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The Comprehensive Wetlands Conservation and Management Act of 1991: A Restructuring of Section 404 that Affords Inadequate Protection for Critical Wetlands

Denis Collins Swords*

"A great battle for dominance occurs daily in Louisiana’s coastal zone. The Mississippi River struggles to dominate the Gulf water while the Gulf incessantly wears away at the handiwork of the River. Few in Louisiana comprehend the immensity and grandeur of this encounter. For 5000 years the River has built the present coastal zone features and for 5000 years the sea has fought to crumble them. With ease we comprehend and appreciate the beauty of the Grand Canyon. But the Mississippi River delta system, one of the 10 great delta systems in the world, is as significant and artful as any canyon or mountain range."—Dr. Sherwood M. Gagliano

I. INTRODUCTION

By sponsoring legislation before the 102nd Congress, two members of Louisiana’s Congressional delegation positioned themselves at the forefront of a current battle waged over wetlands regulation. The Louisiana delegation sponsored identical bills both in the United States Congress, H.R. 1330, and in the Senate, S. 1463, titled the Comprehensive Wetlands Conservation and Management Act of 1991. By replacing the current wetlands regulatory scheme, the proposed legislation promises long-term effects on wetlands across the nation. The legislation’s potential impact is particularly great for Louisiana, “the national leader in amount of coastal wetlands and in the amount of wetlands lost each year.”

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2. Introduced by Louisiana Representative J. Hayes.
3. Introduced by Louisiana Senator J. Breaux.
The two bills propose major changes in the type and amount of property qualifying as wetlands and in the degree of protection afforded wetland areas. Proponents of the measures perceive benefits to economic development through less restrictions on the use of wetlands. The proponents insist the proposed legislation "provides a more realistic view of wetlands, protecting those that are important and allowing development of areas that aren't." Opponents fear the legislation offers insufficient protection for wetlands. According to the opponents, the proposed legislation diminishes protection currently afforded wetlands by both loosening restrictions governing development activities in wetlands and by reducing the amount of acreage protected as wetlands.

This comment investigates the current battle over wetlands regulation. An initial overview explains the importance of wetlands and discusses the nature of the problems inherent in wetlands regulation. This investigation necessarily proceeds to a brief review of the current wetlands regulatory vehicle, section 404 of the Clean Water Act (CWA). Next, this comment focuses on the Comprehensive Wetlands Conservation and Management Act of 1991, H.R. 1330/S. 1463 (Hayes-Breaux bill), because of claims that "[a]ll other legislation will be judged against the Hayes [and Breaux] legislation" and because 172 members of the House of Representatives and 20 Senators signed as co-sponsors of the bills. The comment pays particular attention to a proposed wetlands classification scheme in the Hayes-Breaux bill, critically judging the degree of protection afforded wetlands under that scheme. Finally, the comment suggests an action plan that includes passing one section of the Hayes-Breaux bill and further includes alternatives to passing the remaining sections of the bill.

II. BACKGROUND

Since 1932, "Louisiana has lost more than 1,500 square miles of land to the Gulf of Mexico." The amount of land surrendered to the Gulf represents an area as large as "the city of Baton Rouge, the District of Columbia, Bermuda, the Cayman Islands[,] a dozen Gibralters and . . . the state of Rhode Island" combined. Recently, the state received

6. Id. at B3.
12. Id.
good news; from 1983 to 1990 the rate of erosion of Louisiana's coastal wetlands decreased from 50 to 25 square miles per year. Alarming predictions of future loss rates of 100 square miles per year now appear discredited.

In spite of the reduced rate, Louisiana's coast continues to erode rapidly. Louisiana "suffers about 80% of the country's wetlands loss." The fate of Louisiana's coast causes great concern because the state's "coast [is] so vast that it holds one-quarter of the Nation's wetlands, [and] so rich that it produces almost one-third of the Nation's seafood." But Louisiana is not alone. Over the "last 200 years, 30 to 50 percent of the wetlands in the lower 48 states have been converted to other uses by activities such as agriculture, mining, forestry, oil and gas extraction, and urbanization." While natural events such as "erosion, sedimentation, subsidence, and sea level rise" contribute to the loss of wetlands, "at least 95 percent of actual wetland losses over the last 25 years were due to man's activities."

"[W]etlands are sensitive transitional areas located between open water and dry land that are saturated with water at least part of the growing season ... " Such areas generally include "the marshes, swamps, bogs, bottomlands, and tundra that comprise about 5 percent of the contiguous United States and about 60 percent of Alaska...." Once perceived as a "menace ... and a hinderance to land development," wetlands are now perceived as "vital natural resources of critical importance to the people of this country."

Indeed, wetlands provide both important intrinsic values and ecological services. But wetlands

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13. See Anderson, supra note 11.
14. Oliver A. Houck, Ending The War: A Strategy To Save America's Coastal Zone, 47 Md. L. Rev. 358, 359 n.6 (1988). Houck notes that "Louisiana is losing about 50 square miles each year, an area the size of the District of Columbia. In ten years that rate will double."
18. Id.
20. OTA Report, supra note 17, at 3.
21. OTA Report, supra note 17, at 37.
22. OTA Report, supra note 17, at 38 (citation omitted).
23. OTA Report, supra note 17, at 37. "[Some people] may wish to protect wetlands simply out of a desire to preserve natural areas for future generations or because they are often the last areas to be developed."
24. OTA Report, supra note 17, at 6. Ecological services of wetlands include: 1) floodpeak reduction—the temporary storage of runoff and slowdown of downstream flow; 2) water-quality improvement—the temporary or permanent retention of pollutants such
also serve as “attractive sites for industrial, agricultural, and residential developments, [and] wetland owners have strong economic incentives to replace wetlands with airports, port facilities, soybean fields, and shoreline housing.” The tension created by the opposing interests makes wetland preservation a difficult task. Currently section 404 of the CWA “is the heart of the nation’s wetlands protection program” directed at preventing further wetlands destruction. When it originally drafted section 404 as part of the Federal Water Pollution Control Act Amendment of 1972 (FWPCAA), Congress did not intend that the measure protect wetlands. Rather, Congress enacted section 404 to cover dredge and fill activities in navigable water bodies. One United States Senator claims that originally section 404 “was not adopted as a wetlands regulatory program.” The Senator states that the courts and federal agencies expanded section 404 to include wetlands, creating “administrative nightmares, confusion and frustration among our constituents who are told they cannot use their land because it is a wetland.”

as “suspended materials, excess nutrients, toxic chemicals, and disease causing microorganisms,” thereby improving the quality of water flowing through the wetland; 3) general needs of food and habitat—including provisions for 20 percent of all plants and animals listed as endangered or threatened; 4) shoreline stabilization—reduction of shoreline erosion caused by large waves and flooding; and 5) ground water recharge—supplementing regional ground water through percolation. See generally Bhavani Prasad V. Nerikar, Comment, This Wetland is Your Land, This Wetland is My Land: Section 404 of the Clean Water Act and its Impact on the Private Development of Wetlands, 4 Admin. L.J. 197 (1990).


Critics of section 404 claim it "represents an unprecedented federal presence in land use regulation." 30 One United States Senator finds section 404 "a classic example of federal agencies and the courts carrying a law far beyond the original intent of Congress." 31 The Senator complains that section 404 "has been used to open the door to federal regulation of adjacent wetlands, 75 percent of which are privately owned." 32 Proponents of section 404 feel it "remains the most effective means of preserving the nation's diminishing wetland resources" in spite of its perceived shortcomings. 33

Wetlands have many valued uses other than their use as a natural resource. For example, wetlands possess value as a key area for oil and gas exploration and production, and as a location for real estate development activities. Because the different uses thwart preservation of wetlands as a natural resource, "more is at stake in the wetlands field where the decision is whether or not to allow the activity at all than in many other areas of environmental law where the decision is what level of pollution control to require for the activity." 34 This level of decision likens section 404 to a national zoning law under whose auspices public interest groups can prohibit major proposed developments.

Since the enactment of the FWPCA, Congress has generally embraced wetlands protection. But "the 102nd Congress is being pressed by criticisms that implementation of the Federal wetland regulatory program under section 404 exceeds congressional intent." 35 Recent events strengthening wetlands protection mobilized the private interests pressing Congress for less regulation. Whereas environmentalists hoped to capitalize on President Bush's 1988 campaign promise of "no net loss of wetlands," 36 they now find themselves in a struggle to maintain the current protections in the CWA. One House of Representatives aide

30. Blumm and Zaleha, supra note 25, at 698 (footnote omitted).
32. Id.
33. Blumm and Zaleha, supra note 25, at 698 (footnote omitted). See also Getches, supra note 26, at 685 stating:
This provision, § 404 of what is now known as the Clean Water Act, has become a symbol of hope for conservationists who contend that the law is versatile enough to reach a panoply of insults to the environment and a symbol of federal overreaching to developers caught in its widening regulatory compass. (footnote omitted).
summarized the environmentalists' position: "They've been completely outflanked by a sophisticated and well-oiled lobbying machine behind" bills that environmentalists find antagonistic to wetlands protection.\textsuperscript{37}

The campaign to ease wetlands restrictions began with the 1989 implementation of a new Wetlands Delineation Manual. The manual changed the technical criteria considered when identifying wetlands, thereby greatly expanding the area subject to section 404 regulation.\textsuperscript{38} Use of the new manual created a grass-roots movement of homebuilders and farmers that was later joined by oil and gas interests intent on lobbying Congress to ease wetlands restrictions.\textsuperscript{39} Events in February of 1990 created a second catalyst for the shift. At that time, the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA), after several years of disagreement, reached an accord over mitigation requirements for wetlands that strengthens protection efforts.\textsuperscript{40} These actions precipitated the introduction of "[a]bout 30 bills with wetland provisions"\textsuperscript{41} in the 102nd Congress.\textsuperscript{42} Six of the "bills are clearly aimed

\textsuperscript{37} Kriz, supra note 10, at 1920.

\textsuperscript{38} Id. One sponsor of the Hayes-Breaux bill claims that the Wetlands Delineation Manual renders Phoenix, Arizona one of the largest wetlands in the United States. Representative J. Hayes, speech at Paul M. Hebert Law Center, Louisiana State University (Mar. 9, 1992) [hereinafter Hayes Speech].

\textsuperscript{39} Kriz, supra note 10, at 1919-20. Jane Nicholes, Bogged Down, The Times of Acadiana, Nov. 6, 1991, at 13 reports that one group representing private citizens is the National Wetlands Coalition. The paper reports that Robert Szabo, a Washington D.C. attorney originally from Lafayette, Louisiana, heads the group. According to the Times of Acadiana, the National Wetlands Coalition:

is an impressively large group of business, oil and gas, real estate, agriculture and landowner interests that formed about the time President George Bush got elected and made his "no net loss" pledge to preserve the nation's wetlands.

Its chair is the head of the Louisiana Land and Exploration Co., which, according to Szabo, ran into repeated and expensive delays in getting permits for levees and other measures that would protect coastal wetlands owned by the company.

The coalition, says Szabo, wanted input into changes in wetlands regulation, and it eventually centered on the Section 404 permit process. The coalition is behind Hayes' bill, which would change the definition of wetlands and the process of regulating activities on it [sic]. But the biggest change would be to classify wetlands based on function and importance.

\textsuperscript{40} Environmental Protection Agency and Department of Defense, Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines (Feb. 7, 1990) [hereinafter Guidelines MOA].

\textsuperscript{41} Zinn, supra note 35, at 3.

