

# Issue Brief for Congress

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## Wetland Issues

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## Wetland Issues

### SUMMARY

Wetlands, in a wide variety of forms, are found throughout the country. The various values of these areas have been increasingly recognized in recent years, but the remaining acreage continues to disappear. When European settlers first arrived, total wetland acreage was more than 220 million acres in the lower 48 states, according to estimates by the U.S. Fish and Wildlife Service. It estimates that by 1997 total wetland acreage was 105.5 million acres. Losses continue, although the rate of loss has slowed considerably during the past decade and restoration efforts have grown, and some regions are approaching the national policy goal of no-net-loss. Recent losses have been concentrated in forested wetlands, and net losses are greatest in the eastern United States.

Several laws provide varying levels of protection under different circumstances: §404 in the Clean Water Act; the swampbuster and other programs in federal farm law; and laws that protect specific sites or types of wetlands, such as the enactments that have established National Wildlife Refuge System units and the Wetland Reserve Program. Although the rate of wetland loss has slowed, these laws and their implementation are viewed by many protection advocates as inadequate. Others, who advocate the rights of property owners and development interests, by contrast, characterize these same efforts as overzealous and too extensive. Numerous state and local wetland programs increase the complexity of the protection effort.

Both the Clinton and earlier Bush Administrations had made wetland protection a priority, but the current Bush Administration

has not announced any comprehensive wetlands policies.

The only major wetland legislation Congress has enacted recently has addressed agricultural wetlands (in the 1996 and 2002 farm bills). However, numerous wetland bills have been introduced during the past decade either to implement Administration policies or to initiate alternative approaches, and many hearings have been held.

In recent years, wetlands issues have involved controversy over the rate of wetlands loss, continuing efforts to reauthorize the Clean Water Act and other legislation that affects wetlands, implementation of farm bill provisions, and specific actions that raise concerns about changes in wetlands programs. Examples of such actions were implementation of Corps of Engineers changes to a nationwide permit (changes generally opposed by the development community), and a federal decision that overturned the 1993 "Tulloch" rule, which had expanded regulated actions to include excavation. Revised rules issued in May which redefine key wetlands permit regulatory terms and a January 2001 Supreme Court decision affecting regulation of isolated wetlands have attracted attention from policymakers.

The 107<sup>th</sup> Congress included provisions in the farm bill (P.L. 107-171) that will expand the Wetland Reserve Program and enhance federal wetland protection efforts on agricultural lands. The House has passed legislation to reauthorize the North American Wetlands Conservation Act (H.R. 3908).

## **MOST RECENT DEVELOPMENTS**

The 107<sup>th</sup> Congress included wetland protection provisions in the recently-enacted 2002 farm bill (P.L. 107-171). These provisions, which the Department of Agriculture is starting to implement, expand a land retirement program called the Wetland Reserve from 1,075,000 acres to 2,275,000 acres and create a component of the Conservation Reserve Program to protect 1 million acres of isolated wetlands that are 10 acres or smaller and are not adjacent to larger streams. Numerous other provisions, while not specifically directed to agricultural wetland protection, could increase protection or restoration at some locations. Other legislation moving through Congress would reauthorize the North American Wetlands Conservation Act (H.R. 3908, H. Rept. 107-421). Other recent events that may attract congressional attention include court decisions that would limit the geographic reach of the Clean Water Act §404 program and rules issued in May that redefine two key terms in the §404 program. The revisions have been criticized by environmental groups.

## **BACKGROUND AND ANALYSIS**

Wetlands, in a variety of forms, are found throughout the country. They are known in different regions as swamps, marshes, fens, potholes, playa lakes, or bogs. While these places can differ greatly, they all have distinctive plant and animal assemblages because of the wetness of the soil. Some wetland areas may be continuously inundated by water, while other areas may not be flooded at all. In coastal areas, flooding may occur on a daily basis as tides rise and fall.

Functional values, both ecological and economic, at each wetland depend on its location, size, and relationship to adjacent land and water areas. Many of these values have been recognized only recently. Historically, many federal programs encouraged wetlands to be drained or altered because they were seen as having little value as wetlands. Wetland values can include:

- habitat for aquatic birds and other animals and plants, including numerous threatened and endangered species; production of fish and shellfish;
- water storage, including mitigating the effects of floods and droughts;
- water purification;
- recreation;
- timber production;
- food production;
- education and research;
- and open space and aesthetic values.

Usually wetlands provide some composite of these values; no single wetland in most instances provides all these values. The composite value typically declines when wetlands are altered. In addition, the effects of alteration often extend well beyond the immediate area because wetlands are usually part of a larger water system. For example, conversion of wetlands to urban uses has increased flood damages; this value is receiving considerable attention as natural disaster costs have mounted through the 1990s.

Federal laws that affect wetlands have changed since the mid 1980s as the values of wetlands have been recognized in national policies. Previously, some laws, such as selected provisions in the federal tax code, public works legislation, and farm programs, encouraged destruction of wetland areas. Federal laws now either encourage wetland protection, or prohibit or do not support their destruction. These laws, however, do not add up to a fully consistent or comprehensive national approach. The central federal regulatory program, §404 of the Clean Water Act, requires permits for the discharge of dredged or fill materials into many but not all wetland areas; however, other activities that may adversely affect wetlands do not require permits. An agricultural program, swampbuster, is a disincentive program that indirectly protects wetlands by making farmers who drain wetlands ineligible for federal farm program benefits; those who do not receive these benefits have no reason to participate. Several other acquisition and incentive programs complete the current protection effort.

