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THE WHITE HOUSE

WASHINGTON

July 27, 1976

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: JAMES T. LYNN
FROM: JAMES E. CONNOR *JEC*
SUBJECT: Army Corps of Engineers Dredge
and Fill Authority Under Section 404
of the Federal Water Pollution Control
Act

Confirming a phone call to your office, the President has reviewed your memorandum on the above subject and has approved the following:

Decision 1: On the activities to be exempt from regulation modify Administration's previous position to the effect that:

- "all", not just "normal", current agricultural and forestry activities should be exempt by statute;
- permit decisions should be based on navigation, water quality, and fish and wildlife considerations -- not any other environmental factors.
- any activity deemed by the Corps to be insignificant should be exempt, and
- the Corps should have authority to delegate the program to the States as to any waters other than navigable waters.

Decision 2: On geographical extent of Corps jurisdiction:

- retain Administration's previous position (Cleveland-Harsha, all waterways and wetlands)

Please follow-up with the appropriate action.

THE WHITE HOUSE

WASHINGTON

July 27, 1976

MR. PRESIDENT:

Army Corps of Engineers Dredge and
Fill Authority Under Section 404 of the
Federal Water Pollution Control Act

Staffing of the attached memorandum from Jim Lynn has resulted in the following:

Decision 1 : Approval of Decision 1 was supported by Messrs. Marsh, Cannon, Buchen, Hartmann and Friedersdorf. NSC had no recommendations to make.

Decision 2 : The first choice -- retain Administration's previous position (Cleveland-Harsha) -- was supported by Messrs. Marsh, Cannon, Buchen and Friedersdorf. However, Mr. Marsh added "I believe this is the type of subject that can only be developed by a staffing meeting where there is greater explanation of the choices. Therefore, my views above are not strong and could be modified after an oral presentation."

The third choice -- support modified Wright Amendment -- is supported by Mr. Hartmann.

Jim Connor



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

MEMORANDUM FOR: THE PRESIDENT
FROM: JAMES T. LYNN
ISSUE: Army Corps of Engineers Dredge and Fill Authority under Section 404 of the Federal Water Pollution Control Act

In May you decided to support a restriction -- known as the Cleveland-Harsha Amendment -- to jurisdiction of the Corps under Section 404 of the Federal Water Pollution Control Act over dredge and fill permits.

On June 3 the House instead adopted tighter restrictions on the Corps -- the so-called Wright Amendment.

In view of the House action and your recent decision to delay until September 1 any further expansion of Corps permit jurisdiction under present law, the Senate Public Works Committee has scheduled hearings for next Tuesday and Wednesday.

Your advisors are divided on the Administration position in the Senate hearings.

Background

Dredged material consists of sediments removed from the bottoms of water bodies for the purpose of maintaining navigational channels; fill material consists of solid material placed in the water to create additional land or structure (e.g., levees, dams, roadways).

The Corps has been authorized to control dredge and fill activities by permit:

- o since 1899, in waterways ("navigable waters") that are navigable or potentially navigable (about 100,000 miles) plus;
- o since 1972, in waterways ("historically navigable waters") that have been historically navigable (e.g., traversed by colonial fur traders -- about 500,000 additional miles), plus;

- o since 1975, in all other waterways (about 1,650,000 miles) including adjacent wetlands, e.g., swamps (about 84,000 square miles) of the United States, whether navigable or not.

The reasons for monitoring dredge and fill activities have been:

- o since 1899, preventing obstructions to navigation, plus;
- o since 1967, enhancing fish and wildlife and water quality plus; 1/
- o since 1970, enhancing all factors affecting the public interest, including other environmental considerations (e.g., land use, aesthetics).

Agriculture, forestry, dredging and real estate development groups oppose the additions to the jurisdiction of the Corps program since 1972.

