

# ARTICLES

## FEDERAL REGULATION OF ISOLATED WETLANDS

By  
STEPHEN M. JOHNSON\*

*The Clean Water Act authorizes regulation of "waters of the United States." But, it is not clear whether isolated wetlands, which are neither navigable nor adjacent to navigable waters, are subject to regulation under the Act. While the U.S. Supreme Court has not decided the issue, and there has been some conflict in the federal circuit courts, the author argues that Congress intended isolated wetlands to be regulated under the Act and that the Commerce Clause of the Constitution gives power to that intent.*

### I. INTRODUCTION

Historically, wetlands were referred to as "swamps."<sup>1</sup> They were seen as insect-ridden wastelands prime for dredging, filling

---

\* The author is a trial attorney in the Environmental and Natural Resources Division of the U.S. Department of Justice. The views expressed in this Article are the author's and do not reflect the views or policies of the Department of Justice.

1. Wetlands vary widely, and modern classification systems discourage the use of such generic labels to identify the entire class. "Swamps," "bogs," and "marshes" are not merely synonyms for wetlands. Instead, each describes a particular type of wetland. "Swamps," for instance, are wetlands that are dominated by trees or shrubs. See GORDON MEEKS, JR. & L. CHERYL RUNYON, NATIONAL CONFERENCE OF STATE LEGISLATURES, WETLANDS PROTECTION AND THE STATES 5 (Karen Hansen ed., 1990).

or draining.<sup>2</sup> Not surprisingly, more than half of the wetlands that existed in the contiguous forty-eight states when America was born have been destroyed.<sup>3</sup>

Gradually, wetlands began to be appreciated for the benefits that they provide.<sup>4</sup> Often referred to as "nature's kidneys,"<sup>5</sup> wetlands improve water quality by removing excess nutrients,<sup>6</sup> sedi-

---

2. MEEKS & RUNYON, *supra* note 1, at 1. See also GENERAL ACCOUNTING OFFICE, WETLANDS OVERVIEW 9 (1991) [hereinafter GAO]; WILLIAM A. NIERING, WETLANDS 18 (1985); U.S. FISH AND WILDLIFE SERVICE, WETLANDS OF THE UNITED STATES: CURRENT STATUS AND RECENT TRENDS 1 (1984). [hereinafter FWS]. Throughout history, government policies frequently encouraged the destruction of wetlands. For instance, in 1764, the Virginia Assembly chartered the Dismal Swamp Company to drain 40,000 acres of the Great Dismal Swamp to harvest the timber in the swamp. NIERING, *supra*, at 30-31. Similarly, in the Swamp Lands Acts of 1849, 1850, and 1860, Congress granted 65 million acres of wetlands to 15 western states for "swamp reclamation." WILLIAM L. WANT, LAW OF WETLANDS REGULATION § 2.02[1] (1989).

3. A 1990 study by the Fish and Wildlife Service estimates that 53% of the 221 million acres of wetlands that existed in the lower 48 states in 1780 were destroyed by the 1980s. GAO, *supra* note 2, at 11 (citing THOMAS E. DAHL, U.S. FISH AND WILDLIFE SERVICE, WETLANDS LOSSES IN THE UNITED STATES: 1780's to 1980's 1 (1990)). During that period, 19 states lost more than half of their wetlands, and 6 states lost more than 85% of their wetlands. *Id.* at 11, 91. Between 1950 and 1970 alone, an average of 458,000 acres of wetlands were lost per year. FWS, *supra* note 2, at vii. Agricultural development accounted for 87% of the losses during that period, with urban development accounting for 8%, and other development accounting for 5%. *Id.*

4. See MEEKS & RUNYON, *supra* note 1, at 1. Wetlands are one of America's most productive sources of food protein. ELINOR L. HORWITZ, COUNCIL ON ENVIRONMENTAL QUALITY, OUR NATION'S WETLANDS 21 (1978). See also JOHN GOLDMAN-CARTER, NATIONAL WILDLIFE FEDERATION, A CITIZEN'S GUIDE TO PROTECTING WETLANDS 27-31 (1989); FWS, *supra* note 2, at 19.

