

CONGRESSIONAL OPTIONS

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"Environmental Regulatory Process: Does It Work?" Well, much like Keith Laughlin said, the answer is, "it depends." It depends on what subject of environmental regulation you are addressing and it depends on one's perspective. I will focus a little bit this morning on an issues that I think is of concern to you, and certainly is occupying an enormous amount of the attention of the Environment and Public Works Committee, for which I work. That is the subject of wetlands.

The §404 Program of the Clean Water Act is our nation's principal defense against the loss of wetlands. In this country its our primary regulatory program for protecting wetlands. Yet, by virtually all accounts and certainly by the accounts that we have heard this morning, it is a program that is in desperate need of repair. It is a program that is too often confusing to the regulated community. Implemented by as many as 5 different agencies on any particular project; often working with different rules, different procedures; a source of enormous confusion and frustration. In addition, the regulated community has been frustrated by needless delays. You have heard stories of those this morning, in obtaining permits. I would like to point out that it is not just the regulated community that has experienced this frustration. Before going to work for the committee, I was a lawyer for the National Wildlife Federation. One of the cases that I worked on was actually a case that Terry Huffman and I worked on together involving Katie Prairie Area outside of Houston, Texas. Where we spent nearly three years trying to get Corps to agree that an area that you could walk out on and actually stand in water on and literally see wall-to-wall snow geese and other water fowl, was a wetland. It took 3 years to do that. That does not seem like a situation that ought to prevail. The frustration from these delays, and just getting an answer, is something that has been experienced across the board.

Section 404 has been difficult to comply with, particularly for small land owners: farmers, ranchers who have found themselves confused and frustrated. The agencies implementing this program have often had the difficult time deciding what is a wetland; what are the proper ways to determine whether wetlands exist; let alone land owners who are faced with that question, who may lack both the technical expertise and the financial

resources to answer that very basic question. In addition, states have had very little incentive to get more involved, more actively involved, in wetland protection efforts. Even though the Clean Water Act has provided for assumption by states of §404 program, only 2 states have done that: Michigan, and just in the last couple of weeks, New Jersey has also assumed the 404 Program. That is because there's nothing really in it for the state, by and large. There has been no great incentive for states to take on this regulatory program.

And finally, and perhaps most importantly, §404 has not been as effective as it could be in stemming the hemorrhage of wetlands in this country. Estimates are that we may be continuing to lose as many as 300,000 acres of wetlands a year. Wetlands that are enormously important to the life of this nation, both environmentally and economically. Wetlands provide flood control benefits, filter pollutants from our streams, recharge ground water and provide enormously valuable for fish and wildlife. They are truly a national resource that we should be working very hard to conserve. We need a program that will effectively do that.

So, by all of these measures, I think it is relatively easy to conclude that the §404 regulatory process is in need of repair. There are a number of areas that need fixing. I do not want to point out that there is at least one are where I think that §404 has been enormously effective. That, I guess, in the public education area. Before 1972, and certainly before 1977, when it became clear that wetlands were regulated under the Clean Water Act, most people thought of wetlands as swamps, breeding grounds for malaria, mosquitoes, mud, you name it. Not something deserving of protection. And yet, since we have had the 404 program, and because of the associated public education that has gone on with that program, by and large, I think you will find people in this country recognize that wetlands are worth protecting. They may disagree on what is a wetland and which wetlands are most deserving of protection, but, by and large, I think people recognize now that we do need to protect wetlands. They are a benefit to the nation and future generations.

So what we have, then, with the §404 program, is a program that is filled with enormous promise, promise that is yet to be fulfilled. That is where Congress and the

White House have come into this issue. The Clean Water Act is up for reauthorization and so the Congress, and most immediately, the Environmental and Public Works Committee in the Senate, and the House of Public Works Committee and the House Merchant Marine and Fisheries Committee, in the House of Representatives, are struggling with this issue of how do we fulfill that promise. How do we avoid throwing out the baby with the bath water?

My boss, Senator Max Baucus, Chairman of the Environment and Public Works Committee, has introduced a bill, along with Senator John Chafee of Rhode Island, who is the ranking Republican on the committee, to try to fulfill that promise. The bill, Senate Bill 1304, seeks to make wetlands protection more effective and to make wetlands regulation more efficient, consistent and fair; and to provide incentives for the states to get involved. A few of the things that the Baucus-Chafee Bill will do is, first of all, it will establish, very clearly, the protection of wetlands as a function of the Clean Water Act and that there is a national goal of no net loss of wetlands. Does that mean that you will never be able to develop in wetlands? Absolutely not. What it means is that we are going to work to conserve and restore wetlands so that we, in the long run, increase the quantity and quality of wetlands. That will involve trade-offs in different places. In some areas wetlands will be absolutely preserved. In others there will be trade-offs through mitigation banking and some of the techniques that have been mentioned earlier today.

The Baucus-Chafee Bill was also put into the statute something that the Corps and EPA have done themselves very recently, which is to regulate drainage of wetlands. An enormous amount of the wetlands lost that the country experiences comes from drainage wetlands, primarily for agriculture. The Baucus-Chafee Bill will bring that into the §404 permitting process. Does that mean that you will never be able to drain a wetland? Again, absolutely not. What it means is that you will have to apply for a permit in some instances. In other instances you will be covered by a general permit.

Perhaps the most immediate benefit to the folks in the room is that the Baucus-Chafee Bill, much like the administration's plan, will set some deadlines for processing of permit decisions, in most cases, a 90-day deadline. The Bill will also establish an administrative appeals process, so that parties are not faced with the dilemma of hiring a lawyer and go to court to challenge a permit decision. This process will provide an alternative, hopefully a less expensive and more efficient one, of administratively appealing a permit decision which has not been satisfactory.

The Baucus-Chafee Bill will also encourage greater state involvement in the wetlands program by authorizing state programmatic, and general permits that encourage the states to take on all or a portion of the wetlands program, provided that they demonstrate that their efforts will be at least as protective as the federal program for wetlands.

The Baucus-Chafee Bill will make it easier for small land owners and farmers to comply with the Act. It will do things very much in keeping with the administration's policy of having the agency sing from the same hymnal, use the same definition of wetlands, the same techniques for delineating wetlands, and making sure that people know which agency they need to contact to have their wetlands questions answered. The committee held a hearing on this bill in September. Both from that hearing, and since that time, we have received literally hundreds of comments on the bill. The staff has been working very hard to incorporate comments that we have received into a re-write of the bill. We are working to take the bill to a mark up in the subcommittee chaired by Senator Graham in early February.

Our bottom line is that we want to produce a bill that, several years from now when a panel is held and the question is asked, "Does the environmental regulatory process work?" The answer for wetlands will be, "You bet it does."