

Armed Forces being taken prisoner by North Vietnamese, Pathet Lao, and Viet Cong enemy forces;

Whereas the first such United States serviceman taken as a prisoner of war, Navy Lt. Commander Everett Alvarez, was captured on August 5, 1964;

Whereas following the Paris Peace Accords of January 1973, 591 United States prisoners of war were released from captivity by North Vietnam;

Whereas the return of these prisoners of war to United States control and to their families and comrades was designated Operation Homecoming;

Whereas many members of the United States Armed Forces who were taken prisoner as a result of ground or aerial combat in Southeast Asia have not returned to their loved ones and their whereabouts remain unknown;

Whereas United States prisoners of war in Southeast Asia were routinely subjected to brutal mistreatment, including beatings, torture, starvation, and denial of medical attention;

Whereas United States prisoners of war in Southeast Asia were held in a number of facilities, the most notorious of which was Hoa Loa Prison in downtown Hanoi, dubbed the "Hanoi Hilton" by the prisoners held there;

Whereas the hundreds of United States prisoners of war held in the Hanoi Hilton and other facilities persevered under terrible conditions;

Whereas the prisoners were frequently isolated from each other and prohibited from speaking to each other;

Whereas the prisoners nevertheless, at great personal risk, devised a means to communicate with each other through a code transmitted by tapping on cell walls;

Whereas then-Commander James B. Stockdale, United States Navy, who upon his capture on September 9, 1965, became the senior POW officer present in the Hanoi Hilton, delivered to his men a message that was to sustain them during their ordeal, as follows: Remember, you are Americans. With faith in God, trust in one another, and devotion to your country, you will overcome. You will triumph.;

Whereas the men held as prisoners of war during the Vietnam conflict truly represent all that is best about America;

Whereas two of these patriots, Congressman Sam Johnson, of Texas, and Senator John McCain, of Arizona, have continued to honor the Nation with devoted service; and

Whereas the Nation owes a debt of gratitude to all of these patriots for their courage and exemplary service: Now, therefore, be it

Resolved, That the Senate—

(1) expresses its gratitude for, and calls upon all Americans to reflect upon and show their gratitude for, the courage and sacrifice of the brave men who were held as prisoners of war during the Vietnam conflict, particularly on the occasion of the 25th anniversary of Operation Homecoming, their return from captivity; and

(2) acting on behalf of all Americans—

(A) will not forget that more than 2,000 members of the United States Armed Forces remain unaccounted for from the Vietnam conflict; and

(B) will continue to press for the fullest possible accounting for such members.

THE FEDERAL WETLANDS PERMIT PROGRAM

Mr. LOTT. Mr. President, I want to call attention to a Federal permit program that is causing problems in Mississippi, in the Southeastern United

States and, indeed, in the entire United States: the Federal Section 404 "wetlands" permit program. This program has its roots in Section 404 of the Clean Water Act, but has been designed primarily by the Federal courts and the Federal agencies, the Environmental Protection Agency and the U.S. Army Corps of Engineers, and not by the elected officials of this Nation.

Twenty years have passed since the Congress of the United States has addressed this program legislatively. Currently, a Federal appellate court decision, two pending appellate court cases and a new proposed rulemaking by the Corps of Engineers are stirring up controversy about this program. No one should be surprised. This program is held together by baling wire and string and pieces are beginning to fall off all over the place.

I encourage the Senate Environment and Public Works Committee to bring to the full Senate legislation that makes meaningful, common sense changes to the Section 404 permit program. Review of this program is long overdue. Mr. President, I hope that this Congress can take meaningful action on the Section 404 program in 1998.

One basic controversy about this program is the issue of the areas that are regulated as wetlands. The Federal agencies have interpreted their jurisdiction to extend to the farthest reaches of the Commerce Clause, and, I think, even beyond, including those isolated areas that merely "could affect" interstate commerce. Specifically, to some agencies this means those areas where a migratory bird "could" land. To make this grab for jurisdiction worse, according to the U.S. Fish and Wildlife Service, 75 percent of all Section 404 regulated areas are on privately owned property!

