

THE WHITE HOUSE

WASHINGTON

August 6, 1993

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BOB SUSSMAN, ENVIRONMENTAL PROTECTION AGENCY
WILLIAM WHITE, DEPARTMENT OF ENERGY

FROM: KATIE MCGINTY, DIRECTOR
OFFICE ON ENVIRONMENTAL POLICY

SUBJECT: AUGUST 10 DEPUTIES MEETING ON WETLANDS POLICY

I have called a deputy's meeting for Tuesday, August 10 at 10:30 a.m. in Room 476 of the Old Executive Office Building to review the policy recommendations of the Interagency Working Group on Federal Wetlands Policy, which has been chaired by the Office on Environmental Policy. The group has been meeting since early June to determine Administration positions on major wetlands issues in anticipation of Congressional reauthorization of the Clean Water Act.

The working group has reached consensus on all major issues, and their recommendations have been reviewed at two assistant secretary level meetings. There do not appear to be any remaining major disagreements on policy. Compliance with a court settlement deadline requires us to come to closure on Administration policy in the very near future.

Enclosed you will find the agenda for next Tuesday's meeting, the latest draft of the working group's report, and a short summary of the report. As the agenda indicates, we will review the time line for decision making and the major policy positions contained in the report at Tuesday's meeting. I am pleased with the group's work. The package of policy recommendations outlined in the paper will bring meaningful and much-needed reform to Federal wetlands policy, while maintaining protection of this vital natural resource.

Any written comments on the policy paper that your agency may wish to make should be submitted to the Office on Environmental Policy by the close of business on Thursday, August 12. Please have your staff call Lisa Kamm at 456-6224 to arrange for clearance into the building.

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AGENDA
DEPUTIES MEETING ON FEDERAL WETLANDS POLICY

Tuesday, August 10, 1993

- I. Background/Interagency Working Group on Federal Wetlands Policy
- II. Time Line for Decision Making
 - A. Compressed between completion of reconciliation and Tulloch Rule deadline
 - B. Milestones
 - 1. Deputies Meeting/August 10
 - 2. Agency Comments Due/August 12
 - 3. Finalize Policy/August 16
 - 4. Brief Hill, Interest Groups & Press/August 17-24
 - 5. Tulloch Rule due/August 23
 - 6. Announce Policy/August 25
 - 7. Senate testimony/Early September
- III. Major Issues to Review
 - A. Five Principles
 - B. Highlights
 - C. Alaska
 - D. Categorization/Sequencing
 - E. Takings
 - F. The Flood
- IV. Politics/Anticipated Reaction
 - A. Interest groups
 - 1. Agriculture
 - 2. Development
 - 3. Environmentalists
 - 4. State & Local Government
 - B. The Hill
 - 1. The committees
 - a. Senate EPW, Agriculture
 - b. House Public Works, Merchant Marine, Agriculture, Interior
 - 2. Critics of the current regulatory program
 - 3. Supporters of the current regulatory program
- V. Next Steps
 - A. Agency comments by August 12
 - B. Develop strategy for August 17 to 24
 - 1. Communications
 - 2. Congressional
 - 3. Public outreach

A FAIR AND FLEXIBLE APPROACH TO WETLANDS PROTECTION

The nation's wetlands perform many functions that are important to society, such as improving water quality, recharging groundwater, and supporting a wide variety of fish, wildlife and plants, including threatened and endangered species. In recent weeks, the magnitude of the disastrous floods that have wrecked havoc on the heartland of our nation have reminded us of the important role that wetlands play in natural flood control. The economic importance of wetlands to commercial fisheries and recreational uses is enormous. But the nation's wetlands are being lost at a rate of hundreds of thousands of acres per year due to both human activity and natural processes. This continued loss of the nation's wetlands occurs at great cost to society.

Notwithstanding the importance of wetland resources and continued losses, efforts to protect wetlands have engendered considerable controversy. In this regard, it is imperative to recognize and consider fully the impacts of wetlands protection policies on those individuals who own wetland property. Statutory, regulatory, and policy objectives should be accomplished in a manner that avoids unnecessary impacts upon such individuals.

Given the economic and environmental significance of wetlands, the alarming rate of wetlands loss, and concerns for the regulated public, the Interagency Working Group on Federal Wetlands Policy has been working since early June to formulate a Clinton Administration approach to effective wetlands protection based upon fairness and flexibility.

The administration convened the Interagency Working Group on Federal Wetlands Policy to develop Clinton administration positions on federal wetlands policy prior to Congressional reauthorization of the Clean Water Act. The group has been chaired by the White House Office on Environmental Policy and included the participation of the Army Corps of Engineers, the Environmental Protection Agency, the Office of Management and Budget, and the Departments of Agriculture, Commerce, Energy, Interior, Justice, and Transportation.

In addition to interagency discussions, the working group has served as a forum to receive the views of a broad range of stakeholders in the wetlands issue. For example, the working group has received presentations that have included: a bipartisan group of eight members of the U.S. Congress; representatives of state and local government; environmentalists; the development community; agricultural interests; scientists and others.

After receiving the views of this broad range of interests, the working group began its deliberations by establishing the following principles that serve as the framework for the Clinton administration's federal wetlands policy.

FIVE PRINCIPLES FOR FEDERAL WETLANDS POLICY

- 1) The Clinton Administration supports the 1988 Conservation Foundation National Wetlands Policy Forum's interim goal of no overall net loss of the nation's remaining wetlands, and its long-term goal of increasing the quality and quantity of the nation's wetlands resource base;
- 2) Regulatory programs must be efficient, equitable, flexible, and predictable, and must be administered in a manner that both protects wetlands, avoids unnecessary impacts upon private property and the regulated public, and minimizes those effects that cannot be avoided. Duplication between regulatory agencies must be avoided and the regulated public must have a clear understanding of regulatory requirements and various agency roles.
- 3) Non-regulatory programs, such as advanced planning, wetlands restoration, inventory, and research, must be implemented to reduce the Federal government's reliance upon regulatory programs as the primary means to protect wetlands resources and to accomplish long-term wetlands gains;
- 4) The Federal government should expand partnerships with state, tribal, and local governments, the private sector and individual citizens and approach wetlands protection and restoration in an ecosystem/watershed context; and
- 5) Federal wetlands policy should be based upon the best scientific information available.

A COMPREHENSIVE PACKAGE OF REFORMS

Building upon these principles, the working group has developed a comprehensive package of initiatives that will significantly reform federal wetlands policy, while maintaining protection of this vital natural resource. This set of initiatives represents an approach to wetlands policy reform that is based upon protection, fairness and flexibility.

This approach includes regulatory reforms and innovative, non-regulatory policy approaches; it includes administrative actions that will take effect immediately, and legislative proposals that the Congress can adopt during the reauthorization of the Clean Water Act. The Clinton Administration looks forward to working closely with the Congress to implement this new approach to federal wetlands policy.

The highlights of the reform package include:

- An Executive Order to adopt an interim goal of no overall net loss of the Nation's

remaining wetlands resource base, and a long-term goal of increasing the quality and quantity of the nation's wetlands;

- A final rule issued by the Corps and EPA that excludes over 54 million acres of prior converted cropland from wetlands regulations;
- Reducing duplication and inconsistency for American farmers by making the Soil Conservation Service the lead agency for wetlands regulation on agricultural lands under both the Clean Water Act and the Food Security Act;
- To increase fairness and efficiency in the wetlands permitting process, the Corps of Engineers will (1) establish an administrative appeals process so that landowners can seek recourse short of going to court; and (2) establish deadlines for issuing permits under the 404 program. The Administration will strongly support the additional funding necessary to implement these initiatives;
- The Army Corps of Engineers, the Environmental Protection Agency, the Soil Conservation Service, and the Fish and Wildlife Service will all use the 1987 delineation manual pending receipt of the National Academy of Sciences Study;
- An endorsement of the use of mitigation banks as part of the Section 404 regulatory program;
- Incentives for states and localities to engage in watershed planning, which can reduce the conflict that results when decisions are made on a permit-by-permit basis;
- A final rule issued by the Corps and EPA increases the scope of activities regulated under the 404 program, closing a loophole that led to the degradation and destruction of wetland areas;
- Continued support for the USDA's Wetland Reserve Program, which provides an incentive for farmers to restore wetlands on their property; and
- The administration will promote the restoration of wetland areas through voluntary, non-regulatory programs.