\textsuperscript{42} Jeffrey A. Zinn and Claudia Copeland, Wetlands Issues in the 102nd Congress, Congressional Research Service Issue Brief 12-13 (Jan. 17, 1992) composed the following "selected list of bills that would affect wetland resources if enacted."

\textit{H.R. 251 (Bennett) Wetlands No Net Loss Act of 1991. Promotes the conservation and enhancement of wetlands and offsets or prevents the loss of
at revising the section 404 program. Before reviewing the proposed legislation comprising the main topic of this comment, a brief review of section 404 of the CWA follows.

III. Overview of Wetlands Regulation Under § 404

A. Administrative Responsibilities

1. Corps Authority

Section 404 creates an administrative anomaly within the provisions of the CWA by carving out from the general permit authority of the Administrator of the EPA (Administrator) a specific authority for the Secretary of the Corps (Secretary). The Secretary maintains authority...
to specify disposal sites for the deposit of two types of pollutants: dredged material and fill material. Under section 404, the Secretary of the Corps “may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” Dredged material “means material that is excavated or dredged from the waters of the United States.” Fill material “means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an [sic] waterbody.” The discharge of dredged and fill material means the addition of such materials to the waters of the United States.

Section 404 “represents a compromise between those who would have given EPA virtually complete control over the regulation of discharges of dredged and fill material . . . and those who would have favored overwhelming dominion by the Corps of Engineers . . . .” The Corps obtained permitting authority for two reasons. First, proponents viewed section 404 as an extension of the Corps’ prior administration of dredging activities under the Rivers and Harbors Act. Second, the Corps opposed regulation of its extensive dredge and fill activities by another agency. Thus, section 404 originated as a tool, implementing

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45. 33 C.F.R. § 323.2(c) (1991). The discharge of dredged material occurs with “any addition of dredged material into the waters of the United States . . . , [but] does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.” Id. § 323.2(d).
46. Id. § 323.2(e).

The term “discharge of fill material” means the addition of fill material into the waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewerage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

Id. § 323.2(f).
48. 33 U.S.C. § 403 (1991). “[I]t shall not be lawful to excavate or fill, or in any manner to alter or modify . . . any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.”
49. Want, supra note 34, at 2-7.
federal power under the commerce clause, to facilitate the Corp's permitting program "for traditional 'dredge and fill' activities in navigable waters" rather than as a means for protecting wetlands.50 Under the compromise agreement, the Corps' authority includes initial permitting, but the Administrator of the EPA maintains final authority through the right to exercise a veto power under section 404(c).51 Section 404 also requires the Administrator, in conjunction with the Secretary, to develop guidelines for use in permit application decisions and for specifying disposal sites.52 The basic "distinction in the roles of the two agencies is that the Corps administers the wetlands permit program and the EPA mostly exercises certain review and policy-setting functions."53

2. EPA Authority

Section 404(c) requires the EPA to issue guidelines for the Corps' consideration of permit applications, spelling out how and on what basis the Corps may issue or deny a permit. In addition, the EPA maintains a veto authority under section 404(c).54 The section authorizes the Administrator to "prohibit the specification ... of any defined area as a disposal site ... whenever he determines ... that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas."55 Thus, section 404 sets up an interrelated, complex system authorizing the EPA's oversight of the Corps' permitting process.

B. Jurisdiction

1. Regulated Waters

Originally, under the FWPCA, the Corps only regulated those waters within its traditional jurisdiction56 as established under the Rivers and Harbors Act.57 The Rivers and Harbors Act confined the Corps' regulatory role to activities affecting the "navigable capacity of any of

53. Want, supra note 34, at 2-2 (footnote omitted).
55. Id.
56. Kilborn, supra note 27, at 326.
the waters of the United States. . . ."\(^5\) Under the Rivers and Harbors Act, navigable waters evolved from waters navigable in fact "to include also those waters that were navigable in the past and those that could become navigable with reasonable improvements . . ., [but] the limits of navigable waters remained the ordinary high water mark for fresh waters and the mean high mark for tidal waters."\(^6\) This definition set a jurisdictional limit excluding many wetland areas from the Corps' supervision, contrary to the FWPCAAs's broad definition of navigable waters as "the waters of the United States."\(^7\)

The Corps resisted regulation beyond navigable waters as evolved under the Rivers and Harbors Act, maintaining that "section 404 was simply an exemption from the new EPA permit system for its preexisting regulatory program."\(^8\) The District Court for the District of Columbia responded to a suit challenging the Corps's limited interpretation of its jurisdiction in Natural Resources Defense Council v. Callaway.\(^9\) In Callaway, the court ordered the Corps to expand its regulations to reflect Congress' regulatory mandate contained in the 1972 amendments and assert "federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution."\(^10\) Two years later, the Corps responded with regulations "expanding its jurisdiction to include not only wetlands adjacent to navigable waters but also wetlands adjacent to other waters, interstate wetlands, and intrastate wetlands 'which could affect' interstate or foreign commerce."\(^11\) Congress also responded to the Callaway decision. The House of Representatives attempted to restrict the Corps' "jurisdiction to navigable waters capable of transporting interstate commerce."\(^12\) However,

\[^6\] Blumm and Zaleha, supra note 25, at 704 (footnotes omitted).
\[^8\] Blumm and Zaleha, supra note 25, at 704.
\[^10\] Id. at 686.
\[^11\] Blumm and Zaleha, supra note 25, at 713. The Corps' regulations proclaim:
"[W]aters of the United States" means (1) All waters . . . subject to the ebb and flow of the tide; (2) All interstate waters including interstate wetlands; (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams) mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters; . . . [and] (7) Wetlands adjacent to waters (other than waters that are themselves wetlands). . . .
\[^12\] C.F.R § 328.3(a) (1991) (emphasis added).

One author maintains that "[w]hile Callaway produced a good deal of administrative activity, its chief legacy was to activate congressional interest in the 404 program." Blumm and Zaleha, supra note 25, at 706.

\[^13\] Kilborn, supra note 27, at 327.
the Senate "rejected the House bill and maintained the Corps' broad jurisdiction over all waters of the United States." Finally, in 1977 Congress amended the FWPCA by passing the CWA. In the final version of the CWA, "the Senate bill prevailed, and Congress preserved the Corps' broad jurisdiction over all waters of the United States." Unlike the FWPCA, Congress intended to protect wetlands when it passed the CWA. One author states: "Although Congress did not state specifically that its intent in passing the CWA was to protect wetlands, the legislative history of the CWA suggests that Congress intended the section 404 program to protect wetlands."

The question of jurisdiction reached the Supreme Court in United States v. Riverside Bayview Homes, Inc. In Riverside Bayview Homes, the Court faced the issue of "whether it is reasonable, in light of the language, policies, and legislative history of the Act [CWA] for the Corps to exercise jurisdiction over wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as 'waters.'" The Supreme Court held "that a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act." The Court expressly left open the question of whether the Corps' wetlands jurisdiction extends to those areas not adjacent to waters of the United States but saturated by groundwater.

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66. Id.
67. Id.
68. Id. at 328.
70. Id. at 131, 106 S. Ct. at 461 (footnote omitted).
71. Id. at 135, 106 S. Ct. at 463.
72. Id. at 124 n.2, 106 S. Ct. at 458 n.2. In a recent opinion, Hoffman Homes, Inc. v. Administrator, U.S. E.P.A., 961 F.2d 1310, 1313 (7th Cir. 1992), the Seventh Circuit Court of Appeals considered the open question of "whether it is reasonable—in light of the language, policies and legislative history of the Clean Water Act—for the EPA to exercise jurisdiction over intrastate, isolated wetlands." (footnote omitted). The area at issue, an .08 acre bowl-shaped depression, called Area A, "had no surface or groundwater connection to any other body of water." Id. at 1311. Evidence showed the area "did not perform sediment trapping or flood control functions for any body of water, was not used for industrial or fishing purposes, and was not visited by interstate travelers for recreational or other purposes." Id. In addition, the court found no "evidence that migratory birds, or any other wildlife, actually used Area A for any purpose." Id.

On the other hand, the court found that adjacent wetlands "do as a general matter play a key role in protecting and enhancing water quality. Protection of adjacent wetlands, therefore, furthers the stated objective of the Clean Water Act." Id. at 1314 (citation omitted). Hence, "the court in Riverside stated that Congress chose to define the waters covered by the Act broadly, [but] it did not hold that section 404 jurisdiction extends to
The Court's ruling in *Riverside Bayview Homes* reversed a narrow construction of CWA jurisdiction by the Sixth Circuit. The Sixth Circuit Court of Appeals required frequent flooding of wetlands by adjacent navigable waters to qualify as regulated adjacent wetlands.\(^7\) Thus, as a result of both the legislative and judicial reversals of narrowly defined jurisdiction, the Corps extended its section 404 coverage to wetlands.

2. Defining Wetlands

The permitting process under section 404 does not apply to lands other than those defined as wetlands. Wetlands occur in a broad spectrum of geographic and climatic regions, resulting in a concomitantly broad variety of wetland types. In addition to the EPA and the Corps, two federal agencies have important responsibilities with regard to identifying and delineating wetlands in the United States: the Department of Agriculture's Soil and Conservation Service (SCS); and the Department of Interior's Fish and Wildlife Service (FWS).

SCS identifies wetlands to ensure compliance with the "Swampbuster" provision of the 1985 Farm Act.\(^7\) The FWS serves important advisory roles in the section 404 and Swampbuster programs.\(^7\) Before 1989 the four agencies identified wetlands according to their own unique guidelines. All wetlands definitions rely on three essential characteristics: 1) the amount of water present or hydrology; 2) the type of vegetation; and 3) the characteristic soil type. To ensure greater consistency in wetlands definitions, the four agencies issued a joint Federal Manual for Identifying and Delineating Jurisdictional Wetlands in January of 1989 (Delineation Manual).\(^6\)

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\(^7\) Isolated wetlands. Id. (citations omitted).

The court thus based its holding on the different roles performed by adjacent and isolated wetlands. Finding that "the EPA's construction of section 404 to include authority over isolated wetlands, including Area A, is unreasonable." Id. at 1316. But the Seventh Circuit court carefully construed its holding to comply with *Riverside*, stating: "The Supreme Court's reasoning in *Riverside* leads to the conclusion that the Clean Water Act does not give the EPA authority to regulate isolated wetlands." Id. at 1314.

\(^7\) United States v. Riverside Bayview Homes, Inc., 729 F.2d 391, 397-98 (6th Cir. 1984).

\(^7\) 16 U.S.C. § 3821 (1991). The Swampbuster program renders "any person who in any crop year produces an agricultural product on converted wetland ... ineligible" government assistance programs including price support payments, farm storage facility loans, crop insurance, disaster payments and guaranteed loans for any commodity produced by that person during that year.


\(^6\) Id. at 3. The wetland hydrology criterion under the Delineation Manual requires "inundation or saturation for one week or more during the growing season." Environmental Protection Agency, Side-By-Side Comparison of the 1989 Manual and Proposed
The Delineation Manual "created a storm of controversy because of its perceived expansion of wetlands." Farmers and developers claimed "80 percent of Louisiana could be considered a wetland under the rules." Under pressure, the Corps and the EPA in conjunction with FWS and SCS requested public comments in August of 1991 on proposed revisions to the earlier expanded definition of wetlands adopted by those agencies in the 1989 Delineation Manual. The agencies called for comments to the proposed Revised Wetlands Delineation Manual even though they contended that the "Manual is a technical guidance document which is not required by law to go through Administrative Procedure Act (APA) legislative rulemaking procedures...." The EPA states that revisions "have been proposed to address technical concerns identified in implementing the Federal Manual over the past two years, to reduce misinterpretations and the possibility of erroneous wetland determinations, and to better explain the 1989 Federal Manual's usage."

