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Agricultural Non-Point Source Pollution and Wetlands: A Sensible Approach

by ANTHONY P. FARRELL

Farm wetlands, such as prairie potholes, are quickly disappearing while simultaneously our water quality is continuing to degrade. Both problems are inseparably linked to the control of agricultural runoff. Runoff from farms and fields can be filtered effectively through wetlands on farms, but the incentive to restore these natural systems is lacking.

While some state and federal programs are attempting to address the problem through regulation and monetary stimuli, only the marketplace can provide the solution. It is time for the creation of a wetlands mitigation bank, where environmentalists and farmers both will have their interests satisfied.

I. INTRODUCTION

For the last few decades, water quality in the Midwest has noticeably declined, suffering from the ravages of agricultural chemicals, natural additives, and other runoff from farm feedlots, all by-products of farm production. The high rate of nitrates has tainted 52% of the nation's 94,600 public water sources, and often causes "blue baby syndrome" in infant children. Nitrates can be directly traced to the runoff of manure from farm feedlots in the Midwest, and artificial fertilizer added to the fields to replace the use of manure. The nitrate, phosphorus, sediment, and fecal coliform bacteria-contaminated water eventually finds its way to the rivers and streams from which many communities draw their drinking water.

Chemicals from farm fields such as pesticides and herbicides also pollute many of our water supplies, as the residues, especially atrazine, eventually find their way into ground and surface waters. These pollutants are the principal reasons for the low ratings of the quality of ground and surface water in Midwestern states.

One study has concluded that pollution from runoff sources is now a leading cause of water quality impairment, other studies have found farming responsible for 64% of the non-point source pollution in rivers. At the same time, the availability of water in the Midwest has declined, forcing many cities and farms to find new sources of drinking water, as former sources of groundwater either dry up or become polluted. These two trends affecting our drinking water in the Midwest can be attributed largely to the loss of wetlands on farms during the last 100 years. Since 1790, Missouri has lost 87% of its original freshwater wetlands, leaving only an estimated 643,000 acres comprising 1.4% of the state's total land area. Farming has claimed 87% of the wetland losses from filling, draining, and plowing the rich soil and utilizing the readily available water to boost yields and to turn what was seen as wasteland into productive farmland. This unchecked destruction of what many consider the earth's most biologically productive habitat was seen as progress, as there was little knowledge of what long term effects this "progress" would have on the ground and surface waters of the Midwest.

Freshwater wetlands act as a natural filter for agricultural pollutants such as nitrates and pesticides, recharge groundwater supplies, protect against floods, and help control erosion of topsoil from farmland. The disastrous flooding this summer in the Midwest might have been substantially diminished had many of the original wetlands been in

1. The term "mitigation banks" refers to "wetlands restoration projects that provide compensation credits to offset foreseeable wetlands losses from future discharges of dredged or fill material into navigable waters where compensatory mitigation is not practicable," Bill Tracking Report on S. 1304, 103d Cong., 1st Sess. (1993) ("Wetlands Conservation and Regulatory Improvements Act"), available in LEGOS, Legis Library, Blt Eds.
4. "Blue baby syndrome" or Methemoglobinemia is a toxic consequence of a high nitrate level in drinking water. Rae Tyson & Tracy Walmer, Chemicals Seen Into Our Water Supplies, USA TODAY, November 14, 1990, at 3A.
5. Runoff is "something that drains or flows off, as rain which flows off the land in streams." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, (Unabridged ed. 1971).
11. See Assault on the Aquifer, ORLANDO SENTINEL Trib., January 12, 1993, at 16A; Geordie Wilson, B.C. Pollution of Aquifer Travels to U.S., SEATTLE TIMES, August 9, 1992, at 6B.
13. WORLD RESOURCES INSTITUTE, ENVIRONMENTAL ALMANAC 134 (1992). Most other states have had similar losses.
14. Id. at 138.
15. Id. at 139.
16. Id. at 137.
17. Id. at 134; MISSOURI DEPARTMENT OF CONSERVATION, FARMING AND WILDLIFE, WETLANDS, SERIES 6, 4 (1992).
place to absorb the excess rainfall received. In the flood’s aftermath, the Clinton administration is considering a proposal to buy or lease farmland and revert the land to wetlands as flood control. A 1989 study of a marshy wetland in Hancock County, Iowa showed an 86% reduction of nitrate levels in the water that filtered through the marsh. Despite the current debate on how to define wetlands, freshwater wetlands and their vital filtering process must be preserved and restored in order to ensure a safe and adequate supply of drinking water for our future. Several commentators believe not enough is being done at this time, either by the federal government or the states.