While numerous wetland protection bills have been introduced in recent Congresses, the only major new wetlands legislation to be enacted has been in the two most recent farm bills, in 1996 and 2002. While Congress did not complete action on any other wetland legislation, the Clinton Administration took a strong interest in the wetlands debate. In 1993, it announced new federal policies based on five principles: 1) supporting no overall net loss of the Nation's remaining wetlands together with increasing the quality and quantity of wetlands as a long-term goal; 2) making regulatory programs fair, flexible, and predictable; 3) encouraging options to regulatory programs; 4) expanding partnerships to protect and restore wetlands in an ecosystem/watershed context; and 5) basing wetland policies on the best scientific information available. Subsequently, it sought increased funding for wetlands protection efforts through the Clean Water Action Plan and the Lands Legacy Initiative and set a goal of a net gain of 100,000 acres annually starting in FY2005.

While Congress has not enacted major changes, it has provided a forum where conflicting interests in wetland issues have been debated. These conflicts are between:

- Environmental interests and wetland protection advocates who have been pressing for greater wetlands protection by improving coordination and consistency among agencies and levels of governments, and strengthened programs; and
- Others, including large landowners, farmers, small businessmen, and individuals who own small parcels of land, who counter that protection efforts have gone too far, and that wet areas that provide few wetland values have been aggressively protected. They have been especially critical of the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) for administering the §404 program in an overzealous and inflexible manner.

Wetland issues revolve around disparate scientific and programmatic questions, and conflicting views of the role of government where private property is involved. Scientific questions include how to define wetlands, the current rate and pattern of wetland losses, and the importance of these losses. Federal program questions include; the operation of the principal federal regulatory program and other programs to protect, restore, or mitigate wetland resources; relationships between agriculture and wetlands; whether all wetlands should be treated the same in federal programs and which wetlands should be subject to

regulation; and federal funding of wetland programs. In addition, private property questions are raised because almost three-quarters of the remaining wetlands are located on private lands, and some property owners believe they should be compensated when federal programs limit land use and thereby diminish its value.

## **What is a Wetland?**

There is general agreement that the presence of a wetland can be determined by a combination of soils, plants, and hydrology. The only definition of wetlands in law, in the swampbuster provisions of farm legislation, lists those three components but does not include more specific criteria, such as what conditions must be present, for how long, and during what portion of the year. Controversies are exacerbated when many sites that have those three components, including sites that have wetland characteristics only some portion of the time, do not look like what many people visualize as wetlands.

Wetlands subject to federal regulation are a large subset of all places that are judged to be wetlands according to criteria used in the scientific community. These regulated wetlands, under the §404 program discussed below, are currently identified using technical criteria in a wetland delineation manual issued by the Corps in 1987. It was prepared jointly and is used by all federal agencies to carry out their responsibilities under this program (the Corps, EPA, FWS, and the National Marine Fisheries Service (NMFS)). The manual provides guidance and field-level consistency among the agencies that have roles in wetland regulatory protection. (A second and slightly different manual, agreed to by the Corps and the Natural Resources Conservation Service, is used for delineating agricultural lands.) While the agencies try to improve the objectivity and consistency of wetland identification and delineation, judgement continues to play a role and can lead to site-specific controversies. Cases discussed below (see **Judicial Proceedings Involving §404**) are efforts to exclude certain types of wetlands or activities affecting them from the regulatory program.

## **How Fast are Wetlands Disappearing, and How Many Acres are Left?**

It has been estimated that when European settlers first arrived, wetland acreage in the area that would become the 48 states was more than 220 million acres, or about 5% of the total land area. By 1997, total wetland acreage was estimated to be 105.5 million acres, according to data compiled through the FWS National Wetlands Inventory (NWI). Data compiled by the NRCS and the FWS in separate surveys and using different methodologies (and yielding different results) both show that the annual loss rate has been dropping from almost 500,000 acres annually nearly three decades ago to less than 100,000 annually. The FWS survey estimated the average annual rate of loss was 58,500 acres between 1986 and 1997 while NRCS used its Natural Resources Inventory (NRI) to estimate that the average annual loss rate was 32,600 acres between 1992 and 1997.

This difference in loss statistics has led to disagreements over the actual rate of loss and the effectiveness of current policies. The Clinton Administration announced in March 1998 that FWS and NRCS would coordinate future assessments of wetlands loss, based on data collected by the NRCS every 5 years in the NRI. The Administration sought to end this “battle of the numbers” that has obscured other wetland protection issues. This battle was

explored in a July 1998 General Accounting Office report titled *Wetlands Overview: Problems with Acreage Data Persist*. The recent joint announcement of inconsistent loss rates and statements by the two agencies that it is infeasible to produce statistically reliable data for a single report on wetlands gains and losses indicate that the battle continues.

Numerous shifts in federal policies since 1985 (and changes in economic conditions as well) strongly influence wetland loss patterns, but the composite effects remain unmeasured. There is a large time lag from changes in policy to release of data that measure these changes. Further, these data only measure acres, and do not provide any insights into changes in the quality of remaining wetlands as measured by the values they provide.

