SECTION 404 OF THE FEDERAL WATER POLLUTION CONTROL ACT AND WETLAND MANAGEMENT:
REGULATORY REFORM
vs
FEDERAL ENVIRONMENTAL PROTECTION

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Synopsis

Section 404 of the Federal Water Pollution Control Act, the Army Corps of Engineers' dredge and fill permit program, is once again the focus of legislative and administrative reform efforts. Legislative reforms include proposals to return the Corps' jurisdiction to traditionally navigable waters and to limit permitting time to 90 days. Administrative reforms have been more substantive, broad-reaching in scope, and controversial. In July 1982, the Corps issued amendments to its regulations in response to the stated goals of President Reagan's Task Force on Regulatory Relief. The Corps also undertook substantial changes in memoranda of agreement between the Corps and other agencies, namely the Environmental Protection Agency and the United States Fish and Wildlife Service, involved in reviewing permits. Environmental groups and some states are alarmed about the possible impacts on wetlands that the changes may allow. The National Wildlife Federation and other groups filed suit in December 1982 challenging many of the changed regulations. Currently, a quiet war is being waged behind-the-scenes at the Assistant Secretary level between the Department of the Interior and the Corps. Recently, the Corps has again proposed revisions to §404, raising concern and criticism. Additionally, interest in §404 is increasing in Congress with hearings to consider the effectiveness of the program, with consideration of the Clean Water Act reauthorization, and with wetlands legislation introduced to meet the growing national concern.

Introduction

§404 has undergone several legislative and administrative changes since its inception in 1972 with the enactment of the Federal Water Pollution Control Act (FWPCA). The changes have caused considerable controversy. The trend of the changes until the present Administration has been to expand and make the prov°gram a more independent entity. However, strong dissatisfaction with §404, voiced since 1977, has found a receptive ear.

In August 1981, in response to Executive Order 12291, which created the President's Task Force on Regulatory Relief and required agencies to conduct regulatory impact analysis of their major regulatory programs, the Corps began looking at the §404 program. Under a May 7, 1982 directive from the Task Force, Assistant Secretary of the Army for Public Works, William Gianelli, directed changes in the §404 enforcement rules.

The Task Force suggested five major targets for reform: 1) reducing the uncertainty and delay in the permit review process, 2) encouraging states to assume control of the §404 program, 3) reducing conflicting and overlapping policies, 4) expanding the use of general permits, and 5) clarifying the jurisdictional scope of the program.

On July 22, 1982, in order to implement these goals, the Corps rescinded the 1980 Carter Administration proposed regulations (45 FR 62732) that would have

fully implemented the 1977 amendments to §404 before final promulgation. The Corps issued interim final regulations (47 FR 31794) making substantial changes to the 1977 regulations.

The Corps also changed and reissued the memoranda of agreement (MOAs) with the Departments of Interior, Agriculture, Commerce and Transportation and with the Environmental Protection Agency (EPA), that govern the other agencies' role in the permitting process. The Corps also suggested that EPA's §404(b)(1) guidelines should be advisory policy guidelines, not binding regulations.

Most recently, EPA has amended its dredge and fill guidelines to meet the goals of the Administration Task Force by reducing the regulatory burdens on the agencies involved and the public but has held its turf in the battle over the legal significance of those guidelines.

All this activity was precipitated by opponents of the §404 program, such as the American Petroleum Institute, the National Ocean Industries Association, and some state governments, notably Wisconsin and Alaska. The critics of §404 contend vigorously that the permit process is unnecessarily burdensome due to its extensive public comment period and its elaborate interagency review procedures. Industry claims that the §404 program results in costly delays and frustration to the individual property owner without providing tangible environmental benefits. Opponents argue that the geographic scope of the program is unreasonably broad, more extensive than Congress intended, and so poorly defined that no one can determine with certainty which lands are subject to Corps regulation. The states claim, on the last point, that the lack of certainty has interfered with state prerogatives in making land use decisions.

On the other hand, environmental groups and other states contend that the §404 program has significantly reduced the annual rate of wetland destruction without unreasonable delays or regulatory burdens. Environmental advocates point out that §404 is the only nationwide federal program designed to protect wetlands, which are extremely valuable resources from both an ecological and an economic standpoint. They contend that, without §404 in place, hundreds of thousands of wetlands would be destroyed. A November 1981 report by the Office of the Chief of Engineers analyzing the Corps' regulatory program concluded that the §404 program reduced destruction of wetlands from 660,000 acres to 330,000 acres per year in 1981. The report also found that the §404 program has produced a net benefit to the water quality and navigation objectives of the program but has added less than 2% to the total cost of those projects it regulates.

In addition to the administrative reforms outlined above, critics of §404 have introduced legislation in the 97th and 98th Congresses that would reduce the jurisdiction of the Corps by strictly defining the term "navigable waters" narrowly and by limiting the time for issuing permits to 90 days.

Environmental interests, represented by the National Wildlife Federation (NWF) and 15 other environmental groups, have filed suit challenging the Corps' changes to §404 (National Wildlife Federation v. Marsh, No. 82-3632 (D.D.C., complaint filed December 22,1982)).

Defining Wetlands

Defining the term "wetlands" can be a tenuous and politicized business, but most definitions include lands at least periodically covered with water and having soils at least periodically saturated with water. "Wetlands" can describe many types of land: swamps, marshes, tidewater flats, bogs, prairie potholes, muskeg, arctic tundra, playa lakes, and hardwood forest bottomlands.

