Approved: Carl Dean Holmes
2/1/94 Date

MINUTES OF THE HOUSE COMMITTEE ON ENERGY AND NATURAL RESOURCES.

The meeting was called to order by Chairperson Carl Holmes at 3:30 p.m. on January 27, 1994 in Room 526-S of the Capitol.

All members were present except: Representative Betty Jo Charlton - Excused
Representative Russ Mills - Excused

Committee staff present: Raney Gilliland, Legislative Research Department
Dennis Hodgins, Legislative Research Department
Mary Torrence, Revisor of Statutes
Shirley Wilds, Committee Secretary

Conferees appearing before the committee: J. Michael Luzier, Director, National Assn of Home Builders
Janet Stubbs, KS Home Builders Assn

Others attending: See attached list

Chairperson Holmes called the meeting to order.

Janet Stubbs. Ms. Stubbs of the Kansas Home Builders Association introduced J. Michael Luzier to the Committee. (See Attachment #1)

J. Michael Luzier. (See Attachment #2) Mr. Luzier presented a national overview of the wetlands issue, explaining how federal wetlands policy affects property owners in Kansas and state efforts to protect wetlands.

Mr. Luzier informed the Committee that Section 404 (enacted in 1972) of the Clean Water Act (CWA) requires permits for the discharge of dredged or fill material into "waters of the United States." The recent Tulloch rule has been expanded to regulate virtually all land-clearing, ditching excavation and channelization activities, as well as discharge activities. He said the program is jointly administered by the U. S. Corps of Engineers and U. S. Environmental Protection Agency. He maintains this joint effort has proven to be a central problem with the program. He explained, by giving one agency all the responsibility to run the program (Corps) and another agency the most significant authority to define program standards (EPA), Congress created an administrative structure that has produced agency conflict and inconsistent policies for those regulated by the program. He said if the EPA had to run the program, it might revise many of the policies forced upon the Corps, i.e. substantive standards for permit review and the definition of "wetlands."

Under 404b(1) guidelines, Mr. Luzier reported such guidelines are based on the precept that dredge and fill materials should not be discharged into special aquatic sites (includes wetlands) unless the applicant demonstrates the discharge will not have an unacceptable adverse impact. He said to implement this precept, the Guidelines establish two rebuttable presumptions. If an applicant can verify there is no alternative to filling a wetland, he must then rebut the second presumption that the placement of fill into a wetland causes an unacceptable impact on aquatic ecosystems. If an applicant can pass the second test (significant degradation test) the Guidelines then require the applicant to mitigate, or offset, the environmental impacts of the fill.

Mr. Luzier said before 1972 the nation's waters were regulated by the Corps under the Rivers and Harbor Act of 1899 termed "navigable in fact," later expanded to waters that could be "made" navigable. With the Water Pollution Control Act Amendments of 1972, jurisdictional waters became "navigable waters of the United States," but "waters of the U.S" was never defined. In short, although Congress intended to expand the definition of jurisdictional waters beyond the old "navigability" test, it wrote no clear jurisdictional "wetlands" definition.

Although a definition and regulations of "wetlands" was adopted by both EPA and the Corp in 1977, not all members of Congress were convinced that the amendments had solved the definitional problem. Only recently

have the EPA and Corp agreed upon a single method to actually delineate wetlands boundaries on property. According to Mr. Luzier, the delineation issue is not fully resolved. He said Congress has directed the National Academy of Sciences to perform a scientific analysis of the various delineation manuals, and there may be significant revisions upon completion of that study.

To eliminate or minimize Wetlands Regulatory Problems in Kansas, Mr. Luzier offered several options. Among his suggestions were (see attachment for details of each):

1. Have SCS delineate and map wetlands in the State.

2. Consider assuming the Section 404 Program.

3. Consider developing a regional general permit in conjunction with EPA and the Corps.

4. Develop mitigation banks in Kansas. (There are mitigation banks in Ohio and Florida)

5. Participate in the Clean Water Action Reauthorization Process.

Upon completion of its business, the meeting adjourned at 4:30 p.m.

The next meeting is scheduled for January 31, 1994.

GUEST LIST

Committee: Energy and Natural Resources **Date: 1/27/94**

NAME: (Please print)	Address:	Company/Organization:
Steve Adams	Topeka	Dept. of Wildlife & Parks
Chris Wilson	Wamego	KS. Seed Industry Ass'n
M.S. Mitchell	Wichita	KBIA
JANET STUBBS	TOPEKA	KBIA
Alan STEPPAT	TOPEKA	PETE McGill & Assoc.
Ken Kern	Topeka	SCC
Blake Henning	Topeka	KWO
Dale Lambley	"	KDAL
Joyce Wolf	LAWRENCE	KLT
Cynthia Abbott	Mayetta	Ks. Audubon Council
Tricia R. Bears	Topeka	Kansas Audubon Council
Jim Ludwig	"	Western Resources
PHILIP HURLEY	TOPEKA	PATRICK J. HURLEY CO.
Russ FREELY	Topeka	KUMA
Bob Brow	Topeka	KS. Lon Dealers
GEORGE AUSTIN	TOPEKA	DWR
Karl Mueldener	"	KDHE
Don Cawby	"	KDHE
RJ Robel	Manhattan	KWF KSRA
Bill Craven	Topeka	Sierra Club
Mike Beam	Topeka	Ks. Lvstk. Assn.

J. Michael Luzier
Director
Environmental Regulation Department
State, Local and Regulatory Affairs Division
National Association of Home Builders

J. Michael Luzier manages NAHB's Environmental Regulation Department which has expertise in environmental policy, planning, and engineering. The Department handles a variety of state and federal environmental regulatory issues including wetlands, stormwater management, non-point source pollution, solid waste, and endangered species.

