



WETLANDS FACT SHEET #10

Was the 404 Program Intended to Regulate Wetlands?

The History

In 1972, Congress passed the Federal Water Pollution Control Act Amendments "to restore and maintain the chemical, physical, and biological integrity" of the Nation's waters. The Act defined "navigable waters" as "waters of the United States." The legislative history made plain that Congress intended the broadest possible Federal jurisdiction, expanding beyond traditionally navigable waters.

However, when the U.S. Army Corps of Engineers (Corps) issued regulations to implement the Section 404 program in 1974, it limited the program's jurisdiction to traditionally navigable waters, including adjacent wetlands, but excluding many small waterways and most wetlands. In 1975, a federal district court directed the Corps to revise and expand its regulations to be consistent with Congressional intent.

In response, the Corps issued interim final regulations to include waters that are not adjacent to navigable waters ("isolated waters") in the program's jurisdiction. In 1977, the Corps issued final regulations and explicitly included "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce." The definition promulgated in 1977 is substantially the same as the one in effect today.

What Has Congress Done?

When Congress amended the Act in 1977, it was aware of the Corps' recent assertion of jurisdiction over wetlands. This issue was in

EPA and the Corps of Engineers have identified examples of waters generally not considered waters of the United States. These examples include nontidal drainage and irrigation ditches excavated on dry land, artificially irrigated areas which would revert to upland if the irrigation ceased, and certain artificial lakes or ponds created on dry land.

fact extensively debated. In the end, Congress rejected attempts to narrow the scope of that jurisdiction, in large part because of concern that to do so would unduly hamper protection of wetlands. Other 1977 amendments, such as the Section 404(f) exemptions, general permitting authority, and the provision for State assumption of the 404 program in some waters, responded to concerns regarding this scope of jurisdiction. In providing for State assumption, Congress made specific reference to wetlands in the Act itself.

What Has the Supreme Court Said?

Regarding the issue of jurisdiction for wetlands adjacent to rivers, lakes, streams, estuaries, etc., the Supreme Court has unanimously held that the Corps acted reasonably in interpreting the Act's geographic jurisdiction to extend to wetlands adjacent to other "waters of the U.S.," even if those wetlands are saturated only by ground water sources (as opposed to surface water flooding). However, the Supreme Court has not yet ruled on the issue of non-adjacent, isolated wetland jurisdiction.

FOR MORE INFORMATION: Call the EPA Wetlands Hotline* at 1-800-832-7828.

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