## Section 404 Program

The principal federal program that provides regulatory protection for wetlands is found in §404 of the Clean Water Act (CWA). Its intent is to protect water and adjacent wetland areas from adverse environmental effects due to discharges of dredged or fill material. Established in 1972, §404 requires landowners or developers to obtain permits from the Corps of Engineers to carry out activities involving disposal of dredged or fill materials into waters of the United States, including wetlands.

The Corps has long had regulatory jurisdiction over dredging and filling, starting with the River and Harbor Act of 1899. The Corps and EPA share responsibility for administering the §404 program. Other federal agencies, including NRCS, FWS, and NMFS, also have roles in this process. In the 1970s, legal decisions in key cases led the Corps to revise this program to incorporate broad jurisdictional definitions in terms of both regulated waters and adjacent wetlands. Section 404 was last significantly amended in 1977.

This judicial/regulatory/administrative evolution of the 404 program has generally pleased those who view it as a critical tool in wetland protection, but dismayed others who would prefer more limited Corps jurisdiction or who see the expanded regulatory program as intruding on private land-use decisions and treating wetlands of widely varying value similarly. Underlying this debate is the more general question of whether §404 is the best approach to federal wetland protection.

Some wetland protection advocates have proposed that it be replaced or greatly altered. First, they point out that it governs only the discharge of dredged or fill material, while not regulating other acts that drain, flood, or otherwise reduce functional values. Second, because of exemptions provided in 1977 amendments to §404, major categories of activities are not required to obtain permits. These include normal, ongoing farming, ranching, and silvicultural (forestry) activities. Further, permits generally are not required for activities which drain wetlands (only for those that fill wetlands), which excludes a large number of actions with potential to alter wetlands. Third, in the view of protection advocates, the multiple values that wetlands can provide (e.g., fish and wildlife habitat, flood control) are not effectively recognized through a statutory approach based principally on water quality, despite the broad objectives of the Clean Water Act.

**The Permitting Process.** The Corps' regulatory process involves both general permits for actions by private landowners that are similar in nature and will likely have a minor effect on wetlands and individual permits for more significant actions. According to

program data compiled by the Corps, the agency received an average of 74,500 §404 permit requests annually from FY1996 to FY1999. Of those, more than 84% were authorized under a general permit, and the average length of time for action was 14 days. A general permit, which can apply regionally or nationwide, is essentially a permit by rule for activities with minor impact; most do not require pre-notification or prior approval. About 7% were required to go through the more detailed evaluation for an individual permit, which may involve complex proposals or sensitive environmental issues. The average time to complete review of these applications was 107 days; only 0.3% of applications for individual permits were denied. In FY1999, Corps-issued permits authorized a total of 21,556 acres of wetland impact (30% less than in FY1998), while those permits required that 46,433 acres of wetlands be restored, created, enhanced, or preserved as mitigation for the losses authorized.

Regulatory procedures on individual permits allow for interagency review and comment, a coordination process that can generate delays and an uncertain outcome, especially for environmentally controversial projects. EPA is the only federal agency having veto power over a proposed Corps permit; EPA has used its veto authority 11 times in the nearly 30 years since the program began. Critics have charged that implied threats of delay by the FWS and others practically amount to the same thing. Reforms during the Reagan, earlier Bush, and Clinton Administrations streamlined certain of these procedures, with the intent of speeding up and clarifying the Corps' full regulatory program, but concerns continue over both process and program goals.

Most recently, controversy surrounds revised regulations issued by EPA and the Corps on May 3 which redefine two key terms in the 404 program, "fill material" and "discharge of fill material." The agencies say that the revisions are intended to clarify certain confusion in the program due to previous differences in how the two agencies defined those terms, but environmental groups contend that the changes allow for less restrictive and inadequate regulation of certain disposal activities, including disposal of coal mining waste, which could be harmful to aquatic life in streams. The Senate Environment and Public Works Committee held a hearing on these issues on June 6, and legislation to reverse the agencies' action has been introduced (H.R. 4683). (For additional information, see CRS Report RL31411, *Controversies over Redefining "Fill Material" Under the Clean Water Act.*)

**Nationwide Permits.** Nationwide permits are a key means by which the Corps minimizes the burden of its regulatory program. These general permits authorize activities that are similar in nature and are judged to cause only minimal adverse effect on the environment. General permits minimize the burden of the Corps' regulatory program by authorizing landowners to proceed without having to obtain individual permits in advance. They are issued for 5-year periods and thereafter must be renewed by the Corps.

In December 1996 the Corps reissued the 37 existing nationwide permits and 2 new permits. The Corps made changes to strengthen the environmental restrictions of nationwide permit 26 (NWP 26), which has been particularly controversial because of concern that it results in significant cumulative unmonitored wetlands losses. The changes to NWP 26 pleased wetland protection advocates but displeased development and commercial interests who contended that permitting would now be more burdensome. At the same time, the Corps announced it would replace NWP 26 in 2 years with more specific activity-based permits.



Fulfilling that pledge, the Corps issued final replacement permits for NWP 26 in March 2000; these permits took effect June 7, 2000. In contrast to NWP 26, which authorized activities in certain categories of waters, the replacement permits authorize projects for five specific types of activities, with terms and conditions to ensure that the activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. The major change that the Corps believed will strengthen protection of aquatic resources is a maximum acreage limit under the new NWPs of one-half acre, reduced from the previous maximum of three acres. The Corps also issued additional general conditions applicable to all nationwide permits to further ensure protection of aquatic resources, such as limitations on discharges of fill material into 100-year floodplains. Developers said the replacement permits are too restrictive of the regulated public and would require more landowners to seek individual permits, which is more costly and time-consuming for the regulated public. The Corps acknowledges that more individual permits will be required and that costs for landowners and the Corps itself will increase as a result of the permit changes, but the Corps believes that these impacts will be less severe than developer groups contend and will be outweighed by the additional resource protection that the permits will provide. (For more information, see CRS Report 97-223, *Nationwide Permits for Wetlands Projects: Regulatory Developments and Current Issues*.)