Studies have also indicated that some wetlands contribute to groundwater recharge, the replenishment of underground aquifers. FWS, *supra* note 2, at 23; NIERING, *supra* note 2, at 31. Furthermore, wetlands play a vital role in maintaining biospheric stability. For instance, wetland plants are important in producing oxygen from carbon dioxide and some studies indicate that the methane generated by wetlands plays a role in protecting the ozone layer. NIERING, *supra* note 2, at 34.

5. MEEKS & RUNYON, *supra* note 1, at 1.

6. The increased use of nitrogen-rich agricultural fertilizers leads to increased levels of nutrients in hydrologic systems. NIERING, *supra* note 2, at 33. Wetlands prevent nutrient overloading (eutrophication) by removing nutrients, especially nitrogen and phosphorous, from water before it leaves the wetland ecosystem. *Id.* See also FWS, *supra* note 2, at 18.

Tincum Marsh, a 512 acre freshwater tidal marsh located just south of Philadelphia, illustrates the natural ability of a wetland to filter nutrients from the

ments,<sup>7</sup> and pollutants<sup>8</sup> from water. They prevent flooding<sup>9</sup> and soil erosion,<sup>10</sup> and provide critical habitat for countless species of migratory waterfowl and endangered species.<sup>11</sup> They also produce tremendous quantities of natural products.<sup>12</sup> In addition to those tangible and intangible economic benefits, wetlands provide immeasurable recreational, educational, and aesthetic benefits.<sup>13</sup>

---

surrounding water. While three sewage treatment plants discharge treated sewage into the marsh, the marsh removes 4.9 tons of phosphorous, 4.3 tons of ammonia, and 138 pounds of nitrates from the water each day. FWS, *supra* note 2, at 18.

7. By removing sediments from water, wetlands reduce the turbidity of the water which leaves the wetland ecosystem, and reduce the siltation of water bodies which are located downstream from the wetland. *Id.* Since sediments transport various pollutants and nutrients, wetlands also filter pollutants and nutrients out of water when they remove sediments. *Id.*

8. *Id.* See also NIERING, *supra* note 2, at 33. Recognizing the ability of wetlands to remove pollutants from water, scientists are studying the use of natural wetlands, and even the construction of artificial wetlands, for waste treatment. *Id.* at 33-34.

9. Most wetlands temporarily store flood waters, and thereby slow the velocity of the water and lower flood crests. FWS, *supra* note 2, at 21. See also NIERING, *supra* note 2, at 31. By slowing the velocity of flood waters, wetlands also reduce the erosive potential of the waters. FWS, *supra* note 2, at 21. Since almost half the damage caused by floods is damage to agriculture, in the form of crop land erosion, wetlands play a vital role in protecting agricultural land from flood waters. *Id.* A scientific study conducted in Wisconsin determined that flooding may be reduced by almost 80% in watersheds with wetlands compared to similar watersheds without wetlands. *Id.* at 22.

10. FWS, *supra* note 2, at 23.

11. Scientists estimate that 150 North American bird species depend on wetlands for survival. NIERING, *supra* note 2, at 32. These ecosystems provide essential breeding grounds, feeding grounds, and wintering areas for the birds. FWS, *supra* note 2, at 14. Wetlands also provide critical habitat for one-third of the nation's endangered species. *Id.* at 17. See also COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: 22ND ANNUAL REPORT 195 (1992).