Wetlands are among the most biologically productive lands in the world. Wetlands produce abundant microbes, plants and insects, providing feeding and breeding grounds for fish, birds and animals. 60 to 70% of the 10 to 12 million waterfowl living in the lower 48 states breed in prairie potholes, most often found in the upper Midwestern states. Marine species dependent on wetlands account for two-thirds of the cash value of fisheries along the Gulf and Atlantic coasts. An estimated $12 billion yearly is generated by wetlands supporting commercial and recreational fishing.

Wetlands replenish groundwater, provide natural flood control measurable in dollars of property damage avoided, and can remove a wide range of pollutants, including toxics, from waters. For example, one five-square-mile bog near Milwaukee, Wisconsin is critical to groundwater supply over a 165-square-mile area.

Wetlands are being destroyed at a fast rate. Roughly half of the 150 million acres of wetlands originally in the lower 48 states have been destroyed and are continuing to disappear at a rate of 330,000 acres yearly. A September 1982 report by the U.S. Fish and Wildlife Service covering all the states found that of the appoximately 172 million acres of wetland remaining, some 458,000 acres a year are being lost.

Defining Dredge and Fill

Before 1972, the Corps held total jurisdiction over dredging as part of its responsibility for maintaining the navigability of harbors and inland waterways. Periodic dredging is necessary to keep channels open in many waterways since rivers naturally deposit sediment downstream at their mouths.

Once removed from a channel, sediment or "spoil", has to be redeposited somewhere. A standard disposal method has been to pump the dredged mud into a diked-off, enclosed area near a river mouth. Eventually, the water drains out of the dredged material creating an artificial land mass over an area formerly wetland or shallow water.

Filled areas provide land near central cities where building space is most scarce and valuable. However, new artificial land masses in estuaries and river mouths can create choke-points for natural river and tidal flows, aggravating problems with flooding, siltation, pollution and disrupting the fresh water-salt water balance on which tidewater creatures depend.

Dredge spoil can be a water pollutant as it contains sediments that have trapped chemical pollutants, toxic heavy metals and pesticides--the unfortunate legacy of years of pollution in urban harbors and waterways. Dredging and disposing of toxic sediment is a delicate undertaking. The dredging

process itself can stir up sediments and release toxic materials back into the water. Correct disposal necessitates care, to avoid simply moving pollution from one area to another. With safe disposal, dredging can serve the dual purpose of alleviating pollution in a waterway.

Dredging is vital to the commercial life of many cities. Payload and profits are dependent on the depth of ship channels being able to accomodate larger vessels. Since rivers naturally deposit sediment continually, regular dredging is necessary to maintain channels and harbors.

Legislative History

To fully understand the context of §404, a history of wetlands protection legislation is useful. The following listing of major federal laws pertaining to wetlands development and protection does not include many amendments and reauthorizations of the laws but does provide a brief historical sequence leading to the current development of the issue.

- 1824 Rivers and Harbors Act. The law authorized the Army Corps of Engineers to construct navigation improvements on the Ohio River. Later laws extended the Corps' jurisdiction to all navigable waterways and gave it authority to issue dredge and fill permits.

- 1929 Migratory Bird Conservation Act. Authorized federal purchase of new areas for waterfowl refuges.

- 1934 Migratory Bird Hunting Stamp Act. Required all hunters to purchase a federal stamp (the "duck stamp") before hunting migratory waterfowl. Proceeds from stamp sales go toward purchase of new waterfowl refuge areas under the 1929 act.

- 1934 Fish and Wildlife Coordination Act. Authorized various federal agencies to make land and water resources available to the Fish and Wildlife Service for use as fish and wildlife management areas and refuges.

- 1946 Fish and Wildlife Coordination Act (PL 79-732). Established a policy that all new federal water projects should, if possible, include measures to prevent harm to fish and wildlife. Required federal agencies to consult with the Fish and Wildlife Service before issuing permits or building a project.

- 1950 Dingell-Johnson Act (Fish Restoration Act--PL 81-681). Established a tax on certain fishing tackle to be used for aid to the states in funding their fish restoration and management programs.

- 1958 Fish and Wildlife Coordination Act Amendments (PL 85-624). Amended the 1946 law to require federal water resource agencies to treat fish and wildlife conservation as being of equal importance with other project purposes. The 1946 law had made fish and wildlife conservation subordinate to other purposes.

- 1958 Duck Stamp Amendments (PL 85-585). Raised the price of duck stamps from $2 to $3 (earlier raised from $1 to $2 in the 1949 Duck Stamp Act, PL 81-222) and required that all revenues go for land aquisition, except for certain administrative outlays.

- 1961 Wetlands Loan Act (PL 87-383). Authorized appropriations (originally $105 million) to supplement duck stamp revenues in order to speed acquisition of waterfowl habitat. The funds were considered a loan or advance against future duck stamp revenues, to be paid back out of those revenues after a certain time (originally seven years). After that time, 75% of duck stamp revenues would go to repay the loan.

- 1962 Drainage Conflict Act (PL 87-732). Prohibited the agriculture secretary from using federal funds to help farmers drain lands that the Interior secretary had found to be valuable wildlife habitat--at least until the Department of the Interior had made the farmer an offer to lease or purchase the land. Farmers did not have to accept such offers and could drain their land without federal aid. This law in effect applied only to North Dakota, South Dakota and Minnesota.

- 1964 Land and Water Conservation Fund Act (PL 88-578). Set up a fund within the Federal Treasury to help finance acquisition of outdoor recreation areas by federal and state agencies. The fund, subject to annual appropriations, was created out of revenues from user fees at federal recreation areas, sales of certain surplus federal property and a tax on motorboat fuel. Later, revenues from federal offshore oil and gas leasing were added to the fund.

- 1969 National Environmental Policy Act (PL 91-190). Required federal agencies to consider the environmental impact of all major proposed actions and prepare written statements of those impacts and alternatives to the proposed action.