A key developer group, the National Association of Home Builders, challenged the replacement NWPs in a lawsuit filed the same day the permits package was published in the *Federal Register*. The lawsuit challenges a number of details in the permits and more generally contends that the new permits are contrary to the intent of Congress that the Corps provide a streamlined process in its nationwide permitting program. Other lawsuits challenging the permits have been brought by the National Stone Association and the National Federation of Independent Business. These cases are still pending.

Nationwide permits are issued for periods of no longer than 5 years. Thus, in August 2001, the Corps proposed to re-issue all 43 nationwide permits (including those issued in March 2000), most of which were last re-issued in 1996. EPA and environmental groups object to some revisions that the Corps proposes in order to add flexibility, including relaxation of certain permit conditions, fearing that they would result in a net loss of wetland acres. Industry groups favored flexibility in the proposal, but say that some requirements for case-by-case review could nullify the positive aspects. The Corps received more than 2,100 public comments and modified some aspects of the proposal when it issued final permits January 15, 2002. The re-issued permits became effective March 18. Reactions to the final permits were mixed, much like the August 2001 proposal: environmental advocates contend that, even with modifications, the re-issued permits are not adequately protective of water quality, while developer groups argue that the overall program continues to focus on arbitrary regulatory thresholds that result in undue burden on developers and the Corps.

Section 404 authorizes states to assume many of the permitting responsibilities. Two states, Michigan (in 1984) and New Jersey (in 1992), have done this. Others have cited the complex process of assumption, the anticipated cost of running a program, and the continued involvement of federal agencies because of statutory limits on waters that states could regulate as reasons for not joining these two states. Efforts (both administrative and legislative) continue towards encouraging more states to assume program responsibility.

**Judicial Proceedings Involving §404.** The §404 program has been the focus of a number of lawsuits recently. The status of aspects of the Corps' regulatory program was made uncertain by a federal court ruling in January 1997. The U.S. District Court for the District of Columbia overturned regulations issued by the Corps and EPA in 1993 that had extended the scope of regulation to include certain landclearing and excavation activities. Those regulations were issued as part of the settlement of a lawsuit brought by environmental groups over the agencies' failure to regulate discharges associated with excavation (*North Carolina Wildlife Federation et al. v. Tulloch*). At issue was whether "fallback" from dredging activities constituted pollution, under the CWA. The court ruled that incidental fallback is not pollution and, thus, the agencies had exceeded their authority under the Clean Water Act. In January 2001, the Clinton Administration issued a regulation to close what the government viewed as a "loophole" resulting from the Tulloch case, which it estimated to have resulted in conversion of 20,000 acres of wetlands. The regulation seeks to clarify circumstances in which mechanized landclearing or excavation activity in waters of the U.S. will result in discharges which are subject to CWA regulation. After reviewing this new rule, the Bush Administration announced in April 2001 that it would allow the regulation to take effect without modification. Regulated industries are displeased with the new rule, and two groups filed lawsuits challenging it.

In December 1997, the U.S. 4<sup>th</sup> Circuit Court of Appeals ruled in favor of a Maryland developer, finding that the Corps had exceeded its authority in claiming jurisdiction over isolated wetlands. The court in *U.S. v. Wilson* said that the Corps exceeded its authority in trying to regulate wetlands whose degradation or destruction could have an impact on interstate commerce. Rather, a "case-by-case" determination is necessary to decide whether an activity has an effect on a wetland and whether the effect is substantial. Environmentalists said that the ruling, if interpreted broadly, would make it harder for the federal government to justify regulating interstate wetlands. However, the ruling only affected Corps districts covered by the 4<sup>th</sup> Circuit (Virginia, West Virginia, Maryland, and the Carolinas). A U.S. request for a rehearing of the case was denied in January 1998, and the government subsequently decided not to seek Supreme Court review. In May 1998, the Corps issued guidance outlining how to address isolated wetlands in the 5 states affected by the ruling. The Corps will continue to assert jurisdiction over isolated wetlands, but only where it can show a substantial connection between the wetland and interstate commerce.

*U.S. v. Wilson* is one recent example of long-standing controversy and litigation over whether isolated waters are properly within the jurisdiction of §404. Isolated waters that are wetlands which are not physically adjacent to navigable surface waters often appear to provide few of the values for which wetlands are protected, even if they meet the technical definition of a wetland. On January 9, 2001, the Supreme Court ruled on the question of whether the CWA provides the Corps and EPA with authority over isolated waters. The Court's 5-4 ruling in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers* (No. 99-1178) held that the Corps' denial of a §404 permit for a disposal site on isolated wetlands solely on the basis that migratory birds use the site exceeds the authority provided in the Act. The full extent of retraction of the regulatory program resulting from this decision is unclear for now. Environmentalists believe that the Court misinterpreted congressional intent on the matter, while industry and landowner groups welcomed the ruling. Policy implications of how much the decision restricts federal regulation depend on how broadly or narrowly the opinion is applied. The government's view on this key question was answered in a January 19, 2001, memorandum issued jointly