12. FWS, *supra* note 2, at 23. See also MEEKS & RUNYON, *supra* note 1, at 7. Over 82 million acres of wetlands are commercially forested in the 49 continental states of the United States. FWS, *supra* note 2, at 23. Some of the products harvested in wetlands include timber, cranberries, blueberries, wild rice, fish and shellfish, water hyacinths, and peat. *Id.* See also MEEKS & RUNYON, *supra* note 1, at 8. Almost two-thirds of the fish and shellfish that are harvested commercially depend on wetlands for spawning or for use as nurseries. *Id.* at 7. See also FWS, *supra* note 2, at 13. While the intrinsic value of wetlands can be maintained with proper management of the harvesting of many natural products, the harvesting of some products can be devastating to the ecosystem. The harvesting of peat, for instance, is essentially a mining operation and permanently destroys the wetland ecosystem. MEEKS & RUNYON, *supra* note 1, at 8.

13. Wetlands often provide havens for hunters, fishers, hikers, swimmers,

Recognizing the inherent value of wetlands, Congress and states enacted legislation to protect wetlands<sup>14</sup> and to eliminate incentives for destroying them.<sup>15</sup> The federal government and the

---

boaters, bird watchers, and nature photographers, among others. FWS, *supra* note 2, at 24.

14. One of the oldest federal wetlands protection statutes is the Migratory Bird Hunting Stamp Act, 16 U.S.C. § 718 (1988). Enacted in 1934, the legislation requires hunters of migratory waterfowl to purchase and display licenses, known as "duck stamps." 16 U.S.C. § 718a. The proceeds from the sale of duck stamps are deposited in a Migratory Bird Conservation Fund, which is used to purchase wetlands and surrounding areas for use as refuges or as waterfowl protection areas. 16 U.S.C. § 718d. Through 1989, the government spent \$49 million to obtain easements to protect 1.2 million acres of wetlands, and spent an additional \$102 million to obtain title to 564,000 acres of wetlands. GAO, *supra* note 2, at 23.

Another federal statute, the Water Bank Act, authorizes the Secretary of Agriculture to purchase 10 year easements on wetlands and adjacent areas "to preserve, restore, and improve the wetlands of the [n]ation." 16 U.S.C. §§ 1301-1311 (1988). In exchange for an annual payment, owners of wetlands agree not to drain, fill or otherwise destroy their wetlands, and to implement conservation plans and practices to protect the wetland habitat. *Id.* § 1303. As of July 1, 1991, the federal government was spending eight million dollars per year to protect 543,208 acres of wetlands under the Act. GAO, *supra* note 2, at 23.

The most comprehensive federal wetlands protection program, however, is the regulatory program established by section 404 of the Clean Water Act. 33 U.S.C. § 1344 (1988). The section 404 regulatory program is jointly administered by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers. *Id.* The Clean Water Act prohibits the discharge of dredged or fill materials into wetlands or other waters without a permit under the section 404 program. *Id.* Persons who violate the Act are subject to criminal prosecution, 33 U.S.C. § 1319c, and face civil penalties of up to \$25,000 per day of violation. *See id.* § 1319d. The government can also order them to restore the wetlands to the condition that they were in prior to the illegal filling activity. *See id.* § 1319a.

Several states have enacted legislation to provide additional protection to wetlands beyond the protection afforded by federal law. *See* WANT, *supra* note 2, § 13.02. *See also* MEEKS & RUNYON, *supra* note 1, at 10-14.

15. Prior to 1985, federal farm policies implicitly encouraged farmers to dredge or fill wetlands and convert them to agricultural land in order to obtain federal credit and commodity supports. GAO, *supra* note 2, at 21. However, in 1985, Congress removed some of those incentives when it enacted the Food Security Act of 1985. Pub. L. No. 99-198, 99 Stat. 1354 (codified in scattered sections of 7 and 16 U.S.C.) [hereinafter 1985 Farm Bill].

The "swampbuster" provisions of the 1985 Farm Bill deny price supports, loans, insurance, and other payments and benefits to farmers for any year that the farmers plant crops on wetlands that were converted to agricultural use after the enactment of the law. 16 U.S.C.A. § 3821 (West Supp. 1992).