The recent Congressional attempts to limit the scope of the program center around two alternative approaches:

- o limiting geographical jurisdiction (exempting certain rivers, river segments and wetlands from Corps regulation);
- o limiting activities (exempting certain activities, such as agriculture and forestry operations, from Corps regulation).

The Cleveland-Harsha amendment takes the latter approach -- exempting "normal" agriculture and forestry activities (which were never intended to be regulated), while retaining Corps jurisdiction over all waterways and wetlands. The Wright amendment includes both approaches -- incorporating the Cleveland-Harsha exemptions for agriculture and forestry, but also limiting Corps jurisdiction to navigable waters and adjacent wetlands plus coastal wetlands (pre-1972 jurisdictions).

1/ Since 1972 the Environmental Protection Agency has also had authority to ensure water quality -- whether affected by dredge and fill activities or otherwise -- in all the waters of the United States. This not at issue.

Agency Positions

The agencies (Army, EPA, Interior, Agriculture, Commerce, DOT, CEQ and OMB) are agreed that -- whatever the geographical extent of Corps jurisdiction --

- o "all", not just "normal", current agricultural and forestry activities should be exempt by statute,
- o the factors the Corps should take into account in permit decisions should be limited to navigational, water quality and fish and wildlife considerations -- and should not include other environmental factors (such as land use and aesthetics) -- but no attempt should be made to exempt the Corps program from NEPA to lessen the burden of preparing environmental statements. 2/
- o any activity deemed by the Corps to be insignificant should be exempt, and
- o the Corps should have authority to delegate the program to the States as to any waters other than navigable waters.

If you approve, the Administration's previous position will be modified accordingly.

The agencies are in disagreement over the appropriate geographical extent of the Corps jurisdiction.

Army, EPA, CEQ, Interior and DOT prefer retaining Corps geographic jurisdiction over all waterways and wetlands as provided in Cleveland-Harsha.

2/ Logically, there is no need for broad gauged environmental impact statements -- which include discussion of all sorts of impacts -- if just navigation, water quality and fish and wildlife are to be considered. However, Army, EPA, CEQ, and Interior strongly oppose -- on both policy and pragmatic grounds -- any attempt to exempt the program from NEPA to reduce the time, effort and expense of preparing such documents. In addition, NEPA results in a complete disclosure of environmental impacts to the public, and to State and local governments.

Agriculture prefers narrowing Corps geographic jurisdiction as in the Wright amendment -- i.e., limiting Corps jurisdiction to navigable waters and adjacent wetlands plus coastal wetlands. This would exclude approximately 2,150,000 miles of waters and 60% of inland wetlands.³

Commerce would also include historically navigable waters, and would authorize the Corps to add additional waters and wetlands as necessary for the protection of municipal water supplies, fish and wildlife, and pollution and flood control.

Army, EPA, CEQ, Interior and DOT support the broadest Corps geographic jurisdiction (Cleveland-Harsha) because:

- o coastal and inland wetlands -- constituting 3.5 percent of the land area of the United States -- are a water resource which provides natural benefits of flood protection, water purification, water supply, water pollution control, erosion and sedimentation control and habitat for aquatic life that supports sport and commercial fisheries; in addition, wetlands also serve as storage areas for water that eventually seeps down and replenishes natural underground water supplies;
- o the biological productivity of a wetland is completely divorced from the fact that it is or is not located adjacent to a river capable of carrying commerce;
- o reliance on State and local governments which have not provided adequate protection for our wetlands -- 40% of the Nation's wetlands were eliminated between 1850 and 1956 -- is misplaced;
- o it will be favorably received by environmental interests and goes a long way toward satisfying agricultural and forestry interests.