II. FEDERAL AGRICULTURAL REGULATIONS AND PROGRAMS

Water pollution from a “point source” is regulated by the federal government under the Clean Water Act of 1977 (CWA), which requires a National Pollutant Discharge Elimination System (NPDES) permit, for all discharges of point source pollutants, such as industrial and municipal wastes. The discharge must affect “navigable waters,” enabling the federal government to regulate these “Waters of the United States” as opposed to “Waters of the State,” discharges to which are governed by state law exclusively. After federal approval, qualified states may administer the NPDES permit program for all waters within the state.

While the precise categorization of what constitutes “navigable waters” is currently in dispute, “navigable waters” do include wetlands adjacent to navigable waters that affect interstate commerce. The wetlands do not even have to be navigable in fact. The federal government’s jurisdiction also includes those wetlands used by migratory birds, which ensures the coverage of most farm wetlands.

The majority of runoff from farm fields and feedlots will eventually discharge into or affect either “Waters of the United States” or “Waters of the States,” as these terms are given broad interpretation. Thus the federal government or the state would have jurisdiction over the discharge, depending on the facts in each situation, and whether the state has an approved NPDES permit program.

The Clean Water Act does not require the Environmental Protection Agency (EPA) to regulate the runoff from farm fields and feedlots as thoroughly as the NPDES system for point sources. The EPA claims it has not yet aggressively tackled agricultural pollutants because of the high number of sources and the difficulty of controlling the runoff. Instead the EPA has focused its energy on “point sources” of pollution, as opposed to “non-point sources,” a distinction based on the physical source of the discharge.

Under the CWA and EPA’s regulations, a “concentrated animal feeding operation” must obtain an NPDES permit for large operations which discharge into navigable waters at times other than a 25-year, 24-

18 Richard Gaffney of the Missouri DNR, quoted in Often-Flooded farmland might be bought out, COLUMBIA DAILY Tribune, September 15, 1993, at 4A. See Ronald E. Yates, RESTLESS RIVER, COLUMBIA DAILY Tribune, July 25, 1993, at 1D.


20 Daryl Smith, Wetlands: Let’s Leave Well Enough Alone, STAR TRIB., February 5, 1992, at 15A.

21 Scientists in the Committee on Wetlands Characterization are to publish a report on September 30 on their definition of a wetland. Scientists define what is a wetland, U.P.I. REG. NEWS, September 8, 1993. See also Ruby Abramson, Experts Assail Proposed Rules For Wetlands, LA. TIMES November 22, 1991, at AI.

22 The Corps of Engineers and the EPA both look at hydrology, soil, and vegetation for classification of wetlands; “wetlands means those areas that are inundated or saturated by surface or groundwater 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.” Wetlands generally include swamps, marshes, bogs and similar areas. 33 C.F.R. § 328.3(b) (1991); 40 C.F.R. § 230.3(h), § 230.41(b)(3) (EPA 1992).

23 See e.g., Peter Steinhardt, Mud Wrestling, SEBRA, Jan.-Feb. 1993, at 55; see also James C. Buresh, Note, State and Federal Land Use Regulation: An Application to Groundwater and Nonpoint Source Pollution Control, 95 YALE L.J. 1433 (1986).

24 A point source is defined as: Any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharges and return flows from irrigated agriculture. 33 U.S.C. § 1362(14) (1988 & Supp. IV 1992); 40 C.F.R. § 122.2 (1992) (differs slightly from statute). Added as a point source by Pub. L. No. 100-4, § 329.4 (1988); see also 40 C.F.R. § 1362(7) (1988).

25 The Clean Water Act has been found to preempt federal nuisance law in interstate waters. See Milwaukee v. Illinois & Michigan, 451 U.S. 304 (1981). Thus the nuisance theory is only available in local situations, as between neighbors of a livestock farming operation.


29 Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. 33 C.F.R. § 329.4 (Corps 1992). See, e.g., United States v. Sassler, 967 F.2d 993, 995 (4th Cir. 1992).


33 Riverside Bayview Homes, Inc. at 132.


36 The EPA has set up a “Wetlands Hotline” for information on regulation of wetlands, national and state programs affecting wetlands, and general information on wetlands values and functions. The number is 1-800-832-7282.

37 See 40 C.F.R. § 322.3(e) (1992).


39 Id. at 21.

40 40 C.F.R. § 122.23(a) (1992).
hour storm event and which exceed the effluent limitations. Concentrated animal feeding operations are thus technically point sources and any excessive discharges require an NPDES permit. The EPA has not yet meaningfully enforced this requirement except in exceptional circumstances where affected citizens prod the EPA to act, such as under the citizen suit provision of the CWA.

EPA apparently has focused its efforts on the regulation of industrial and municipal wastes.

Non-point sources are those sources of pollutants which do not qualify as point sources, such as runoff from farm fields and small livestock feeding operations. Under § 208 of the CWA states are given the responsibility to control agricultural non-point sources through an “Areawide Waste Treatment Management Plan.” Section 208 directs the states to: 1) Identify and designate areas having substantial non-point source water quality control problems; 2) Begin a planning process within one year to control these problems; 3) Set forth procedures and methods to control to the extent feasible such sources; and 4) Use a combination of agriculture cost sharing and federal grants to achieve the non-point source objectives of the CWA.

