. This technology based approach represented an entirely new approach. And, where this technology does not result in water quality standards being met, more advance treatment is necessary. The National Pollutant Discharge Elimination System was established requiring permits from the Environmental Protection Agency, or a state with an EPA-approved permit program, for the discharge of pollutants into the waters of the United States. States were required to adopt and enforce water

quality standards, utilizing criteria and guidance developed by EPA setting designated uses of water bodies and permissible levels of pollutants to ensure those uses.

The existing law is largely as formulated in 1972. Significant changes have been made over the years in areas such as the control of toxic pollutants and the control of non point source pollution, but the basic concepts remain unchanged. The 1972 Act was a landmark in Federal pollution control efforts and, while not as effective as hoped, has achieved substantial benefits in water quality.

This year the Committee on Public Works and Transportation will be developing legislation reauthorizing the Federal Water Pollution Control Act. Last year the Committee's Subcommittee on Water Resources held extensive hearings on a variety of issues associated with reauthorization. This article discusses the major issues with which the committee expects to be concerned in the reauthorization process.

## **Funding**

The 1972 Act established a program of 75 percent grants for the construction of sewage treatment plants and related works such as interceptor and collector sewers, correction of sewer infiltration and inflow problems, rehabilitation of sewers, and correction of combined sewer overflows. Grant monies were allotted to states primarily on the basis of their relative needs. The projects to be funded within a state were determined by the state.

In the 1981 amendments to the Act, significant changes were made to the grants program. Eligibility for grants was reduced to sewage treatment plants, correction of inflow/infiltration problems, and interceptor sewers. (A Governor had discretion to make up to 20 percent of the money available for the other items which had formerly been eligible). In addition, the Federal share was reduced from 75 percent to 55 percent, and grant assistance was limited to present needs, as opposed to capacity for future growth. These changes were forced by the Reagan Administration after it suc-

ceeded in reducing the grant authorization to zero in the 1981 Budget Reconciliation Act.

In the 1987 amendments, again largely at the behest of the Administration, the construction grant program was phased out and a new program was established to provide grants to states for the establishment of State Revolving Loan Funds from which the states could make loans to communities for the construction of sewage treatment plants. The state matching share is 20 percent. This new program was authorized at a maximum level of \$2.4 billion a year for fiscal year 1991 (after being phased in at \$1.2 billion a year for the two prior fiscal years, with construction grant funding being at the same level for those two years and then ending), then declining \$600 million per year until the final year of authorization in fiscal year 1994 at a level of \$600 million. This was to be the end of Federal financial assistance, a goal the Administration had sought for a number of years.

Under the construction grants program over 13,000 grants have been awarded since 1972 to 5,811 facilities. The total amount appropriated under the program was \$55.2 billion. Under the revolving loan fund grant program, \$5.9 billion has so far been appropriated.

In spite of the funding made available since 1972 and the substantial progress which has been made, much more remains to be done. An estimated additional \$80.4 billion is needed to meet the year 2010 population needs for sewage treatment. The revolving loan funds will be able to meet only a small amount of these total needs.

A number of issues relating to funding assistance must be considered. Foremost among these is the question of whether assistance should be increased for fiscal years 1993 and 1994, presently authorized at \$1.2 and \$0.6 billion respectively, and extended beyond 1994. Should the states be given more flexibility in the use of the revolving loan funds, which now must first be used to meet sewage treatment requirements and then may be used for nonpoint source pollution and estuary protection programs and, to a limited ex-

tent, otherwise ineligible items such as collector sewers and combined sewer overflow correction? Would the overall pollution control program be more effective, and the results more beneficial, if these constraints were removed in whole or in part? In addition, the revolving loan funds are of little or no benefit to small communities, which lack the economies of scale in relation to sewage treatment, or to poor communities. Even no-interest loans are of no benefit - they cannot afford to repay them. Would a partial return to a grants program be justified in such cases, either federal grants or grants by a state out of revolving loan fund monies?

### **Combined Sewer Overflows**

Combined sewers are those which carry both stormwater and sewage. Combined sewer overflows are flows in excess of the sewers' capacity which are discharged directly into receiving waters without going to the sewage treatment plant. Overflows also can occur because of faulty valves, manhole covers, and the like. Overflows can occur in both wet weather and dry weather conditions. The Environmental Protection Agency has estimated that there are between 15,000 and 20,000 overflow discharge points currently in operation. These combined sewer overflows are point sources of pollution subject to the permit requirements of the Act, including technology based and water quality based requirements.