Agriculture favors a narrower Corps geographic juris-

³ Since, under the Wright amendment, the States can petition the Secretary of the Army to administer a regulatory program in all waters, conceivably, but improbably, Corps jurisdiction under Wright could approach that of the Cleveland-Harsha amendment.

diction (Wright) -- navigable waters and adjacent wetlands, plus coastal wetlands because this approach:

- o regulates the most important wetlands for water quality, the remaining wetlands making a much less significant contribution to commercial fishing;
- o acknowledges what many argue to be the Congressional intent of the 1899 and 1972 Acts, i.e., not to create a broad Federal wetlands protection program;
- o is popular as evidenced by the 2-1 margin in favor of such restriction in the House and is favored by agricultural and industrial interests;
- o provides States with an option to invite Federal jurisdiction or regulate themselves -- a reasonable compromise in Federal-State relations, and recognizes that changing public attitudes on wetlands are best reflected at the State -- not the Federal -- level; ^{4/}
- o is a more effective way to limit Federal jurisdiction because restricting geographic coverage is simpler to understand than exempting certain activities;
- o encourages public perception that the Administration is minimizing Federal regulation;
- o does not duplicate other Federal programs, such as the Coastal Zone Management Act, Fish and Wildlife Coordination Act and the Wetlands Acquisition Program, which are available to protect wetlands

^{4/} Historically, dredge and fill activities in wetlands have been encouraged by government policies (e.g., the Swamp Land Acts of 1849, 1850, and 1860) for beneficial purposes such as agricultural and industrial production and mosquito control. In recent years, increased environmental awareness has shifted public attitudes towards wetlands preservation.

Commerce favors the narrow Corps jurisdiction (Wright) but would add historically navigable waters, and would authorize the Corps to regulate selected additional areas meeting specified criteria. This approach would:

- o position you in support of Federal wetlands protection, and at the same time, position you favorably with those opposed to broad Federal jurisdiction;
- o tailor the Corps regulatory role to the degree of public interest in protecting specific areas.

Army, CEQ, EPA, Interior and DOT respond that this approach:

- o will result in administrative difficulties and possibly extensive litigation in making the required designations, with the result that only those wetlands adjacent to navigable waters will be protected;
- o will still not assure environmental groups that critical areas will be protected;
- o would create uncertainties in the private sector as to whether activities in particular areas may be subject to Corps regulation;
- o would allow the destruction of environmentally critical wetlands during the time interval before Federal jurisdiction is established.

Decisions

1. On the activities to be exempt from regulation, modify Administration's previous position to the effect that:
 - o "all", not just "normal", current agricultural and forestry activities should be exempt by statute;
 - o permit decisions should be based on navigation, water quality, and fish and wildlife considerations-- not any other environmental factors.
 - o any activity deemed by the Corps to be insignificant should be exempt, and
 - o the Corps should have authority to delegate the program to the States as to any waters other than navigable waters.

Supported by all agencies, CEQ and OMB. Interior objects to delegation to the States, on grounds that they have more effective control over wetlands by working with the Corps than by working with the States.

Approve

RCF

Disapprove

2. On geographical extent of Corps jurisdiction:

- o retain Administration's previous position (Cleveland-Harsha, all waterways and wetlands) supported by Army, EPA, Interior, DOT, CEQ, and OMB; RCF
- o support Wright amendment (navigable waters, adjacent wetlands and coastal wetlands); supported by Agriculture, acceptable to OMB; _____
- o support modified Wright amendment (navigable waters and adjacent wetlands, plus historically navigable waters and coastal wetlands, but with Corps authority to protect additional areas); supported by Commerce and acceptable to OMB. _____

STAFFING

bad 7/27/76

July 27, 1976

MR. PRESIDENT:

Army Corps of Engineers Dredge and
Fill Authority Under Section 404 of the
Federal Water Pollution Control Act

Staffing of the attached memorandum from Jim Lynn
has resulted in the following:

Decision 1 : Approval of Decision 1 was supported by
Messrs. Marsh, Cannon, Buchen, Hartmann and
Friedersdorf. NSC had no recommendations to make.