Section 303 of the CWA requires the states to adopt and implement water quality standards for approval by the EPA, and consequently to create a “continuing planning process” which incorporates the § 208 Areawide Waste Treatment Management Plan. While the states grudgingly have followed these guidelines, neither the EPA nor the states have put a high priority on adopting and achieving non-point source water quality standards. While Congress attempted to entice the states to review and revise the § 303 standards in 1981, it has never put any teeth into the enforcement of those standards.

The Missouri Department of Natural Resources (DNR) has initiated an Areawide Waste Treatment Management program as required under § 208 of the CWA based on a Management Plan written in 1979. Unfortunately, Missouri has not gone beyond the minimum steps required in §§ 208 and 303 of the CWA. Presumably, this inaction results from the failure of the governor to designate areas with poor water quality which require special attention under the Missouri Clean Water Law as “waste treatment management areas.”

The Water Quality Act of 1987 added § 319 to the CWA which requires state Non-point Source Management Plans (NPS plan) and sets additional water quality standards the states must meet in accordance with their § 208 Areawide Waste Treatment Management Plans and § 303 continuing planning process. The attainment of certain goals is not required, though the plans were to be prepared for approval by the EPA by August 1988. Congress gave the states $400 million to prepare the NPS plans and implement the programs created under the plans, which are discussed more thoroughly in Part V of this comment.

Congress has begun regulation of pesticide and insecticide use on farms through the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The act allows the EPA to classify the pesticides and other agricultural chemicals as “registered” and requires certain licensing and training procedures for the application of those pesticides which cause any unreasonable adverse effects on the environment.

Even though FIFRA requires the responsible use of pesticides, contaminated runoff as a result of rainfall will still occur and should be treated before it pollutes surface waters. A preferable watershed planning approach has been adopted in the Clean Water Act reauthorization legislation, Senate Bill 1114.

III. Federal Protection of Wetlands
The Corps of Engineers has exclusive jurisdiction to protect the majority of wetlands through the approval of “dredge and fill” permits under § 404 of the Clean Water Act.

42 For pollution source feedlots the Effluent Guidelines and Standards are in 40 C.F.R. § 412 (1992).
45 However, the trend may be changing, see Draft Legislation Would Require Non-Point Source Pollution Controls, 1993 D.E.R. (BNA) 59 (1993).
53 Telephone interview with Rich George, Missouri Department of Natural Resources, Division of Environmental Quality, Office of Water Quality (October 26, 1992).
54 See infra, text accompanying note 94.
60 See Federal Non-point Source Programs Lack Coordination, State Official Says, 24 Env't Rep. (BNA) No. 11, at 466 (1993). (where a commentator favors a watershed-based approach.)
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Water Act.63 A § 404 permit is required for any discharge of “dredge and fill” material into, or which will affect, the navigable waters, under guidelines placing the preservation of wetlands as a high priority in the requirement to find “practical alternatives” to the discharge.64

Corps of Engineers permitting for § 404 “dredge and fill” operations currently constitutes the main front in the protection of farm wetlands, including prairie potholes. This approach would be dramatically changed by one proposed bill in Congress.65 Meanwhile, the general or nationwide permit system reduces the strength of § 404 by allowing many activities to proceed unhindered after pre-discharge notification of the Corps.66

Section 404 has not been completely effective in stopping the loss of farm wetlands due to the exception from the permitting requirements for normal farming, ranching, or forestry activities.67 This exclusion is limited to activities which do not impair, reduce, or bring the navigable waters into a use to which they were not previously subject.68

The Corps exempts “prior converted wetlands” from the § 404 permitting requirements.69 These are wetlands converted before September 23, 1985, that are inundated for no more than 14 consecutive days during the growing season.70

Many of the valuable farm wetlands already have been lost through development, farming, or dredging operations by the Corps itself.71 The Corps’ authority under § 404 is also adequate to preserve existing farm wetlands, as the majority of “dredge and fill” permits are approved without much hassle.72

Several federal programs have attempted to tackle the problem of diminishing wetlands, though with limited success due to funding shortages and the available exceptions. These provisions, while beneficial and significant for wetland protection, fail to recognize the functional values of wetlands73 beyond reducing soil erosion and providing duck habitats.