Michael has served as NAHB's lead staff on wetlands regulatory issues for the past ten years. In that capacity, he regularly interacts with federal, state and local policy makers regarding wetlands regulatory policy as well as a host of other environmental policy matters.

Mr. Luzier served on the National Wetlands Policy Forum as staff representative for NAHB's 1989 President and Forum member. Michael has had numerous wetlands articles published in trade and professional publications and is a frequent speaker at national conferences on wetlands and other environmental policy issues. Michael directed the development of NAHB's publication Developer's Guide to Federal Wetlands Regulations and is co-author of Developing Difficult Sites: Solutions for Developers and Builders.

Prior to joining NAHB in 1982, Mr. Luzier worked for the Maryland Department of Natural Resources in the state's non-point source pollution control program. He earned his Bachelors Degree in Political Science from Virginia Tech in 1979, and his Masters in Environmental Planning from the University of Pennsylvania in 1981.

1/27/94
Energy & Natural Resources
Attachment #1

Testimony of J. Michael Luzier

Director of Environmental Regulation
National Association of Home Builders

Before the House Energy and Natural Resources Committee

January 27, 1994

Energy & Natural Resources
Attachment #2
1/27/94

Introduction

My name is Michael Luzier. I am the Director of Environmental Regulation for the National Association of Home Builders (NAHB). NAHB represents over 168,000 member firms engaged in all aspects of residential and commercial construction. I am pleased to have the opportunity to testify today.

I understand that the Committee is interested in a national overview of the wetlands issue to understand how federal wetlands policy affects property owners in Kansas and state efforts to protect wetlands.

For the past ten years, I have been directly involved in the wetlands policy debate at the federal, state and local levels. Having worked with scores of policy officials at all levels of government and having studies the permitting problems that hundreds of builders and developers have experienced, I believe I have a thorough understanding of the wetlands issue as it seen from different perspectives.

I have organized my testimony into two major parts. First, I will present an overview of the federal wetlands permit process, including a brief discussion of the various permitting problems property owners confront. Second, I will outline some options that the State of Kansas may want to consider in hopes of minimizing or eliminating the problems that have occurred in other states.

Overview of Section 404 of the Clean Water Act

Section 404 of the Clean Water Act (CWA) requires permits for the discharge of dredged or fill material into "waters of the United States." In a recent regulation known as the Tulloch rule, the program has been expanded to regulate virtually all landclearing, ditching, excavation and channelization activities as well as discharge activities.

The Section 404 program is jointly administered by the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA). Congress ill-fated decision to split the permitting authority between two agencies has proven to be one of the central problems with the program. Lacking a single agency to run the entire program, the history of Section 404 is one of agency infighting, and the often the creation of inconsistent program policies. For property owners and permit applicants, the result has been the creation of a regulatory program known for the confusion, uncertainty and delay it creates for those who must comply with it.

Although he Corps has the responsibility to process permits and run the program on a day-to-day basis, EPA is the agency that has been vested with the ultimate authority to define key program policies

and standards. For example, EPA has the authority to determine the geographic scope of the jurisdictional limits of the regulatory program (i.e., to define wetlands and determine which activities in wetlands require permits). EPA has the authority to define and interpret the substantive standards for permit issuance. EPA has the authority to determine whether or not a particular state can assume the administration of the Section 404 program. Most notably, EPA has the authority to veto any permit the Corps proposes to issue, or any permit a delegated state proposes to issue. Although EPA insists that it rarely invokes its authority to veto permits, formally doing so on less than 1% of permits, EPA often uses the threat of a veto to sway permit decisions.

The bifurcated administrative structure of the 404 program has proven problematic. By giving one agency all the responsibility to run the program (Corps) and another agency the most significant authority to define program standards (EPA), Congress created an administrative structure that has produced agency conflict and inconsistent policies for those regulated by the program. Since EPA generally does not have to administer the program, it has been able to adopt extreme policies without regard for their workability or reasonableness. If EPA had to run the program, it might revise many of the policies that it has forced upon the Corps.

Two prime examples of the unreasonable policies EPA has insisted upon are the two major policies the program is built upon: 1) substantive standards for permit review; and 2) the definition of "wetlands."

Permit Standards: The 404(b)(1) Guidelines

The b(1) Guidelines are based on the precept that dredge and fill materials should not be discharged into special aquatic sites, which includes wetlands, unless the applicant demonstrates that the discharge will not have an unacceptable adverse impact, either individually or in combination with known or probable cumulative impacts, on the special aquatic sites. To implement this precept, the Guidelines establish two rebuttable presumptions.

First, for non-water dependant projects, it is presumed that there is a practicable alternative to filling wetlands, and that the practicable alternative poses less environmental impact than filling wetlands. If the applicant can pass this so-called alternatives test by proving that there is no alternative to filling the wetland, he must then rebut the second presumption that the placement of fill into a wetland causes an unacceptable adverse impact on aquatic ecosystem. If the applicant can pass this second test, referred to as the significant degradation test, the Guidelines then require the applicant mitigate, or offset, the environmental impacts of the fill.

Practicable Alternatives

Articulated through a series of court cases and agency guidance documents, the alternatives test requires the applicant to prove that he cannot avoid the wetland altogether. The Guidelines state that a practicable alternative includes requiring the applicant to purchase a non-wetland site and develop it instead of the site he owns. Moreover, the Guidelines have been interpreted to require applicants to evaluate the availability of alternatives at the time the applicant "enters the market," not at the time he submits his permit application. Thus, EPA has determined that it is reasonable and practicable to re-evaluate an investment decision an applicant made years in the past, holding applicants responsible for knowing whether or not all properties on the market had wetlands on them, and whether or not any one of these properties could have been developed without filling wetlands.