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previous position (Cleveland-Harsha) -- was supported
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Jim Connor



EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

MEMORANDUM FOR:

THE PRESIDENT

FROM:

JAMES T. LYNN

ISSUE:

Army Corps of Engineers Dredge and Fill Authority under Section 404 of the Federal Water Pollution Control Act

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- o since 1975, in all other waterways (about 1,650,000 miles) including adjacent wetlands, e.g., swamps (about 84,000 square miles) of the United States, whether navigable or not.

The reasons for monitoring dredge and fill activities have been:

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- o since 1970, enhancing all factors affecting the public interest, including other environmental considerations (e.g., land use, aesthetics).

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- o any activity deemed by the Corps to be insignificant should be exempt, and
- o the Corps should have authority to delegate the program to the States as to any waters other than navigable waters.

If you approve, the Administration's previous position will be modified accordingly.

The agencies are in disagreement over the appropriate geographical extent of the Corps jurisdiction.

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2/ Logically, there is no need for broad gauged environmental impact statements -- which include discussion of all sorts of impacts -- if just navigation, water quality and fish and wildlife are to be considered. However, Army, EPA, CEQ, and Interior strongly oppose -- on both policy and pragmatic grounds -- any attempt to exempt the program from NEPA to reduce the time, effort and expense of preparing such documents. In addition, NEPA results in a complete disclosure of environmental impacts to the public, and to State and local governments.

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- o acknowledges what many argue to be the Congressional intent of the 1899 and 1972 Acts, i.e., not to create a broad Federal wetlands protection program;
- o is popular as evidenced by the 2-1 margin in favor of such restriction in the House and is favored by agricultural and industrial interests;
- o provides States with an option to invite Federal jurisdiction or regulate themselves -- a reasonable compromise in Federal-State relations, and recognizes that changing public attitudes on wetlands are best reflected at the State -- not the Federal -- level; 4/
- o is a more effective way to limit Federal jurisdiction because restricting geographic coverage is simpler to understand than exempting certain activities;
- o encourages public perception that the Administration is minimizing Federal regulation;
- o does not duplicate other Federal programs, such as the Coastal Zone Management Act, Fish and Wildlife Coordination Act and the Wetlands Acquisition Program, which are available to protect wetlands

4/ Historically, dredge and fill activities in wetlands have been encouraged by government policies (e.g., the Swamp Land Acts of 1849, 1850, and 1860) for beneficial purposes such as agricultural and industrial production and mosquito control. In recent years, increased environmental awareness has shifted public attitudes towards wetlands preservation.

Commerce favors the narrow Corps jurisdiction (Wright) but would add historically navigable waters, and would authorize the Corps to regulate selected additional areas meeting specified criteria. This approach would:

- o position you in support of Federal wetlands protection, and at the same time, position you favorably with those opposed to broad Federal jurisdiction;
- o tailor the Corps regulatory role to the degree of public interest in protecting specific areas.

Army, CEQ, EPA, Interior and DOT respond that this approach:

- o will result in administrative difficulties and possibly extensive litigation in making the required designations, with the result that only those wetlands adjacent to navigable waters will be protected;
- o will still not assure environmental groups that critical areas will be protected;
- o would create uncertainties in the private sector as to whether activities in particular areas may be subject to Corps regulation;
- o would allow the destruction of environmentally critical wetlands during the time interval before Federal jurisdiction is established.

Decisions

1. On the activities to be exempt from regulation, modify Administration's previous position to the effect that:
 - o "all", not just "normal", current agricultural and forestry activities should be exempt by statute;
 - o permit decisions should be based on navigation, water quality, and fish and wildlife considerations-- not any other environmental factors.
 - o any activity deemed by the Corps to be insignificant should be exempt, and
 - o the Corps should have authority to delegate the program to the States as to any waters other than navigable waters.

Supported by all agencies, CEQ and OMB. Interior objects to delegation to the States, on grounds that they have more effective control over wetlands by working with the Corps than by working with the States.

