

A Five Point Plan for Expanding the Nation's Wetlands Base and Improving the Section 404 Program

Among the many environmental issues faced by aggregate producers, the wetlands regulatory program under Section 404 of the Clean Water Act continues to be a difficult regulatory hurdle. NSSGA is a key member of The National Wetlands Coalition, which is a broad cross-section of state and national trade associations, business and agricultural interests, local governmental entities, Native American groups and others that have joined together to advocate a balanced federal policy for conserving and regulating the nation's wetlands. The following is an outline of a proposed plan developed by the coalition.



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Over the last decade, the loss of the nation's wetlands has been slowed substantially or, according to some observers, even reversed. Nevertheless, we have not yet achieved meaningful wetlands gains nationwide, even though such gains could be achieved by restoring previously functioning wetlands. The wetlands regulatory program remains controversial among landowners and users of land, including state and local agencies, and has been thrown into some measure of disarray by the Supreme Court's decision on "isolated wetlands" in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (531 U.S. 159 (2001)), known as "SWANCC."

The opportunity may exist in the current administration to harness private sector initiative to expand the nation's base of functioning wetlands, improve the administration of and reduce the level of controversy surrounding the Section 404 permitting program. The following is a five-point plan for achieving these objectives.

Adopt a Reasonable Goal For Expanding the Wetlands Base of the Nation and Activate the Private Sector to Achieve this Objective

According to very rough estimates by the U.S. Fish and Wildlife Service that have become part of the "lore" surrounding the wetlands issue, about 100 million acres of wetlands have been "lost" since the colonial era of our nation. Most of this loss has not been due to the development of cities and other such permanent conversions of wetlands, but rather to the drainage of wetlands for farming. Today, with the increase in productivity of American agriculture, many of these lands are no longer cultivated and are lying fallow.

Both the opportunity and the technology exist to return these lands to their former wetlands state. Recent studies by the National Academy of Sciences and the Department of Ecology of the state of Washington suggest that wetlands restoration is more likely to be successful when performed through private sector mitigation banks.

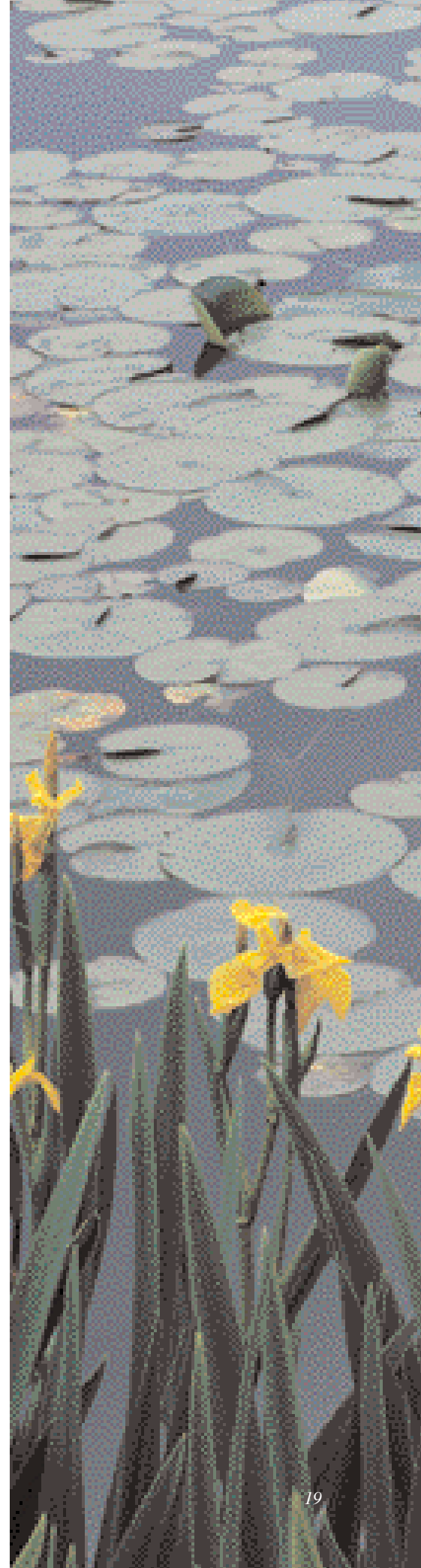
Perhaps a goal of 20,000 acres of wetlands gain per year could be established by the administration. This would entail restoring an average of 400 acres per state above the restoration needed to replace wetlands disturbances permitted under the Section 404 program. This amount of restoration could be achieved through a number of mechanisms, including modest changes to the rules governing mitigation banks and the credits allowed for per acre per mitigation banks, such as requiring all federally funded developments (such as highways, airports and the like) to mitigate through private mitigation banks at a favorable ratio.