The alternatives analysis is an open-ended standard which provides permit writers unbridled in determining the acceptability of a permit application. In the simplest terms, it suffers from the N + 1 problem: no matter how many alternatives an applicant considers, the agencies can always identify another alternative that could have been considered. As a result, developers are often required to resubmit their development plans in response to a series of hypothetical alternatives identified by the agencies. Proposals to place a small amount of fill into wetlands for a road crossing often require an analysis of the feasibility of building a bridge instead of placing fill for a culvert. Proposals to place a small amount of fill into a wetland for a stormwater management pond often require proof that the project is financially infeasible if the pond is moved to uplands, thereby causing the loss of several building lots.

Significant Degradation

If the applicant can prove that there is no alternative to filling the wetland, then he must prove that the fill will not cause or contribute to significant degradation of the aquatic environment. Given the presumption that the aquatic environment, including "wetlands" that are dry to the touch, are among the most important environmental resources the nation possesses, this can be a difficult and costly task. It is not uncommon for developers to have to perform various environmental studies to show that the environmental impacts are not significant.

Mitigation

If the permit applicant can prove that the fill is unavoidable and imposes insignificant impacts on the environment, he must then provide mitigation for any impacts that do occur. Generally, there are three ways to mitigate the impacts of filling wetlands: 1) the applicant can restore existing wetlands that have been damaged or degraded in some way; 2) they can enhance the environmental functions of existing wetlands; and 3) they can create wetlands out

of uplands. In few circumstances can applicants preserve existing wetlands for mitigation.

Generally, EPA and the Corps prefer restoration over enhancement and creation, with creation being the least preferred option of the three. Moreover, the agencies prefer mitigation to be provided on the site where the wetlands loss occurs as opposed to mitigating losses off-site. In addition, the agencies have a strong preference for in-kind mitigation, meaning that they want the applicant to restore or create the same type of wetland that is being impacted. Although there is no absolute mitigation ratio of acres lost to acres mitigated, it is not uncommon for mitigation ratios of 2 to 1 or more to be required.

Although EPA and the Corps have issued guidance stating that mitigation banking may be a viable form of mitigation, the agencies are generally skeptical of the concept, even though it provides numerous environmental benefits. Mitigation banking would allow many small mitigation projects scattered throughout a region to be consolidated into a larger bank site that could be strategically located to provide the maximum environmental benefit. For many types of wetlands, the larger size of the mitigation project would increase the chances for success of the mitigation project.

The Definition of "Wetlands"

When Congress enacted Section 404 in 1972, it never intended the program to regulate wetlands. The expansion of the program to cover wetlands was the result of EPA's determination that Congress did intend to regulate wetlands.

Before 1972, the Corps was regulating the nation's waters under the Rivers and Harbors Act of 1899. Under this act, the Corps' jurisdiction over surface waters was defined in terms of navigability. Essentially, the Corps' jurisdiction extended to those waters that were "navigable in fact." This was later expanded to waters that could be made navigable with reasonable improvements, but the essential limit remained that a jurisdictional waterway was one over which people and goods could be floated for market. (See 1 Environmental Policy Division of the Congressional Research Service of the Library of Congress, A Legislative History of the Water Pollution Control Act Amendments of 1972 at 250 (1973) (hereinafter "1972 Leg. Hist.").

The definition of jurisdiction waters changed with the Federal Water Pollution Control Act Amendments of 1972. Renamed the Clean Water Act, Congress defined jurisdictional waters as "navigable waters," and defined them "waters of the United States." Congress apparently intended to expand jurisdictional waters beyond the traditional "navigability" test, but it never defined the key term "waters of the United States." Although the conference committee expressly did not undertake to define the term "navigable waters,"

the conference report explains that the term is intended to be broader than the prior understanding of the term.

> The conference agreement does not define the term ["navigable waters of the United States"]. The Conference fully intended that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes. [1 1972 Leg. Hist. at 178.]

This broader jurisdiction was not unlimited, however; not all water within the national boundaries was covered as groundwater, for example, was excluded. [Id. at 250.] However, as the conference report notes, the specific reach of the definition was left undefined. Moreover, Congress made no legislative finding articulating the connection between waters or wetlands and interstate commerce. Section 101 of the Clean Water Act, which declares Congress's "goals and policy" contains no mention of interstate commerce at all.

In short, although Congress intended to expand the definition of jurisdictional waters beyond the old "navigability" test, it wrote no clear definition of jurisdictional "wetlands."

Lacking any clear direction from Congress, the Corps continued to define its jurisdiction by the old "navigability" concept despite EPA efforts to expand the program to all wetlands. In 1975, a federal district judge ordered the Corps to expand their definition of wetlands to encompass all wetlands. In 1977, the Corps issued final regulations extending jurisdiction to all "wetlands" that are adjacent to navigable waters as traditionally defined, all tributaries of navigable waters, and to all interstate waters whether or not navigable and their tributaries. This expansive definition of navigable waters has been sustained by the Supreme Court as it relates to adjacent wetlands, but the Court has not addressed the question as to the applicability of the definition to wetlands that are "isolated" from navigable waters.

The definition of "wetlands" that was adopted in both EPA's and the Corps's 1977 regulations states that:

> The term "wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas. (33. C.F.R. 328.3 and 40 C.F.R. 230.3)

Recognizing that the new definition significantly expanded the Section 404 program, Congress considered revising the definition

when it amended the act in 1977. The House proposed to restrain the reach of Section 404 to navigable waters and adjacent wetlands, with specific definitions of each term. Leaders in the Senate favored a different approach to resolving the expanded scope of the program. Rather than tackle the definitional issue, the Senate preferred to delegate the Section 404 program to the states for discharges of fill material to navigable waters; exempt a host of activities such as farming, silviculture, and ranching; and authorize the issuance of general permits to cover a range of activities.

As reported out by the conference committee and eventually passed, the 1977 amendments provided for delegation of permitting authority to the states for all discharges to "navigable waters" other than those used for interstate or foreign commerce, authorized the issuance of self-executing general permits to reduce administrative red tape, and maintained a substantial list of permitting exemptions. Having secured enough exemptions to soften the effect of the Corps' expanded jurisdiction and expecting jurisdiction for all but truly navigable waters to be transferred to the states, Congress believed they had solved the problems of Section 404.