- 1970 Water Bank Act (PL 91-559). Authorized the agriculture secretary to contract with landowners to preserve major breeding areas of migratory birds. Landowners would agree not to drain or fill wetlands, and would be compensated for loss of income. Limits on the kinds of wetlands eligible under the 1970 act forced all the funds to go to only 15 states, with about 75% going to Minnesota, North Dakota, and South Dakota.

  In his fiscal 1980 budget, President Carter proposed ending the program, but Congress appropriated $10 million that year to continue it. The Carter administration had argued that it was preferable for the federal government to purchase the wetlands outright, limiting development once and for all. Originally authorized at $10 million annually, the program in recent years has received appropriations adequate only to fulfill existing contracts.

- 1972 Clean Water Act (PL 92-500). Prohibited discharge without a permit of dredged or fill material into a waterway. Under Section 404 of the Act, environmental standards were to be set by the Environmental Protection Agency and the program was to be administered by the Army Corps of Engineers.

- 1973 Endangered Species Act (PL 93-205). Prohibited all federal agencies from carrying out projects that would destroy or change habitat critical to the survival of endangered or threatened species. Authorized the federal government to acquire lands and waters for the purpose of protecting species, using funds from the Land and Water Conservation Fund.

Regulatory Background

Until 1975, the Corps administered the §404 program only with respect to waters that met the traditional test of "navigability". However, in 1975, in Natural Resources Defense Council, Inc. v. Callaway, (392 F. Supp. 685, D.D.C. 1975), a federal district court ruled that §404 extended the Corps' jurisdiction not only to traditionally and historically navigable water but to all waters of the United States. The court ordered the Corps to expand its jurisdiction to include all navigable waters, adjacent wetlands, isolated wetlands, such as prairie potholes, and lakes. Despite many proposed amendments seeking to reduce the legal reach of the §404 program, the 1977 reauthorization of Clean Water Act did not alter the jurisdictional provisions of the statute. The Corps phased in the changes in scope over a two-year period, not completely adopting them until 1977 (47 FR 31832, 33 CFR §330.3(a)).

As attempts at legislative reform continued with no success, the regulated community continued to voice criticism of the scope of the program, the lack of sufficient Corps control over implementation of §404, and the amount of time involved in the interagency review process. The critics also pointed out that the Corps has not taken sufficient advantage of its authority to issue general permits under §404(e) of the statute. However, the general permits provision is a double-edged sword because it is difficult for potential dischargers to determine if they are authorized to discharge and, once discharging, they are faced with substantial uncertainty in planning since at any time they may be required to get an individual permit.

The critics also contended that the Corps expanded its jurisdiction unreasonably. The first of two major areas of concern involves the definition of wetlands. The 1977 regulations, which define wetlands as areas that are "inundated or saturated by surface or ground water....sufficient to support a prevalence of [wetlands] vegetation", were construed to be vague and difficult to apply in practice. Whether the Corps may assert jurisdiction over a certain area involves complicated factual determination that often leads to litigation and consequent uncertainty detrimental to business planning.

The Corps has noted that the NRDC v. Callaway decision does not preclude the Corps from exercising its discretion to define "waters of the United States". However, generally the courts have construed the definition of wetlands liberally and have subsequently expanded the Corps' jurisdiction.

The second major concern of §404 program critics on the issue of the broad scope of the Corps jurisdiction is that it encroaches on state authority over management of state resources. Through the §404 permitting process, the federal government has placed itself in a position to de facto dictate state land use policy.

The States are given the opportunity to assume control over the dredge and fill program (33 U.S.C.§1344(g)), but not one state yet has done so. Reasons for states not having applied to EPA for delegation include: 1) the criteria set forth in §404(g)-(k) are difficult to meet and provide for substantial federal oversight; 2) §404 provides no federal funding, meaning little or no incentive; 3) states cannot administer the program in tide waters and other federally navigable waters.

A very recent example of of the difficulty of assuming portions of the Corps program §404 program was the effort of Washington State. Working under a grant from EPA, the Washington Department of Ecology (WDOE), analyzed the feasibility of assuming portions of the program. Dealing with the regulation of discharge of dredge or fill materials into non-navigable waters, the study concluded that under current budget constraints, and considering deficiencies in the proposed state program, it would not be wise for the State to seek delegation of the program at the current time. The report's perception was that, to successfully assume the §404 responsibilities, Washington would have to adopt new laws and regulations, redefine environmental management programs and support staff positions.

In addition to the obvious jurisdictional and delay in permit decision problems, the Corps itself is currently complaining that it lacks sufficient control over permit decisionmaking. §404(b)(1), guidelines which the Corps must apply to permits, is to be developed by EPA not the Corps. §404(c) gives EPA the right to veto any permit it finds would have an adverse impact on fish and wildlife. EPA is also responsible under §301 for enforcing the program by bringing suit against unpermitted dischargers.

The Corps must give "full consideration" to the views of other agencies, such as the Fish and Wildlife Service concerning permit decisions. Critics charge that the Corps has deferred too much to the other agencies and has allowed the imposition of unjustified permit stipulations requested by those agencies.

The Corps' requirement for "public interest review" has been characterized by the American Petroleum Institute as "vague, indefinite and bearing little relation to the underlying statute". (The standard for Corps approval of a permit application is whether it is in the public interest. The public interest factors to be considered include conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood damage prevention, water supply, water quality, and energy (33 C.F.R. §320.4(a) 1982). Critics view the public interest review as a tool for "blackmailing" applicants into the adoption of mitigation measures.

