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THE WHITE HOUSE
WASHINGTON

June 2, 1976

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR:

JAMES T. LYNN

FROM:

JAMES E. CONNOR *JEC*

SUBJECT:

Administration Position on Proposed
Legislation to Reduce Regulatory
Authority of the Corps of Engineers in
the context of H. R. 9560 - Water
Pollution Control Act Amendments

The President reviewed your memorandum of May 31 on the above subject and decided to support the Cleveland-Harsha Amendment and to oppose the Breaux Amendment.

I understand that you have already communicated this decision to the Congressional people. Please follow-up with any other action necessary.

cc: Dick Cheney



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

Date:

TO: *Jim Connor*

FROM: Deputy Director

The President gave this to me after the meeting (in a private follow-up in the oval office).

He decided to support the Cleveland/Barack mand-ment and to oppose the

Breaux amendment. I understand that if he will handle Cong. notification Paul Chernin.

THE WHITE HOUSE
WASHINGTON

June 1, 1976

MR PRESIDENT:

Administration Position on Proposed Legislation
to Reduce Regulatory authority of the Corps of
Engineers in the con text of H. R. 9560 - Water
Pollution Control Act Amendments

Staffing of the attached memorandum prepared by Jim Lynn
resulted in the following recommendations:

Max Friedersdorf - Recommends Option 3.

Jack Marsh - Recommends Option 5 or Option 7.

Jim Cannon - Recommends Option 4.

Bill Seidman declined to select an option until after the
meeting.

Jim Connor



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

May 31, 1976

Note for Mr. Cheney -

Here is the memorandum on Corps of Engineers dredge and fill legislation that Jim Lynn spoke to you about on Saturday.

House action is set for Wednesday.

A Presidential meeting with concerned agency heads and advisers is suggested for Tuesday.

Because of the time squeeze, no agency heads have seen this memo.

Copies are enclosed for the following should you wish to share it with them before the meeting:

Cannon, Friedersdorf, Kleppe, Butz, Richardson,
Train, Peterson (CEQ), Veysey (ARMY),
Taft (Justice)

(at or)



EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

May 31, 1976

ACTION

THE PRESIDENT HAS SEEN...

MEMORANDUM FOR: THE PRESIDENT

FROM: James L. Lynn

SUBJECT: What position should the Administration take on proposed legislation to reduce regulatory authority of the Corps of Engineers in the context of H.R. 9560, the Water Pollution Control Act Amendments of 1976?

Specific Issue: Scheduled for House debate on June 2 and 3 is the "Breux Amendment" that would (a) limit the regulatory authority of the Corps of Engineers over dredge and fill activities to waters of the U.S. defined as navigable before the "navigable waters" definition was expanded by the Water Pollution Control Act Amendments of 1972, and (b) provide that dredge and fill operations outside the restricted definition of navigable waters may not be regulated under either the water pollution laws or the Refuse Act. Federal agencies concerned are sharply divided over what position to take on this debate.

Context: The "Breux Amendment" is included in H.R. 9560, the Water Pollution Control Act Amendments of 1976, which contains several other provisions opposed by the Administration which may make it a candidate for veto regardless of the Breux Amendment. Most objectionable features are that it:

- authorizes \$5 billion over the President's FY 1977 Budget request for the construction of wastewater treatment projects.
- increases the number of previously constructed wastewater treatment projects eligible for retroactive reimbursement and authorizes an additional \$350 million to pay for this expanded eligibility.
- establishes a new loan guarantee program for the non-Federal share of constructing wastewater treatment plants.
- provides discretionary authority to waive the entire non-Federal share for the construction of wastewater treatment plants.

A list of major provisions, both objectionable and supportable is at Attachment A.

Background of the Corps Permit Program:

In the 1899 Rivers and Harbor Authorization Act the Corps of Engineers was given the responsibility for protecting the Nation's waterways from activities which would impede navigation, such as bridge construction and the disposal of refuse.

