

DEPARTMENT OF THE ARMY

COMPLETE STATEMENT

OF

**THE HONORABLE JOHN PAUL WOODLEY, JR.
ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS)**

BEFORE

**COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
UNITED STATES HOUSE OF REPRESENTATIVES**

ON

The Clean Water Restoration Act of 2007

April 16, 2008

Good morning Mr. Chairman and Members of the Committee. I am very pleased to be here this morning to speak to you about the Army's Regulatory Program and its implementation pursuant to the Clean Water Act. My testimony briefly summarizes the Army's responsibilities under the Clean Water Act, describes the significant progress that we have made improving program performance over the years, and makes observations about the future of the Regulatory Program in consideration of key challenges and opportunities. My testimony also will detail a number of serious concerns and questions raised by H.R. 2421, "The Clean Water Restoration Act of 2007".

Overview of the Clean Water Act

A primary goal of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," including wetlands. Wetlands are among the Nation's most valuable and productive natural resources, providing a wide variety of functions and services. They help protect water quality, store flood waters, support commercially valuable fisheries and migratory waterfowl, and provide primary habitat for myriad wildlife and fish species.

The Clean Water Act is a key part of the President's wetlands policy. As the basis for the regulatory program, the Act ensures the continuation of the "no net loss" policy established by President George H.W. Bush. The Act has enabled the Administration to employ other programs of the Army Corps of Engineers (Corps), Environmental Protection Agency (EPA), and the Departments of Interior, Agriculture, and Commerce to build on "no net loss" toward an overall increase in wetlands acreage.

In the 35 years since its enactment, the Clean Water Act, together with The Food Security Act, including swampbuster, ongoing public and private wetlands restoration programs, and active Tribal, State, local, and private protection efforts, has helped to prevent the destruction and degradation of hundreds of thousands of acres of wetlands and similar impacts to thousands of miles of rivers and streams. The average annual net rate of wetland loss across the nation was reduced from about 460,000 acres per year between the mid 1950s and mid 1970s, to 32,000 acres of annual net gain between 1988 and 2004. This has been achieved through a combination of Federal, Tribal, and State regulatory activities and environmental restoration and protection projects in partnership with many state and local agencies and conservation groups. In 2004, President George W. Bush announced an ambitious new initiative to achieve an overall increase in wetlands by restoring, creating and protecting 3 million acres of wetlands over 5 years. The Administration and our partners are on track to exceed the 3 million acre target by Earth Day 2008, one year early.

The Clean Water Act section 404 program has played an important role in maintaining the quality and quantity of our Nation's aquatic resources by requiring that permit applicants avoid adverse effects to these resources whenever possible, and minimize those effects that cannot be entirely avoided. Only after applicants have avoided and minimized adverse effects to the extent feasible does the Corps then work with them to develop acceptable compensatory mitigation projects for unavoidable impacts to aquatic resources that restore the functions and services they provided. Operating within a framework of "no net loss," the Corps has consistently required well

above a one-to-one compensation ratio for unavoidable effects on a regional and national basis.

Implementation of Section 404 of the Clean Water Act

The Corps and the U.S. Environmental Protection Agency (EPA) have worked together to administer the Clean Water Act since the 1970s. Through the agencies' efforts, wetlands, and the aquatic environments of which they are an integral part, are protected and the environmental and economic benefits provided by these valuable natural resources are realized while allowing important development projects to go forward.

The Corps has the primary day-to-day implementation responsibility for Section 404, which covers discharges of dredged and fill material into waters of the United States, including wetlands. Any person planning to discharge dredged or fill material first must obtain authorization from the Corps (or a Tribe or State approved to administer the section 404 program) in the form of an individual permit or a general permit before undertaking the activity. In practice, the vast majority of projects (more than 92% in 2006) are authorized by general permits, which require less paperwork by the project proponent and the agencies than an individual permit application, because the activities authorized by these permits have no more than minimal effects on the aquatic environment. Individual permit applications receive a more comprehensive review because, for the most part, these projects are larger, more complex, or involve a greater potential effect on significant aquatic resources. Corps Regulatory Program staff review permit applications and their District Engineers decide whether to issue or

deny authorizations for proposed activities. The Corps also initiates certain compliance and enforcement actions.