Administrative Reforms--The 1982 Regulations

In the July 1982 amendments to it rules, the Corps sought to implement many of the regulatory goals targeted by the Task Force on Regulatory Relief and, at the same time, defused the critics need for legislative reform of §404. The 1982 regulations contain at least 25 changes, two of which are particularly significant: expeditious permit issuing and expansion of the national permit program.

In order to reduce delay, the 1982 rules require the district engineer to make a decision on most applications within 60 days. The 30-day public comment period remains the same, but the district engineer may only extend this period for special circumstances up to 30 days rather than the 75 days provided in the 1977 regulations.

To reduce paperwork and delays, the 1982 rules:

- encourage the district engineer to develop joint application review procedures with state and federal agencies whose permit programs overlap the Corps' program;

- add a pre-application consultation procedure for major projects to ensure sufficient information for decisionmaking and prevent the return of the application to the applicant as lacking in that regard.

The most controversial change designed to reduce delays is the expansion of the use of general nationwide permits. Under §404, the Corps is allowed to issue both general and individual permits. §404(e) specifically allows the Corps to issue general permits on a regional or nationwide basis for categories of activities that are substantially similar in nature and cause only minimal individual and cumulative environmental impacts. General permits, unlike individual permits, allow anyone to discharge dredged or fill material for specified activities without obtaining a permit if the requirements of the general permit are met. Under the 1982 regulations, a discharger does not need to notify the Corps before the discharge, nor report the activity afterwards to the Corps (47 FR 31821, 31831, §325.5(c)).

In 1982 the Corps issued 27 general nationwide permits. The permits basically fall into three categories: 1) nationwide permits for discharges into certain waters (47 FR 31832, §330.4), 2) nationwide permits for specific activities (47 FR 31832, §330.5) including discharges from outfall structures and small hydropower dams, 3) nationwide permits for activities that occurred before the regulations completely asserted jurisdiction over all waters of the U.S. and activities prior to 1968 (47 FR 31832, §330.3).

Of the categories, the first is the most controversial. Of these, the "headwaters general permit" authorizes discharges into nontidal rivers, streams, and their lakes and impoundments, including adjacent wetlands, that are located above headwaters. The "isolated waters general permit" covers discharges into other nontidal waters that are not part of a surface tributary system. Both permits eliminate acreage limitations contained in the 1977 regulations, which limited discharges to water bodies smaller than 10 acres. The effect is to exempt over one million acres of wetlands in Michigan, Minnesota, Wisconsin, and North Dakota from individual regulation.

An area of concern under the 1977 regulations was that nationwide permits do not take into account state and local needs. As a response in 1982, the Corps added a provision granting the district engineer discretionary authority on a case-by-case basis to require individual permits and to override a nationwide permit for an entire category or geographic region (47 FR 31834, §330.7).

In an effort to promote better federal/state relations, the 1982 regulations encourage district engineers to develop joint procedures wherever state

agencies have permit programs that overlap the Corp's program. A new section has also been added to note that EPA may transfer §404 programs to the states and that the Corps supports such transfers (47 FR 31813, §323.5). Also included is a provision describing and clarifying the legislative exemptions to the program under §404(f) (47 FR 31812, §323.4).

The Corps did not, as first expected, replace the term "wetlands" with the term "inundated lands", but did change the meaning of another key term. The Corps redefined "fill material" to refer to material used for the primary purpose of replacing an aquatic area with dry land (47 FR 31811,§323.2(k)) and left regulation of that area to the EPA through the national pollutant discharge elimination system permit program on smaller-scale discharges. The Corps took care to emphasize that, in the 1982 regulations, it does not have the authority to regulate activities that occur subsequent to a permited dredge or fill activity (47 FR 31819, §325.2(e)(1)).

The Corps added a provision that encourages division or district engineers to make use of alternative procedures for issuing permits, such as letters of permission, that may evade interagency review procedures.

The 1982 regulations originally no longer required that district engineers give "great weight" to input from wildlife agencies in evaluating permits as required in previous regulations (47 FR 31804, §320.4(c)). This change has now been deleted by the Corps, but the change has yet to be published in the Federal Register.

The Corps put restrictions on the district engineers authority to initiate mitigation as well. The district engineer may now only require mitigation measures if no local, state, or other federal programs or policies exist to achieve the desired result (47 FR 31824, §325.4(c) and mitigation measures must be "directly related" to the project (47 FR 31824, §325.4(d).

Memoranda of Agreement 1982

The Corps took a second step in streamlining the §404 process in July 1982 when it renegotiated the Memoranda of Agreement (MOAs) required by §404(q) of the FWPCA. That section requires agreements expected to minimize "duplicative, endless paperwork and delays" and to ensure decision within 90 days.

Under previous MOAs, if the Fish and Wildlife Service were to disagree with the district engineer's decision on a permit application, the agency could request "elevation"--referral to a higher authority within the Corps. Elevation was automatic on request, with the more significant applications elevated to a higher level than those with lesser impacts. The new MOAs did away with the differences between applications (MOA Between the Sec. of the Interior and the Sec. of the Army, July 25, 1982). Under the new MOAs, elevation is allowed only on the approval of the Assistant Secretary of the Army, Civil Works and the reviewing agency may not request elevation solely on the basis of environmental resource values.

Instead, the Corps has established three criteria for elevation: 1) insufficient interagency coordination at the district level, 2) development of significant new information, or 3) the necessity of policy-level review of issues of national importance.

Reactions to the Reforms--The Quiet War in the Administration

Under §404(b)(1), the Corps must evaluate permit applications according to EPA guidelines. The guidelines are binding on the Corps and provide a basis for evaluating the physical, chemical, and biological effects of discharges of dredged of fill material on aquatic resoures.