Approve _____ Disapprove _____

2. On geographical extent of Corps jurisdiction:

- o retain Administration's previous position (Cleveland-Harsha, all waterways and wetlands) supported by Army, EPA, Interior, DOT, CEQ, and OMB; _____
- o support Wright amendment (navigable waters, adjacent wetlands and coastal wetlands); supported by Agriculture, acceptable to OMB; _____
- o support modified Wright amendment (navigable waters and adjacent wetlands, plus historically navigable waters and coastal wetlands, but with Corps authority to protect additional areas); supported by Commerce and acceptable to OMB. _____

THE WHITE HOUSE

ACTION MEMORANDUM

WASHINGTON

LOG NO.:

Date: July 24, 1976

Time:

FOR ACTION: ~~Jack Marsh~~
 Jim Cannon
 Phil Buchen
 Bob Hartmann
 Max Friedersdorf

~~XXXXXXXXXXXX~~

Brent Scowcroft
Dave Gergen

FROM THE STAFF SECRETARY

DUE: Date: Tuesday, July 27

Time: 10:00 a.m.

SUBJECT:

Hearing 7⁰⁰ p.m. Tues

Lynn memo re: Army Corps of Engineers Dredge and Fill Authority under Section 404 of the Federal Water Pollution Control Act

ACTION REQUESTED:

- For Necessary Action
- For Your Recommendations
- Prepare Agenda and Brief
- Draft Reply
- For Your Comments
- Draft Remarks

REMARKS:

Cannon - approve decision 1
approve 1st choice decision 2

Mat - approve 1st choice of decision 2

Scowcroft - no recommendation (see comment)

Marsh - approve decision 1 - see comments
approve 1st choice of 2

Buchen - (Schmuts) agree with OMB

Hartmann - approve decision 1 + on decision 2 option 3

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

Jim Connor
For the President

ACTION MEMORANDUM

Date: July 24, 1976

Time:

FOR ACTION: Jack Marsh
Jim Cannon
Phil Buchen
Bob Hartmann
Max Friedersdorf

~~XXXXXXXXXXXX~~
~~cc (for information)~~

Brent Scowcroft
Dave Gergen

FROM THE STAFF SECRETARY

DUE: Date: Tuesday, July 27

Time: 10:00 a.m.

SUBJECT:

Lynn memo re: Army Corps of Engineers Dredge
and Fill Authority under Section 404 of the
Federal Water Pollution Control Act

ACTION REQUESTED:

For Necessary Action

For Your Recommendations

Prepare Agenda and Brief

Draft Reply

For Your Comments

Draft Remarks

July 27, 1976

REMARKS:

On Question 1, I approve and on Question 2 I lean to the first choice.

However, I believe this is the type of subject that can only be developed by ^astaffing meeting where there is greater explanation of the choices. Therefore, my views above are not strong and could be modified after an oral presentation.

Jack Marsh

NOTE: Dictated by Mr. Marsh but NOT read by Mr. Marsh.

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

Jim Connor
For the President

THE WHITE HOUSE

WASHINGTON

July 26, 1976

MEMORANDUM TO: JIM CONNOR
FROM: JIM CANNON *JCC FOR JIM CANNON*
SUBJECT: Army Corps of Engineers Dredge
and Fill Authority under Section 404
of the Federal Water Pollution Control Act

In regard to Jim Lynn's memorandum to the President
on the Section 404 issue:

Decision 1

The Domestic Council concurs with the
OMB, CEQ and "all agencies" that the
modifications to the previous Adminis-
tration position should be approved.

Decision 2

On the geographical extent of the Corp's
jurisdiction, the Domestic Council supports
the first choice, that of retaining the
Administration's previous position (Cleveland-
Harsha, all waterways and wetlands).