EPA is currently implementing a strategy with the objectives of ensuring that if overflow discharges occur they are only as a result of wet weather: bringing all wet weather discharges into compliance with the requirements of the Act; and minimizing water quality, aquatic biota, and human health impacts from wet weather overflows. The states and EPA are establishing priorities for the permitting of overflow discharges based on the nature of the discharges and the receiving waters, where discharges cannot reach compliance by the dates specified in the Act, enforcement actions requiring compliance within the shortest reasonable time will be undertaken.

Combined sewer overflows are significant

contributors of pollution. The primary issues concerning overflows concern the extent and manner of controlling or eliminating the overflows and whether additional financial assistance should be provided. The costs of correcting combined sewer overflow problems are very large - as much as \$100 billion in the extreme case of constructing separate storm and sanitary sewers. States and municipalities are seeking a control strategy that considers the particular circumstances of the particular discharge being addressed and an evaluation of the cost effectiveness of the corrective measures. They are also seeking financial assistance. The environmental community is seeking the establishment of combined sewer overflow control provisions in the Act, requiring technological based standards for correction of the problems and a strict timetable for achieving compliance.

### **Stormwater**

Materials carried by rainfall and snowmelt runoff and surface drainage are significant contributors of pollutants to water bodies. The pollutants include those from streets and roads, industrial sites, waste sites and agricultural lands, and may consist of heavy metals, suspended solids, sediments, pesticides, petroleum products, construction chemicals, animal waste, salt, fertilizers, and industrial waste. Where the runoff carries the materials into bodies of water from diffuse sources it is covered under nonpoint source pollution control programs. The stormwater program covers runoff which is discharged from separate storm sewers, which are subject to regulation as point sources of pollution under the Act. The EPA estimates that there are more than one million separate stormwater discharge points throughout the country. In many water bodies, pollution associated with stormwater discharges represents more than one half of the pollution entering the water.

The permitting of such a large number of discharges is a huge administrative task. For this reason, and because many stormwater discharges do not constitute a significant threat to water quality, control of stormwater discharges was not high on EPA's regulatory agenda. The agency instead

concentrated on the permitting and controlling of industrial and municipal waste discharges. Through the 1970s and early 1980s EPA proposed a number of regulations dealing with stormwater discharges, but none ever became final. Finally, in the Water Quality Act of 1987, the most recent amendments to the Water Pollution Control Act, a new program for the regulation and control of stormwater discharges was established. The program provided for a phased in approach. EPA was required to establish regulations for permit applications from large municipalities with populations over 250,000 and industries by February of 1989, with applications due from these dischargers by February, 1990. Permits were to be issued within a year, and compliance was to take place within three years of permit issuance. Medium sized municipalities, with populations between 100,000 and 150,000, were to have regulations established by February 1991, applications filed by February, 1991, permits issued within a year and compliance within three years of permit issuance. For other discharges composed entirely of stormwater, no permit is required prior to October, 1992.

The EPA did not meet the statutory deadlines for promulgation of regulations, and has administratively extended the dates for permit applications. an action for which it has been sued and is presently in court. The lawsuit, brought by the Natural Resources Defense Council challenges EPA's regulations on the grounds that they do not establish substantive pollution control requirements and that they unduly narrow the definition of stormwater discharges associated with industrial activity.

Basically, for municipalities, the regulations require a two part application process whereby the applicants furnish information as to existing programs to control stormwater, data as to the discharges. and a description of proposed stormwater management plans. Industries are permitted to submit group applications instead of individual applications where they are similar, and are also covered by a two part permit application process involving the submission of data as to their activities and their materials management plans.

A number of issues relating to stormwater discharges have been raised. Perhaps the most serious is that of water quality standards. States and municipalities are concerned that EPA will require compliance with water quality standards through the inclusion of numerical effluent limitations in municipal stormwater permits. They argue that such limitations could not be met because the municipalities lack any means of effectively controlling the activities which result in pollutants being carried by stormwater such as illegal discharges of substances into the sewers (motor oil, for example), the timing and amounts of applications of various chemicals in relation to storm events, and the like.

The Act provides that permits for discharges from municipal storm sewers shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and systems, design and engineering methods, and other provisions. EPA's General Counsel has ruled, however, that in addition to best management practices, the meeting of applicable water quality standards can be required. Municipalities are seeking an amendment which would require only best management practices, or "maximum extent practicable", control of stormwater discharges. The environmental community, of course, seeks strict enforcement of existing law.

It is probably not feasible to provide that water quality standards need not be met - the whole premise of the Act is based on the achievement of water quality standards. It may be necessary, however, to consider a longer phased-in program with increasingly strict requirements being imposed if experience shows that in some cases the control measures that have been undertaken have not achieved the desired results. The requirements would be continuously ratcheted down, where needed, to meet the final goal. It will be difficult at best to determine in advance of actual experience the effectiveness of various measures in view of the variables involved such as amount and timing of rainfall, seasonal activities such as application of pesticides and fertilizers, and the corresponding

differences in the nature of the runoff from time to time.

## **Nonpoint Source Pollution**

Nonpoint source pollution is pollution that enters bodies of water from diffuse sources rather than from discrete sources such as pipes and ditches. It includes agricultural and urban runoff. More than fifty percent of the pollution entering the nation's waters comes from nonpoint sources. Agricultural and urban runoff includes fertilizers, pesticides, petroleum products, sediments and silt, and other materials subject to being carried by rainwater, snowmelt and drainage. Agricultural activities are the major source of nonpoint pollution.

Major efforts in pollution control in the past focused on point sources of pollution - discharges from industrial sources and from municipal treatment plants. The 1972 Act addressed the question of nonpoint pollution in section 208, which called for the development of areawide pollution control plans identifying and controlling both point and nonpoint sources of pollution. That program had mixed success and was never fully implemented, although it was one of the cornerstones of the Act. Over 200 plans were approved by EPA, however, which addressed nonpoint sources.

In the Water Quality Act of 1987, a new section was added to the Act dealing with nonpoint pollution. It established a program whereby states with nonpoint pollution control programs approved by EPA could receive financial assistance in the form of matching grants to implement the programs. All states have either fully- or partially-approved programs. The program is not mandatory in that while all states must perform assessments of their nonpoint pollution problems and submit plans for addressing them to EPA, no penalties attach and no backup Federal plans exist where states do not have programs. Mandatory nonpoint source control programs have lacked the necessary political support for passage - the agricultural community is especially opposed to mandatory programs.

A separate nonpoint source pollution con-

trol program for coastal states was contained in the Coastal Zone Act Reauthorization Amendments of 1990. That provision requires states with approved coastal zone management plans to develop and implement programs to control nonpoint source pollution. State programs are subject to approval by both EPA and the National Oceanic and Atmospheric Administration. State programs are required to be enforceable under state law and must provide for implementation of management measures which are in conformity with guidance issued by EPA. If a state does not submit an approvable plan on schedule, funds under the Coastal Zone Management Act and nonpoint source grants under the Federal Water Pollution Control Act are withheld.

The obvious issue with regard to nonpoint source pollution is whether the concepts of the provisions of the Coastal Zone Management Act should be extended to inland states so that all states' nonpoint programs are operating under the same rules. While this has the advantage of logic, it may prove difficult if opposition arises to the implementation of the coastal zone management provisions, as it well might. The EPA has also expressed concerns about the existing requirements in the Clean Water Act for state nonpoint programs not being strong enough and suggested the need for strengthening amendments, although specifics have not been discussed.

## **Contaminated Sediments**

Sediment contamination is a significant contributor to water quality problems in surf act waters throughout the country. It also poses major risks for aquatic organisms. The EPA has identified hundreds of locations nationwide with concentrations of contaminants in the bottom sediments at levels that are of concern. In the United States portion of the Great Lakes alone there are at least 27 areas with contaminated sediment problems of sufficient severity to require study and remedial action.

The contamination in the sediments comes from both nonpoint runoff and discharges of

stormwater, municipal waste and industry. The types of contaminants frequently found include heavy metals, pesticides, and other toxins. The contaminants in underwater sediments are taken up by aquatic life and move through the food chain. They are also subject to disturbance and resuspension through such activities as dredging.

The dredging of ports and harbors, and the disposal of the dredged material, are significantly affected by contamination in bottom sediments. The dredging activity itself can stir up the sediments, releasing contaminants which may have been immobile in the sediment or capped by relatively clean material. The disposal of contaminated dredged material can be especially troublesome and traditional disposal into open water may not be feasible, resulting in the necessity for diked disposal areas or on-land disposal, dramatically increasing the costs of constructing and maintaining navigation projects.

The EPA has been developing sediment criteria that could be used both in the prevention and remediation of contaminated sediments. Numerical criteria would establish concentrations of contaminants that are harmful to aquatic life and human health. These criteria could then be used in the making of decisions as to whether to remediate contaminated sediments through such actions as removal or capping with clean material and the setting of requirements for discharges of pollutants from point sources and the control of nonpoint sources of pollution in order to prevent contaminants from reaching harmful levels.

The major issue with regard to sediment criteria is whether legislative direction should be provided for the development of criteria and their use in determining what actions should be taken to prevent water quality degradation from contaminated sediments. The environmental community strongly supports such legislative action. The navigation interests are opposed to the establishment and use of numerical criteria on the ground that they may render it unnecessarily difficult and expensive to construct and maintain navigation projects involving dredging and the disposal of

dredged material. They favor, instead, a continuation of existing procedures which essentially test the effects of dredged material on organisms in order to determine the harmfulness of the material rather than relying on uniform numerical criteria. Their fear is that dredged material may fail to pass numerical criteria yet in particular instances not pose a significant threat to aquatic life.

The issue of sediment criteria is very difficult and played a major role in the lack of passage of coastal pollution legislation in the last Congress.

## **Arid Areas**

In the arid west and southwest there are streams which are dry for much of the year, either because of natural conditions or because the entire streamflow is diverted for uses such as municipal water supply and irrigation. There are also streams in which there is water, but the entire or major part of the flow consists of discharges from treatment plants, irrigation return flows, and the like.

Municipalities and industries in these areas desire more flexibility in the setting of effluent limitations, arguing that it is unfair and often infeasible to require their discharges to meet standards for aquatic life, for example, when their discharge constitutes the only water in the stream and the stream would otherwise be dry. Municipalities are also concerned about the difficulty of meeting water quality standards in the discharge of stormwater where the stormwater is the only water entering the stream and the stormwater itself would have to meet applicable standards without any diluting or buffering effect of existing streamflows.

Whether a response to these concerns could or should be attempted is problematic. Should exceptions to the attainment of water quality standards be tolerated in any event, and if so how can it be done for one region of the country and not for others in spite of different circumstances. Once the process is started, where does it end. Nevertheless, the issue is an important one and will have to be considered.

## **Water Conservation**

Recent droughts, both in the western and eastern United States, have pointed to the need for water conservation in order to reduce the need for additional withdrawals from surface and groundwater and to respond to limited surface and groundwater resources. In the area of pollution control, conservation offers the added benefit of a reduction in the need for treatment capacity through a reduction in the use of water and the concomitant reduction in the amount of effluent entering treatment plants. Also, higher levels of treatment of pollutants in municipal treatment plants offers the opportunity to make water available for reuse, if not for domestic use at least for possible agricultural use and for irrigation of parks, golf courses, and similar facilities.

The use of water conserving fixtures in residences and commercial buildings is not within the jurisdiction of the Public Works and Transportation Committee. The Committee can, however, address the issues of higher levels of treatment and water reuse and indirect incentives for the conservation of water. Additional financial assistance for such efforts has been proposed, as well as selected demonstration programs and projects. As with other aspects of pollution abatement and treatment, finding the money is a problem, but the issue has the potential for substantial benefits and warrants close examination.

## **Pollution Prevention**

Pollution prevention and toxics use reduction are pollution control approaches which have gained increasing support in recent years as efficient and cost effective strategies to address pollution problems. For manufacturing and chemical use, pollution prevention involves changes in the manufacturing process, including reduced use of toxic chemicals, that reduce the amount and toxicity of pollution released to the environment. For nonpoint and municipal pollution control, pollution prevention includes measures such as reduced pesticide and fertilizer use and street sweeping. In

many cases, changes in manufacturing processes are cost effective, providing savings in raw material, pollution control, and disposal costs.

Despite the potential cost savings, adoption of pollution prevention measures has been minimal to date. In the 1990 Budget Reconciliation Act, Congress enacted a pollution prevention technical assistance program. Also, the EPA has instituted a voluntary pollution prevention program to encourage industry to reduce releases of 15 to 17 toxic chemicals by fifty percent within five years.

The issue here is whether legislative direction and requirements for pollution prevention as it relates to water pollution should be provided. If so, should specific goals be set for amounts of reduction, should specific toxics be targeted, or should broad policy goals be established and states given encouragement or requirements to establish pollution prevention programs with assistance and approval by EPA.