The swampbuster provisions were strengthened by the Food, Agriculture, Conservation and Trade Act of 1990. Pub. L. No. 101-624, 104 Stat. 3359 (codified in scattered sections of 7 and 16 U.S.C.). Under the Act, farmers who drain,

states began to pursue unified programs to preserve wetland ecosystems.<sup>16</sup> As a result of these efforts, the rate of wetland loss in the United States has declined.<sup>17</sup>

Recently, however, the tide of wetland protection has begun to recede. In order to appease developers, farmers, and property rights advocates, the federal government proposed narrowing the definition of wetlands that are subject to federal regulation.<sup>18</sup> The

---

dredge, fill or otherwise convert any wetland after November 28, 1990, "for the purpose, or to have the effect, of making the production of an agricultural commodity possible" shall be ineligible for various price supports, loans, insurance, payments and benefits for the year in which the wetlands are converted and for every year thereafter. 16 U.S.C.A. § 3821b (West Supp. 1992) (emphasis added). As of August 1991, over \$3.7 million worth of benefits were withheld from farmers due to violations of the swampbuster provisions of the 1985 Farm Bill. GAO, *supra* note 2, at 21.

16. Prior to 1989, the U.S. Army Corps of Engineers, the EPA, the Fish and Wildlife Service, and the U.S. Department of Agriculture's Soil Conservation Service each employed its own standards and procedures for identifying wetlands. U.S. ARMY CORPS OF ENGINEERS ET AL., *FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS 1* (1989). In 1989, the four agencies jointly adopted a manual which set forth uniform standards and procedures for identifying wetlands. *Id.* at 2.

The federal government reached out to states and to a broad coalition of industry and environmental groups to establish a common agenda for wetlands protection. In 1987, EPA convened a National Wetlands Policy Forum, consisting of state governors and agency directors, local government officials, chief executive officers of environmental and business organizations, farmers, ranchers, and academics. GAO, *supra* note 2, at 15. See also MEEKS & RUNYON, *supra* note 1, at 9-10. The forum prepared an action agenda, which formed the basis for EPA's current wetlands protection agenda. U.S. EPA, *WETLANDS ACTION PLAN* (1989).

17. The Fish and Wildlife Service estimates that the annual rate of wetlands loss has declined to 290,000 acres. GAO, *supra* note 2, at 11.

18. Federal Manual for Identifying and Delineating Jurisdictional Wetlands, 56 Fed. Reg. 40,446 (1991). The government's proposal would narrow the definition of wetlands by changing the standards and methods that the government uses to identify wetlands. On August 14, 1991, EPA, the Corps, the Fish and Wildlife Service, and the Soil Conservation Service proposed revisions to the wetlands delineation manual that the four agencies jointly adopted in 1989. *Id.* The proposed revisions were prompted by protests from farmers and developers that the 1989 manual greatly increased the acreage of wetlands subject to regulation. *EPA Rejects OMB Proposal That Would Slow Issuance of Wetlands Manual*, INSIDE E.P.A. WEEKLY REPORT, Aug. 2, 1991, at 1-2.

The 1991 revisions have, however, been broadly criticized as confusing and scientifically flawed. *EPA, Interagency Experts All Find Wetlands Manual Confusing, UnScientific*, INSIDE E.P.A. WEEKLY REPORT, Nov. 29, 1991, at 3. See also *State Officials to Draft Wetlands Manual, Charging Federal Effort Flawed*, IN-

government may also sanction the conversion of thousands of acres of wetlands to farmland.<sup>19</sup> At the same time, representatives

---

SIDE E.P.A. WEEKLY REPORT, Mar. 6, 1992, at 18-19. Over 70,000 public comments were submitted on the revisions, and they have not yet been finalized. *White House Wetlands Meeting Offers No Resolution over Disputed Manual*, INSIDE E.P.A. WEEKLY REPORT, Apr. 17, 1992, at 1-2.