However, not all members of Congress were convinced that the 1977 amendments had solved the definitional problem. Senator Dole, for example, remarked as follows:

> Regulations--submitting all of the waters of the United States to permits. That, in effect, is what is done by the committee bill. They say, "we have moved it on over to the States," but what they have created is shadow Federal regulations. What they actually say is, "You cannot have a State program unless every 'i' is dotted, every comma in the proper place, and every detail is approved by the Federal bureaucracy. If at any time we decide to change our mind on it we can withdraw that."
>
> That is the kind of Federal regulation we are talking about. [A Legislative History of the Clean Water Act of 1977, at 944 (1978)]

Delineating Wetlands

Although EPA and the Corps have had the same definition of wetlands in their respective regulations since 1977, only recently have they agreed upon a single method to actually delineate wetlands boundaries on property. Between 1977 and 1987, there was no nationally applicable, systematic technical procedure to guide delineations. Each Corps District applied the wetlands definition largely through best scientific judgement in a manner that seemed to make sense in the region of the country they were located. However, problems of inconsistent delineations became apparent,

creating significant confusion and unequal application of the wetlands regulations.

By 1977, both EPA and the Corps had developed their own delineation manual. Not surprisingly, the two manuals did not produce the same results, with EPA's manual generally producing larger wetlands than the Corps'. The problem was compounded by the fact that other federal agencies, the Soil Conservation Service (SCS) and the Fish and Wildlife Service (FWS), not only had adopted different definitions of "wetlands" than EPA and the Corps, they also had developed different methods of delineating wetlands. The result was mass confusion among property owners as what was and what was not a jurisdictional wetland under Section 404 of the Clean Water Act.

In January 1989, all four agencies jointly issued the Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1989 Manual) in hopes of eliminating the confusion surrounding the delineation issue. The 1989 manual become effective March 20, 1989, and superseded the earlier manuals issued by the Corps and EPA.

Although the 1989 manual stated that all three parameters for defining wetlands (hydric soils, wetlands hydrology, and hydrophytic vegetation) must be present for an area to meet the wetlands definition, the manual allowed users to assume the presence of one or more of these parameters in the absence of field indicators. For example, the 1989 manual allowed the presence of hydric soils and hydrophytic vegetation to establish the existence of wetlands hydrology. The FWS estimated that the 1989 manual expanded Clean Water Act jurisdiction over 60 million acres of wetlands that had not been regulated before.

Due to the strong public outcry of the expanded regulation, Congress included a provision in the Energy and Water Development Appropriations Act of 1992, known as the Johnston Amendment, which prohibited the Corps from using the 1989 manual for permitting or enforcement purposes. Because the amendment did not similarly restrict EPA's use of the 1989 manual, EPA continued to use the 1989 manual until January 1993 when it entered into a Memorandum of Agreement with the Corps, joining the Corps in the use of the 1987 manual.

The 1987 manual has moderated the problems with excessive delineations in some parts of the country, although it still contains provisions which can lead to excessive delineations. Nevertheless, the 1987 manual does represent an improvement over the 1989 manual.

The delineation issue is not, however, fully resolved. Congress has directed the National Academy of Sciences (NAS) to perform a scientific analysis of the various delineation manuals. When the

NAS study is complete, there may be significant revisions made to the current method of delineating wetlands. Moreover, H.R. 1330, a wetland bill currently being considered by Congress as part of Clean Water Act reauthorization would substantially revise the wetlands definition. If enacted, H.R. 1330 would require further revisions to the 1987 delineation manual.

New Procedure For Delineating Wetlands on Agricultural Land

EPA, the Corps and SCS recently entered into an agreement whereby the SCS will be the lead agency for delineating wetlands on agricultural lands. Agricultural lands are defined as:

> those lands intensively used and managed for the production of food or fiber to the extent that the natural vegetation is has been removed and cannot be used to determine whether the area meets applicable hydrophytic vegetation criteria in making a wetland determination.

These lands would include intensively used and managed cropland, hayland, pasture land, orchards, vineyards, and areas which support wetland crops such as cranberries, taro, watercress and rice. Agricultural lands do not include range lands, forest lands, wood lots, or tree farms, and it does not include lands where the natural vegetation has not been removed, even though that vegetation may be regularly grazed or mowed and collected as forage or fodder. Examples of this later category would include uncultivated meadows and prairies.

EPA and the Corps have agreed to accept SCS delineations on agricultural lands for Section 404 purposes. Moreover, the SCS will delineate wetlands on agricultural lands using the National Food Security Act Manual rather than the 1987 manual. In addition, EPA and the Corps will accept SCS delineations on non-agricultural lands that are either narrow bands immediately adjacent to, or small pockets interspersed among agricultural lands. On non-agricultural lands, SCS will use the 1987 manual.

Options to Consider for Eliminating or Minimizing Wetlands Regulatory Problems in Kansas

There are several options the Kansas legislature has for avoiding the pitfalls other states have experienced in wetlands protection, and perhaps even for minimizing some of the problems that the Section 404 program has created.

1. Have SCS delineate and map wetlands in the state.

   I understand that the Conservation Districts and the Soil Conservation Service are already developing wetlands protection programs in the state. These programs could be

expanded to include an aggressive delineation and mapping program.

There would be several benefits of such a program. First and foremost, if the delineations were performed in conformance with the new EPA/Corps/SCS memorandum discussed above, property owners would be put on advance notice of the existence of wetlands before they buy property. Developers would then be able to avoid paying too much for land that contains wetlands, which would reduce the need for them seek Section 404 permits to fill wetlands. The wetlands resource would benefit greatly from such a program. The single most important resource needed to protect wetlands by avoiding them is a reliable, accurate mapping program.