This package of initiatives represents a tremendous opportunity to move beyond the unnecessary polarization that has characterized the wetlands policy debate in recent years. By adopting an approach to wetlands protection that is based upon fairness and flexibility, the Administration proposes a policy that will engender the strong support of the American people.

PROTECTING AMERICA'S WETLANDS:

A FAIR AND FLEXIBLE APPROACH

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I. A FAIR AND FLEXIBLE APPROACH TO WETLANDS PROTECTION

The nation's wetlands perform many functions that are important to society, such as improving water quality, recharging groundwater, and supporting a wide variety of fish, wildlife and plants, including threatened and endangered species. In recent weeks, the magnitude of the disastrous floods that have wrecked havoc on the heartland of our nation have reminded us of the important role that wetlands play in natural flood control. The economic importance of wetlands to commercial fisheries and recreational uses is enormous. But the nation's wetlands are being lost at a rate of hundreds of thousands of acres per year due to both human activity and natural processes. This continued loss of the nation's wetlands occurs at great cost to society.

Notwithstanding the importance of wetland resources and continued losses, efforts to protect wetlands have engendered considerable controversy. In this regard, it is imperative to recognize and consider fully the impacts of wetlands protection policies on those individuals that own wetland property. Statutory, regulatory, and policy objectives should be accomplished in a manner that avoids unnecessary impacts upon such individuals.

Given the economic and environmental significance of wetlands, the alarming rate of wetlands loss, and concerns for the regulated public, the Interagency Working Group on Federal Wetlands Policy has been working since early June to formulate a Clinton Administration approach to effective wetlands protection based upon fairness and flexibility.

II. BACKGROUND

Federal programs to protect the nation's wetlands have been the focus of considerable controversy in recent years. Much of the attention focused upon the 1989 Interagency Wetlands Delineation Manual (1989 Manual). The 1989 Manual, prepared jointly by the U.S. Army Corps of Engineers ("the Corps"), the Environmental Protection Agency (EPA), the Fish and Wildlife Service (FWS) of the Department of the Interior, and the Department of Agriculture's Soil Conservation Service (SCS). The 1989 Manual was created in response to criticism that Federal agencies were not using a single set of common procedures to "delineate" -- or identify -- wetlands under the programs administered by these agencies.

But rather than alleviating concerns about inconsistencies in delineation, the 1989 Manual only further fueled the controversy. Critics claimed that the 1989 Manual represented an expansion of regulatory jurisdiction without opportunity for public participation. In addition to the storm of criticism generated by the 1989 Manual, the Federal program regulating wetlands pursuant to Section 404 of the Clean Water Act has been criticized as unfair, inflexible, burdensome, and confusing.

In response to this controversy, the Bush Administration embarked upon a closed-door effort to revise the 1989 Manual. This process resulted in the technically-flawed 1991 Manual that would

have substantially and indefensibly reduced the amount of wetlands subject to protection. The proposed 1991 Manual generated additional controversy and resulted in further polarization on this issue. Since January 1993, both the Corps and EPA have reverted to using the 1987 Manual.

The controversy surrounding both the 1989 and the 1991 Manuals demonstrate the importance of full public participation during the consideration of regulatory proposals of such significance. The Clinton Administration is committed to encouraging such public participation to the maximum extent feasible.

III. THE INTERAGENCY WORKING GROUP ON FEDERAL WETLANDS POLICY

The Administration convened the Interagency Working Group on Federal Wetlands Policy in response to an April 23, 1993, letter from Senators Breaux, Bumpers, Ford, Johnston, Mathews, Pryor, and Sasser. The working group has been meeting since June 4 to develop Clinton Administration positions on Federal wetlands policy prior to Congressional reauthorization of the Clean Water Act. The group has been chaired by the White House Office on Environmental Policy and included the participation of the EPA, the Corps, the Office of Management and Budget, and the Departments of Agriculture, Commerce, Energy, Interior, Justice, and Transportation.

In addition to interagency discussions, the working group has served as a forum to receive the views from a broad range of stakeholders in the wetlands issue. For example, the working group has received presentations that have included: a bipartisan group of eight members of the U.S. Congress; representatives of state and local government; environmentalists; the development community; agricultural interests; scientists and others.

After receiving the views of this broad range of interests, the working group began its deliberations by establishing the following principles that serve as the framework for the Clinton Administration's Federal wetlands policy.

IV. FIVE PRINCIPLES FOR FEDERAL WETLANDS POLICY

- 1) The Clinton Administration supports the 1988 Conservation Foundation National Wetlands Policy Forum's interim goal of no overall net loss of the nation's remaining wetlands, and its long-term goal of increasing the quality and quantity of the nation's wetlands resource base;
- 2) Regulatory programs must be efficient, equitable, flexible, and predictable, and must be administered in a manner that both protects wetlands, avoids unnecessary impacts upon private property and the regulated public, and minimizes those effects that cannot be avoided.

Duplication between regulatory agencies must be avoided and the regulated public must have a clear understanding of regulatory requirements and various agency roles.

- 3) Nonregulatory programs, such as advanced planning, wetlands restoration, inventory, and research, must be implemented to reduce the Federal government's reliance upon regulatory programs as the primary means to protect wetlands resources and to accomplish long-term wetlands gains;
- 4) The Federal government should expand partnerships with state, tribal, and local governments, the private sector and individual citizens and approach wetlands protection and restoration in an ecosystem/watershed context; and
- 5) Federal wetlands policy should be based upon the best scientific information available;

V. A COMPREHENSIVE PACKAGE OF REFORMS

Building upon these principles, the working group has developed a comprehensive package of initiatives that will significantly reform Federal wetlands policy, while maintaining protection of this vital natural resource. This set of initiatives represents an approach to wetlands policy reform that is based upon protection, fairness and flexibility.

This approach includes regulatory reforms and innovative, non-regulatory policy approaches; it includes administrative actions that will take effect immediately, and legislative proposals that the Congress can adopt during the reauthorization of the Clean Water Act. The Clinton Administration looks forward to working closely with the Congress to implement this new approach to Federal wetlands policy. In addition, the Administration will establish a permanent, ongoing interagency working group to monitor the implementation of the policies contained in the reform package.

The highlights of the reform package include:

- An Executive Order to adopt an interim goal of no overall net loss of the Nation's remaining wetlands resource base, and a long-term goal of increasing the quality and quantity of the nation's wetlands;
- A final rule issued by the Corps and EPA that excludes over 54 million acres of prior converted cropland from wetlands regulations;
- Reducing duplication and inconsistency for American farmers by making the Soil Conservation Service the lead agency for wetlands regulation on agricultural lands under both the Clean Water Act and the Food Security Act;
- To increase fairness and efficiency in the wetlands permitting process, the Corps of

Engineers will (1) establish an administrative appeals process so that landowners can seek recourse short of going to court; and (2) establish deadlines for issuing permits under the 404 program. The Administration will strongly support the additional funding necessary to implement these initiatives;

- The Army Corps of Engineers, the Environmental Protection Agency, the Soil Conservation Service, and the Fish and Wildlife Service will all use the 1987 delineation manual pending receipt of the National Academy of Sciences Study;

- An endorsement of the use of mitigation banks as part of the Section 404 regulatory program;

- Incentives for states and localities to engage in watershed planning, which can reduce the conflict that results when decisions are made on a permit-by-permit basis;

- A final rule issued by the Corps and EPA increases the scope of activities regulated under the 404 program, closing a loophole that led to the degradation and destruction of wetland areas; and

- Continued support for the USDA's Wetland Reserve Program, which provides an incentive for farmers to restore wetlands on their property;

- The administration will promote the restoration of wetland areas through voluntary, non-regulatory programs.