3. Classifying Wetlands

Currently section 404 treats all wetlands equally. Section 404 provides no classification scheme for categorizing wetlands. A classification scheme might facilitate devising regulatory responses based on the functional value of the wetlands. At present, the EPA is "investigating . . . classification of wetlands into a few broad groups based on their functional value. . . ." The EPA is also investigating the appropriateness of a concomitant set of corresponding regulatory responses. In furtherance

Revised Manual 2 (Aug. 14, 1991) [hereinafter Side-by-Side Comparison]. The Delineation Manual considers an area saturated when water is found as deep as 18 inches from the soil surface "in poorly drained or very poorly drained mineral soils with low permeability. . . ." Id. at 3. Additionally, the Delineation Manual allows wetlands determinations based on assumed rather than actual hydrology "if the area was disturbed." Id. at 1. The Delineation Manual also allows assumed vegetation based on soils and hydrology and assumed soils based on the vegetation present. Id. Finally, the Delineation Manual accepts hydric soil characteristics alone as sufficient criterion to meet the definition of a wetland. Id. at 4.

77. Dickerson, supra note 28, at 1484.
78. Anderson, supra note 5. But see Kriz, supra note 10, at 1921 claiming that Louisiana "contains about 5.3 million acres of wetlands, as defined in the 1989 manual. That's roughly 20 percent of the state."
81. Backgrounder, supra note 75, at 1.
of this investigation, the EPA "will establish an interagency committee to define a limited number of wetland categories."\(^{83}\)

C. Regulated Activities

The heart of section 404 is the regulation of private actions through a system of permits. Under section 404, the Corps may require permits for regulated activities in all jurisdictional wetlands.\(^ {84}\) But according to a recent study, "[m]any activities resulting in substantial wetlands losses are not regulated by the Corps Section 404 program."\(^ {85}\) Unregulated activities include "drainage of wetlands, dredging and excavation of wetlands, lowering of ground water levels, flooding of wetlands, deposition of material other than dredged or fill, removal of wetland vegetation, and activities on nonwetland areas."\(^ {86}\) These activities escape the reach of section 404 because "the 404 program regulates only the discharge of dredged or fill materials onto wetlands" and these activities either involve no discharge onto wetlands, or they involve the discharge of materials other than dredged or fill.\(^ {87}\)

Judicial decisions have increased coverage to some degree. For example, section 404 does not expressly regulate land clearing activities and wetlands draining. But in *Avoyelles Sportsmen's League, Inc. v. Marsh*,\(^ {88}\) the Fifth Circuit Court of Appeals determined that the removal and redepositing of wetlands vegetation onto adjacent wetlands constitutes a regulated discharge, requiring a permit.

A person seeking to discharge dredged or fill material onto wetlands must first either gain a Corps issued section 404(a)\(^ {89}\) individual permit, qualify under a section 404(e)\(^ {90}\) general permit, or fit the particular

\(^{83}\) Id.
\(^{84}\) Zinn, supra note 35, at 2 n.1.
\(^{85}\) GAO Report, supra note 4, at 19.
\(^{86}\) OTA Report, supra note 17, at 168.
\(^{87}\) OTA report, supra note 17, at 167.
\(^{88}\) 715 F.2d 897, 923 (5th Cir. 1983).
\(^{89}\) 33 U.S.C. § 1344(a) (1991) states:

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

\(^{90}\) Id. § 1344(e) (1991) states:

(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature,
discharge of dredged or fill material under one of the section 404(f) exceptions. The Corps issues individual permits to applicants only after completing a two-part test. First, the Corps completes a public interest review balancing private interests against environmental impacts of the proposed activity. Second, the Corps makes an environmental analysis by determining whether the project comports with the section 404(b)(1) guidelines established by the EPA.92

Under the terms of a 1990 Memorandum of Agreement (MOA)93 interpreting the 404(b)(1) guidelines, the Corps must engage in a process termed sequencing when making its environmental analysis. Through sequencing, the MOA requires that wetland losses first be “avoided to the maximum extent practicable;”94 remaining unavoidable impacts will then be mitigated to the extent appropriate and practicable by requiring steps to minimize impacts95 and, finally, to compensate for aquatic resource values”96 through compensatory mitigation.97 The Guidelines MOA requires the Corps to subject all permit applications to the sequencing analysis.

The Corps receives approximately 15,000 individual permit applications annually from persons seeking to discharge dredged or fill material into areas covered by section 404. The Corps issues about 10,000 (or 67%) of the requested permits while denying a mere 500 (3%). The

91. Id. § 1344(f) (1991).
93. Guidelines MOA, supra note 40.
94. Id. § C(1) at 3. Avoidance “allows permit issuance for only the least environmentally damaging practicable alternative.” Id.
95. Id. § C(2) at 4 stating that minimization “will be required through project modifications and conditions.”
96. Id. at 3.
97. Id. § C(3) at 4. Compensatory actions consist of “restoration of existing degraded wetlands or creation of man-made wetlands.”
remaining 4,500 either qualify for a general permit, or the applicant withdraws the request.98

Section 404 specifically exempts a number of activities, including "normal agricultural, silvicultural, ranching activities, construction or maintenance of water structures, construction or maintenance of agricultural ponds or irrigation ditches, construction of temporary sedimentation basins, and construction or maintenance of farm roads, forest roads, or temporary mining roads."99 While exempted activities result "in large and unregulated wetlands losses," landowners are not afforded an absolute right to undertake such activities.100 According to the EPA Office of Wetlands Protection, the Corps should apply the section 404(f)(1) exemptions narrowly, exempting only activities with "minor impacts on aquatic resources."101

Section 404(f)(2) renders the exemptions inapplicable to discharges "incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters reduced...."102 This limitation requires that farmers obtain permits for discharges to convert wetland areas into upland crop areas.103

Recently, the Corps issued a new field guide expanding the farming exemption to include all wetlands farmed prior to 1985.104 These changes harmonize section 404 and the Swampbuster provisions by clarifying

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98. Backgrounder Manual, supra note 75, at 4. In addition, 75,000 minor activities fall under the authority of general permits. The Corps issues general permits for "categories of activities that are similar in nature and that will have only a minimal impact on the environment." See also The Conservation Fund, Arlington, Va., Section 404 Program Critics Call for Reform, 10, No.7 Land Letter (Mar. 1, 1991) [hereinafter Land Letter]. For example, one general permit exempts all wetlands smaller than 10 acres that are isolated from or located above the headwaters of rivers and streams. However, for those wetlands between one and ten acres in size, parties must notify the Corps of their plans to discharge and the Corps may require a permit for wetlands considered important.

100. GAO Report, supra note 4, at 19.
102. Highlights, supra note 92, at 2.
104. Id.
105. Courts tend to read the exceptions narrowly. For example, the court in Avoyelles, 715 F.2d at 925, found an exemption for "normal farming activities" inappropriate because no ongoing farming or forestry operations existed on the property. The court determined there could be no ongoing farming operation until the completion of land clearing operations. Id.
that prior converted cropland, as defined by Swampbuster,107 "will not be regulated under the 404 program, regardless of the nature of the fill activity that takes place."108 The new provisions work an expansion into the 404 farming exemptions by allowing development of "prior converted croplands" into a home or business without a 404 permit.109 Prior regulations required a permit for activities other than farming.

IV. OVERVIEW OF WETLANDS REGULATIONS UNDER H.R. 1330/S. 1463

The Hayes-Breaux bill proposes to replace section 404 of the CWA as it pertains to wetlands. The bill finds replacement of section 404 necessary because "the Federal permit program established under section 404 . . . was not originally conceived as a wetlands regulatory program and is insufficient to ensure that the Nation's wetlands resource will be conserved and managed in a fair and environmentally sound manner."110 The Hayes-Breaux bill purports to accomplish these goals by making several key changes to the permitting program. The key changes discussed in this comment include provisions: 1) to cancel the veto authority currently held by the EPA; 2) to narrow the definition of wetlands contained in the 1989 Delineation Manual; 3) to create three categories of wetlands subject to different levels of regulation; and 4) to expand the activities covered by the program. This comment also makes reference to additional changes in the Hayes-Breaux bill that provide compensation for wetlands subject to the highest level of classification, expand the current exemptions under the general permitting scheme, and also provide for mitigation banking.111

The Hayes-Breaux bill includes a congressional finding that "wetlands play an integral role in maintaining the quality of life . . . [and] serve important ecologic and natural resource functions. . . . [but] they also present health risks in some instances where they act as breeder grounds for insects that are carriers of human and animal diseases."112 Congress also finds that "most of the loss of wetlands in coastal Louisiana is not attributable to human activity."113 Finally, the Hayes-

111. H.R. 1330/S. 1463 § 4(29) defines mitigation banking as "wetlands restoration, enhancement, preservation or creation for the purpose of providing compensation for wetland degradation or loss."
112. Id. § 2(a)(1), (2) & (6).
113. Id. § 2(a)(4).
Breaux bill declares that "75 per centum of the Nation's wetlands in the lower forty-eight States are privately owned and . . . an effective wetlands conservation and management program must reflect a balanced approach that conserves and enhances important wetlands values and functions while observing private property rights, recognizing the need for essential public infrastructure, . . . and providing the opportunity for sustained economic growth."114

A. Administrative Responsibilities

The Hayes-Breaux bill significantly alters administrative responsibilities for protecting wetlands. Under the Hayes-Breaux bill, the Corps receives exclusive permit authority.115 The EPA retains no veto authority, and the Hayes-Breaux bill eliminates the advisory roles of the FWS and the SCS. Generally under the Hayes-Breaux bill, the Corps determines wetlands classification. Thus, any person contemplating regulated activities "shall make application to the Secretary identifying the site of such activity and requesting that the Secretary determine . . . the classification of the wetlands in which such activity is proposed to occur."116

The Hayes-Breaux bill grants limited authority to the FWS. It authorizes the Director of the FWS to conduct an advance classification of wetlands.117 But when the Director's responsibility includes advance

114. Id. § 2(5).
115. Id. § 3(b)(1).
116. Id. § 3(c)(1).
117. Id. § 3(h)(1) states:

UNITED STATES FISH AND WILDLIFE SERVICE WETLANDS IDENTIFICATION AND CLASSIFICATION PROJECT.—(1) The Director, in concurrence with the Chief of the Soil Conservation Service, shall undertake a project to identify and classify wetlands in the United States. The Director shall complete such project not later than ten years after the date of enactment of the Comprehensive Wetlands Conservation and Management Act of 1991.

(2) In conducting the project under this section, the Director shall identify and classify wetlands in accordance with standards for delineation of wetlands established by the Secretary under subsection (g) of this section.

(3) In conducting the project under this section, the Director shall provide notice and an opportunity for a public hearing in each county, parish or borough of a State before completion of identification and classification of wetlands in such county, parish, or borough.

(4) Promptly after completion of identification and classification of wetlands in a county, parish, or borough under this section, the Director shall publish information on such identification and classification in the Federal Register and in publications of wide circulation and take other steps reasonably necessary to ensure that such information is available to the public.

(5) The Director shall report to Congress on implementation of the project to be conducted under this section not later than two years after the date of the enactment of the Comprehensive Wetlands Conservation and Management Act of 1991.
classification, "the Secretary shall, by rule, provide for a right of appeal to the Secretary . . . or the de novo determination of classification" by the Secretary. Pursuant to the de novo review the "Secretary may sustain an advance classification made by the Director or may modify such classification" for any of several reasons listed in the Hayes-Breaux bill.