2. Consider Assuming the Section 404 Program

If property owners in the state are experiencing the delays and excessive costs imposed by the Section 404 program, the state could consider assuming the federal program. Although the state must agree to enforce the federal standards, property owners would benefit from having one state agency to deal with instead of two federal agencies.

3. Consider Developing a Regional General Permit in Conjunction with EPA and the Corps.

Recognizing that wetlands in Kansas are not the same as wetlands in Florida or Maine, the state could develop a regional general permit that makes sense for Kansas. The regional permit would specify the standards for wetlands protection that make sense in Kansas, and a self-executing general permit would provide property owners administrative relief from the long permit processing times the Section 404 program is noted for.

4. Develop Mitigation Banks In Kansas

Mitigation banking provides an excellent opportunity to acheive No Net Loss of wetlands, or perhaps even a net increase in wetlands, while minimizing many of the problems permit applicants have experienced in the regulatory program. I believe Kansas is well suited for mitigation banking as I suspect there is a considerable acreage of farmed wetlands that could be restored to their original wetlands condition quite easily. Mitigation banking provides numerous benefits to all stakeholders in the policy debate. No net loss can be acheived, permit applicants can transfer their mitigation responsibility to a business entity that is in the business of wetlands protection, and private dollars can be put to work creating and restoring wetlands.

5. Participate in the Clean Water Act Reauthorization Process.

The Clean Water is up for reauthorization. The Senate is expected to begin mark-up of a wetlands bill in mid to late February, and many of the key issues such as the definition, delineation, and the alternatives analysis will be debated. Congress does not always think about the impact of federal law on the states, and it often imposes federal mandates without the necessary funding to implement them. Your views on what should and should not be required under the Clean Water Act would be invaluable to providing a Congress an understanding of the impacts of federal legislation on the states.

WETLANDS FACTSHEET

"YOU MAY REMEMBER MY PLEDGE, THAT OUR NATIONAL GOAL WOULD BE NO NET LOSS OF WETLANDS . . ."
PRESIDENT GEORGE BUSH

AGRICULTURE AND FEDERAL WETLANDS REGULATION: SEPARATING THE WHEAT FROM THE CHAFF

Throughout the present Clean Water Act reauthorization, some members of the agricultural community have ceaselessly portrayed federal wetland protection programs as an ever-tightening noose around their necks that soon promises to strangle their operations and kill their livelihoods. Typical assertions to support these bold claims include farmers being precluded from plowing fields that have been cultivated for generations, farmers being unable to move dirt around on their farms or ranches without fear of fines or going to jail, farmers being prohibited from plowing uplands because of nearby wetlands, and farmers being unable to maintain existing drainage systems.

Like so many other attacks that have been made on the Nation's federal wetlands program, these claims are fraught with mis-information, many lack any factual basis, and others completely distort and misrepresent the Section 404 program. The truth of the matter is that farming practices are largely exempted from Section 404. It's time to separate the wheat from the chaff and plow a furrow of truth through these falsehoods and myths.

SECTION 404 PROVIDES A BROAD ARRAY OF EXEMPTIONS AND ALLOWANCES FOR THE FARMING COMMUNITY

Section 404 of the Clean Water Act, implemented by the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA), is designed to protect the waters of the U.S. and to stem the loss of our Nation's valuable wetlands. Despite the historic loss of over 100 million acres of wetlands --most to agriculture-- and despite continued massive losses of wetlands to agricultural use, Section 404 provides a broad array of exemptions and allowances for the farming community. In fact, farmers receive one of the most generous sets of wetland exemptions and enjoy special treatment that far exceeds any other segment of the regulated community.

–MORE–

National Wildlife Federation
1400 Sixteenth Street, N.W. • Washington, D.C. 20036-2266 • 202/797-6800

THE LIST OF AGRICULTURAL ACTIVITIES EXEMPTED FROM SECTION 404 PERMITTING REQUIREMENTS IS LENGTHY

Many farming activities are completely exempted from regulation by the Clean Water Act. The following activities are explicitly exempted from the Section 404 program if they are part of an established, normal, ongoing farming, ranching or forestry operation, even if they do result in the discharge of dredged or fill material into wetlands:

- plowing
- cultivation
- harvesting
- normal crop rotation
- resumption of farming in a wetland that is fallow as part of a normal rotational cycle
- seeding included in normal operations, including placement of soil beds for seeds or seedlings
- discharges associated with established wetland crop or forestry production on established farm lands (for example, building rice levees)
- emergency removal of material blocking or constricting drainageways that are part of an established crop production
- maintenance, including emergency reconstruction of serviceable structures such as dams, dikes, levees, and causeways
- construction or maintenance of irrigation ditches and apportionment facilities
- maintenance of drainage ditches
- construction or maintenance of farm or stock ponds, or farm, forest, or temporary mining roads, provided that such roads are constructed and maintained according to best management practices
- land leveling for rice production in areas of established farming activity.

The above activities are not exempted from Section 404 if they are associated with conversion of a wetland to a new use that reduces the reach, or impairs the flow or circulation, of waters of the U.S. For example, discharges associated with construction of a drainage ditch that converts a bottomland forested wetland to an upland are not, and should not be, exempted.

IN ADDITION TO THE GENEROUS LIST OF SECTION 404 EXEMPTIONS PROVIDED FARMERS, GENERAL PERMITS ALSO ALLOW MANY AGRICULTURAL ACTIVITIES TO OCCUR IN WETLANDS

Many activities not expressly exempted from Section 404 may be authorized by general permits. General permits are reviewed expeditiously and with only minimal environmental consideration. They are issued at national, regional, or state levels. One of the many general permits that has been given to the agriculture community is Nationwide General Permit 26, which grants authority for

virtually any discharge of dredged or fill material into headwaters and isolated wetlands less than 10 acres in size. Activities authorized under general permits do not require individual Section 404 permits.