by EPA and the Corps in which the agencies provide a legal interpretation based on a narrow reading of the Court's decision, thus allowing federal regulation of some isolated waters to continue. However, the issues remain under discussion within the Administration and elsewhere. While it likely will take some time to assess how regulatory protection of wetlands will be affected as a result of the decision, the remaining responsibility to protect affected wetlands falls on states and local governments. Whether states will act to fill in the gap left by removal of some federal jurisdiction is unclear, but a few states (Wisconsin and Ohio, for example) have passed new laws to do so. (For additional information, see CRS Report RL30849, *The Supreme Court Addresses Corps of Engineers Jurisdiction Over 'Isolated Waters': The SWANCC Decision*.)

**Treat All Wetlands Equally.** Under the §404 program, there is a perception that all jurisdictional wetlands are treated equally, regardless of size, functions, or values. This has led critics to focus on situations where a wetland has little apparent value, but the landowner's proposal is not approved or the landowner is penalized for altering a wetland without a federal permit. Critics believe that one possible solution may be to have a tiered approach for regulating wetlands. Several legislative proposals introduced in recent Congresses would establish three tiers — from highly valuable wetlands that should receive the greatest protection to the least valuable wetlands where alterations might usually be allowed. Some states (New York, for example) use such an approach for state-regulated wetlands. The Corps and EPA issued guidance to field staff emphasizing the flexibility that currently exists in the 404 program to apply less vigorous permit review to small projects with minor environmental impacts.

Three questions arise: (1) What are the implications of implementing a classification program, (2) How clearly can a line separating each wetland category be defined, and (3) Are there regions where wetlands should be treated differently? Regarding classification, even most wetland protection advocates acknowledge that there are some situations where a wetland designation with total protection is not appropriate. But they fear that classification for different degrees of protection could be a first step toward a major erosion in overall wetland protection. Also, these advocates would probably like to see almost all wetlands presumed to be in the highest protection category unless experts can prove an area should receive a lesser level of protection, while critics who view protection efforts as excessive, would seek the reverse.

Locating the boundary line can be controversial when the line encompasses areas that do not meet the image held by many. Controversy would likely grow if a tiered approach required that lines segment wetland areas. On the other hand, a consistent application of an agreed-on definition may lead to fewer disputes and result in more timely decisions.

Some states have far more wetlands than others. Different treatment has been proposed for Alaska because about one third of the state is designated as wetlands, yet a very small portion has been converted. Legislative proposals have been made to exempt it from the §404 program until 1% of its wetlands have been lost. Some types of wetlands are already treated differently. For example, playas and prairie potholes have somewhat different definitions under swampbuster (discussed below), and the effect is to increase the number of acres that are considered as wetlands. This differential treatment contributes to questions about federal regulatory consistency on private property.

## Agriculture and Wetlands

National surveys almost two decades ago indicated that agricultural activities had been responsible for about 80 percent of wetland loss in the preceding decades, making this topic a focus for policymakers. Congress responded by creating programs in farm legislation starting in 1985 that use disincentives and incentives to encourage landowners to protect and restore wetlands. Swampbuster and the Wetlands Reserve are the two largest efforts, but other programs such as the Conservation Reserve and Conservation Reserve Enhancement Programs are also being used to protect wetlands. Recent wetland loss surveys conducted by NRCS and by FWS indicate that agriculture is now responsible for between 25% and 30% of conversions, and that the total number of acres lost also has plunged.

**Swampbuster.** Swampbuster, enacted in 1985, uses disincentives rather than regulations to protect wetlands on agricultural lands. It has been controversial with farmers concerned about redefining an appropriate federal role in wetland protection on agricultural lands, and with wetland protection advocates concerned about inadequate enforcement. Since 1995, the NRCS has made wetland determinations only in response to requests because of uncertainty over whether changes in regulation or law would modify boundaries that have already been delineated. NRCS estimates that more than 2.6 million wetland determinations have been made and that more than 4 million sites may eventually be required.

Swampbuster was amended in the Federal Agricultural Improvement and Reform Act of 1996 (P.L. 104-127) to grant producers greater flexibility. Changes include:

- expanding the definition of agricultural land used in the MOA to include pasturelands, rangelands, and tree farms, and exempting swampbuster penalties when wetlands are voluntarily restored;
- providing that prior converted wetlands will not be considered “abandoned” if it remains in agricultural use, giving the Secretary discretion to determine which program benefits swampbusters are ineligible for, and granting good-faith exemptions;
- encouraging mitigation and establishing a mitigation banking pilot program; and repealing required consultation with the U.S. Fish and Wildlife Service.

An interim final rule was issued on September 6, 1996; a final rule has not been issued.

The 2002 farm bill (P.L. 107-171) makes a single amendment to swampbuster in section 2002 that should not affect either the acres that are protected or the characteristics of the protection effort.

**Wetland Reserve Program (WRP).** Under the WRP, enacted in 1990, landowners receive payments for placing easements on farmed wetlands. All easements were permanent until provisions in the 1996 farm bill were implemented. This law made the WRP an entitlement, extended its authorization through 2002, and capped enrollment at 975,000 acres. The FY2001 Agriculture Appropriations legislation (P.L. 106-387) raised the enrollment cap to 1,075,000 acres. Legislative proposals that were considered during the 106<sup>th</sup> Congress sought to replace the cap with an annual enrollment limit. (Increased enrollment was a goal of the Clinton Administration’s Clean Water Action Plan; see below.)