The description of the complete package that follows demonstrates the tremendous opportunity that exists to move beyond the unnecessary polarization that has characterized the wetlands policy debate in recent years. (Some initiatives are listed under more than one heading for the sake of clarity.) By adopting an approach to wetlands protection that is based upon fairness and flexibility, the Administration proposes a policy that will engender the strong support of the American people.

A. ADDRESSING LANDOWNER CONCERNS

Issue Definition: The program that regulates wetlands under Section 404 of the Clean Water Act has been criticized as being slow, burdensome, unpredictable and unfair. For example, it has been claimed that permits take too long to obtain; that wetlands delineations are sometimes slow, inaccurate, and inconsistent; and that it is unfair that the Corps of Engineers does not provide a process by which landowners can appeal the denial of a wetlands permit short of suffering the expense of going to court.

Administration Positions: The Clinton Administration believes that the federal government has a responsibility to the public to conduct such programs in a manner that

is efficient, responsive and fair. Therefore, the administration supports the following reforms to reduce the impact of the 404 program on the public:

● ***Deadlines for Permit Action*** Within 1 year the Corps will modify its regulations, through a public rulemaking process, to establish regulatory deadlines for reaching decisions regarding permit applications. The regulations will generally require the Corps to reach permit decisions within 90 days from the date of issuance of the public notice, unless precluded by other laws such as the National Environmental Policy Act and the Endangered Species Act.

● ***The Adoption of an Appeals Process*** Within one year, the Corps of Engineers will develop an administrative appeals process. The process, which will be implemented after a legislative rulemaking, will be designed to allow for administrative appeals of determinations by the Corps that it has regulatory jurisdiction over a particular parcel of property, permit denials, and administrative penalties. The process will allow third parties to participate in applicant appeals of permit denials and will require that applicants exercise their right to appeal before initiating judicial action. The administration will strongly support the additional personnel and funding necessary to successfully implement the appeals process.

USDA already has an appeals process and landowners will still be able to appeal SCS delineation through that route.

● ***Delineation Training and Certification*** All employees of Federal agencies who conduct wetlands delineations will be required to participate in an interagency wetlands delineation training program to improve accuracy and consistency in delineation in Federal wetlands programs or have comparable training and experience. As appropriate, state agencies will also be encouraged to participate in the federal training program. In addition, by the end of 1993, the Corps will propose regulations for implementing a certification program for private sector delineators.

By requiring training of federal delineators, jurisdictional determinations can be done more accurately and more consistently across the country. By encouraging the growth of a pool of certified private sector wetlands consultants, jurisdictional determinations can be done far more quickly than if the job of performing delineations is solely the responsibility of Federal agency personnel. In addition, the Corps will streamline its process by which it considers and accepts delineations performed by certified wetlands consultants.

B. ADVANCE PLANNING AND WATERSHED MANAGEMENT

Issue Definition: Typically, decisions affecting wetlands are made on a project-by-project, permit-by-permit basis. This precludes the effective consideration of the cumulative effects of piecemeal wetlands loss and degradation. It also hampers the ability of State, Tribal, regional,

and local governments to integrate wetlands conservation objectives into the planning, management, and regulatory tools they use to make decisions regarding other natural resource issues. This can often result in inconsistent and inefficient efforts among agencies at all levels of government, and frustration and confusion among the public.

In contrast, advance planning, particularly comprehensive planning conducted on a watershed basis, offers the opportunity to have strong State/Tribal, local, and public participation in designing and implementing specific solutions to the most pressing environmental problems of that watershed. Advance planning generally involves at least the identification, mapping, and preliminary assessment of relative wetland function within the planning area. More comprehensive advance planning may identify wetlands that merit a high level of protection and others that may be suitable for development, and may also incorporate wetlands conservation into overall land use planning at the local level. Advance planning can provide greater predictability and certainty to property owners, developers, project planners, and local governments.

Administration Positions: To encourage greater use of comprehensive advance planning, particularly with State, Tribal, regional, and local involvement, to identify wetlands protection and restoration needs, opportunities, and concerns, the Administration is taking the following actions:

● ***Provide Incentives for States/Locals to Integrate Watershed and Wetlands Planning.***

The Clean Water Act should authorize the development of State watershed protection programs, requiring local and regional involvement and Federal approval of the State programs. Wetlands should be incorporated into the overall watershed approach, with minimum standards for wetlands protection and restoration planning. Approved watershed plans would receive a high priority for technical and financial support for activities such as mitigation banking, advance identification, and watershed-based categorization under the Section 404 regulatory program. There would also be a high priority given to developing Programmatic General Permits that defer to local regulatory programs implementing approved watershed plans.

● ***Endorse State/Tribal Wetlands Conservation Plans.*** Congress should endorse the development of State/Tribal comprehensive wetland plans, with the goal of building State and Tribal capacity to protect and manage their wetlands resources. These plans should generally be integrated into watershed protection plans. EPA is currently funding the development of 22 State Wetlands Conservation Plans; Congress should provide EPA the authority to use its Wetlands Grants program to fund both their development and implementation.

● ***Provide for Greater Integration of Advance Planning Into the Section 404 Regulatory Program.*** The Administration will support efforts to better integrate advance planning and the Section 404 regulatory program, including appropriate local or watershed-based categorization frameworks and regionalized improvements to implementation of existing Nationwide Permit 26 in headwaters and isolated waters. Such opportunities are expected

to grow as States, Tribes, and regional and local governments progress on watershed plans, State Wetlands Conservation Plans, and other wetlands-related planning processes. Where State, Tribal, regional, or local governments have approved watershed plans that address wetlands, EPA and the Corps will give high priority to assisting with the development of categorization under Section 404. Categorization approaches should be local or regional in nature, and reflect the whole panoply of impacts and functions that affect wetlands within the watershed or planning area.

● ***Program General Permits Under Section 404.*** The Corps will issue guidance which specifies the circumstances under which the Federal agencies will defer to existing State, Tribal, regional, and local programs through issuance of Program General Permits (PGPs). PGPs are extremely useful in reducing unnecessary duplication between Federal and non-Federal regulatory programs, and generally enhancing the role of State and local governments, and advance planning, in decisions regarding wetlands and other aquatic resources. The Administration recommends that Congress amend Section 404(e) of the Clean Water Act to provide explicitly for issuance of Program General Permits, with appropriate environmental safeguards, for approved State, Tribal, regional, and local regulatory programs.

● ***Improve Nationwide Permit 26 Through Regionalization.*** In order to improve the implementation of existing Nationwide Permit 26 (NWP 26) in isolated waters and in headwater areas, the Corps, in close coordination with appropriate agencies, and with the opportunity for public notice and comment, will undertake a field level review of NWP 26 to develop regional descriptions of the types of waters, and the nature of activities in those waters, subject to authorization. Advance planning efforts that have assessed the functions and values of local isolated wetlands and headwaters, and have considered factors such as cumulative losses and scarcity of particular classes of waters, will be used to facilitate this effort.

● ***Mitigation Banking.*** Wetland mitigation banking refers to the restoration, creation, enhancement, and in certain defined circumstances, preservation of wetlands expressly for the purpose of providing compensatory mitigation in advance of discharges into wetlands authorized under the Section 404 regulatory program. Advance planning can be used to identify appropriate locations for, and uses of, mitigation banks. EPA and the Corps will issue guidance to their field staff that clarifies the manner in which wetlands mitigation banking fits in the Section 404 regulatory program. Congress should endorse the appropriate use of banking as a compensatory mitigation option under the Section 404 regulatory program, and explicitly allow use of the State Revolving Fund to capitalize mitigation banks.