In reviewing the Director's advance classification, the Secretary may determine that lands do not meet the required standards, that the weight of information does not meet the requirements of the classification, or that changes in the land (not caused by unauthorized activities) render it incapable of meeting the relevant standards. The Hayes-Breaux bill provides one additional circumstance for modifying an advanced determination by the Director: when the limitations imposed by the classification "would effectively preclude reasonable economic use of the wetlands." Thus under the Hayes-Breaux bill, the Secretary holds original power over all decisions except the advanced classification of wetlands, an exercise over which the Secretary possesses appellate powers. No agency manifests authority over the Corps under the Hayes-Breaux bill.

Act and annually thereafter.

(6) Any classification of lands as wetlands under this section shall, to the fullest extent practicable, be recorded on the property records in the county, parish or borough in which such wetlands are located.

118. Id. § 3(c)(5).
119. Id. § 3(c)(4)(A).
120. Id. The Hayes-Breaux bill provides:

(4)(A) Within thirty days of receipt of notice of an advance classification by the Secretary under paragraph (2)(B) of this subsection, an applicant may request the Secretary to make a de novo determination of the classification of wetlands that are the subject of such notice. Such de novo determination shall be made by the Secretary in consultation with the Director. The Secretary may sustain an advance classification made by the Director or may modify such classification if the Secretary determines, upon examination of all relevant information submitted by the applicant or otherwise available to the Secretary (including, if appropriate, an on-the-ground examination), that—

(i) the lands involved do not meet the standards and criteria for delineating wetlands set forth in paragraph (2) of subsection (g);

(ii) the weight of relevant information does not support the determination of the advance classification with respect to the specific wetlands involved;

(iii) the factual basis for such advance classification is no longer valid; except that such change in factual circumstances has not been caused by activities undertaken without authorization by the Secretary as may have been required under this section;

121. Id. § 3(c)(4)(A)(iv) states "the limitations on uses of the specific wetlands involved that would be imposed by the Secretary under the requirements of this section would effectively preclude reasonable economic use of the wetlands."
B. Jurisdiction

1. Regulated Waters

The Hayes-Breaux bill covers "wetlands or waters of the United States"\(^\text{122}\) as areas requiring permits for prohibited activities. It specifically defines wetlands as "those lands that meet the criteria for delineation of lands as wetlands" as set forth in the Hayes-Breaux bill.\(^\text{123}\) Under the bill, wetlands "means lands which have a predominance of hydric soils and which are inundated by surface water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."\(^\text{124}\) Thus, the Hayes-Breaux bill regulates wetlands as defined by the Hayes-Breaux bill itself.

2. Defining Wetlands

The Hayes-Breaux bill directs the Secretary "to establish standards ... that shall govern the delineation of lands as 'wetlands' ... [and] shall be binding on all Federal agencies in connection with the administration or implementation of any provision of this section."\(^\text{125}\) The bill further directs that the delineation standards may not result in the classification of wetlands "unless clear evidence of wetlands hydrology, hydrophytic vegetation, and hydric soil are found ... during the growing season."\(^\text{126}\) By definition, hydrophytic vegetation cannot be "equally adapted to dry or wet soil conditions" and the wetland must contain "some obligate wetlands vegetation. ..."\(^\text{127}\) Wetlands hydrology requires the presence of water at the surface "for at least twenty-one consecutive days during the growing season. ..."\(^\text{128}\) Finally, the Hayes-Breaux bill prohibits "the classification of lands as wetlands that are temporarily or incidentally created as a result of adjacent activity."\(^\text{129}\)

3. Wetland Classification

Pursuant to the Hayes-Breaux bill, either the Secretary or the Director classifies all wetlands, placing them in one of three categories.

\(^{122}\) Id. § 3(a)(2).
\(^{123}\) Id. § 3(a)(3)(A).
\(^{124}\) Id. § 4(21).
\(^{125}\) Id. § 3(g)(1).
\(^{126}\) Id. § 3(g)(2)(A)(i). According to § 4(26) of the bill, growing season "means, for each plant hardiness zone, the period between the average date of last frost in spring and the average date of first frost in autumn."
\(^{127}\) Id. § 3(g)(2)(A)(ii) & (iii).
\(^{128}\) Id. § 3(g)(2)(A)(iv).
\(^{129}\) Id. § 3(g)(2)(A)(v).
Under the bill's provisions, classification by the Secretary of the Corps occurs when a person seeks to undertake activities that require permits. In addition, the Hayes-Breaux bill calls on the Director of the FWS, in concurrence with the Chief of the SCS, to conduct a ten year program "to identify and classify wetlands in the United States."

Landowners may appeal the Director's classification to the Secretary. The Secretary may modify the classification if he determines that "the limitations on uses of the specific wetlands... would effectively preclude reasonable economic use of the wetlands." 

The appropriate officer considers for type A classification "those wetlands that are of critical significance to the long-term conservation of the ecosystem." To receive type A classification, wetlands must have five characteristics in addition to their status as critically significant wetlands. First, type A wetlands must "serve critical wetlands functions, including the provision of critical habitat for a concentration of avian, aquatic, or wetland dependent wildlife." Second, only those wetlands that "consist of or may be a portion of ten or more contiguous acres and have an inlet or outlet for relief of water flow" meet the type A wetlands requirements. Third, the classification requires "a scarcity within the watershed or aquatic ecosystem of identified ecological functions served by such wetlands..." Fourth, there must be "no overriding public interest in the use of such wetlands for purposes other than conservation." Last, the Hayes-Breaux bill requires that "the nature and scope of wetlands functions are such that minimization and compensation are not feasible means for conserving wetlands values and functions" before classifying a wetland as type A.

The Hayes-Breaux bill provides an additional non-characteristic based control for delineating type A wetlands. The bill stipulates: "No more than 20 per centum of any country [sic], parish, or borough shall be classified as type A wetlands; except that, type A wetlands in Federal or State ownership... shall be included in calculating the percent of type A wetlands in a county, parish, or borough."

The Hayes-Breaux bill provides that type A classification "shall constitute a taking by the United States of the owner's interest in such land..." Compensation for the taking "shall be based upon the

130. Id. § 3(b)(1).
131. Id. § 3(c)(4)(A)(iv).
132. Id. § 3(c)(3)(A).
133. Id. § 3(c)(3)(A)(i).
134. Id. § 3(c)(3)(A)(ii).
135. Id. § 3(c)(3)(A)(iii).
136. Id. § 3(c)(3)(A)(iv).
137. Id. § 3(c)(3)(A)(v).
138. Id. § 3(g)(3).
139. Id. § 3(d)(4).
fair market value of such interests in lands at the time of such taking."\textsuperscript{140} Additionally, the determined fair market value "may include reasonable attorneys fees. . . ."\textsuperscript{141}

Type B wetlands "provide habitat for a significant population of avian, aquatic or wetland dependent wildlife, or provide other significant wetlands functions including significant enhancement or protection of water quality, or significant natural flood control."\textsuperscript{142}

Wetlands not qualifying as type A or B fall into the type C category. Type C wetlands serve "limited" or "marginal wetlands functions."\textsuperscript{143} Those serving marginal wetlands functions qualify as type C wetlands when they "exist in such abundance that regulation of activities in such wetlands is not necessary for conserving important wetlands values and functions."\textsuperscript{144} In addition, type C wetlands classification may be based on factors other than the relative value of the wetland. Type C classification extends to "prior converted cropland, . . . fastlands,\textsuperscript{145} or wetlands within industrial complexes or other intensely developed areas that do not serve significant wetlands functions as a result of such location."\textsuperscript{146}

C. Regulated Activities

Prohibited activities (those requiring a permit or an exemption) under the Hayes-Breaux bill include "the discharge of dredged or fill material into waters of the United States, including wetlands at a specific disposal site; or the draining, channelization, or excavation of wetlands."\textsuperscript{147} The Hayes-Breaux bill expands covered activities beyond the discharge of dredged and fill material covered under section 404. Thus anyone draining, channelizing, or excavating a wetland area must seek a permit, as well as those who discharge dredged or fill material.

Permit requirements vary according to the classification of the wetland. With three exceptions, the Secretary must deny permits for activities in type A wetlands. The Secretary shall not issue permits in type A wetlands unless he determines that:

\begin{itemize}
\item \textsuperscript{140} Id. § 3(d)(8)(B).
\item \textsuperscript{141} Id.
\item \textsuperscript{142} Id. § 3(c)(3)(B).
\item \textsuperscript{143} Id. § 3(c)(3)(C).
\item \textsuperscript{144} Id.
\item \textsuperscript{145} Id. § 4 (24) defines fastlands as "lands located behind permitted man-made structures, such as levees constructed and maintained to permit the utilization of such lands for commercial, industrial or residential purposes consistent with local land use planning requirements."
\item \textsuperscript{146} Id. § 3(c)(C)(iii)(iv) & (v).
\item \textsuperscript{147} Id. § 3(a)(2)(A) & (B) (emphasis added).
\end{itemize}
(A) such an activity can be undertaken with minimal alteration or surface disturbance; (B) there are overriding public interest concerns that require use of the lands for purposes other than conservation; ... or, (C) the proposed use of the land, taking into account all proposed mitigation, will result in overall environmental benefits, including the prevention of wetlands loss.\textsuperscript{148}

The Hayes-Breaux bill's definition of overriding public interest concerns includes the following: 1) the likelihood of mitigating adverse impacts "through avoidance and minimization [that] will protect, enhance, or increase critical wetlands values and functions,"\textsuperscript{149} or 2) "the lack of practical and feasible means for accomplishing the project purpose at an alternative location."\textsuperscript{150}

For type B wetlands, the Hayes-Breaux bill allows the Secretary to issue permits subject to terms and conditions necessary to ensure the wetland and its aquatic ecosystem suffer no "significant loss or degradation of wetlands values and functions."\textsuperscript{151} The Secretary determines what constitutes a significant loss by considering several factors. Factors considered include the "quality and quantity of ecologically significant functions served by the areas to be affected."\textsuperscript{152} Also the Secretary estimates any reduction of impacts through cost effective designs that "avoid or minimize [the] use of wetlands."\textsuperscript{153} Other considerations include the "costs of mitigation requirements and the social, recreational and economic benefits associated with the proposed activity, including local, regional, or natural needs for improved or expanded infrastructure."\textsuperscript{154} Finally, the Secretary weighs the ability to mitigate wetlands loss or degradation as measured by wetlands functions,\textsuperscript{155} as well as the environmental benefits due to mitigation\textsuperscript{156} and "the marginal impact of the proposed activity on the [area] watershed. ..."\textsuperscript{157}

The Hayes-Breaux bill provides for both alternative site analysis and mitigation "[in] considering an application for activities on type B wetlands. ..."\textsuperscript{158} Where the proposed activity involves altering or disturbing ten or more acres, "the Secretary may require alternative site analysis for individual permit applications. ..."\textsuperscript{159} When considering

\begin{itemize}
\item[148.] Id. § 3(e)(2)(A)(B) & (C).
\item[149.] Id. § 3(e)(2)(B)(i).
\item[150.] Id. § 3(e)(2)(B)(ii).
\item[151.] Id. § 3(e)(3)(A).
\item[152.] Id. § 3(e)(3)(A)(i).
\item[153.] Id. § 3(e)(3)(A)(ii).
\item[154.] Id. § 3(e)(3)(A)(iii).
\item[155.] Id. § 3(e)(3)(A)(iv).
\item[156.] Id. § 3(e)(3)(A)(v).
\item[157.] Id. § 3(e)(3)(A)(vi).
\item[158.] Id. § 3(e)(3)(B).
\item[159.] Id.
alternative site analysis, the Hayes-Breaux bill affords a "rebuttable presumption that the project purpose as defined by the applicant shall be binding upon the Secretary."[160]