"PRIOR-CONVERTED WETLANDS" ARE ALSO EXEMPTED FROM REGULATION

Wetlands converted to cropland prior to December 23, 1985 that are flooded for less than 14 consecutive days during the growing season (with the exception of pothole and playa wetlands) are considered to be "prior-converted ("PC") croplands". Pursuant to a 1990 Corps regulatory guidance letter, these PC wetlands --which are estimated to comprise 50 million acres-- are completely exempted from the Section 404 permitting requirements.

SWAMPBUSTER DOES NOT PROHIBIT AGRICULTURAL CONVERSION OF WETLANDS

The Swampbuster provision of the 1990 Farm Bill is intended to reduce the loss of wetlands and to benefit American taxpayers by eliminating subsidies from producers who convert wetlands to croplands. Swampbuster is not a regulatory program or a component of Section 404 and it does not prohibit agricultural conversion of wetlands. Rather, it simply eliminates a producer's eligibility for federal subsidies if that producer elects to convert wetlands to an agricultural commodity.

BECAUSE OF THESE MANY EXEMPTIONS, AGRICULTURAL ACTIVITIES CONTINUE TO BE THE LEADING CAUSE OF WETLANDS DESTRUCTION IN THE UNITED STATES

According to a 1991 study by the U.S Fish and Wildlife Service, the lower 48 states have lost over 50% of their original wetlands since the arrival of Europeans. From the 1950's to the 1970's, 87% of these wetland losses were attributable to agricultural activities. Agriculture continues to be a major force in wetlands destruction, and was responsible for over 50% of all wetlands losses between the mid-1970's and the mid-1980's. Thus, agriculture has been, and continues to be, the Nation's primary cause of wetlands loss.

FACT OR FICTION?

Despite the hew and cry from the American Farm Bureau Federation (a large insurance company), and others that federal wetlands programs --especially Section 404 of the Clean Water Act-- are destroying a way of life, the facts paint quite a different picture. Quite to the contrary, the agricultural community has been the program's "favorite son" and, as demonstrated above, has been granted

far and away some of the program's most generous and accommodating exemptions. Together, these many agricultural exemptions and accommodations completely eclipse those enjoyed by others of the regulated community. In view of this, and in view of the fact that agriculture is the single most important cause of wetlands loss in our country, when the American Farm Bureau Federation comes knocking on your door asking for greater "relief", it's time to ask, "where's the beef?"

We need to STRENGTHEN protection of our Nation's wetlands, not sign a death warrant for these valuable natural resources. It's time, at last, to separate the wheat from the chaff.

OPPOSE H.R. 1330
WETLAND DEATH WARRANTS

These bills, if passed, would greatly accelerate wetlands loss. H.R. 1330, would narrow the current and scientifically established definition of wetlands, defining away over 50% of our Nation's wetlands. They remove the existing balance between the agencies by eliminating the EPA's role in the §404 permitting process. Additionally, according to a study completed by the Congressional Budget Office, the provision in these bills that require the Federal Government to purchase "Type A" wetlands will cost American taxpayers an estimated $10 to $15 billion. The National Wildlife Federation urges you to oppose H.R. 1330.

SUPPORT H.R. 350
BALANCED WETLANDS PROTECTION

H.R. 350 provides for balanced wetlands protection. This bill expands the scope of regulated activities to include drainage and flooding. It also addresses concerns of the regulated community by clarifying the exemptions for agriculture, and improves the regulatory process by expediting the section 404 permitting process. The National Wildlife Federation urges your support of H.R. 350

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June, 1992

NATIONAL AUDUBON SOCIETY

FACT SHEET

True or False?

A Dozen Myths About Wetlands and Section 404 of the Clean Water Act

A determined and well-financed coalition of interests that believe themselves to be hampered by wetlands regulations are waging a campaign to weaken Section 404 of the Clean Water Act. Representatives of farm, homebuilders, oil and gas, and road construction lobbying organizations have visited virtually every congressional office with "horror stories" about Section 404 and have promoted amendments to the Clean Water Act that would destroy the program.

Separating myth from fact shows that the 404 regulatory program can be an effective tool to protect valuable wetlands *without* placing undue burdens on landowners, farmers and developers. Furthermore, wetlands also play key economic, health and recreational roles in a community, in addition to providing critical wildlife habitat. Wetlands guard against flooding, provide spawning and "nursery" areas for commercially important fisheries, offer opportunities for hunting and fishing, control pollution, trap sediment, recharge drinking water supplies, and provide unique recreational opportunities.

MYTH 1

Farmers who have been farming for decades need to get a 404 permit to continue farming.

FACT

Section 404 exempts ongoing farming, ranching and silviculture activities from the law's permitting requirements. A farmer who has been farming his land can continue to do so, even if his operation involves the deposition of dirt into a wetland, so long as that activity is part of his ongoing operation. However, if the farmer wishes to begin farming on wetlands that have not been farmed before, then the Act's permitting requirements may apply.

MYTH 2

A farmer can't even switch crops without getting a 404 permit.

FACT

A farmer may plant different crops, if they are part of a normal or established crop rotation. However, if the farmer has allowed the land to revert back to wetlands, not as part of a normal crop rotation, and it requires modification of the hydrological regime to start farming again, then a permit may be necessary.

MYTH 3

You need a permit to develop a wetland even if it has been farmed and cropped for generations.

FACT

If land has been converted to upland prior to the enactment date of the Clean Water Act (1972), and the land no longer displays the three wetlands characteristics — hydrology, hydric soil and hydrophytic plants — then the land is no longer a wetland and is not covered by Section 404. If, however, this land has been allowed to lie fallow (not as a part of a normal crop rotation) and has reverted to wetland, then a permit must be acquired before the area is filled.

