

DEPARTMENT OF THE ARMY

COMPLETE STATEMENT

OF

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BEFORE

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

ON

**The 35th Anniversary of the Clean Water Act: Successes and
Future Challenges**

October 18, 2007

Good morning Mr. Chairman and Members of the Committee. I am very pleased to be here this morning to speak to you about the 35th Anniversary of the Clean Water Act: Successes and Future Challenges. My testimony briefly summarizes the Army's responsibilities under the Clean Water Act and describes the significant progress that we have made improving program performance over the years, making sure that section 404 is implemented consistent with the goals of the Clean Water Act. My testimony also touches upon challenges and opportunities.

Overview of the Clean Water Act

A primary goal of the Clean Water Act is "to restore and maintain the physical, chemical, 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.

In the 35 years since its enactment, the Clean Water Act, together with 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, from development and natural causes, such as subsidence, has been reduced from about 460,000 acres per year between the

mid 1950s to the mid 1970s to 60,000 acres, of annual net loss, between 1986 and 1997.

The Corps of Engineers Clean Water Act section 404 program has played an important role in maintaining the Nation's aquatic resources by encouraging people to avoid them if possible, minimizing their involvement if necessary, and by compensating for unavoidable impacts to aquatic resources, including wetlands.

Additionally, since Earth Day 2004, the Administration has restored, protected, or improved 2,769,000 acres of wetlands. This figure represents gross gains (i.e. it doesn't factor in wetlands losses). These acres are part of a national goal announced by the President to move beyond "no net loss" of wetlands and to attain an overall increase in the quantity and quality of wetlands in America. Specifically, the President established a goal to increase, improve, and protect three million acres (gross) of wetlands by 2009. Some of the activities that have helped improve, restore, or protect acres of wetlands include the Farm Bill conservation programs, work on National Wildlife Refuges, and acquisitions of land for migratory birds through the North American Wetlands Conservation Act. The Army Corps of Engineers also contributes to the President's initiative through its aquatic ecosystem restoration program. Wetlands are at the core of this country's rich natural heritage and are central to its healthy, prosperous future.

Implementation of Section 404 of the Clean Water Act

The Corps and EPA work together to administer the Clean Water Act. 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. Through the Corps' 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.

Any person planning to discharge dredged or fill material into certain waters of the United States 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 (92+% in 2006) are authorized under 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 to significant aquatic resources. The Corps reviews permit applications and decides whether to issue or deny authorizations for proposed activities. The Corps also initiates compliance and enforcement actions.

EPA's role under the Clean Water Act's Section 404 includes coordinating with States or Tribes that choose to administer the Section 404 program, determining the geographic scope of jurisdiction, interpreting statutory exemptions from the permitting requirement, 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 issue Section 404 permits, and provides comments to the Corps (or State) in the review of permit applications pursuant to the Guidelines.

Under the *Guidelines*, a discharge is permissible only when there is no practicable alternative with less adverse effect on the aquatic ecosystem, appropriate steps have been taken to minimize potential adverse effects to the aquatic ecosystem, and unavoidable impacts are mitigated.

The no-net-loss goal is accomplished in the Section 404 program by working with applicants and resource and regulatory agencies to avoid, minimize, and compensate for unavoidable impacts to aquatic resources. For the last ten years, Corps' data show an overall no net loss of wetlands for the 404 program and that lost aquatic functions are being replaced. However, the Federal government uses many other programs and authorities, including Sections 1135 and 206 of the Water Resources Development Act (WRDA) and the Comprehensive Everglades Restoration Program (CERP) to achieve an overall increase or improvement in the waters and wetlands nationwide. The U.S. Fish and Wildlife Service's report *Status and Trends of Wetlands in*

the Conterminous United States 1998 to 2004 reported an average annual net gain of 32,000 acres a year.

Corps Successes and Future Challenges

The George W. Bush Administration supports our program and wetlands protection. The Administration has requested, and Congress has appropriated, increases in funding for our Regulatory Program budget from \$138 million in FY 2003 to \$180 million in FY 2008, a 30 percent increase (in nominal dollars). These increases have enabled the Corps to make over 110,000 jurisdictional determinations and provide over 100,000 written authorizations, annually. In addition to enforcement duties, Corps regulators are also adjusting to the many changes in the program caused by court decisions, policy adjustments, program improvements, and the effects of increased coordination under the Endangered Species and National Historic Preservation Acts.

Despite these challenges, the Corps, in coordination and cooperation with other agencies, is helping to exceed no-net-loss while further improving program performance, predictability, and transparency through the following actions:

1. In 2004, a multi-agency team developed a Mitigation Action Plan with 17 specific action items to improve the ecological performance of compensatory mitigation. To date, nine actions have been completed.
2. In March 2006, the Corps and the EPA published a draft compensatory mitigation rule to improve performance, consistency, and update a number of guidance documents in one place. This draft rule used input from the National Research Council and provides flexibility for evaluating

compensatory mitigation strategies in a watershed context -- we are optimistic that the final rule will be published later this year.

3. In March 2007, the Corps published new and greatly improved Nationwide Permits, general permits whereby activities with minimal effects can be authorized quickly and efficiently, while protecting the aquatic environment.
4. The Corps has invested in a new database system, a web-based tool to improve the management of the Corps' programs including recording impacts of authorized activities and the performance of compensatory mitigation projects. This system also includes spatial tools and a robust geographic information system enabling regulators and the public to better consider watershed factors in the permit evaluation process. It pulls digital wetlands data over the Internet through a Web mapping connection directly from the U.S. Fish and Wildlife Service's National Wetlands Inventory database. We are currently working with our Federal, Tribal, State and local partners, including the general public, to ensure that all wetlands data are available in digital format and are as up-to-date as possible. We are also working with these parties to share data and to ensure public accessibility to the system. The data base was installed for use Corps-wide in May 2007.
5. The Regulatory Program has been studied by the General Accountability Office approximately five times since 2000 and we have worked to implement nearly all of the GAO recommendations, including the

improvement of documentation practices and mitigation project monitoring, data base development, enhancing inter-agency coordination, implementing consistency initiatives and improving productivity and efficiency through the utilization of WRDA Section 214 funds for additional staff. In addition, programs supporting transportation streamlining and addressing off-shore aquaculture issues have also been implemented.

6. In June 2007, the Corps and the EPA signed and released guidance to the field and public regarding the landmark U.S. Supreme Court decision in the Rapanos and Carabell cases. This inter-agency guidance focuses on using the two standards) defined by the Supreme Court (Scalia and Kennedy) in order to produce clear jurisdictional decisions and enhance consistency and predictability nationwide. The Guidance also establishes a coordination protocol between the Corps and EPA to ensure proper application of the guidance and promote consistency. We have been monitoring the day-to-day activities to determine the effects on the program, in particular response time to the regulated public. The agencies also initiated a six-month public comment period on June 5, 2007, to solicit input on early experience with implementing the guidance. The agencies, within nine months from the date of initiation for that comment period, plan to reissue, revise , or suspend the guidance after carefully considering the public comments received and field experience with implementing the guidance. The agencies are also considering rulemaking.

Together, these actions enable the Corps to make better permit decisions, decide where and how to restore, enhance, and 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.

Conclusion

In conclusion, the Corps and the EPA have a long history of working together closely and cooperatively in order to fulfill our important statutory duties on behalf of the public. We remain fully committed to protecting America's waters, as intended by Congress and expected by the American people. Although there are certain legal and policy challenges facing the Army's Regulatory Program, the 35th anniversary finds the program operating robustly, supporting over \$200 billion in economic development annually, while protecting the aquatic environment.

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.