EPA's role under Section 404 of the Clean Water Act includes approving and overseeing State or Tribal assumption of the Section 404 program, determining the geographic scope of jurisdiction for the CWA as a whole, including Section 404, interpreting statutory exemptions from permitting requirements, reviewing Corps or State issued permits where appropriate, and sharing enforcement responsibilities with the Corps. EPA also developed, in consultation with the Corps, the Section 404(b)(1) Guidelines (*Guidelines*) which are the environmental criteria that the Corps applies when deciding whether to authorize an activity and to allow a project to move forward.

Corps Successes and Future Challenges

This administration has supported the regulatory program and wetlands protection by requesting increases in funding from \$138 million in FY 2003 to \$180 million in FY 2008 (same in FY 2009), a 30 percent increase (in nominal dollars). While the regulatory program received its requested level of funding for FY2008 (\$180 million), the Continuing Resolution (CR) in 2007 froze the regulatory program at the FY2006 level of \$158 million. The Corps will continue to administer the program to the best of its ability with the resources provided, but needs the Administration's FY2009 request to be fully funded if we are to provide the level of effective environmental protection and timely service to permit applicants that we have provided in the past.

The Corps, in coordination and cooperation with other Federal, tribal, state, and local agencies, continues to advance the no-net-loss goal while further improving program performance, predictability, and transparency through the following actions:

1. Just this month, the Corps and the EPA published a final compensatory mitigation rule to improve performance and consistency, and update a number of guidance documents in one place, drawing heavily on input from the National Research Council. This rule will provide for evaluating compensatory mitigation strategies in a watershed context, improve performance by requiring improved monitoring and ensuring that project success is evaluated against scientifically-defensible ecological performance standards, and add timeframes and predictability to the approval process for mitigation banks and In-Lieu-Fee arrangements.
2. In March 2007, the Corps published a new and improved package of *Nationwide Permits*, general permits whereby activities with minimal effects can be authorized quickly and efficiently, while protecting the aquatic environment. While many of the permits are similar to those in the previous round (permits must be reissued every 5 years) the new permits generally provide for greater environmental protection, for example by requiring pre-construction notification and Corps project-specific review for a much larger group of activities. Together with the final mitigation rule, the new permits should provide significantly enhanced protection of aquatic resources and compensation for unavoidable impacts.

3. The Corps, with support from EPA, has invested in a new database management system, ORM2, a web-based tool to improve the management of the Corps' regulatory programs including recording impacts of authorized activities and the performance of compensatory mitigation projects. This system eventually will be linked to spatial tools and a robust geographic information system enabling regulators and the public to more carefully consider watershed factors in the permit evaluation process. The database was installed for use Corps-wide in June 2007 and the GIS component is scheduled for implementation in the 2008-2009 timeframe.
4. The Regulatory Program has been studied by the Government Accountability Office five times since 2000 and the Corps has implemented nearly all of the GAO recommendations, including the improvement of documentation practices and mitigation project monitoring, database development, enhancing inter-agency coordination, implementing consistency initiatives and improving productivity and efficiency through the utilization of an authority in WRDA 2000 (Sec. 214) which allows the Corps to accept funds from public entities to hire additional staff. Additionally, Memorandums of Understanding with other agencies for energy and transportation projects are integrating regulatory processes and environmental reviews, which will improve overall productivity and efficiency.
5. In June 2007, the Corps and the EPA signed and released guidance to the field and the public regarding the U.S. Supreme Court decisions in *Rapanos v. United States & Carabell v. United States (Rapanos)*. This inter-agency guidance

focuses on using the two standards established by the Supreme Court (the Plurality standard and Justice Kennedy's significant nexus standard) in order to produce well-documented jurisdictional decisions, and enhance consistency nationwide. The Guidance also established a temporary enhanced coordination protocol between the Corps and EPA to monitor application of the guidance and promote consistency. The agencies allowed this protocol to partially expire on January 21, 2008, after determining that its purpose had been served. Through the protocol, hundreds of cases were reviewed and sufficient information was obtained to ensure greater nationwide consistency and identify areas where additional refinement of the Guidance may be appropriate. In addition, the agencies are currently completing their review of the comments received on the Guidance and will announce the results of that review shortly. Since the expiration of the temporary protocol, the Corps and EPA have returned to our prior coordination procedures, although all JDs for isolated waters based on the (a)(3) interstate commerce factors are still reviewed by both EPA and the Corps.

6. The Army is deploying Lean Six Sigma (LSS) to accelerate business transformation. In the Regulatory Program, a LSS pilot analysis for Individual Permits and jurisdictional determinations was performed in the South Pacific Division (FY 2005), and at the Seattle District (FY 2006). An additional study was performed at Mobile District in FY 2007. A final report with recommendations is being produced as a resource for all Districts to use. These recommendations cover process improvements, such as streamlining, powering

down decision-making, and relationship building with stakeholder interests, demonstrating the Army's commitment to wisely use allocated program funds.

These key actions are enabling the Corps to make better permit decisions, further protect wetlands and other aquatic resources, improve the performance of compensatory mitigation projects, and expand the public's access to information on proposed projects and compensatory mitigation activities.

Now I would like to briefly discuss how the two Supreme Court decisions, SWANCC and Rapanos, have affected the Regulatory Program and how we have responded.

SWANCC and Rapanos Decisions

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC), the Supreme Court held that the Corps could not assert Clean Water Act jurisdiction over isolated, non-navigable, intrastate waters based solely on their use as habitat by migratory birds.

Clarifying agency guidance regarding the SWANCC decision was provided in the *Federal Register* on January 15, 2003 (68 FR 1991). First, the guidance eliminated the use of the Migratory Bird Rule as the sole basis for jurisdiction. Second, it required that field staff must seek formal project-specific headquarters approval prior to asserting jurisdiction over any isolated water body based solely on (a)(3) interstate commerce factors (33 CFR 328.3(a)(3)). Under a portion of the post-Rapanos enhanced coordination procedure that still remains in effect, field staff must also seek headquarters approval before denying jurisdiction over isolated waters.

In the *Rapanos* decision, the Supreme Court addressed the following two questions: (1) whether wetlands that are adjacent to non-navigable tributaries of traditional navigable waters are part of “the waters of the United States” within the meaning of the Clean Water Act, and (2) whether application of the Act to the wetlands at issue in the *Rapanos* case is a permissible exercise of congressional authority under the Commerce Clause. In this case, the Justices issued three separate substantive opinions, with no single opinion commanding a majority of the Court. Both the plurality opinion, authored by Justice Scalia, and Justice Kennedy’s opinion determined that the cases at issue should be remanded back to the district court for reconsideration using an appropriate jurisdictional standard. However, these two opinions identified different standards. The agencies determined that it was appropriate to assert jurisdiction over waters that satisfy either standard, and this is the approach we adopted in our June 2007 Guidance.

Corps and EPA Reaction to the Rapanos Decision

In June 2007, the EPA and the Army signed and issued a joint memorandum interpreting the *Rapanos* decision and providing guidance to the field and the public for implementation of Section 404: *Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States*. The Guidance is intended to aid field staff in making timely jurisdictional determinations in accordance with the Court’s decision, using available staff resources. These determinations are to be based on case-specific facts demonstrating that waters are navigable-in-fact (including adjacent wetlands), relatively permanent (including directly

abutting wetlands), or significantly affect the chemical, physical, and biological integrity of navigable waters. As a result of the Rapanos decision, the Corps will:

- Implement the Clean Water Act jurisdictional standards articulated by the Court in the plurality and Kennedy opinions.
- Categorically assert Clean Water Act jurisdiction over the following classes of water bodies: traditional navigable waters; wetlands adjacent to traditional navigable waters; non-navigable tributaries of traditional navigable waters that are relatively permanent (i.e., tributaries that typically flow year-round or have continuous flow at least seasonally); and wetlands that directly abut such relatively permanent tributaries.
- Assert jurisdiction over the following classes of waters when a science-based, fact-specific analysis determines that those waters have a significant nexus with traditional navigable waters: non-navigable tributaries that do not typically have continuous flow at least seasonally; wetlands adjacent to such tributaries; and wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary. A significant nexus exists if the tributary, together with its adjacent wetlands, has more than an insubstantial or speculative effect on the chemical, physical, and/or biological integrity of downstream traditional navigable waters.
- Generally, not assert jurisdiction over erosion features, upland swales, small washes (characterized by low volume, infrequent, and short duration flow), and many ditches excavated wholly in and draining only uplands.

Additionally, the EPA and Corps have developed several supporting documents, including a *Jurisdictional Determination Reporting Form* and an *Instructional Guidebook* to support the form. The form was developed to document the rationale and findings of jurisdictional determinations. Approved determinations are made available for public review as they are published on district regulatory web pages. The *Instructional Guidebook* is an 80-page document that further discusses the guidance provided in the joint memorandum, as well as providing additional references for making and documenting jurisdictional determinations.

When the guidance was announced, we issued a Federal Register notice requesting public comments on experience applying the guidance during the first six months of implementation. We further indicated that the agencies, within nine months from the date of issuance, would review and revise, reissue or suspend the guidance after carefully considering the public comments received and field experience with implementing the guidance. We extended the public comment period for an additional 45-day period through January 21, 2008. Over 62,000 comments were received (including about 1500 substantive comments and over 60,000 form letters) and over 18,000 jurisdictional determinations were finalized. As noted above, we will be announcing the results of our review of the comments and initial experience implementing the guidance shortly.

The EPA and Army also signed implementing guidance which:

- Modified the SWANNC guidance by requiring field staff to seek formal project-specific headquarter approval prior to asserting or declining jurisdiction over any

non-navigable, isolated, intrastate water body based solely on 33 CFR 328.3(a)(3) (links to interstate commerce);

- Required that all actions undergoing a “significant nexus” evaluation be available for review by EPA; and
- Allowed EPA field staff an opportunity to request a higher level review if there was a disagreement.

In accordance with the above guidance, Corps and EPA headquarters have reviewed or are reviewing 684 jurisdictional determinations involving isolated waters and 61 jurisdictional determinations involving “significant nexus” evaluations since June of 2007. We are working closely with the staff at EPA headquarters to wrap up the remaining unresolved cases and have not been accepting new cases for Headquarters review since the temporary Coordination Process expired on January 21, 2008 (except for Headquarters review of JDs involving the (a)(3) factors).

H.R. 2421

Based upon discussions with Committee staff, it is my understanding that the intent of HR 2421 is to capture those isolated and ephemeral features and associated wetlands that were determined to not be jurisdictional under the Supreme Court holdings in SWANCC and Rapanos, regardless of whether they affect the chemical, physical, chemical and biological integrity of navigable waters. Both the SWANCC and Rapanos decisions identified limits on Clean Water Act jurisdiction based on their interpretation of the intent of Congress. It is our understanding that under HR 2421, the jurisdiction of the Clean Water Act would be extended to an unspecified limit of Congress’s legislative power under the Constitution.

In implementing the Court's decision, our approach has not been to focus on a particular target for the limits of jurisdiction. Rather, we have tried to ensure that jurisdictional determinations for ephemeral waters and their adjacent wetlands are based on a scientific, fact-based analysis of their potential effects on the chemical, physical, and biological integrity of navigable waters. We have not tried to either systematically expand or systematically limit jurisdiction, but have asserted jurisdiction where the science and the facts show that the legal standards for jurisdiction are satisfied.

We have several serious concerns with H.R. 2421 as drafted. . First, it appears that the consequence of the legislation will be to extend the jurisdiction beyond those waters determined to be not jurisdictional under the SWANCC and Rapanos decisions. This appears to go beyond the original intent of Congress in establishing the jurisdictional reach of the Clean Water Act, which reflected a careful balance between the legitimate and important Federal interest in protecting water quality and the equally important and long-standing interest of States in managing and allocating land and water resources within their boundaries. HR 2421 also goes beyond any interpretations of jurisdiction advanced by the agencies in the 30 years preceding the SWANCC and Rapanos decisions. For example, it is not clear whether the bill would require any link to interstate commerce for a water to be jurisdictional.

A second concern is that the bill could open up a whole new line of litigation regarding the limits of Congress's legislative power under the constitution, creating additional uncertainty and unpredictability for the environment, the regulated community, and State and Federal agencies. The Corps and EPA are in the early

stages of implementing the recent Court decisions. A legislative change at this time would render useless our significant investment in implementing the Court's decisions and making the guidance as clear and useful as possible, and would almost certainly initiate a new round of uncertainty and litigation.

In addition to these serious concerns, there are a number of questions that the Committee should consider in order to understand the significant implications of the bill.

The first question is whether it is appropriate to upset the Federal-State balance established in the original Clean Water Act by extending Federal jurisdiction to essentially all isolated waters and every ephemeral aquatic feature on the landscape, without conducting a case-by-case, science-based analysis of their impacts on the chemical, physical and biological integrity of navigable waters, for which the constitutional basis of Federal authority is clear. A second question is how removing the term "navigable" from the Clean Water Act might affect the implementation of other provisions of the CWA and the Corps regulatory program, and how this change might affect the regulated community, the regulatory agencies, the authorities of the respective States, and current exemptions provided for in statute and regulation. A third question is whether this extension of Federal jurisdiction would significantly increase the costs of small landowners, manufacturers, farmers, and transportation and energy projects, and whether there would be commensurate environmental benefits to justify these increased costs. Also, what would be the budgetary, workload, and processing time implications for the Corps regulatory program, as well as the Clean Water Act regulatory programs of other Federal, Tribal and State agencies if they were

suddenly faced with a significant increase in CWA permit applications for activities and resources with no significant nexus to navigable waters?

Another important question is whether or not HR 2421 would result in a new round of litigation that would have to be resolved by the Courts from scratch, upsetting 30 years of established Court precedent about where the limits of jurisdiction lie. One view is that the current disagreements about the limits of jurisdiction would simply be relocated on the landscape—the limits of Congressional legislative power under the Constitution rather than the import of the word “navigable.” It seems unlikely that the result would be additional clarity or predictability for either regulatory agencies or the regulated community.

Finally, as a practical matter, the Committee should consider how HR 2421 would affect different parts of the country in different ways. We suspect that the impacts may be quite different in places like Alaska and Florida, where much of the landscape is wet or adjacent to wet areas, from the arid West, or the Great Plains, where many water courses have water flowing in them only occasionally, with limited habitat functions.

Conclusion

In conclusion, my office and the U.S. Army Corps of Engineers remain fully committed to protecting America’s waters as intended by Congress and expected by the American people. Although there are on-going legal and policy challenges facing the Army’s Regulatory Program, currently the program is operating robustly, protecting the environment, and supporting over \$220 billion in economic development annually. I have personally visited each of the 38 District Regulatory Programs, and I have found

Corps of Engineers regulators to be highly professional individuals, committed to the goals of the National Regulatory Program. I am very proud of their many accomplishments, and the Nation is indeed fortunate to have this dedicated workforce, who has earned and deserves all of our support. We stand ready to work with the Committee to explore the questions I have raised in my testimony and to ensure that all implications are considered.

Mr. Chairman, this concludes my testimony. I appreciate your interest and would be pleased to answer any questions you or the Members of the Committee might have.