MYTH 4

Farmers who cropped their wetlands after 1972 and have continuously cropped those lands must get a permit if they wish to convert those lands to another use, including a non-agricultural use.

FACT

Under a recently issued Regulatory Guidance Letter (RGL 90-7), any farmer who cropped wetlands on his property before 1985 may put those lands to any use he wishes. The regulatory

plies, filter pollutants from runoff, and provide essential habitat for migrating waterfowl and shorebird populations. So-called "temporary wetlands" are most often wet in the spring, when they are critically important to migratory birds. These species have suffered drastic population declines in recent years, due in part to the loss of wetland habitat in this country and in Canada.

MYTH 10

Some wetlands are of little value and don't deserve complete protection.

FACT

With more than half of the wetlands in the lower 48 states already destroyed, we have already lost too many of these remarkably productive ecosystems and the benefits they provide. Policy makers at all levels of government, in partnership with business and wetlands advocates, must help to protect all of the wetlands that remain. Even severely degraded wetlands can be restored, so we need to conserve what's left if we are ever to achieve a "net gain" of wetlands values.

Furthermore, there is no scientifically reliable method of determining which wetlands are most valuable. This uncertainty is compounded by the fact that the values and functions may vary in importance in different areas — wildlife values may be most important in one place, while flood control may be more important elsewhere.

MYTH 11

You can't do anything in a wetland without a 404 permit.

FACT

Quite to the contrary, most activities in wetlands do not require a permit. Permits are required only for discharging dredged or fill material into wetlands. Draining, flooding or chemically contaminating a wetland does not require a permit; nor does cutting off the inflow of freshwater into a wetland or the removal of wetland vegetation. Furthermore, if the proposed activity will result in only an insignificant discharge of material into a wetland, or is part of an ongoing farming, ranching or silviculture activity, a permit is not required. Clearly, protections now in place are minimal and do nothing to regulate a wide variety of activities that destroy or degrade wetlands.

MYTH 12

Congress never intended that the Clean Water Act protect wetlands.

FACT

The debate surrounding the passage of the 1977 amendments to the Clean Water Act shows a clear congressional intent to protect wetlands. This intent is also implicit in the Act's objective to "restore the chemical, physical and biological integrity of the Nation's waters." This conclusion has been affirmed unanimously by the U.S. Supreme Court, and by numerous lower courts.

For more information about the Audubon wetlands campaign, contact the Audubon Washington, DC office, 202-547-9009, or your regional office.

National Audubon Society
June 1991

The Rest of the Story: John Pozsgai -- Shattered American Dream Or Ravaged Wetland?

The Story:

The press, the industry financed "National Wetlands Coalition" and several members of Congress have passionately told the story of John Pozsgai, a poor Hungarian immigrant whose American dream was shattered by federal wetlands laws and villainous federal regulators. Mr. Pozsgai owned a small parcel of land in Bucks County, Pennsylvania, on which he ran a diesel mechanic shop. He had hoped to expand his business on nearby property, but instead ran up against wetlands regulations and landed in jail with a three year sentence and a $200,000 fine. So much for the American dream. . . or so it would seem.

The Rest of the Story:

The Federal District Court's ruling on Mr. Pozsgai and other relevant documents shed a completely different light on this case. Prior to purchasing his property, Mr. Pozsgai was told by the Corps of Engineers and others that the site contained wetlands, and that he would need a Section 404 permit to develop the land. Similarly, several engineering firms contracted by Mr. Pozsgai (and later fired) found that the site contained wetlands. Armed with this information, Mr. Pozsgai negotiated a substantially reduced price for the property.

Shortly after buying the land, and in clear defiance of the Corps' notification that he needed a permit for work on the land, Mr. Pozsgai began filling the property. The supposedly "clean" fill materials included concrete rubble, wood and other building scraps. The Corps and local officials repeatedly notified Mr. Pozsgai that his actions were illegal, but he continued filling the wetland on at least 30 separate occasions. Mr. Pozsgai's intransigence astounded the judge at his trial. When asked if he had violated the court's order to stop his activities, he denied doing so. The judge at that point postponed the hearing, recommending that Mr. Pozsgai's attorney inform him of the penalties for perjury. During sentencing, the judge observed:

> It is hard to visualize a more stubborn violator of the laws that were designed to protect the environment. I think the sentence has to take into account not only punishment for that high degree of willfulness but also serve as a deterrent to others...

The Corps repeatedly told Mr. Pozsgai that he would need a permit to develop his land. Had he cooperated with the agencies rather than stubbornly ignoring their notices and violating the law, Mr. Pozsgai would have likely received his permit and never been taken to court. The permit process is designed to protect wetlands from avoidable development, and to ensure that other alternatives are considered before wetlands are used.

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Shortly after Mr. Pozsgai's illegal actions, neighbors began complaining of flooded basements, mildewed furniture, and other property damage caused by the flooding. The real victims of this story are Mr. Pozsgai's neighbors, not himself as some would have you believe. The losses of public values incurred by wetlands filling are precisely the reasons why Section 404 exists today.

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April 1993

The Rest of the Story:
The Crawfish Caper
Melvin Wayne Domingue, St. Martin Parish, Louisiana

The Story:

Mr. Melvin Wayne Domingue found a parcel of land in south Louisiana on which he hoped to farm crawfish. He cleared the land of some trash, at an alleged cost of $20,000, and began building and restoring levees in preparation for the venture. He was warned shortly thereafter by the U.S. Army Corps of Engineers that his property was a wetland and might require a Clean Water Act Section 404 permit for his activities. He continued the work and was issued a Cease and Desist order. Mr. Domingue then applied for an "after-the-fact" permit to continue to construct and maintain the levee system creating a 35 acre freshwater impoundment for crawfish production. The Corps denied the permit. The crawfish caper has since been publicized by the media and members of the Louisiana Congressional delegation as an example of why the Section 404 program needs to be radically overhauled. According to Senator J. Bennett Johnston ". . .some provision should be made for landowners like Domingue who make such improvements."