## **Great Lakes**

Because of their size and their ecological and commercial importance, and because of major pollution problems which have resulted from man's activities, the Great Lakes have received special attention in the Clean Water Act. Section 118 of the Act establishes a program for the control and abatement of pollution in the Great Lakes, and establishes a Great Lakes National Program Office within the EPA. The purpose of the section is to achieve the goals of the Great Lakes Water Quality Agreement between the United States and Canada. That agreement, first entered into in 1978 and amended in 1987, sets goals of zero discharge of persistent toxic substances and the prohibition of discharges of toxic substances in toxic amounts. In addition, it establishes an ecosystem approach to pollution control - recognizing the cycling of pollution from one media to another and the movement of pollutants through plant and animal life.

In 1990, Congress took further legislative action with passage of the Great Lakes Critical

Programs Act. designed to improve implementation of the Great Lakes Water Quality Agreement and accelerate Great Lakes cleanup. The Act calls for development of Great Lakes water quality standards to implement the water quality agreement, development of numerical sediment criteria, and remedial action plans for contaminated sediments, as well as increased funding for Great Lakes programs.

The greatest concern with regard to pollution in the Great Lakes is how to achieve additional reductions in pollutants entering the lakes and how to remove those that are there. Because of the nature of the Great Lakes - the amount of water entering and leaving the lakes is small compared to their size - most pollutants entering the system do not leave. or take a very long time to do so. It has therefore been argued that particular care must be taken to determine acceptable interim pollutant concentration standards for water quality standards and that zero discharge, particularly of persistent toxic bioaccumulative pollutants, must ultimately be achieved.

At a minimum, the 1990 Act must be reauthorized and some technical problems need to be addressed. Additionally. consideration needs to be given to the issue of whether additional direction or requirements with regard to zero discharge of certain pollutants should be provided.

## **Coastal Pollution**

The coastal environment provides an important habitat for fish and wildlife and supports extensive commercial activities. Some seventy percent of the United States population lives within fifty miles of a coastline. Coastal waters are subject to a wide array of pollutants from municipal and industrial discharges. stormwater runoff. nonpoint source runoff. and combined sewer overflows. Because of the importance of coastal waters. the degree of pollution to which they are subject. and the damage which has been suffered because of pollution. they warrant special consideration. The Coastal Zone Management Act is one of the pri-

mary Federal statutes relating to protection of the coastal environment and coastal waters, calling for the development and implementation of coastal zone management plans by the states.

The Federal Water Pollution Control Act is another primary statute, as its provisions apply to coastal waters, and some provisions are also targeted specifically at coastal areas, such as the National Estuary Program which calls for the development of comprehensive plans for the cleanup and protection of selected estuaries. Still, a need has been perceived for additional legislation to provide increased emphasis on and protection of coastal waters. In the last Congress the Public Works and Transportation and Merchant Marine and Fisheries Committees developed and reported legislation aimed at protecting coastal waters through coordination of existing programs, new and more stringent requirements for high value coastal waters. increased state efforts for coastal area protection, increased funding assistance, and a variety of other measures. That legislation did not reach the floor of the House. The issues that it addressed will again be addressed in connection with reauthorization of the Federal Water Pollution Control Act.

## **Watershed Planning**

Section 208 of the 1972 Act called for development and implementation of areawide pollution control plans to address all sources of water pollution. That program, for a variety of reasons, did not prove effective. One of the issues we will be examining is the establishment of a process whereby states and municipalities are encouraged to develop pollution control plans on a watershed basis in which available authorities and pollution control techniques and approaches are coordinated in an effective manner to achieve a comprehensive and efficient solution to the water pollution problems of a particular area. The authority for such action exists, but it appears that legislative encouragement and guidance is necessary if it is to take place. This approach would also involve increased flexibility in the use of available financial assistance



and should ideally include consideration, use, and coordination of all applicable programs of the various Federal agencies such as agricultural programs, coastal zone management programs, and programs under the Federal Water Pollution Control Act.

## **Wetlands**

The most contentious issue facing the committee, and the one which will largely determine when and whether there is legislation agreed to by the House and Senate and sent to the President, is that of wetlands protection.

Wetlands sustain nearly one third of the Nation's endangered and threatened species. They provide breeding and wintering grounds for waterfowl and shorebirds. Coastal wetlands provide nursery and spawning grounds for the majority of United States commercial fish catches. Wetlands also provide benefits by lessening flood damage through the retention of flows, reducing erosion, recharging groundwater, filtering sediment, and abating pollution.

The United States Fish and Wildlife Service has estimated that over one half of the wetlands existing in the lower forty eight states at the time of European settlement no longer exist. In 1988, the National Wetlands Forum, operating under the aegis of the Conservation Foundation at the request of EPA, recommended an interim goal of no net loss of wetlands by acreage and function and a long term goal to increase the quantity and quality of the Nation's wetlands. This goal was endorsed by the President.