The Hayes-Breaux bill requires that mitigation "shall be imposed when the Secretary finds that activities undertaken . . . will result in the loss or degradation of type B wetlands functions. . . ."[161] The mitigation determination requires that the Secretary take into consideration the "type of wetlands affected, the character of the impact on ecological functions, whether any adverse effects on wetlands are of a permanent or temporary nature, and the cost effectiveness of such mitigation and shall seek to minimize the costs of such mitigation."[162]

In type C wetlands, activities may be undertaken without authorization.[163] While the Secretary may require reporting activities commenced in type C wetlands,[164] "[n]o requirements for alternative site analyses or mitigation of environmental impacts shall apply for activities undertaken in type C wetlands."[165]

Exempted activities under the Hayes-Breaux bill, or those activities not requiring permits, for the most part mirror the exemptions listed in section 404. The most notable differences include the following: 1) a farming exemption on "farmed wetlands;"[166] 2) an exemption for activities "undertaken in incidentally created wetlands" exhibiting wetlands characteristics for less than ten years;[167] and 3) an exemption for expanding ongoing rice farming operations "so long as such expansion does not occur in type A wetlands, does not result of [sic] in the conversion of more than ten acres of wetlands per operator per year, and the converted wetlands . . . remain as wetlands or other waters of the United States."[168]

V. Discussion

For nearly 20 years Congress, the courts, and federal regulatory agencies consistently expanded wetlands regulations. In spite of the increased regulation, activities "responsible for as much as 80 percent of all wetland losses are exempt from 404."[169] Environmentalists fret over further weakening of what they perceive as an inadequate wetlands
protection program. Environmentalists view the Hayes-Breaux bill as "a sharp reversal of longtime wetlands protection policies." Support for the Hayes-Breaux bill includes the Farm Bureau, real estate interests and oil development interests.

From its outset, the Hayes-Breaux bill antagonizes environmentalists. For example, the Hayes-Breaux bill finds that the majority of Louisiana's coastal erosion is not attributable to human activity. However, experts familiar with Louisiana's coastal erosion blame human activities for causing much of the wetlands loss. Human activities that contribute to coastal wetlands erosion include drainage of freshwater wetlands for agricultural purposes, dredging of navigation canals, and construction of flood control levees. The following examination considers some features of the Hayes-Breaux bill that alarm environmentalists.

170. See Kriz, supra note 10, at 1919. Kriz also quotes a source stating "I think we underestimated the ability to rally as much support behind a bill like this, which we think is so lacking in credibility." Id. at 1920. Accord Rodgers, supra note 8, at 37 wherein the author quotes a source stating "the Hayes bill is 'very bad,' for it would 'severely weaken' 404 protection."

171. See Kriz, supra note 10, at 1919.

172. See OTA Report, supra note 17, at 89 reporting that:

[C]hanges in sea level, sedimentation, erosion, subsidence, and overgrazing by birds or mammals all have played a role in the loss of wetlands in coastal Louisiana. Because of the many factors involved, it is difficult to determine the significance of losses from natural processes relative to those from man's activities. However, there is evidence that until artificial hydrologic changes were made, such as containment of the Mississippi River and canal dredging, there was a slow, long-term net gain of land (including wetlands) in the region. The dramatic reverse of these gains implies that much of the loss is man induced, resulting from a combination of sediment starvation; canal construction; saltwater intrusion from navigation channels; and freshwater pumping for rice irrigation, marsh impoundment, and cattle grazing.

173. See OTA Report, supra note 17. The report cites examples of wetlands loss in Louisiana that illustrate the error of the fact finding in the Hayes-Breaux bill. One example deals with the draining and clearing of freshwater wetlands for agricultural purposes, finding that "[i]n Louisiana, 51 percent of the original 4.5 million hectares [11.1 million acres] of forested wetlands have been converted to agricultural use, mostly for soybean and cotton production." Id. at 121.

174. See OTA Report, supra note 17. The report determines that "[t]he dredging of canals primarily for access to oil and gas development sites also has contributed significantly to direct and indirect wetland losses in coastal Louisiana." The report finds that "several recent studies in the Mississippi Delta have shown a positive correlation between canal density and the extent of wetland loss." The wetlands loss is attributed to "saltwater intrusion into wetlands as water is flushed in and out by the tides. Salinity changes may kill vegetation, and tidal flows help erode the banks of canals, causing them to widen at the annual rate of from 2 to 14.8 percent per year." Id. at 119-20.

175. Probably the human factor leading to the greatest destruction of Louisiana's coastal wetlands is the flood control or levee system along the Mississippi River. For thousands of years, the Mississippi River overflowed its banks each spring, depositing
A. Administrative Responsibilities

The Hayes-Breaux bill effects a major change in administrative responsibilities. Under the bill, the EPA would lose its current authority under section 404(c) to veto projects which it determines to have unacceptable environmental impacts. Further, the Hayes-Breaux bill eliminates the EPA's role in establishing the 404(b)(1) guidelines, and it eliminates the advisory roles of other Federal agencies. The net result is that the bill's administrative changes delegate absolute permitting authority to the Corps.

Though rarely used, environmentalists feel the check supplied by the 404(c) veto remains a preeminent weapon in wetlands protection. Indeed, one writer states: "This veto power is arguably one of the single most promising legal mechanisms for the protection of wetland habitats, since it specifically addresses protection of wildlife and it leaves open the question of what constitutes an adverse impact severe enough to trigger a veto." Rather than restricting the veto power, most commentators complain of the EPA's "parsimonious use of its veto" and call for expanded use instead. In fact, EPA has exercised veto proceedings "on only 22 projects. Only 11 of these were eventually vetoed" out of an estimated 150,000 permit applications received since the effective date of section 404(c). The others were revised by the permit applicant to accommodate EPA's concerns or were withdrawn...

The Hayes-Breaux bill further alters 404 by denying the EPA its role in developing guidelines for the Corps' consideration of permit applications. The guidelines serve as "the substantive criteria for dredged and fill material discharges under the Clean Water Act." The guidelines work in conjunction with the veto power of 404(c). If the "[g]uidelines

sediment that gradually built the delta from a position near Baton Rouge, Louisiana to its present location.

Fine-grained sediment comprises the bulk of the Mississippi River's load. This fine-grained sediment subsides, or sinks, after deposition largely because of compaction. When new sediment cannot replenish deposits to offset subsidence, the land sinks below sea level. The levee system impounds the Mississippi River, preventing replenishing spring flood deposition, and forcing the Mississippi River to deposit its sediment load beyond the continental shelf into the abyssal depths of the Gulf. Thus, the levee system starves coastal wetlands of vital sediment. See generally Hecht, supra note 15.

177. Kilgore, supra note 47, at 10481.
178. Dickerson, supra note 28, at 1490. Accord Kilgore, supra note 47, at 10481 wherein the author calls the veto a powerful weapon but complains that the power "is a double-edged sword: the agency has used the veto quite sparingly."
180. See Questions and Answers, supra note 82, at 2.
are properly applied, EPA will rarely have to use its 404(c) veto,"183 because permits will only issue where they meet the substantive criteria. Alternatively, "without the use or at least the creditable threat of a veto, EPA has little to say in the implementation of the guidelines,"184 because the EPA is without the coercive threat of a veto to force compliance.

Less importantly, the Hayes-Breaux bill eliminates the advisory role for other federal agencies under 404(m).185 That provision allows other federal agencies such as the FWS an opportunity to comment on the appropriateness of permit issuance or modification. The Corps bears no obligation to accept the recommendations and frequently rejects them. The GAO estimates that the Corps "issued permits over the denial recommendations of resource agencies in 37 percent of our sample cases" in one year.186 This statistic underlines the importance of the EPA's veto power as a mechanism for ensuring the Corps' implementation of the EPA's guidelines.

The Hayes-Breaux bill's administrative scheme runs counter to the recommendations of the great majority of commentators. Most commentators view the Corps as a proponent of development whose goals regarding wetlands diametrically oppose the goals of the EPA.187 One author asks how we can expect the Corps "to develop projects and practices to restore coastal wetlands when their primary mission runs in precisely the opposite direction."188 Others agree, one stating: "The time has come for one agency—the EPA—to assume all of the administrative duties under the Act [CWA]."189 Given the depth of feeling running counter to the Hayes-Breaux bill's proposed administrative scheme, Congress will be hard put to approve such an idea.

183. Id.
184. See Kilgore, supra note 47, at 10481.
185. 33 U.S.C. § 1344(m) (1991) states:
   Not later than the ninetieth day after the date on which the Secretary notifies the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service that (1) an application for a permit under subsection (a) of this section has been received by the Secretary, or (2) the Secretary proposes to issue a general permit under subsection (e) of this section, the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such applications or such proposed general permit in writing to the Secretary.
186. Land Letter, supra note 98, at 3.
188. Houck, supra note 14, at 359.
189. Griswold, supra note 28, at 172. Accord Blumm and Zaleha, supra note 25, at 699 stating "we reluctantly recommend that Congress relieve the Corps of Engineers of its permit issuing responsibilities."
B. Jurisdiction

1. Regulated Waters

The Hayes-Breaux bill specifically covers wetlands as it defines them. The bill thus answers the one open question from *Riverside Bayview Homes*,\(^\text{190}\) whether areas not adjacent to open water but saturated by groundwater fall within the purview of the Corps' authority. The Seventh Circuit Court of Appeals recently addressed this open question in *Hoffman Homes, Inc. v. Administrator, U.S. E.P.A.*\(^\text{191}\) The *Hoffman* court determined that "[i]solated wetlands do not contribute to maintaining the chemical, physical, and biological integrity of the Nation's waters. Accordingly, they are not within the scope of the [Clean Water] Act."\(^\text{192}\) But if such an area meets the definition of a wetland as specified by the Hayes-Breaux bill, it should be subject to the permitting authority of the Secretary.

However, the Hayes-Breaux bill's definition of type A wetlands precludes areas not connected to open waters because type A wetlands must have "an inlet or outlet for relief of water flow."\(^\text{193}\) Areas saturated by groundwater are not subject to type A classification. In addition, type B wetlands must either provide habitat for a significant population or provide "significant enhancement or protection of water quality, or significant flood control."\(^\text{194}\) Since an isolated wetland saturated by groundwater is unlikely to significantly affect water quality or flood control, such wetlands will only qualify as a type B wetlands when they provide habitat for a significant population of wildlife. Apparently, the Hayes-Breaux bill's provisions generally classify these isolated groundwater saturated areas as unregulated type C wetlands. Such a classification comports with the holding in *Hoffman*\(^\text{195}\)

2. Defining Wetlands

The 1989 Delineation Manual served as the driving force behind the Hayes-Breaux bill. Indeed, one Senator declared, "In one arbitrary, bureaucratic declaration, 60 million acres of land—property previously not designated as 'wetlands'—suddenly became subject to federal regulation."\(^\text{196}\) One sponsor of the Hayes-Breaux bill criticized the Delin-

\(^{191}\) 961 F.2d 1310 (7th Cir. 1992). See supra note 72 for a discussion of the case.
\(^{192}\) Id. at 1314 (citation omitted).
\(^{194}\) Id. § 3(c)(3)(B).
\(^{195}\) *Hoffman*, 961 F.2d 1310.
\(^{196}\) Special Report from Senator Bennett Johnston, supra note 31, at 1.
ation Manual, declaring, “I believe federal agencies may have interpreted the meaning of ‘wetlands’ in this manual too broadly, so that areas that do not appear to be wetlands are now considered wetlands.”