The Food Security Act of 198574 (1985 Farm Bill) established the Conservation Reserve Program75 (CRP) to convert highly erodible farm fields to “set-aside” acres, for which the farmer receives an annual payment. This program has been very popular, as 1.2 million acres were placed in the 1987 CRP program in Missouri alone.76 While the CRP program has reduced soil erosion, the Agricultural Department Soil Conservation Service (SCS) favors highly erodible slopes, areas where wetlands cannot be sustained. The SCS also frequently allowed haying and foraging in these acres during times of drought, creating an unstable environment for wetlands.77 The 1985 Farm Bill also established an incentive payment program for farmers who create and implement a water quality improvement plan, which may include the use of wetlands.78

The 1985 Farm Bill also contained the “Swampbuster Provision”79 which denies farm subsidies, disaster payments, and various loan eligibilities to those farmers who have converted wetlands to farmland after the 1985 Farm Bill took effect on December 23, 1985. Thus any crops grown by a farmer in violation would not be subsidized by the federal government because of the “converted wetlands.”80 While the Swampbuster program currently removes the subsidy incentives for the destruction of farm wetlands, it does nothing to restore wetlands already

66 For example, statewide permit # 26 authorizes discharges of dredged or fill material into waters which do not impair or destroy greater than 10 acres of isolated or headwater wetlands with pre-discharge notification, 33 U.S.C. § 330 (1992).
70 Same definition as the Swampbuster program, see text accompanying note 80, infra.
71 Pat Durkin, Rivers will continue to run through it — but with curves; Engineers see error of their ways, begin to restore bends, ecologies, Houston Chronicle, September 20, 1993, at 8.
72 Recently the Corps has been taking its responsibility more seriously as seen by United States v. Foosgai, 1993 U.S. App. LEXIS 15, 293 (3d Cir. Aug. 10, 1993), where the court upheld the Corps’ actions in obtaining a restraining order to protect the filling of wetlands.
73 See Dalana W. Johnson, Comment, Saving the Wetlands From Agriculture: An Examination of Section 404 of the Clean Water Act and the Conservation Provisions of the 1985 and 1990 Farm Bills, 7 J. LAND USE & ENvtm. L. 229 (1992) (the author recognizes the need to identify the inherent value in wetlands through economic incentives).
76 Missouri Department of Natural Resources, NOSPORE SOURCE MANAGEMENT PLAN 45 (1989).
If crop prices rise, farmers may be convinced that the loss in subsidies due to the Swampbuster provision will make it worthwhile to convert farm wetlands to production, as there is no guarantee subsidies will always be needed or exercised. The disruption from such a decision would be catastrophic to the maintenance of wetlands, as they are very sensitive to normal farming practices. Unfortunately for water quality in the Midwest, the Agriculture Department would like to soften the Swampbuster rules if the land was farmed six out of the last ten years. This draft proposal would have a devastating effect on the ability to control farm runoff and would allow millions of acres of critical wetlands to be destroyed.

In the Food, Agriculture, Conservation, and Trade Act of 1990 (1990 Farm Bill), Congress has attempted to restrict some farm wetlands through the Wetland Reserve Program (WRP), which is to be administered by the Agricultural Stabilization and Crop Service (ASCs) of the Department of Agriculture. In this program farmers offer a bid price for the farmed or converted wetlands they want entered in the program and the ASCs accepts the bid based on the land’s value, the bid price, and whether the farmer would agree to a permanent conservation easement over their land.

Under a cost sharing agreement, 75% of the cost for restoring the wetland is paid by the government over a 10-year period. The Soil Conservation Service and the Fisheries and Wildlife Service are to provide technical expertise. In 1992 Congress appropriated $46.4 million for the program in nine pilot states, which is enough for 50,000 acres. The goal for the complete program, one million acres across the country by 1995, should be easily reached as farmers in the pilot program offered up to 500,000 acres. Unfortunately, Congress has not found the money (more likely the political will) to fund the WRP for 1993. With this apparent lack of support, it is clear the federal government is not completely sold on the idea of funding wetland restorations.

### IV. Wetland Destruction

Several federal programs have been partially responsible for the loss of wetlands on farms. By propping up the prices farmers receive for their grains, the federal farm subsidy program has promoted the destruction of many vital wetlands. The superficial prices and normal market forces encourage the use of all fertile lands (wetlands being the most fertile) for the production of crops. As the price received for grain remains artificially high, farmers often drain the swamps and marshes on their land and convert them to productive fields to increase their profit margin. As a result, water quality has become a secondary concern following the need to increase crop production.

Actions by the Corps of Engineers in fulfilling their mission of creating navigable and manageable rivers and streams also have been responsible for the incredible loss of wetlands. As the Corps has straightened and channelized rivers to be deeper and faster, wetlands adjacent to the rivers have been dredged or filled as a nuisance to navigation. These wetlands adjacent to rivers and their tributaries were especially beneficial, as they were the final filtration process for agricultural pollutants before they enter major rivers.

These crucial wetlands in floodplains historically cushioned much of the flooding from the Missouri and Mississippi Rivers. This summers flooding demonstrates how an increase in transportation abilities can negatively impact flood control efforts.