Date: July 24, 1976

Time:

FOR ACTION: Jack Marsh
Jim Cannon
Phil Buchen
Bob Hartmann
Max Friedersdorf
FROM THE STAFF SECRETARY

~~XXXXXXXXXXXX~~

Brent Scowcroft
Dave Gergen

M.G.

DUE: Date: Tuesday, July 27

Time: 10:00 a.m.

SUBJECT:

Lynn memo re: Army Corps of Engineers Dredge and Fill Authority under Section 404 of the Federal Water Pollution Control Act

ACTION REQUESTED:

For Necessary Action

For Your Recommendations

Prepare Agenda and Brief

Draft Reply

For Your Comments

Draft Remarks

REMARKS:

*Recommend we support
Harsha Cleveland partition*

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

Jim Connor
For the President

THE WHITE HOUSE
WASHINGTON

July 27, 1976

MEMO FOR: ED SCHMULTS

FROM: KEN LAZARUSK

SUBJECT: Lynn memo re Army Corps of
Engineers Dredge and Fill Authority
under Sec. 404 of Federal Water
Pollution Control Act

Suggested response:

Counsel's Office has reviewed your draft memo to the President on the subject noted above and requests to be recorded as in agreement with OMB in all respects.

Approve



A handwritten signature, possibly 'R. L.', is written over the 'Approve' line. Below the signature, the date '7/27' is written vertically.

Disapprove _____

Date: July 24, 1976

Time:

FOR ACTION: Jack Marsh
Jim Cannon
Phil Buchen
Bob Hartmann
Max Friedersdorf

~~XXXXXXXXXXXX~~

Brent Scowcroft
Dave Gergen

FROM THE STAFF SECRETARY

DUE: Date: Tuesday, July 27

Time: 10:00 a. m.

SUBJECT:

Lynn memo re: Army Corps of Engineers Dredge
and Fill Authority under Section 404 of the
Federal Water Pollution Control Act

ACTION REQUESTED:

For Necessary Action

For Your Recommendations

Prepare Agenda and Brief

Draft Reply

For Your Comments

Draft Remarks

REMARKS:

#1 Approve
#2 action 3
tjl

Agree
RTA

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delay in submitting the required material, please
telephone the Staff Secretary immediately.

Jim Connor
For the President

NATIONAL SECURITY COUNCIL

July 26, 1976

MEMORANDUM FOR: JIM CONNOR

FROM: JEANNE DAVIS *Jn*

SUBJECT: *Jn* Comments on Lynn's Memorandum
re: Army Corps of Engineers Dredge
and Fill Authority under Section 404 of
the Federal Water Pollution Control Act

The NSC has no recommendation to make on this issue.

In reading the memorandum, however, we were confused as to Commerce's position. By only using the word "include", it is not clear if it is meant to exempt historically navigable waterways from Corps jurisdiction or to exempt them from the Wright amendment approach and therefore permit the Corps to continue to retain jurisdiction.

Date: July 24, 1976

Time:

Staff-

FOR ACTION: Jack Marsh
Jim Cannon
Phil Buchen
Bob Hartmann
Max Friedersdorf

~~XXXXXXXXXXXXXXXX~~

Brent Scowcroft
Dave Gergen

FROM THE STAFF SECRETARY

DUE: Date: Tuesday, July 27

Time: 10:00 a.m.

SUBJECT:

Lynn memo re: Army Corps of Engineers Dredge
and Fill Authority under Section 404 of the
Federal Water Pollution Control Act

ACTION REQUESTED:

- | | |
|---|--|
| <input type="checkbox"/> For Necessary Action | <input checked="" type="checkbox"/> For Your Recommendations |
| <input type="checkbox"/> Prepare Agenda and Brief | <input type="checkbox"/> Draft Reply |
| <input checked="" type="checkbox"/> For Your Comments | <input type="checkbox"/> Draft Remarks |

REMARKS:

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Draft Remarks

REMARKS:

*No view except
recommendation but memo for
It be boiled down —
Jf 7/26*

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