The Cabinet Council on Natural Resources and Environment, chaired by Interior Secretary James Watt, March 9, 1983, agreed to have EPA submit FWPCA amendments to Congress as the Administration's official proposal that would not change §404. The Council also agreed that the Corps could draft legislation that would limit the scope of §404, introduce the bill through "a friend on the Hill" separately from the EPA proposal.

As the result of a heated confrontation between William Gianelli, Assistant Secretary of the Army, Civil Works, and John Hernandez, Jr., then Acting Administrator of EPA, on March 18, 1983, in which the dispute over whether the guidelines are advisory or binding was not resolved, both men wrote letters to Vice President Bush in his capacity as head of the Task Force on Regulatory Relief.

In a March 23, 1983 letter, Gianelli proposed to make the guidelines advisory rather than mandatory in order to "implement fully the task force decisions" and to "attain optimum management efficiency".

Hernandez wrote a letter to Bush on March 22, 1983, expressing concern that making the guidelines advisory "would introduce a major element of uncertainty into the permit process, lead to inconsistent decisions, and, most fundamentally, undercut the level of environmental protection traditionally provided by the §404 program. The change advocated by the Corps "would present a significant legal risk" and would have "serious, adverse policy ramifications" wrote Hernandez.

Senator John Chafee (R-R.I.), Chairman of the Subcommittee on Environmental Pollution and a longtime supporter of §404, also wrote to Bush, but expressed a greater concern. He stated:

> "Mr. Gianelli is no longer seeking regulatory reform, he is seeking regulatory relief. This is precisely the type of regulatory excess that is making the public view the Republican Party as anti-environmental. If Mr. Gianelli's recommendation is accepted, the criticism of the President would be damaging and totally unnecessary.
>
> Certainly the outcry among those that have been unfairly dubbed 'tree hugger' would be great, but it would also be spirited among the hunters and the fishermen that are the real backbone of the conservation movement in this country. They are the ones that will become aware that this proposal means greater destruction of wetlands and habitat which translates into fewer numbers of fish and wildlife."

Chafee asked that no decision be made until the appointment of a new EPA administrator had been made.

The new EPA Administrator, William Ruckelshaus, stated his position in testimony before Chafee's subcommittee June 14. Ruckelshaus said that the Corps now agrees that use of the criteria is mandatory. Ruckelshaus has obtained further agreement that EPA's guidelines and the Corps' rules for administering the permit program "must be harmonized".

Chafee's response was, "I hope you can work this out satisfactorily without giving ground."

On another issue creating interagency strife, the Baltimore Sun reported April 10 that since the new MOAs went into effect, requests for elevation usually have been unsuccessful. While the agencies rarely requested elevation under the old MOAs, the possibility did indeed encourage applicants to accept mitigation measures, which, in many cases, reduced net applicant costs and protected a substantial amount of wetland acreage.

As of April 15, 1983, the Department of the Interior had requested the elevation and review of 16 permit decisions under the new MOAs. The Assistant Secretary of the Army, Civil Works, who now decides whether to grant a request for elevation, has declined to reverse any of these decisions.

This issue has brought G. Ray Arnett, the Assistant Interior Secretary for Fish, Wildlife, and Parks, into direct conflict with Gianelli. The National Journal has reported that Arnett, staunchly pro-Administration, is nevertheless committed to such wildlife concerns as defending the current scope of wetlands protection and saving Florida's Everglades National Park from further damage from water "conservation" practices undertaken by the Corps. Gianelli reportedly has been slow to respond to the Everglades' need for restoration of natural water flows. So far, Interior Secretary Watt has managed to keep the escalating turf fight under wraps.

Reactions to the Reforms--States and Environmental Groups

Groups interested in environmental protection and wetland management, and some states have expressed concern at the 1982 reform efforts. In response to the claims that the Corps' §404 program is too broad, they counter that the program is one of the few laws capable of protecting wetlands.

Although, the states have the option to assume responsiblity for §404 activities, they have not done so, primarily for financial reasons and are unlikely to step in if the Corps' jurisdiction is restricted. Some states have responded by exempting themselves from some of the new and expanded nationwide permits.

For instance, in Wisconsin, discharges included in the headwaters general permit and the isolated waters general permit are not authorized. Other states have followed Wisconsin's lead, but not in time to be included in the Federal Register (47 FR 31832, §330.4n.1).

As for the conclusion that the §404 program is unreasonably time-consuming, the environmental groups point to the November 1981 Corps study which said that the review process has become more efficient as the program has matured. The average processing time has decreased from 141 days in 1978 to 120 days in

1981. Both controversial an non-controversial types of permit decisions show decreased processing time. Further, the delay costs were estimated by the study to be only 0.7% of the total financial value of the controversial projects.

Environmental groups say that they do not oppose streamlining the permit decision process, easing the regulatory burden on the applicants, and clarifying the roles of the reviewing federal and state agencies. However, they do express concern that the Corps has gone too far, causing the §404 program to be less effective.

Reaction to the Reforms--the NWF Lawsuit

In December 1982, the National Wildlife Federation (NWF), joined by 15 other environmental groups, filed suit against the Corps, challenging the July 1982 amendments to the regulations. The Edison Electric Institute and 72 other utilities, the Phosphate Mining Council, and the National Coal Association, have intervened on the side of the defendants.

The complaint asserts that six of the 27 nationwide permits expand the scope of the general permit program beyond the bounds set by §404. The headwaters general permit and the isolated waters general permit were challeged by the NWF because they are for "categories" of water, while §404(e) authorizes general permits for activities that are "similar in nature". The surface mining general permit and the categorical exclusions general permit were attack on the grounds that they are likely to cause far more than the "minimal individual or cumulative impacts" permitted by §404(e). The NWF also contends that since no environmental impact statement was prepared and, because the environmental assessment fails to provide sufficient data to adequately determine the impacts of the general permits, that a violation of the National Environmental Policy Act has occurred.