Hence, “S. 1463 is intended to remedy this current policy crisis.” The proposed revisions “increase the burden of proof required to identify and delineate a wetland by clarifying and restricting the manner in which field indicators are used to indicate whether the three criteria (wetland hydrology, hydrophytic vegetation, and hydric soils) are met.”

The Revised Wetlands Delineation Manual, published for public comment in August of 1991, appears to resolve the major complaints aimed at its predecessor. While the earlier version only required evidence of the three parameters, the Revised Wetlands Delineation Manual requires “[i]ndependent indicators of all 3 parameters” unless the area meets a specific exception. Also, the earlier Manual required “inundation or saturation for one week or more during the growing season.”

The Revised Wetlands Delineation Manual “requires inundation for 15 or more consecutive days, or saturation to the surface for 21 or more consecutive days during the growing season.” Finally, the former version only required water within 18 inches of the soil surface for certain soil types but the Revised Wetlands Delineation Manual requires inundation or saturation “at the surface.”

Under the Revised Delineation Manual, some critics complain that “[m]any areas currently recognized as nationally important wetlands wouldn’t be considered wetlands at all . . .” They complain that “[s]o flawed is the administration’s new manual, so incomprehensible is the manner in which it is written, and so indefensible is the ‘science’

197. Letter from John Breaux to Denis Swords (February 10, 1992).
198. Id.
199. 56 Fed. Reg. 40446, 40452 (1991), defines wetland hydrology:
   An area has wetland hydrology when it is:
   1. Inundated for 15 or more consecutive days, or saturated from surface water or from ground water to the surface for 21 or more consecutive days during the growing season in most years, or
   2. Periodically flooded by tidal water in most years.
200. 56 Fed. Reg. 40446, 40454 (1991), states that the “term ‘hydrophytic vegetation’ describes plants that live in conditions of excess wetness.”
201. 56 Fed. Reg. 40446, 40455 (1991), lists four soil types that qualify as hydric soils.
202. See Backgrounder, supra note 75, at 5 (footnotes not in original).
204. See Side-by-Side Comparison, supra note 76, at 1.
205. Id. at 2.
206. Id.
207. Id. at 3.
208. Anderson, supra note 5, at 3B.
The Hayes-Breaux bill adopts a delineation of wetlands very similar to that proposed in the Revised Wetlands Delineation Manual. The proposed definitions result in a reduction of the net acreage protected as wetlands. Some estimates place the reduction at nearly one-half of the currently protected wetlands. EPA apparently plans to adopt the Revised Wetlands Delineation Manual after processing the more than 40,000 comments received on the proposals. The revisions curtail the necessity for this aspect of the Hayes-Breaux bill.

Stability seems the lone advantage of setting minimum delineation guidelines within the statute as opposed to the Revised Wetlands Delineation Manual. Federal agencies could no longer unilaterally change the delineation guidelines. Hence, the provisions would prevent a repeat of the public outcry that accompanied the last changes. But a statutory definition prevents the flexibility usually accorded administrative agencies when dealing with complex scientific problems. In fact, environmentalists complain that the proposed definition represents a political decision rather than a technical one. These critics feel any revisions should have a firmer scientific foundation. The Hayes-Breaux bill's provisions, being the creation of a political body, serve to entrench the critic's complaints.

3. Wetlands Classification

The classification scheme embodies the heart of the Hayes-Breaux bill. One sponsor explains the reason for a classification scheme, stating that the basic problem with section 404 is that all wetlands are treated as if they were the same. In fact, they're not equal in makeup, they're not equal in value and they certainly should not be equal in the amount of regulations that are applied. To date, much comment on the proposed classification scheme is unfavorable. One Senate critic of the idea asserts that regulated parties are already in constant disagreement with the Corps over whether their lands are wetlands, it is hard to envision how establishing Class A, B and C wetlands would simplify things. The point is that most scientific experts agree that setting up a national classification system based on wetland type is not do-able.

The Hayes-Breaux bill orders the Director of the FWS and the Chief of the SCS to undertake a project to identify and classify wetlands

209. Id.
211. Land Letter, supra note 98, at 6.
213. Id. at 1921-22 (quoting Senator J. Chafee).
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in the United States.\(^{214}\) The provisions set a project completion date of ten years after enactment of the Hayes-Breaux bill.\(^{215}\) Most experts believe classifying wetlands presents a difficult as well as expensive undertaking. One estimate places the cost of such a project at $13 billion.\(^{216}\)

Critics who believe the project impossible point to the National Wetlands Inventory, an ongoing, nationwide wetlands mapping program conducted under the auspices of the FWS. The program has been under way for fifteen years, yet "maps have been completed for less than 75 percent of the nation's wetlands."\(^{217}\) The FWS inventory serves no regulatory purpose; thus, it remains free of the site specific pressures that would complicate the Hayes-Breaux bill's mapping project.\(^{218}\) Also, the FWS project requires far fewer fine-line delineations than would be necessary when implementing advanced classification under the Hayes-Breaux bill. Clearly these arguments support the proposition that the proposed comprehensive effort to classify all the nation's wetlands presents a formidable task.

Invoking a classification system also promises to create delays in the processing time for individual permits. Currently, only fifty percent of the applications received are processed in less than sixty days. Another twenty percent require 121 days to one full year to process. Since the Corps receives approximately 15,000 applications per year, these percentages represent large numbers.\(^{219}\) Under the Hayes-Breaux bill, many of the 15,000 applications would necessitate classification of the proposed work site; due to this extra burden, permitting delays may be greatly increased. Besides these practical problems concerned with effecting the classification scheme, critics complain of the substantive definitions for type A, B, and C wetlands, and of the Hayes-Breaux bill's provisions for protecting those areas.

Opponents see two problems with the type A classification as specified in the Hayes-Breaux bill. First, they complain about the required compensation for lands designated as type A wetlands. Pursuant to the bill's terms, a type A classification results in a compensable taking by the federal government. Critics charge that requiring compensation will operate as a hinderance to designations of type A wetlands, thereby limiting the higher degree of wetlands protection to the few properties

\(^{215}\) Id.
\(^{216}\) Land Letter, supra note 98, at 5.
\(^{217}\) Zinn, supra note 35, at 6.
\(^{218}\) Id. at 5-6.
\(^{219}\) Backgrounder, supra note 75, at 4.
the Government finds affordable. Proponents argue that stringent regulation combined with the estimated seventy-five percent private ownership of the nation's wetlands requires a compensation scheme. Second, some critics wonder whether any wetlands meet the stringent requirements for a type A classification. One sponsor of the Hayes-Breaux bill counters that an estimated eighteen to forty percent of Louisiana's wetlands comply with the type A qualifications. While the above enumerated problems could hinder wetlands preservation by limiting the amount of area classified as type A wetlands, an even greater problem concerns the degree of protection assigned type A wetlands—the only wetlands afforded any grounds for permit denial under the Hayes-Breaux bill.

To gain the protection of a type A classification, wetlands must undergo a two-step process. First, the wetland must meet the substantive requirements of section 3(c)(3)(A) of the Hayes-Breaux bill. Second, the wetlands identified thereunder as type A wetlands must withstand the bill's procedural exceptions to the general rule that no permits issue for activities in type A wetlands. A consideration of both aspects follows, beginning with the substantive requirements for a type A classification.

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220. See Kriz, supra note 10, at 1922. See also, Land Letter, supra note 98, at 5 (quoting Congressman Hayes) claiming that the provision will discourage bureaucrats from rendering type A classifications "because they know they've just bought the farm."

221. Speech, supra note 38.

222. Land Letter, supra note 98, at 5.

223. Hayes Speech, supra note 38.

224. The provision states:

(A) classify as type A wetlands those that are of critical significance to the long-term conservation of the ecosystem of which such wetlands are a part and which meet the following requirements—

(i) such wetlands serve critical wetlands functions, including the provision of critical habitat for a concentration of avian, aquatic, or wetland dependent wildlife;

(ii) such wetlands consist of or may be a portion of ten or more contiguous acres and have an inlet or outlet for relief of water flow; except that this requirement shall not operate to preclude the classification as type A wetlands lands containing prairie pothole features, playa lakes, or vernal pools if such lands otherwise meet the requirements for type A classification under this paragraph;

(iii) there exists a scarcity within the watershed or aquatic ecosystem of identified ecological functions served by such wetlands such that the use of such wetlands for activities described in subsection (a) would seriously jeopardize the availability of these identified wetlands functions;

(iv) there is no overriding public interest in the use of such wetlands for purposes other than conservation; and;

(v) the nature and scope of wetlands functions are such that minimization and compensation are not feasible means for conserving wetlands values and functions.
Type A wetlands must bear a "critical significance to the long-term conservation"\textsuperscript{225} of their surrounding ecosystem. That is, the type A wetland must be "a turning point, or specially important juncture"\textsuperscript{226} to the long-term conservation of the ecosystem. In addition, the wetland must meet quality and quantity based standards, public interest based standards, and minimization or compensation based standards to earn the title of type A wetland.

The quality based standards require that the wetland serve critical wetlands functions that necessarily includes critical habitat.\textsuperscript{227} The critical habitat must also have an inlet or outlet for relief of water flow. Critical habitats cannot receive a type A classification if the water saturating the wetland derives from groundwater, even where the wetland's location places it adjacent to open waters. If held to these requirements, even the \textit{Riverside Bayview Homes}\textsuperscript{228} wetland would fail the type A classification, thereby repudiating the Corps' permit denial in that instance.

The quantity based standard requires that type A wetlands consist of, or be a part of, ten or more contiguous acres. The Hayes-Breaux bill apparently presumes that unless there exists a certain quantity of wetland, no reason exists to afford that wetland a higher degree of protection. Thus, the ten or greater acres requirement places all small wetlands beyond the reach of type A classification.

Pursuant to this requirement, all critical habitats of less than ten acres fail to qualify for a type A classification. The Hayes-Breaux bill also presumes that too much of a wetland places that area beyond the need for increased protection. Hence, assignment of type A status only occurs where "there exists a scarcity within the watershed or aquatic ecosystem of identified ecological functions served by such wetlands" and the use of the wetland would seriously jeopardize the availability of the critical wetlands functions.\textsuperscript{229} An additional limitation to classification of large areas as type A wetlands exists in section 3(g)(3) of the Hayes-Breaux bill. That section allows that "[n]o more than 20 percentum of any country [sic], parish, or borough shall be classified as type A wetlands."\textsuperscript{230}

The impact of these limitations on type A classification is analogous to one author's construction of the impact of a loophole found in the Guidelines MOA.\textsuperscript{231} Writing about that loophole, the commentator com-

\textsuperscript{226} Webster's Seventh New Collegiate Dictionary 197 (7th ed. 1967).
\textsuperscript{230} Id. § 3(g)(3).
explains that failing to protect wetlands from small losses "provides an exception for the type of small, de minimis actions that have gobbled up coasts and inland waterways, quarter-acre by quarter-acre..."

Alternatively, discarding protection for areas where there does not exist a scarcity of identifiable ecologic functions "provides a de maximis exemption for activities, irrespective of scale and damage, in areas with a 'high proportion' of wetlands; that is, the remaining areas of greatest biological importance. Goodbye Louisiana." 233

The reasoning behind limitations based solely on total area defies logic. If a wetland is of critical significance, legislation should attempt to preserve whatever remaining parcel of the wetland exists. If the parcels exist in less than ten acre plots, it seems reasonable to assume that these critical wetlands lead a precarious existence and hence deserve the full protection of the law. The very reality of wetland parcels of less than ten acres should lend proof that their "exists a scarcity... of identified ecological functions served by such wetlands" thereby meeting one of the type A requirements. 234 Unilaterally limiting protection of small wetland areas runs counter to President Bush's "no net loss" of wetlands policy. Although Congress is not bound by the "no net loss" goal, Congress should consider the merits behind the policy before unilaterally rejecting the idea.