The primary Federal law relating to the protection of wetlands is section 404 of the Federal Water Pollution Control Act, originally enacted in 1972. That section provides that no person may discharge dredged or fill material into any water of the United States without a permit from the Secretary of the Army. Wetlands are waters of the United States. Many activities involve the discharge of dredged or fill material such as construction of

housing developments, shopping centers, commercial buildings, roads, airports, and the like.

Section 404 has been controversial since its inception, and has been an issue each time the Federal Water Pollution Control Act has been reauthorized since 1972. Changes were made to the provision in 1977 allowing states to administer their own permit programs for the discharge of dredged or fill material except in traditionally navigable waters and adjacent wetlands, and exempting certain activities from the permit requirements such as normal farming, silvicultural and ranching activities. Other than that, the section has escaped change.

The controversy over the section 404 program has now reached such a state, however, that the issues must be resolved if there is going to be a reauthorization bill. The present state of affairs has its origin largely in a new interagency wetlands delineation manual developed in 1989 by the four agencies having jurisdiction and exercising authorities with regard to wetlands - the U.S. Army Corps of Engineers, the EPA, the Department of Agriculture, and the Fish and Wildlife Service. This manual establishes the factors to be considered and the procedures to be used in delineating the boundaries of wetlands, and was developed jointly by the agencies so that they would all be using the same methods. In some Corps of Engineers Districts the new manual resulted in little or no change in the section 404 program, but in others it resulted in more areas being classified as wetlands. This, along with delays associated in getting permits or decisions on permit applications, and pent up dissatisfactions with the program, led to an upswelling and coalescence of opposition.

In August of 1991 a proposed revised Delineation Manual was published for public comment, and the comment period is still open. It has been reacted to favorably by those who feel the existing manual defines too many areas as wetlands, and has been strongly criticized by others, including environmental groups, as containing methods for determining what areas are wetlands

which would result in the loss of protection of many areas now classified as wetlands.

A number of legislative proposals to change the program have been introduced, and a substantial amount of testimony on the program was received by the Subcommittee on Water Resources last year. Many changes in the program have been suggested, both to reduce its coverage and to broaden its scope.

The issue of compensation has been raised, with one proposal requiring compensation to be paid to owners of certain types of high value wetlands who are not permitted to undertake development on them. Others have complained that the regulatory program covering wetlands is so restrictive that in many cases takings of property are involved and have urged legislative provisions providing means of compensation in addition to the existing constitutional protections against takings of property without just compensation, the argument being that many people simply cannot afford to take their cases to court.

Proposals have been made for the classification of wetlands according to their value - the functions they serve, the criticality of the habitat they provide, and the types of wildlife for which they provide habitat. Wetlands of higher value would receive a higher degree of protection than those of lower value.

Wetlands mitigation banking has been proposed. Under the existing program, when a permit to undertake an activity in a wetland is applied for, a process called sequencing is applied. The sequencing alternatives are, in order of preference: first, avoidance of impact upon the wetland if a practicable alternative exists; second, steps to minimize the impacts through project modifications and permit conditions; and, finally, compensatory mitigation for unavoidable adverse impacts. Mitigation can include such things as enhancement and protection of part of the wetland area involved and acquisition and protection of other equivalent wetlands. The concept of wetlands mitigation banking

would permit wetlands to be restored, for example, and later credited against mitigation requirements for permitted activities.

Consideration must be given to what can be done to expedite the existing permit process, which in extreme circumstances can take years.

Increased state involvement in the protection of wetlands is also an issue. How can states be encouraged to undertake wetlands protection programs in lieu of the Federal program? Should financial assistance be provided? Should EPA retain a veto of state permitting actions? Should protection programs broader than the simple regulation of discharge of dredged and fill activities be required?

Finally, there is the issue of whether the scope of section 404 should be expanded to cover other activities which destroy or adversely affect wetlands such as drainage. In connection with this issue is that of whether comprehensive wetlands protection provisions should be enacted rather than relying on a limited revision of section 404, which does not effectively address the overall public policy question of adequately protecting and improving our wetlands resources.

## **Conclusion**

This article discusses the major issues before the House Committee on Public Works and Transportation. Other issues have been addressed in a Senate Environment and Public Works Committee bill introduced last year. What will ultimately appear in the House and Senate bills cannot be predicted with any certainty at this time. The one thing that is certain, however, is that the process of developing the reauthorizing legislation will be long and difficult.