Now under Executive Order No. 11,990 of May 24, 1977, federal agencies are to ensure their actions minimize the destruction of wetlands and preserve the values of wetlands. This action has virtually reversed much of the Corps’ policy and attitude regarding wetlands.

The nature of our society and the position of wetlands on farms also has sped up the process of wetland destruction. Since farmland is privately owned, the government currently places fewer limits on the uses and management of those lands. This system results in a public resource being depleted by private landowners for their own benefit. To ensure wetlands survive and flourish, the farmers’ role as stewards of the land must be reexamined. This task will need to be undertaken by the next generation, while our society tries to fix the immediate problems of the water’s deteriorating quality and dwindling availability.

### V. State Regulations and Programs

In accordance with the Water Quality Act of 1987, the Missouri DNR has submitted a management plan, identified pollution problems, and made recommendations to control non-point discharges in the “Non-point Source Management Plan” (NPS plan).
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This non-binding guidance document required by §319 of the CWA does not require a permit scheme for non-point sources. The DNR has apparently incorporated its former §208 Areawide Waste Treatment Management Program into the NPS plan.94

Programs under Missouri's NPS Plan through the DNR, University of Missouri Extension Service, and the Department of Conservation (MDC), are primarily focused on education, technical assistance, and cost-sharing to control soil erosion and water pollution. Numerous small projects (such as the State Wetland Conservation Program) are available, along with a few large projects (such as the Special Area Land Treatment, SALT) to target critical sites.95 While these programs may improve the water quality in some areas, the benefits are not widespread and do not attack the pollution at its source, as comprehensive farm wetland restorations could.

In the "Non-point Source Annual Report" for 1991, the DNR explained the activities and progress the state has made toward meeting its water quality standards imposed by §319 for controlling non-point source pollution.96 This report included the SALT projects, conservation programs, and testing and survey services in attempts to improve water quality in ground and surface waters. Several of the activities aim to control sediment, nutrients, and pesticides from agricultural runoff through various DNR, MDC, or U.S. Department of Agriculture sponsored projects.97 Like many others, the state still lacks a comprehensive and effective program for dealing with agricultural runoff.

To achieve the water quality standards for non-point source pollution in §319 of the federal CWA, the states are to identify and use applicable Best Management Practices (BMP).98 These BMP's can vary from state to state and are flexible to provide for the treatment of different types of water pollution. In the context of non-point source agricultural runoff, the appropriate BMP's are wetlands, as no other natural or technology-based system can more effectively and efficiently handle the wastes unique to agriculture.

In the Missouri NPS Plan which was prepared in 1989 (to be updated in 1993), many different types of wetlands are utilized as BMP's.99 The use of these wetlands can easily be expanded due to their efficiency, low cost, and natural occurrence on farms. In classifying more wetlands as BMP's, the DNR can help to satisfy the ambitious goals of the CWA.100 When agricultural runoff is required to be controlled by the states, the Missouri DNR may then fully realize the value of farm wetlands for their filtering processes and cost effectiveness.

The Missouri Clean Water Law101 has substantially the same definition for a "point source"102 as does the federal law, absent the common law remedies such as the "common enemy"103 doctrine or a private nuisance

94 See supra, text accompanying note 47.
96 See supra, note 56.
98 "Schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of 'waters of the United States.' BMP's also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage," 40 C.F.R. § 122.2 (1992).
102 "Point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissures, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are, or may be, discharged. Mo. Rev. Stat. § 644.016(6), Supp. 1992; Mo. Code Regs. tit. 10, § 20-2.010(35) (1992).
ties" and applies different standards for vari-
wastes, Kansas sets minimum standards for
was upheld due to an extremely offensive
non-point source pollution utilizing a permit
goon.' The Kansas approach to agricul-
or feedlot areas, or a waste retention la-
ous types of animals and their waste storage
runoff from "Water Pollution Control Facili-
administrative regulations in
Article 16 and
controlling agricultural pollutant runoff un-
Environment began a regulatory scheme for
ground aquifers.
streams and rivers, or by seepage into under-
indirectly affects water supplies through
as the majority of agricultural runoff only
family's normal daily
affected drinking water supplies and the
situation where the feedlot runoff adversely
causing noxious odors and diminishing wa-
bic lagoon flowed onto the plaintiffs' land,
where overflow of hogwastes from an anaero-
for the plaintiffs was upheld due to an extremely offensive
nuisance law is of limited use to remedy the problem,
as the majority of agricultural runoff only
starts water supplies through
streams and rivers, or by seepage into under-
ground aquifers.
The Kansas Department of Health and
Environment began a regulatory scheme for
controlling agricultural pollutant runoff un-
der Articles 16 and 18 of the Kansas Admin-
istrative Regulations in 1991.¹¹⁷ For manure wastes, Kansas sets minimum standards for
runoff from "Water Pollution Control Facili-
ties" and applies different standards for vari-
tious types of animals and their waste storage
or feedlot areas, or a waste retention la-
goon.¹¹⁸ The Kansas approach to agricul-
tural runoff shows its willingness to combat
non-point source pollution utilizing a permit
and effluent limits system. This type of
strategy, while appropriate for point sources,
may not be as efficient as would a compre-
hensive wetlands treatment program which
directly improves the water quality.