Data released in March 2001 show almost 1,050,000 acres are in the program. Almost 35% of the enrollment is in three states, Louisiana, Mississippi, and Arkansas. Most of the land is enrolled under permanent easements, while only about 5% is enrolled under 10-year restoration agreements. Farmer interest exceeds available funding, but Congress had repeatedly limited enrollment in appropriations legislation. For FY2002 (and FY2003), the Bush Administration requested no new funding for the WRP, noting that the authorized enrollment ceiling would be reached by the end of FY2001. The House and Senate Appropriations Committees concurred for FY2002 (in P.L. 107-76), pending completion of the current farm bill debate. (For more information on agriculture programs to protect wetlands, see CRS Issue Brief IB96030, *Soil and Water Conservation Issues*.)

**Farm Bill Legislation (P.L. 107-171).** The 2002 farm bill includes wetland provisions. The WRP enrollment cap was raised from 1,075,000 acres to 2,275,000 acres through FY2007, with 250,000 acres to be enrolled annually. Other WRP provisions passed in one of the two bills were not retained by the conference committee: it deleted a House-passed provision to repeal the wetland mitigation banking provision of the swampbuster program, enacted in the 1996 farm bill, and Senate passed provisions to authorize that up to 25,000 of the acres enrolled each year be enrolled through a new enhancement program to restore wetlands in partnerships with state and local governments and NGOs, modeled after an enhancement subprogram within the Conservation Reserve Program.

The farm bill also expanded the 500,000 acre Farmable Wetlands Pilot Program within the Conservation Reserve Program. This program was enacted in the FY2001 Agriculture Appropriations to enroll farmed wetlands smaller than 5 acres in six North Central states. It now becomes a national program of 1 million acres, with no state being able to enroll more than 100,000 acres. It is limited to enrolling wetland areas that are smaller than 10 acres and are not adjacent to larger streams and rivers. Several other conservation programs, including the Environmental Quality Incentives Program and the Wildlife Habitat Incentive Program, were also amended in ways that may have incidental protection benefits for wetlands, both because of much higher funding levels and because of program changes. Finally, some new programs could help protect wetlands, including the Conservation Security Program, which would provide payments to install and maintain practices on working agricultural lands, a Surface and Groundwater Conservation Program (funded through the Environmental Quality Incentive Program), a new program to retire wetlands that are part of a cranberry operation; and several programs to better manage water resources. (For more information, see CRS Report RL31255, *Resource Conservation Title: Comparison of Current Law with Farm Bills passed by the House and Senate*.)

**Agricultural Wetlands and the §404 Program.** The §404 program applies to qualified wetlands in all locations, including agricultural lands. But the Corps and EPA exempt “prior converted lands” (wetlands modified for agricultural purposes before 1985) from §404 permit requirements under a memorandum of agreement (MOA), and since 1977 the Clean Water Act has exempted “normal farming activities.” Another MOA signed in January 1994 by the NRCS, the Corps, EPA, and FWS gives NRCS the responsibility for making wetland determinations for the §404 program on agricultural lands. These determinations are made under §404 rules and procedures. Finally, the January 2001 Supreme Court *SWANCC* decision, discussed above, apparently will exempt certain isolated wetlands from Corps jurisdiction; NRCS has estimated that about 8 million acres might be exempted by this decision. While these exemptions and the MOA have displeased some

protection advocates, they have probably dampened some of the criticisms from farming interests over federal regulation of private lands. These agencies have been unsuccessfully trying to revise the MOA to address changes made in the 1996 farm bill and to respond to problems that have emerged in implementing the original MOA.

## **Private Property Rights and Landowner Compensation**

An estimated 74% of all remaining wetlands in the coterminous states are on private lands, and only 13% are located on federal lands. Questions of federal regulation of private property stem from the belief that land owners should be compensated when a “taking” occurs and alternative uses are prohibited or restrictions on use are imposed to protect wetland values. The U.S. Constitution provides that property owners shall be compensated if private property is “taken” by government action. The courts generally have found that compensation is not required unless all reasonable uses are precluded. Many individuals or companies purchase land with the expectation that they can alter it. If that ability is denied, they contend, then the land is greatly reduced in value. Many argue that a taking should be recognized when a site is designated as a wetland. In June, the Supreme Court held that a Rhode Island man who had acquired property after the state enacted wetlands regulation affecting the parcel is not automatically prevented from bringing an action to recover compensation from the state, but ruled that the state’s action had not taken all economic value of the property into account (*Palazzolo v. Rhode Island*, U.S. No. 99-2047). The previous three Congresses have explored these issues in numerous hearings, including an October 2000 hearing by the House Government Reform Committee specifically on impacts of federal wetlands policy on property owners. Each considered, but did not enact, property rights protection proposals, in part because the Clinton Administration had strongly hinted that it would have vetoed such legislation. (For more information, see CRS Report RL30423, *Wetlands Regulation and the Law of Property Rights “Takings.”*)

## **Wetland Restoration and Mitigation**

Federal wetland policies during the past decade have increasingly emphasized restoration of wetland areas. Much of this restoration occurs as part of efforts to mitigate the loss of wetlands at other sites. The mitigation concept has broad appeal, but implementation has left a conflicting record. The most recent examination of this record, presented in a June 2001 report from the National Research Council, found it to be wanting. Likewise, a GAO report issued in May criticizes the ability of the Corps to track the impact of in-lieu-fee projects under its current mitigation program. Whether it is possible to restore or create wetlands with ecological and other functions equivalent to or better than those of natural wetlands that have been lost over time is a subject that both scientists and policymakers debate. Results so far seem to vary, depending on the type of wetland. Congress has repeatedly endorsed mitigation in recent years.