The 1899 Act made it unlawful to deposit refuse of any kind into navigable waters, or a tributary thereof, without first obtaining a permit from the Secretary of the Army.

The 1899 Act limited the geographic jurisdiction of the permit program to waters that were being used or could be used with reasonable improvements to transport interstate or foreign commerce.

Similarly, the 1899 Act limited the scope of the Corps' review of a permit application to the effects the proposed activity would have on navigation.

In 1970, as directed by Executive Order, the Corps expanded its program to cover pollutants as well as navigational hazards.

In 1972, by administrative action, the definition of navigable waters was expanded to include those that had historically served as part of an interstate transportation system, in addition to those that can presently be used for navigation either with or without reasonable improvements. Thus voyageur streams and some intrastate lakes became "navigable".

The Water Pollution Control Act Amendments of 1972 (P.L. 92-500) altered the program as follows:

- Transferred the pollutant permit program to EPA, and provided that it could be delegated to States for administration under EPA supervision.
- Required that dredge and fill operations in navigable waters must have a permit from the Corps of Engineers, subject to EPA veto. This program was not delegable to States.
- Expanded the definition of navigable waters to include all "waters of the United States" for all purposes of the Act.

When the Army by regulation attempted to restrict the Corps permit program only to the traditional navigational servitude areas, court action brought by environmentalists directed the Corps in 1975 to expand its permit program to all waters of the United States to the fullest extent allowed by the Constitution. This had the following effects:

- Expanded the program into secondary and tertiary tributaries of navigable streams, and;
- Expanded the program inland from mean high water mark or mean high tide into adjacent wetlands - salt marshes and fresh water swamps.

The impact of this decision was to make the dredge and fill permit program a Federally administered land use control program aimed at protection of shorelines and wetlands from economic development requiring dredge or fill operations. The outcome was very unpopular in farming and forestry States and in States with substantial wetlands. It was also inconsistent with the Administration stance on the Federal role in land use as reflected in the Coastal Zone Act and our stance on land use. The outcome was and is very popular with all the major environmental groups, with environmentalists generally, and with EPA, CEQ, Interior and Justice. Army, initially opposed to expansion, now supports the Federal regulatory program, though it would support delegation to States. Agriculture and OMB favor roll-back of the Corps program to traditional navigational servitude lines.

Legislative Situation:

General debate and amendment are scheduled for Wednesday and Thursday this week on H.R. 9560, containing the Breaux Amendment, adopted by close vote of the Public Works Committee.

The Breaux Amendment would:

- limit the Corps dredge and fill permit program to waters subject to present and prospective use for interstate navigation.
- prevent regulation of dredge and fill activities from regulation under other sections of the water pollution laws.

The effect of the Breaux Amendment would be to

- remove Federal power to regulate deposition of fill material or dredge spoil in wetlands, thus removing a Federal mechanism for land use control.
- possibly jeopardize EPA's ability to control toxicants that may be contained in fill material from entering waters.

Representatives Cleveland and Harsha, supported by environmentalists, have sponsored a proposed substitute for the Breaux Amendment that would

- provide specific exemption from permit requirements for agricultural and silvicultural activities.
- provide for issuance of general permits for classes of dredge and fill operations considered insignificant.

The effect of the Cleveland-Harsha amendment would be to

- retain Federal jurisdiction over wetlands and tributaries.
- clearly legalize exemptions and general permits now contained in Corps regulations but subject to challenge in court.

Discussion:

Two themes run through this issue: (1) pollution control, and (2) Federal role in land use regulation. The pollution control issue arises solely from uncertainty as to whether the Breaux Amendment would compromise EPA-States ability to control toxicants that may enter the water from fills, and from the potential risk of depositing polluted dredge spoil from channels in wetland areas where they may affect the fish and wildlife productivity of wetlands. Our judgment is that in practice, Breaux would not prevent EPA control of toxic pollutants.