Ensure an Appropriate Interpretation by the Federal Government of the SWANCC Case Regarding Isolated Wetlands

On Jan. 9, 2001, the Supreme Court in the SWANCC case decided that "isolated wetlands" are not jurisdictional to the federal government under Section 404 of the Clean Water Act. Specifically, the court invalidated the "migratory bird rule" that was employed by the federal agencies to assert jurisdiction in SWANCC and similar cases. The court went on to indicate that the Congress, in using the term "navigable waters" in Section 404 of the Act, intended to regulate waters that "were or had been navigable, in fact, or which could reasonably be so made."

The SWANCC case has engendered significant debate within the administration regarding the meaning of the court's decision. Did the court mean only to invalidate the "migratory bird rule" as the basis for jurisdiction? Or, did the court mean that the Section 404 program was to be restricted to areas more closely related to the term "navigable waters?" Those asserting that the case must be narrowly interpreted also advance other creative grounds for asserting jurisdiction that, if successful, could actually broaden the area covered by Section 404.

The administration should interpret the SWANCC case to mean that the jurisdiction of the Section 404 program





is to be limited to those areas that are more traditionally related to “navigable waters.” Since the issuance of the SWANCC case, two states, Ohio and Wisconsin, have enacted legislation to regulate “isolated wetlands” in a fashion that is responsible, yet more flexible than the Section 404 program. At this stage in the evolution of the nation’s environmental ethic, the states

can be trusted to act responsibly with respect to environmentally valuable “isolated wetlands.” Given the wide range of “isolated wetlands” across the nation, states are in a better position to make judgments respecting the regulation of these areas, and the court noted expressly in the SWANCC opinion the states’ “traditional and primary” authority over land and water use.

Concentrate Implementation of the Section 404 Program in the Army Corps of Engineers

While the Army Corps of Engineers has the lead authority in statute for the implementation of the Section 404 program, a number of decisions over the past 25 years have concentrated significant authority over the program in the Environmental Protection Agency. A final rule issued on Dec. 24, 1980 converted a proposed advisory role for the EPA to a leadership role on key aspects of the regulatory program. An Attorney General’s opinion in September 1979 granted the EPA lead authority to determine the jurisdiction of the Section 404 program. Finally, Section 404(c) allows the EPA to “veto” a decision of the corps to issue a Section 404 permit by “withdrawing” the proposed “dredge and fill” disposal area for certain environmental reasons. The practice has developed that the EPA can exercise this “veto” authority at any time during the permit application period, and even after the corps has granted the permit.

This “dual” agency implementation causes enormous difficulties for permit applicants and is unique among federal regulatory programs. To the maximum extent possible, responsibility and accountability for the implementation of the Section 404 program should rest with the Army Corps of Engineers.

The Section 404 Program Should be Implemented Consistently in Every Corps District Office

Over the last two decades, decision-making authority has devolved



within the corps from the national headquarters to the corps' 38 district offices. Unfortunately, the result has been inconsistency of implementation, with some district offices refusing to follow the directives of corps headquarters in the implementation of the Section 404 program. Actions must be taken to ensure that every district office of the corps follows

common guidelines in the application of the program. Sufficient control of the Section 404 program must again be consolidated in the headquarters of the corps to ensure consistent administration of the program.

Provision Must be Made to Assist Applicants Who are Having Undue Difficulty in the Permitting Process

The Section 404 program is marked by an unusual degree of discretion in the hands of corps district staff. Unfortunately, this discretion can be misused by various corps staff because of misunderstandings of aspects of the program, personal bias, poor presentations by applicants and a variety of other reasons, including good faith disagreements. Often, applicants have no legal or other representation. Sometimes applicants have third party representation; sometimes that representation is competent and sometimes it is not. Provision, therefore, should be made for applicants who find themselves in a difficult position in the district office to obtain some form of assistance. One thought is the establishment of an ombudsman whose job is to cut through red tape on behalf of a permit applicant, and whose job performance is assessed by his ability to do so.

None of the changes discussed herein require legislation or propose to change existing standards for the implementation of the program. Yet, if implemented, this five-point program could expand the wetlands base of the nation and remove much of the continuing controversy surrounding the Section 404 "wetlands" permitting program. □

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