● ***Promote Voluntary, Cooperative Programs.*** With more than 70 percent of the nation's remaining wetlands located on privately owned property, it is clear that cooperation with the private sector in implementation of wetlands protection and restoration activities is critical. Advance planning offers an excellent opportunity to involve the public in

general, and property owners in particular, in developing and implementing wetlands protection and restoration plans. The Administration will support planning activities that include cooperative activities with property owners, and will increase support for programs that assist landowners in the implementation of such plans through restoration, technical assistance, and education and information programs.

- ***Revise the Executive Order on Wetlands.*** The existing executive order on wetlands (11990) will be revised to direct the Federal agencies to take a watershed/ecosystem approach to wetlands protection and restoration. In addition, it will require Federal agencies that conduct or assist with multi-objective natural resource planning to incorporate wetlands protection into their programs to the extent possible.

- ***Provide Better and Coordinated Information and Technical Assistance on Wetland Issues.*** The Federal agencies will coordinate to provide States, Tribes, regional and local governments, and the public with timely, consistent information concerning wetlands programs. The agencies will develop a strategic plan for delivering information on regulatory programs, and encourage the development of innovative education and outreach materials and initiatives to assist the public in understanding wetlands issues.

The Administration will also direct the Wetlands Subcommittee of the Federal Geographic Data Committee to complete reconciliation and integration of all Federal agency Wetland Inventory activities. In addition, the Administration will coordinate wetlands restoration, research, inventory, monitoring, cooperative programs, and information and education activities.

C. AGRICULTURE

Issue Definition: Two Federal statutes protect wetlands on agricultural lands. The Food Security Act Wetlands Conservation provision, which is known as the Swampbuster program, is administered by the Soil Conservation Service (SCS) of the U.S. Department of Agriculture, in consultation with the Fish and Wildlife Service if the Department of the Interior. The Clean Water Act Section 404 program is run jointly by the Department of the Army and the Environmental Protection Agency. American farmers have been subjected to needless duplication and frustrating inconsistency in the implementation of these two statutes.

Administration Position: The Administration recognizes the valuable contribution of agricultural producers to the Nation's economy and more generally to the American way of life. We also appreciate the challenges faced by farmers as they try to comply with wetlands regulations, as well as other environmental requirements affecting farm operations. As a result, the Administration is committed to ensuring that Federal wetlands programs do not place unnecessary restrictions or burdens on farmers and other landowners, while providing necessary environmental safeguards.

The Administration has identified a number of actions that can be taken to reduce the impact of these wetlands protection programs on American agriculture. At the heart of

this effort is a commitment on the part of all Federal agencies involved to work closely and cooperatively to coordinate their work under these two statutes so as to increase efficiency, minimize duplication, and reduce inconsistencies between the programs.

The following initiatives demonstrate our commitment to protect and restore the Nation's wetlands and reduce unnecessary impacts on the farm community:

- ***Prior Converted Cropland Rulemaking.*** EPA and the Corps have just completed rulemaking which excludes an estimated 53 million acres of prior converted cropland from regulation under Section 404 of the Clean Water Act. These lands were converted from wetlands to croplands prior to the passage of the Food Security Act of 1985, which established the Swampbuster program. The Administration is also recommending that Congress include in the Clean Water Act a definition of "waters of the United States" that explicitly excludes from Clean Water Act jurisdiction areas determined to be prior converted cropland.

- ***A Package to Eliminate Duplication and Inconsistency***

The SCS, EPA, the Corps, and FWS have recently signed an interagency agreement that will reduce existing overlap and inconsistencies in the implementation of Federal wetlands programs affecting agricultural lands by undertaking, within 120 days, the following initiatives:

- ***Make the SCS the Lead Agency on Agricultural Lands.*** The SCS, the Corps, EPA, and FWS will develop procedures which provide that written SCS wetland delineations will represent the final government position on the extent of Swampbuster and Clean Water Act jurisdiction on agricultural lands. Interagency training programs will be developed to ensure that agency field staff are properly trained, that standard, agreed-upon methods are utilized in making delineation and mitigation determinations, and that EPA and the Corps have the ability to monitor SCS determinations on a programmatic basis. SCS, EPA and Corps will also address enforcement responsibilities on agricultural lands to assure that the Federal government's activities are equitable, coordinated and consistent.

- ***Guarantee Consistency in Delineations on Agricultural Lands.*** The Corps, EPA, SCS, and FWS will develop field guidance for implementing the 1987 Wetlands Delineation Manual to clarify procedures for identifying wetlands in areas managed for agriculture. The agencies will also expedite current efforts to revise the SCS Food Security Act Manual to provide greater consistency between wetlands delineation procedures in the FSA Manual and the 1987 Manual.

- ***Greatly Increase Farmers' Certainty in Agency Decisions.*** The Corps, in coordination with EPA, SCS, and FWS, will propose a Nationwide General Permit for discharges associated with "minimal effects" and "frequently cropped with mitigation" conversions determined by SCS and FWS to qualify for exemption from Swampbuster provisions. This will provide greater certainty to the Nation's

farmers that they can rely on SCS/FWS mitigation determinations. While the nationwide permit will include appropriate conditions to protect valuable wetlands, an individual review by Corps and EPA will generally not be required.

● ***Wetlands Reserve Program.*** The Wetlands Reserve Program (WRP) offers a significant opportunity to assist farmers who are interested in restoring wetlands on their property. Response by farmers to the nine State pilot program was overwhelming, with proposals for 250,000 acres of restoration by over 2300 farmers. The 1194 Appropriations will provide for 75,000 new acres to be enrolled in the WRP. Also, the Act will more than double – to 20– the number of states where producers can participate in the program. The current Midwest flood provides a particularly valuable opportunity to assist farmers in restoring wetlands that have historically provided valuable flood protection. Congress should fully fund the Administration's budget requests for the WRP in 1995, and should expand the program in the 1995 Farm Bill.

D. CATEGORIZATION

Issue Definition: A persistent criticism of the Section 404 regulatory program is that the permit process is inflexible to the extent that "all wetlands are treated the same" from a regulatory perspective. Opinions of this nature have led to calls for a nationwide wetlands categorization system to rank wetlands.

This nationwide wetlands categorization system would rank all wetlands based upon their relative function and importance to society. This ranking, in turn, would govern the regulatory response at the time of a specific permit application. This *a priori* approach to wetland categorization is articulated in H.R. 1330, legislation introduced into the 103rd Congress.

Administration Position: While conceptually *a priori* categorization and ranking may seem attractive, its logistical, fiscal and environmental implications make it unworkable. For example, simply mapping the lower 48 states at a scale suitable for detailed regulatory use would involve a mammoth undertaking yielding nearly 14 million maps and costing in excess of \$500 million. Assessing the functions of every wetland in the country would be a far larger and more complicated task and would require staffing and funding many times that necessary to complete mapping alone.

There is no scientific basis for a nationwide ranking of functionally distinct and diverse wetland types; any such scheme to assign different levels of regulatory protection to wetlands nationwide would be highly subjective and unscientific. The H.R.1330 proposal to buy all of the highest ranking wetlands would be economically infeasible as the Congressional Budget Office estimates the acquisition costs for just the lower 48 states to range between \$10 billion and \$45 billion.

Finally, an *a priori* categorization and ranking approach would not provide for

consideration of the individual impacts associated with specific projects. As a consequence, small projects with minor impacts would be precluded from "high value" wetlands while, at the same time, large and environmentally damaging projects would be automatically approved if they were located in "lower value" wetlands. A nationwide *a priori* categorization scheme would further complicate the Section 404 program and would conflict with the Administration's goals of administering a scientifically sound regulatory program that is efficient, predictable and understandable.