The NWF also challenged several definitions contained in the 1982 regulations. §404(f) exempts certain dredge and fill activities from the requirements of §404, including discharges for the "construction or maintenance [but not construction] of drainage ditches" (33 U.S.C. §1344(f)(1)(E)). The 1982 regulations expand the exemption beyond the statute to include discharges associated with any irrigation facility. "Fill material is defined to exclude the regulation of discharge of material that in fact "fills" an aquatic area if that filling is not the primary purpose of the discharge (47 FR 31813, §323.4(b)). NWF contends that this definition is inconsistent with EPA regulations.

Generally, the NWF also claims that the regulations severely restrict the imposition of mitigation measures by the district engineers.

Administrative Reform--The 1983 Revised Regulations

On May 12, 1983, William Gianelli announced proposed revisions to the July 1982 Interim Final Regulations (48 FR 21466). In his announcement, Gianelli stated that "the proposed regulations do not suggest changes to the scope of jurisdiction of the program. Instead they clarify this by assembling the definitions of previously scattered terms dealing with jurisdiction into a

special section of the regulations where they can be more easily referenced... ..The changes strengthen our policy of respecting the decisions of state and local governments and reinforce the authority of the Corps and other agencies."

The most publicized change was the reinstatement of the 10-acre lake limitation on the headwaters and isolated waters nationwide permits, allowing them to be individually regulated (§330.2(c). However, natural lakes larger than 10 acres are now defined as "naturally occurring waterbodies with a minimum of 5 acres of open water which, including contiguous wetlands, comprise a minimum of 10 acres". This could mean that a 15 acre lake/wetland area with less than five acres of open water would be regulated under a nationwide permit, not an individual one. The extent of wetland vegetation may vary seasonally causing the acreage of the open water to have to be recalculated periodically.

By section, the controversial changes in the 1983 regulations include:

- §320.4(a)(1)--General policies for evaluating permit applications. Public interest review. The proposed revision states that "A permit will be granted unless its issuance is found to be contrary to the public interest". The current rules state that "no permit will be granted unless its issuance is found to be in the public interest". The language shifts the burden of proving what is in the public interest from permit applicants who want to use the bodies of water and wetlands for projects to regulators and those who want to preserve water quality and wetlands.

  Morgan Rees, director of Corps regulatory programs, said that the change is being proposed because there is "no statutory requirement for the public interest presumption. When considering the public interest factor, we want to presume a project's innocence until it is proven guilty."

- §320.4(c)--Fish and Wildlife. All references to "great weight" regarding the input of state and federal fish and wildlife agencies has been deleted. Corps officials will now "consult" with the U.S.FWS and the National Marine Fisheries Service.

- §320.4(g)--Consideration of property ownership. Under this section "a right to reasonable private use and development" of property "will be recognized as a factor in the public interest review process".

- §320.4(q)--Economics. "When private enterprise makes application for a permit, it will generally be assumed that appropriate economic evaluations have been completed and, therefore, the proposal is economically viable and there is a need for it in the marketplace".

- §325.2(e)(1)--Processing of applications. Alternative procedures. Letters of permission. This section would allow "minor" discharges of dredge and fill material to be approved by letters of permission, a plan analogous to a general permit according to the Corps. The Corps acknowledeges through Rees that "there are legal questions about this section" in that it may not meet the §404(a) public notice and comment period requirement.

- §328.3(b)(e)(f-i)--Definitions. Adjacent. Wetlands. Subsection (b) would limit protected "adjacent" wetlands to those that are "bordering, contiguous, or immediately neighboring" and have "reasonably perceptable surface or subsurface hydrologic connection to a water of the United States".

  Subsection (e) defines wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support...a prevalence of vegetation typically adapted for life in saturated soil conditions". The definition is the same as the one currently being used in the Corps' regulatory program. However, subsections (f-i) define the terms "inundation", "saturated", "prevalence of vegetation" and "typically adapted" to limit the scope of wetlands to "generally include swamps, marshes, bogs, and similar areas".

  Subsection (h), "Prevalence of vegetation", is defined as "those rooted emergent plants that comprise at least 50% of the dominant species within a plan (sic) community". In the Great Lakes region, the definition could eliminate marshes dominated by submersed or floating, non-rooted plants, as well as hardwood forest bottomland bogs.

- §330.5(a)(26)(27)--Nationwide permits for specific activities. Authorized activities. This proposal would extend nationwide permits to private projects adjacent to Corps' public works projects (26) and to all federal projects that a Corps district engineer determines conform to EPA criteria under §404(b)(1) (27). Problems may also occur here as nationwide permits are limited by statute to projects with minimal impacts on the environment.

- §330.9--State water quality certification. §401(a)(1) provides that "no license or permit shall be granted until the certification...has been obtained or waived". The complex wording of the proposed changes can be interpreted to mean that nationwide permits will be issued for a state even if the state denies certification, as did Wisconsin, followed by several other states. If this view is correct, then each state will have to conduct an individual review of each activity covered under the nationwide permit and determine if individual certification should be waived or denied. Again, the administrative burden would effectively shift to the states. Given §401(a)(1), the legality of the proposed change is questionable.

Reaction from representatives of two environmental groups was sharp and both predicted a certain lawsuit over the revisions. William Brown, senior scientist-attorney for the Environmental Defense Fund and Thomas Tomasello of the NWF, criticized numberous portions of the revisions, calling some illegal and other violations of the public trust.

The comment period on the proposal ended July 11, 1983. Final Regulations will be issued following the receipt of comments and after appropriate consideration is given to these comments and those stemming from the July 22, 1982 Interim Final Regulations.