On December 23, in *Wilson v. United States Corps of Engineers*, the United States Court of Appeals for the Fourth Circuit overturned the criminal convictions of an individual, a corporation and a partnership for violating the Section 404 program in Charles County, Maryland. The individual had been sentenced to 21 months in jail and the three defendants had been fined a total of \$4 million. The Fourth Circuit overturned the convictions and remanded the case to the district court, finding that only those areas that are either connected on the surface to navigable waters or are proven to be in interstate commerce could be regulated under the Section 404 program. Specifically, the court held that:

Absent a clear indication to the contrary, we should not lightly presume that merely by defining 'navigable waters' as 'the waters of the United States', Congress authorized the Army Corps of Engineers to assert its jurisdiction in such a sweeping and constitutionally troubling manner. Even as a matter of statutory construction, one would expect that the phrase 'waters of the United States', when used to define the phrase 'navigable waters' refers to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters.

When viewed in light of its statutory authority, (the regulation), which defines 'waters of the United States' to include intrastate waters that need have nothing to do with navigable or interstate waters, expands the statutory phrase 'waters of the United States' beyond its definable limit.

Accordingly, we believe that in promulgating (the regulation), the Army Corps of Engineers exceeded its congressional authorization under the Clean Water Act, and that, for this reason, (the regulation) is invalid.

At long last, this case begins to limit the reach of the bureaucracy onto privately owned property under this program.

A second area of controversy is a regulation issued by the Clinton Administration in September, 1993, that broadly expanded the definition of activities that are regulated under the Section 404 program. As many of you know, this permit problem was never designed to be a wetlands permit program, but rather evolved in that direction through judicial rulings and agency interpretations. The activities in "wetlands" that are regulated under Section 404 of the Clean Water Act are the "discharge of dredged and fill material" into the "navigable waters". On the face of it, the statute does not cover other activities that could degrade wetlands, such as "draining" or "excavating" wetlands. Obviously, if we are going to have a wetlands regulatory program and protect valuable wetlands, the program needs to cover "drainage" and "excavation."

In September 1993, the Clinton Administration issued a rulemaking that expanded coverage of the Section 404 program to include activities like drainage and excavation. Many of us noted that this might be good public policy, but this expansion exceeded the statute, and legislation would be necessary to expand the program to cover these activities.

On January 23, 1997, a Federal district court in the District of Columbia struck down this regulation, called the Tulloch rule, as exceeding the statutory authority of the Clean Water Act. On January 9, 1998, the United States Court of Appeals for the District of Columbia Circuit heard oral arguments in this case. The Federal government had a rough day in court. I am told that the judges suggested that the agency interpretation of the jurisdictional reach of the Section 404 program went as far as "land that might be wet someday". One of the appellate judges asked the government attorney whether riding a bike through a wetland, where dirt accumulated on the tires and then fell off into the wetland during riding, would be an activity regulated under the Section 404 program. The government attorney answered yes, but the regulation was not aimed at this activity. The judge answered correctly, "Not yet!"

This brings me to a recent Corps judgment on Nationwide Permit 26 that was attacked on the front page of the Washington Post on Saturday, January 31st.

With the Corps and the EPA interpreting almost every activity as one covered by the Section 404 program, the Corps has adopted a series of Nationwide Permits that cover routine activities and prevent the necessity of proceeding through the costly and time-consuming normal permitting process. One of these permits, Nationwide Permit 26, which covers certain areas up to 3 acres in size, is scheduled to expire in December 1998. The Corps is developing a series of "replacement permits". These "carve outs" are essential if the Corps is to be able to manage this program without enormous delays in permit processing times. This is particularly true as the bureaucracy continually expands the types of activities that are regulated under the Section 404 program. Yet, some interest groups are attempting to pressure the Administration to reject these replacement permits. If they are successful, I am convinced that the program will fall into disarray, prompting calls not only for the reform of the current program, but the repeal of the whole thing. We will all have to keep an eye on this development.

Finally, a case is pending in the United States Court of Appeals for the Ninth Circuit styled Resource Investments, Inc. v. U.S. Army Corps of Engineers. In this case, the Corps used its Section 404 regulations to overturn the judgment of a county government in a public bid process regarding the location of a new solid waste disposal facility. I can assure you that it is not this Senator's view that the mission of the Army Corps of Engineers is to make judgments that historically have been within the purview of local elected officials.

Mr. President, this is just a quick survey of some of the judgments that are being made by Federal agencies and Federal courts regarding the Section 404 program. These judgments sometimes expand and sometimes narrow this program. What is missing—and has been missing for 20 years—is the judgment of elected officials about fundamental aspects of this regulatory program that defy common sense and so often intrude on privately owned property, local economic activities and governmental infrastructure decisions. It is long-past time for the committee of jurisdiction over this program to bring forth legislation that proposes meaningful and responsible adjustments to this awful program.