Limiting the protection afforded large wetland areas by requiring a scarcity of identified ecological functions also disregards the policy goals spelled out in the "no net loss" of wetlands declaration. The reason behind the "no net loss" policy relates to the common perception that the United States currently suffers too much loss of wetlands. One can hardly argue with that belief when statistics show loss rates of more than 500,000 acres of wetlands per year. 235 In addition, Louisiana faces the specter of losing large portions of four coastal parishes within the next century. 236 The "scarcity" requirement assumes that large quantities of critical wetlands can continue to suffer less than maximum protection, an idea shared by few experts. The "scarcity" provision seems particularly hard to fathom in the context of the Hayes-Breaux bill because the bill contemplates compensating landowners whose property acquires

232. Id at 10214.
233. Id.
235. Sleeper, supra note 19, at 13. The author's statistics show that only 103 million acres of wetlands remain of the estimated 220 million acres that existed in the United States during Colonial times. The author claims that this translates to a loss rate of 60 acres of wetlands per hour over the last 200 years.
236. "Within the next century four coastal parishes will sink largely below water; within half that time one may entirely disappear." Oliver A. Houck, Land Loss in Coastal Louisiana: Causes, Consequences, and Remedies, 58 Tul. L. Rev. 3, 4-5 (1983).
a type A classification. In light of the compensation provision, there
appears no reason to protect landowners by a parsimonious granting of
type A classification.

Prior to securing a type A classification, wetland areas also face a
public interest analysis. Wetlands receive type A classification only when
there exists "no overriding public interest in the use of such wetlands
for purposes other than conservation." The Hayes-Breaux bill's find-
ings speak of such a public interest balance, pitting conservation interests
against "the need for essential public infrastructure, such as highways,
ports, airports, sewer system[s], and public water supply systems and
providing the opportunity for sustained economic growth." Essential
public infrastructure and an opportunity for sustained economic growth
give this exception seemingly unlimited bounds. One can ask, will any
project that promises to provide tax revenues and jobs qualify under
this exception thereby preventing the protection of a type A classifi-
cation?

The final requirement that type A wetlands must meet constrains
the type A label to instances where "the nature and scope of wetlands
functions are such that minimization and compensation are not feasible
means for conserving wetlands values and functions." Minimization
involves project modifications and permit conditions designed to mini-
mize adverse impacts. Compensation involves the restoration of existing
degraded wetlands or the creation of man-made wetlands. This exception
presents a formidable barrier to type A designation because the Hayes-
Breaux bill strongly favors minimization and compensation as means
for protecting wetlands values. Indeed, the Hayes-Breaux bill presumes
compensation functions as a viable conservation method.

This final requirement, regarding the feasibility of minimization and
compensation, equates to step two and three in the sequencing steps
outlined in the recent Guidelines MOA. The Guidelines MOA se-
quencing process considers how to avoid impacts when permitting a
specific project by issuing permits only for "the least environmentally
damaging practicable alternative." Unlike the type A "sequencing" in
the Hayes-Breaux bill, the Guidelines MOA requires that projects first
seek to avoid all impacts. The Guidelines MOA also includes a rebuttable
presumption that alternative sites causing less impact are available for
non-water dependent projects. Pursuant to the Guidelines MOA require-
ments, "[c]ompensatory mitigation may not be used as a method to

238. Id. § 2(a)(5).
239. Id. § 3(c)(3)(A)(v).
241. Id. at 3.
reduce environmental impacts in the evaluation of the least environmentally damaging practicable alternatives. . . .”242

Unlike the Guidelines MOA, the Hayes-Breaux bill prefers minimization and compensation to avoidance. The preference under the Hayes-Breaux bill appears to instruct the Secretary to abstain from type A designations where the Secretary finds that minimization and compensation are possible. The bill makes no mention of avoiding impacts.

Under the Hayes-Breaux bill, minimization and mitigation steps should be available for most projects. For minimization, the question is one of degree; whether the minimization steps are sufficient to conserve wetlands functions and values. Mitigation, referred to as compensatory mitigation in the Guidelines MOA, is presumed to function as a viable conservation method under the Hayes-Breaux bill's provisions. The Hayes-Breaux bill includes provisions for mitigation banking243 and instructs the Secretary to impose mitigation requirements when “he finds that activities undertaken . . . will result in the loss or degradation of type B wetlands functions and values. . . .”244 But the Secretary may determine not to impose mitigation requirements for several reasons listed under section 3(e)(3)(E).245

The listed exceptions do not include a finding that mitigation is not a feasible means for conserving wetlands values and functions. The exceptions fail to recognize any situations where mitigation appears technically infeasible. To receive a type A classification, the nature and

242. Id. at 4.
244. Id. § 3(e)(3)(C).
245. The provision states:

(E) Notwithstanding the provisions of subparagraph (C), the Secretary may determine not to impose requirements for compensatory mitigation if the Secretary finds that—

(i) the adverse impacts of a permitted activity are limited;

(ii) the failure to impose compensatory mitigation requirements is compatible with maintaining wetlands functions and values and no practicable and reasonable means of mitigation is available;

(iii) there is an abundance of similar significant wetlands functions and values in or near the area in which the proposed activity is to occur that will continue to serve the functions lost or degraded as a result of such activity, taking into account the impacts of such proposed activity and the cumulative impacts of similar activity in the area;

(iv) the temporary character of the impacts and the use of minimization techniques make compensatory mitigation unnecessary to protect significant wetlands values; or

(v) a waiver from requirements for compensatory mitigation is necessary to prevent special hardship.
The scope of wetlands functions must be "such that minimization and compensation are not feasible means for conserving wetlands values and functions." Thus, the exceptions for imposition of mitigation requirements fail to recognize one of the necessary requirements for a type A classification. In other words, the Hayes-Breaux bill's type B permitting procedures presume mitigation successfully conserves "wetlands values and functions."

The mitigation section discussed above refers to permitting in type B wetlands. However, when permits authorizing activities in type A wetlands require mitigation, they "may contain such terms and conditions concerning mitigation (including those applicable under paragraph (3) for type B wetlands). . . ." Thus, the Hayes-Breaux bill applies type B mitigation terms to type A wetlands and therefore fails to provide for a finding of non-feasible mitigation for either type A or type B wetlands.

In sum, the Hayes-Breaux bill contains formidable substantive requirements for meeting a type A classification. Wetlands must be critical and of a certain size; type A wetlands can be neither too small nor too abundant. Type A wetlands must not potentially serve any purpose related to the essential public infrastructure or economic growth. Finally, the critical wetlands functions must not be susceptible of mitigation. In view of this litany of requirements, the Hayes-Breaux bill very much deserves criticism of its overly stringent criteria for granting type A classification.

The Hayes-Breaux bill also contains procedural barriers to protecting type A wetlands. For example, when reviewing an advanced determination by the Director of the FWS, the Secretary of the Corps may modify the classification by determining that the limitations on the specific wetland "would effectively preclude reasonable economic use of the wetlands." Refusal of type A classification to a wetland of critical significance thus depends on the available economic uses of the wetland. This provision is nonsensical since the primary reason for type A classification is to protect certain critical wetlands from the effects of economic use. This provision completely reverses the considerations taken into account when classifying wetlands, by elevating "reasonable economic use" to a primary consideration that vetoes a finding that an area serves a critical wetland function. Apparently, the Secretary might modify the Director's type A classification to an unregulated type C classification if the Secretary finds that any use limitations preclude "reasonable economic use."

247. Id. § 3(e)(2).
248. Id. § 3(c)(4)(A)(iv).
Making type A classification dependent upon "reasonable economic use" also conflicts with the assumption that type A classification is a taking that requires compensation. Presumably, type A classification results in a taking because it denies the owner all beneficial use of the property subject to the statutory classification. In *Riverside Bayview Homes*, the Supreme Court noted:

[The possibility that the application of a regulatory program may in some instances result in the taking of individual pieces of property is no justification for the use of narrowing constructions to curtail the program if compensation will in any event be available in those cases where a taking has occurred. Under such circumstances, adoption of a narrowing construction does not constitute avoidance of a constitutional difficulty, ... it merely frustrates permissible applications of a statute or regulation.]

A statute that grants a takings provision but then narrows its own construction to curtail the very program that the statute advances is beyond comprehension. The very purpose of the takings provision is to ameliorate any harm that befalls those who suffer from application of the statute.

In the permitting procedures for type A wetlands, the Hayes-Breaux bill expresses consideration for particular uses of wetlands. Where the Secretary finds "overriding public interest concerns that require use of the lands for purposes other than conservation," the Secretary may grant a permit for that use. Overriding public purpose includes "the lack of practical and feasible means for accomplishing the project purpose at an alternative location." The Hayes-Breaux bill fails to designate who defines the project purpose in this instance. Project purpose is an ambiguous term. When considering type B alternative site analysis, the Hayes-Breaux bill provides that the applicant's stated purpose binds the Secretary. Should the same hold true in the permitting procedures for type A wetlands, applicants might narrowly define their projects such that no means other than completing the project in the particular wetland exists. One writer suggests "it is important to note that in alternatives analyses the Corps, not the applicant, defines each project's purposes. In formulating the definition, the Corps does not defer to

250. Id. at 128, 106 S. Ct. at 460 (citation omitted; footnote omitted).
252. Id. § 3(e)(2)(B)(ii).
253. Id. § 3(e)(3)(B).
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the applicant's definition without question." The author finds a clear rationale for this policy: to prevent self-serving definitions that "make it virtually impossible to find another site that could meet the specified goals."255

The final assault on type A classification comes from the time limits placed upon permit applications. If final action on a permit does not take place "within six months from the date that the . . . application is complete, a permit shall be presumed to be granted authorizing the activities proposed in such application under such terms and conditions as are stated in such completed application."256 Delayed permits effectively convert all wetlands to unregulated type C wetlands.

Currently the Corps processes seventy-five percent of individual permit applications in less than 120 days.257 Thus, twenty-five percent or 3750 of the 15,000 annual permit applications received by the Corps require more than 120 days and hence may fall into the category of permits requiring more than six months for Corps action. Regardless of the nature of these wetlands, the delay allows unrestricted completion of the applied for activity. The current number of type A wetlands potentially subject to this default permit process appears low; however, the classification scheme in the Hayes-Breaux bill creates new demands on the permit process that may cause a significant increase in the number of delayed permits.

The Secretary may issue permits for activities in type B wetlands, subject to conditions he finds necessary to protect the wetland from significant loss or degradation of its values and functions. For type B wetlands, the Hayes-Breaux bill encourages mitigation over alternative site analysis. The only mention of avoidance of impact refers to project design rather than to the selection of alternative sites as stressed in the Guidelines MOA. The Secretary must consider "the opportunities to reduce impacts through cost effective design to avoid or minimize use of wetlands."258 Alternative site analysis "may" be required under the Hayes-Breaux bill only for "alteration or permanent surface disturbance of ten or more contiguous acres of wetlands."259

Mitigation requirements "shall be imposed when the Secretary finds that activities . . . will result in the loss or degradation of type B wetlands functions and values where such loss or degradation is not a temporary

255. Id. at 400-01.
257. See Backgrounder, supra note 75, at 4.
259. Id. § 3(e)(3)(B).
or incidental impact."\(^{260}\) The considerations thus established in the Hayes-Breaux bill run absolutely counter to those established pursuant to section 404(b)(1)\(^ {261}\) in the recent Guidelines MOA. The thrust of the MOA is avoidance of discharge "if there is a practicable alternative to the proposed discharge which would have less adverse impact to the aquatic ecosystem" rather than to seek minimization or mitigation.\(^ {262}\) The Hayes-Breaux bill's thrust is apparently to always seek mitigation for areas less than 10 acres and to allow, but not require, the Secretary to consider alternative site analysis for larger areas. The preferred policy inferred from the Hayes-Breaux bill is mitigation, the last resort under the MOA.