Legislative Reforms--97th Congress

As the FWPCA was up for reauthorization during the 97th Congress, opponents of the §404 introduced bills to amend the program. The bills sought to return the Corp's jurisdiction to traditionally navigable waters, those "susceptible to use in their natural condition or by reasonable improvement, as a means to transport interstate or foreign commerce...including all water subject to the ebb and flow of the tide...".

Four bills were introduced during the 1st session of the 97th Congress to change the scope of §404: S. 777, H.R. 393, H.R. 3083, H.R. 3962. The bills would have prohibited regulation of waters other than navigable waters under the FWPCA, the Rivers and Harbors Act, or any other act. Tomasello, in hearings before the House Merchant Marine and Fisheries Committee in 1982, alleged that these provisions would remove 85% of the nation's wetlands from the Corps' regulatory authority or 126 million of the 148 million acres currently covered.

The bills would have repealed the §404 provisions allowing states to take over the optional state permit program, but would have authorized states to request that the Corps regulate waters other than navigable. A state could ask the Corps to apply its dredge and fill program to the state's wetlands. Another change would have been reversing the burden of proof for issuing permits. Finally, the bills would have mandated that all permit decisions be made within 90 days.

The reauthorization of the FWPCA did not take place in the 97th Congress due to the §404 controversy. In the December 1982 lame duck session, Senator John Tower (R-Texas) made it clear that he would use S. 777 as an amendment on any Clean Water legislation. Chafee, trying to move reauthorization legislation along, decided not to take the chance that the §404 program might be emasculated and did not push the bill.

Legislative Reform--98th Congress

Although the administrative remedies to reform the program have embodied much of the content of previous legislation, the attack on §404 continues with H.R. 1570, a bill modeled on its predecessors. Introduced February 22, 1983 by Rep. Sam B. Hall, Jr. (D-Texas), the bill has not had any hearing to date.

The yet-to-be-introduced Corps' bill is expected to, in addition to provisions noted earlier, rescind §404(c), which authorizes EPA to veto permits, amend §404(b) to transfer EPA's authority for developing environmental guidelines to the Corps.

Current FWPCA reauthorization legislation takes differing stances in each house of Congress. On the Senate side, S. 431, introduced February 3, 1983 by Chafee, contains no changes in the §404 statute and was reported by voice vote from the Senate Environment and Public Works Committee. The bill faces opposition from Tower and Senator Lloyd Bentsen (D-Texas) when the bill reaches the floor. The Texans may settle for language simplifying the permit process and easing the transfer of the permit program to the states but they could derail a FWPCA rewrite as well. However, aides have been quoted as saying that the two senators would rather compromise with Chafee than oppose him.

In the House, H.R. 3282, the Water Quality Renewal Act, was introduced June 16 by Rep. James Howard (D-N.J.), chairman of the House Public Works and Transportation Committee. The bill is scheduled for hearings on July 19 and 20 in the Water Resources Subcommittee.

H.R. 3282 proposes changes in §404 that would restore some of the provisions from the 1977 regulations. The bill would prohibit the Corps from issuing a dredge-and-fill permit unless it is determined that the discharge would not have an "unacceptable adverse effect" on the aquatic environment and that no practical alternative exists that would have a less adverse effect.

Corps engineers would be required to notify EPA, the Departments of Interior and Commerce, and other federal agencies when they receive permit application. The agencies would have 30 days, and in some cases 60 days, to comment on each application, with the district engineers being required to "give full consideration" to these comments.

If the district engineer intended to issue a permit despite comments opposing it, the engineer would be required to notify the agency or agencies in opposition within 90 days after the application was received "to the maximum extent possible". EPA, DOI and Commerce could then appeal the district engineer's decisions to issue permits. The Secretary of the Army would be required to issue a final decision on the disputed permit application within 30 days after receiving the division engineer's recommendation.

Again, the bill will face opposition from the powerful Texas delegation in committee and on the floor. The intensity of concern by Texas legislators on the §404 issue stems from several factors. §404 permits restrict oil and gas drilling and transportation in a state with a powerful energy industry. Permit restrictions on agricultural irrigation have also not found popularity.

Legislative Initiatives--Wetland Management and Protection

With several key wetlands statutes up for renewal, Congress is also dealing with proposals to change the laws themselves, most often in the direction of increased protection.

Both the Senate Environment Committee and the House Merchant Marine and Fisheries Committee on May 16 reported bills, S. 1284 (S. Rept. 98-90) and H.R. 2395 (H. Rept. 98-132), to extend the Wetlands Loan Act and allowing the federal government to continue to use revenue from "duck stamps" to buy wetlands. Without the extension, most of the estimated $16 million in annual revenue would have to go to the Treasury to repay monies loaned to the wetland acquisition program.

Both bills were kept to simple reauthorization measures so that they could gain committee approval by the budget act's May 15 deadline for reporting authorizing legislation.

Both Chafee and Rep. John Breaux (D-La), chairman of the House Merchant Marine Subcommittee on Fisheries, expect to add substantive legislative changes during a second round of work in committee.

In addition to the "shell" bills S. 1284 and H.R. 2395, two pairs of bills propose further wetlands preservation. Another separate piece of legislation provides for classification and inventory of wetlands in the United States.

On January 25, 1983, Secretary of Interior Watt unveiled his own draft bill, the "Protect Our Wetlands and Duck Resources (POWDR) Act. Its approach is to limit federal subsidies for development in wetlands. The idea is based on a similar approach used to limit federal subsidies in the Coastal Barrier Resources Act of 1982 (PL 97-348). CBRA gained almost universal bipartisan support.