In contrast to nationwide *a priori* categorization, local or regionally developed advance planning at the watershed level can provide a scientifically sound and workable framework for early consideration of variations in wetland functions within the Section 404 program. Appropriate functional assessment techniques can be applied to all wetlands within the boundaries of a particular watershed or planning area, and reasonably foreseeable development needs can be superimposed upon this inventory and assessment to identify appropriate regulatory responses in advance of specific permit applications. Highly functional and ecologically significant wetlands can be identified as deserving a very high standard of protection; conversely, wetlands with limited function and ecological significance, or activities that would cause minimal environmental harm, can be identified as appropriate for general permits or other regulatory streamlining methods.

When outside the context of an advance planning effort, the Section 404(b)(1) Guidelines provide the Corps and EPA with the flexibility to appropriately scale the regulatory response to reflect the relative function of the affected wetland, the character of the proposed discharge, and the probable environmental impact.

The Administration recognizes that wetland functions and project impacts vary from case to case and that permit applicants deserve a timely and predictable regulatory response that is appropriate for the project being proposed. To this end, the Administration proposes the following actions:

- ***Issue Section 404(b)(1) Guidelines Flexibility Guidance.*** EPA and the Corps will issue guidance to their field staff to clarify and standardize implementation of the flexibility afforded by the 404(b)(1) guidelines to make regulatory decisions regarding the analysis of project alternatives based on the relative severity of the environmental impact of proposed discharges. This guidance clarifies, for example, that small projects with minor impacts are subject to a less rigorous compliance analysis compared to larger projects with more substantial environmental impacts.

- ***Develop Improved Analytical Tools for Wetlands Functional Assessment.*** The agencies will expedite development of a new approach for wetland functional assessment known as the "i, Classification System (HGM). The HGM methodology is being developed by the agencies and the academic community as an improved analytical tool to make timely and accurate assessments of wetland functions. This tool will assist the agencies in assessing the relative severity of environmental impact of proposed discharges

o determine an appropriate regulatory response consistent with the 404(b)(1) Guidelines flexibility guidance referenced above.

- **Encourage Advance Planning Efforts.** The agencies will provide technical assistance for advance planning efforts addressing wetlands conservation, and will counsel planning participants on methods to link local or regional planning with Section 404 regulatory decision making. Wetland categorization will be supported within the context of an approved advance plan to provide landowners with early identification and characterization of wetlands on their property, streamlined permit review, and more flexible mitigation sequencing where appropriate.

- **Regionalize General Permits for Activities in Defined Categories of Waters.** The Section 404 program already embodies a form of wetlands categorization through use of Nationwide Permit 26 (NWP 26), a "category of waters" general permit that authorizes discharges into isolated waters and headwaters. The Corps will undertake, in close coordination with relevant State and Federal agencies, a field level review and evaluation of NWP 26 for the purpose of regionalizing and improving its use. Congress should amend Section 404(e) to recognize the concept of regionalized "category of waters" general permits.

Technical Note: Development of "category of waters" general permits by the Corps, in consultation with EPA, FWS, and the National Marine Fisheries Service (NMFS), should be based on regional considerations of the types of waters subject to the general permit and the defined categories of activities (i.e., defined by character, size, location within the watershed) subject to authorization in these waters such that, in combination, the environmental effects of the discharges are determined to be minimal.

E. GEOGRAPHIC JURISDICTION

The term "geographic jurisdiction" encompasses a set of wetlands issues that concern the determination of which waters fall under the jurisdiction of the Section 404 program of the Clean Water Act. These issues include the delineation manual that specifies the methodology by which wetlands are identified; the definitions of "wetlands" and "waters of the United States;" "artificial" wetlands; and isolated waters.

Issue Definition: Delineation Manual

As previously indicated, there has been a great deal of controversy surrounding the manuals that Federal agencies use in the field to delineate wetlands. The 1989 Manual was strongly criticized by some who claimed that it was an attempt by the bureaucracy to greatly *expand* the geographic jurisdiction of wetlands regulation without opportunity for public involvement. The proposed 1991 Manual that followed was roundly criticized by those who claimed that it would greatly *reduce* the geographic jurisdiction of wetlands protection. In an attempt to resolve this

controversy, in the fall of 1992 the Congress directed EPA to fund a National Academy of Sciences (NAS) study of wetlands delineation. That study is expected to be completed in the fall of 1994. Since January 1993, both the Corps and EPA have adopted the 1987 Manual, which was in use prior to the issuance of the 1989 Manual.

Administration Position: The Clinton Administration supports the use of the 1987 Wetlands Delineation Manual by the Corps, EPA, SCS, and FWS pending the receipt of the National Academy of Sciences study. (See "Guarantee Consistency in Delineations on Agricultural Lands" under AGRICULTURE.) The adoption of the 1987 Manual by the Corps and EPA has increased confidence and consistency in identifying wetlands and has diminished the controversy associated with the 1989 and 1991 manuals. If the Federal agencies jointly conclude that the 1987 Manual should be revised to respond to recommendations of the National Academy of Science, any proposed changes will be the subject of a formal rulemaking procedure that will provide full opportunity for public comment. In addition, any changes will be field tested prior to final adoption to determine their impact in the real world.

To increase public confidence in the Section 404 regulatory program, the Administration recommends that the Congress endorse the continued use of the 1987 Manual in the reauthorization of the Clean Water Act, pending recommendations that may result from the National Academy of Sciences study.

Issue Definition: Defining "Waters of the U.S." and "Wetlands"

The Clean Water Act regulates discharges to "navigable waters," which are defined in the statute as "waters of the United States." However, the Act does not contain a definition of "waters of the United States." Similarly, while the Act refers to "wetlands," the statute does not define the term. Explicit definitions of these terms in the statute, consistent with longstanding regulatory definitions, would clarify Congress's intent with regard to the scope of geographic jurisdiction under the Act.

Administration Position: The Administration recommends that Congress incorporate the definition of "waters of the United States" contained in existing EPA and Corps implementing regulations. To provide additional consistency among Clean Water Act and Food Security Act programs, Congress should incorporate the relevant portions of the definition of "wetlands" contained in the Clean Water Act regulatory definitions, which is essentially identical to the wetlands definition in the 1990 Farm Bill.

The EPA/Corps definition of "waters of the United States" explicitly includes recently promulgated language clarifying that "prior converted croplands" are not jurisdictional for purposes of the Clean Water Act. The statutory definition should also incorporate examples of "artificial" wetlands to clarify that such waters do not fall under the jurisdiction of the Act (see the following issue).

The Administration also recommends that Congress add examples of "isolated waters" to

the statutory definitions of wetlands. From a scientific standpoint, isolated wetlands perform many of the same vital functions performed by other scientific wetlands, such as flood and erosion control, and groundwater recharge, as well as providing critical habitat for migratory waterfowl and other wildlife, and contribute to achieving objectives of the Clean Water Act both individually and as a class.

Issue Definition: "Artificial" Wetlands

Neither the Clean Water Act or its implementing regulations distinguish between natural and created wetlands. However, certain "artificial" wetlands do not normally exhibit the values and functions typically attributed to natural wetlands. These "artificial" wetlands are created from upland due to human activity and would revert to upland if such activity ceased. The fact that these areas are not specifically excluded from the jurisdiction of the Clean Water Act in either statute or regulation has caused confusion.

Administration Position: The EPA and the Corps will incorporate examples of "artificial" wetlands (such as non-tidal drainage and irrigation ditches excavated on upland), into their regulations to clarify the types of waters that are generally not subject to Clean Water Act jurisdiction because they are created out of upland. The Administration also recommends that the Congress incorporate examples of "artificial" wetlands into the statutory definition of wetlands to clarify that such waters do not fall under the jurisdiction of the Act (see previous issue).