In some States, possibly a significant number, dredge and fill activities would not be regulated. This is not to suggest, however, that the discharge of toxicants through dredge and fill operations constitute a significant threat to public health relative to the direct discharge of toxicants by industries. Federal dredging, comprising the greatest amount of environmentally controversial dredging,

would continue to be subject to the environmental impact statement process which should enable effective environmental balance to be maintained in the placement of dredge spoil.

The land use issue is critical. Environmentalists generally view the dredge and fill permit program as a wetlands protection mechanism. The wetland resources are considered so critical environmentally that they should be protected from fill (the ultimate pollutant - that pollutes the wetlands out of existence) by Federal regulation. That State or local governments cannot be trusted to make balanced land-use decisions in this area is demonstrated by the fact that 40% of our wetlands disappeared between 1850 and 1956, and filling, draining and other wetland degrading practices continue unregulated in many areas today.

On the other hand, this Administration has generally supported the policy that direct regulation of private land use was not an appropriate Federal role. The Coastal Zone Act provides incentives for States to regulate coastal wetlands if they wish to, and their individual decisions under that Act are not subject to Federal veto or approval. In the land-use bill debate, the Administration consistently opposed direct Federal controls, opting for either no Federal role at all, or only a Federal incentive to establishing State control programs. The assumption that eliminating Federal controls is equivalent to eliminating all controls may not continue to be valid as States (1) put coastal zone and other land use programs in place, and (2) react to the environmental pressures at State and local levels.

Breaux Amendment Options:

1. Take no Administration position - allow agencies to speak for themselves in preparing Congressmen for debate (they are already doing this).
2. Oppose Breaux now on the basis that no hearings have been held and insufficient information is available to justify changing the status quo.
3. Support the Harsha-Cleveland amendment either
 - a. On grounds that the wetlands do indeed require special Federal protection
 - b. As an interim measure protecting our own efforts to limit the Federal program pending further studies and hearings

4. Support Cleveland-Harsha if amended to allow delegation of the entire Corps dredge and fill program to those States willing to administer it.
5. Support Cleveland-Harsha provided it is amended in such a way as to effectively come out in the Breaux position or in the position of option 7 below. (See Attachment B)
6. Support Breaux provided it is amended to allow the Corps to administer a dredge and fill permit program outside of navigational servitude areas in a given State on petition by that State.
7. Support Breaux provided it is amended to restore Federal jurisdiction in historically navigable waters.
8. Support Breaux.

Major Implications:

Option 1 - no Administration position - would allow you to avoid exposure on what may well be a no-win issue and avoid commitment to a specific section of a bill that may be overall unacceptable. It may be viewed as avoiding leadership responsibility. This would be acceptable to all concerned agency heads except possibly Mr. Butz and Mr. Lynn, and would probably be acceptable to minority Public Works Committee members.

Option 2 - oppose Breaux for procedural reasons - would pass up a possible opportunity to back off an extensive Federal regulation program, but would preserve the option to reopen the issue in the future. Would probably be acceptable to all concerned agency heads and minority with the possible exception of Mr. Butz.

Option 3 - support Cleveland-Harsha -

- a. On grounds that wetlands require Federal protection
 - abandons the anti-Federal land use control posture where wetlands are concerned.
 - would be supported by environmentalists, the bill's sponsors, EPA, CEQ, Justice, Army.

- would possibly be opposed by Mr. Butz, if agricultural or silvicultural interests remain dissatisfied.

b. As an interim measure

- keeps options open, and may be acceptable to all parties except dredging interests.

Option 4 - Cleveland-Harsha plus delegation to States - is an apparent compromise on the Federal land-use jurisdiction issue and would put the Corps program on the same delegable basis as EPA's industrial effluent permit program, but would still remain a direct Federal land use program for wetlands (but not agricultural or silvicultural) in those States unwilling to administer one. Would be acceptable to Federal agencies including EPA and Army, but would be opposed by environmental groups. Possibly acceptable to Cleveland and Harsha.