At Watt's request, the bill was introduced by Chafee April 5 in the Senate (S. 978) and by Rep. Edwin Forsythe (R-N.J.) March 23 in the House (H.R. 2268). Hearings were held on June 23 in Breaux's subcommittee and on July 12 in Chafee's subcommittee.

Admittedly a limited approach, the POWDR bill would protect only those wetlands that provide significant habitat for wildlife, migratory birds and endangered species; contribute to fish or shellfish production; or contribute to flood control, erosion control or water quality.

Within a system created of those wetlands, federal subsidies would be prohibited. However, an extensive list of exempted activities makes the bill unable to cover the resources it claims to protect. Among the exemptions are energy and mineral development, highway construction or maintenance, national security, Coast Guard facilities, forestry activity, agricultural commodity price supports, water resource development and emergency actions to protect life or property--some 90% of currently subsidized development.

POWDR also extends the Wetlands Loan Act for 10 years, forgiving the loan, and would increase the duck stamp price to $15.

Committee staffers do not give the proposal much chance for enactment, as it lacks clarity in predicting what subsidies would be lost and because its exemption loopholes are so broad.

The second pair of bills are both entitled the "Emergency Wetlands Resources Act of 1983". Chafee introduced S. 1329 May 19 and Forsythe introduced companion legislation H.R. 3082 May 23. Hearings were held on S. 1329 in the Senate Environmental Pollution Subcommittee July 12. The House Merchant Marine and Fisheries Subcommitte on Fisheries, Wildlife Conservation and the Environment had hearings on H.R. 3082 June 23.

The legislation would extend the authorization for appropriations under the Wetlands Loan Act for 10 years, forgiving the loan provided by existing law and authorizing future funding as regular appropriations rather than as an "advance" on the loan. Of the current $200 million loan authorization, $147 million has been appropriated to date.

Title II of the legislation would authorize the Interior Secretary to require a fee for entrance into certain units of the National Wildlife Refuge System, but anyone possessing a valid federal Duck Stamp or a Golden Eagle Passport would not have to pay a fee. The approximately $3.5 to $5.0 million that this provision may raise annually would be deposited into the Migratory Bird Conservation Fund (MBCF) for federal and state wetland acquisition programs.

Title II also would increase the price of the federal Duck Stamp gradually from $7.50 to $15. Import duties on foreign-made arms and ammunition would be directed into the MBCF for federal and state wetland acquisition efforts.

Title III would amend the MBCF authorize for 10 years a program of matching grants to states for assistance with federally approved wetland acguisition projects. The program would make $50 million available annually for federal assistance to pay for 75% of the total cost of each approved project.

Title IV would require completion of the National Wetlands Inventory Program for mapping the U.S. Fish and Wildlife Service's priority wetland areas within three years. Mapping the remaining sections of the contiguous U.S. would be completed within five years. The USFWS would be required to issue periodic updates on the status and trends of the nation's wetlands. Title IV also would require the Interior Secretary to conduct a study and by September 1985 prepare a report to Congress regarding wetland losses in the U.S. The study would examine the extent to which federal subsidies encourage the destruction of wetlands and would make recommendations for wetland conservation based on an evaluation and comparison of all amanagement alternatives.

Introduced January 6, 1983 by Rep. Bill Chappell (D-Fla), H.R. 492 proides $2 million and authorizes the Secretary of the Interior to classify and inventory wetland resources in the United States, measure wetlands degredation, and evaluate the environmental contribution of natural wetlands. The bill was heard by Breaux's subcommittee June 23.

Other proposals that may be forthcoming would increase the tax writeoffs available to landowners who donate wetlands to government or private conservation agencies. A bill along those lines was introduced last year by Senator Malcolm Wallop (R-Wyo) who intends to reintroduce the legislation this month. Rep. Robert Lagomarsino (R-Calif) intoduced a similar but not identical measure last year and has plans to reintroduce that legislation this year.

Political Analysis

The key to reaching consensus on the §404 and wetland issue in the Senate is Chafee. As a Republican and a conservationist, he may be able to find common ground for environmentalists and the Reagan administration. Chafee's subcommittee has jurisdiction over both the FWPCA reauthorization and the wetlands preservation laws.

On the House side, the key figure is Breaux who not only chairs the Merchant Marine subcommittee with jurisdiction on wetland matters but is also the second-ranking Democrat on the House Public Works Subcommittee on Water Resources, the venue for the FWPCA and §404.

Breaux, however, is walking a tightrope. He represents a western Louisiana district where wetlands are are major portion of the total land area and vital to its economy. Louisiana's economy is a blend of conflicting interests on wetlands: oil and gas, flood control and drainage projects, agriculture, shipping and a fur industry.

Breaux has said he favors the Wetlands Loan Act extension, but is noncommital on other issues. Federal District Courts in Louisiana have been the site of four major §404 cases in the last two years, with several of them turning on the issue of how broadly to define the term wetlands. In his district, adding federal money for wetlands acquisition rather than subtracting federal subsidies that promote development is likely to be more popular.

Conclusion

The administrative reforms made by the Corps over the last year have largely achieved the goals of the President's Task Force for the §404 permit program. However, the pending NWF lawsuit and the devisive infighting engendered by the changes in the Administration cast some doubts about the permanence of the revisions. Nevertheless, the changes may reduce the pressure from industry and landowners to cut back on the scope of the program.

However, evidence from a pending Office of Technology Assessment study to the effect that the §404 program is not as effective in prohibiting destruction of wetlands, could lead to a counteroffensive to strengthen §404.

Those seeking to reverse the Corps' regulatory relief initiatives have key support from members of Congress. However, the regulated industries, particularly oil and gas and shipping, have strong support there as well. The §404 and wetlands issue will continue to be a battleground for contending forces to determine how the law will be applied.