F. MITIGATION AND MITIGATION BANKING

Issue Definition: Mitigating the harmful effects of necessary development actions on the Nation's waters is a central purpose of Federal wetland regulatory programs. The 404 regulatory program relies upon a sequential approach to mitigating these harmful effects by first avoiding unnecessary impacts, then minimizing environmental harm, and, finally, compensating for remaining unavoidable damage to wetlands and other waters.

Mitigation banking refers to a wetland restoration or creation effort undertaken expressly for the purpose of compensating for unavoidable wetland losses in advance of development actions, when compensatory mitigation is not appropriate or practicable at the development site. Units of restored or created wetland are expressed as "credits", and accumulated credits are subsequently withdrawn to offset "debits" incurred at the development site.

Administration Position: The sequential approach to mitigation provides a logical, predictable, and reasonable framework for mitigating impacts associated with proposed development actions. The Administration supports the use of mitigation banking in appropriate circumstances as a means of compensating for authorized wetland impacts.

The Administration is proposing the following actions to ensure that mitigation of environmental impacts within the Section 404 program is effective, predictable, and

consistent with a watershed management perspective:

- ***Issue Mitigation Planning Guidance.*** EPA and the Corps, in coordination with FWS and NMFS, will issue guidance to their field staff to clarify the requirements for developing compensatory mitigation conditions in Section 404 permits. This guidance is intended to increase the success of mitigation projects in offsetting impacts to wetlands and other waters resulting from permitted activities. This guidance is expected to help permit applicants by providing greater consistency and certainty with regard to how Section 404 mitigation requirements are applied.

- ***Endorse the Use of Mitigation Banking Under the Section 404 Regulatory Program.*** While a number of technical and procedural questions regarding the establishment and long term management of mitigation banks remain, conceptually banking offers numerous advantages. Banking provides for greater certainty of successful compensatory mitigation in the permit process by requiring mitigation to be established before permits are issued. Banks are often ecologically advantageous because they consolidate fragmented wetland mitigation projects into one large contiguous parcel that can more effectively replace the lost wetland functions within the watershed. Mitigation banks also provide a framework for financial resources and planning and technical expertise to be brought together in a fashion often not possible with smaller mitigation projects.

Congress should recognize the advantages offered by mitigation banking to compensate for wetlands losses and should endorse the appropriate use of banking as a compensatory mitigation option under the Section 404 regulatory program. Congress should also explicitly allow use of the State Revolving Fund by States to establish and operate mitigation banks.

- ***Issue Mitigation Banking Guidance.*** EPA and the Corps, in coordination with FWS and NMFS, will issue guidance to their field staff to clarify the manner in which wetlands mitigation banking is appropriately used within the Section 404 regulatory program. This guidance will provide interim direction pending the results of additional studies, but will encourage, within environmentally sound limits, the use of mitigation banks for compensatory mitigation under Section 404.

- ***Develop Improved Analytical Tools.*** The agencies will expedite current efforts being coordinated by the Corps Waterways Experiment Station to develop an improved wetland functional assessment tool, the Classification System, to assist in conducting impact analysis and determining appropriate and effective mitigation measures.

G. RESTORATION

Issue Definition: This Nation has lost nearly half of the wetland acreage that existed in the lower 48 States prior to settlement. The effect of this wetland loss is reflected in declining populations of fish, waterfowl, and other living things dependent upon the aquatic environment; in degraded water quality; and, most recently, in the extent of flooding in the Midwest.

The 404 regulatory program under the Clean Water Act and the Swampbuster provisions under the Food Security Act are attempts to stem this loss of wetlands. At best, the regulatory approach can ensure no further net loss. But to achieve a positive increase in the Nation's wetlands will require the healing of damaged wetlands. That is the opportunity provided by wetlands restoration.

Our ability to restore wetlands, particularly inland wetlands in agricultural areas, has been well-established over the last decade. A number of private and governmental entities have successfully restored degraded or lost wetlands to productive status. For example, the Fish and Wildlife Service, in cooperation with private landowners across the nation, has implemented 9,500 restoration projects affecting 200,000 acres. Last year, a 50,000 acre pilot of the USDA wetlands reserve program received proposals from 2,300 farmers to restore 500,000 acres.

Administration Position: Restoring former wetlands that have been drained or otherwise destroyed in the past to functioning wetlands today is key to achieving the Administration's interim goal of no net loss of the Nation's remaining wetlands, and it's long term goal to increase the quality and quantity of the Nation's wetlands base.

In support of a broad-based effort to restore that portion of the Nation's historic wetlands base that has been destroyed or degraded in the past, the Administration proposes to take the following actions:

- ***Wetlands Reserve Program.*** The 1994 Appropriations act will provide for 75,000 new acres to be enrolled in the Wetlands Reserve Program. The Act will also more than double – to 20 – the number of states eligible for participation in the program. The administration will also use this program in the Midwest to restore wetlands in the course of providing financial assistance to farmers and improved flood protection for all those affected by the recent flooding. The Administration will also pursue full funding of the President's budget request for the Wetlands Reserve Program in FY 1995, and will seek to have this program expanded in the 1995 Farm Bill.

- ***Promote Wetlands Restoration through Voluntary, Cooperative Programs and Outreach Activities.*** Wetlands conservation efforts have historically focused largely on wetlands regulation and acquisition. These programs continue to be essential to a comprehensive strategy for achieving the Administration's wetlands goals. However, stemming the net loss of the Nation's wetlands base and achieving a long term increase in wetlands acreage is dependent upon restoring wetlands that have been drained, diked,

or otherwise destroyed in the past.

The universe of restorable former wetlands is predominantly on private lands, and the Administration presently has in place a number of Federal programs that focus on or incorporate voluntary, cooperative efforts to restore wetlands on private lands (e.g., FWS' Partners for Wildlife program, Bay and Estuary program, and North American Waterfowl Management Plan Joint Ventures; USDA's Wetlands Reserve, Water Bank, Water Quality Incentives, Forestry Incentives, and Stewardship Incentives programs.) The Administration will inventory existing Federal programs that seek to restore wetlands through cooperative, voluntary agreements and outreach efforts with private and other non-Federal landowners, and will examine opportunities to expand such programs, including education and outreach activities.

- ***Revise the Executive Order on Wetlands.*** The existing executive order on wetlands will be revised to incorporate the Administration's interim and long term wetland goals and to establish wetlands restoration as an essential vehicle for Federal and quasi-Federal agencies to achieve those goals.

H. ROLES OF FEDERAL AGENCIES

Issue Definition: Public support for Federal wetlands protection programs, such as the Clean Water Act Section 404 regulatory program and the Food Security Act Swampbuster program, have suffered during recent years from a perception that multiple agency roles in the Administration of these programs has contributed to confusion, delays, overlap, and a general sense that no single agency is "in charge".

Administration Position: The Administration is initiating steps to streamline the implementation of Federal wetlands protection programs by reducing duplication, overlap, and delay by emphasizing the ultimate role of a single Federal decisionmaker. For example, a memorandum of agreement has recently been signed to give the Soil Conservation Service, in consultation with the Fish and Wildlife Service, the final authority to make delineations and mitigation decisions on agricultural land (see AGRICULTURE).

The Administration is committed to providing for effective and timely participation by the agencies with roles in Federal programs affecting wetlands while emphasizing the ultimate role of a single Federal agency decisionmaker. This increased coordination between the relevant agencies will be accomplished through the following mechanism:

- ***Continue Implementation of the 1992 Interagency Section 404(q) MOAs.*** EPA, the Corps, FWS, and NMFS recently issued guidance to their field staff to improve interagency coordination procedures established in the 1992 Memoranda of Agreement under Section 404(q). These MOAs define a process for expeditious review and

resolution of agency concerns regarding individual permit decisions. The MOAs, also establish procedures for resolving concerns involving the implementation of Section 404 program policy that can be accomplished without delaying individual permit decisions.