Minnesota has begun an ambitious project
to clean up the Minnesota River in 10 years
using pollution control grants and enforce-
ment of dumping regulations.¹¹⁹ Minnesota
officials will be concentrating on controlling
the runoff pollution of sediment, nitrates,
and fertilizer from farms as they constitute
the major sources of pollution. Minnesota
hopes the WRP, CRP and its own wetland
preservation program will help in the cleanup
plan. While the initiative is very encourag-
ing, the state is still depending on govern-
ment funding for wetland incentive pay-
ments, unlike a market-based system such as
mitigation banking.

Florida is hoping to begin a vast wetlands
restoration project of its own to return the
Kissimmee River to its original meandering
route.¹²⁰ As a part of the Central and Sou-
thern Florida Flood Control Project of 1948,
the Corps of Engineers built a complex
system of levees and canals, turning the
Kissimmee River into a "straight ditch."¹²¹
With the source of water for the Everglades
being channeled away, the wetlands were
drained and converted into farmland now
polluting the Everglades with oxygen-rob-
bting nitrates. Now the Corps will attempt to
revive the Kissimmee River and restore many
of the lost wetlands which were adjacent to
its natural channel.¹²² This project is exem-
plary of the Corps' new thinking about
wetlands and their values.

Along with the Kissimmee River project,
Florida researchers are also experimenting
with using wetlands to filter phosphorus and
nitrates from farm runoff in the Everglades
Nutrient Removal (ENR) project.¹²³ They
initially using a marsh filtering system on
3,742 acres as a test area for others which
will become Stormwater Treatment Areas.¹²⁴
The project is being funded through utility
fees charged to farmers whose lands drain
into the treatment areas. This pilot project
is very encouraging and can eventually be
adopted by other states as a means to control
agricultural runoff.

The Izaak Walton League has begun a
program known as "Partners for Wetlands"
which uses private donations and state con-
tributions to restore farm wetlands with tech-
nical assistance from state soil and water
districts.¹²⁵ While the program is limited in its
ability to affect national resources, it has
been very successful in Minnesota to create
wetlands for migratory birds and other wa-
terfowl.¹²⁶

Over the last 54 years, Ducks Unlimited
has preserved and enhanced nearly 6 million
acres of wetlands in North America largely
for the purpose of creating waterfowl habi-
tat.¹²⁷ Many of these wetlands have been on
near farmland, thus providing filters for
agricultural runoff as well as a safe haven for
migratory birds. If duck lovers can find
enough money to preserve wetlands for
game uses, the Midwestern states should be
able to fund farm wetland restorations to
improve water quality.

Even though the states have been slow to
deal with the problem of non-point source
pollution, they do acknowledge that the
technology and information is available to
control it.¹²⁸ Even with this technical knowl-
edge, control of non-point source pollution
has not yet been adequately addressed by

¹¹³ For nuisance elements, see 66 C.J.S. Nuisances § 23(d) (1966).
¹¹⁴ Bower, 461 S.W.2d at 784.
¹¹⁵ Id. at 806.
¹¹⁶ See Bower, 461 S.W.2d 784 (Mo. 1970).
¹¹⁹ Sharon Schmicide, Minnesota River Cleanup is Pledged, Star Trib., September 23, 1992, at 1B.
¹²¹ Id.
¹²² See Bower, 461 S.W.2d 784 (Mo. 1970).
¹²³ Id.
¹²⁴ Id.
¹²⁵ Id.
¹²⁶ Dean Rebuffani, Again, Wind Whispers in Marshes; Teamwork and Persistence Help Restore Wetlands, Star Trib., September 14, 1992, at 1B.
¹²⁷ See Bower, 461 S.W.2d 784 (Mo. 1970).
¹²⁸ See Sharon Schmicide, Minnesota River Cleanup is Pledged, Star Trib., September 23, 1992, at 1B.
¹³⁰ For more information on the "Partners for Wetlands" program, call 612/467-2486.
¹³¹ Id.
¹³² Id.
¹³³ See Sharon Schmicide, Minnesota River Cleanup is Pledged, Star Trib., September 23, 1992, at 1B.
¹³⁴ See 16 Env't Rep. (BNA) No. 36, at 1768.
conventional regulatory schemes, primarily because of the overwhelming number of sources and the influence of the farm lobby. 129

VI. WETLAND TECHNOLOGY

Many people automatically think of swamps and marshes when they think of wetlands, but wetlands come in many types, and vary with the region and fluctuation of water inundations. The farm fields and pastures of Missouri and Iowa once were spotted with “prairie potholes” on much of the bottomland, where the rainwater would collect and be filtered back into the groundwater after rains and during the spring melting. As well as purifying agricultural runoff, these marshy wetlands were the feeding and nesting grounds of many migratory birds and other waterfowl.