One reason for preferring avoidance to mitigation is that the success of mitigation remains questionable. Federal studies show that more often than not such efforts end in failure.\(^ {263}\) In a major study of wetlands, the Office of Technology Assessment concluded: "The ability to construct new wetlands should not be used as sole justification for the unregulated conversion of wetlands to other uses: manmade wetlands do not necessarily provide the same values as natural ones."\(^ {264}\) In addition, the study determined that "it is probably not possible to create new wetlands at the rate they have been converted to other uses in the past."\(^ {265}\)

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\(^{260}\) Id. at § 3(e)(3)(C).


Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

\(^{262}\) Guidelines MOA, supra note 40, at 3. See Houck, supra note 231, at 10214. The author expresses concern over the ability of the MOA to accomplish its goals because of two loopholes contained therein. One allows deviation from sequencing when considering insignificant environmental losses. Critics believe this loophole allows continued losses from the de minimis actions along coasts and inland waterways. But the MOA requires that both the EPA and the Corps agree that deviations will result in insignificant losses. Actions concerning de minimis deviations require positive approval by EPA. The MOA requires EPA's authority to go forward unlike the veto power that requires EPA to exercise its authority to prevent action. Thus, EPA's concurrence should prevent this loophole from having serious consequences.

The second loophole grants an exception to sequencing where sequencing may not be practicable because there is a high proportion of land that is wetlands. This provision is troubling for Louisiana because it seems to exempt much of the state from the benefit of the section 404(b)(1) guidelines analysis.


\(^{264}\) OTA Report, supra note 17, at 117 (emphasis in original).

\(^{265}\) Id.
Critics contend that adverse impacts are frequently the subject of inadequate mitigation that is not properly monitored or maintained. For example, one writer concludes that inadequate mitigation occurred in a recent development along the Mississippi River. The project required the conversion of 1000 acres of wetlands into a Jack Nicklaus golf course. The required "mitigation consists of a small swamp park with a boardwalk." The same critic further complained of the mitigation exchange rate for wetlands lost, stating that permit mitigation requirements for one year "represent approximately 50,000 wetland acres saved." But under that same permit process "nearly four times as many acres have been lost." High mitigation costs are a second reason to prefer avoidance. For example, in Florida, officials plan to spend $400 million to reduce agricultural pollution in the Everglades and another $270 million to obliterate the largest of a system of canals partially responsible for the loss of fifty percent of the Everglades. A policy favoring mitigation, an uncertain and expensive option, seems dubious.

In addition to favoring avoidance, the Guidelines MOA incorporates "rebuttable presumptions that 1) alternatives for non-water dependent activities that do not involve special aquatic sites are available and 2) alternatives that do not involve special aquatic sites have less adverse impact on the aquatic environment." The Hayes-Breaux bill includes no such presumptions. The Hayes-Breaux bill also considerably weakens the Secretary's opportunity to impose any redesign of projects to avoid wetland areas by imposing a "rebuttable presumption that the project purpose as defined by the applicant shall be binding upon the Secretary."

Under section 404, the Corps, not the applicant, defines the purpose of projects. As stated earlier, the "rationale for this policy is" to prevent a developer, from giving "so detailed and narrow a definition as to make it virtually impossible to find another site that could meet the specified goals." The limited call for alternative site analysis required in the Hayes-Breaux bill appears easily avoided by creative purpose definition.

The Hayes-Breaux bill provides an exception to the requirement of compensatory mitigation in type B wetlands where the Secretary makes

266. Zinn, supra note 35, at 8.
267. Houck, supra note 14, at 360 (footnote omitted).
268. Houck, supra note 231, at 10212.
269. Id.
270. Sleeper, supra note 19, at 14.
271. Guidelines MOA, supra note 40, at 3.
273. McGreevey, supra note 254, at 400-01.
any one of several findings. An exception dispensing with mitigation requirements results from a finding that "there is an abundance of similar significant wetlands functions and values in or near the area in which the proposed activity is to occur that will continue to serve the functions lost or degraded as a result of such activity. . . ."274 This provision mirrors the requirement under the type A classification scheme that there exist a scarcity of the particular wetlands functions. Both requirements regard abundance as a reason to overlook the value of a wetland. But the present existence of an abundance of healthy wetlands area should not serve as a reason to afford less protection.

The provision somewhat mitigates the negative effect of the "abundance exception" by forcing the Secretary to take "into account the impacts of such proposed activity and the cumulative impacts of similar activity in the area."275 Presumably, this requirement would prevent deterioration of the wetlands beyond a certain point.

Another exception to the mitigation requirement allows no mitigation where a waiver "is necessary to prevent special hardship."276 The Hayes-Breaux bill fails to specify either who must suffer the hardship or the nature of the special hardship that must be suffered. Two possible parties exist: the landowner and a person other than the landowner (such as a lessee) planning an activity in the wetland. The failure to place any limits on what qualifies as a special hardship or on who must suffer the hardship renders this a broad exception. The lack of confining parameters may allow the exception to swallow the mitigation requirement.

Although the success rate of mitigation efforts remains dubious, an attempted mitigation project is preferable to no mitigation requirement. At least the required expense of a mitigation effort might discourage marginal development projects in wetland areas. Thus, the mitigation loopholes may have far reaching effects by preventing the imminent expense of mitigation from working as a deterrent.

Critics complain about the wholesale removal of type C wetlands from the program's jurisdiction. Such a step potentially writes off vast wetland areas because they have alleged low values. The proposal to

275. Id.
276. Id. § 3(e)(3)(E)(v).
277. Id. § 3(e)(5)(a).
278. Id. § 3(e)(5)(C).
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write off areas of wetlands runs counter to President Bush's goal of "no net loss" of wetlands. The proposed Revised Wetlands Delineation Manual also promises to remove large expanses of "marginal wetlands" from the regulatory scheme. A combination effect of excluding from regulation both wetlands under the revised Delineation Manual and wetlands classified as type C deals a one-two punch that threatens to relinquish vast expanses of wetlands to the unprotected category.

C. Regulated Activities

Perhaps the one area of the Hayes-Breaux bill that pleases environmentalists is the addition of "draining, channelization, or excavation of wetlands" to the regulated activities.279 Because of this provision, the Hayes-Breaux bill gives the Corps the authority to regulate a broader range of wetlands damaging activities. Under the current section 404, "a developer can drain a wetland area . . . without risking legal repercussions."280 In fact, "over 80 percent of the wetland losses in this country" are beyond the regulatory reach of section 404.281

VI. CONCLUSION

The Hayes-Breaux bill addresses several problems with wetlands conservation and management but fails to put forth a viable program for wetlands protection. The bill approaches wetlands protection with a flawed basic premise as indicated in its finding that most of Louisiana's coastal erosion is not attributable to human activity.282 While experts might argue over which activities of man cause the greatest loss of wetlands, few if any would argue that human activities have not at the very least greatly exacerbated the erosion process. A bill that fails to recognize the cause of the underlying problems cannot hope to ameliorate the results.

From the outset, the Hayes-Breaux bill's classification scheme faces the difficult hurdle of proving that it is a viable alternative. Federal agencies dealing with wetlands have disagreed for years over how to define the limits of a wetland. Now this Hayes-Breaux bill would require those agencies to make fine-line delineations within wetlands. No demonstrated proof exists evidencing the capability to make such classifications.

The Hayes-Breaux bill fails to protect even those wetlands providing the most critical wetlands functions. The failure is due to the short-
comings in the type A classification procedure. First, the Hayes-Breaux bill grants type A status to a very narrow range of wetlands, then the bill confers very broad exceptions to permit denials for activities in those wetlands.

Type A classification endures extremely demanding standards. The demanding standards deny critically significant wetlands what limited protection is afforded by a type A classification. Also, the Hayes-Breaux bill withholds type A classification for a variety of reasons unrelated to the value of the particular wetlands. The most disturbing of reasons allows denial of type A classification where limitations on uses of the specific wetland imposed by the Hayes-Breaux bill would effectively bar reasonable economic use of the wetlands.

The permit procedure fails to provide adequate protection for the different classes of wetlands. Loopholes allow the Secretary to disregard the general ban on activity in type A wetlands. The most disturbing loophole allows permits where overriding public interest concerns require use of the land for non-conservation purposes.

Permit loopholes for type B wetlands concern the mitigation requirements specified by the Secretary. Where an abundance of type B wetlands exist, the Secretary may disregard any mitigation requirements. This provision fails to recognize the value of large undisturbed expanses of wetlands, and it fails to recognize the goal of preventing all net losses of wetlands.

Implementation of a classification scheme suffers many uncertainties. The EPA is considering such a scheme. The problems are largely of a technical nature within the expertise of the agency. Because of the uncertainties involved, classification should be developed through the agencies rather than through Congressional legislation.

In one major administrative change, the Hayes-Breaux bill totally removes the EPA from the 404 permit procedure. Although the EPA uses its veto authority sparingly, protectionists regard the authority as critical to control an agency with a poor environmental record. Congress should not eviscerate the EPA from section 404 decisions. The recent instances of the Corps and the EPA displaying an ability to agree on wetlands policies, such as the Guidelines MOA, offer evidence that the current management scheme of checks and balances can work.

One positive aspect in the Hayes-Breaux bill—its inclusion of activities beyond the discharge of dredged and fill material—would subject more activities to the permit procedure. While the increase of regulated activities may encourage support of the Hayes-Breaux bill, an analysis of the permitting provisions discourages support. Unfortunately, more activities subjected to more relaxed permitting provisions afford no extra protection to wetlands.

Congress should amend section 404 by passing section 3(a) of the Hayes-Breaux bill. That section prohibits the "draining, channelization,
or excavation of wetlands" in addition to the discharge of dredged and fill material. Since activities causing more than eighty percent of the nation's wetlands loss remain beyond the reach of the current section 404, presumably section 3(a) would have an immediate, beneficial impact on wetlands preservation. However, Congress should reject the remainder of the Hayes-Breaux bill.

The pressure bearing upon Congress to correct the overreaching of section 404 should abate with implementation of the Revised Wetlands Delineation Manual. The lack of urgency grants Congress greater opportunity to carefully consider additional revisions to section 404. In the meantime, Congress should allow the agencies further opportunity to solve the problems they have already begun to address through such vehicles as the Guidelines MOA.

The EPA proposes the consideration of a classification scheme. While any such scheme faces the practical problems of field classification, the agencies that have developed a wetlands delineation expertise may overcome these problems. Critics complain that under a classification scheme, "[a]ll but the 'important' [wetlands] will go." But a classification scheme stressing absolute protection for critical wetlands balanced against a permit process stressing sequencing, as per the Guidelines MOA, for less critical wetlands, may resolve much of the tension between protectionist and development minded parties. Before such a classification should render any wetland areas unregulated, similar to the Hayes-Breaux bill's treatment of type C wetlands, such a scheme must account for the large amount of area no longer considered wetlands under the Revised Wetlands Delineation Manual. Removing marginal wetland areas from the regulatory process through the revised definition should balance the need to absolutely deregulate any additional wetland areas.