Much of the attention on wetland restoration has focused on Louisiana; it is estimated that 80% of the total loss of coastal wetlands in the United States has taken place in this state (coastal wetlands are about 5% of all wetlands in the United States). In response to these losses, Congress authorized a task force, led by the Corps, to prepare a list of coastal wetland restoration projects in the state, and provided funding to plan and carry out restoration projects in this and other coastal states under the Coastal Wetlands Planning, Protection and Restoration Act of 1990, also known as the Breaux Act. According to the FWS, 24 coastal

states received funding under this program between 1992 and 1997 for 96 projects. For the \$43.3 million expended, 51,184 acres of wetlands were protected, over 42,000 through acquisition and nearly 8,600 through restoration. Restoration projects are also taking place in other places. In early June 2002, for example, 16,500 acres of salt ponds in San Francisco Bay were purchased by the state of California and the U.S. Fish and Wildlife Service from Cargill Inc and will be restored..

Many federal agencies have been active in wetland improvement efforts in recent years. In particular, the FWS has been promoting the success of its Partners in Wildlife program, which it says has restored almost 500,000 acres of wetlands and almost 3,000 miles of riparian and in-stream habitat (and upland habitat also) with about 22,000 landowners.

Other programs also restore and protect domestic and international wetlands. The North American Wetlands Conservation Act, was reauthorized through FY2003 in the 105<sup>th</sup> Congress (P.L. 105-312), and Congress is currently considering legislation to reauthorize this program through FY2007 (H.R. 3908, H. Rept. 107-421). Authorized appropriations were increased from \$30 million to \$50 million annually in §902(i) of P.L. 106-554, omnibus FY2001 appropriations. It has been combined with funding created under several other laws to create the North American Wetlands Conservation Fund. The fund provides federal matching grants for wetland conservation projects to help implement the North American Waterfowl Management Plan. Projects are located in Canada, Mexico, and the United States. According to the Department of the Interior, this program has contributed \$288 million for more than 700 projects through FY2000 which have protected, restored, or improved nearly 9.1 million acres of wetlands in the United States and Canada. Partners have provided matching funds exceeding \$727 million.

Under the Convention on Wetlands of International Importance, more commonly known as the Ramsar Convention, the United States is one of 123 nations that have agreed to slow the rate of wetlands loss by designating important sites. These nations have designated almost 1,050 sites since the convention was adopted in 1971. The United States has designated 18 wetlands, encompassing almost 3 million acres.

Mitigation has also become an important cornerstone of the §404 program in recent years. A 1990 MOA signed by the agencies with regulatory responsibilities outlines a sequence of three steps leading to mitigation: first, activities in wetlands should be avoided when possible; second, when they can not be avoided, impacts should be minimized; and third, where minimum impacts are still unacceptable, mitigation is appropriate. It directs that mitigated wetland acreage be replaced on a one-for-one functional basis. Therefore, mitigation may be required as a condition of a §404 permit.

Some wetland protection advocates are critical of mitigation, which they view as justifying destruction of wetlands. They believe that the 404 permit program should be an inducement to avoid damaging wetland areas. These critics also contend that adverse impacts on wetland values are often not fully mitigated and that mitigation measures, even if well-designed, are not adequately monitored or maintained. Supporters of current efforts counter that they generally work as envisioned, but there is little data to support this view. For example, in May 2001, the General Accounting Office issued a report finding that the Corps has not been able to track the impact of its program that allows in-lieu-fee mitigation projects in exchange for issuing permits that allow wetlands development. (*Wetlands*

*Protection: Assessments Needed to Determine the Effectiveness of In-Lieu-Fee Mitigation*, GAO-01-325) Questions about implementation of the 1990 MOA and controversies over the feasibility of compensating for wetland losses further complicate the wetland protection debate. The GAO report was followed by a June report from the National Research Council that said that mitigation projects called for in permits affecting wetlands were not meeting the federal government's "no net loss" policy goal for wetlands function (*Compensating for Wetlands Losses under the Clean Water Act*, National Research Council, June 2001). In response, in November, the Corps issued new guidance to strengthen the standards on compensating for wetlands lost to development, but the guidance has been criticized by environmental groups and some Members of Congress for weakening rather than strengthening mitigation requirements and for the Corps' failure to consult with other federal agencies.

Interest has grown recently in creating "mitigation banks," in which wetlands are created, restored, or enhanced in advance to serve as "credits" that may be used or acquired by permit applicants when they are required to mitigate impacts of their activities. Numerous public and private banks have been established, but many believe that it is too early to assess their success. Detailed federal guidance for establishment, use, and operation of mitigation banks was finalized by the Corps, EPA, FWS, NRCS, and NMFS in the *Federal Register* on November 28, 1995. Provisions in several laws, such as the 1996 farm bill and the 1998 Transportation Equity Act (TEA-21), endorse the mitigation banking concept. (For more information, see CRS Report 97-849, *Wetland Mitigation Banking: Status and Prospects*.)