Option 5 - Support Cleveland-Harsha with amendments that would effectively result in Breaux outcome or, preferably, Breaux relaxed to restore Corps jurisdiction over historically navigable waters (like option 7 in substance). (See Attachment B) - Preserves our position on Federal land-use jurisdiction, might possibly avoid a break with Cleveland and Harsha, but would probably be opposed by them, would certainly be opposed by environmentalists and by all concerned agency heads except for Mr. Butz and Mr. Lynn (the latter if option 7 results).

Option 6 - Breaux plus authority for Army to administer a dredge and fill permit program in other areas of a State on petition by that State - preserves most of our position on Federal jurisdiction over land use, yet provides Federal wetlands protection if a State requests it. May be acceptable to all concerned agency heads with exception of Mr. Train and Mr. Peterson, would be acceptable to development interests, but would be strongly opposed by environmentalists. Position of Cleveland and Harsha on this option unknown, but Wright of Texas is reported to view it as acceptable.

Option 7 - Support Breaux with amendments to restore jurisdiction over historically navigable areas - this is the clearest reaffirmation of our posture on direct Federal regulation of land use, is supported by development interests, but strongly opposed by environmentalists. All concerned agency heads would probably oppose, except Mr. Lynn and Mr. Butz. Cleveland and Harsha would strongly oppose.

Option 8 - Support Breaux - Same agency and congressional views as option 7.

Conclusion: I am troubled by the fact that this total bill may turn out to be unacceptable no matter what we do, as we are not making much headway in heading off other objectionable features. Nevertheless, I believe we should establish an Administration position on the Breaux issue. I would personally support option 5 or 7, or if jurisdiction over historically navigable waters is retained, then option 6 too. If I thought that Cleveland and Harsha would support some major changes in other provisions that we need, such as extension of time allowed for States to obligate their waste treatment grant allotments, or deletion of the \$5 billion authorization, I could support option 3b (Cleveland-Harsha as an interim measure pending further review). However, I doubt that they would support us.

This is a very important land use issue. I believe it would be useful for you to meet Tuesday morning to discuss the issues with Messrs. Kleppe, Butz, Richardson, Train, Peterson, Veysey of Army, Taft of Justice, O'Neill of OMB, Cannon of Domestic Council and Friedersdorf.

Decision:

Arrange meeting on Tuesday

Approve option _____

RR 4 PM.

Attachments

Major Provisions of H.R. 9560,
Water Pollution Control Act Amendments of 1972

Provisions that the Administration Objects to

- Authorization of \$5 billion for the construction of wastewater treatment plants in FY 1977, \$6 billion for FY 1978 and \$6 billion for FY 1979.
- Authorization of an additional \$350 million (over the present authorization of \$2.6 billion) for the retro-active reimbursement of waste treatment projects previously constructed.
- Authorization of \$150 million for "208" areawide waste treatment planning.
- Specifically authorizes the construction of new collector sewers and the rehabilitation of existing sewers -- both measures directly counter to the Administration's legislative reform package.
- Provides loan guarantees for the non-Federal share (25%) of waste treatment plant construction.
- Authorizes the Administrator of EPA to waive the non-Federal share for a waste treatment plant grant.

Provisions Supported by the Administration

- Provides time extensions for meeting the statutory treatment requirements imposed on municipally owned treatment plants.
- Authorizes the delegation of the day-to-day management of the construction grants program to individual States.
- Authorizes the use of ad valorem taxes in addition to user charges, as a financial basis for authorizing and maintaining municipal waste treatment plants.

Potential amendments to the Cleveland-Harsha amendments
which would approximate the Breaux position

1. Eliminate land-locked lakes
2. Eliminate Federal regulation of intermittent streams and wetlands not adjacent to traditionally navigable waters
3. Eliminate Federal regulation of primary tributaries and wetlands adjacent to primary tributaries
4. Eliminate Federal regulation of coastal wetlands and wetlands adjacent to traditionally navigable waters

Alternative to the above which would approximate option 7

1. Amend Cleveland-Harsha to provide that the Corps dredge and fill regulatory program would be operative for tributaries of navigable streams and in wetlands above mean high tide (or high water mark) only upon petition of a State government