Not all wetlands must be “wet” in order to be useful; dry wetlands are considered to be more effective at filtering nitrates and other nutrients such as phosphorus. 130 When nitrates and nutrients are present in water which is left standing for extended periods of time, the Biochemical Oxygen Demand (BOD) increases. 131 When the BOD reaches a critical level, an “algae bloom” (eutrophication) is produced which robs the water of much of its oxygen and slows down the filtration process. 132

Agricultural runoff may best be filtered through the use of a series of stages of different types of wetlands. In the first stage, the water is slowed down by tall grasses and gentle slopes, allowing some of the water to seep in while much of the surface water flows into a wetter wetland. 133 This initial stage would eliminate most of the nitrates and other nutrients by filtering the water through a porous substrate into groundwater. 134 These wetlands would also reduce soil erosion from fields by slowing the runoff.

Pollutants consisting of pesticides, bacteria, ammonia and the like are handled better by vegetation inundated with water for extended periods of time. 135 Cattails, bulrushes, reeds and other wetland grasses are very effective at attracting molecules of these pollutants and breaking them down into harmless by-products. 136 In this second stage of the process, a wet depression or marsh is allowed to collect water for a period of time to recharge groundwater and filter the pesticides, bacteria and ammonia. After the water is filtered through these stages, it may be drained into rivers or streams for later municipal or industrial use.

VII. PROPOSAL

A comprehensive market-based incentive program to replenish the nation’s wetland reserves cannot be dependent on handouts or erratic funding from Congress. Funding a project to restore wetlands on farms needs to come from private sources with government supervision. 137

A Wetland Mitigation Banking System would be able to provide funds for the replacement of farm wetlands through mitigating 138 the losses of non-farm wetlands. “Credits” would be given to farmers who create farm wetlands of a certain acreage, then these credits would be sold to developers who had drained or filled other wetlands to “mitigate” these losses. 139 A governmental entity or the market would approve the farm wetland credits and find buyers for those credits. 140 Those who destroy wetlands in urban or other non-farm areas would be required to buy these credits as the price of developing those wetlands. This concept has been widely used in the reduction of sulfur dioxide (SO2) emissions from utility plants using high sulfur coal. 141

In order to increase the net acreage of wetlands, the mitigation bank 142 could require a ratio of three acres of restored wetlands to one acre destroyed. This would speed up the process of replacing the farm wetlands which are urgently needed to filter agricultural runoff. The mitigation rules can be written by either the Corps or the state agency administering the program, which would oversee the creation of the “credit” wetlands. The mitigation bank concept could be implemented in conjunction with the Wetland Reserve Program already in place.

There are theoretical problems with allowing developers to destroy wetlands if they have the money to buy enough credits, but the proposed 3:1 ratio should reduce the monetary inducement. The mitigation bank option would not preclude the possibility of fines, injunctions, and other penalties for developers.

The Corps now favors on-site mitigation and at least a “one for one functional replacement” with an adequate margin for loss (no net loss) 143 in their overall mitigation policy. 144

130 Dianne Dumanoski, Drier Wetlands Believed Better Pollution Filters, Des Moines Reg., January 5, 1992, at 5A.
131 Biochemical Oxygen Demand: Amount of oxygen needed to decompose organic wastes; this process depletes the oxygen available for fish and other wildlife and also produces methane and hydrogen sulfide by anaerobic decomposition, Dr. Randy Miles, Address at the University of Missouri-Columbia Soil and Water Resources Seminar (September 14, 1992).
132 Id.
133 The drier wetlands are known as Vegetative Submerged System (VSS) wetlands. Id.
134 Id.
135 Known as Free Water Surface (FWS) wetlands. Id.
136 Id.
138 “Mitigation” is defined under the Council on Environmental Quality regulations at 40 C.F.R. § 1508.20 (1992). This definition may be revised however, as President Clinton recently eliminated the Council on Environmental Quality.
140 Id. at 69.
142 The U.S. Fish and Wildlife Service (FWS) defines mitigation banking as the intentional creation, restoration, or enhancement of a wetland to protect a habitat for the purpose of compensating for unavoidable, necessary losses from specific future development actions. See FISH & WILDLIFE SERVICE, BIOLOGICAL REPORT 89(41) (July 1988), interpreted in Robert D. Sokolove and Pamela D. Huang, Privatization of Wetland Mitigation Banking, 7 NAT. RESOURCES & ENV’T 36 (1992).
Many times the projects are left unmonitored and subsequently fail to attain a fully operational status. In an article supporting the creation of private wetland mitigation banks, two environmental attorneys argue on-site mitigation has limited use and effectiveness, and tends to be costly.