## Recent Administration and Congressional Wetlands Activities

While recent congressional activities center on reauthorizing omnibus farm legislation, discussed above, they also include continued funding for Clinton Administration proposals from prior years that were discussed in the context of FY2002 appropriations and are anticipated to be revisited with the FY2003 budget, such as the Conservation Spending Category which originated with the Lands Legacy Initiative. It is unclear what direction wetland policies might take in the future, as the Bush Administration has not taken any overall policy positions.

**Clinton Administration Initiatives.** In 1998, the Clinton Administration released a Clean Water Action Plan intended to address the nation's remaining water quality challenges. Restoring and protecting wetlands was a key feature of the plan. It called for achieving a net gain of 100,000 acres of wetlands annually by the year 2005. The Clinton Administration believed this could be achieved by tightening permit rules under §404, by placing more wetlands into the Wetlands Reserve Program, Conservation Reserve Program, and similar federal and non-federal programs, and by increasing the wetland acres restored and enhanced by the Corps of Engineers. The action plan was not accompanied by proposals or legislation concerning the CWA or other laws, and in Congress, it was considered mainly through the appropriations process. Overall, FY1999, FY2000, and FY2001 appropriations bills provided only a portion of the increased funds requested by the Administration. (For further information, see CRS Report 98-150, *The Clean Water Action Plan: Background and Early Implementation*.)

The Clinton Administration also proposed a Lands Legacy Initiative with the FY2000 and FY2001 budgets. This initiative centered on providing more funding for natural resource



programs, especially land acquisition programs under the Land and Water Conservation Fund and the North American Wetlands Conservation Fund. In FY2000, Congress provided funding for the initiative beyond the regular agency appropriations, but less in total than the Administration had requested, while in FY2001, Congress provided more than the Administration had requested. (For further information, see CRS Issue Brief IB0015, *Managing Growth and Related Issues in the 107<sup>th</sup> Congress.*)

**Legislative Activity in the 106<sup>th</sup> Congress.** The most significant wetlands legislative activity in the 106<sup>th</sup> Congress involved increasing appropriations. While about 40 bills with wetland provisions were introduced, only a few that were not controversial saw any legislative action. For example, in October 1999, the House passed H.R. 2821, a bill to add two members to the North American Wetlands Conservation Council. In November 1999, the Senate approved S. 1119, a bill to reauthorize the Coastal Wetlands Planning, Protection and Restoration Act through FY2009. Neither bill received further action.

Some regulatory issues were addressed in the FY2000 Energy and Water Development Appropriations bill (P.L. 106-60). This law included language providing that \$5 million in additional funds for the Corps' regulatory program to establish an administrative process for appeals of jurisdictional determinations by the Corps. It also directed the Corps to study the workload impacts and costs of compliance of the proposed replacement nationwide permits (see **Nationwide Permits**, above). The issue of nationwide permits was addressed again, following publication of the replacement permits in March 2000, through the FY2001 Energy and Water Development Appropriations bill (P.L. 106-377). It included legislative language requiring the Corps to report to Congress on changed costs and increased workload caused by of the final replacement permits, to prepare a biannual report on the performance of the Corps' regulatory program, and to provide information to the public on permit applications and processing.

**107<sup>th</sup> Congress.** So far, the 107<sup>th</sup> Congress has enacted omnibus farm bill legislation (see discussion above, **Farm Bill Legislation**), and on May 7, the House passed legislation to reauthorize the North American Wetlands Conservation Act (H.R. 3908, H. Rept. 107-421). Also, the House Transportation and Infrastructure Water Resources and Environment Subcommittee held two hearings. The first, on September 20, 2001 considered H.R. 1474, a bill to promote restoration, conservation, and enhancement of wetlands by specifically authorizing a wetlands mitigation banking program to be administered by the Corps. The second, on October 4, 2001 was an oversight hearing on enforcement of wetlands regulatory programs where witnesses presented allegations of improper treatment by federal regulators and enforcement officials.

## **FOR ADDITIONAL READING**

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U.S. Department of Agriculture, Economic Research Service. *Wetlands and Agriculture: Private Interests and Public Benefits*, by Ralph Heimlich, *et al.* [Washington] 2001, 123p. Agricultural Economic Report No. 765.

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U.S. General Accounting Office. *Wetlands Protection: Assessments Needed to Determine the Effectiveness of In-Lieu-Fee Mitigation*. [Washington] May 2001. 75 p.

### **CRS Reports**

CRS Report RL31131. *Selected Conservation Proposals for the Next Farm Bill*, by Jeffrey Zinn. 6 p.

CRS Report 97-223. *Nationwide Permits for Wetlands Projects: Regulatory Developments and Current Issues*, by Claudia Copeland. 22 p.

CRS Report RL31255. *Resource Conservation Title: Comparison of Current Law with Farm Bills Passed by the House and Senate*, by Jeffrey Zinn. 24 p.

CRS Report 97-849. *Wetland Mitigation Banking: Status and Prospects*, by Jeffrey Zinn. 21 p.

CRS Report RL30423. *Wetlands Regulation and the Law of Property Rights "Takings"*, by Robert Meltz. 41 p.

CRS Report RL30849. *The Supreme Court Addresses Corps of Engineers Jurisdiction over "Isolated Waters": The SWANCC Decision*, by Robert Meltz and Claudia Copeland. 11 p.