The Rest of the Story:

Mr. Domingue has been portrayed as yet another victim of over-zealous regulatory action by the Corps of Engineers and EPA. Yet even Mr. Domingue concedes that the land in question is a wetland. The site sits in a lowland with little drainage and is covered with wetland vegetation. The levees that were constructed were as high as seven feet--far more than required to cultivate crawfish--and were more likely designed to keep water out rather than to keep it on the site. The land is indisputably one within the jurisdiction of the Section 404 regulations.

After visiting the site and noting the illegal activity, the Corps posted a warning that the levee work might require a permit under Section 404 of the Clean Water Act. At the next visit, the warnings had been removed, and construction continued. The Corps continued to post warnings while trying to locate the property owner and the individuals responsible for the activity. Eventually the Corps identified Mr. Domingue as the person responsible for the work, and issued him a Cease and Desist order.

The owner of the land, however, remained in question. The previous land owner defaulted on a loan and the property was repossessed by a Lafayette bank. Although the exact nature of the transaction is unclear, Mr. Domingue arranged with the bank to use the land for crawfish production prior to actually purchasing the land. The agreement included an eventual price of $850 per acre, but after learning that the site would require a permit for his activities, he returned to the bank and negotiated a new price of only $350 per acre.

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The "after-the-fact" permit was ultimately denied based on a number of factors. Biologists familiar with the site have said that the property is not suitable for crawfish farming because it would be very difficult to drain the land sufficiently during summer months to sustain crawfish. The levee system was presumably constructed to help make it possible to dry the land, but any efforts to raise crawfish at this site would be risky. Mr. Domingue noted in his application that there were alternative, less damaging sites available in the area, and this was a major factor in the permit decision. In fact, crawfish farming is not a wetland dependent activity and the operation would likely have failed after substantially disturbing the wetland.

Several other factors were involved in the permit decision. First, the property was a bottomland hardwood forest and cypress swamp with a wide diversity of vegetation communities. The permit review considered the property valuable for providing many important wetland functions, including floodwater storage for the Vermilion River Basin and important nesting and wintering habitat for wading birds and waterfowl. The site also falls within an area known as Cypress Island, an important wetland listed for consideration as part of the National Priority Conservation Plan under the Emergency Wetlands Resources Act of 1986. It is also very close to the state's largest white ibis rookery.

Far from overzealous, the Corps has tried to work with Mr. Domingue to develop an alternative plan for his crawfish operation. With the help of scientists, the Corps developed a proposal for a small design change which, if agreed to by Mr. Domingue, would have precluded the need for a permit. Mr. Domingue steadfastly refused to incorporate these changes, however, and ultimately failed to obtain his permit. As for the trash that Mr. Domingue reportedly removed, agency staff have indicated that, while there was some illegally dumped trash on the side of the dirt roads bordering the property, it was a very small quantity that could not have cost $20,000 for removal.

This story is typical of the half truths associated with ongoing efforts to weaken Section 404. The program was designed to protect wetlands, yet in most cases permits are issued for activities in these important and sensitive areas. The "faceless bureaucrats" in these agencies usually work hard to try to find solutions under which permits can be issued, but they receive little credit from the development community for their efforts. The government has almost always been more than fair in dealing with recalcitrant individuals like Mr. Domingue, and that is part of the reason the country continues to lose almost 300,000 acres of wetlands each year.

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April 1993

The Rest of the Story: Ray Hendley and the Statesboro, Georgia Swamp

The Story:

The Washington Post published a story on May 11, 1991 about a developer in Statesboro, Georgia who got bogged down in the muck of federal wetlands regulations. Ray Hendley constructed five homes just south of Statesboro, but was required to remove or tear down two of the houses because the Corps of Engineers and the Environmental Protection Agency said he had illegally filled wetlands to construct the houses. The Post ran a picture of the property, showing a supposedly dry residential neighborhood, and stated that this case was "the kind of anecdote land owners and developers revel in telling." The story goes that Mr. Hendley could not possibly have known the land in question was a wetland, and that he was an innocent victim of an overzealous federal regulatory program.

The Rest of the Story:

The Post article failed to mention that the water marks visible on the tree trunks in the picture accompanying the story clearly indicate the area is a wetland. The construction site was in fact a bald cypress swamp, and looked quite different before Mr. Hendley illegally dumped fill on the property and built the houses. The need for filling this site before construction suggests that Mr. Hendley knew very well he was building on a wetland.

Ray Hendley has been in the construction business for more than 20 years. The requirement that developers obtain wetland permits has been in place since the Clean Water Act amendments of 1972. Mr. Hendley claims not to have known that a wetlands permit was required for his development, yet he was issued two Cease and Desist orders for the project by the Army Corps of Engineers. He was also cited by the Environmental Protection Agency in 1989 for building illegally in wetlands. At that time he was advised not to perform any further work in wetland areas.

Despite clear warning that he was in violation of federal law, Mr. Hendley elected to continue his project. It was completed before any enforcement could occur. Rather than undo all of his development, the Environmental Protection Agency negotiated an agreement with him so that he need only remove fill and remove or dismantle two houses that were on the lowest part of the site, with only a few other minor concessions.

Shortly after Mr. Hendley began illegally filling the cypress swamp, neighbors adjacent to the project began complaining that their properties were flooding as a result of his actions. The portrait of Ray Hendley as a victim of unfair wetlands regulation misses the mark. Rather, enforcement actions taken against him were reasonable, and the real victims of Mr. Hendley's illegal filling activities are the neighbors whose properties now flood. This case is a prime example of why

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Section 404 is needed to steer development out of wetlands. Without protection, the public suffers the loss of valuable wetlands and the benefits such as flood control and habitat they provide. Clearly, self interested development that destroys wetlands ultimately harms others.

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