The agencies will continue to use the 1992 MOAs and, based on this experience, determine in the future whether additional guidance or revisions to the MOAs are necessary. It is critical to the ultimate effectiveness of the Section 404 program to preserve the advisory responsibilities of Federal resource agencies such as the EPA, FWS and NMFS to reflect their relative expertise and authorities while reducing duplication, overlap, and delay. It is equally critical to recognize and understand the Corps' leadership and final decision-making role as "project manager" for the evaluation of permit applications under the Section 404 regulatory program.

I. ROLE OF STATE, TRIBAL, AND LOCAL GOVERNMENT

Issue Definition: Decisions on where and how to protect or restore wetlands are often most appropriately made at State, Tribal, or local levels. However, the current Section 404 regulatory program is run at the Federal level, except for certain waters in one State (Michigan). Many States, Tribes, and local governments do have their own wetlands programs, which often overlap, are inconsistent with, or are simply distinct from Federal programs. This has resulted in inefficiency, frustration by the regulated public, and significant confusion.

Administration Position: The Administration is committed to increasing State, Tribal, and local government roles in Federal wetlands protection and restoration efforts. To increase consistency and clarity and reduce the confusion generated by the current relationship between the Federal government and State, Tribal, and local governments in wetlands protection and restoration, and to bring decision making to more appropriate levels, the Administration is taking the following actions:

- ***Assist States, Tribes, and Local Governments in Taking a Stronger Role in Wetlands Protection.*** The Administration will provide technical and financial assistance and guidance to States, Tribes, and local governments to assist them in taking more of a leadership role in wetlands protection, e.g., through State/Tribal assumption of Section 404, development of comprehensive State/Tribal Wetland Conservation Plans, application of State/Tribal Section 401 Certification authority to wetlands, development of Program General Permits under Section 404, and better coordination between State, Tribal, and local permit programs and the Section 404 program.

- ***Provide Incentives for States, Tribes, and Regional and Local Governments to Integrate Watershed and Wetlands Planning.*** The CWA should authorize the development of State/Tribal watershed protection programs, requiring local and regional involvement and Federal approval of the State/Tribal programs. Wetlands should be

incorporated into the overall watershed approach, with minimum requirements for wetlands protection and restoration planning. Approved watershed plans would receive a high priority for technical and financial support for activities such as mitigation banking, advance identification, and categorization under the Section 404 regulatory program. There would also be a high priority given to developing programmatic General Permits that defer to local regulatory programs implementing approved watershed plans.

● ***Increase Deference to State, Tribal, Regional, and Local Wetlands Decisionmaking.***

The Corps will issue guidance which specifies the circumstances under which the Federal agencies will defer to existing State, Tribal, regional, and local programs that effectively regulate Section 404 activities, through issuance of Program General Permits (PGPs). The guidance will also clarify the safeguards required to ensure these programs adequately protect wetlands and other waters.

The use of PGPs is designed to increase the roles of State, Tribal, regional, and local governments in wetlands protection, provide an incentive for watershed planning efforts, and reduce redundancy and overlap between these programs and the Federal Section 404 program. The Administration recommends that Congress amend Section 404(e) of the Clean Water Act to provide explicitly for issuance of PGPs with appropriate safeguards for approved State, Tribal, regional, and local regulatory programs.

● ***Endorse State/Tribal Wetlands Conservation Plans.*** Congress should endorse the development of State/Tribal comprehensive wetland plans, with the goal of building State and Tribal capacity to protect and manage their wetlands resources. These plans should generally be integrated into watershed protection plans. EPA is currently funding the development of 22 State Wetlands Conservation Plans; Congress should provide EPA the authority to use its Wetlands Grants program to fund both their development and implementation.

● ***Enhance State/Tribal Assumption of Section 404.*** Congress should provide EPA the authority to use its Wetlands Grants program to fund both development and implementation of State assumption of the Section 404 program. In addition, Congress should authorize partial assumption of the Section 404 program by States and Tribes as an interim step toward full assumption. By authorizing partial assumption of discrete areas within State or Tribal jurisdiction, the State/Tribe can get experience with the program as it develops full statutory equivalency, and the Federal government can defer to the State/Tribe as early as possible.

● ***Provide States/Tribes with Access to Wetlands Delineation Training.*** State and Tribal agencies will be encouraged to participate in the Federal interagency wetlands delineation training and certification programs, to strengthen their abilities to conduct wetlands delineations, and to improve consistency in wetlands identification among State and Federal wetlands programs.

● ***Improve Nationwide Permit 26 Through Regionalization.*** Category of Waters General

Permits can be extremely effective, with appropriate environmental safeguards, in authorizing small projects typically associated with private landowners and for reducing the workload burden on the Corps. In order to improve the implementation of existing Nationwide Permit 26 (NWP 26) in isolated waters and headwaters, Corps Districts, in close coordination with appropriate agencies, and with the opportunity for public notice and comment, will undertake a field level review of NWP 26 to develop regional descriptions of the types of waters subject to authorization. This regional review will specifically consider the function/values attributable to various types of isolated wetlands and headwaters in those areas, as well as regional factors such as cumulative losses and scarcity of particular classes of waters.

- ***Support Development of Mitigation Banks.*** Recognizing the advantages offered by mitigation banking to compensate for wetlands losses, EPA and the Corps will issue guidance to their field staff that clarifies the manner in which wetlands mitigation banking fits in the Section 404 regulatory program. In addition, Congress should endorse the appropriate use of banking as a compensatory mitigation option under the Section 404 regulatory program, and explicitly allow use of the State Revolving Fund to establish and operate mitigation banks. Wetland mitigation banking refers to the restoration, creation, enhancement, and in certain defined circumstances, preservation of wetlands expressly for the purpose of providing compensatory mitigation in advance of adverse impacts to wetlands.

J. SCOPE OF REGULATED ACTIVITIES

Issue Definition: The Clean Water Act Section 404 program regulates "discharges" of dredged and fill material to wetlands and other waters of the United States. In the past, these terms have been interpreted in a way that created regulatory "loopholes" under which certain projects could be specifically designed, using expensive and sophisticated methods, so that they did not require Section 404 authorization.

The environmental effects of these projects on wetlands were no different than less sophisticated projects involving discharges of dredged or fill material, which have been regulated under Section 404. Also, these loopholes have led to inconsistencies in how the Section 404 program has been implemented around the country.

Administration Position: The Administration is issuing a rule, and asking Congress to take corresponding legislative action, to close these regulatory loopholes by clarifying the types of activities that involve discharges of dredged or fill material subject to Section 404 review.

The following actions will result in better protection of wetlands, and improve the fairness, predictability, and consistency of the Section 404 program.

- **Clarify Definition of "Discharge of Dredged Material."** Under the final rule, this term is defined to ensure that discharges into wetlands and other waters will be consistently regulated when they are associated with excavation activities, such as ditching, channelization, or mechanized landclearing, that have environmental effects of concern. The rule explicitly excludes from Section 404 regulation discharges associated with activities that have only *de minimis*, or inconsequential, environmental effects. In an effort to reduce the impact of these changes on the regulation of minor activities with only minimal adverse environmental effects, the Corps will coordinate with EPA to develop additional general permits authorizing such minor activities. The revised definition does *not* affect the existing exemptions in Section 404(f) for ongoing farming, ranching, and silviculture.
- **Clarify Definition of "Discharge of Fill Material."** The agencies also are clarifying the definition of "discharge of fill material" to ensure that activities in waters of the United States that involve the non-traditional use of pilings (e.g., shopping malls, parking garages) will require Clean Water Act authorization. In an effort to reduce the impact of these changes on the regulation of minor activities with only minimal adverse environmental effects, the Corps will coordinate with EPA to develop additional general permits that authorize such activities.
- **Legislative Clarification of Scope of Activities Regulated Under Section 404.** Congress should amend the Clean Water Act to make it consistent with the agencies' rulemaking.