Congress created further confusion regarding which manual should be used to identify wetlands when it enacted legislation which prohibits the Corps from using any of its appropriations for the 1992 fiscal year for delineating wetlands under the 1989 manual. See Energy and Water Development Appropriations Act of 1992, Pub. L. No. 102-104, 105 Stat. 510, 518 (1991). The legislation also provides that, for pending enforcement actions and permit applications in which wetlands were delineated using the 1989 manual, landowners or permit applicants can elect a new delineation under the Corps of Engineers' 1987 manual. *Id.*

Subsequent to the issuance of the proposed revisions to the 1989 manual and challenges to the scientific validity of the revisions, legislation was introduced to require the National Academy of Sciences to conduct a study of the scientific basis of wetlands delineation. See H.R. 3578, 102d Cong., 1st Sess. (1991). The White House has opposed such a study. *'Top Bush Aides' Opposition Dims Prospects for Study on Wetlands Manual*, INSIDE E.P.A. WEEKLY REPORT, Feb. 28, 1992, at 3-4. The dispute regarding which manual should be used to identify wetlands remains unresolved.

19. The EPA and the Corps have proposed regulations that will remove wetlands which qualify as "prior converted cropland" from federal jurisdiction under the Clean Water Act. Proposed Rule for the Clean Water Act Regulatory Programs of the Army Corps of Engineers and the EPA, 57 Fed. Reg. 26,894 (1992). A wetland qualifies as "prior converted cropland" if, prior to December 23, 1985, the wetland was drained or altered to remove water and cropped to the extent that it was inundated with water for no more than 14 consecutive days during the growing season. *Id.* at 26,897.

The proposed regulation codifies a policy which the Corps adopted in 1990 to establish greater consistency between the regulation of wetlands by the Corps and the United States Department of Agriculture (USDA) under the swampbuster provisions of the 1985 Farm Bill. *Id.* Recently, however, the USDA has indicated that it intends to expand its definition of "prior converted cropland" to include wetlands which have been farmed for six of the last ten years and meet the requirements for "prior converted cropland," regardless of whether the wetlands were converted prior to December 23, 1985. *USDA Drafts Plan Weakening Farmed Wetland Regs, Prompting EPA Protest*, INSIDE E.P.A. WEEKLY REPORT, May 22, 1992, at 1, 6.

Although the regulation which was recently proposed by EPA and the Corps incorporates the existing USDA definition of "prior converted cropland" by reference, the proposal stresses that if the USDA definition is amended, EPA and the Corps will review the amended definition and determine, at that time, whether to incorporate the amended definition by reference. 57 Fed. Reg. at 26,897. Therefore, the USDA's adoption of an amended definition of "prior converted cropland" might further decrease the acreage of wetlands subject to regulation under the Clean Water Act.

in Congress have introduced legislation to fundamentally restructure the existing federal program for the regulation of wetlands under the Clean Water Act.<sup>20</sup> Each of these initiatives strives to decrease the universe of wetlands that are subject to federal regulation.

Disputes regarding the extent of the federal government's jurisdiction to regulate wetlands have not, however, been limited to the executive and legislative branches of the federal government. The judiciary has frequently been called upon to determine which wetlands, if any, are subject to federal regulation under the Clean Water Act. In 1985, in *United States v. Riverside-Bayview Homes*,<sup>21</sup> the U.S. Supreme Court determined that the Clean Water Act authorizes federal regulation of wetlands that are *ad-*

---

20. 33 U.S.C. §§ 1251-1386 (1988). The Clean Water Act requires permits for discharges of dredged or fill material into waters of the United States, which EPA and the Corps have interpreted to include wetlands. *Id.* §§ 1311, 1344. Under the Act, the permit program is administered by the Corps or by the states. *Id.* § 1344. The EPA, however, plays an important role in the permitting process. Permit decisions must be made in accordance with guidelines established by EPA and the Corps, and EPA can "veto" permits where it determines that the discharge authorized by the permit will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas. *See id.* § 1344b-c. The Fish and Wildlife Service also provides comments on proposed permits under the Act. *See id.* § 1344m.