Restoring wetlands on farms will be more successful than on-site mitigation as the farmland likely was a wetland before being drained. Wetlands created on farms are generally more valuable to our environment than wetlands in urban areas due to the purifying role farm wetlands play.

Another problem with on-site mitigation projects is that the same developer who destroys wetlands is also responsible for creating new wetlands. With a private wetlands mitigation bank, the farmer creating the farm wetlands has different incentives from the developer destroying the wetlands.

In order for a wetland mitigation bank to be effective, scientists and regulatory agencies need to establish a regional wetland valuation system to define and preserve high priority wetlands. This ranking of wetland types according to functions and values would allow restoration programs to focus on farm wetlands which are valuable in the Midwest, while also according high values to those urban wetlands which comprise crucial habitat.

Farm wetlands could be created in the same areas where they once were, though the restoration program would need to be flexible to address particular needs and situations. For instance, the wetlands could be placed only on erodible bottomland, in waterways between crops, on flat pasture land, or in areas where several farms drain into a common stream, being able to adjust to the available soils, hydrology, and vegetation.

Restoration of wetlands must be done with supervision and technical assistance from biologists, hydrologists, and various engineers in order to be successful. This consultation expertise is readily available from specialists in the state Departments of Conservation, local ASCS offices, and others from the University Extension Services.

A conservation easement on the wetland should be sufficient to protect the wetland from being drained, filled, or otherwise destroyed. These easements should be in perpetuity to keep the area protected from subsequent changes in the ownership of the farmland. Also there must be continued property and income tax advantages to the landowners for their conservation easements.

Using a wetland mitigation bank would take the wetland restoration process away from the politics of Congressional funding so the work can begin. With the political influence wielded by the agricultural lobby, the task of preserving and restoring wetlands should not be left up to those who feed in the farm Political Action Committee trough.

Another way to fund farm wetland restoration would be to charge a "utility fee" to farmers whose lands drain into a common wetlands project. This market-oriented plan would require farmers to take responsibility for the pollutants which runoff from their farming operations.

Monies from the farm subsidy program also should be used to fund the restoration of farm wetlands, as the highly intensive farming practices encouraged by subsidizing crop prices are responsible for much of the destruction of wetlands. Unfortunately, the administrative hassles and the strength of the farm lobby would probably lessen the effectiveness of a utility fee or a decrease in farm subsidies.

VIII. CONCLUSION

In his wetlands reform plan introduced August 24th, President Clinton seeks to: 1) Affirm the "no net loss" policy as a preliminary step to restoring many wetlands; 2) Exempt "prior converted wetlands" from regulation; 3) Create streamlined appeals processes for affected landowners; 4) Encourage creation of wetlands mitigation banks; 5) Require § 404 permits for actions which drain wetlands; and 6) Designate the SCS as the lead federal agency on farm wetlands. These proposals greatly enhance the likelihood that wetlands mitigation banking will become a reality.

Wetlands are well suited to the task of filtering agricultural runoff, and we need to restore their natural processes. The lost wetlands were originally altered to increase agricultural production or transportation capabilities; the benefit in water quality and availability from the added wetlands will greatly outweigh the corresponding loss in farmland acreage.

Lawmakers must realize that control of agricultural non-point source pollution is not a legal or technical problem, but rather an economic problem which is better addressed through an incentive based mitigation program. We must provide a solution which is more appropriate for the problem of agricultural runoff and is more flexible than ordinary regulatory schemes. While changes must be made in the state and federal approaches to farm runoff, a permit program which simply declares the runoff of agricultural wastes to be criminal will not by itself improve the quality and availability of water in the Midwest. The states in the Midwest must take the initiative to restore farm wetlands by providing cost sharing or mitigation agreement programs to encourage farmers to reinstate nature's way of handling agricultural runoff.

145 Maria Cone, Many New Wetlands Wither Away in Neglect, L.A. Times, August 2, 1992, at 1A; but see Michael D. Pattinson, Builder, Project Manager Did Not Neglect Mission Viejo Wetlands, L.A. Times, August 9, 1992, at 1B.
146 Robert D. Sokolove and Pamela D. Huang, Privatization of Wetland Mitigation Banking, 7 Nat. Resources & Env't 36 (1992).
147 Id. at 69.
148 Supra, note 131.
149 Supra, note 143.
150 William E. Taylor and Dennis Magee, Should All Wetlands Be Subject to the Same Regulation?, 7 Nat. Resources & Env't 32 (1992).
151 Ken Miller, Clinton Plan Greeted with Mild Enthusiasm on Hill, GANNET NEWS SERVICE, September 15, 1993.