

# CLEAN WATER ACT REAUTHORIZATION: WETLAND ISSUES AT CENTER STAGE

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The reauthorization of the Clean Water Act brings numerous issues of federal water policies to the fore, including funding for sewage treatment plants, control of nutrients and toxics, treatment of urban storm water and policies towards agricultural and other nonpoint sources of pollution. But the most contentious issue concerns regulation of activities affecting the Nation's wetlands, the subject of Section 404 of the Act.

Of the country's remaining 95 million acres of coastal and inland vegetated wetlands, about two-thirds are in private ownership. This fact underscores the two-faced nature of wetlands first, as part of the waters of the United States, intimately linked to deeper water aquatic ecosystems through flows of water and, second, as a part of an urban or agricultural landscape, often in private ownership.

Three wetland issues addressed in bills before the Congress, Bush Administration actions, and litigation in federal courts are:

1. What is a wetland? and what methodology is appropriate for delineating wetland boundaries?
2. What policies should govern the regulation of wetlands?, i.e., How easy or difficult should it be to obtain a Section 404 permit? and
3. Should a denial or strict conditioning of a Section 404 permit ever constitute a taking of private property under the Fifth Amendment to the Constitution?, and, if so, under what circumstances?

These three issues are obviously inter-related. The basic fact is that, as a matter of Clean Water Act policy, the protection of the nation's remaining wetlands is vital. Indeed, a reauthorized

Clean Water Act should include policies that go beyond protection of the nation's remaining wetlands to encompass a major wetland restoration program.

## **Delineation of wetlands**

The announcement by President Bush last August of a wetlands manual revising in dramatic ways the 1989 manual brought to abrupt public attention the central question as to what a wetland is. The 1989 manual, co-authored by four federal agencies, the Corps, EPA\*\*\*, the Fish and Wildlife Service and the Department of Agriculture, was the culmination of a decade of careful scientific categorization of wetland plants and soils in a manner useful for delineating the boundaries of many wetland ecosystems. The Farm Bureau, the oil and gas industry, and developers all attacked the 1989 manual on the grounds that it went far beyond the 1987 manual. In fact this was not the case.

A report prepared by EDF and the World Wildlife Fund entitled "How Wet is a Wetland?" (January, 1992), with input from more than 40 scientists, documented that the President's manual would withdraw federal jurisdiction from at least half of the nation's vegetated wetlands. Field testing by the responsible federal agencies showed the revised manual, particularly the hydrology criterion, to be technically unworkable. As technically impoverished as this revised manual is, one of the bills in the Congress addressing Section 404, H.R. 1130, sponsored by Congressman Hayes of Louisiana, would restrict jurisdiction over wetlands probably even more.

The Corps of Engineers is currently using the 1987 manual, a generally satisfactory document. Of course, with field experience, any manual

that endeavors to set forth a method for delineating the upland boundaries of the scores of different wetland systems in the country must undergo technical refinement. While the federal agencies have professionals who could carry out these refinements, given the politics of this issue, input from the National Academy of Sciences would be most useful.

### Regulatory policies

A central issue in the wetlands debate is whether all wetlands should be classified or categorized based on their value, functions, or any other variable. While the Corps and EPA recognize that different wetland systems perform different functions, and some have suffered degradation, they do not in general “classify” wetlands with one exception. That exception is the classification that takes place through the advanced identification program. In that program, cooperating federal and state agencies map and classify wetlands within a designated ecosystem and, based on the categories, propose alternative uses. Such an effort is underway in the Hackensack Meadowlands of New Jersey, the Rain Water Basin in Nebraska, and a few other places.

The President’s August 1991 wetlands policy proposes classification systems. Unless a classification method is very carefully designed, every developer, farmer, and energy company would have a strong incentive to have his/her wetland given the lowest possible ranking. This does not auger well for a technically credible process. Further, particular pieces of wetlands in private ownership are parts of a larger ecosystem, and one part cannot be scientifically assessed without clarifying its function in the larger system. Thus, classification of wetlands must be done at a basin level. The classification of a particular tract of wetlands should therefore not be triggered by the filing of a permit application. In addition, wetlands classification depends on the objectives of the exercise, and delineation of those objectives can be controversial.

For all of these reasons, scientifically responsible classification is resource-intensive and will not deliver the answers that developers and farmers are seeking. At the same time, advanced identification projects should be pursued because they can provide all interested parties, including property owners, with an assessment of their wetlands that can promote a search for alternatives.

### Regulatory Takings

If government action “takes” private property, then the Fifth Amendment demands government compensation. Developers whose permits have been denied in the past have not successfully brought takings challenges. Typically, in most permit denial situations, developers have alternatives, including some adjacent uplands, such that all economically viable use of their property has not been removed.

The U.S. government is now faced, however, with a growing number of takings challenges where wetland permits have been significantly conditioned, as well as denied. Two of those cases are before the federal Circuit Court that hears appeals from the Court of Claims. In one case, *Loveladies Harbor*, the primary issue is whether the Court should take into account the developer’s entire historic tract in coastal New Jersey, most of which has already been developed, or whether it should focus solely on a few remaining areas of wetlands. Based on well-established precedents, it should be a straight-forward case since the developer has enjoyed extensive use of his holdings. However, the government lost the first round.

In the second case, *Florida Rock*, the Corps denied a permit to do rock mining in wetlands in the East Everglades within the watershed of Dade County’s water supply system. Since the Corps found that the mining could facilitate introduction of pollutants into the ground water, the case raises the issue of how far the government can go in restricting the use of property that will demonstrably cause harm to others.

H.R. 1330 enters the fray by declaring, most unwisely, that the denial of any permit to fill any wetlands classified in the best wetland quality category automatically constitutes a taking entitling the property owner to compensation.

Permit holders act as though theirs was the only private property affected by government action on wetland permits. However, other private property can be adversely affected where destruction of wetlands contributes incrementally to downstream flooding or water pollution or loss of fish, ducks, and other wildlife populations. Many small businessmen make a living, directly or indirectly, off of these highly wetland-dependent resources. Yet, because the filling or draining of any one tract of wetlands typically does not have a clearly demonstrable downstream impact, those "downstream" property owners have no tort action against the wetland permittee for damages. The point remains, however, that the 404 permit program can and should be viewed as a regulatory device for preventing harm to other private property owners, as well as public values.

## **Wetland restoration**

The Aquatic System Restoration Committee of the National Research Council, National Academy of Sciences, recommended in its report issued in December 1991 that the U.S. should have a goal of net restoration of 10 million acres of wetlands by 2010. The most important wetland restoration program in the U. S. today is the agricultural Wetland Reserve Program (WRP) set up in the 1990 Farm Act as part of the Conservation Reserve Program. It calls for the reconversion of 600,000 to one million acres of former wetlands now in agricultural use by 1995. Implementation and funding have been slow, but the basic program is conceptually sound. However, even if aggressively implemented, the WRP would not fully compensate for wetland losses that are occurring at a rate of at least 200,000 acres per year. Thus, the National Academy of Science report envisions a much larger national wetland restoration effort than that reflected in the WRP.

A major wetland restoration program that fosters local and state wetland protection and restoration plans could, if properly designed, allow for classification directed at potential wetland restoration tracts, as well as existing acreage, and introduce some regulatory flexibility where the environmental gains from restoration of former wetlands (not creation of man-made wetlands) clearly outpace any permitted losses. The National Academy of Science report describes several such mechanisms in detail. The Congress should fully explore these proposals.