Under the Comprehensive Wetlands Conservation and Management Act of 1991, a recent legislative proposal, EPA's role in the Clean Water Act permitting process would be eliminated. H.R. 1330, 102d Cong., 1st Sess. (1991). The proposed legislation would also increase the amount and type of wetlands that are exempt from the permit requirements of the Clean Water Act. *Id.* § 3f. Further, the legislation would classify wetlands by size and value, and impose varied regulatory requirements on them depending on their classification. *Id.* § 3c. If a wetland receives the highest classification provided for by the legislation, the United States would be forced to compensate the owner of the wetland for any diminution in the value of the land caused by the classification. *Id.* § 3d. Environmentalists have strongly criticized the proposed legislation. *Industry, Environmentalists Face Possible House Battle over Wetlands Bill*, INSIDE E.P.A. WEEKLY REPORT, July 10, 1992, at 1.6. The 102d Congress recessed without enacting H.R. 1330.

The Wetlands Reform Act of 1992 was also introduced during the 102d Congress. H.R. 4255, 102d Cong., 2d Sess. (1992). In contrast to House Bill 1330, the Wetlands Reform Act maintains and strengthens EPA's role in the wetlands permitting process. *Id.* §§ 105, 107, 201. It also increases the activities in wetlands which are subject to the permit requirements of the Clean Water Act, and requires the National Academy of Science to conduct a study of wetlands delineation. *Id.* §§ 201-202. The 102d Congress recessed without enacting H.R. 4255.

21. 474 U.S. 121 (1985).

*adjacent* to other waters of the United States.<sup>22</sup> However, the Court expressly refused to decide whether the Act also authorizes regulation of *nonadjacent*, or isolated, wetlands.<sup>23</sup>

A few years after the Supreme Court's decision, the U.S. Court of Appeals for the Ninth Circuit addressed the question that the Supreme Court avoided. In *Leslie Salt Co. v. United States*,<sup>24</sup> the Ninth Circuit held that the Clean Water Act authorizes federal regulation of isolated wetlands.<sup>25</sup> The Ninth Circuit also held that such regulation is not precluded by the Commerce Clause of the Constitution.<sup>26</sup> Recently, however, in *Hoffman Homes v. EPA*,<sup>27</sup> a Seventh Circuit panel reached the opposite conclusion, and held that the Clean Water Act does *not* authorize federal regulation of isolated wetlands.<sup>28</sup> The court also held that regulation of certain intrastate, isolated wetlands is not authorized by the Commerce Clause.<sup>29</sup> However, five months after it issued the *Hoffman Homes* opinion, the Seventh Circuit vacated the opinion.<sup>30</sup> While the court did not explain its rationale for vacating the decision, the court's action has temporarily forestalled further deterioration of federal wetlands protection under the Clean Water Act.

This Article reviews the federal regulation of "adjacent" and "isolated" wetlands under the Clean Water Act. Section II reviews the statutory and regulatory basis for regulation of wetlands under the Clean Water Act, and the case law which has interpreted the scope of federal regulation under the Act. The remainder of the Article explores the federal government's au-

---

22. *Id.* at 139.

23. The Court noted, "We are not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to open bodies of water . . . and we do not express any opinion on that question." *Id.* at 131 n.8.

24. 896 F.2d 354 (9th Cir. 1990).

25. *Id.* at 360.

26. *Id.*

27. 961 F.2d 1310 (7th Cir.), *reh'g granted and opinion vacated*, 35 Env't Rep. Cas. (BNA) 1328 (7th Cir. Sept. 4, 1992).

28. *Id.* at 1316.

29. *Id.* at 1320-1321.

30. *EPA Victorious as Court Rejects Ruling Questioning Agency Wetlands Authority*, INSIDE E.P.A. WEEKLY REPORT, Sept. 11, 1992, at 13. The court granted EPA's petition for rehearing, and referred the case to a senior court attorney for settlement negotiations. *Id.* If negotiations fail, the court will rehear the case. *Id.*



































