K. STATE OF ALASKA

Issue Definition: The extent and nature of Alaska wetlands reflect, in part, climatological and physiographic conditions found in no other State. More than 99% of Alaska's wetlands remain, and much of the State's developable lands are wetlands. This abundance of wetlands in combination with Alaska's short building season, leads some to claim that the Section 404 program places a heavier burden on Alaskans than on the rest of the country.

The previous Administration attempted to address some of these problems by proposing the "Alaska 1% rule" which would have excepted wetlands in Alaska from wetlands mitigation requirements until 1% of Alaska's wetland resources had been developed. The "Alaska 1% rule" was put out for public comment in November, 1992, and while 17% of the over 6,500 comments received favored the rule, the rest raised substantive concerns about its potential to have a devastating impact on the environment.

Objections to the proposed rule focused on several key considerations:

- An additional 1.5 million acres of Alaska's wetlands would be destroyed before the 1% threshold would be met, including potentially all of Alaska's 345,000 acres of extremely valuable coastal wetlands. Wetlands losses in Alaska have historically been greatest in coastal areas where the State's population is concentrated. For example, losses of high value coastal wetlands near

the cities of Anchorage and Juneau are estimated to exceed 50% of their historic base.

- The proposed rule would hinder management efforts for several Federally listed or proposed threatened and endangered species that utilize Alaska's coastal wetlands, as well as hastening the listing of additional candidate species.
- Although full in-kind compensation is often not possible or practicable, opportunities do exist for restoration or rehabilitation of disturbed areas in proximity to a proposed development that have the potential to benefit affected fish and wildlife populations.
- There is enough flexibility in the existing Section 404 regulatory program to respond to Alaska's unique concerns administratively. During the last 20 years, of the approximately 4,000 permit applications received by the Corps Alaska District, only 2.7% were denied; the remaining applications were either issued as individual or general permits, or withdrawn. Of the more than 3,000 individual permits issued, only 0.5% required compensatory mitigation.

Administration Policy: Because of the significant adverse environmental consequences that it would allow, the "Alaska 1% rule" will be withdrawn. The best way to address Alaska-specific concerns regarding the Section 404 program is through targeting the specific areas where questions in program policies or implementation have been raised. Finalizing the Alaska 1% proposed rule would have had far broader and avoidable, adverse environmental consequences.

The EPA and the Corps will, within the next 90 days, initiate meetings with the Federal resource agencies, State and local government agencies, representatives of native villages, industry groups including oil and fishing interests, and environmental groups, to consider other environmentally appropriate means to assure regulatory flexibility and the feasibility of alternative permitting procedures in Alaska.

In addition, the Administration is proposing a number of actions to improve implementation of the Section 404 regulatory program nationwide (e.g., issuing guidance on flexibility in the Section 404(b)(1) Guidelines, mitigation banking, mitigation planning, advance planning, programmatic general permits; establishing an administrative appeals process; providing for more explicit consideration of wetland functions; and regionalizing nationwide permit no. 26. See later discussion for more details). These actions, in combination with any Alaska-specific proposals developed as a result of the process outlined above, should contribute significantly to addressing many of Alaska's concerns with implementation of the Section 404 regulatory program.

L. TAKINGS

Issue Definition: Some critics of the Section 404 regulatory program have asserted that Federal efforts to restrict what landowners can do with wetlands on private property constitutes a "taking" of private property and requires compensation under the Fifth Amendment of the Constitution.

Legislation has been proposed that would require the compensation of landowners for "takings" that result from permit denial decisions, and other regulatory actions under the Section 404 program.

Administration Position: The Administration strongly supports private property rights. We recognize that fair and equitable administration of any Federal regulatory program involves more than strict technical considerations and must include sensitivity to the rights and expectations of citizens. Implementation of the Section 404 program often requires a difficult balancing of environmental protection, public interests, and individual interests. Fortunately, although public and private interests are frequently competing, they are only rarely mutually exclusive.

Wetlands regulation under Section 404 does not necessarily result in a restriction on use of property. Many activities undertaken on wetlands either are not regulated at all, explicitly exempted from regulation, or authorized by general permits. In situations where individual permits are required, the Federal agencies can work with permit applicants to design projects that meet the requirements of the law and protect the environment and public safety, while accomplishing the objectives and protecting the property rights of the applicant.

However, in some rare instances the public interest and the private interests of a landowner may be irreconcilable. In such instances, it should be emphasized that property owners have never had the right to use their property in a manner that injures others: the filling of a wetland area could result in the flooding of adjoining property; could have an adverse effect upon local water quality; or could endanger a commercial fishing area upon which others depend for their livelihood. Restrictions on the actions of some property owners may, in fact, be necessary to protect the property rights, safety, or economic interests of other individuals or the community at large.

Moreover, in those situations where a property owner believes that government action amounts to a taking, the courts are available to review such claims and determine whether compensation is constitutionally due. There are well-established constitutional and legal principles relating to the question of when a governmental regulation of private property amounts to a taking which entitles the owner to compensation. Due to the unique nature of each situation, they must be considered on a case-by-case basis. Therefore, it is unnecessary and unwise to address this issue through legislation.

The Administration is strongly committed to reducing the impact of the 404 program on landowners. Many of the Administration positions that have been described in this paper are designed to make the program as efficient, predictable, consistent, and equitable as possible (see ADDRESSING LANDOWNER CONCERNS, AGRICULTURE and CATEGORIZATION)

VI. POSTSCRIPT: LESSONS FROM THE FLOOD

The entire Nation feels the pain of those Americans experiencing the physical destruction and economic loss caused by the disastrous floods that have devastated the Nation's heartland. Many lives have been lost, and billions of dollars in damage has been caused to property and crops. In the short term, we must use the tools available to us to assist those struggling to deal with severe economic hardship due to the floods. We must concentrate our attention on helping people rebuild their lives by protecting our riverfront communities and providing assistance to businesses and the agricultural community adversely affected by the flood

We must also look to the future, and learn from this flood how to more effectively protect human health and safety, property, and the environment. Many scientists have concluded that past manipulation of the rivers in the Midwest has contributed to the current level of devastation by separating the river channels from their natural floodplains, eliminating millions of acres of additional flood storage capacity. Wetlands within the floodplain and higher in the watershed control floods by absorbing rain, snow melt, and floodwaters and releasing it slowly, thereby reducing the severity of downstream flooding. The states in which flooding has caused the most damage are those midwestern states which have lost the highest percentage of their wetland resources.

We must be cautious not to repeat policies and practices which added to the destruction of these floods. One way to assist landowners while alleviating some flood risks by enhancing flood control is through funding wetlands restoration and acquisition programs targeted to help those in flood-ravaged areas. Programs such as the USDA Wetlands Reserve Program provide farmers with much needed support and increase the quantity of flood-absorbing wetlands in this region.

Of course, we recognize that wetlands and river system restoration and protection alone will not suffice. It will be critically important that we quickly rebuild some of the flood control structures. However, we have learned the importance of also looking at alternative non-structural measures that may provide as much or better flood control at the same or lower cost. Such measures would include using more natural river corridor systems and wetlands, rather than extensive levee systems for the length of the river. It is important that *all* potential flood control measure, both structural and non-structural, be considered and evaluated from a pragmatic and cost-benefit standpoint.

It is not a question of whether to protect cities and farms; it is a question of how best to protect them. In the case of riverfront communities, protective levees may be the only reasonable answer, but in other circumstances, natural answers may make more sense. We can identify ways to protect and restore our river and wetlands systems so that they work *for* us, integrated with structural flood control measures. Of course, wetlands that provide flood control generally will also provide other important functions, such as fish and wildlife habitat, water quality improvement, and recreational opportunities. In our response to this flood-borne tragedy, the Administration will pursue measures that are, most importantly, the most

effective means to prevent this catastrophe from happening again. Doubtless this will involve a combination of repair and construction of flood control structures together with restoration of natural flood attenuating river and wetlands systems.