By the way, Mr. President, I should add one more thing. The current President of the United States, when he was the Governor of Arkansas, chaired the Lower Mississippi River Delta Development Commission. The statutory charge of this Commission was to study the seven-state Lower Mississippi River Delta region and to develop a ten-year regional economic development plan. This is a particularly troubled region economically. Both my state of Mississippi and the President's state of Arkansas contain portions of the Lower Mississippi River Delta.

In May, 1990, the Commission filed its report, which was submitted to Congress over the signature of the current President. That report specifically addressed the problems of Federal wetlands regulation, stating:

The national wetlands policy has caused significant problems for agriculture, aquaculture and commercial and industrial development.

* * * * *

Current definitions do not adequately differentiate the quality of wetlands.

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Current interpretations of the national wetlands policy have placed major limitations on the Delta's economy because commercial and industrial development is being impaired. (all quotes from page 80 of the report)

The report then made a number of recommendations, including these two from page 81 of the report:

Congress should direct appropriate federal agencies to establish minimum-sized wetlands for regulation.

* * * * *

Congress should assign the responsibility for identification and maintenance of a wetlands inventory to one agency, and require consultation with other affected agencies.

Mr. President, the President of the United States seems to have forgotten what he learned as chair of the Lower Mississippi River Delta Development Commission. The current Federal Section 404 permitting program regulates all wetlands regardless of size and is administered by two Federal agencies: the Corps of Engineers and the EPA. The President was correct with respect to these recommendations in 1990, but now that he is in a position to act, nothing has happened. I would hope that the President of the United States would submit at least these meaningful changes to Congress for our consideration in 1998.

Mr. BOND. Mr. President, I share the concerns of the Majority Leader regarding the shortcomings of the Section 404 program. In light of the recent and pending court cases, as well as the ongoing controversy over the scheduled demise in December of Nation Wide Permit 26, I agree strongly that Congress must address the Section 404 program legislatively. We should not continue to let the program bob and weave and stray in response to interpretations or policy preferences of each successive court decision or agency action. The law is unpredictable and it is not fair to the agencies administering the law or the landowners impacted by the law.

Based on accounts of the oral arguments in the United States Court of Appeals for the District of Columbia Circuit, and subsequent conversations my staff has had with various officials, it appears very possible that the lower court decision on the "Tulloch" rule will be upheld. The "Tulloch" rule extends regulation under the Section 404 program to activities like "drainage" and "excavation" that harm wetlands. The lower court held that expanding

the Section 404 program to cover these activities might be very good public policy, but the current statute does not cover these activities. Legislation expanding the program will be needed. In its successful attempt to obtain a stay of the lower court decision, the Federal government filed documents suggesting that the failure to regulate "drainage" and "excavation" would be an environmental catastrophe. Thus, if the Court of Appeals upholds the lower court decision, legislation will be necessary to cover these activities.

My colleague from Louisiana and I have released a series of proposals in a "discussion draft" to encourage discussion of these difficult issues. One proposal in the draft would expand the activity regulated under Section 404 to include "drainage" and "excavation." This draft signals our commitment to engage in a constructive process with all parties to develop legislation that will stabilize the Section 404 program, expand the program to cover activities that are destructive to wetlands and make a number of common sense changes to the program that will make it more acceptable to private landowners on whose property 75% of these regulated areas are located.

Senator BREAU and I released our discussion draft last summer. Time is growing short in this session of Congress, yet there is still time to act if there is a willingness of the various stakeholders to negotiate constructively and the will for us to legislate. I believe that I speak for my colleague from Louisiana when I pledge our cooperation in any reasonable process to develop Section 404 improvement legislation that will earn the support of a majority of our colleagues and will be good both for the environment and the regulated community.

Mr. President, I agree with the Majority Leader. Twenty years without legislative attention is long enough for the Section 404 program. The time has arrived to tackle this difficult issue.

NOTICE OF ADOPTION OF AMENDMENTS

Mr. THURMOND. Mr. President, pursuant to Section 303 of the Congressional Accountability Act of 1995 (2 U.S.C. sec. 1383), a Notice of Adoption of Amendments was submitted by the Office of Compliance, U.S. Congress. This notice contains amendments to Procedural Rules of the Office of Compliance to cover the General Accounting Office and the Library of Congress under various sections of the Congressional Accountability Act.

Section 304 requires this notice and the amendments to be printed in the CONGRESSIONAL RECORD, therefore I ask unanimous consent that the Notice and Amendments be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows: