

INCONSISTENT REGULATION OF WETLANDS AND OTHER WATERS

(108-58)

HEARING

BEFORE THE
SUBCOMMITTEE ON
WATER RESOURCES AND ENVIRONMENT
OF THE

COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

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INCONSISTENT REGULATION OF WETLANDS AND OTHER WATERS

Tuesday, March 30, 2004

HOUSE OF REPRESENTATIVES, COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE, SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT, WASHINGTON, D.C.

The subcommittee met, pursuant to call, at 10:06 p.m. in room 2167, Rayburn House Office Building, Hon. John J. Duncan, Jr. [chairman of the subcommittee] presiding.

Mr. DUNCAN. The Subcommittee will come to order.

Congressman Gilchrest has to move to other things very quickly. I want to get as many of these opening statements out of the way as soon as we can.

I want to welcome everyone to today's hearing on the Inconsistent Regulation of Wetlands and Other Waters. I have been concerned for a long time about how the Corps of Engineers and the EPA regulate wetlands. I hear not from my own constituents about this issue, but other members talk with me frequently about the problems their constituents are having with the Corps and the EPA on the wetlands problems.

In October 2001, I held a hearing on the wetlands permitting process. At that hearing, the Subcommittee heard about arbitrary wetlands jurisdictional decisions and about intimidation when citizens tried to disagree with the Corps or EPA about what land is, and is not, subject to Federal regulation.

In September 2002, I participated in a hearing held by my good friend and colleague, Congressman Ose, on implementation by the Corps and the EPA of the Supreme Court decision, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, also called the SWANCC decision. At that hearing we heard anecdotal evidence of inconsistent and arbitrary decision making.

Congressman Ose followed up that hearing with a request to the General Accounting Office to determine whether the anecdotal evidence presented by witnesses represented a pattern across Corps Districts.

The GAO issued its report in February 2004. This report provides clear documentation of widespread inconsistency among Corps Districts regarding what is and is not regulated as a "water of the United States" under the Clean Water Act.

This inconsistency is not the result of differences in climate and geography. The Corps Districts simply do not agree on the basic rules of law they must apply. This situation cannot be accepted. No one has any clear guidance on what lands are subject to Federal

jurisdiction. Decisions are made on a case-by-case basis and different Corps Districts or different Federal agencies can come up with different interpretations of the law. Because of this, ordinary citizens cannot know when an activity on their land will be subject to Federal regulations.

Section 404 of the Clean Water Act gives the Corps of Engineers the authority to regulate “the discharge of dredge material or fill material into the navigable waters at specified disposal sites.”

That provision was originally enacted to address open water disposal of material dredged from navigation channels.

The Clean Water Act defines “navigable waters” as “waters of the United States.” Through agency and judicial interpretation, this definition has been expanded to include any property that the Corps or EPA considers a wetland.

In fact, it got so ridiculous that the Corps and the EPA adopted what we called the “glancing goose” test, allowing them to assert Federal jurisdiction over private property if a migratory bird so much as looked at it. Fortunately, as the Supreme Court has recognized, there is a limit to how far an agency can expand its statutory authority.

In the 2001 opinion in the SWANCC case, the Supreme Court held that the Court cannot stretch the meaning of “navigable waters” so far as to include isolated wetlands just because they are used by migratory birds.

The “glancing goose” test is gone once and for all. However, it is clear to me that many in the Corps and the EPA are still trying to regulate every area of land they consider “wet” by adopting new expansive interpretations of the term “waters of the United States” on a case-by-case basis.

According to GAO, some Corps Districts are trying to regulate wetlands that are miles away from any navigable water on the grounds that the wetlands is in the 100-year flood plain. Flooding once every 100 years does not turn land into a navigable water of the United States.

Some Corps Districts are trying to regulate wetlands that are completely unconnected to navigable waters simply because of rainwater that moves over the surface of the land during very heavy storms. We do not regulate rain. Sheet flows of rain are not waters of the United States. It is beyond me to understand how any Corps official could think that this rainwater gives them the authority to regulate people’s private property. There has to be some balance and common sense in this at this point.

Some Corps Districts are also trying to assert Federal jurisdiction over land because it is next to a sewer or a drainpipe that ultimately discharges to a water of the United States, calling these sewers and drainpipes “tributaries of the waters of the United States.”

In California, State agencies have taken that extreme concept even further and have called streets, curbs, and gutters “waters of the United States.” I do not understand how the Corps can call sewer pipes, drain pipes, and gutters “tributaries” of the waters of the United States.

I do not understand how the Corps can say that they have jurisdiction over a wetland that is adjacent to a “tributary” of a water

of the United States when that land is not near any surface stream. It is simply next to a drain pipe or a storm sewer.

I do not understand how the San Diego County Stormwater permit can say that applying EPA's regulatory definition to municipal streets, curbs, and gutters and are "always considered waters of the United States."

Clean Water Act jurisdictional decisions have an enormous impact on people's lives and can have a significant adverse effect on the ability of our communities to build and maintain the public infrastructure. Inconsistent and arbitrary decision making must end. The Corps of Engineers and the EPA must establish clear and reasonable rules for determining when wetlands and other waters are and are not subject to Federal jurisdiction.

These rules have to be the same whether you are in my District, Mr. Costello's District, or any other part of the United States. They should be fair, and especially not harmful to very small farmers or small land owners.

I would now like to recognize the Ranking Member of the Subcommittee, Mr. Costello, and explain to him why I started without him. Mr. Gilchrest is running late for a meeting so I said we would go ahead and get my statement out of the way as quickly as possible and get to him as soon as you finish.

Mr. COSTELLO. Mr. Chairman, I appreciate that and know that you always promptly start on time. We were running a few minutes late, as I was on a conference call and could not get off.

Mr. Chairman, I thank you for calling the hearing today. I do have a lengthy opening statement which I am going to spare you. I will enter it into the record.

Mr. DUNCAN. Without objection, so ordered.

Mr. COSTELLO. I do want to welcome our witnesses here today and ask unanimous consent, Mr. Chairman, that not only my statement but also the testimony of our colleague, Mr. Dingle, the dean of the House and a longtime outdoorsman and supporter of protecting the Nation's waters, including wetlands, and the testimony of our colleague, Mr. Tierney, who also has a long-standing interest in wetlands issues be made part of the record.

Mr. DUNCAN. Without objection, so ordered. Thank you very much.

Mr. Gilchrest?

Mr. GILCHREST. Thank you, Mr. Chairman, for the gracious time that you have allowed me to speak sooner rather than later. I want to welcome all the witnesses here this morning, especially my colleague, Doug Ose, EPA, the Corps of Engineers, and the other people who will testify later this morning.

I apologize because I have a number of things going on at the same time, but I wanted to come in to give a perspective on this hearing which I think is an excellent hearing to show the various ways that the Corps, the EPA, and State agencies determine what is and what is not a wetland, including the Federal courts.

The Federal courts have adjudicated this issue in different ways in different parts of the country. But what I would like to do is show two specific instances where the Federal courts have decided the jurisdiction of non-tidal wetlands to be appropriate under the Clean Water Act, depending on the hydrology.

The thing that is at issue with us here today is whether what we do on the land, regardless of where that land is, does it have an environmental degradation effect on water that no one would dispute is navigable waters of the United States? I think that is the issue.

To get at that issue, we can actually go beyond what we think isolated wetlands are. We can go on to what we determine hydric soil is, depending on the type of vegetation there. We can simply look, to a large extent, at the hydrology, of whether it is a ditch, whether it is a man-made function somewhere, a canal, or whatever.

This is not a full answer, but if it receives water, and water is degraded environmentally, and then that water does run into what is obviously a navigable water, a wide stream, a river, a bay, that is the area that we need to take a look at to avoid that degradation to improve water quality.

The case of *U.S. v. Deaton*, in my Congressional district, was a case where you had a drainage ditch and in the course of the 1990's there was often very little rain in that particular ditch. We do not have many fast-flowing creeks in the flat area of the Eastern Shore of Maryland. That ditch ran into Perdue Creek, to Beaver Dam Creek, to the Wicomico River.

So to resolve this issue, the Corps of Engineers put a little dye in the ditch and they found out that the dye, when it became soluble, flowed all the way to the Wicomico River, which is a large river, a tidal basin, of the Chesapeake Bay where they bring barges and a number of big ships up.

The point is that it was the hydrology that was the important factor that needed to be taken under consideration with dealing with the Clean Water Act.

Another case, *Headwaters, Incorporated v. Talent Irrigation District*, dealt with a canal that was largely separated from what the average person would be considered navigable waters. The Court said in this particular case:

"Pollutants need not reach interstate bodies of water immediately or continuously in order to inflict serious environmental damage...It makes no difference that a stream was or was not at the time of the spill discharging water continuously into a river navigable in the traditional sense. Rather, as long as the tributary would flow into the navigable body [under certain conditions], it is capable of spreading environmental damage and is thus a 'water of the United States' under the Act."

We all want to protect property rights. That is the foundation upon which this Republic remains consistent and steady and safe. But if we are looking at improving water quality, the hydrology of any particular area, regardless of where that water comes from, if it is water that will eventually pass through navigable waters of the United States, and that means that it has an environmental degradation effect, that is the area that we need to be concerned about.

Mr. Chairman, thank you for the time. Thank you for holding the hearing.

Mr. DUNCAN. Thank you very much, Mr. Gilchrest.

Mr. Blumenauer?

Mr. BLUMENAUER. Thank you, Mr. Chairman. You and the Ranking Member have met, I think, the standards of our Committee once again by having a fascinating range of people that will be appearing before us on a critically important subject.

Our colleague, Mr. Gilchrest, talked about one of the important notions in terms of hydrology and the inter-connectiveness, how these waterways are tied together to be part of a larger picture.

I think it is entirely appropriate for us to deal with the issue of uniformity and make sure that not just property owners, but local government officials, the Corps of Engineers, all know the rules under which they are operating. I think the extent to which this hearing will help us focus on that, it plays an important public service.

I am somewhat sympathetic to the Chairman's comment about how at times sewers and drainpipes and streets and gutters, in the minds of some, are regarded as waterways. What we have done in most of our communities, as they have developed, is that in many cases we have just simply taken those urban streams and dropped them into pipes and culverts, or we have created new ones.

I think that is a reality that we need to contend with. We have taken these delicate, seemingly ecosystems, and we have engineered them in ways that nature could never have imagined. That said, the American public wants uniformity, but it wants waterways protected. People care about water quality. Sportsmen and recreational users deeply care about the subject that we are talking about here today.

But we are talking about the compound effects of having almost half of our waterways that do not meet current water quality standards. We have over half our wetlands that have disappeared since European settlement. In some communities that I visit, we have lost 90 percent of the wetlands. That has dramatically compounded their problems.

Even though Administration after Administration has a no net loss policy for wetlands, we continue to lose hundreds of acres of wetlands every day. In talking about uniformity, we have had other surveys that indicate that the Corps of Engineers are not funded and equipped, and they do not police right now requirements to make sure that wetlands are restored, and if the wetlands are restored, that they are functioning in the way that they were envisioned under the permitting process.

This is the tip of the iceberg on a very serious issue. I would just say from my perspective, when we have a situation where the Corps cannot manage, cannot monitor, cannot make sure that the wetlands that are supposed to be restored now are, in fact, being restored. When under the natural process that takes place, some cases legally, many cases illegally, we continue to lose wetlands.

I respectfully suggest that this is not the time to reduce the scope of wetlands protection. I am all in favor of dealing with uniformity. I am all in favor of this Committee providing as much guidance as possible, and if necessary through statute. I think Congress needs to be serious to fund the Corps to be able to do the job that it wants to do.

When I talk with men and women in the field, this is something that we can help provide resources, and in some cases, for private

property owners, to be able to adequately respond to the environmental demands. This was one of the great ironies, and I think tragedies, of the Farm Bill, where we are spending billions of dollars on things that actually do not help typical farmers very much, and complicate our situation in international trade.

Members of this Committee, I know, were trying to make sure that we had money there that was spent to help farmers and other people with open space to be able to comply, often times with expensive provisions.

I have a longer statement, believe it or not, Mr. Chairman, that I would have officially entered into the record.

Mr. DUNCAN. Without objection, so ordered.

Mr. BLUMENAUER. I really appreciate the service that you and the Ranking Member continue to do by having a balance approach to serious problems.

Mr. DUNCAN. Thank you very much, Mr. Blumenauer. I appreciate your interest and your service.

Mr. Shuster, do you have a statement?

Mr. SHUSTER. Thank you, Mr. Chairman. I will be brief. I do not want to hold up our witnesses today any longer than we need to.

I just want to thank you for holding this hearing today. I think in all due respect to my friend from Oregon, I do not think we want to reduce the scope of the Corps, but just make it consistent. In every case in my district where we are seeing economic development or roads being built, nobody knows what is going to happen when we get involved in wetlands.

I also see in my district that we are gaining wetlands. There is one case where a bridge that went in. There was 1.3 acres of wetlands. They had establish 16 acres of new wetlands. In many cases, at least in Pennsylvania, I am seeing a net gain in wetlands acreage because of that.

I think it is important that developers and State agencies across this country can count on what is going to happen with the Federal regulations when we are talking about wetlands.

That is all I have to say. I welcome our distinguished guests here today. Thank you very much.

Mr. DUNCAN. Thank you very much, Mr. Shuster.

Dr. Ehlers?

Mr. EHLERS. Thank you, Mr. Chairman. I appreciate your having this hearing. It is a tough issue. Wetlands have always been a tough issue. I am from the State of Michigan, and we were the first State to establish their own wetlands statute and continue to operate under that with the permission of the EPA because we meet all the Federal requirements.

Since I was the Chairman of that Committee in the State Senate, I have long experience tussling with the wetlands issue. What makes it extremely complicated in this issue is the meaning of the word "isolated" as used by the court, because there are very few isolated bodies in this country other than the Great Salt Lake and a few other spots.

Nine times as much water flows under the ground as above the ground. It connects even the isolated bodies to other bodies, but underground rather than above-ground. The real question then be-

comes: What filtering mechanism is there that will remove pollutants or other problems relating to that?

So it is a very difficult and very complex issue. I look forward to hearing the testimony.

I yield back the balance of my time.

Mr. DUNCAN. Thank you very much. We are very pleased and honored to have our colleague, Congressman Doug Ose from the great State of California, with us here today.

Doug, we appreciate your interest in this issue. We know, as I mentioned in my opening statement, you have really looked into this issue on several different occasions and in different ways. We are pleased to have you with us.

Your full statement will be placed in the record. You can present whatever parts of it you wish to at this time.

**TESTIMONY OF HON. DOUG OSE, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF CALIFORNIA**

Mr. OSE. Thank you, Mr. Chairman, and Mr. Costello. It is a pleasure to be here with you and the members of this Subcommittee. I thank you for the opportunity to testify here on this issue.

I have been directly or indirectly involved with this issue seemingly since I was a child. My interest has intensified since the Supreme Court's January 2001 Solid Waste Agency of Northern Cook County decision.

My constituents are experiencing difficulties in understanding what information and criteria the Corps uses to determine jurisdiction because the Corps does not have, and has not had, a national standard for interpreting either the Clean Water Act, or its implementing regulations.

I learned that the EPA and the Corps had issued a two joint memoranda in 2001 for the purpose of avoiding such inconsistencies among Corps districts. However, the net result is not consistency, but chaos.

As Chairman Duncan suggested, I have been involved in this issue through chairing the Subcommittee on Government Reform on Energy Policy, Natural Resources, and Regulatory Affairs. In September 2002, that Subcommittee held a hearing entitled, Agency Implementation of the SWANCC decision. I do have a copy of the report from that hearing that I would like to enter into the record, Mr. Chairman.

Mr. DUNCAN. Without objection, so ordered.

Mr. OSE. Both the EPA and the Corps testified at that hearing that since the Supreme Court revoked the Migratory Bird Rule in its SWANCC decision, the Corps district offices were inconsistently interpreting the Clean Water Act and its implementing regulations in making jurisdictional determinations.

The testimony was that this inconsistency was unfair to the regulated community, and that the Administration would issue additional guidance and initiate a rulemaking to clarify which waters of the United States are subject to Federal jurisdiction.

The Corps even admitted that since the Migratory Bird Rule provided an umbrella over all other jurisdictional issues, Corps staff had found no need to define such terms, as Dr. Ehlers suggested, of adjacency, isolated tributary, or neighboring.

In February 2003, I asked GAO to conduct a study to determine a number of things. First, which criteria were used by the Corps district and regional offices in making their jurisdictional determinations? Second, to what extent do these criteria vary from region-to-region?

Since that time I have received assurances from policy officials at the Army that a rulemaking to lessen the inconsistent application of the law would be both initiated and finalized. Frankly, I am here before you today somewhat dumfounded to discover that subsequent testimony today will be that the Administration intends to not initiate or formalize a rule.

In February 2004, GAO submitted its report to me. Mr. Chairman, I suspect you have quite closely gone through it.

Mr. OSE. GAO submitted this report to me last month. As expected, the report came to the same conclusions and identified the same problems that witnesses had shared with us anecdotally 18 months ago.

GAO states, "Corps districts differ in how they interpret and apply the Federal regulations when determining what wetlands and other waters fall within the jurisdiction of the Federal Government. Districts apply different approaches to identify wetlands that are adjacent to other waters of the United States." That is on page three of the report.

GAO further stated, "Prior to the 2001 SWANCC decision, the Corps generally did not have to be concerned with such factors of adjacency, tributaries, and other aspects of connection with an interstate or navigable water body." That comment is on page nine.

GAO's report provides examples of how factors that determine jurisdiction are interpreted and weighted differently in the various Corps district offices. For example, GAO states that the treatment of ditches and other man-made conveyances are some of the most difficult and complex jurisdictional issues faced by the Corps. These conveyances, however, are very common features of private property. The district offices differ in their practices in testing whether a man-made conveyance is a sufficient connection to a water of the United States to require Federal jurisdiction.

More than three years after the SWANCC decision, there is still no national policy regulating when a citizen can or cannot discharge into waters of the United States because no one knows what the term "waters of the United States" really means.

The absence of a definition cannot be a license for Federal staff to literally make one up. The consequences are that citizens in one part of the country, say Oregon, are treated differently than the citizens in another part of the country, say Sacramento, in that they are regulated by seemingly the same set of rules that are applied differently from a geographic standpoint.

I am calling upon the Administration to promptly resolve this problem by requiring both the EPA and the Corps to mandate that all district offices consistently interpret the law. That does not mean that the Corps should not take into consideration other local environmental conditions and other site-specific considerations.

All I ask is that jurisdictional interpretations be standardized so that those who are affected by this law know what the law actually requires. Fairness dictates nothing less to our citizenry.

I thank you for the opportunity to appear today. I would be happy to take any questions.

Mr. DUNCAN. Thank you. Doug, in my Subcommittee, we do not ask questions of Member panelists because we have chances to discuss these matters with you later on the floor and so forth. We know that you have other matters that you need to attend to. Also, we want to get to the other witnesses.

Thank you very much for being with us. You have been a good witness. You have made a great addition to the record of this hearing.

Thank you very much.

Mr. OSE. Thank you, Mr. Chairman.

Mr. DUNCAN. We will go ahead now and start with the second panel. This panel consists of the Honorable John Paul Woodley, Jr., representing the United States Department of the Army. He is the Assistant Secretary of the Army for Civil Works. He has been with us several times before. He is accompanied by Dr. Mark Sudol, who is the Chief of the Regulatory Branch of the Corps of Engineers.

We also have another witness who has been with us several times, a former member of the staff of this Subcommittee, representing the U.S. Environmental Protection Agency, the Honorable Benjamin H. Grumbles, who is Acting Assistant Administrator for Water.

Gentlemen, we are very pleased to have each of you with us. We always proceed in the order that the witnesses are listed in the call of the hearing. All the full statements by all the witnesses will be included in the record if they are submitted to the staff of the Subcommittee.

Secretary Woodley, we will start with you. You may begin your testimony. Thank you very much for being with us.

TESTIMONY OF HON. JOHN PAUL WOODLEY, JR., ASSISTANT SECRETARY OF THE ARMY, CIVIL WORKS, WASHINGTON, D.C., ACCOMPANIED BY MARK SUDOL, CHIEF, REGULATORY BRANCH, U.S., CORPS OF ENGINEERS, WASHINGTON, D.C.; THE HONORABLE BENJAMIN H. GRUMBLES, ACTING ASSISTANT ADMINISTRATOR FOR WATER, U.S. ENVIRONMENTAL PROTECTION AGENCY, WASHINGTON, D.C.

Mr. WOODLEY. You are more than welcome, Mr. Chairman. It is always a pleasure and a delight to appear before your Subcommittee.

I am here to speak to you about our Clean Water Act jurisdictional practices. The Corps is responsible for the day-to-day administration, including reviewing permit applications and deciding whether to issue or deny permits under the Clean Water Act. The Corps makes more than 100,000 jurisdictional determinations and provides over 86,000 written authorizations annually.

This work is spread across 38 districts, accomplished by some 1,200 highly-skilled professional regulators. The benefits of an effective and predatory regulatory program are cleaner water, a healthier environment, more jobs, and a stronger economy.

Congress appropriated \$139 million in fiscal year 2004 for the Corps' portion of the Section 404 Clean Water Act program. The

President has asked for \$150 million in his budget request for fiscal year 2005.

These resources are required to process individual and general permit authorizations, accomplish jurisdictional determinations, perform compliance activities for mitigation projects, review appeals of jurisdictional determinations and permit denials, improve program efficiency and data collections, and develop proposed regulations and guidelines.

I would like to highlight two very important initiatives that will improve program performance and transparency. First, the Corps is collecting information on jurisdictional and non-jurisdictional calls, using a standard reporting format. Starting this April, the Corps will share this information with Federal and State agencies, Indian tribes, and the public.

Second, the Corps is installing a comprehensive permit tracking database that will provide very detailed information, including spatial data, on permit impacts and compensatory mitigation.

I would like to talk briefly about the January 2004 General Accounting Report on the practices used by the Corps districts pertaining to jurisdictional determination. The report acknowledges the challenges faced by the Corps districts since the Supreme Court decision in 2001 in the SWANCC case, such as the wide variety of ecological, geographic, and climatic situations that are encountered across the country, the individual interpretations by regulators on how to apply regulations that may differ, and the fact that the Corps regulations do not define the term "tributaries," nor do they explain how adjacency is to be established for purposes of the Clean Water Act jurisdiction.

As the very distinguished prior witness indicated, prior to the decision, our use of the Migratory Bird Rule in many of these contexts made the lack of these key definitions less problematic. It is not surprising that inconsistencies were observed by the GAO. Our 1,200 regulators in 38 district offices, making more than 100,000 jurisdictional determinations annually will necessarily result in a certain amount of inconsistency.

It is perhaps our most difficult and vexing management challenge. Each and every day they must exercise on-the-ground judgment in a wide variety of factual and ecological settings.

The GAO report recognizes this and agrees with all the factors involved that it would not be possible to achieve nationwide consistency. But we believe we can and should increase our regulatory predictability in each of our Corps districts.

We agree with the GAO recommendations, and will address them as follows: First, the Corps will conduct a comprehensive survey this year to assess district jurisdictional practices to determine the extent of these and the extent of the differences revealed in the GAO report which, as you recall, dealt with a very small subset of our districts nationwide.

Secondly, the Army in coordination with the EPA, will evaluate whether and how these differences in jurisdictional practices should be resolved. Third, the districts have already begun to document their jurisdictional practices and will make that information available to the public.

Our goal is to build a comprehensive and accurate information base to track determinations and improve consistency. We are fully committed to protecting Clean Water Act jurisdictional waters as intended by Congress, and as expected by the American people.

Thank you very much, Mr. Chairman. I have more extensive written testimony that I would asked be included in the record.

Mr. DUNCAN. Thank you very much, Secretary Woodley.
Administrator Grumbles.

Mr. GRUMBLES. Thank you, Mr. Chairman.

This Administration is committed to no net loss of wetlands and also an overall gain of wetlands, as well as fairness and consistency in the regulation program. I have read from cover-to-cover the GAO report, and I have also watched much of the debate and discussion over the last several years on these perennial issues of consistency and definitions.

Like Chairman Ose, I can concur wholeheartedly that the GAO provides a valuable service and that it is identifying some areas where we need more work. We welcome that. We will be putting a lot of effort and energy into ensuring the consistency, transparency and predictability of jurisdictional determinations.

In December, the Administration announced that it was not going forward with a rulemaking on waters of the United States. At the same time, we were instructed to increase our efforts to ensure greater consistency, predictability, transparency, and sound science in the decision making.

I want to highlight in the time I have, some of the things we are doing. I should say at the outset that wetlands, as you know, come in all shapes, sizes, and types, and so do the delineators themselves. That is to say there is a human element to this. There is also a climate and a geography element. I think that runs through and is acknowledged in the GAO report.

But because this is essentially a jurisdictional determination, there does need to be a clear road map, rules of the road, that people can follow. We are putting a lot of effort into this up-front science in terms of the delineation of wetlands and also in terms of following the National Academy of Sciences.

The Administration announced in December 2002, a multi-year effort for a mitigation action plan to increase the science of restoring and creating wetlands to help us get to the President's goal of no net loss.

The key aspects that this hearing is really focusing on, the consistency among the Corps districts and the regions, is one that we understand there are areas where there are still questions. We recognize that in the legal guidance memorandum in January 2003. We continue to recognize that. We know that adjacency, while it has a definition, needs continued work in terms of field testing and working with staff to flesh that out further.

On the issue of tributaries, that is not defined, but we do have guidelines to follow. We recognize that some of the issues raised in the GAO report, on sheet flow, for example we need to continue to work on. When it comes to issues of ditches and constructed conveyances, that is an area that we continue to provide additional support behind and guidance and work among the districts to try to determine how best to proceed on that front.

I wanted to just highlight a couple of other things, Mr. Chairman. Secretary Woodley, in his statement, highlighted two things. I want to just reemphasize that. EPA is working very closely with the Corps on increasing the transparency that the GAO report called for, the documenting and the publication of the jurisdictional determinations in April or May, we will be getting a listing of not just decisions but determinations where there was no jurisdiction found. That, coupled with the guidance from January 2003, will help give all of us and the public a broader picture.

We are also very supportive in working with the Army on the regulatory permit tracking so we can really follow the decisions on a district-to-district basis.

The last thing, Mr. Chairman, is that I would just note that in the budget submission for EPA, the Agency is requesting an additional \$5 million beyond the \$15 million that was previously requested in prior years and appropriated. That additional funding is specifically for grants to States and tribes to help them develop their programs so that they, rather than the Federal Government, are the ones that are trying to assert jurisdiction over and to protect these wetlands and waters that we do recognize as providing important and invaluable ecological and economic benefits to the country.

Mr. Chairman, I look forward to answering any questions you or your colleagues have.

Mr. DUNCAN. Thank you very much, Administrator Grumbles.

Secretary Woodley, I know that the Administration decided not to go forward with the rulemaking to clarify the scope of the Clean Water Act jurisdiction. But without the public process of rulemaking, and without clear rules, how do you think ordinary citizens are supposed to know what is and is not subject to Federal jurisdiction?

Ordinary citizens, small farmers, and small landowners have had problems with this all across the country. What would you say to some small farmer that came to you and said, "I just cannot figure this out? Am I going to have to hire a Philadelphia lawyer to figure this out for me?" What would you say to them?

Mr. WOODLEY. Mr. Chairman, that is a big problem. I think I would have to tell him that we are working to iron out the inconsistencies that exist and improving our transparency and improving our availability of information to the public every day, I think we can proceed in that light in that regard in a more efficient way than we could by any further administrative process.

Mr. DUNCAN. Several weeks ago a lawyer from the Corps General Counsel's office gave a speech at a Federalist Society luncheon. Someone in the audience asked him how ordinary citizens are supposed to know which wetlands are regulated. The Corps lawyer answered that question by saying that ordinary citizens should read the briefs filed by the Department of Justice and enforcement actions around the country.

Do you think that is an acceptable answer? What concerns me, and it is not just in this area, it is in every area of the Federal Government, the bigger the Government gets, the more rules and the more regulations, the more red tape, and the big giants can handle it because they can hire the lawyers and the accountants.

They can hire the staffs to file all the forms and keep up with all these rules and regulations and the red tape.

But what concerns me are the little guys out there. There are just thousands of them around this country. Do you think that is a good answer, to say that they should read all the briefs? They do not even know how to find them, most people.

Mr. WOODLEY. Mr. Chairman, I was at that seminar that you describe. I do not recall the exchange precisely, but I do recall that the gentleman was speaking throughout the period as representing his own views and not those of the Agency. As you may know, these exchanges are often very informal in Federalist Society and other seminars that we have. I am sure he did not mean to imply that citizens should be sent to the law libraries when they wanted to understand the nature of any wetlands determination that might be made on their property.

But we are committed for our part to be as transparent with this and to have our Corps people explain and foster an understanding of the basis on which they make their decisions. It is an area that we need a lot of improvement on.

Mr. DUNCAN. I wish you would make it a goal to simply decrease the number of regulations and make them understandable. Every once in a while you are going to find some bad guy, but most of these small farmers and small land owners, they want to do what is right if they can just figure out what it is.

Administrator Grumbles, would you not agree that while we have to have things on a case-by-case situation, that the rules themselves cannot change and have to be consistent? It is like a football game. The rules are nationwide. Everybody understands. The referees all know the rules, but they have to apply the rules each play, or on a game-by-game situation. But the rules themselves have to be out there where people can know what they are going to be before they start playing the game.

Mr. GRUMBLES. Mr. Chairman, I would agree with that statement. I think the key to what makes it such a complicated or a challenging issue over the years is that there are scientific facts about wetlands and what you look at. Those should be generally uniform and understood. Then when you get to the legal jurisdictional issues, that, too, needs to have a broad consistent basis.

The challenge is that this is a big country and there are many different watersheds and different climatological, geological, and hydrological conditions. When you translate the basic rules of the road into a site-specific decision as to whether or not a particular parcel is regulated by the Federal Clean Water Act, that is where the risk comes into play and, actually, the opportunity to be able to have some variability and flexibility.

I think you are right that the basic concept that from a legal jurisdictional perspective, particularly when site-specific factors are not intended to come into play, there needs to be clarity and consistency.

Mr. DUNCAN. I understand what you are saying. Let me ask you this. One of the witnesses on the next panel will raise concerns about the extension of Clean Water Act jurisdiction over streets, curbs, gutters in a California stormwater permit. Does the EPA consider curbs and gutters to be waters of the United States? Do

we now have designated uses and water quality standards for people's driveways, for instances? What do you say about that?

Mr. GRUMBLES. I would say no, we do not consider concrete curbs and gutters waters of the United States. But the important additional information and qualifications are that under the Act you have two basic areas and decisions you need to make before you regulate under the Federal Clean Water Act.

One is, is it a water of the United States? We do have the view, and the case law continues to support that view, that certain vegetated conveyances, ditches, and drainage systems are, themselves, waters of the United States. And as Congressman Gilchrest noted, that is also an issue that is being litigated.

The other aspect, though, is whether or not something is a point source. That makes it subject to having to get a permit, too. The Act itself says that various types of conveyances or discrete pipes or systems become point sources.

What happens is that there is a spectrum of different types of infrastructure, depending on the amount of concrete and the amount of vegetation, and the natural component of it, that shifts the decision from whether or not it would be considered a conveyance under the Clean Water Act, or possibly a water of the United States.

The last thing is that we have been regulating, based on Congress' amendments in 1987 to the Clean Water Act. We do regulate storm sewer systems throughout the country under the Clean Water Act through a permitting program.

Mr. DUNCAN. Well, I understand particularly if something is a very large operation, a large point source. What I would go back to is something that I said in my opening statement. I think we need a little common sense and balance in here. If some very small landowner or small farmer has some very minor type problem, they should not come down in the same way or even the more difficult way than some big giant corporation.

Mr. Costello?

Mr. COSTELLO. Secretary Woodley, let me follow up on an answer that you gave to the Chairman's question. You said that on the issue of inconsistencies that it was a big problem and that you are working to iron these inconsistencies out. You mentioned that you are improving and giving the public information almost every day.

I wonder if you would tell us what steps the Agency is taking to, in fact, provide information to the public every day?

Mr. WOODLEY. There are two things that I could point to in particular in that regard. There was no reporting or tracking of the call on jurisdiction or non-jurisdiction. It was made in the context of each individual permit. We have inaugurated a program to collect that information using a standard reporting form with standard data fields that will allow us to compare the decisions across jurisdictions, or across the districts. That will be made public to Federal agencies and the State agencies.

Mr. COSTELLO. I am not sure that I am understanding your answer. When a determination is made, will the public find out how that determination was made?

Mr. WOODLEY. Yes, sir.

Mr. COSTELLO. How will they find that out? It will be published?

Mr. WOODLEY. Yes, sir; and I think we have in mind an internet publication on that as well. Let me ask Dr. Sudol, if I may.

Mr. GRUMBLES. Congressman, it is important to point out, and I think one of the key recommendations of the GAO report, is to do that type of publication for the public. For whatever reasons over the years that type of communication of public awareness has not been provided to the extent that we are proposing to do, and will be doing, working through the Corps.

Mr. COSTELLO. Are you also working on a procedure where there will be an appeal process, for instance, by a party that is impacted that may not agree with the decision?

Mr. GRUMBLES. I know, Congressman, that there is existing an administrative appeals process, so not just the courts as a last resort, but an administrative appeals process for jurisdictional delineations for wetlands jurisdictional determinations. We will continue to implement that because we recognize that that, coupled with public awareness, is an important component to increasing the overall fairness, as well as the effectiveness of the wetlands permitting program.

Mr. COSTELLO. I am told that an administrative appeal does not cover, for instance, an adjoining landowner. My question is: If someone feels that they have adversely affected by a decision of jurisdiction, will they have an appeal process?

Mr. GRUMBLES. I know that was an issue to try to determine the scope of which aggrieved parties could be part of that administrative appeals process. I know that a decision was made several years ago to keep it focused on the applicants. I am not aware of a decision to broaden that scope. I do not know if you are or not.

It is certainly something that we can commit to look at, but right now I am not aware of any change to the administrative appeals process. I think one of the key things for us is looking at ways to increase the overall fairness of the wetlands permitting program in general. That is where we are trying to emphasize now more consistency among the districts and also a tracking system, as well as what Secretary Woodley is saying, a new approach to put on the internet and to at least have available to the public, decisions both jurisdictional determinations and non-jurisdictional determinations.

Mr. COSTELLO. Mr. Secretary, as we are all aware, the Supreme Court ruling held that Federal jurisdiction over waters in the United States could not be established based solely on the Migratory Bird Ruling. That is now the law. I am just wondering why the Agency decided to go beyond the Court's ruling, beyond the Migratory Bird Rule?

Mr. WOODLEY. Go beyond it to what extent?

Mr. COSTELLO. Let me give you some examples. Use as habitat for endangered species, or use or irrigated crops sold in commerce. The Agency further restricted field staff concerning waters used by interstate to foreign travelers, waters used in production of fish or shellfish sold in interstates or foreign commerce, or use for industrial purposes.

My question is: Why did the Agency choose to expand the impact of the Court decision, given the fact that there have been Federal appeals courts, in particularly in the Sixth District, that invalidated only the Migratory Bird Rule.

Mr. WOODLEY. You will recall that the Migratory Bird Rule, as it is called, is not itself part of our regulations, but is rather a gloss on the regulation provided in the preamble. I think you are referring to the guidance that was issued at the same time as the Advanced Notice of Proposed Rulemaking.

The guidance, as I understand it, was drawn up in conjunction with and in cooperation with the EPA and the experts on the legal matters at the Department of Justice. It was intended to address the impacts of the decision directly, those that were immediately apparent. That would take care of, as you say, the Migratory Bird Rule. I think it was called by a less formal and respectful name earlier in the proceeding.

The rationale, I think, of the SWANCC decision, however, if not directly overruling, clearly called into question some of the rationale that underpinned the provisions in the preamble that you are describing. If I recall correctly, the guideline does not suggest that our regulators in the field should automatically determine that there is no jurisdiction with respect to that type of wetlands but rather should seek guidance from higher headquarters so that we can actually have a greater degree of consistency across the program with respect to those matters that had been so significantly called into question by the rationale underpinning the Supreme Court's decision in January 2001.

Mr. GRUMBLES. Congressman, I would just amplify on what Secretary Woodley said, when the Supreme Court was speaking directly to the issue and the Bartlett landfill or balefill in the SWANCC case, they specifically spoke to us, to the public, about the Migratory Bird Rule.

When our lawyers were interpreting that decision, it was clear to us that when the Supreme Court spoke to the Migratory Bird Rule, they were speaking to all the components of the Migratory Bird Rule, which really is not a rule. That is the components in the preamble that relate to migratory birds, endangered species, and also irrigation water.

So we said that our interpretation is that that is no longer a prong to assert jurisdiction over isolated intra-State non-navigable waters. There are other factors, the (a)(3) factors, that we said in our guidance, that are called into question. We are not sure what the status is of those. They are called into question if you read through the rationale and the reasoning of the Supreme Court.

So for those there needs to be additional coordination for purposes of national consistency. There needs to be coordination with the headquarters offices. These are additional interstate commerce connections to isolated interstate non-navigable waters.

Mr. COSTELLO. So the staff in the district offices were instructed, based upon legal analysis of the Court ruling?

Mr. GRUMBLES. The legal guidance directed the staffs on that category of isolated intra-state, non-navigable waters, if they are going to be asserting jurisdiction over those, relying on those so-called (a)(3) factors, then given the uncertainties in the Supreme Court case about whether or not those are even jurisdictional, they need to get approval first from headquarters before they do assert jurisdiction over those categories.

We have been watching to see the results of that guidance since January 2003. There have been 10 or 15 specific instances where the districts have contacted headquarters and said, "This is an area where we are not sure, where we may be asserting jurisdiction based on those factors."

In several cases we are found that are other reasons to assert jurisdiction because the waters are maybe navigable in fact, or maybe interstate, or something on those lines.

That is what we are operating under now and continue to operate under, is to see how that legal guidance from January 2003 is actually working, and to try to take the lessons from the GAO report and, as Secretary Woodley indicated, do a full survey of all 38 Corps districts and also work towards a better tracking system and a publication of the results of the jurisdictional determinations under the legal guidance.

Mr. COSTELLO. Thank you.

Thank you, Mr. Chairman. I see I am out of time. I have a few more questions and hopefully we can come back.

Mr. COSTELLO. Thank you very much.

Dr. Ehlers?

Mr. EHLERS. Thank you. Mr. Chairman, I like your football analogy because that applies to this situation in a couple of ways. First of all, it seems to me that one of the most important things you have to have is clear rules. That is easier said than done because of geographical differences across the country.

Michigan, my State, Louisiana, and several others could best be described as large tracks of land floating on even larger bodies of water. We have water everywhere in Michigan, 11,000 small lakes and four Great Lakes. That is certainly a different situation in Arizona or Texas. The rules, although they are clear, have to take into account geographical differences across the country.

But that is only the beginning of the process. Next comes the application of the rules and in the football example you have to have a referee. I think it is very important to try to have consistent decisions about what the rules mean as applied to a particular area.

That is also very difficult, and that requires more staff training than anything else. Having different people go out and look at the same site and come back and say, "I would rank it this way," and then having them argue about it. You need consistent ongoing training programs to do that so that you try to get consistent application at least within a district or within a certain area.

There is another third part that I generally find missing. I emphasized this when I had that responsibility in the State of Michigan and it really helped. That is to instill a helpful attitude in the referees, the people who are going out. It makes a world of difference. Your job is not to simply look at the application, stamp "no" on it and drop it in the mail. Your job is to talk with the person, say, "I am sorry you cannot do it the way you want to do it, but let me suggest a few ways that you could do it that would fit within the rules.

I found absolutely no one was doing that. Once the program was instituted, the complaints dropped dramatically. I think really what you have to aim for, first of all, are clear rules. I hope you

can establish that even if you need to make allowances for different geographical areas.

Secondly is consistent application. That is an educational matter. Then the proper attitude. That becomes crucial and very hard to instill on certain people that tend to be attracted to jobs like that where they enjoy being unpleasant.

A "be happy" attitude can go a long ways on the part of the people working in these jobs. Maybe that has to be one of the job requirements.

I do not have any specific questions. I appreciate your testimony very much. I recognize the tough job you have. I just wanted to give those suggestions. To take the football analogy even further, after all, referees are wrong many times, too. If you poll the audience at a football game, roughly 50 percent will say the referee is wrong on any given call. The best you can hope for is that when the game is over, everyone will say, "Well, it cut both ways. It came out all right."

I hope that this is, in some ways, helpful. Thank you.

Thank you, Mr. Chairman.

Mr. DUNCAN. Thank you very much, Dr. Ehlers. I think you made some very good suggestions there.

Next we will go to Mr. Baker.

Mr. BAKER. Thank you very much, Mr. Chairman. I appreciate your willingness to call this hearing.

I am most troubled, and I will just start with that bumper sticker up front, "Get it out of the way." I am not coming at this in an objective way. I realize it. This is the most illogical body of law for the least public benefit of anything I have had the occasion to reflect on for some time. I come at this way.

We start with the presumption that the rules are intended to benefit a protected resource that is deemed to be in jeopardy if a project goes forward. A construction project, interstate, elevated, postage stamp wetland. During the course of the construction, everybody goes around it. Everybody observes the protocols required. The project is completed. The developer leaves. Traffic is on the highway.

You look down there six months after project completion, the wetlands is dead. The postage stamp has no way to survive. There is no mechanism to take identifiable resources and put them on a clearly defensible wetlands that has a long-term effect for the positive development of natural wildlife and other resources.

We go to individuals who have purchased property in good faith, being told in writing that the property that they now own is not a wetlands. They begin construction. A cease-and-desist order is issued. They go to the regulatory body and say, "This is a mistake. Somebody put it in writing that our property is not subject to wetlands controls. We are being told we cannot build." They say, "You are correct. You can. You have to put it back in its original condition. You have to plant trees. You are going to be responsible for the life of those trees for your natural lifetime."

The Agency is not responsible for its own conduct. In private enterprise, you make a deal, you have to hold up your end of the responsibility. If you do not, there is a consequence. If an individual, who has bought property with their own after-tax dollars, engages

in an activity and is told by a bureaucratic determinant that your property is no longer yours and you are going to go to jail if you do not put it back in its original condition, is out of control.

Louisiana provides one-third of the Nation's seafood, and I am tired of being lectured to by people whose districts are under six inches of concrete about Louisianians not being promoters of wetlands. This is beyond just a mere irritation. This has gone to unreasonable levels of interference in the common course of business practice and in individual property rights, to lead to the taking of one's property without just compensation.

If there was a mechanism where you could come in and say, "The tractor rut, or the skidder track, or the logging road has irrevocably affected adversely wetlands protection, adversely affected some species of identified critter," and you want to assess a value to that, and then let that person apply that money to a permanently managed, professionally competent wetlands preservation area, bingo.

I think most people would say, "Now that makes some sense." If this Committee hearing, Mr. Chairman, lasts two hours, Louisiana will have lost six acres of wetlands. Six acres. We are now debating, because it is not clear, whether curb-side water runoff is a navigable waterway.

With all due respect to the hydrological, climatological, and geological, that is the most illogical thing that I have ever heard in my life. Where do we grab common sense by the neck and shake a program out of the agencies that, in fact, result in my kids seeing a net increase in wetlands, while we get out of the cornfields of Iowa, telling people they cannot farm land they have had in their family for 200 years because the tractor rut is filled up with water.

I am sorry. I should have asked a question. My point is that no matter how we have looked at this, and no matter how we try, you go to the Corps office in New Orleans, you hire people, you do the best you can to get by, and ultimately you are told that your property is not yours.

We had a fellow with two parcels. It was a body shop. He acknowledged that he had wrongly deposited waste from the body shop activities on his vacant lot next door. Somebody showed up and said, "You have to clean this up because you have all kinds of stuff in the dirt." So he had to haul the dirt out, a lot of it.

When he got finished, he was going to get fill to put the lot back in its original pristine condition, and a cease-and-desist order was issued to keep him from filling it in because he had created a wetlands. The people in the community were filing suit because he had created a hazard for the kids in the neighborhood.

Now, what do you do to that fellow? I suggest you put him in the hole and cover him up. That would be the easiest remedy. These lead to illogical public policy determinations that ultimately have no value for the long-standing environment and our wetlands preservation, that do not thing that cost individuals a great deal of discomfort and ultimately money. It is not based in logic.

I have been waiting a long time to say this. I appreciate your courtesy in allowing me to do.

I yield back.

Mr. DUNCAN. Thank you very much, Mr. Baker. Thank you for a very good and heartfelt statement. You certainly highlighted some of the problems.

Before we go to Mr. Bishop, I would just like to thank Mrs. Maloney for being here. He has a personal interest in this because her father and his small farm was adversely affected by some of the very things that I mentioned earlier. I know she has a great concern and great personal knowledge of exactly what I was talking about before about how some of these things hurt the small landowners and the small farmers most of all.

Mrs. Maloney?

Mrs. MALONEY. I would like to ask one question.

I would like to follow up on what the gentleman from Louisiana said that the definition keeps changing. And now the definition apparently in his district has been changed to include running off a curb, that is now a wetlands, if I heard you correctly.

May I ask the panelists? What is the definition of a wetland? What is the definition, and under what grounds are you able to change the definition and expand it as he mentioned had happened in his district?

Mr. GRUMBLES. Mr. Chairman, I can respond to that. The definition of a wetland is those areas that are inundated or saturated by surface or ground water at a frequency and duration that under normal circumstances you find the presence of hydrophytic vegetation. It typically includes marshes, bogs, and similar areas.

The battle, though, as the gentleman from Louisiana articulated is that when we get into the finer aspects of that, the Clean Water Act is interpreted by a variety of different courts and that is where you have some of gray areas as to what is inundated and saturated in sufficient duration and frequency.

When we translate that into the field so that the regulators can actually give the public the specificity they need, we do have general basic rules and guidance that we follow, but there are some hot spots, there are some areas where there continues to be uncertainty. What we are acknowledging is that we do not need a rule-making at this time to address those.

What do we do need to do, though, is to roll up our sleeves and work harder with the public and with the stakeholders on some of these specific areas, like ditches or how far up you go for something to be a waterway in the U.S. when you are tracking up the tributary system.

I just wanted to say, Mr. Chairman, on the points that the gentleman from Louisiana made on mitigation banking, the point about the need for common sense on postage stamp wetlands. One of the areas that we are very proud of is the work that we are doing in coordination with Congress on advancing the preference for mitigation banking under circumstances—

Mrs. MALONEY. But, sir, my question was: How do you define a wetland? As I understand from the gentleman from Louisiana, his constituent had a dry piece of land, and they apparently went down six inches, did not hit water; went down 12 inches, did not hit water. So they finally said that when it rains and some water goes into the basin on the side, it is wetlands.

Now, is that a fair definition of wetlands? In other words, specifically how deep do you have to dig before you hit water to call it a wetlands? One constituent told me they dug six inches, did not hit water, so then the guy said, "Well, we need to dig deeper." Then they decided the regulation was 12 inches. Then they dug down 12.

So it is mushy and it is not fair to the public not to have clear guidelines. It is more or less, "I want to make your land wetlands. Therefore, we are going to come up with criteria whether it is birds flying that land in the middle of a desert, or whatever, to call it wetlands.

This belies the public support for a very important bill. What we are hearing from him and others is that there is no clear definition. It keeps moving and changing, not only from jurisdiction-to-jurisdiction, but wildly within jurisdictions.

Mr. GRUMBLES. There is a delineation manual. You are right. We get into the number of inches. I think the manual that is currently operating is 12 inches down from the surface.

Mrs. MALONEY. Was that ever written by Congress or was that interpreted by the Agency?

Mr. GRUMBLES. It has certainly been interpreted by Congress and reviewed by Congress, but it is an Agency technical scientific document that is the first step of the process to determine the scientific facts, the hydrology, the plants, and the hydric nature of the soils. Then admittedly you do get into the murkier or mushier part. That requires a judgment, looking at the Clean Water Act, as to whether or not there is a sufficient connection to navigability or to interstate commerce.

Mr. DUNCAN. Let me just interrupt there. We have to go to Mr. Bishop and to Mr. Taylor.

Mrs. MALONEY. Certainly.

Mr. DUNCAN. As Mrs. Maloney has certainly pointed out, this is what this hearing is all about, these problems that she has discussed here.

Mr. Bishop?

Mr. BISHOP. Thank you, Mr. Chairman. I have no questions at this time.

Mr. DUNCAN. Mr. Taylor?

Mr. TAYLOR. Thank you, Mr. Chairman. I want to thank you gentlemen for being here. I will endeavor to relay some questions that are posed to me. I happen to represent the southernmost portion of Mississippi. We have Louisiana literally 45 minutes from my home. A heck of a lot of people from Mississippi commute to Louisiana along I-10.

And if you had commuted from Mississippi to Louisiana along I-10 for the past 20 years, you would have seen on the south side of I-10 where Slidel hits Lake Pontchartrain, 20 years ago you would have seen that as marsh. I may be off a year or two. But maybe 15 years ago someone put some cows out there. If you were to have gone by 8 years ago or 10 years ago, you would have seen 24 hours a day a large drag line out there ditching it. If you would have gone by three years ago, you would notice that it now suburbia.

I will contrast this with some folks in Mississippi who, on a regular basis, are a bit frustrated when their upland piney woods,

which do get wet, large tracks of that have to be set aside as they try to develop them. What I have been told, and I am asking this in the form of a question is this.

If someone takes the time and has the time to take a track that is obviously wet, throws some cows out there for a period of time, and establishes it as agricultural, that you can go from wetlands from agricultural to commercial to residential all on a legal basis, but if you just try to go from some woods that are wet to residential, you cannot do that.

Now, again, I am told these things. I am going to give you the experts, to tell me whether or not that is true. That is certainly the perception. Then again, since I represent two different Corps districts, but being very close to a third Corps district, I think we are just frustrating to a lot of Mississippians, and I would guess to a lot of Americans, is what they perceive, based on what I just told you, is radically different enforcement of the law.

If you would, first walk through me through that scenario. That really did happen. I am a casual observer to this. I do not pretend to be an expert. But I can tell you in 20-plus years of driving to New Orleans, what is now suburbia was clearly a marsh 20 or 25 years ago. Those steps did happen. For a while, a guy had some cows out there. Then it was ditched. Then the drag line just worked 24 hours a day and turned it into suburbia.

I am a big fan of marshes. I am on-line to try to help Louisiana to rebuild their marshes. I know how important they are. So I was a bit taken aback to watch what was clearly a marsh turned into suburbia. How do you do that in one place, and yet we are pretty strict right across the line for another.

Mr. WOODLEY. Generally I do not think you can follow the sequence that you have described.

Mr. TAYLOR. Could I get a legal clarification of that? I have been told that is how it happens.

Mr. WOODLEY. Yes, sir; we can get that for you.

Mr. TAYLOR. Again, this is not hearsay. I can spend enough time traveling through Slidel to remember an area, I mean a large track, that was clearly a marsh, then some cows, then some ditches, and now suburbia.

Mr. WOODLEY. I would have no idea what kind of permitting action took place to allow this.

Mr. TAYLOR. Would any of the other gentlemen care to comment on that? Would anyone from the Corps wish to comment on that?

Mr. DUNCAN. Dr. Sudol, would you like to say something?

Mr. SUDOL. Yes, sir. I would like to comment on a couple of things. Number one, it is not legal to put some cows on there and turn it into agriculture and then turn it into commercial or residential. There are exemptions for agriculture to allow continued agriculture on those properties, but once you change the use from agriculture to either commercial or residential, you are required to get a permit.

Now you threw in another complicating factor, the dragging of the ditch line. Currently under the regulations if you excavate within a wetlands and have no discharge back into that, that is not a regulated activity. So what happens in some places is that people go in, ditch the wetlands, and dry out the surface. That becomes

non-wetlands, and then they can fill without requiring a permit. That would be legal under current regulations.

But your definition going strictly from agriculture to commercial is not currently legal. There is some confusion in certain places. We have a team looking at that, providing guidance to our entire regulated community this May. They are going to give a presentation in our national conference on that issue. So we will be getting guidance out.

But that is the best answer I can give you, sir. We will try to get more information.

Mr. TAYLOR. Thank you.

Mr. DUNCAN. Without objection, so ordered.

Mr. TAYLOR. So if a property owner has the financial resources and the time to ditch it without discharging, and put that fill on top of what is clearly a marsh—

Mr. SUDOL. They cannot put the fill on, sir. If they placed the fill into a marsh, that would be considered discharge of fill. They would have to take the fill, truck it off site, and put in an upland site, and wait for the area to dry out.

Mr. TAYLOR. OK. So you can ditch. You have to have some booms so that you do not have turbid water going out into another body?

Mr. SUDOL. Yes, sir. We would work with EPA on that.

Mr. TAYLOR. But once you ditch it is obvious that that water is going to collect and drain. That is how that occurred.

Mr. SUDOL. I will look into that, sir.

Mr. TAYLOR. So the same sort of deal; if there were piney woods that happened to retain water, again if someone chose to develop it, you would ditch it and let it naturally drain?

Mr. SUDOL. Unfortunately that could happen sir.

Mr. WOODLEY. If I am not mistaken, Mr. Taylor, that was based on a court case that is known as Tulloch; is that correct, Dr. Sudol? Poor Colonel Tulloch was a district engineer at the time. His name has been abused by this because it is an area of our jurisdiction that has been, by judicial action, restricted. That is to the good or to the ill, depending on what your point of view is.

I can tell you the point of view that they took in Virginia when I was the Secretary of Natural Resources. It was very shortly after the Court decision, and there was considerable activity in the Tidewater area of Virginia, which is similar to your district in that it is very substantially wetlands topography.

There became a considerable activity in the area of Tulloch ditching at that time. Our General Assembly, in their next meeting, passed a comprehensive state wetlands statute supplementing the Federal statute, and giving the State regulatory body the power to regulate the activity of Tulloch ditching, which the Corps had removed from the Federal jurisdiction.

It is something that seems to me, based on the legal underpinnings for it, would require some kind of legislative action, either State or Federal, whatever is most appropriate in your view, that would create the regulatory scheme that one would need if the activity that you described is considered in need of regulation.

Mr. BAKER. Would you gentleman yield on that point?

Mr. TAYLOR. Certainly.

Mr. BAKER. I appreciate the gentleman yielding. I just have a slightly different perspective on the Tulloch decision. I believe the litigation went to whether or not a public body could go in and excavate a previously constructed canal to its original design configurations so you could take out what sloughed off the banks, what was deposited, and you get that material out because previous to Tulloch, they could stop you from even going in and doing maintenance of a waterway that ultimately led to a navigable body because it was connected to a navigable waterway.

I think there is a great deal of confusion here. I can tell you that if you tried to get a permit this morning to dig a ditch on a wetlands in Baton Rouge, you would have a heck of a challenge on your hands.

Mr. TAYLOR. If I may ask, and certainly I would not doubt the word of my colleague from Baton Rouge, but what would be your opinion of what my colleague just said about if you wanted to go dig a ditch in a wet area anywhere, South Mississippi, Baton Rouge, South Texas?

Mr. WOODLEY. I believe that if it involved a filling of a jurisdictional water, that it would require a permit.

Mr. TAYLOR. What is the normal time frame for something like that, sir?

Mr. SUDOL. Let me try to answer that in a little more detail, sir. In a wetland, what will generally happen is that it will depend on the process. If you dig a ditch and you take that material and you put it into the wetlands adjacent to the ditch, that requires a permit.

There are nationwide permits for that process, and depending on if there are extenuating circumstances such as endangered species, water quality issues, or historic properties, generally those permits are issued in under 60 days for ditching activities, sir. If it is a large-scale ditching activity that impacts many acres, that will probably take a little bit longer, depending on the size and scope of the operation.

Mr. TAYLOR. Thank you, Mr. Chairman.

Mr. DUNCAN. We are going to have to move on. In the Mississippi marshland situation, you can drain, but you cannot fill or discharge without a permit.

Mr. COSTELLO. Mr. Chairman, I do think we ought to wish Ben well tomorrow when he appears before the Senate for his hearing.

Mr. DUNCAN. Certainly that is the case. We wish you the very best.

Mr. GRUMBLES. Thank you.

Mr. DUNCAN. I want to thank each of you, Dr. Sudol, Secretary Woodley, and Administrator Grumbles for being here with us. You have been very helpful and very informative.

We will move on to the third panel.

The next panel consists of Dusty Williams, representing the National Association of Flood and Stormwater Management Agencies. He is the General Manager of the Riverside Flood Control and Water Conservation District from Riverside, California.

Then we have Brian R. Holmes, who is the Executive Director of the Maryland Contractors Association, representing the Nationwide Public Projects Coalition.

He will be followed by Gary W. Perkins, who is Vice President of Field Operations for Bronco Construction Company out of Denham Springs, Louisiana.

We have Aldean Luthi from Hancock, Minnesota, who is here representing the American Farm Bureau Federation. Then we have Charles M. Tebbutt, who is the Staff Attorney for the Western Environmental Law Center. He is from Eugene, Oregon.

I want to thank each of you for being here. Several of you have come very long distances to be here. We appreciate that very much. We will proceed in the order of the witnesses that are listed.

Your full statements will be made a part of the record. You can then expand on that or elaborate on your statement as much as you wish.

We are going to have some votes here soon.

Mr. Williams we will go ahead with your statement and then we will have to break for the votes.

TESTIMONY OF DUSTY WILLIAMS, GENERAL MANAGER, RIVERSIDE FLOOD CONTROL AND WATER CONSERVATION DISTRICT, RIVERSIDE CALIFORNIA, APPEARING FOR THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES; BRIAN R. HOLMES, EXECUTIVE DIRECTOR, MARYLAND CONTRACTORS ASSOCIATION, GLEN BURNIE, MARYLAND, APPEARING FOR THE NATIONWIDE PUBLIC PROJECTS COALITION AND THE AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION; GARY W. PERKINS, VICE PRESIDENT OF FIELD OPERATIONS, BRONCO CONSTRUCTION, DENHAM SPRINGS, LOUISIANA APPEARING FOR EARTH MANAGEMENT AND PRESERVATION; ALDEAN LUTHI, HANCOCK MINNESOTA, APPEARING FOR THE AMERICAN FARM BUREAU FEDERATION; AND CHARLES M. TEBBUTT, STAFF ATTORNEY, WESTERN ENVIRONMENTAL LAW CENTER, EUGENE, OREGON.

Mr. WILLIAMS. Thank you, Mr. Chairman.

Mr. Chairman and members of the Committee, I am appearing before you today representing not only Riverside County, but on behalf of NAFSMA, the National Association of Flood and Stormwater Management Agencies.

I am pleased to have the opportunity to address this Committee on an issue of importance to those I represent. As a bit of background, I should tell you that Riverside County is a rapidly urbanizing county in Southern California, located about 50 miles east of Los Angeles.

We are typical of many Southern California counties in that we enjoy a semiarid climate. Our river streams and water courses generally flow only in direct response to rain events, and those are quite seldom.

NAFSMA, on the other hand, represents more than 100 local and State flood control agencies across the Nation, serving a total of more than 76 million citizens. Our most significant issue has involved the inability of flood control districts and public works agencies to carry out normal routine maintenance on flood control facilities.

In many of the flood control systems, especially in the Western United States, natural channels play an integral role in flood protection, while supporting habitat and natural water quality functions.

If these channels cannot be cleared regularly and easily, the community is placed in harm's way. The flood risk is very real. Recently, a number of California member agencies were told by FEMA's flood insurance program that any claims due to flooding in the areas where the channels were blocked would be subrogated against the flood control agencies since the channels have not been adequately maintained.

On one hand, the Federal Government was saying that the channels could not be cleared without undertaking a time-consuming costly process, while at the same time clearly sending the message that the channels must be cleared now.

Then there is the further dilemma of what is jurisdictional. A clear consistent definition across and within Federal agencies for such key terms as "navigable waters," "waters of the U.S.," "isolated waters," and "tributaries" would go far.

The process of requiring a 404 permit triggers the involvement not only of the EPA and the Corps of Engineers, but also the Fish and Wildlife Service, the States in some cases, and the regional water quality control boards, in California's case.

Just issuing a consistent set of definitions that would be supported by all the agencies would be a much welcomed accomplishment that would help significantly to address such inconsistencies as identified by the GAO and others.

Further, we recognize and appreciate the need to address regional differences. We support the establishment of clear guidance to provide uniformity within regions and districts and consistency that reflects the true intent of the Clean Water Act.

The recent report from the GAO on waters and wetlands clearly demonstrates numerous differences between 16 Corps district offices and their interpretation of what constitutes a jurisdictional water of the U.S.

NASMA members can attest to these differences, especially those of us in the arid Southwest. Within our generally dry region, jurisdictional delineations have gone so far as to determine that stormwater running down a paved street makes that street jurisdictional, warranting mitigation if the water is placed in the storm drain.

The report points to the differences between Corps districts. While we believe this is true, significant differences can occur within the districts themselves, depending on which staff member is working on your project.

This is due to the lack of uniform guidance on the definition of waters, what constitutes an ordinary high water mark, and the process for conducting jurisdictional delineations.

Many man-made flood management facilities are classified jurisdictional and require permits prior to routine maintenance critical to the public's health and safety. The current regulations require that if these facilities are allowed to have vegetation established within them, then the responsible public agency must mitigate for

the removal of such vegetation, suffer unnecessary delays, and excessive maintenance and administrative costs.

Therefore, once they are permitted, extra efforts to keep these channels devoid of vegetation must be undertaken to avoid such costs and delays. This practice, in essence, promotes a scorched earth policy. We strongly recommend the establishment of guidance allowing public agencies the ability to properly manage their public infrastructure without having to implement such drastic policy.

The ability to allow vegetative growth and managing natural channels without regulatory interference would provide greater value to the watersheds by providing water quality functions, as well as habitat functions for various species, and at the same time, provide the required flood protection.

In summary, we understand that environmental issues must be addressed and/or mitigated to allow flood control projects to be constructed. What we are asking for is the reasonable and predictable application of Section 404 permits with allowances for regional differences.

We request the development of a means to allow local agencies to perform required maintenance without the need to obtain additional Federal permits. We encourage the Corps to better coordinate with all local, State, and Federal agencies to streamline the issuance of Federal permits.

We support the GAO's recommendation for the Corps to survey its district to solicit information on differing approaches in determining wetlands jurisdiction. We urge that national stakeholder groups, representing those impacted by these decisions, be given a role in the interpretation and understanding of the findings.

NAFSMA would welcome the opportunity to participate in the national stakeholder discussion on these issues.

I thank you for the opportunity to address this Committee this morning. I would be happy to answer any questions you may have.

Mr. DUNCAN. Thank you very much, Mr. Williams.

I do apologize, but we never can predict exactly when these votes are going to come up.

The Subcommittee will have to be in recess for about 15 minutes while we go do two different votes.

Thank you very much.

[Recess.]

Mr. DUNCAN. The Subcommittee will come back to order.

I apologize for the interruption.

Mr. Holmes, I believe you are next. You may begin your statement.

Mr. HOLMES. I am Brian Holmes. I am Executive Director of the Maryland Highway Contractors Association. I have served on the American Road and Transportation Builders Association's Environment Committee for more than 15 years. I am an incorporator of the National Wetlands Coalition.

In addition to representing ARTBA, I am also here on behalf of the Nationwide Public Projects Coalition, of which I am Chairman. ARTBA is a federation of over 5,000 construction companies, engineering firms, construction equipment manufacturers, materials, suppliers, public agencies, universities, and other organizations en-

gaged in transportation and construction activities in the United States.

NPPC is an association made up of mostly of regional and local governments that are involved in municipal water supply, flood control, agricultural irrigation, waste water and storm water management, and transportation infrastructure. NPPC member public agencies represent some 15 million constituents, extending from Connecticut to California, and from Alaska to Georgia.

I am going to dispense with the rest of my prepared remarks because the previous questions and some of the testimony have covered SWANCC, the SWANCC rulemaking, the GAO report, and Deaton.

I would just like to make a couple of points in my remarks. First of all, the lack of definitions for two key terms in the 404 regulatory program is unacceptable. You clearly need a rulemaking to define these terms. You cannot run a regulatory program without key terms being defined. I think it was unfair for the previous witnesses to blame uncertainty on the courts. They have only stepped in to try to clean up the mess.

To continue with the football analogy, it seems to me that the Corps and the EPA are suggesting that we have to go to the booth for official review and a ruling before you can even run a play.

Finally, I think that communicating the determinations is no substitution for defining your terms. I think the problems here are similar to what happens if you build a fence, and you cut the first post, and then you cut the second post, copying the first one, and then the third one copying the second, et cetera. By the time you get to the end, the first one and the last one do not look anything like each other.

Here, what we have gotten away from is the necessity to obtain permits for discharging dredged or fill material into navigable waters of the United States. That standard is a far cry from dropping dye into a roadside ditch, an action which Deaton says a permit should first have been obtained before you do it.

As for geographical and climate differences, that is what we have States for. I think Tulloch illustrates the depths to which the Clean Water 404 program has descended. Tulloch essentially argued that the bits falling off a shovel constitute a discharge of dredged or fill material into the navigable waters of the United States and that pilings for piers are fill material within the meaning of the Clean Water Act. I submit that we are getting too contorted here and that the whole concept is essentially bankrupt.

The States can and do regulate wetlands and water courses without pretending that they are navigable. They can and do have differing and appropriate definitions of wetlands, using hydrology, hydric soils and hydric vegetation.

As it is appropriate for States to do this, it is inappropriate for the Federal Government to micro-manage activities that do not constitute the discharge of dredged or fill material into navigable waters.

I would like to finish on the legislative front. We are very interested in the bill that Congressman Baker of Louisiana is planning to introduce. The provisions of his Comprehensive Wetlands Conservation and Management Act could bring forth clarity and con-

sistency, reduce inefficiency and delays, and make the protection of high value wetlands a national mandate, using the methodology of the former H.R. 1330 and the Clean Water Reauthorization bill that was processed in this Committee under the Chairmanship of Representative Bud Shuster.

Thank you. I would be happy to answer any questions.

Mr. DUNCAN. Thank you very much, Mr. Holmes.

Mr. Perkins?

Mr. PERKINS. Thank you, Mr. Chairman, and ladies and gentlemen of the Committee. I would like to thank the Committee for the opportunity to speak with you today, and a special thanks to Congressman Baker and his staff.

I am Vice President of a small business contractor, Bronco Construction Corporation. We purchased 33 acres for new buildings for our company. The property front is a major highway, U.S. Highway 190, and is adjacent to the City of Walker, Louisiana, near Baton Rouge. This land is approximately nine miles from any navigable waterway.

Our inspection of the property, which is predominately a pine forest, revealed no standing water. Following the requirements of the U.S. Army Corps of Engineers, we hired a wetlands consultant at a cost of \$4,000. Their preliminary assessment, based on the Corps guidelines, showed three isolated areas that were potentially wetlands with no connection between the three areas.

So we had an elevation survey done at cost of approximately \$2,500. The survey showed the land to have a gradual continuous slope from Northeast corner to the Southwest corner. The lower point in the project area are all higher than the base flood elevation, meaning they are not in the wetlands. They are not the postage stamp. The lowest point in the project area are higher than the base flood elevation with no connection between the three areas. I have included that survey in Section 8 of my submittal.

Then, because we needed to fill one area for the construction project, we applied for the 404(a) permit from the Corps which cost \$318. After the Corps' review of the data, they decided that we had to mitigate 1.28 acres, and we had to purchase 2.6 acres at a cost of \$19,500 from a privately owned mitigation bank. Additionally, we were restricted to one bank in our watershed where the owners of the bank have no limit on the price that they set.

Because of this cost of \$19,500 for 1.28 acres, I contacted my Congressman. Mr. Michael Eby, of Congressman Richard Baker's office, contacted the Corps because of these outrageous mitigation fees. This prompted a visit to the site by four representatives of the Corps, along with Mr. Eby and I.

We found ourselves fighting briars, crawling on our hands and knees, like a coon dog after an armadillo. The Corps made an extensive effort, jumping from one lizard tail to button bushes trying to locate a connecting point between the two potential wet areas. Then we happened upon an old skitter rut, approximately 25 years old.

The Corps guys got all excited and said, "Aha. Here it is, the connecting point between the two areas." This really happened. Mr. Eby and I found no such connection. The skitter ruts they found ran east and west, approximately 600 feet south of the northern-

most potential wet area. The small isolated wet areas on the property are not wetlands. The nearest small made-man drainage ditch is over a quarter of a mile away. The Corps has once again overstepped its bounds and violated my Fifth Amendment rights.

I have several friends and business acquaintances who have encountered similar problems. I have some of their testimonies included. These unreasonable and inconsistent regulations have cost many private individuals millions of dollars, while mitigation bank owners profit.

Private property land rights are a vital freedom protected by the U.S. Constitution that set America apart. The property that we have worked hard to acquire should be free from unreasonable Government agency interference.

So, I am here on behalf of Earth Management and Preservation, a nonprofit corporation based in Denham Springs, Louisiana. Earth MAP is a grass roots organization comprising of businessmen and women, real estate practitioners, developers, individual land owners, and other concerned citizens. Earth MAP is dedicated to the principle that every person is entitled to clean air and water. The air we breath and the water we drink should be free from pollution for ourselves, our children, and grandchildren.

We should leave the environment as we found it and pass it on to future generations. Earth MAP members are environmentalists, and we recognize that the environment in which we live is important. However, the rights of landowners, as ensured by the Fifth Amendment, are equally as important. We believe in sound conservation, balanced with an individual's Constitutional rights, to own and possess property, free of unlawful deprivatation.

As the U.S. Environmental Protection Agency Administrator, Mike Leavitt said, in his opening statement on November 6, 2003, we need to balance the needs of the environment and the needs of humanity.

Finally, we agree and we endorse the commitment to uphold the beauty and the preservation of America's vast resources.

We appreciate the opportunity to speak with you today. We will be happy to answer any questions.

Mr. DUNCAN. Thank you very much, Mr. Perkins.

Mr. Luthi?

Mr. LUTHI. Mr. Chairman, members of the Subcommittee, my name is Aldean Luthi. Our family operates a corn and soy bean farm near Hancock, Minnesota. I am a member of the Stevens County Farm Bureau and I am pleased to be here on behalf of the American Farm Bureau Federation.

I want to highlight for you what you may already know, that the Federal Government's approach to wetlands regulations is controversial, overbearing, and confusing. It is having a direct impact on my operation's ability to remain a viable economic unit.

My problem with the U.S. Army Corps of Engineers surfaced about a month ago after I initiated a project to improve the draining of 11 of 130 acres I have under a center pivot irrigation system. Before I conducted any work, I contacted USDA's Natural Resources Conservation Service to get approval, and I was told that they did not consider my land to be a wetland. That was the land that was trying to improve.

After applying for the permit, the Corps wrote me that they had reviewed my information and did consider my proposal, an attempt to fill 11.8 acres, a wetland. The Corps said I would need a Section 404 permit and would have to restore or create wetlands at a ratio of 1.5 acres of compensatory mitigation to one acre of wetlands adversely impacted.

I will need approximately 17.7 acres of restored or created wetlands, which will cost me about \$77,000. To top it off, the Corps also sent a copy of a public's notice, inviting a public interest review of my intended of my own land.

I am here to tell you that nothing could be more intimidating than to be confronted with the question of whether Federal Clean Water Act jurisdiction over navigable waters extends to the land that I farm.

To make matters worse, the Corps claims that jurisdiction over my property is based upon a hydrologic connection of my field to an unnamed wetland, which is adjacent to another unnamed wetland, which is adjacent to an unnamed tributary which is adjacent to the non-navigable Chippewa River, a tributary of the non-navigable upper reach of the Minnesota River.

Mr. Chairman, my point is that the navigable portion of the Minnesota River is over 160 miles as the crow flies from my land. The tenuous hydraulic connection that exists between my land and the Corps' tributary is generated by runoff and only occasionally exits my property through a culvert and a levee that my center pivot irrigation system uses to circle through the Corps' unnamed wetland.

The frequency and the volume of the surface water runoff is generally limited and varies from year-to-year. The flow through the unnamed wetlands is nonexistent most of the year. Any water that leaves my property, continues through a Federal wildlife management area immediately abutting my property and once on the wildlife management area, the water encounters various water management structures designed to obstruct and prevent the flow of the water into the unnamed tributary.

Water that encounters the water management structures sometimes overflows the structure and travels through the remaining portion of wetland, and ultimately into the Chippewa River at a point that is about three-quarters of a mile from my property.

My 130 acres, including the 11 acres that the Corps is calling a wetland, has been farmed for almost a century, and prior to Federal ownership of the land abutting my property, there was little or no drainage problems. In fact, the unnamed wetlands referred to in the Corps jurisdiction determination, was once an active farming operation.

Only after the Department of the Interior bought the property, build water management structures, and converted the site into a wetland, was there a direct impact to the lack of drainage from my land. My land is not navigable water. It is non where near navigable water. If my land can be regulated by navigable water, just about any land can.

My situation is not unique. There are other farmers who face the same problem but do not feel that they may criticize the Corps or other Federal agencies without inviting more regulatory burdens upon their farms. It is fortunate that I have several farm bill tools

at my disposal. I appreciate their incentive-based alternatives exist.

But Mr. Chairman, I am a farmer. I am interested in keeping my land in production, not taking it out of production. Those programs work well for some people, but for someone like myself, I want to be able to improve my land and maintain a viable and economic farming operation to pass along to my children.

I also question why my project would not fall under Clean Water Act Section 404(f) exemptions. I thought that the law allowed farm and ranch operations to continue normal farming and ranching activities, but it appears that the Army Corps and I interpret the Clean Water Act jurisdiction reach differently.

Mr. Chairman, this just goes to show that there is a great need for Congress to clarify these issues. There is too much room for different interpretations of which lands are regulated by navigable waters and which activities are exempt. The current situation leaves farmers like myself with a great deal of uncertainty.

Thank you for the opportunity to tell my story. I hope you and your colleagues will look at how to protect our natural resources while also maintaining the ability for farmers and ranchers to continue producing food, fiber, and fuel.

I have a few pictures we are going to show just to clarify. The pictures are worth a thousand words. It will give you more of an insight of what we are talking about here as far as the farming operation is concerned.

On the screen, you will the irrigator circles. This is what is the first wetlands that is on my property. We call it a wetland. We know it is a wetland. It is designated as a wetland.

The area that I want to improve the drainage on is this portion right here. It has been farmed. The irrigation system circles on these little lines you can see across here. It makes the whole circle. That is one reason when I said that my family was interested in farming it, in order to farm it economically, we have to run an irrigator across the whole works. That is why we would like to do this part more efficiently.

This is a picture of the land that we are talking about. The center pivot is right behind me. I took the picture. Over here is the wetlands area. This is the area that I want to improve the drainage. For all the time it has been farmed.

This is another picture of the wetlands area. It shows the dike that it runs on, the difference in the topography of the land, and the drainage across there. It is fairly flat. It does not run off except in the spring. Our spring thaw has already happened this year. We probably only had one day that the water had run off. That is probably going to be the extent of it for the year. My feeling is that the impact is rather trivial.

Thank you, Mr. Chairman. I will entertain any questions you may have.

Mr. DUNCAN. Thank you very much, Mr. Luthi.

Mr. Tebbutt?

Mr. TEBBUTT. Thank you, Mr. Chairman. My name is Charlie Tebbutt. I have been an attorney with the Western Environmental Law Center representing groups throughout the West for the last

ten years, seeking to protect our Nation's waters from illegal pollution.

I am here today to advocate for the full protections of the Clean Water Act to our Nation's already imperiled waters. Without these protections, to the degree originally envisioned by the Act, many of our Nation's waters will be further diminished and degraded.

Let me also just say at the outset that what we have been talking about and heard a lot today about is wetlands. But wetlands are only one part of waters in the United States. There are many, many parts of waters in the United States. Wetlands are an integral part, but again, are just one.

The attempts to take away some of the protections of the Clean Water Act would result in the exact opposite of what was intended in passing this landmark legislation. Congress declared it to be our Nation's policy to eliminate the discharge of pollutants into our waters by 1985. That is nearly 20 years ago.

I would also like to say that Congress has made a balanced choice. We have heard a lot here about property rights. The issue of property right is the unlawful taking of property.

Congress has passed laws that say that protection of our clean water is just one of the first and foremost aspects of our public health and environmental laws. People know that. People are on notice that wetlands and streams must be protected.

Therefore, it is important for everyone to recognize this. The gentleman on my right does have wetlands on his property and he is trying to protect them, and I admire that. It is important that we do that across the board.

Since my time is short today, I have chosen just a couple of examples of some pictures. These pictures are from a case that I worked on in the State of Washington. These are common fact situations that I run across in enforcing the Clean Water Act through the citizen suit provisions in the arid West.

The first example involves a large concentrated animal feeding operation. I am going to run through a couple of these pictures. These show a panorama, essentially, of manure. What you are seeing in this picture is about four to six feet of manure piled on a two-acre area right down to a stream in arid Eastern Washington. If you just follow this, and imagine that the first picture is on your left, and each other picture goes to your right, that is the approximate two acres of manure that is present on this property.

The area just at the top here is the manure line. Right at the edge of that manure is a stream. That will become more clear in the next picture. This is the headwaters of the stream right now.

In the West these do not look like the streams that we see many places. We do not have volumes of water flowing through these. They are low volume streams, but these are the lifeblood of the regions.

My clients received an anonymous phone call about massive amounts of manure discharging into the stream. They took these photographs. I would like you to take a close look at this photograph, and then take a close look at the next one. That is the same stream bed.

The owner of that land, the owner of a large concentrated animal feeding operation, over 5,000 animals, went in after we told him

about his illegal discharge, and obliterated the stream altogether, about a quarter mile that ran through his property. As you can see in the foreground of that picture, that is the abutment of a bridge that goes under the culvert. The stream goes under the road right there and continues through the property. We then brought a 404 action against him for violating the Clean Water Act. The case was settled the day before trial.

The next picture shows the stream reforming. Water has an amazing way of starting to reform itself. The farmer ditched that to allow the stream to flow through there because otherwise it would have caused more damage on his property.

It was nearly six months later that we determined that the land was under the defendant's control, and in response to the fact that we showed him this information, he obliterated the stream.

The second scenario involves another egregious example of pollution. This involves a couple of examples. The picture that we see here is a concentrated animal feeding operation, right in this area here, a large dairy of over 2,000 head on about 30 acres, by the way. The people I represent, the clients nearby, have approximately 200 head of cattle on 2,000 acres. They are traditional ranchers, in the true sense.

What happened is that there is a spring. The dairy sits on a plateau above two other ranches, this ranch here and this ranch here. It is about 150 feet to 200 feet higher than those other areas. What the owner of the land did is he bulldozed all his manure waste, dead animals, syringes, calf fetuses, and other material right into where this spring starts. There is a picture of the pile of manure that he took in.

I will skip the next slide, but what it does say is that it shows the pile of manure, straw, posts, wires, and dead calves were dumped at the top of the gully. If you will look closely, right there is the calf fetus lying right next to the spring. The spring runs right next to it.

Here are the carcasses lying right in the spring. That is the water system right there that runs through it. Those are the carcasses lying in it and next to it. This happened over a period of years.

My clients discovered this degradation of the land and brought it to our attention when the State agencies and Federal agencies failed to do their job. But the point is that this stream runs across the land. You can see the green indications on the map. It runs down to another creek, which goes into the Prairie Reservoir used for recreation and eventually to the Snake River.

In each example these intermittent streams were being horribly polluted by un-permitted discharges. Under the present Administration's implementation of the Clean Water Act, as reflected in its guidance and abandoned draft rule, these waters would likely be dropped from protection.

These waters feed larger streams and rivers which, if left unprotected, would diminish the amount of water reaching these downstream rivers and the quality and safety of these waters. In the West we cannot stress that enough because water is a precious resource.

I am sure my time has elapsed, but I urge you not to weaken the Clean Water Act, but to give it the full effect wisely intended in 1972. Anything less further imperils our common public health and the environment.

Thank you.

Mr. DUNCAN. Thank you very much, Mr. Tebbutt.

I am going to go first for questions to Mr. Baker.

Mr. BAKER. Thank you, Mr. Chairman.

I am going to go to the principal policy underlying wetlands management.

Mr. Tebbutt, do you feel that wetlands mitigation is useful public policy?

Mr. TEBBUTT. It can be under certain circumstances. But most wetlands mitigation studies have shown it is not effective because you cannot recreate what nature has already created.

Mr. BAKER. Would it be your professional opinion, then, that where identifiable wetlands are on a person's or a company's property, that would be identified as a unique wetlands, that just no activity be permitted in that instance on that site, or on a site adjacent which would adversely affect the wetlands?

Mr. TEBBUTT. Well, I think every situation has to be looked at individually. If you look at what the Corps has done to date, the Corps has approved some 99.85 percent of all applications to do work in wetlands. There is a very small example of situations where there are problems.

But the Clean Water Act provides a floor through which we should not fall so that we can protect the few remaining resources we have.

Mr. BAKER. My question was going at policy, not necessary the Corps' implementation. I think I know where the 1.5 percent are that get denied. However, putting that aside for the moment, trying to get to a platform from which we can go forward, do you think the current system is working fine?

Mr. TEBBUTT. No, I do not. I believe it is inconsistent, but it needs to be applied more consistently and true to form to the Clean Water Act, which it has not been. A great deal of our wetlands have been lost under the existing regulations which was not envisioned by this Clean Water Act.

Mr. BAKER. There could be agreement reached, perhaps, on what constitutes a valuable wetlands resource that might be endangered because of current inaction that is not subject to a project or permit application.

Take Schandler Island off the Gulf Coast. Nobody is proposing a multistory building. Nobody is drilling out. Nobody is driving cars. It is just a resource that we are losing day-by-day.

Now, that is an extremely valuable wetland, unique and rare, and we are doing nothing. But we are in people's backyards who are trying to build barbecue pits. I will give you an example. I have a shrimper not far from Baton Rouge, not in my district, had a swale in an Riparian of land. An Riparian is a narrow section going back to the waterfront.

He wanted to build his own shrimping vessel. He brought in a single load of dirt to level off the yard so that he would have a plat-

form on which to construct his vessel. The Corps showed up, made him haul it all out, and told him that he could not do that.

In that instance, although I take it from your testimony that every drop of water on every parcel of land has ultimately some contributory value to our overall wetlands condition.

It would seem that if we had a system that allowed that gentleman to pay a fee, use that to protect the identified resource which we are losing in great number, that the public policy position would be to preserve for the long period those wetlands for which there is no confusion, for which there is no dispute, for which business people would be more likely available to write a check and say, "Take it and someone such as yourself, a professional, go manage it in perpetuity for the benefit of all."

It is that logical perspectives of developable property that are now being blocked and in many cases the mitigation bank, privately owned, charges confiscatory rates that has no relationship to enlarging the wetlands. It is already there. It is in the bank. It is being maintained anyway. You are just getting money out of a landowner.

Is there not a way for us to move forward on some better methodology than the one that is simply based on the presumption that any water coming off of your property, potentially is a hazard to the rest of society; therefore, we are not going to let you build a barbecue pit. That does not seem to serve either side very well because the identified wetlands that we are losing in great number, there are no resources.

Mr. TEBBUTT. Yes, if I may respond. First of all, the Corps only turns away .15 percent of applications rather than 1.5.

Mr. BAKER. I thought you said 98.5 percent were approved.

Mr. TEBBUTT. 99.85 percent, I believe I said.

There are a couple of points.

One, there are exemptions within the Clean Water Act for small-time operations that do not affect large areas of wetlands. There are also general permits available for those types of situations.

So I think the system is in place to take care of these situations. Some people make the mistake of not knowing about them, and they need to be treated as such. If it is a legitimate mistake, those are issues to be handled first by the Agency with kid gloves. Not everyone should be treated with a hammer. It is different between a small property owner trying to do something on his land versus a large industrial entity that knowingly goes in and destroys wetlands.

The system allows those two situations to be treated differently already through penalties, through mitigation, and through other things.

The other point that I would like to address is the mitigation banks. I do not know anything about your mitigation bank in your area, sir, but in other places there are mitigation banks that are publicly owned and that do not use usurious rates to try to make a profit off of wetlands mitigation. Maybe that is the system that should be looked at, and not restructuring the Clean Water Act entirely.

Mr. BAKER. I thank the gentleman. I know my time has expired, Mr. Chairman. I will just be real quick in summarizing.

I think there are clear differences in perspective about how the system is functioning. In the many years I have been involved in this subject from a public official perspective, and working with individuals who come to the office, like Mr. Perkins, the process is not a matter of days or weeks. It is often a matter of months, or more likely a year.

It is very expensive. Ultimately if you agree to mitigate, the availability of like-determined property available in a mitigation bank is very limited. They are privately owned. If not extortion, it is something very close to it in order for you to be able to use your own property.

Perhaps our administration in our region is just different from the rest of the country. I do not know, but ours is totally unacceptable from the standard of reasonableness, Mr. Chairman. I appreciate again your willingness to call this hearing. I could probably go on for too long.

Thank you.

Mr. DUNCAN. Thank you very much, Mr. Baker. You have added a lot to this hearing.

Mr. Costello?

Mr. COSTELLO. Thank you, Mr. Chairman. Following up on one of Mr. Baker's first question and the point that he made, Mr. Tebbutt, let me ask you this. You have heard a lot of testimony today and a lot of frustration from members of this Subcommittee about the inconsistencies with the policy and methodologies used by the Corps.

I think I heard you say that there ought to be more consistency in applying rules. Can you expand on that? Would you agree with the frustration that you have heard here today with the methodologies used by the Corps and the inconsistencies?

Mr. TEBBUTT. I do not disagree that there are frustrations with what the Corps does. I have been extremely frustrated with the Corps myself in much of the work that I have done, for their failure to be able to come out in the field to delineate a wetlands or an intermittent stream because they just do not have the funding to do it.

I think that is the rub. That is where a lot of the inconsistency comes in is that the field staff is so stretched. There are so many wetlands areas, so many streams that need protection, that they do not know what to do. As a result, 99.85 percent of all applications get through. I am sure they all should not get through.

As everyone has talked about today, we have had no net loss of wetlands policy for 10, 12, or 15 years now. But we continue to lose wetlands. That is the reason. The law is not being applied as it was intended. Yes, there are going to be frustrations, but most of those people have an opportunity to go through the Corps to work with the Corps to get additional funding from various Congressional provisions that exist out there, to deal with the problems of the land and to get around the wetlands that need protection, and to work with the wetlands rather than simply destroying them.

So I do think that there is an opportunity to improve the system. There always is. But we should not throw the baby out with the bath water here.

Mr. COSTELLO. So if I understood you correctly, the inconsistencies is more of a problem because there is a lack of funding and a lack of personnel to enforce; is that correct?

Mr. TEBBUTT. I think that is part of it. The problems that I have seen in the field in enforcement cases and others is that people go out and do things, often times without talking with the Corps of Engineers, or to the EPA, or sometimes they talk to one agency that tells them something different.

I do not disagree that there needs to be more consistency, but the program was set up 32 years ago. Is it working? Is it perfect? Absolutely not. It needs constant improvement. As we get more information and more science, we continue to improve it. I think Congress could give more funding to the agencies to do their job as well.

Mr. COSTELLO. Let me ask you and the other members of the panel as well if they would like to offer their thoughts or an answer to this.

Is it possible or even admissible to create a one-size fits all methodology in determining Federal jurisdiction over waters, including wetlands?

Mr. TEBBUTT. It is a very difficult task because things vary from place-to-place. But what Congress has done and what the regulations say that exist presently is that they define what are protected waters of the United States. It is that implementation that we need to look towards. There are going to be different hydrologic conditions, meteorological conditions, et cetera that I would pose to you is logical and is what the Clean Water Act intended to do. That is what we need to follow through with.

Mr. COSTELLO. Would any of the other panelists like to take a shot? Mr. Holmes?

Mr. HOLMES. Thank you, Mr. Costello. Just to clear up one point, on the statistic of 99.85 percent of applications being granted, I think that is in comparison to the denials rather than to the number of applications which are initiated and are abandoned in despair. I think there are plenty of cases where people elect to stop throwing good money after bad in what appears to be an interminable process to get a permit.

As to the one-size-fit-all, I think if the Clean Water Act were to be restricted to navigable waters of the United States and adjacent wetlands, you probably could do a one-size-fits-all. You might want to do something along the lines, which I believe is in Representative Baker's bill, about how you define wetlands and even classify them.

But for the extraordinary jurisdictional reach we are now seeing under the Clean Water Act, I think that is something that is really best left to the States. The States could protect their own resources and have a better feel for the geographical peculiarities, certainly better than the Federal Government could achieve.

Mr. COSTELLO. Thank you. Mr. Chairman, I have one more question.

Mr. Luthi, let me ask you this. Did the Corps offer you an explanation as to why the proposed activities on your farm was not subject to Section 404(f), exemptions for normal farming activity? Did they give you an explanation?

Mr. LUTHI. Mr. Costello, as far as an explanation goes, the only explanation I got was, as I alluded to in my testimony, that this public notice is the only correspondence I got from the Army Corps until about a week afterwards. After the public notice went out, I did get a letter explaining their demands about the mitigation.

I want to point out one thing, too, that the Army Corps has come in and said, "This is a wetland." which was not on my wetlands map before I had applied for this permit. You talk about no net loss. If they can go ahead and do this, we are going to be adding to the no net loss wetlands value.

The other part, as Mr. Holmes had alluded to, the cost of this project is so astronomical that they know that I will not go ahead with it. I think that is the portion. I have not heard back from the Minnesota DNR. I did get a letter from the Minnesota Pollution Control that they wrote on the Clean Water part of it.

Other farmers have had this problem, too, that they know that they have us over a barrel. I am not like Mr. Perkins here who has already spent a whole bunch of money in legal fees. I have not gotten into it that far. I am just talking about the mitigation part of the \$77,000.

Realistically, I have a neighbor who had the same thing. He had a half-acre. He wants to mitigate out because it is right in the middle of his field. He knows they call it a wetland. He wants to mitigate it out. He has \$11,000 in that half-acre in legal fees. He has no where near mitigating it out. They do not make it possible to be done.

That is the point that I want to make known. We need to have some consistency.

Mr. COSTELLO. Thank you, Mr. Costello and Mr. Chairman.

Mr. DUNCAN. Thank you very much.

Mr. Holmes, not only would the 99.85 not count the abandoned applications, but it would also not include those that were granted only after lengthy or very costly compliances or changes that were made at the instruction of the Army Corps. That is where a lot of the problem comes in.

Mr. Williams, if streets and curbs and gutters are considered waters of the United States in your area, what does that do to the ability of public agencies to provide public services? Does a community have to make water entering a storm sewer, for instance, already meets their water quality standards?

Mr. WILLIAMS. First, I would like to clarify that I showed that as an example. I do not want to characterize to this Committee that that is everywhere throughout our country or within Southern California.

But it does happen on occasion. It does show the inconsistencies. With regard to your question about the water quality of the water entering the storm drains, Section 402 of the Clean Water Act through the NPDES program is really charged with the water quality issue there. That is something that all of our jurisdictions have to deal with as well.

Mr. DUNCAN. Let me ask you, Mr. Holmes and Mr. Williams, either one of you or both of you. Both of you represent organizations that build and maintain public projects.

What impact do you think the confusion over the Clean Water Act jurisdiction has had on the ability to provide benefits to the public through public infrastructure projects?

Any comments, Mr. Holmes?

Mr. HOLMES. The cost of obtaining a permit for a public project has become astronomical. You can probably spend more getting a permit for a bridge or a highway project than you pay for the engineering for the design of it.

Mr. DUNCAN. That is the point I am really getting at. I chaired the Aviation Subcommittee for six years.

Mr. HOLMES. Airports?

Mr. DUNCAN. We had testimony there that all these airport projects generally cost on average about three times what they should have, primarily because of the environmental rules and regulations and red tape. They said it took 14 years from conception to completion to complete the main runway at the Atlanta Airport because of all these rules and regulations. It only took 99 days of actual construction.

Mr. Perkins or Mr. Luthi, do you think these pictures that Mr. Tebbutt have shown, are they typical of the farmers or landowners in your areas?

Mr. LUTHI. I would like to answer that. No, sir. I do not believe they are. It makes me sick to see that there would be people that would classify themselves as farmers and do this. We have to protect our environment we live in. We want to be the stewards of the land. In our area we have several dairies. They are just outstanding. You could almost eat off the parking lot. They are that clean.

Mr. DUNCAN. The problem that I see is this. There are so few of these people that are doing these extremely bad terrible things. The regulators have increased their funding and their employment so much over the years that they are coming after people who are not doing these bad things because they cannot find enough of these other people to prosecute. I have expressed my concerns several times over the small farms and small land owners.

What I have seen over the years, and I have not had any family members or real close friends who have had these things happen to them, but I have seen thousands, and read about thousands of small coal operations having to close down because of all the rules and regulations and red tapes. There have been thousands of small timber operations, and thousands of small farms, and hundreds of small oil companies.

What I have seen is that these environmental extremists are the best friends that the extremely big business has because they are running the small guys out of every business and industry in the country. What I have also noticed is that most of these environmental extremists come from very wealthy or very upper income families. Perhaps they do not realize how much they are hurting the poor, the lower income, the working people in this country, and the little guy in these operations.

But it just seems to me that it has gotten totally out of whack, and totally unfair. Most of these people have never farmed. They have never met a payroll. Most of them come from the big cities.

I just wish that they could spend some time out in the country with people like you and see what you have to go through and how

you have to be almost legal geniuses to understand and comply with all these rules and regulations and laws and red tape, not only from the EPA and the Army Corps, but the State agencies.

I was a lawyer and a judge before I came to Congress. There are so many millions of laws and rules and regulations on the books in this country today, they have not even designed a computer that can keep up with all them, much less a human being.

I thank you very much for taking time out from your schedules to be here at this hearing today. I hope that this has been helpful to some extent. I appreciate your testimony.

That will conclude this hearing.

[Whereupon, at 5:17 p.m., the Subcommittee was adjourned, to reconvene at the call of the Chair.]

Statement for the Record

Rep. Earl Blumenauer

Water Resources and Environment Subcommittee Hearing

“Inconsistent Regulation of Wetlands and Other Waters”

March 30, 2004

Clean water is important to all Americans, regardless of their political affiliation. According to a February 2004 nationwide survey conducted by prominent Republican pollster, Frank Luntz, 91 percent of those surveyed were concerned that America’s waterways would not be clean for future generations.

Our record of simply complying with existing law has been inadequate. Today, 40 percent of assessed rivers, lakes, and coastal waters do not meet current water quality standards. We’ve already lost over one-half of our nation’s wetlands since European settlers arrived in this country, and in some areas we’ve lost over 90 percent of the original wetlands.

This is not the time to look at limiting the jurisdiction of the Clean Water Act. If anything, we should be putting in place policies and programs that guarantee further restoration and protection of our nation’s water. We continue to lose between 60,000 and 100,000 acres of wetlands every year, in spite of the Bush administration’s “no net loss” policy.

Earlier this Congress I was one of 218 members of the House of Representatives, including many members of this Subcommittee, to urge the President to abandon a proposed rulemaking to limit the jurisdiction of the Clean Water Act. I am pleased that the administration has since withdrawn this rule, but I continue to be concerned that the guidance given to the Corps and the EPA is confusing, and has the potential of reducing wetland protections.

The bottom line is that all waters of the United States deserve protection. Increased flows of pollution and floodwaters affect downstream drinking water quality, harm recreational uses such as fishing, swimming, and boating, harm water-based businesses all the way down to the coasts, and dramatically reduce the presence of wildlife, including migratory waterfowl. Protecting wetlands is also often the most cost effective way to purify water, increase wildlife habitat, and prevent floods.

STATEMENT OF BRIAN R. HOLMES
ON BEHALF OF
NATIONWIDE PUBLIC PROJECTS COALITION AND
AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION
TO THE SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
TO THE HEARING ON
INCONSISTENT REGULATION OF WETLANDS AND OTHER WATERS
10:00 A.M. MARCH 30, 2004
2167 RAYBURN HOUSE OFFICE BUILDING

Introduction

Good morning Mr. Chairman and members of the Subcommittee. My name is Brian Holmes, Executive Director of the Maryland Contractors Association. Before that, I spent 13 years as Director of Regulatory Affairs for the Connecticut Construction Industries Association, which included service on a state legislative task force on wetlands and testimony before state and federal legislative and regulatory bodies on wetlands issues. As a member of the Council of State Executives of the American Road and Transportation Builders Association (ARTBA), I have served on its environment committee for more than 15 years and am an incorporator of the National Wetlands Coalition. In addition to representing ARTBA, I am also here on behalf of the Nationwide Public Projects Coalition (NPPC), of which I am Chairman.

Let me take a moment to tell you about these two organizations.

ARTBA is a federation of over 5,000 construction companies, professional engineering firms, construction equipment manufacturers, materials suppliers, public agencies, universities and other organizations engaged in transportation construction activities throughout all parts of the United States. Our industry generates more than \$200 billion annually in U.S. economic activity and sustains more than 2.2 million American jobs. Established in 1902, ARTBA is the only U.S. trade association that represents the full spectrum of organizations comprising this major industry.

NPPC is an association made up mostly of regional and local governments that are involved in municipal water supply, flood control, agricultural irrigation, wastewater and stormwater management, and transportation infrastructure. NPPC member public agencies represent some 15 million constituents extending from Connecticut to California and from Alaska to Georgia. Some members are firms that provide services to the public sector. NPPC's goal is to help change those environmental laws, rules, and case law that too often impede the provision of vital public infrastructure and services in a safe, timely, affordable, and, yes, environmentally responsible fashion.

Our Concerns Over Wetlands Jurisdictional Issues

Both of these organizations are very concerned that the jurisdictional scope of Section 404 of the Clean Water Act is being determined on a case-by-case basis by individual district offices of the Corps of Engineers, leading to a very inconsistent, conflicting and confusing regulatory program. In February 2003, ARTBA provided comments to the Corps and the Environmental Protection Agency, in response to an Advance Notice of Proposed Rulemaking (ANPRM) issued by those agencies, strongly supporting the idea of a federal rulemaking process to clarify the jurisdictional scope of the Section 404 program in a way that would remove, or at least reduce, the tremendous inconsistency that exists currently across the Nation. Unfortunately, on December 16, 2003, EPA and the Corps decided not to complete that rulemaking, which, in our opinion, amounts to an abrogation of their responsibilities. This irresponsible decision has allowed the tremendous levels of confusion and ambiguity over the scope of federal wetlands regulation to continue, a situation that is not healthy for the environment, NPPC's constituents, or the transportation construction industry.

This situation is completely unnecessary. In 2001, the U.S. Supreme Court clarified (in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), commonly known as SWANCC) held that certain isolated waters are not subject to federal jurisdiction under the Clean Water Act as it presently is written. We have continually been dismayed that, despite this clear interpretation provided by our Nation's highest court, internal disagreements within the Corps and EPA have prevented the agencies from providing guidance to their field offices that would enable government regulators to draw clear distinctions between non-regulated isolated wetlands and regulated wetland areas. We believe this is due to the fact that the controversies reflected in the more than 33,000 comments the agencies received in response to the ANPRM mentioned above caused them to attempt to finesse the issue by passing the buck down to the Corps' district offices. As one might expect, this guidance void has caused regulatory staff personnel in Corps district offices to make dramatically differing judgments regarding the extent of regulatory jurisdiction over wetland areas that could be classified as isolated, leading to great confusion and increased permit delays.

Cancellation of that rulemaking left in place a January 2003 document issued by the Corps and EPA as guidance for jurisdictional determinations over isolated wetlands. Under that guidance, Corps districts are given broad authority to interpret statutory language, implementing regulations, and case law on a project-specific basis. Corps district personnel are allowed to determine on case-by-case bases whether or not specific wetland parcels are considered adjacent to navigable waters, or whether specific water bodies are considered to be tributaries to navigable waters. This unprecedented and disjointed delegation of authority to Corps field offices is certain to cause continued confusion in the wetlands permitting program until either the agencies, Congress, or both act to clarify the situation.

The Recent GAO Report

As the Subcommittee knows, we are not the only ones pointing out this reality. In a report issued last month, the General Accounting Office (GAO) confirmed that jurisdictional decisions are being made inconsistently across the country by Corps district offices. The GAO studied the jurisdictional calls made by 16 of the Corps 38 district offices from April 2003 to January 2004. The GAO study found that Corps districts differ greatly in how they interpret and apply the federal regulations when considering jurisdiction over adjacent wetlands, tributaries, and ditches and other man-made conveyances. Specific areas of inconsistent interpretations include the following:

- Hydrologic Connection. Corps districts differ in how they determine whether there is a sufficient hydrologic connection between a wetland and a water of the United States to deem the wetland jurisdictional. For example, some districts allow connection by sheetflow – overland flows of water over uplands (e.g., sheetflow) to suffice for asserting jurisdiction, while other districts do not. Also, some district offices deem any wetlands in the 100-year floodplain, regardless of actual hydrologic connectivity or lack thereof, to have a connection to waters of the U.S. sufficient to assert jurisdiction, while other districts do not.
- Proximity. Corps district offices widely vary in their use of proximity as a factor in making jurisdictional determinations. For example, one district regulates wetlands located within 200 feet of other waters of the United States, while another district uses 500 feet as a jurisdictional “rule of thumb.” Still other districts consider the proximity of wetlands to other waters of the United States on case-by-case bases without any reference to a specific linear distance.
- Anthropogenic Conveyances. Districts differ in how they regulate wetlands connected to other waters of the United States by ditches, pipes, storm sewers and other human-made conveyances. For example, one district regulates wetlands connected to other waters of the United States by ditches, only if the ditch modifies or replaces a natural stream. However, other districts regard wetlands to be subject to CWA jurisdiction regardless of whether or not a ditch connecting them modifies or replaces a natural stream.
- Presence of Barriers. While Corps and EPA regulations allow assertion of jurisdiction over wetlands separated from waters of the United States by man-made or natural barriers, Corps districts differ over whether jurisdiction is limited to those separated by one barrier, two barriers, or no reference to the number of barriers at all.
- Public Information. The GAO study found that the Corps is adding to the confusion generated by the above factors by failing to make information available to the public about their practices for making jurisdictional determinations. Only three of the 16 districts studied by the GAO presently make such available to the public.

Current Litigation

Obviously the situation described above reflects very bad government. We applaud the action by the Chairman of this Subcommittee, Mr. Duncan, for his actions in filing an *amicus curiae* brief with the Supreme Court last month asking the Court to help clarify this situation. We agree with the Chairman that the recent decision of the U.S. Court of Appeals for the 4th Circuit in *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), improperly interpreted the structure and operation of the CWA, and that the decision, coupled with the withdrawal of the SWANCC rulemaking process mentioned above, have left the determination of the jurisdictional scope of the CWA to arbitrary and inconsistent case-by-case determinations by agency officials.

NPPC also filed an *amicus* brief on behalf of the appellant in *Deaton*, joined individually by municipal and agricultural water agencies from California, Colorado, and Georgia. That brief asked the Justices to consider that the Corps' inconsistent and confusing assertion of Clean Water Act regulatory jurisdiction "even over *de minimis* ditches" often leaves public agencies as well as private citizens "at the whim of a particular regulator as to the jurisdictional test to be employed. The real world impacts for public projects are profound....In the wake of SWANCC and in the face of inaction by the Environmental Protection Agency and the Corps, the *amici* have found it difficult if not impossible to predict where and when CWA jurisdiction will be imposed."

Possible Congressional Wetlands Regulatory Reforms

We are particularly interested in a bill that Congressman Richard Baker of Louisiana is planning to introduce in the near future. We the provisions of Mr. Baker's "Comprehensive Wetland Conservation and Management Act" could bring substantial clarity and consistency to a program lacking in those aspects and will reduce waste and inefficiency, reduce time delays, and elevate the protection of high-value wetlands as a national mandate.

While the bill still is in the discussion draft process, we understand that it is based on the earlier and visionary H.R. 1330 that was introduced in 1991 and actually passed by the House as part of H.R. 961, the Clean Water Amendments of 1995. NPPC was vitally interested at the time because we were involved in adding language that would recognize the need for essential public infrastructure in wetlands conservation and management decisions. Unfortunately, the Senate did not take that bill up.

We recognize that we are preaching to the choir where H.R. 1330 is concerned because eight of its original sponsors currently serve on the Transportation and Infrastructure Committee, including Chairman Don Young and Chairman Duncan of this subcommittee. We also note that fully one-third of the original 175 cosponsors now are members of the House, and another seven have moved over to the Senate. Plus, we notice the names of Speaker Dennis Hastert and Majority Leader Tom DeLay as 1991 cosponsors, as well as then-Congressman and now Secretary of Homeland Security, Tom Ridge.

We believe that passage of a bill in the spirit of H.R. 1330 would go a long way toward restoring competent and even-handed administration of the nation's wetlands laws and regulations, which is very much what today's hearing is all about.

Most Critical Jurisdictional Issues

In an effort to assist the Subcommittee with its efforts to improve Section 404, let me discuss in some detail the two most critical wetlands jurisdictional issues we feel Congress should address in whatever wetlands-related bills come before it, and then summarize briefly five additional recommendations we have for improving Section 404.

The two most critical jurisdictional issues are those affecting how "waters of the United States" should be defined in light of the SWANCC decision. The two issues are (1) whether, and under what circumstances, the Corps and EPA may continue to use commerce clause factors to assert jurisdiction over isolated waters, and (2) what factors should be considered in determining if waters are considered to be "isolated waters" for jurisdictional purposes.

- Commerce Clause Factors. The first issue involves clarification of the question of whether Congress intended the jurisdiction of the CWA to be determined by the limited concept of "navigability" or by the more expansive parameters allowed by the Commerce Clause of the U.S. Constitution. While we believe the SWANCC decision clearly indicates that the jurisdiction specified by Congress in the CWA, including the Section 404 program, does not permit the broad application of the law that would be allowed by the Commerce Clause, the Corps and EPA apparently have difficulty in understanding that plain language. Therefore, we recommend that Congress make it clear that, in enacting the CWA, Congress intended to only exercise its authority over navigation and that regulatory jurisdiction does not extend to isolated waters that are intrastate and non-navigable where the sole basis for asserting CWA jurisdiction rests on any of the factors listed in the Migratory Bird Rule (i.e., habitat for birds protected by Migratory Bird Treaties or migratory birds that cross state lines; habitat for endangered species; or for use in irrigating crops sold in interstate commerce) or any other factor that might be related to interstate commerce, such as recreation, the sale of fish or shellfish, or industry. Congress should clarify that the agencies should limit their focus on "navigability" and avoid using other theories, such as interstate commerce, as a basis for jurisdiction under the CWA.
- Definition of Isolated Waters. Current regulations implementing Section 404 define "isolated waters" as those intrastate, non-navigable waters, including wetlands, that are not part of or adjacent to traditionally navigable waters or their tributaries. In its definition of "adjacent," the regulations currently include the concept of "neighboring," which leads some field regulators to assert broad jurisdiction, well beyond the limits of the CWA as clarified by the SWANCC decision. For example, the term "neighboring" is used to assert jurisdiction over wetlands that have never been contiguous and that are in fact far removed from navigable and tributary waters. In addition, regulators sometimes take a very broad interpretation of non-navigable

tributaries to navigable waters, frequently not requiring a continuous surface connection in order to assert jurisdiction.

We recommend that Congress clarify that non-continuous surface connections or underground connections of significant length, such as storm drains, should not be considered to be sufficient hydrologic connection to support jurisdiction, and that federal jurisdiction should exclude areas reached through underground connections.

In addition, we recommend that Congress clarify that the federal agencies' regulatory jurisdiction for waters involving only surface conditions (not involving underground connections) are limited to a specific, clearly defined point along the "tributary system" upstream from traditionally navigable waters. While there are several such points of demarcation that the Congress could select for defining the limits of jurisdiction, we believe the one that would lead to the most consistent interpretation among field regulators, would be to limit the definition of isolated waters to traditional navigable waters and their adjacent wetlands.

While some have argued for including non-navigable tributaries of navigable waters to the above-recommended definition, such tributaries obviously are further removed from the requisite nexus. In addition, wetland areas adjacent to non-navigable tributaries are even further removed, and arguments supporting the inclusion of such areas within the regulatory jurisdiction of the CWA are even weaker. We recommend that Congress clarify that there must be a significant nexus between the wetland and navigable water in order for the federal government to assert jurisdiction over it under the CWA.

Additional Recommendations

While we believe the two issues discussed above are the most important ones to be addressed by Congress in reforming Section 404, we also have five additional recommendations for improving Section 404. These additional recommendations are as follows:

- Wetlands Delineation. Criteria for wetlands delineation should be clarified in law. Such criteria should require that all three parameters of wetlands (hydrology, hydrophytic vegetation and hydric soil) be present in order for a wetlands determination to be made.
- Wetlands Categories. Wetlands should be classified into categories based on the relative values and the functions they serve. This was a keystone of H.R. 1330. Regulation of discharges of dredged or fill material into wetlands should be based upon these categories. High value, environmentally sensitive areas that provide a full range of wetlands values and functions should be more strictly regulated than they are currently. On the other hand, requirements for wetlands of lesser or marginal value and function should be relaxed.

- EPA Veto Authority. EPA's authority under Section 404(c) to veto permits issued by the Corps of Engineers, or by states that have assumed the Section 404 permit program, should be terminated.
- Expeditious Permit Decisions. Statutory deadlines should be established for completion of decisions on Section 404 permit applications. We believe that 90 days after submission of complete applications is reasonable.
- Mitigation Banking. The practice of mitigation banking has been encouraged strongly by Congress and has proved to be a big success, in terms of slowing the rate of wetlands loss in the United States while allowing high priority economic development activities to occur in some categories of wetlands. We are pleased that the Federal Highway Administration, in conjunction with the U.S. Army Corps of Engineers and the Environmental Protection Agency, issued new guidance in mid-July 2003 on wetlands mitigation banking and we urge Congress to further institutionalize this "win-win" practice in statutory language.

Conclusion

In summary, we advocate modification of Section 404 of the Clean Water Act in a manner that will allow proper balancing of environmental protection goals with those dealing with continued economic growth. We believe that the points I just summarized provide a sound framework for achieving that balance. That concludes my statement, Mr. Chairman. I would be pleased to answer any questions you or other Subcommittee members may have.



**Statement
of the
American Farm
Bureau Federation**

**TO THE
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT OF THE HOUSE
TRANSPORTATION AND INFRASTRUCTURE COMMITTEE
REGARDING
INCONSISTENT REGULATION OF WETLANDS AND OTHER WATERS**

March 30, 2004

**Presented by
Aldean Luthi**

**STATEMENT BY
THE AMERICAN FARM BUREAU FEDERATION
TO THE
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT OF THE HOUSE
TRANSPORTATION AND INFRASTRUCTURE COMMITTEE
REGARDING
INCONSISTENT REGULATION OF WETLANDS AND OTHER WATERS**

March 30, 2004

**Presented by
Aldean Luthi**

Mr. Chairman and members of the subcommittee, my name is Aldean Luthi. I am a corn and soybean farmer from Hancock, Minnesota. My wife and six children help operate a 1,500-acre farm. I am a member of Stevens County Farm Bureau and I am pleased to be here on behalf of the American Farm Bureau Federation.

I want to highlight for you what you may already know: that the federal government's approach to wetlands regulation is controversial and confusing and it is having a direct impact on my operation's ability to remain a viable economic unit.

My problem with the U.S. Army Corps of Engineers (Corps) surfaced about a month ago after I initiated a project to improve the drainage on 11 of the 130 acres I have under center pivot irrigation. Before I conducted any work, I contacted USDA's Natural Resources Conservation Service and the State of Minnesota to get approval and was told that they did not consider my land to be a wetland. Afterward, the Corps wrote me that they had reviewed my information and did consider my proposal an attempt to fill "11.8 acres of wetland." The Corps said I would need a section 404 permit and would have to restore or create wetlands at a ratio of 1.5 acres of compensatory mitigation to one acre of wetland adversely impacted. I will need approximately 17.7 acres of restored and/or created wetland, which will cost me about \$77,000. As you may know, the line between profit and loss on a farm is very thin. That kind of increase in my cost of production would have a huge impact on my farm's viability.

The Corps also sent me a copy of its Public Notice inviting a public interest review of my intended use - of my land. I did not get a warm and fuzzy feeling when I opened that letter. Nothing could be more intimidating to a farmer than to be confronted with the question of whether federal Clean Water Act jurisdiction over "navigable waters" extends to the land that we farm.

To make matters worse, the Corps' claim of jurisdiction over my property is based upon a hydrologic connection of my field to an unnamed wetland which is adjacent to another unnamed wetland which is adjacent to an unnamed tributary which is adjacent to the non-navigable Chippewa River, which is said to be a tributary to the non-navigable upper reach of the Minnesota River.

Mr. Chairman, my point is that the navigable portion of the Minnesota River is more than 160 miles as the crow flies from my land. The tenuous hydrologic connection that exists between my land and the Corps "tributary" is generated by runoff and only "occasionally" exits my property

through a culvert in a levee that my center pivot irrigation system uses to circle through the existing unnamed wetland on my property.

The frequency and volume of the surface water runoff is generally limited and varies from year to year. The flow through the unnamed wetland is non-existent most of the year. Any water that leaves my property continues through a federal wildlife management area immediately abutting my property. Once on the wildlife management area, the water encounters various water management structures designed to obstruct and prevent the surface flow of the unnamed tributary. Water that encounters the water management structure sometimes overflows the structure and travels through the remaining portion of wetland and ultimately into the non-navigable Chippewa River, at a point about three-quarters of a mile from my property.

My 130 acres and the 11.8 acres the Corps is calling a "wetland" have been farmed for almost a century, and prior to federal ownership of the land abutting my property, there were little or no drainage problems. In fact, the area referred to in the Corps' jurisdictional determination was once an active farming operation. To say that the government has been a bad neighbor might be an understatement. Only after they bought the property, built levees and other water management structures and converted the site into a wetland was there a direct impact on drainage, or lack thereof, of my land.

My land is not navigable water; it's nowhere near navigable water. If my land can be regulated as navigable waters, just about any land can. My situation is not unique. There are other farmers who face the same problem but who don't feel they can criticize the Corps or other federal agencies without inviting more regulatory burdens on their own farms. Fortunately, as of now I have not received any violation notices.

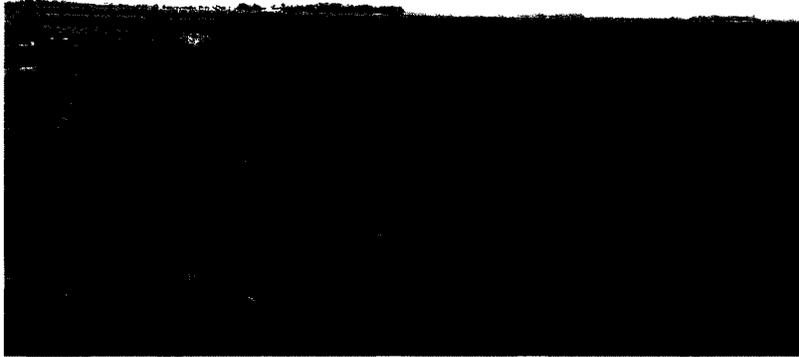
It is also fortunate that I have several farm bill tools at my disposal. I appreciate that incentive-based alternatives exist. I know that I could place these 11.8 acres in the Conservation Reserve Program, the Wetland Reserve Program or the Wildlife Habitat Incentives Program. But, Mr. Chairman, I am a farmer. I am interested in keeping my land in production, not taking it out of production. Those programs work for some people, but for someone like myself I want to be able to improve my land to maintain a viable farming operation to pass along to my children. If I have to give up bits and pieces soon my operation will run out of land and not be a viable and economic operation.

I also question why my project would not fall under Clean Water Act section 404(f) exemptions. I thought the law allowed farms, ranches and forestry operations to continue "normal" farming and ranching activities. But it appears that the Corps and I not only read the Clean Water Act jurisdictional reach differently, but also normal farming exemptions. Mr. Chairman, this just shows that there is a great need for Congress to clarify these issues. There is too much room for different interpretations of which lands are regulated as navigable waters, and which activities are exempt. The current situation leaves farmers like myself with a great deal of uncertainty.

Thank you for the opportunity to tell my story. I hope you and your colleagues will look at how to protect natural resources while also maintaining the ability of farmers and ranchers to continue producing food, fiber and fuel.



Photograph taken 1991.
Drainage improvements limited to area inside red circle.



Photograph of proposed drainage area.

Testimony of Congressman Doug Ose
Transportation and Infrastructure
Water Resources & Environment Subcommittee Hearing
“Inconsistent Regulation of Wetlands and Other Waters”
March 30, 2004

It has been more than three years since the January 2001 Supreme Court decision revoking the Army Corps of Engineers’ so-called Migratory Bird “Rule.”¹ This landmark wetlands decision, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), commonly known as SWANCC, held that the Corps exceeded its authority when it used the existence of migratory birds as a basis for asserting Federal jurisdiction over waters of the United States under Section 404 of the Clean Water Act (CWA).

Since the Supreme Court’s decision, the 38 Corps district offices have filled the vacuum left by the Supreme Court’s decision with widely varying interpretations of what is considered a “water of the United States” and, therefore, subject to Federal jurisdiction. While it is appropriate for Federal agencies to consider site-specific conditions when implementing regulations, Federal agencies should not apply Federal statutes and regulations on an ad hoc basis. For three years, the CWA Section 404 permitting system has been chaotic and, to my chagrin, the Administration has decided not to ameliorate this regulatory uncertainty.

As a former owner of several small businesses and now a Member of Congress, I find the Corps’ ad hoc jurisdictional decisions to be unfair and unacceptable public policy. As a result, I have been deeply involved in this issue for three years and have taken steps to bring this problem to the public’s and the Administration’s attention.

In January 2001, ten days after the SWANCC decision, the Corps and the Environmental Protection Agency (EPA) issued a joint memorandum to their regional offices instructing district staff not to assert jurisdiction over waters and wetlands solely on the basis of use by migratory birds (Attachment A). In light of the Supreme Court’s questioning of the constitutionality of jurisdiction over isolated, intrastate and non-navigable waters, Federal district staff were also instructed to consult agency legal counsel. This swiftly-issued memorandum did little to clarify Federal jurisdiction.

In May 2001, the Corps issued a subsequent memorandum prohibiting districts from developing local practices for asserting jurisdiction and from using any practices not in effect before the SWANCC decision (Attachment B). The Corps stated that the purpose of the prohibition on new practices was to minimize any inconsistencies among the districts.

¹ The so-called Migratory Bird “Rule” is, in fact, not a codified rule promulgated under the Administrative Procedure Act. Instead, it is merely language that was included in the noncodified preamble to a 1986 Corps regulation entitled “Final Rule for Regulatory Programs of the Corps of Engineers” (51 FR 41206). This so-called “Rule” stated that, “waters of the United States” could include waters ‘which are or would be used as habitat by birds protected by Migratory Bird Treaties’ (51 FR 41217).

Notwithstanding this memorandum's intent, regulatory uncertainties are common throughout the Corps district offices.

By the Fall of 2002, more than a year and a half had passed since the SWANCC decision, yet, EPA and the Corps had neither issued clarifying guidance nor initiated a rulemaking. In response to this inaction, in September 2002, the House Government Reform Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, which I chair, held a hearing entitled "Agency Implementation of the SWANCC Decision." Hearing witnesses testified that, regardless of their interpretation of SWANCC, both Federal agencies and the regulated community would greatly benefit from additional nonregulatory guidance and/or a codified rule clarifying when Federal jurisdiction applies. I would like to submit a copy of the full hearing print for your hearing record.

Robert Fabricant, former General Counsel for EPA, testified that EPA recognized, "that field staff and the public could benefit from additional guidance on how to apply the legal principles in individual cases" (p. 18). Thomas Sansonetti, then Assistant Attorney General for Environment and Natural Resources at the Department of Justice, admitted that, "[i]t is not so much the standard, it is the application of those standards to a set of facts that really provides the problem" (p. 36). Mr. Sansonetti further confirmed that Federal jurisdiction varies from case to case and that a person would have difficulty finding certainty in the existing regulations.

I concluded from the Subcommittee's hearing that, prior to the SWANCC decision, the Corps used the so-called Migratory Bird "Rule" as a basis for jurisdiction whenever possible rather than answer the harder questions of "neighboring," "isolated," and other terms defined in the Corps's codified rule entitled Definition of Waters of the United States (33 CFR § 328.3). However, once the so-called Migratory Bird "Rule" was invalidated, the Corps found itself in the same position as the regulated community, i.e., without a clear set of criteria or standards for applying Section 404 of the CWA and its implementing regulations.

Another consequence of the regulatory uncertainty is the Corps' permit applications backlog. According to the Office of Management and Budget's Fiscal Year 2005 Budget Program Assessment Rating Tool (PART), permit processing times continue to increase. In 2001, the Corps had a 120 day processing completion rate of 61 percent. This statistic fell to 56 percent in 2003. Clearly, the backlog caused by the SWANCC decision is negatively impacting the Corps' performance.

In January 2003, EPA and the Corps finally published an Advanced Notice of Proposed Rulemaking (ANPRM) in the Federal Register (68 FR 1991, Attachment C). The ANPRM stated that, "the goal of the agencies is to develop proposed regulations that will further the public interest by clarifying what waters are subject to the CWA jurisdiction and affording full protection to these waters through an appropriate focus of Federal and State resources consistent with the CWA." The ANPRM did not put forth any specific regulatory scheme; rather, it solicited comments "on issues related to the jurisdictional status of isolated waters under the CWA which the public wishes to call to our attention." The ANPRM includes

an Appendix with a joint EPA and Corps issued guidance document superceding the January and May 2001 guidance. It does not clarify the key issues.

In February 2003, I asked the General Accounting Office (GAO) to conduct a study "into what criteria district and regional offices use in making these jurisdictional determinations and to what extent these criteria vary from region to region." During the summer of 2003, I personally met with Army policy officials and they promised that a rulemaking was forthcoming. Despite promises from the Administration, in December 2003, the Administration reneged on its promise to provide certainty to States and the regulated community.

Shortly after the Administration's decision, in February 2004, GAO submitted its study to me.² GAO's conclusions confirm the chaos that the regulated community is experiencing and essentially reiterate witness testimony from the Subcommittee's September 19, 2002 hearing. GAO's report states that, "Corps districts differ in how they interpret and apply the Federal regulations when determining what wetland and other waters fall within the jurisdiction of the Federal government. Districts apply different approaches to identify wetlands that are adjacent to other waters of the United States" (p. 3).

For example, GAO reports that, "[p]rior to the 2001 SWANCC decision, the Corps generally did not have to be concerned with such factors of adjacency, tributaries, and other aspects of connection with an interstate or navigable water body, of the wetland or water body qualified as jurisdictional water on the basis of its use by migratory birds" (p. 9). Dominick Izzo, Deputy Assistant Secretary for Civil Works for the Army, testified in my Subcommittee's September 2002 hearing that, prior to SWANCC, the "migratory bird rule provided an umbrella over all the other jurisdictional issues" (p. 37).

The GAO report provides examples of how factors that determine jurisdiction are interpreted and weighed differently in Corps district offices across the nation. For example, in the Galveston district office, staff uses the 100-year floodplain to determine whether a wetland is adjacent to waters of the United States. In contrast, the Jacksonville and Philadelphia district offices use the 100-year floodplain as one of many factors considered when making jurisdictional determinations. Chicago and Rock Island, however, do not consider 100-year floodplain at all (pp. 17-18).

According to GAO, the treatment of "man-made conveyances are the most difficult and complex jurisdictional issue faced by the Corps" (p. 22). District offices have varying practices to test whether a man-made conveyance provides a wetland sufficient connection to a water of the United States to impose Federal jurisdiction (pp. 22-26). For example, GAO reported that three district offices would find a wetland jurisdictional if water flowed in a man-made surface conveyance between the wetland and the water of the United States. Other districts reported that a "ditch would also need to have an ordinary high watermark or a display of wetland characteristics in order to establish jurisdictional status for a

² GAO initially informed me that it would issue its report on January 12, 2004. On January 2, 2004, GAO asked to extend the deadline to February 27, 2004 to include recent events, such as the Administration's decision not to pursue a rulemaking, in its report.

wetland.” Still other districts require the presence of water at least once a year and that the water flow from the wetland through the ditch and into a water of the United States. Yet, if the flow of water was reversed, that is from the water of the United States to the wetland, the Corps would not find jurisdiction. Finally, another district states that a “ditch would establish a tributary connection for a wetland only if the ditch was a modification of or replacement for a natural stream” (pp. 22-23). Clearly, citizens across the country are not subjected to the same interpretations for determining jurisdiction. Attachment D includes my summary chart compiled from data in GAO’s report. In addition, I would like to submit a copy of the full GAO report for your hearing record.

The inconsistency in criteria is not merely between Corps districts, it is also within a single office. I have heard from numerous private citizens who have sought Section 404 permits within the same district office. In each case, the Corps asserted jurisdiction using different criteria. For example, in my own district, there is no specific number of feet that certain isolated body of water must be to another water to be “adjacent” or “neighboring” and, therefore, jurisdictional. In some cases it can be 20 feet. In other cases, there is no specific distance; yet, the Corps asserts jurisdiction.

EPA and the Corps have acknowledged the inconsistent application of the CWA’s implementing regulations. GAO’s report confirms it. Mr. Fabricant testified at the Subcommittee’s September 2002 hearing that, as a result of the confusion, “our [EPA] efforts have also focused on determining where rulemaking might be advisable” (p. 18). Despite the developing case law, Mr. Fabricant further testified that, “the Army Corps and EPA retain authority to move forward with guidance or rulemaking before those court cases are decided. We are not in a holding pattern waiting for those cases to be decided” (p. 32). Mr. Fabricant also testified that there is no definition of the words “contiguous,” “bordering,” or “neighboring” in law or regulation. He then concluded “[t]hat sort of begs the question whether this might be an appropriate area to consider for additional rulemaking” (p. 47).

Mr. Izzo also admitted that there is no national consistency in how the regulations and statute are applied. While expressing sympathy for the dilemma that inconsistency places on citizens, he affirmed that there is no single standard nation-wide for defining “adjacency” or “isolated waters.” He then stated that the standard would be subject to a new rulemaking (p. 53).

More than three years since the SWANCC decision, there is still no national policy regulating when a citizen can or cannot discharge into “waters of the United States” because no one knows what the term “waters of the United States” really means. This absence of definition cannot be a license for Federal staff to make it up. The consequence is that citizens in one part of the country are regulated by one set of rules and citizens in another part of the country are regulated by another set of rules.

Today, I call upon the Administration to resolve this problem once and for all by requiring both EPA and the Corps to require that all district offices consistently interpret the law. This does not mean that the Corps should not take into consideration local environmental

conditions and other site-specific considerations. All I ask for is that jurisdictional interpretations be standardized so that those who are affected by this law know what the law actually requires. Fairness dictates nothing less to our citizenry.

Attachments

[Original date stamped January 19, 2001]

MEMORANDUM

SUBJECT: Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters

FROM: Gary S. Guzy /s/
General Counsel
U.S. Environmental Protection Agency

Robert M. Andersen /s/
Chief Counsel
U. S. Army Corps of Engineers

TO: See Distribution

The purpose of this memorandum is to inform you of a significant new ruling by the Supreme Court pertaining to the scope of regulatory jurisdiction under the Clean Water Act (CWA) and to inform you of what is and is not affected by this ruling. Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99-1178 (January 9, 2001) ("SWANCC") involved statutory and constitutional challenges to the assertion of CWA jurisdiction over isolated, non-navigable, intrastate waters used as habitat by migratory birds.

Although the SWANCC case itself specifically involved section 404 of the CWA, the Court's decision affects the scope of regulatory jurisdiction under other provisions of the CWA as well, including the section 402 NPDES program and the section 311 oil spill program. Under each of these sections, the Agencies have jurisdiction over "waters of the United States." CWA § 502(7). Accordingly, the following discussion applies to any program that involves "waters of the United States" as that term is used in the CWA, and will be relevant to any federal, state, or tribal staff involved in implementing sections 402, 404, 311, and any other provision of the CWA which applies the definition of "waters of the

United States.”¹

In the 5-4 decision, the Supreme Court held that the Corps exceeded its statutory authority by asserting CWA jurisdiction over “an abandoned sand and gravel pit in northern Illinois which provides habitat for migratory birds.” Slip op. at 1. The Court did not reach the question of “whether Congress could exercise such authority consistent with the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3.” Slip op. at 1. It summarized its holding as follows: “We hold that 33 C.F.R. § 328.3(a)(3) (1999), as clarified and applied to petitioner’s balefill site pursuant to the ‘Migratory Bird Rule,’ 51 Fed. Reg. 41217 (1986), exceeds the authority granted to respondents under § 404(a) of the CWA.” *Id.* at 14.² Although the Court held that the Corps’ application of § 328.3(a)(3) was invalid in SWANCC, the Court did not strike down §328.3(a)(3) or any other component of the regulations defining “waters of the United States.”

While the Court’s actual holding was narrowly limited to CWA regulation of “nonnavigable, isolated, intrastate” waters based solely on the use of such waters by migratory birds, the Court’s discussion was wider ranging. For example, the Court clearly recognized the CWA’s assertion of jurisdiction over traditional navigable waters and their tributaries and wetlands adjacent to them. Slip op. at 6, 10. The Court also expressly declined to address certain other aspects of the scope of CWA jurisdiction. Slip op. at 10. As a result, the Court’s opinion has led to questions concerning the effect of the decision

¹The SWANCC decision only addresses the scope of regulatory jurisdiction under the federal CWA. Therefore, the scope of regulatory jurisdiction over aquatic features under other federal statutes is not affected by this decision. In addition, the Clean Water Act explicitly provides that nothing in the Act “shall...be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.” 33 U.S.C. § 1370. Therefore, nothing in the SWANCC decision alters the extent of State (or tribal) jurisdiction over aquatic features under State (or tribal) law.

² 33 C.F.R. § 328(a)(3) describes a subset of “waters of the United States”: “All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce”

The “Migratory Bird Rule” refers to an explanation, in the preambles to 1986 Corps regulations and 1988 EPA regulations, that waters that are or may be used as habitat for migratory birds are an example of waters whose use, degradation, or destruction could affect interstate or foreign commerce and therefore are “waters of the United States.” 51 Fed. Reg. 41217 (1986); 53 Fed. Reg. 20765 (1988).

on other waters within the definition of "waters of the United States" in agency regulations. Accordingly, this memorandum describes which aspects of the regulatory definition of "waters of the United States" are and are not affected by SWANCC.

1. In light of the Court's "conclu[sion] that the 'Migratory Bird Rule' is not fairly supported by the CWA," slip op. 6, field staff should no longer rely on the use of waters or wetlands as habitat by migratory birds as the sole basis for the assertion of regulatory jurisdiction under the CWA.

2. As noted above, the Court's holding was strictly limited to waters that are "nonnavigable, isolated, [and] intrastate." With respect to any waters that fall outside of that category, field staff should continue to exercise CWA jurisdiction to the full extent of their authority under the statute and regulations and consistent with court opinions.

3. The Court did not overrule the holding or rationale of United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), which upheld the regulation of traditionally navigable waters, interstate waters, their tributaries, and wetlands adjacent to each. See id. at 123, 129, 139. Each of these categories is still considered "waters of the United States," as is discussed below in paragraphs 4 and 6.

4. Because the Court's holding was limited to waters that are "non-navigable, isolated, [and] intrastate," the following subsections of the regulatory definition of "waters of the United States"³ are **unaffected** by SWANCC:

"(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide" (see, e.g., SWANCC, slip op. at 7-8);

"(2) All interstate waters including interstate wetlands" (see, e.g., CWA section 303(a)(1); Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 282 (1981));

"(4) All impoundments of waters otherwise defined as waters of the United States under the definition [except subsection (a)(3) waters]" (implicit in SWANCC, slip. op. at 6);

³Different CWA regulations contain slightly different formulations of the definition. For simplicity's sake, this memo refers to the Corps' version at 33 C.F.R. § 328.3(a). Other versions appear at, e.g., 40 CFR §§ 110.1, 112.2, 116.3, 117.1, 122.2, 230.3(s), and 232.2.

"(5) Tributaries to waters identified in paragraphs (a)(1)[, (2), and] (4) of this section" (see, e.g., SWANCC, slip op. at 10);

"(6) The territorial seas" (see CWA section 502(7)); and

"(7) Wetlands adjacent to waters (other than waters which are themselves wetlands) identified in paragraphs (a)(1)[,(2), (4), (5), and] (6) of this section" (see, e.g., SWANCC, slip op. at 6; Riverside Bayview at 134-35, 139).⁴

5. The following subsections of the regulatory definition of "waters of the United States" **are, or potentially are, affected by SWANCC**:

"(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce . . ."

a. Waters covered solely by subsection (a)(3)⁵ that could affect interstate commerce solely by virtue of their use as habitat by migratory birds are no longer considered "waters of the United States." The Court's opinion did not specifically address what other connections with interstate commerce might support the assertion of CWA jurisdiction over "nonnavigable, isolated, intrastate waters" under subsection (a)(3). Therefore, as specific cases arise, please consult agency legal counsel.

b. The Court's opinion expressly reserved the question of what "other waters" were intended to be addressed by CWA § 404(g)(1) (regarding state 404 programs). Factors not addressed in SWANCC may have a bearing on whether subsection (a)(3) may still be relied on as the basis for asserting CWA jurisdiction over certain "other waters." Jurisdiction over such "other waters" should be considered on a case-by-case basis in consultation with agency legal counsel. Factors that may be relevant to the analysis under 33 C.F.R. 328.3(a)(3) include, but are not limited to, the following:

⁴ "Adjacent" is defined by regulation as "bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are 'adjacent wetlands.'" 33 C.F.R. § 328.3(d). This definition was approved in Riverside Bayview and is not undercut by SWANCC.

⁵ Subsection (a)(3) is intended to cover waters that are not covered by the other subsections of § 328.3(a).

(1) With respect to waters that are isolated, intrastate, and nonnavigable -- jurisdiction may be possible if their use, degradation, or destruction could affect other "waters of the United States," thus establishing a significant nexus between the water in question and other "waters of the United States;"

(2) With respect to waters that, although isolated and intrastate, are navigable -- jurisdiction may also be possible if their use, degradation, or destruction could affect interstate or foreign commerce (examples of ways the use, degradation or destruction of a water could affect such commerce are provided at 33 CFR 328.3(a)(3)(i) – (iii)).⁶

c. Impoundments of subsection (a)(3) waters, tributaries of (a)(3) waters, and wetlands adjacent to subsection (a)(3) waters should be analyzed on a case-by-case basis in accordance with subparagraphs 5.a and 5.b immediately above. Such impoundments, tributaries and adjacent wetlands are also part of the "waters of the United States" if the waters they impound, are tributaries to, or are adjacent to are themselves "waters of the United States."

6. The Supreme Court's decision in SWANCC does provide an important new limitation on how and in what circumstances the EPA and the Corps can assert regulatory authority under the CWA. However, this decision's limited holding must be interpreted in light of other Supreme Court and lower court precedents, unaffected by the SWANCC decision, which precedents broadly uphold CWA jurisdictional authority. The following quotations from the Riverside Bayview decision are provided to remind EPA and Corps field offices that most CWA jurisdiction remains basically intact after the SWANCC decision.

a. The Supreme Court's Riverside Bayview decision (at 123, 139) upheld the legality of the basic provisions of the Corps' CWA jurisdictional regulation, which the Court described (at 129) as follows: "The [Corps and EPA jurisdictional] regulation extends the Corps' authority under Section 404 to all wetlands adjacent to navigable or interstate waters and their tributaries."⁷

⁶An example of an intra-state lake that is "isolated" (i.e., not part of the tributary system of traditional navigable waters or interstate waters) but which might reasonably be considered "waters of the United States" under subsections (a)(1) or (a)(3) is the Great Salt Lake in Utah. That "isolated" lake is navigable-in-fact (see United States v. Utah, 403 U.S. 9 (1971)), and has substantial connections with interstate commerce (see, e.g., Hardy Salt Co. v. Southern Pacific Transportation Co., 501 F. 2d 1156 (10th Cir. 1974)).

⁷ The one specific part of the Corps' CWA jurisdiction that the Court did not reach in (continued...)

b. The Court in Riverside Bayview also stated, at 132-33, that:

. . . Section 404 originated as part of the Federal Water Pollution Control Act Amendments of 1972, which constituted a comprehensive legislative attempt 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' CWA§ 101, 33 U.S.C. § 1251. This objective incorporated a broad, systemic view of the goal of maintaining and improving water quality: as the House Report on the legislation put it, "the word 'integrity' . . . refers to a condition in which the natural structure and function of ecosystems is [are] maintained. . . . Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' . . . In keeping with these views, Congress chose to define the waters covered by the Act broadly.

c. In Riverside Bayview, at 133-134, the Court quoted with approval the following language from the preamble to the Corps' 1977 regulations:

"The regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system. For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system."

The Court went on to conclude, at 134, that: "In view of the breadth of federal regulatory authority contemplated by the Act itself . . . the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act."

d. In sum, the holding, the facts, and the reasoning of United States v. Riverside Bayview Homes continue to provide authority for the EPA and the Corps to assert CWA jurisdiction over, inter alia, all of the traditional navigable waters, all interstate

⁷(...continued)

Riverside Bayview related to "wetlands that are not adjacent to bodies of open water" under 33 C.F.R. 328.3(a)(2) or (3). Riverside Bayview, 474 U.S. at 131, n. 8.

waters, and all tributaries to navigable or interstate waters, upstream to the highest reaches of the tributary systems, and over all wetlands adjacent to any and all of those waters.

Any questions not answered by this guidance should be addressed to legal staff attorneys Cathy Winer (EPA) at (202) 564-5494 or Lance Wood (Corps) at (202) 761-8556.

Distribution:

Assistant Administrator for Water (4101)
Assistant Administrator for Solid Waste and Emergency Response (5101)
Assistant Administrator for Enforcement and Compliance Assurance (2201A)
Commander, U.S. Army Corps of Engineers
Deputy Commander, Civil Works, USACE
Regional Administrators, Regions I-X
Commanders, Major Subordinate Commands, USACE
Commanders, Engineer Districts, USACE
Elaine Davies, Acting Director, Office of Emergency and Remedial Response
Office Directors, Office of Water
Water Division Directors, Regions I-X
Regional Counsels, Regions I-X
Division and District Counsels, USACE



REPORT TO
ATTENTION OF:

U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

MAY 11 2001

Attachment B

CECW-OR

MEMORANDUM FOR ALL COMMANDERS, MAJOR SUBORDINATE COMMANDS
AND DISTRICT COMMANDS

SUBJECT: Prohibition on the Development of Local Operating Procedures Addressing
Jurisdictional Determinations in Light of the SWANCC Decision

1. In connection with interagency efforts to address Clean Water Act jurisdiction related to the 'tributary' status of waters, and to the 'adjacent' status of wetlands, the agencies agreed that, pending the development of National Policy, Corps Districts would continue to base these determinations on the local practices that were in effect prior to the 9 January 2001 Supreme Court decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC). In light of this, and effective immediately, the Regulatory offices in all Major Subordinate Commands (MSC) and District Commands are prohibited from developing local practices for determining the extent of Clean Water Act Section 404 regulatory jurisdiction, and from utilizing local practices that were not in effect prior to the SWANCC decision.

2. The Court's decision in SWANCC effectively precludes the assertion of Section 404 jurisdiction over certain isolated waters. This has necessarily focused increased attention on the geographic extent of Section 404 jurisdiction, and on the potential 'tributary' status of waters, and the potential 'adjacent' status of wetlands. However, these and other relevant considerations are the subjects of ongoing interagency and Administration-level coordination. We are imposing this prohibition on the development and/or implementation of new practices in order to avoid compounding existing inconsistencies among Districts, and to minimize complications affecting the development of national policy.

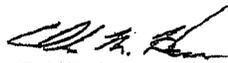
3. Although MSC and District Commands must refrain from adopting new practices for determining the extent of Section 404 jurisdiction, the Headquarters Regulatory Branch can provide case-specific guidance to MSC and District Commands pending the promulgation of

CECW-OR

SUBJECT: Prohibition on the Development of Local Operating Procedures Addressing Jurisdictional Determinations in Light of the SWANCC Decision

national policy. Questions about the prohibition imposed by this memorandum, and requests for case-specific guidance should be addressed to Mr. Ted Rogiel by e-mail to Thaddeus.J.Rogiel@HQ02.USACE.ARMY.MIL or by phone at (202) 761-4595.

FOR THE COMMANDER:



CHARLES M. HESS
Chief, Operations Division
Civil Works

§ 1794.51 Preparation for scoping.

(a) As soon as practicable after RUS and the applicant have developed a schedule for the environmental review process, RUS shall have its notice of intent to prepare an EA or EIS and schedule scoping meetings (§ 1794.13) published in the *Federal Register* (see 40 CFR 1508.22). The applicant shall have published, in a timely manner, a notice similar to RUS' notice.

14. Section 1794.52(d) is amended by removing the last sentence and adding a new sentence at the end of the paragraph to read as follows:

§ 1794.52 Scoping meetings.

(d) * * * The applicant or its consultant shall prepare a record of the scoping meeting. The record shall consist of a transcript when a traditional meeting format is used or a summary report when an open house format is used.

15. Section 1794.53 is revised to read as follows:

§ 1794.53 Environmental report.

(a) After scoping procedures have been completed, RUS shall require the applicant to develop and submit an ER. The ER shall be prepared under the supervision and guidance of RUS staff and RUS shall evaluate and be responsible for the accuracy of all information contained therein.

(b) The applicant's ER will normally serve as the RUS EA. After RUS has reviewed and found the ER to be satisfactory, the applicant shall provide RUS with a sufficient number of copies of the ER to satisfy the RUS distribution plan.

(c) The ER shall include a summary of the construction and operation monitoring and mitigation measures for the proposed action. These measures may be revised as appropriate in response to comments and other information, and shall be incorporated by summary or reference into the FONSI.

16. Section 1794.54 is revised to read as follows:

§ 1794.54 Agency determination.

Following the scoping process and the development of a satisfactory ER by the applicant or its consultant that will serve as the agency's EA, RUS shall determine whether the proposed action is a major Federal action significantly affecting the quality of the human environment. If RUS determines the action is significant, RUS will continue with the procedures in subpart C of this

part. If RUS determines the action is not significant, RUS will proceed in accordance with §§ 1794.42 through 1794.44, except that RUS shall have a notice published in the *Federal Register* that announces the availability of the EA and FONSI.

§ 1794.61 [Amended]

17. Section 1794.61 is amended by:
A. Removing paragraph (b).
B. Redesignating paragraph (a) as the introductory text; paragraph (a)(1) as (a); paragraph (a)(2) as (b); and paragraph (a)(3) as (c).

Dated: December 24, 2002.

Blaine D. Stockton,

Acting Administrator, Rural Utilities Service.

[FR Doc. 03-713 Filed 1-14-03; 8:45 am]

BILLING CODE 3410-15-P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 328**ENVIRONMENTAL PROTECTION AGENCY**

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, and 401

[FRL-7439-9]

RIN 2040-AB74

Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States"

AGENCIES: U.S. Army Corps of Engineers, Department of the Army, DOD; and Environmental Protection Agency.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) are today issuing an advance notice of proposed rulemaking (ANPRM) in order to obtain early comment on issues associated with the scope of waters that are subject to the Clean Water Act (CWA), in light of the U.S. Supreme Court decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*).

Today's ANPRM requests public input on issues associated with the definition of "waters of the United States" and also solicits information or data from the general public, the scientific community, and Federal and

State resource agencies on the implications of the *SWANCC* decision for jurisdictional decisions under the CWA. The goal of the agencies is to develop proposed regulations that will further the public interest by clarifying what waters are subject to CWA jurisdiction and affording full protection to these waters through an appropriate focus of Federal and State resources consistent with the CWA. The input received from the public in response to today's ANPRM will be used by the agencies to determine the issues to be addressed and the substantive approach for a future proposed rulemaking addressing the scope of CWA jurisdiction.

Pending this rulemaking, should questions arise, the regulated community should seek assistance from the Corps and EPA, in accordance with the joint memorandum attached as Appendix A.

DATES: In order to be considered, comments or information in response to this ANPRM must be postmarked or e-mailed on or before March 3, 2003.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Mail comments to: Water Docket, Environmental Protection Agency, Mailcode 4101T, 1200 Pennsylvania Ave., NW, Washington, DC 20460, Attention Docket ID No. OW-2002-0050.

FOR FURTHER INFORMATION CONTACT: For information on this ANPRM, contact either Donna Downing, U.S. Environmental Protection Agency, Office of Wetlands, Oceans and Watersheds (4502T), 1200 Pennsylvania Avenue NW, Washington, DC 20460, phone: (202) 566-1366, e-mail: CWAwaters@epa.gov, or Ted Ruzgie, U.S. Army Corps of Engineers, ATTN CECW-OR, 441 G Street NW., Washington, DC 20314-1000, phone: (202) 761-4595, e-mail: Thaddeus.J.Ruzgie@H2O2.USACE.ARMY.MIL.

SUPPLEMENTARY INFORMATION:**I. General Information****A. Potentially Regulated Entities**

Persons or entities that discharge pollutants (including dredged or fill material) to "waters of the U.S." could be regulated by a rulemaking based on this ANPRM. The CWA generally prohibits the discharge of pollutants into "waters of the U.S." without a permit issued by EPA or a State or Tribe approved by EPA under section 402 of the Act, or, in the case of dredged or fill material, by the Corps or an approved

State or Tribe under section 404 of the Act. In addition, under the CWA, States or approved Tribes establish water quality standards for "waters of the U.S.", and also may assume responsibility for issuance of CWA permits for discharges into waters and wetlands subject to the Act. Today's ANPRM seeks public input on what, if any, revisions in light of SWANCC might be appropriate to the regulations that define "waters of the U.S.", and today's ANPRM thus would be of interest to all entities discharging to, or regulating, such waters. In addition, because the Oil Pollution Act (OPA) is applicable to waters and wetlands subject to the CWA, today's ANPRM may have implications for persons or entities subject to the OPA. Examples of entities potentially regulated include:

Category	Examples of potentially regulated entities
State/Tribal governments or instrumentalities.	State/Tribal agencies or instrumentalities that discharge or spill pollutants into waters of the U.S.
Local governments or instrumentalities.	Local governments or instrumentalities that discharge or spill pollutants into waters of the U.S.
Federal government agencies or instrumentalities.	Federal government agencies or instrumentalities that discharge or spill pollutants into waters of the U.S.
Industrial, commercial, or agricultural entities.	Industrial, commercial, or agricultural entities that discharge or spill pollutants into waters of the U.S.
Land developers and landowners.	Land developers and landowners that discharge or spill pollutants into waters of the U.S.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities that are likely to be regulated by a rulemaking based on this ANPRM. This table lists the types of entities that we are now aware of that could potentially be regulated. Other types of entities not listed in the table could also be regulated. To determine whether your organization or its activities could be regulated, you should carefully examine the discussion in this ANPRM. If you have questions regarding the applicability of this action to a particular entity, consult one of the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. How Can I Get Copies of This Document and Other Related Information?

1. **Docket.** The agencies have established an official public docket for this action under Docket ID No. OW-2002-0050. The official public docket consists of the documents specifically referenced in this ANPRM, any public comments received, and other information related to this ANPRM. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Water Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Water Docket is (202) 566-2426. You may have to pay a reasonable fee for copying.

2. **Electronic Access.** You may access this Federal Register document electronically through the EPA Internet under the Federal Register listings at <http://www.epa.gov/fedrgstr/>.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at <http://www.epa.gov/edocket> to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select search, then key in the appropriate docket identification number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in I.B.1.

For those who submit public comments, it is important to note that

EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and To Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number (OW-2002-0050) in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked late. The agencies are not required to consider these late comments.

1. **Electronically.** If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket,

and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the agencies may not be able to consider your comment.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at <http://www.epa.gov/edocket>, and follow the online instructions for submitting comments. Once in the system, select search, and then key in Docket ID No. OW-2002-0050. The system is an anonymous access system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by electronic mail (e-mail) to CWAwaters@epa.gov, Attention Docket ID No. OW-2002-0050. In contrast to EPA's electronic public docket, EPA's e-mail system is not an anonymous access system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By Mail.* Send four copies of your comments to: Water Docket, Environmental Protection Agency, Mailcode 4101 T, 1260 Pennsylvania Ave., NW, Washington, DC 20460, Attention Docket ID No. OW-2002-0050.

3. *By Hand Delivery or Courier.* Deliver your comments to: Water Docket, EPA Docket Center, EPA West, Room B102, 1301 Constitution Avenue, NW, Washington, DC, Attention Docket ID No. OW-2002-0050. Such deliveries are only accepted during the Docket's normal hours of operation as identified in I.B.1.

D. What Should I Consider as I Prepare My Comments?

You may find the following suggestions helpful for preparing your comments:

a. Explain your views as clearly as possible.

b. Describe any assumptions that you used.

c. Provide any technical information and/or data on which you based your views.

d. If you estimate potential burden or costs, explain how you arrived at your estimate.

e. Provide specific examples to illustrate your concerns.

f. Offer alternatives.

g. Make sure to submit your comments by the comment period deadline identified.

h. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and Federal Register citation related to your comments.

II. The Importance of Updating the Regulations

The agencies have not engaged in a review of the regulations with the public concerning CWA jurisdiction for some time. This ANFRM will help ensure that the regulations are consistent with the CWA and the public understands what waters are subject to CWA jurisdiction. The goal of the agencies is to develop proposed regulations that will further the public interest by clarifying what waters are subject to CWA jurisdiction and affording full protection to these waters through an appropriate focus of Federal and State resources consistent with the CWA. It is appropriate to review the regulations to ensure that they are consistent with the SWANCC decision. SWANCC eliminates CWA jurisdiction over isolated waters that are intrastate and non-navigable, where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross State lines in their migrations. SWANCC also calls into question whether CWA jurisdiction over isolated, intrastate, non-navigable waters could now be predicated on the other factors listed in the "Migratory Bird Rule" or the other rationales of 33 CFR 328.3(a)(3)(i)-(iii).

Although the SWANCC case itself specifically involves section 404 of the CWA, the Court's decision may also affect the scope of regulatory jurisdiction under other provisions of the CWA, including programs under sections 303, 311, 401, and 402. Under each of these sections, the relevant agencies have jurisdiction over "waters of the United States." The agencies will consider the potential implications of the rulemaking for these other sections.

• *Section 404 dredged and fill material permit program.* This program establishes a permitting system to regulate discharges of dredged or fill material into waters of the United States.

• *Section 303 water quality standards program.* Under this program, States and authorized Indian Tribes establish water quality standards for navigable waters to "protect the public health or welfare" and "enhance the quality of water", "taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agriculture, industrial, and other purposes, and also taking into consideration their use and value for navigation."

• *Section 311 spill program and the Oil Pollution Act (OPA).* Section 311 of the CWA addresses pollution from both oil and hazardous substance releases. Together with the Oil Pollution Act, it provides EPA and the U.S. Coast Guard with the authority to establish a program for preventing, preparing for, and responding to spills that occur in navigable waters of the United States.

• *Section 401 State water-quality certification program.* Section 401 provides that no Federal permit or license for activities that might result in a discharge to navigable waters may be issued unless a section 401 water-quality certification is obtained from or waived by States or authorized Tribes.

• *Section 402 National Pollutant Discharge Elimination System (NPDES) permitting program.* This program establishes a permitting system to regulate point source discharges of pollutants (other than dredged or fill material) into waters of the United States.

III. Legislative and Regulatory Context

The Federal Water Pollution Control Act Amendments, now known as the Clean Water Act (CWA), was enacted in 1972. In the years since its enactment, the scope of waters regulated under the CWA has been discussed in regulations, legislation, and judicial decisions.

The CWA was intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Its specific provisions were designed to improve upon the protection of the Nation's waters provided under earlier statutory schemes such as the Rivers and Harbors Act of 1899 ("RHA") (33 U.S.C. 403, 407, 411) and the Federal Water Pollution Control Act of 1948 (62 Stat. 1155) and its subsequent amendments through 1970. In doing so, Congress recognized "the primary responsibilities and rights of States to prevent, reduce,

and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources * * * 33 U.S.C. 1251(b).

The jurisdictional scope of the CWA is "navigable waters," defined in the statute as "waters of the United States, including the territorial seas." CWA section 502(7), 33 U.S.C. 1362(7). The existing CWA section 404 regulations define "waters of the United States" as follows:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) which are or could be used by interstate or foreign travelers for recreational or other purposes; or
(ii) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
(iii) which are used or could be used for industrial purposes by industries in interstate commerce.

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

(8) Waters of the United States do not include prior converted cropland ... Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds ...) are not waters of the United States. 40 CFR.230.3(s); 33 CFR 328.3(a).

Counterpart and substantively similar regulatory definitions appear at 40 CFR 110.1, 112.2, 116.3, 117.1, 122.2, 232.2, 300.5, part 300 App. E, 302.3 and 401.11 (hereafter referred to as "the counterpart definitions").

In regulatory preambles, both the Corps and EPA provided examples of additional types of links to interstate commerce which might serve as a basis under 40 CFR 230.3(a)(3) and 33 CFR 328.3(a)(3) for establishing CWA

jurisdiction over intrastate waters which were not part of the tributary system or their adjacent wetlands. These included use of waters (1) as habitat by birds protected by Migratory Bird Treaties or which cross State lines, (2) as habitat for endangered species, or (3) to irrigate crops sold in commerce. 51 FR 41217 (November 13, 1986), 53 FR 20765 (June 6, 1988). These examples became known as the "Migratory Bird Rule," even though the examples were neither a rule nor entirely about birds. The Migratory Bird Rule later became the focus of the SWANCC case.

IV. Potential Natural Resource Implications

To date, some quantitative studies and anecdotal data provide early estimates of potential resource implications of the SWANCC decision. One of the purposes of the ANPRM is to solicit additional information, data, or studies addressing the extent of resource impacts to isolated, intrastate, non-navigable waters.

Non-navigable intrastate isolated waters occur throughout the country. Their extent depends on a variety of factors including topography, climate, and hydrologic forces. Preliminary assessments of potential resource impacts vary widely depending on the scenarios considered. See, e.g., Ducks Unlimited, "The SWANCC Decision: Implications for Wetlands and Waterfowl" (September 2001) (available at http://www.ducks.org/conservation/404_report.asp); ASWM, "SWANCC Decision and the State Regulation of Wetlands," (June 2001) (available at <http://www.aswm.org>).

There is an extensive body of knowledge about the functions and values of wetlands, which include flood risk reduction, water quality improvement, fish and wildlife habitat, and maintenance of the hydrologic integrity of aquatic ecosystems. The ANPRM seeks information regarding the functions and values of wetlands and other waters that may be affected by the issues discussed in this ANPRM.

V. Solicitation of Comments

The agencies are seeking comment on issues related to the jurisdictional status of isolated waters under the CWA which the public wishes to call to our attention. To assist the public in considering these issues, the following discussion and specific questions are presented. The agencies will carefully consider the responses received to this ANPRM in determining what regulatory changes may be appropriate and the issues to be addressed in a proposed rulemaking to clarify CWA jurisdiction.

The SWANCC holding eliminates CWA jurisdiction over isolated, intrastate, non-navigable waters where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross State lines in their migrations. 531 U.S. at 174 ("We hold that 33 CFR 328.3(a)(3) (1999), as clarified and applied to petitioner's balefill site pursuant to the "Migratory Bird Rule," 51 FR 41217 (1986), exceeds the authority granted to respondents under section 404(a) of the CWA."). The agencies seek comment on the use of the factors in 33 CFR 328.3(a)(3)(i)-(iii) or the counterpart regulations in determining CWA jurisdiction over isolated, intrastate, non-navigable waters.

The agencies solicit comment from the public on the following issues:

(1) Whether, and, if so, under what circumstances, the factors listed in 33 CFR 328.3(a)(3)(i)-(iii) (i.e., use of the water by interstate or foreign travelers for recreational or other purposes, the presence of fish or shellfish that could be taken and sold in interstate commerce, the use of the water for industrial purposes by industries in interstate commerce) or any other factors provide a basis for determining CWA jurisdiction over isolated, intrastate, non-navigable waters?

(2) Whether the regulations should define "isolated waters," and if so, what factors should be considered in determining whether a water is or is not isolated for jurisdictional purposes?

Solicitation of Information

In answering the questions set forth above, please provide, as appropriate, any information (e.g., scientific and technical studies and data, analysis of environmental impacts, effects on interstate commerce, other impacts, etc.) supporting your views, and specific recommendations on how to implement such views. Additionally, we invite your views as to whether any other revisions are needed to the existing regulations on which waters are jurisdictional under the CWA. As noted elsewhere in this document, the agencies are also soliciting data and information on the availability and effectiveness of other Federal or State programs for the protection of aquatic resources, and on the functions and values of wetlands and other waters that may be affected by the issues discussed in this ANPRM.

VI. Related Federal and State Authorities

The SWANCC decision addresses CWA jurisdiction, and other Federal or

State laws and programs may still protect a water and related ecosystem even if that water is no longer jurisdictional under the CWA following SWANCC. The Federal government remains committed to wetlands protection through the Food Security Act's Swampbuster requirements and Federal agricultural program benefits and restoration through such Federal programs as the Wetlands Reserve Program (administered by the U.S. Department of Agriculture), grant making programs such as Partners in Wildlife (administered by the Fish and Wildlife Service), the Coastal Wetlands Restoration Program (administered by the National Marine Fisheries Service), the State Grant, Five Star Restoration, and National Estuary Programs (administered by EPA), and the Migratory Bird Conservation Commission (composed of the Secretaries of Interior and Agriculture, the Administrator of EPA and Members of Congress).

The SWANCC decision also highlights the role of States in protecting waters not addressed by Federal law. Prior to SWANCC, fifteen States had programs that addressed isolated wetlands. Since SWANCC, additional States have considered, and two have adopted, legislation to protect isolated waters. The Federal agencies have a number of initiatives to assist States in these efforts to protect wetlands. For example, EPA's Wetland Program Development Grants are available to assist States, Tribes, and local governments for building their wetland program capacities. In addition, the U.S. Department of Justice and other Federal agencies co-sponsored a national wetlands conference with the National Governors Association Center for Best Practices, National Conference of State Legislatures, the Association of State Wetlands Managers, and the National Association of Attorneys General. This conference and the dialogue that has ensued will promote close collaboration between Federal agencies and States in developing, implementing, and enforcing wetlands protection programs. EPA also is providing funding to the National Governors Association Center for Best Practices to assist States in developing appropriate policies and actions to protect intrastate isolated waters.

In light of this, the agencies solicit information and data from the general public, the scientific community, and Federal and State resource agencies on the availability and effectiveness of other Federal or State programs for the protection of aquatic resources and practical experience with their implementation. The agencies are also

interested in data and comments from State and local agencies on the effect of no longer asserting jurisdiction over some of the waters (and discharges to those waters) in a watershed on the implementation of Total Maximum Daily Loads (TMDLs) and attainment of water quality standards.

VII. Statutory and Executive Order Reviews

A. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), EPA and the Corps must determine whether the regulatory action is "significant" and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this Advanced Notice of Proposed Rulemaking is a "significant regulatory action" in light of the provisions of paragraph (4) above as it raises novel legal or policy issues. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. National Environmental Policy Act

As required by the National Environmental Policy Act (NEPA), the Corps prepares appropriate environmental documentation for its activities affecting the quality of the human environment. The Corps has determined that today's Advance Notice of Proposed Rulemaking merely solicits early comment on issues associated with the scope of waters that are properly subject to the CWA, and information or data from the general public, the scientific community, and

Federal and State resource agencies on the implications of the SWANCC decision for the protection of aquatic resources. In light of this, the Corps has determined that today's ANPRM does not constitute a major Federal action significantly affecting the quality of the human environment, and thus does not require the preparation of an Environmental Impact Statement (EIS).

Dated: January 10, 2003.

Christine Todd Whitman,
Administrator, Environmental Protection Agency.

Dated: January 10, 2003.

R.L. Brownlee,
Acting Assistant Secretary of the Army, (Civil Works), Department of the Army.

Note: The following guidance document will not appear in the Code of Federal Regulations.

Appendix A

Joint Memorandum

Introduction

This document provides clarifying guidance regarding the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC") and addresses several legal issues concerning Clean Water Act ("CWA") jurisdiction that have arisen since SWANCC in various factual scenarios involving Federal regulation of "navigable waters." Because the case law interpreting SWANCC has developed over the last two years, the Agencies are issuing this updated guidance, which supersedes prior guidance on this issue. The Corps and EPA are also initiating a rulemaking process to collect information and to consider jurisdictional issues as set forth in the attached ANPRM. Jurisdictional decisions will be based on Supreme Court cases including *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) and SWANCC, regulations, and applicable case law in each jurisdiction.

Background

In SWANCC, the Supreme Court held that the Army Corps of Engineers had exceeded its authority in asserting CWA jurisdiction pursuant to section 404(a) over isolated, intrastate, non-navigable waters under 33 C.F.R. 328.3(a)(3), based on their use as habitat for migratory birds pursuant to preamble language commonly referred to as the "Migratory Bird Rule." 51 FR 41217 (1986). "Navigable waters" are defined in section 502 of the CWA to mean "waters of the United States, including the territorial seas." In SWANCC, the Court determined that the term "navigable" had significance in indicating the authority Congress intended to exercise in asserting CWA jurisdiction. 531 U.S. at 172. After reviewing the jurisdictional scope of the statutory definition of "navigable waters" in section 502, the Court concluded that neither the text of the statute nor its legislative history supported the

Corps' assertion of jurisdiction over the waters involved in *SWANCC*. *Id.* at 170-171.

In *SWANCC*, the Supreme Court recognized that "Congress passed the CWA for the stated purpose of 'restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters'" and also noted that "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.'" *Id.* at 166-67 (citing 33 U.S.C. 1251(a) and (b)). However, expressing "serious constitutional and federalism questions" raised by the Corps' interpretation of the CWA, the Court stated that "where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Id.* at 174, 172. Finding "nothing approaching a clear statement from Congress that it intended section 404(a) to reach an abandoned sand and gravel pit" (*id.* at 174), the Court held that the Migratory Bird Rule, as applied to petitioners' property, exceeded the agencies' authority under section 404(a). *Id.* at 174.

The Scope of CWA Jurisdiction After *SWANCC*

Because *SWANCC* limited use of 33 CFR § 328.3(a)(3) as a basis of jurisdiction over certain isolated waters, it has focused greater attention on CWA jurisdiction generally, and specifically over tributaries to jurisdictional waters and over wetlands that are "adjacent wetlands" for CWA purposes.

As indicated, section 502 of the CWA defines the term navigable waters to mean "waters of the United States, including the territorial seas." The Supreme Court has recognized that this definition clearly includes those waters that are considered traditional navigable waters. In *SWANCC*, the Court noted that while "the word 'navigable' in the statute was of 'limited import'" (quoting *Riverside*, 474 U.S. 121 (1985)), "the term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." 531 U.S. at 172. In addition, the Court reiterated in *SWANCC* that Congress evidenced its intent to regulate "at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *SWANCC* at 171 (quoting *Riverside*, 474 U.S. at 133). Relying on that intent, for many years, EPA and the Corps have interpreted their regulations to assert CWA jurisdiction over non-navigable tributaries of navigable waters and their adjacent wetlands. Courts have upheld the view that traditional navigable waters and, generally speaking, their tributary systems (and their adjacent wetlands) remain subject to CWA jurisdiction.

Several federal district and appellate courts have addressed the effect of *SWANCC* on CWA jurisdiction, and the case law on the precise scope of federal CWA jurisdiction in light of *SWANCC* is still developing. While

a majority of cases hold that *SWANCC* applies only to waters that are isolated, intrastate and non-navigable, several courts have interpreted *SWANCC*'s reasoning to apply to waters other than the isolated waters at issue in that case. This memorandum attempts to add greater clarity concerning federal CWA jurisdiction following *SWANCC* by identifying specific categories of waters, explaining which categories of waters are jurisdictional or non-jurisdictional, and pointing out where more refined factual and legal analysis will be required to make a jurisdictional determination.

Although the *SWANCC* case itself specifically involved Section 404 of the CWA, the Court's decision may affect the scope of regulatory jurisdiction under other provisions of the CWA as well, including the Section 402 NPDES program, the Section 311 oil spill program, water quality standards under Section 303, and Section 401 water quality certification. Under each of these sections, the relevant agencies have jurisdiction over "waters of the United States." CWA section 502(7).

This memorandum does not discuss the exact factual predicates that are necessary to establish jurisdiction in individual cases. We recognize that the field staff and the public could benefit from additional guidance on how to apply the applicable legal principles to individual cases.¹ Should questions arise concerning CWA jurisdiction, the regulated community should seek assistance from the Corps and EPA.

A. Isolated, Intrastate Waters That are Non-Navigable

SWANCC squarely eliminates CWA jurisdiction over isolated waters that are intrastate and non-navigable, where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross state lines in their migrations. 531 U.S. at 174 ("We hold that 33 CFR § 328.3(a)(3) [1999], as clarified and applied to petitioner's balefill site pursuant to the 'Migratory Bird Rule,' 51 FR 41217 (1986), exceeds the authority granted to respondents under § 404(a) of the CWA."). The EPA and the Corps are now precluded from asserting CWA jurisdiction in such situations, including over waters such as isolated, non-navigable, intrastate vernal pools, playa lakes and potholes. *SWANCC* also calls into question whether CWA jurisdiction over isolated, intrastate, non-navigable waters could now be predicated on the other factors listed in the Migratory Bird

¹ The CWA provisions and regulations described in this document contain legally binding requirements. This document does not substitute for those provisions or regulations, nor is it a regulation itself. It does not impose legally binding requirements on EPA, the Corps, or the regulated community, and may not apply to a particular situation depending on the circumstances. Any decisions regarding a particular water will be based on the applicable statutes, regulations, and case law. Therefore, interested persons are free to raise questions and objections about the appropriateness of the application of this guidance to a particular situation, and EPA and/or the Corps will consider whether or not the recommendations or interpretations of this guidance are appropriate in that situation based on the law and regulations.

Rule, 51 FR 41217 (i.e., use of the water as habitat for birds protected by Migratory Bird Treaties; use of the water as habitat for Federally protected endangered or threatened species; or use of the water to irrigate crops sold in interstate commerce).

By the same token, in light of *SWANCC*, it is uncertain whether there remains any basis for jurisdiction under the other rationales of § 328.3(a)(3)(i)-(iii) over isolated, non-navigable, intrastate waters (i.e., use of the water by interstate or foreign travelers for recreational or other purposes; the presence of fish or shellfish that could be taken and sold in interstate commerce; use of the water for industrial purposes by industries in interstate commerce). Furthermore, within the states comprising the Fourth Circuit, CWA jurisdiction under 33 CFR § 328.3(a)(3) in its entirety has been precluded since 1997 by the Fourth Circuit's ruling in *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997) (invalidating 33 CFR § 328.3(a)(3)).

In view of *SWANCC*, neither agency will assert CWA jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis available for asserting CWA jurisdiction rests on any of the factors listed in the "Migratory Bird Rule." In addition, in view of the uncertainties after *SWANCC* concerning jurisdiction over isolated waters that are both intrastate and non-navigable based on other grounds listed in 33 CFR § 328.3(a)(3)(i)-(iii), field staff should seek formal project-specific Headquarters approval prior to asserting jurisdiction over such waters, including permitting and enforcement actions.

B. Traditional Navigable Waters

As noted, traditional navigable waters are jurisdictional. Traditional navigable waters are waters that are subject to the ebb and flow of the tide, or waters that are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce, 33 CFR § 328.3(a)(1); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-408 (1940) [water considered navigable, although not navigable at present but could be made navigable with reasonable improvements]; *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1911) [dams and other structures do not eliminate navigability]; *SWANCC*, 531 U.S. at 172 [referring to traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made].²

In accord with the analysis in *SWANCC*, waters that fall within the definition of traditional navigable waters remain jurisdictional under the CWA. Thus, isolated, intrastate waters that are capable of supporting navigation by watercraft remain subject to CWA jurisdiction after *SWANCC* if they are traditional navigable waters, i.e., if they meet any of the tests for being navigable-in-fact. See, e.g., *Calvin v. United States* 181 F. Supp. 2d 1050 (C.D. Cal. 2001) [isolated

² These traditional navigable waters are not limited to those regulated under Section 10 of the Rivers and Harbors Act of 1899; traditional navigable waters include waters which, although used, susceptible to use, or historically used, to transport goods or people in commerce, do not form part of a continuous waterborne highway.

man-made water body capable of boating found to be "water of the United States").

C. Adjacent Wetlands

(1) Wetlands Adjacent to Traditional Navigable Waters

CWA jurisdiction also extends to wetlands that are adjacent to traditional navigable waters. The Supreme Court did not disturb its earlier holding in *Riverside* when it rendered its decision in *SWANCC, Riverside* dealt with a wetland adjacent to Black Creek, a traditional navigable water. 474 U.S. 121 (1985); see also *SWANCC*, 531 U.S. at 167 ("In *Riverside*, we held that the Corps had section 404(a) jurisdiction over wetlands that actually abuted on a navigable waterway"). The Court in *Riverside* found that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with' jurisdictional waters, 474 U.S. at 134. Thus, wetlands adjacent to traditional navigable waters clearly remain jurisdictional after *SWANCC*. The Corps and EPA currently define 'adjacent' as 'bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are 'adjacent wetlands.'" 33 CFR § 326.3(b); 40 CFR § 230.3(b). The Supreme Court has not itself defined the term "adjacent," nor stated whether the basis for adjacency is geographic proximity or hydrology.

(2) Wetlands Adjacent to Non-Navigable Waters

The reasoning in *Riverside*, as followed by a number of post-*SWANCC* courts, supports jurisdiction over wetlands adjacent to non-navigable waters that are tributaries to navigable waters. Since *SWANCC*, some courts have expressed the view that *SWANCC* raised questions about adjacency jurisdiction, so that wetlands are jurisdictional only if they are adjacent to navigable waters. See, e.g., *Rice v. Harken*, discussed *infra*.

D. Tributaries

A number of court decisions have held that *SWANCC* does not change the principle that CWA jurisdiction extends to tributaries of navigable waters. See, e.g., *Headwaters v. Talent Irrigation Dist.*, 243 F.3d 526, 334 (5th Cir. 2001) ("Even tributaries that flow intermittently are 'waters of the United States'"). *United States v. Interstate Gen. Co.*, No. 01-4513, slip op. at 7, 2002 WL 1421411 (4th Cir. July 2, 2002), *off'ing* 152 F. Supp. 2d 843 (D. Md. 2002), *off'ing* 152 F. Supp. 2d 843 (D. Md. 2002) (rejecting argument that *SWANCC* eliminated jurisdiction over wetlands adjacent to non-navigable tributaries); *United States v. Krilich*, 393F.3d 784 (7th Cir. 2002) (rejecting motion to vacate consent decree, finding that *SWANCC* did not alter regulations interpreting "waters of the U.S." other than 33 C.F.R. § 328.3(a)(3)); *Community Ass. for Restoration of the Env't v. Henry Bosme Dairy*, 305 F.3d 953 (9th Cir. 2002) (drain that flowed into a canal that flows into a river is jurisdictional); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1178 (D. Idaho 2001) ("waters of the

United States include waters that are tributary to navigable waters"). *Anillo v. Town of Brookhaven*, 136 F. Supp. 2d 81, 118 (E.D. N.Y. 2001) (non-navigable pond and creek determined to be tributaries of navigable waters, and therefore "waters of the United States under the CWA"). Jurisdiction has been recognized even when the tributaries in question flow for a significant distance before reaching a navigable water or are several times removed from the navigable waters (i.e., "tributaries of tributaries"). See, e.g., *United States v. Lamplight Equestrian Ctr.*, No. 00 C 6486, 2002 WL 369552, at *8 (N.D. Ill. Mar. 9, 2002) ("Even where the distance from the tributary to the navigable water is significant, the quality of the tributary is still vital to the quality of navigable waters"); *United States v. Boddy*, 138 F. Supp. 2d 1282, 1291-92 (D. Mont. 2001) ("water quality of tributaries * * * distant though the tributaries may be from navigable streams, is vital to the quality of navigable waters"); *United States v. Bueth Dev. Co.*, No. 2:98CV00, 2001 WL 17580078 (N.D. Ind. Sept. 26, 2001) (refusing to reopen a consent decree in a CWA case and determining that jurisdiction remained over wetlands adjacent to a non-navigable (man-made) waterway that flows into a navigable water).

Some courts have interpreted the reasoning in *SWANCC* to potentially circumscribe CWA jurisdiction over tributaries by finding CWA jurisdiction attaches only where navigable waters and waters immediately adjacent to navigable waters are involved. *Rice v. Harken* is the leading case taking the narrowest view of CWA jurisdiction after *SWANCC*. 250 F.3d 264 (9th Cir. 2001) (rehearing denied). *Harken* interpreted the scope of "navigable waters" under the Oil Pollution Act (OPA). The Fifth Circuit relied on *SWANCC* to conclude "it appears that a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water." 250 F.3d at 269. The analysis in *Harken* implies that the Fifth Circuit might limit CWA jurisdiction to only those tributaries that are traditionally navigable or immediately adjacent to a navigable water.

A few post-*SWANCC* district court opinions have relied on *Harken* or reasoning similar to that employed by the *Harken* court to limit jurisdiction. See, e.g., *United States v. Ropanos*, 190 F. Supp. 2d 1011E.D. Mich. 2002 (government appeal pending) ("the Court finds as a matter of law that the wetlands on Defendant's property were not directly adjacent to navigable waters, and therefore, the government cannot regulate Defendant's property."); *United States v. Needham*, No. 6:01-CV-01897, 2002 WL 1162790 (W.D. La. Jan. 23, 2002) (government appeal pending) (district court affirmed finding of no liability by bankruptcy court for debtors under OPA for discharge of oil since drainage ditch into which oil was discharged was found to be neither a navigable water nor adjacent to an open body of navigable water). See also *United States v. Newdunn*, 195 F. Supp. 2d 751 (E.D. Va. 2002) (government appeal pending) (wetlands and tributaries not contiguous or adjacent to navigable waters

are outside CWA jurisdiction); *United States v. RGM Corp.*, 222 F. Supp. 2d 780 (E.D. Va. 2002) (government appeal pending) (wetlands on property not contiguous to navigable river and, thus, jurisdiction not established based upon adjacency to navigable water).

Another question that has arisen is whether CWA jurisdiction is affected when a surface tributary to jurisdictional waters flows for some of its length through ditches, culverts, pipes, storm sewers, or similar manmade conveyances. A number of courts have held that waters with manmade features are jurisdictional. For example, in *Headwaters Inc. v. Talent Irrigation District*, the Ninth Circuit held that manmade irrigation canals that diverted water from one set of natural streams and lakes to other streams and creeks were connected as tributaries to waters of the United States, and consequently fell within the purview of CWA jurisdiction. 243 F.3d at 533-34. However, some courts have taken a different view of the circumstances under which man-made conveyances satisfy the requirements for CWA jurisdiction. See, e.g., *Newdunn*, 195 F. Supp. 2d at 765 (government appeal pending) (court determined that Corps had failed to carry its burden of establishing CWA jurisdiction over wetlands from which surface water had to pass through a spur ditch, a series of man-made ditches and culverts as well as non-navigable portions of a creek before finally reaching navigable waters).

A number of courts have held that waters connected to traditional navigable waters only intermittently or ephemerally are subject to CWA jurisdiction. The language and reasoning in the Ninth Circuit's decision in *Headwaters Inc. v. Talent Irrigation District* indicates that the intermittent flow of waters does not affect CWA jurisdiction. 243 F.3d at 534 ("Even tributaries that flow intermittently are 'waters of the United States.'"). Other cases, however, have suggested that *SWANCC* eliminated from CWA jurisdiction some waters that flow only intermittently. See, e.g., *Newdunn*, 195 F. Supp. 2d at 764, 767-68 (government appeal pending) (ditches and culverts with intermittent flow not jurisdictional).

A factor in determining jurisdiction over waters with intermittent flows is the presence or absence of an ordinary high water mark (OHWM). Corps regulations provide that, in the absence of adjacent wetlands, the lateral limits of non-tidal waters extend to the OHWM (33 CFR 328.4(c)(1)). One court has interpreted this regulation to require the presence of a continuous OHWM. *United States v. RGM*, 222 F. Supp. 2d 750 (E.D. Va. 2002) (government appeal pending).

Conclusion

In light of *SWANCC*, field staff should not assert CWA jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis available for asserting CWA jurisdiction rests on any of the factors listed in the "Migratory Bird Rule." In addition, field staff should seek formal project-specific HQ approval prior to asserting jurisdiction over waters based on

other factors listed in 33 CFR 328.3(a)(3)(i)-(iii).

Field staff should continue to assert jurisdiction over traditional navigable waters (and adjacent wetlands) and, generally speaking, their tributary systems (and adjacent wetlands). Field staff should make jurisdictional and permitting decisions on a case-by-case basis considering this guidance, applicable regulations, and any additional relevant court decisions. Where questions remain, the regulated community should seek assistance from the agencies on questions of jurisdiction.

Robert E. Fabricant,
General Counsel, Environmental Protection Agency.

Steven J. Morello,
General Counsel, Department of the Army.

[FR Doc. 03-960 Filed 1-14-03; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[IN140-1b; FRL-7433-6]

Approval and Promulgation of Implementation Plans; Indiana

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to conditionally approve rules submitted by the State of Indiana as revisions to its State Implementation Plan (SIP) for prevention of significant deterioration (PSD) provisions for attainment areas for the Indiana Department of Environmental Management.

In the "Rules and Regulations" section of this *Federal Register*, EPA is approving the State's request as a direct final rule without prior proposal because EPA views this action as noncontroversial and anticipates no adverse comments. The rationale for approval is set forth in the direct final rule. If EPA receives no written adverse comments, EPA will take no further action on this proposed rule. If EPA receives written adverse comment, we will publish a timely withdrawal of the direct final rule in the *Federal Register* and inform the public that the rule will not take effect. In that event, EPA will address all relevant public comments in a subsequent final rule based on this proposed rule. In either event, EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

DATES: Comments on this action must be received by February 14, 2003.

ADDRESSES: Written comments should be sent to: Pamela Blakley, Chief, Permits and Grants Section (IL/IN/OH), Air Programs Branch (AR-18), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604.

A copy of the State's request is available for inspection at the above address.

FOR FURTHER INFORMATION CONTACT: Julie Capasso, Environmental Scientist, Permits and Grants Section (IL/IN/OH), Air Programs Branch, (AR-18), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, telephone (312) 886-1426.

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" are used we mean the EPA.

- I. What action is EPA taking today?
- II. Where can I find more information about this proposal and corresponding direct final rule?

I. What Action Is EPA Taking Today?

The EPA is proposing to conditionally approve rules submitted by the State of Indiana as revisions to its State Implementation Plan (SIP) for prevention of significant deterioration (PSD) provisions for attainment areas for the Indiana Department of Environmental Management.

II. Where Can I Find More Information About This Proposal and Corresponding Direct Final Rule?

For additional information see the direct final rule published in the rules and regulations section of this *Federal Register*.

Authority: 42 U.S.C. 4201 *et seq.*
Dated: December 18, 2002.

Bharat Mathur,
Acting Regional Administrator, Region 5.
[FR Doc. 03-617 Filed 1-14-03; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[MD137-3090b; FRL-7420-9]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; Revision to the Control of Volatile Organic Compound Emissions From Screen Printing and Digital Imaging

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the State of Maryland establishing reasonable available control technology (RACT) to limit volatile organic compound (VOC) emissions from an overprint varnish that is used in the cosmetic industry. This action also proposes to add new definitions and amend certain existing definitions for terms used in the regulations. In the Final Rules section of this *Federal Register*, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A more detailed description of the state submittal and EPA's evaluation are included in a Technical Support Document (TSD) prepared in support of this rulemaking action. A copy of the TSD is available, upon request, from the EPA Regional Office listed in the ADDRESSES section of this document. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by February 14, 2003.

ADDRESSES: Written comments should be addressed to: Walter Wilkie, Acting Branch Chief, Air Quality Planning and Information Services Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; and the Maryland Department of the Environment, 1800 Washington Boulevard, Suite 705, Baltimore, Maryland 21230.

FOR FURTHER INFORMATION CONTACT: Ellen Wentworth, (215) 814-2034, at the EPA Region III address above, or by e-mail at ewentworth.ellen@epa.gov. Please note that while questions may be posed via telephone and e-mail, formal comments must be submitted in writing, as indicated in the ADDRESSES section of this document.

Attachment D**SUMMARY OF GAO's FINDINGS ON
DIFFERENCES AMONG CORPS DISTRICT OFFICES**

1. Hydrological Connections to Wetlands
 - a. Wetland within 100-Year Floodplain
 - Galveston: determinative of jurisdiction (“jurisdictional”)
 - Jacksonville & Philadelphia: one of many possible factors, this factor alone is not determinative of jurisdiction
 - Chicago & Rock Island: not a consideration
 - b. Sheet Flow between a Wetland and a Water of the U.S.
 - San Francisco, Sacramento & Los Angeles, CA: jurisdictional; San Francisco considers vernal pools
 - New Orleans & Galveston: not a consideration (too broad and undefined)
2. Proximity to Waters of the United States
 - Jacksonville: jurisdictional within 200 feet
 - Philadelphia: may be jurisdictional within 500 feet
 - Portland & Sacramento: no specific distance; distance is a factor
3. Man-Made and Natural Barriers-Generally
 - Buffalo, Chicago & Galveston: jurisdictional if separated by no more than 1 barrier
 - Rock Island & Omaha: jurisdictional if separated by no more than 2 barriers
 - Jacksonville: jurisdictional regardless of number of barriers if wetland is within 200 feet
 - Baltimore: no maximum number of barriers
4. Sufficiency of a Surface Conveyance/Ditch Connection between a Wetland and a Water of the U.S to make the Wetland Jurisdictional
 - St.Paul, Rock Island & Wilmington: jurisdictional if water flowed from wetland to waters of the U.S. via surface conveyance
 - Portland & Philadelphia: jurisdictional if ditch displays ordinary high watermark or displays wetland characteristics
 - Omaha: water presence at least once per year, water must flow from wetland through ditch into a water of the U.S
 - Fort Worth: ditch must be a modification of a natural stream

5. Jurisdiction of a Ditch Situated between a Wetland and Water of the U.S.
 - Omaha & Fort Worth: jurisdictional if it creates a jurisdictional connection between a wetland and a water of the U.S.
 - Sacramento & Rock Island: may assert jurisdiction over ditch if ditch displays ordinary high watermark, exhibits characteristics of a wetland, or replaces a historic stream
 - Galveston: may assert jurisdiction over ditch if ditch displays ordinary high watermark, exhibits characteristics of a wetland, or replaces a historic stream; however, non-jurisdictional ditches can be filled, thus severing the jurisdictional connection to a wetland - wetland then becomes non-jurisdictional and can be filled without a permit

6. Man-Made Subsurface Conveyances (drain tiles, storm drain systems and culverts) between a Wetland and Waters of the U.S.
 - a. Drain Tiles
 - Chicago: drain tiles establish jurisdiction only with evidence that it supported a history tributary
 - Rock Island, St. Paul & Philadelphia: drain tiles do not establish jurisdiction

 - b. Storm Systems
 - Portland: storm drain may establish jurisdiction if historical stream
 - St. Paul: jurisdictional with underground lake connections

Prepared by Doug Ose

**Testimony of Gary W. Perkins Before the
U.S. House of Representatives Committee on
Transportation and Infrastructure**

**Subcommittee Hearing on
“Inconsistent Regulation of Wetlands and Other
Waters”**

**Tuesday March 30, 2004
2141 Rayburn House Office Building
10:00 a.m.**

TABLE OF CONTENTS

- I.** Transcript of Testimony
- II.** Jurisdictional Determination (By D&S Environmental)
- III.** Only Appropriate Site (Corps of Engineers Mandate)
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- V.** EarthMAP Web Page
- VI.** Letters from Honorable Mike Grimmer (Parish President) and other officials
- VII.** Letters from Local Real Estate Professionals
- VIII.** Elevation Survey Map
- IX.** Executive Order 12630

**Testimony of Gary W. Perkins Before the
U.S. House of Representatives Committee on
Transportation and Infrastructure**

Mr. Chairman, ladies and gentlemen of the committee:

I would like to thank the committee for the opportunity to speak to you today and a special thanks to Congressman Baker and his staff.

I am Vice President of a small business contractor, Bronco Construction Corp. We purchased 33 acres for new buildings for our company. The property fronts a major highway, US Hwy 190, and is adjacent to the city of Walker, La., near Baton Rouge. This land is approximately 9 miles from any navigable water way. Our inspection of the property--which is predominantly a pine forest-- revealed no standing water.

Following the requirements of the U.S. Army Corps of Engineers, we hired a wetlands consultant at a cost of \$ 4,000. Their preliminary assessment based on Corps guidelines showed three isolated areas that were potentially wetlands with NO connection between the three areas.

So we had an elevation survey done at a cost of approximately \$2500. The survey showed the land to have a gradual continuous slope from the northeast corner to the southwest corner. The lowest points in the project area are all higher than the base flood elevation with NO connection between the three areas. I have included that survey in section VIII of my submittal.

Then, because we needed to fill one area for the construction project, we applied for the 404A permit from the Corps which cost \$318. After the Corps' review of the data they decided that we had to mitigate 1.28 acres. AND we had to purchase 2.6 acres at a cost of \$19,500 from a privately owned mitigation bank. Additionally, we were restricted to one bank in our watershed where the owners of the bank have no limit on the price that they set.

Because of this cost of \$19,500 for 1.28 acres, I contacted my Congressman. Mr. Michael Eby of Congressman Richard Baker's office contacted the Corps because of these outrageous mitigation fees. This prompted a visit to the site by four representatives of the Corps, along with Mr. Eby and me.

We found ourselves fighting briars, crawling on our hands and knees like a coon dog after an armadillo. The Corps made an extensive effort, jumping from one lizard tail to button bushes trying to locate a connecting point between the two potential wet areas. Then we happened upon an old skidder rut approximately twenty-five years old.. The Corps guys got all excited and said "AH HAA!!!. Here it is, the connecting point between the two areas."

Mr. Eby and I found no such connection. The skidder ruts they found ran east and west approximately 600 feet south of the northern most potential wet area. The small isolated wet areas on the property are not wetlands. The nearest small man made drainage ditch is over a ¼ mile away. The Corps has once again over-stepped its bounds and gone beyond its jurisdiction, and violated my 5th amendment rights.

I have several friends and business acquaintances who have encountered similar problems. These unreasonable and inconsistent regulations have cost many private individuals millions of dollars while mitigation bank owners profit.

Private property land rights are a vital freedom protected by the U. S. Constitution that set America apart. The property we have worked hard to acquire should be free from unreasonable government agency interference.

I am here on behalf of Earth Management and Preservation (Earth MAP), a non-profit corporation based in Denham Springs, La. EarthMAP is a grass roots organization comprising business men and women, real estate practitioners, developers, individual land owners, and other concerned citizens.

EarthMAP is dedicated to the principle that every person is entitled to clean air and water. The air we breathe and the water we drink should be free from pollution for ourselves, our children, and grandchildren. We should leave the environment as we found it and pass it on to future generations.

EarthMAP members are environmentalists, and we recognize that the environment in which we live is important. However, the rights of the landowners as ensured by the Fifth Amendment are equally as important. We believe in sound conservation, balanced with an individual's constitutional right to own and possess property, free of unlawful deprivation. As U.S. Environmental Protection Agency Administrator Mike Leavitt said in his opening statement November 6, 2003, "We need to balance the needs of the environment and the needs of humanity."

We agree, and we endorse the commitment to uphold the beauty and preservation of America's vast resources.

We appreciate your help and thank you for the opportunity to testify today. I will be happy to answer any questions you might have.

APPLICATION FOR DEPARTMENT OF THE ARMY PERMIT (33 CFR 325)		OMB APPROVAL NO. 0710-003 Expires October 1996	
Public reporting burden for this collection of information is estimated to average 5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Department of Defense, Washington Headquarters Service Directorate of Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302; and to the Office of Management and Budget, Paperwork Reduction Project (0710-0003), Washington, DC 20503. Please DO NOT RETURN your form to either of those addresses. Completed applications must be submitted to the District Engineer having jurisdiction over the location of the proposed activity.			
PRIVACY ACT STATEMENT			
Authority: 33 USC 401, Section 10; 1413, Section 404. Principal Purpose: These laws require authorizing activities in, or affecting, navigable waters of the United States, the discharge or fill material into waters of the United States, and the transportation of dredged material for the purpose of dumping it into ocean waters. Routine Uses: Information provided on this form will be used in evaluating the application for a permit. Disclosure: Disclosure of requested information is voluntary. If information is not provided, however, the permit application cannot be processed nor can a permit be issued.			
One set of original drawings or good reproducible copies which show the location and character of the proposed activity must be attached to this application (see sample drawings and instructions) and be submitted to the District Engineer having jurisdiction over the location of the proposed activity. An application that is not completed in full will be returned.			
(ITEMS 1 THRU 4 TO BE FILLED BY THE CORPS)			
1. APPLICATION NO.	2. FIELD OFFICE CODE	3. DATE RECEIVED	4. DATE APPLICATION COMPLETED
(ITEMS BELOW TO BE FILLED BY APPLICANT)			
5. APPLICANT'S NAME Mr. TIM FRUITT FOR BRONCO CONSTRUCTION CORP.		8. AUTHORIZED AGENT'S NAME AND TITLE (an agent is not required) David C. Temple Jr., RF President / Forester / Wetland Specialist	
6. APPLICANT'S ADDRESS Bronco Construction Corp. 31308 LA Highway 15 Denham Springs, Louisiana 70726		9. AGENT'S ADDRESS D & S Environmental Services, Inc. P.O. Box 273 Maurerap, Louisiana 70449-0273	
7. APPLICANT'S PHONE NOS. W/AREA CODE a. Residence b. Business (225) 655-4830		10. AGENT'S PHONE NOS. W/AREA CODE a. Residence b. Business (225) 261-3321	
11. STATEMENT OF AUTHORIZATION			
I hereby authorize, <u>David C. Temple Jr.</u> to act in my behalf as my agent in the processing of this application and to furnish, upon request, supplemental information in support of this permit application.			
APPLICANT'S SIGNATURE		10-25-02 DATE	
NAME, LOCATION, AND DESCRIPTION OR PROJECT OR ACTIVITY			
12. PROJECT NAME OR TITLE (see instructions) BRONCO CONSTRUCTION INDUSTRIAL FACILITY			
13. NAME OF WATERBODY, IF KNOWN (if applicable) NONE		14. PROJECT STREET ADDRESS (if applicable) BRONCO CONSTRUCTION CORP. 11072 FLORIDA BOULEVARD WALKER, LOUISIANA 70785	
15. LOCATION OF PROJECT LIVINGSTON PARISH COUNTY LOUISIANA STATE			
16. OTHER LOCATION DESCRIPTIONS, IF KNOWN (see instructions) Section, Township, Range, Lat/Long, and/or Accession's Parcel Number, for example. SECTION 29, TOWNSHIP 6 SOUTH, RANGE 4 EAST, LIVINGSTON PARISH, LOUISIANA LATITUDE: 30° 29' 48" N LONGITUDE: 90° 50' 8" W			
7. DIRECTIONS TO THE SITE		SPECIFICALLY, THE SITE IS LOCATED SOUTH OF THE INTERSECTION AT U.S. HIGHWAY 190 AND LA HIGHWAY 449, WHICH IS APPROXIMATELY 1.6 MILES EAST FROM THE TRAFFIC SIGNAL AT THE MAIN INTERSECTION IN WALKER, LOUISIANA.	

18. Nature of Activity (Description of project, include all features)

SEE ATTACHMENT

19. Project Purpose (Describe the reason or purpose of the project, see instructions)

TO CONSTRUCT AN INDUSTRIAL FACILITY, WHICH INCLUDES AN OFFICE BUILDING, A FABRICATION SHOP, A MECHANIC SHOP, A TOOL ROOM, AN EQUIPMENT LAYDOWN YARD, DRIVEWAY ACCESSES AND PARKING AREAS TO ACCOMMODATE THE FACILITY.

USE BLOCKS 20-22 IF DREDGED AND/OR FILL MATERIAL IS TO BE DISCHARGED

20. Reason(s) for Discharge

TO PROVIDE A SUITABLE SUBSTRATE FOR CONSTRUCTION OF AN EQUIPMENT LAYDOWN YARD, A LIMESTONE DRIVEWAY ACCESS AND A LIMESTONE PARKING AREA WITHIN THE FACILITY.

21. Type(s) of Material Being Discharged and the Amount of Each Type in Cubic Yards

PARISH CERTIFIED LEAN CLAY: 2,059 CUBIC YARDS LIMESTONE: 1,029 CUBIC YARDS

22. Surface Area in Acres of Wetlands or Other Waters Filled (see instructions)

1.28 ACRES OF JURISDICTIONAL WETLANDS WILL BE FILLED.

23. Is Any Portion of the Work Already Complete? Yes ___ No ✓ IF YES, DESCRIBE THE COMPLETED WORK

24. Addresses of Adjoining Property Owners, Lessees, Etc., Whose Property Adjoins the Waterbody (if more than can be entered here, please attach a supplemental list)

SEE ATTACHMENT.

25. List of Other Certifications or Approvals/Denials Received from other Federal, State, or Local Agencies for Work Described in This Application.

AGENCY	TYPE APPROVAL	IDENTIFICATION NUMBER	DATE APPLIED	DATE APPROVED	DATE DENIED

Would include but is not restricted to zoning, building, and flood plain permits

26. To the best of my knowledge the proposed activity described in my permit application complies with and will be conducted in a manner that is consistent with the Louisiana Coastal Management Program.

Application is hereby made for a permit or permits to authorize the work described in this application. I certify that the information in this application is complete and accurate. I further certify that I possess the authority to undertake the work described herein or am acting as the duly authorized agent of the applicant.

	10-25-02		10-25-02
SIGNATURE OF APPLICANT	DATE	SIGNATURE OF AGENT	DATE

The application must be signed by the person who desires to undertake the proposed activity (applicant) or it may be signed by a duly authorized agent if the statement in block 11 has been filled out and signed.

18 U.S.C. Section 1001 provides that: Whoever, in any manner within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals, or covers up any trick, scheme, or disguises a material fact or makes any false, fictitious or fraudulent statements or representations or makes or uses any false writing or document knowing same to contain any false, fictitious or fraudulent statements or entry, shall be fined not more than \$10,000 or imprisoned not more than five years or both.

BRONCO CONSTRUCTION INDUSTRIAL FACILITY

Block 18. Nature of Activity (Description of project, include all features)

Overview

The project area encompasses approximately 11.66 acres and is comprised of two vegetative community types, which are pine (majority; non-wetland) and bottomland hardwood (jurisdictional wetland). The entire site will be mechanically cleared to construct an industrial facility, which includes four buildings, two grass areas, one equipment laydown yard, driveway accesses and parking areas to accommodate the facility; consequently approximately 1.28 acres of jurisdictional wetlands (Jurisdictional Determination No. 20-020-2553) will be impacted during this activity.

Jurisdictional Wetland Areas

There will be one limestone equipment laydown yard, one limestone driveway access and one limestone parking area constructed in the jurisdictional wetlands (see Plan View; Figure 2). Natural ground elevation in the non-wetland areas on this site averages 45' in National Geodetic Vertical Datum (N.G.V.D.) and natural ground elevation in the jurisdictional wetland areas averages 6" lower than the non-wetland areas, which is 44'6" N.G.V.D. (see Section View A-A'; Figure 3). In the limestone equipment laydown yard, the limestone driveway access and the limestone parking area, the jurisdictional wetlands will be mechanically cleared and excavated to a depth of -6" (44' N.G.V.D.) below the jurisdictional wetland natural ground elevation (44'6" N.G.V.D.) and refilled to +6" (45' N.G.V.D.) above the jurisdictional wetland natural ground elevation (44'6" N.G.V.D.) with trucked-in parish certified lean clay, which is consistent with the non-wetland natural ground elevation. The parish certified lean clay will be overtopped with +6" (45'6" N.G.V.D.) of limestone.

*THESE
Elevations
were all
guessed at
so we had a
real elevation
survey DONE*

Non-wetland Areas

All buildings, grass areas, concrete driveway access and concrete parking will be constructed in non-wetlands. There will be one 100' X 60' office building, one 200' X 100' fabrication shop, one 60' X 40' mechanic shop, one 50' X 40' tool room, two grass areas, one concrete driveway access and one concrete parking area to accommodate the office facility (see Plan View; Figure 2). The buildings will be constructed on a +6" (45'6" N.G.V.D.) concrete slab with 18" X 24" footings (see Detail 1; Figure 3), the grass areas will be graded and over seeded at the non-wetland natural ground elevation (45' N.G.V.D.), the concrete driveway access will consist of a +6" (45'6" N.G.V.D.) concrete slab and the concrete parking area will consist of a +6" (45'6" N.G.V.D.) concrete slab. All excavated material will be distributed in non-wetland areas and appropriate erosion control methods will be utilized during the construction phase, such as silk fencing, etc.

Drainage and sewerage will comply and receive approval from the appropriate parish agencies.

BRONCO CONSTRUCTION INDUSTRIAL FACILITY

Block 24. Addresses of Adjoining Property Owners, Lessees, Etc., Whose Property Adjoins the Waterbody

Northern Adjoining Property

- Louisiana Department of Transportation & Development (LA DOTD)
P.O. Box 94245
Baton Rouge, Louisiana 70804-9245.
♦ U.S. Highway 190

Southern Adjoining Property

- Bronco Construction Corporation
31388 LA Highway 16
Denham Springs, Louisiana 70726
- Weyerhaeuser Co.
17391 Florida Boulevard
Holden, Louisiana 70785

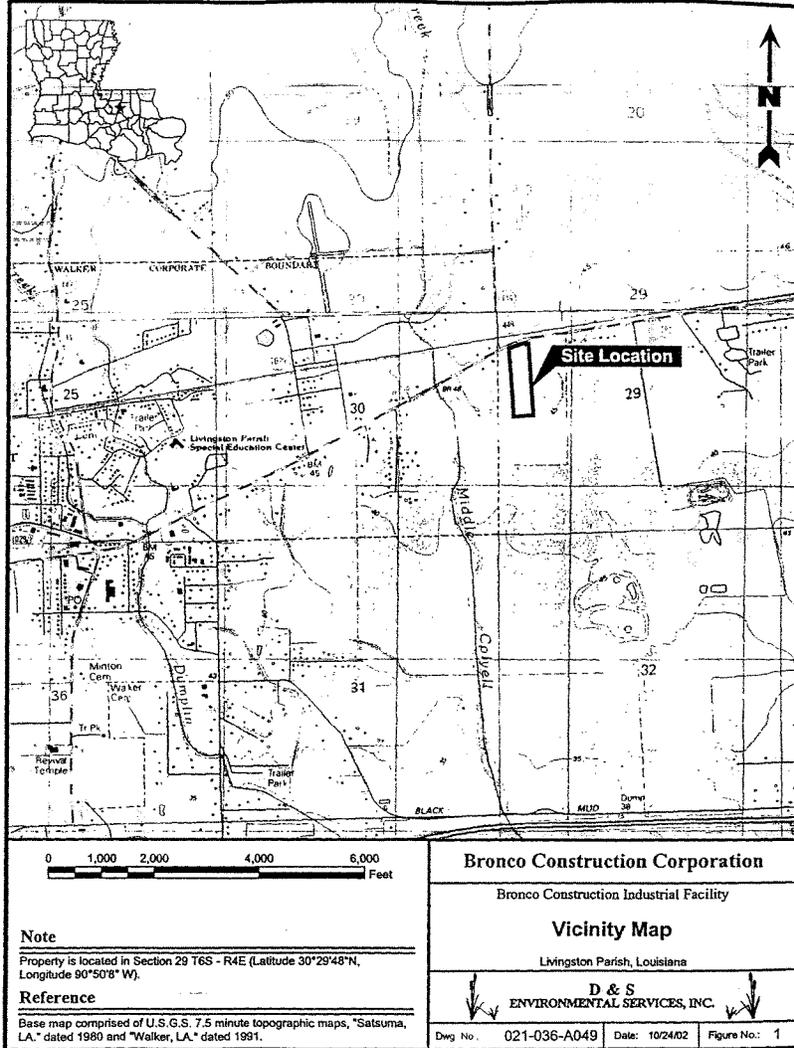
Western Adjoining Property

- Bronco Construction Corporation
31388 LA Highway 16
Denham Springs, Louisiana 70726
- Pam Wascom Wells & Gary Wascom
c/o Stafford Real Estate
13475 Vera McGowen
Walker, Louisiana 70785
- Cajun Automotive & Tire
11032 Florida Boulevard
Walker, Louisiana 70785

Eastern Adjoining Property

- Walter Miller Coburn
14431 Carrol Avenue
Walker, Louisiana 70785

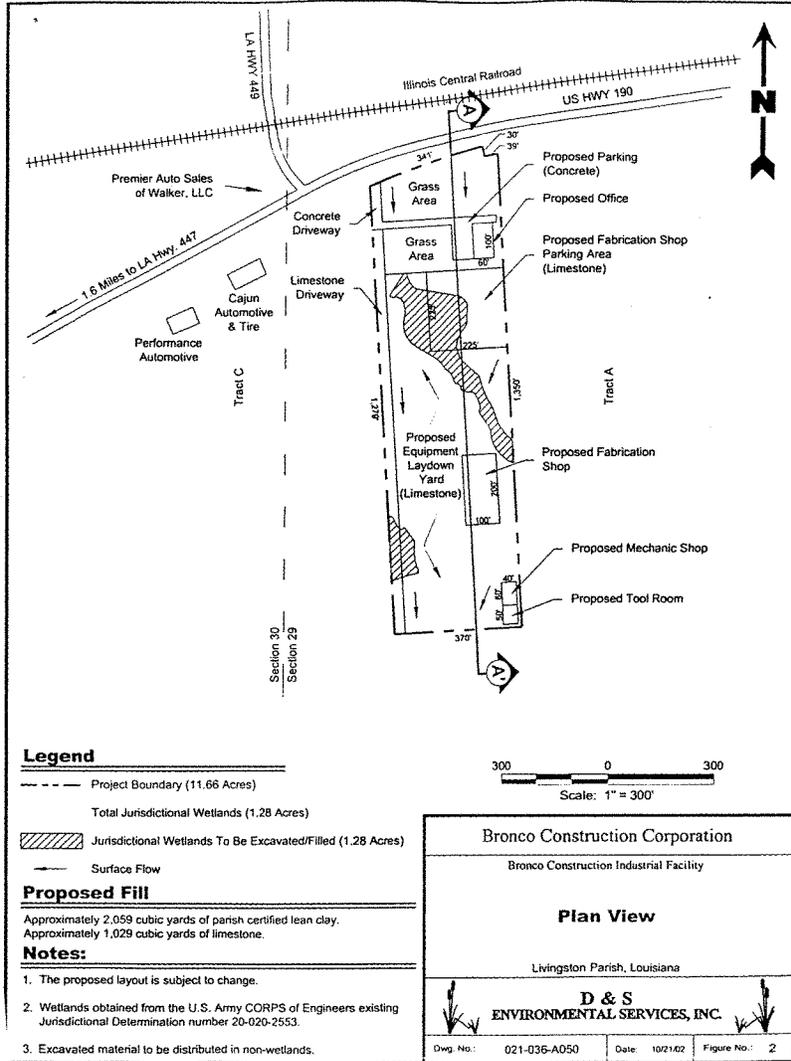
FIGURES



Note
 Property is located in Section 29 T6S - R4E (Latitude 30°29'48"N,
 Longitude 90°50'8" W).

Reference
 Base map comprised of U.S.G.S. 7.5 minute topographic maps, "Satsuma,
 LA." dated 1980 and "Walker, LA." dated 1991.

Bronco Construction Corporation		
Bronco Construction Industrial Facility		
Vicinity Map		
Livingston Parish, Louisiana		
 D & S ENVIRONMENTAL SERVICES, INC.		
Dwg No.	021-036-A049	Date: 10/24/02
Figure No.:	1	



Legend

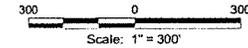
- Project Boundary (11.66 Acres)
- Total Jurisdictional Wetlands (1.28 Acres)
- ▨ Jurisdictional Wetlands To Be Excavated/Filled (1.28 Acres)
- Surface Flow

Proposed Fill

Approximately 2,059 cubic yards of parish certified lean clay.
 Approximately 1,029 cubic yards of limestone.

Notes:

1. The proposed layout is subject to change.
2. Wetlands obtained from the U.S. Army CORPS of Engineers existing Jurisdictional Determination number 20-020-2553.
3. Excavated material to be distributed in non-wetlands.

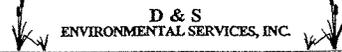


Bronco Construction Corporation

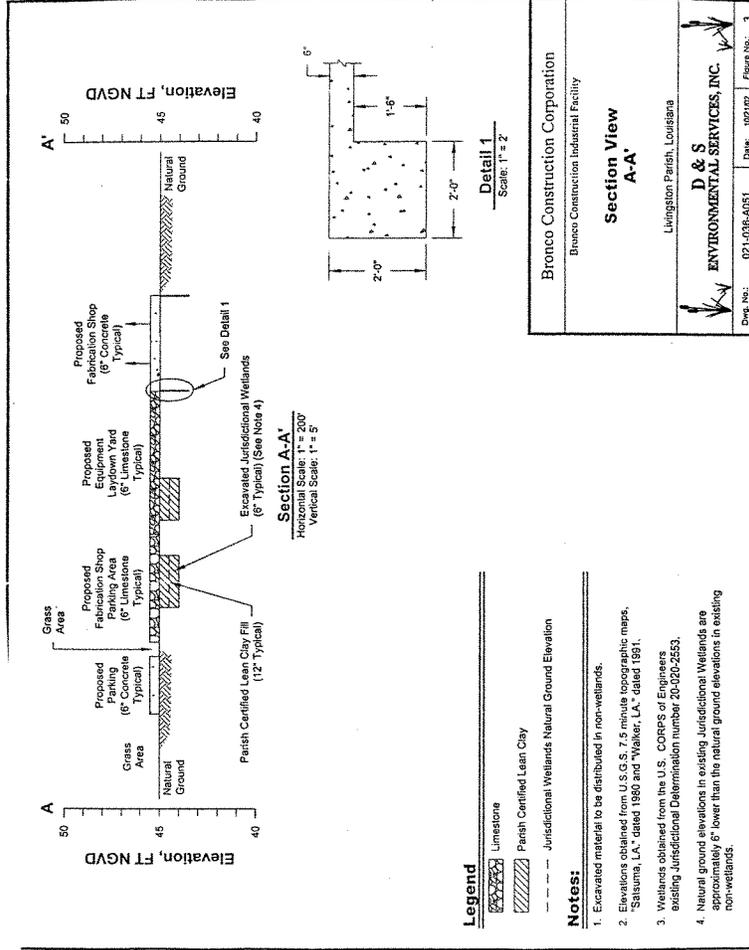
Bronco Construction Industrial Facility

Plan View

Livingston Parish, Louisiana



Dwg. No.: 021-036-A050 Date: 10/21/02 Figure No.: 2



Bronco Construction Corporation
 Bronco Construction Industrial Facility

Section View A-A'

Livingston Parish, Louisiana
D & S ENVIRONMENTAL SERVICES, INC.

Dwg. No.: 021-036-A051 Date: 10/2/02 Figure No.: 3

RICHARD HUGH BAKER
 6TH DISTRICT, LOUISIANA
 COMMITTEE ON
 FINANCIAL SERVICES
 CHAIRMAN
 SUBCOMMITTEE ON
 CAPITAL MARKETS, INSURANCE AND
 GOVERNMENT SPONSORED ENTERPRISES
 SUBCOMMITTEE ON
 FINANCIAL INSTITUTIONS
 AND CONSUMER CREDIT
 SUBCOMMITTEE ON
 INTERNATIONAL MONETARY POLICY
 AND TRADE



Congress of the United States
 House of Representatives
 Washington, D.C. 20515-1806

March 5, 2003

COMMITTEE ON
 TRANSPORTATION AND INFRASTRUCTURE
 SUBCOMMITTEE ON HIGHWAYS
 AND TRANSIT
 SUBCOMMITTEE ON AVIATION
 SUBCOMMITTEE ON
 WATER RESOURCES AND ENVIRONMENT
 COMMITTEE ON
 VETERANS' AFFAIRS
 SUBCOMMITTEE ON HEALTH

Mr. Gary Perkins
 Bronco Construction
 31388 LA Hwy. 16
 Denham Springs, LA 70726

Dear Mr. Perkins:

Enclosed is a letter I received from the U.S. Army Corps of Engineers in response to my inquiry on your behalf.

The Corps goes into considerable detail regarding my request that the Corps assist you in having a wetlands determination made and in developing a mitigation plan for property you own. In addition, the Corps responded to my request that they review the practices of Berkeley Wetlands Mitigation Area.

If you are still interested in pursuing your own wetlands mitigation plan, please let me know and I will do everything I can to assist you in completing your plan.

If you feel that I can be of assistance to you at any time, please do not hesitate to contact me.

Sincerely,


 Richard H. Baker
 Member of Congress

RHB:mre

Enclosure

341 CANNON HOUSE OFFICE BUILDING
 WASHINGTON, D.C. 20515-1806
 (202) 225-3901
 (202) 225-7313 (FAX)

5555 HILTON AVENUE
 SUITE 100
 BATON ROUGE, LA 70808
 (225) 929-7711
 (225) 929-7888 (FAX)



DEPARTMENT OF THE ARMY

NEW ORLEANS DISTRICT, CORPS OF ENGINEERS
P.O. BOX 60267

NEW ORLEANS, LOUISIANA 70160-0267

February 28, 2003

REPLY TO
ATTENTION OF:

Operations Division
Central Evaluation Section

SUBJECT: CW-20-030-2553

Honorable Richard H. Baker
Representative in Congress
5555 Hilton Avenue, Suite 100
Baton Rouge, Louisiana 70808

Dear Mr. Baker:

This responds to your letter dated February 12, 2003, forwarding documentation pertaining to the subject permit application submitted by Mr. Gary Perkins on behalf of Bronco Construction Corporation. The applicant requests authorization to clear, fill and grade an approximately 12-acre tract to construct an industrial facility near Walker, Louisiana, in Livingston Parish. Your letter seeks assistance with having a jurisdictional determination made on the property and developing a mitigation plan to compensate wetland impacts, and further requests investigation of Berkley, Inc., concerning fees charged for use of the Berkley Wetlands Mitigation Area (BWMA).

A wetland determination was conducted by D & S Environmental Services, Inc. on June 19, 2002, and submitted to the Regulatory Branch for approval. Based on review of this data and in-house information, we issued a letter of concurrence with the jurisdictional determination on July 26, 2002.

In regard to mitigation, compensatory mitigation is required for all unavoidable impacts to wetlands resulting from project implementation. Discussions with the applicant's consultant indicated preference toward utilizing a Corps-approved mitigation area to address this requirement. Accordingly, we advised the consultant that the BWMA would be the only appropriate site, due to sole collocation within the same watershed as the applicant's project. We further stipulated that 2.6 acres would be required for the 1.28 acres of wetland impact, since, as a wetland enhancement project, the BWMA generates less credit per acre of mitigation, and, therefore, requires more acreage contracted to achieve functional replacement.

Mr. Perkins contacted Berkley, Inc. and they advised him of their mitigation fees. Because he felt the fees and the level of mitigation were excessive, he contacted the Regulatory Branch to discuss what other compensatory mitigation options were available to facilitate permit compliance. We advised Mr. Perkins that he has the option of proposing his own specific mitigation project. He mentioned the possibility of reforesting a portion of a field that is located on the proposed project site. However, our analysis of the consultant's wetland determination, aerial photography, topographic mapping, and soil data indicated that the proposed field is a non-hydric area and would not support wetland restoration. In further discussion, Mr. Perkins expressed interest in acquiring a suitable tract and performing a restoration project thereon to resolve the matter. We advised Mr. Perkins that we are willing to provide timely assistance with evaluating potential sites and developing a satisfactory restoration plan. We are awaiting his response at this time.

In regard to investigating the fee practices of Berkley, Inc., we do not get involved with the financial administration of private businesses. Price determination requires consideration of numerous variables, such as land acquisition, restoration and long-term management, monitoring, and contingencies, all of which incur cost to the bank sponsor. To investigate the issue of how prospective clients are charged is beyond the purview of the regulatory program. We hope that market forces will direct reputable bank sponsors to establish more banks in those watersheds with active development, so as to foster competition and alleviate some of the negative perceptions by the public.

If I can be of any further assistance, please do not hesitate to contact me.

Sincerely,



Peter J. Rowan
Colonel, U.S. Army
District Engineer

**Berkley Wetlands Mitigation Area
Jerry Eisworth
1295 Florida Boulevard
Denham Springs, La. 70706
Phone: (225) 939-8944
Fax: (225)667-5986**

FAX COVER SHEET

Date: 2-10-03

Attention: David

Company: _____

Fax Number: 261-3321

Department: _____

From: Jerry Eisworth

Total Number of Pages: 3 (Including Cover Page)

Message: _____



P. O. Box 273
 Maurepas, Louisiana 70449-0273
 Business/ Fax: 225-261-3321
 e-mail: davidtemplet@directvinternet.com

Fax Transmittal Form

To:	Mr. Gary W. Perkins	Of:	Bronco Construction Corp.
Fax:	(225) 665-4279	From:	David C. Templet Jr.
Phone:	(225) 665-4830	Date:	February 11, 2003
Subject:	Bronco Construction Industrial Facility Wetland Mitigation Contract		4 pages including cover sheet
Remarks:	Urgent	For your review	Reply ASAP Please comment

Message:

Mr. Perkins,

Please find the attached wetland mitigation contract that you and I discussed earlier. To contract with Berkley Wetlands Mitigation Area, as the Corps of Engineers has requested, you need to have Mr. Tim Pruitt sign and date the permittee section at the bottom of the second page of the contract and include a check for \$19,500.00 made payable to "Berkley" and mail to the address on Berkley's fax cover page. Please contact me should you have questions or require additional information.

Sincerely,

David C. Templet Jr.

WETLAND MITIGATION CONTRACT

THIS AGREEMENT is entered into this 11th day of **February, 2003**, by and between **BERKLEY, INC.**, (hereinafter referred to as "BERKLEY"), whose mailing address is 1295 Florida Blvd., Denham Springs, LA 70726, and **Bronco Construction Corp**, whose mailing address is 31388 La Hwy 16 Denham Springs, LA 70726 (hereinafter sometimes referred to as "Permittee");

WHEREAS, BERKLEY is the sponsor of record of the **BERKLEY WETLANDS MITIGATION AREA** (hereinafter sometimes referred to as the "Mitigation Bank"), as created by the Interagency Agreement (Berkley Wetlands Mitigation Area) dated July 10, 2001.

WHEREAS, BERKLEY is the owner of certain property located in Livingston Parish, Sections 4, 5, 7 and 8, T-7-S, R-5-E, State of Louisiana, more particularly described in the Interagency Agreement (hereinafter referred to as the "Property"), which Property will be under the supervision and oversight of the Mitigation Area Review Team ("MART") as that term is defined in the Interagency Agreement; and

WHEREAS, Permittee desires to acquire a mitigation site which will satisfy Permittee's mitigation obligations to MART, and/or others, as contained in U S Army Corps of Engineers Permit No. **CW-20-020-2553**, for wetlands damages Permittee has incurred, or will incur, elsewhere

NOW THEREFORE, for and in consideration of the promises and the payments hereinafter set forth, **BERKLEY** and Permittee agree as follows:

- 1 **BERKLEY** agrees to satisfy Permittee's mitigation requirements, by mitigating 2.6 acres of the Mitigation Bank as defined in the Interagency Agreement;
- 2 Permittee shall pay **BERKLEY** a non-refundable payment of **Nineteen thousand Five hundred and no/100 Dollars (\$19,500)**, representing \$7,500.00 per acre for **2.6** acres located within the Mitigation Bank. Upon receipt of cash payment of this consideration, **BERKLEY** accepts responsibility for the mitigation of 2.6 acres within the Mitigation Bank, for the duration of time, and subject to the conditions required by the Interagency Agreement;
- 3 This Agreement does not grant unto Permittee any rights to any monies generated by the Mitigation Area, nor to any ownership interest in the Mitigation Area;
- 4 **BERKLEY** agrees to indemnify, save and hold Permittee harmless from and against any and all liability, other than acts of God, arising out of claims made by the U S

Army Corps of Engineers against Permittee, directly related to the mitigation requirements provided for in this contract.

- 5 Each party warrants to the other that it has the right to enter into, and otherwise perform the obligations set forth in, this contract,
- 6 Each party agrees to timely file any and all necessary reports required by supervisory authorities,
- 7 BERKLEY agrees to adhere to the mitigation requirements set forth in Section III of the Interagency Agreement, and shall plant and maintain the Mitigation Bank in strict conformity therewith.
- 8 This Agreement constitutes the entire agreement between BERKLEY and Permittee, and may not be changed, amended or modified except by instrument in writing signed by both parties hereto, and,
- 9 This Agreement shall be governed by and construed under the laws of the State of Louisiana, and shall be binding upon and inure to the benefit of the successors and assigns of all parties.

IN WITNESS THEREOF, the parties hereto have caused this Agreement to be duly executed by their duly authorized officers

AGREED TO AND ACCEPTED, this _____ day of _____, 200__

BERKLEY, INC.

By: _____

AGREED TO AND ACCEPTED, this _____ day of _____, 200__

PERMITTEE

By: _____

Earth Management and Preservation (EarthMAP) was organized in May, 2003 as a non-profit corporation registered in the State of Louisiana. EarthMap's origin is in Livingston Parish, Louisiana. We are a grass roots organization comprised of business men and women, real estate practitioners, developers, individual land owners, and other concerned citizens. The air we breathe and the water we drink should be free from pollution for ourselves, our children, and grandchildren. EarthMap is dedicated to the principle that each person is entitled to clean air and water. We should leave the environment as we found it and pass it on to future generations. But, as new U.S. Environmental Protection Agency Administrator, Mike Leavitt said in his opening statement after he was sworn in as the new Administrator on November 6, 2003 "We need to balance the needs of the environment and the needs of humanity."

We agree and endorse the commitment to uphold the beauty and preservation of America's vast resources. We believe in sound conservation balanced with an individuals constitutional right to own and possess property, free of unlawful deprivation.

EarthMAP members are environmentalists and we recognize that the environment in which we live is important. However, the rights of the landowners as given by the Fifth Amendment are equally as important.

The United States Army Corps of Engineer's guidelines inform us that before we can use, build on, or develop any property, we must spend approximately (\$ 8,000) eight thousand dollars for a qualified consultant just to determine if our property has any wetlands on it. If any wetlands are determined to be on our property, then we must pay another individual or private corporation that owns corps mandated mitigation banks, in the Ponchatrain Watershed up to (\$ 15,000) fifteen thousand dollars per acre just to use our property. It then can take several years just to get the 404A permit from the Corps.

A lot of people have invested in real estate over the years to supplement their retirement or possibly pass on to their children. They purchased property in order to make their lives a little better or just purely for investment reasons. Now they are told by the Corps that they cannot use their property without paying a mitigation fee. These fees in many cases exceeds the appraised value of the land itself.

After paying thousands of dollars over many years for our real estate investments, we now find out that part of our properties have been taken out of commerce and are now worthless.

This, in our opinion amounts to the taking of property by the corps without compensation to the landowner, which is a violation of the Fifth Amendment of the U.S. Constitution.

The program of mitigation banks is not working. While the idea may be noble, the reality is that the burden of expense has been placed on the private property owner. The costs and delays have taken privately owned property away from the owner. The unreasonable costs have limited our ability to sell our property or use it. Other individuals and private corporations that own mitigation banks

have made money with no limit to the amount that they can demand for the mitigation fees. We have been forced by the Corps to pay these individuals or corporations for property that we own. This clearly is a taking of our property without compensation.

After thorough research we find that neither the United States Congress nor any United States Supreme Court decision has ever given the Army Corps of Engineers or the Environmental Protection Agency, any regulatory powers over the tributaries of navigable bodies of water, their adjacent wetlands, or isolated wetlands.

The Corps and the EPA use the Clean Water Act enacted by Congress in 1972 and the United States Supreme Court decision (United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 -1985) as their authority to regulate non-navigable tributaries, their adjacent wetlands, and isolated wetlands.

The Clean Water Act (title 33 chapter 26> Subchapter IV> SEC >1344) only gives the Corps and the EPA jurisdiction over navigable bodies of waters of the United States and their adjacent wetlands.

The Supreme Court decision (United States v. Riverside Bayview Homes, Inc.) only addressed the issue of whether the Corp had jurisdiction over an (80) eighty acre parcel of land that was adjacent to Lake St. Clair in Michigan. The majority decision by Justice White only addressed the issue of wetlands adjacent to navigable bodies of water. In the majority opinion, Justice White wrote in footnote No. 8 on page 8:

“ We are not called upon to question the authority of the Corps to regulate discharge of fill material into wetlands that are not adjacent to bodies of open water, and we do not express any opinion on that question.”

The Supreme Court decision of Solid Waste Agency of Northern Cook County v. United States 99-1178-20011 (SWANCC) should have laid this issue to rest once and for all. The Corps and the EPA have basically chosen to ignore this decision of (SWANCC) written by Justice Renquist that affirmed that the Corps and the EPA have no wetlands regulatory power over the tributaries, their adjacent wetlands, and isolated wetlands.

The illegal rules and regulations have unnecessarily added thousands of dollars to the price of new homes in Livingston Parish and across Louisiana and the entire United States.

The United States Government through government agencies has established many public use areas for the good of the public at large. Some examples are the creation of the Yellowstone, Yosemite, and Grand Canyon National Parks. Many national forests were also established. The Army Corps of Engineers has built and presently maintains numerous dams throughout the United States.

The national parks, national forests, and dams were built with public funds for the preservation of water resources, old growth forests, wildlife habitat, their scenic beauty, and other recreational purposes for the overall good of the public at

large and for future generations to enjoy.

If scientific isolated wetlands reserves (mitigation banks) are needed to filter pollution, chemicals, and etc., for the public at large, then certainly we support them. However, these isolated wetland reserves must be federally or state funded, and established and maintained by the government at public expense. Not at the expense of the selective private property owner's and in violation of the owners Fifth Amendment rights. This right is a vital freedom established by the United States Constitution and sets America apart as a free country.



LIVINGSTON PARISH
Office of the President

An Equal Opportunity Employer

MIKE GRIMMER
Parish President

TRACIE EISWORTH
Director of Finance

JAMES RAY CLARK
Director DPW

March 24, 2004

To Mr. Chairman, Ladies and Gentlemen of the Committee:

As former Mayor of the Town of Walker, Louisiana for 18 years, I have dealt with the wetlands issue on numerous occasions while attempting to expand community services to our citizens. Our wastewater treatment plant was expanded under EPA and DEQ requirements on vacant property which already was owned by the Town of Walker. The cost for mitigation, filing for permits, legal and professional fees cost our citizens and community over \$13,000 per acre for three acres of expansion. Our second project was in a recreational area, where mitigation issues cost the community over \$70,000 to enhance our recreational facility with walking trails, bike trails, ball fields, cooking pavilions, and soccer fields. Even in our sidewalk improvement program, mitigation cost to the community to build new sidewalks was well over \$15,000.

As newly elected President of Livingston Parish, I am now experiencing mitigation costs of \$190,000 on 20 acres of property the parish purchased for the purpose of building a new governmental complex for the public. The Corps of Engineers has determined that over ten acres of this property is classified as wetlands. I have stated on numerous occasions that government is regulating government, at an astronomical cost for mitigation to improve governmental services. I cannot begin to explain the cost of the mitigation that our school board has suffered through in the last ten years. As of today the cost per acre has risen to over \$15,000.00 per acre for any improvement in our Parish.

I am totally aware of the importance of wetlands and wildlife benefits but share a common concern with many Governmental and private developments. However, improvement of federal agency actions could improve the conditions and requirements that have been placed on property.

Your consideration in replacing the current Section 404 of the Clean Water Act with some reasonable conditions would be deeply appreciated. Thank you for your public service to the American people and may God Bless.

Sincerely,

Mike Grimmer
Livingston Parish President

LOUISIANA HOUSE OF REPRESENTATIVES

18590 Highway 16, Suite 5
Port Vincent, LA 70726
Email: hrep88@legis.state.la.us
Phone: 225.698.9694
225.622.6750
800.553.2897
Fax: 225.698.6779



House and Governmental Aff
Judiciary
Transportation, Highways and Pub

M.J. "MERT" SMILEY, JR.
State Representative - District 88

March 23, 2004

Subcommittee on Water Resources
and Environment

Dear Mr. Chairman:

I would like to take this opportunity to express my concern regarding the inconstant agency enforcement of so-called wetlands on private property owners. I am very disturbed with the undue burden this places on the property owner. I do not believe that our citizens should be penalized for having small amounts of wetlands on their property.

I am very aware of the importance of wetlands for our wildlife's natural habit's, but I feel that the Army Corp. of Engineers has taken their definition of isolated wetlands to the extreme.

I ask that you please review this matter most carefully.

With best wishes, I remain

Very truly yours,

A handwritten signature in cursive script that reads "Mert Smiley, Jr.".

M. J. "Mert" Smiley, Jr
La House of Representatives
District 88



JEFFREY G. TAYLOR
LIVINGSTON PARISH ASSESSOR

March 23, 2004

To Mr. Chairman, Ladies and Gentlemen of the Committee;

Let me start by introducing myself. My name is Jeff Taylor and I am the Assessor of Livingston Parish. I have had the pleasure of serving in this capacity for a little more than three years.

During this time, I have had many dealings with wetlands and wetland mitigation. I have seen, in my short tenure, land values go up by artificial means. If a landowner buys a piece of property and has to mitigate out of the land, that adds cost to the land. In other words, if someone buys an acre for \$2,000 and has to mitigate out for an additional \$10,000, when they sell the land they have to recoup the full cost. Therefore, a parcel that sold for \$2,000 now has a value set at \$12,000. This is not fair to the consumer. Same thing goes if a piece of land is inherited, there is still mitigation cost.

I would ask that the committee review the standards before them and give some relief to the citizens that are under this strain.

Sincerely,

A handwritten signature in cursive script that reads "Jeffrey G. Taylor".

Jeff Taylor
Assessor

S & A Investment, Inc.

13515 Fondren Sibley, Walker LA 70785

Phone: 225-665-4747 Fax: 225-667-2246

March 22, 2004

To: Mr. Chairman and members of Congress

RE: Wetlands issues and their inconsistencies

Guidelines are a necessary part of our society. They serve as a safety net to protect those things in life which we hold dear. Just as rules govern our society, regulations govern our wetlands and the use or misuse of this most precious resource. It is the interpretation of these rules which creates a problem and financial hardship on the American public.

The following is a brief analysis of the changing interpretations and the cost factors involving wetlands; the ability to develop a residential neighborhood with affordable housing and the hardships encountered along the way.

In the July of 2001 we began a single family residential development on a seventy-seven acre tract of land in the Livingston Parish area. The property was purchased In 1999 at a price conducive to provide affordable housing to the citizens of our area.

The usual steps were taken in that we hired an engineer for construction plans, streets, and drainage, and wetlands consultant to provide a delineation and permit if necessary. Anticipating some wetlands areas our budget was calculated including mitigation costs. At that time mitigation costs were \$3,000 per acre, provided your ratios were one to one, and you were allowed to choose from several mitigation banks.

At the completion of our delineation our consultant found approximately nine acres of wetlands which he deemed "isolated." These were scattered areas, neither

connected to the other nor were they anywhere close to a navigable stream or other water way.

There were an additional five acres that were indicated in the report that were questionable and the Corps would have the final say. The delineation and a site plan showing the layout of the neighborhood was submitted to the Corps. After their review we now had 19+ acres of wetlands, none of which were "isolated". Thus 25%

of our property is now wetlands and does not fall into the "isolated category" as per the Corps interpretation of the regulations.

After many conversations with our consultant and the Corps personnel, we had worked out what we thought was a solution. On 12/4/01 our project was put out on public notice. The advertisement was for the mitigation of 12.6 acres of wetlands not 19. The plan was to install a berm around the remaining acreage to preserve as much of the wetlands as possible and still have ample room for a building site.

At the end of the public notice period there was only one response from EPA. EPA requested a needs analysis to prove the need for this residential development and to show that we had chosen a site with the least impact on the environment. As the Corps continued to review our file, the requirements begin to change again. Now the officials have decided the entire 19 acres would be destroyed and we would need to mitigate all of it. We were directed to two banks in our watershed with acreage at a 2 to 1 ratio which put the price between \$9500 and 10,500 per acre, quite an increase from \$3000 per acre when we started. This was really creating havoc on our budget, not to mention the time constraints in getting to a completion date.

After many discussions and letters pleading the financial impact was a hardship, we were granted a meeting with Corps personnel. We were anticipating the granting of a permit and some consideration as to the bank we were sent to. There were other banks open at the time, which were more cost effective, but not in our watershed. When we arrived at the meeting, we were informed that a permit was no where near being granted and the site plan for our neighborhood would have to be completely redesigned in order to accommodate their changes to preserve the wetlands.

Things went from bad to worse. After contacting state and local officials, hiring legal counsel and a host of other meetings and letters, a plan was finally sent to us from the Corps. Now this is the final draft. In order to get a permit, we were required to mitigate 13+ acres at a cost of \$9500 per acre and we had to place another 6+ acres under a conservation servitude. We were denied the use of the 6+ acres and the additional 9.55 acres directly behind the 6. We were not granted a crossing, driveway permit or any method to cross over the wet to use the dry behind it. Thus we lost 15.55 acres of usable land. We had to put it under a conservation servitude which restricts its use for perpetuity. As the owner of this property I am allowed to look at it and pay taxes on it until my death, then, my children will inherit that debt. This 15.55 acres translates into approximately 4 lots containing

3.5+ acres each at a conservative value of \$52,000 per lot. A lot value of \$182,000 plus the additional mitigation fees of \$130,000 comes to a total of \$312,000 in unanticipated loss of revenues. Not to mention additional engineering, consultant and attorney fees. My fellow congressmen this is not the way government regulations was designed to protect the public.

This, my friends is only one circumstance in which I was a directly affected by this interpretation of the wetlands regulations. Please take a stand on these issues and give the American public, citizens and businesses alike, a fair interpretation of the guidelines. Rules and regulations are not the problem. I know how to follow the rules. When the interpretation of those rules are not equal for all parties involved something is drastically wrong. Wetland regulations were originally designed to protect the impact along our coastline and our natural water ways. To interpret these regulations in such away that a home owner with a "low spot" in the yard now has wetlands--something is wrong.

Thank you for allowing me to submit this letter. I have many more files available which will allow you to see the ridiculous impact this has had on many of us. My fellow business associates have suffered financial hardships, time delays, and inconsistent interpretations as well. Unfortunately, time nor space allows for each of these cases to be presented. We are asking you, our representatives and leaders to assist in putting an end to the bureaucracy in the wetlands issues.

Sincerely,

Lynn P. Sibley
President

Paco Swain Realty L.L.C.

212 N. Range Ave.
Denham Springs, La. 70726
(225) 664-6777 phone
(225) 667-3191 fax

Dear Sirs,

Thank you for the opportunity to share with you information relevant to the wetlands issue.

As a Real Estate Broker and liscened Real Estate practitioner, I experience the detrimental effects that wetlands rules and regulations impose upon the public in their pursuit to purchase properties as investments that they hope will retain present value and gain future value.

As a land Developer , I personally incur undue cost associated with the determination and mitigation of such wetlands off our project sites.

While I support a clean environment, I believe that the creation of a wetlands law, sufficient to ensure a viable wetlands adjacent to large navigable waterways is indeed a law worthy of recognition. However the distortion of this law that has opened the door to jurisdiction over isolated wetlands, has created a grave injustice to individual property owners that purchase property for value growth and retention.

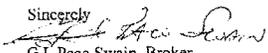
The average cost for assessment, determination and further mitigation of wetlands has cost me an average of \$ 22,000 per acre for my developments. I recently had to purchase 1.8 acres of wetlands off my development at a cost of \$ 32,000 (approx. \$18,000 per acre).

I feel like I am having to double pay for my land. This is an atrocity!

People that I help on a daily basis purchase land, are not financially able to double purchase their land. The imposition of this distorted law has created tremendous hardships on people pursuing the American dream.

Thank you for your help and consideration in clarifying Congress's intent of the wet lands law.

Sincerely


G.L. Swain, Broker

March 23, 2004

RE: Inconsistent Regulation of Wetlands and Other Waters

Mr. Chairman, ladies, and gentlemen of the committee:

In 1996 a friend and I purchased 57 acres from a timber company. The timber company intended to cut the trees and sell the property. To save the trees we paid an additional \$800.00 per acre just for the trees.

We were told that before we could put dirt on less than a quarter of an acre of our property to build a driveway, we should get a permit from the Army Corps of Engineers. We supplied the Corps with a map of our property so they could determine the wet areas. We were told by the Corps that all of our property was wetlands and that if we even rode our three-wheelers on the property we could go to prison or be fined \$10,000.00 a day. Part of the property was pasture with Live Oak trees. In essences, we knew not all of the property was wetlands. To prove this, we hired a consultant at \$90.00 an hour. To pay for the consultant, we decided to sell some of the trees.

We discussed the selling of the trees with the Corps and we were told that we would have to pay \$2000 an acre to mitigate the trees that we were going to cut. In investigating this situation, we determined that the trees would only bring \$800.00 at the mill. The Corps has basically taken our trees out of commerce, trees we bought and paid for are now cost prohibited to sell.

Years later, we found out that we could have sold our trees because we were not removing the trees for development. The Corps lied intently to discourage us from removing the trees and overstepped their jurisdiction.

Our consultant proved that from the river 85 feet back into the property is not wetlands, after much time the Corps agreed. The Corps then stated that we would have to put our driveway in front of our camps. We wanted to place our driveways 120 feet off of the river so it would be behind the camps. The adjacent properties driveway was at 120 feet and we just wanted to extend it to service our area.

After almost \$2000.00, we could not afford to pay the consultant any longer and we still did not have a permit. So, I began working with Michael Farrabe of the New Orleans Corps office. In my discussion with him, I let him know that the safest place for the driveway was behind the camps just as the adjacent property's driveway, which the Corps previously approved.

After 3 years, we were approved for the driveway at 120 feet, now we had to mitigate. The Corps told me that I could chose between a \$3000.00 and a \$5,000.00 an acre bank

and pay a ratio of 4 to 1. I suggested a bank in the Ponchatrain Watershed at \$1200.00 an acre that other citizens had used. Mr. Farrabe said that if I argued that I would have no choice but the \$5000.00 bank at a ratio of 4 to 1.

At the same time, within three miles of my property another landowner was stopped by the Corps when he cut his trees to build a road. Within three months he was allowed by the Corps to get a permit and mitigate at 4 to 1 ratio on his own land. His mitigation cost nothing. I asked Mr. Farrabe if I could do the same as the other landowner had done; set aside a portion of my property and not use it, and he told me "NO, Mr. Henderson, we already control your property, why would we allow you to use your own property as a mitigation bank". Mr. Farrabe had allowed someone else to use their own property. I did not and do not understand why I was not allowed the same option.

After three years, a lot of my time, and aggravation I paid for a half acre at \$3000.00 per acre at 4 to 1. So, my quarter acre cost \$6000.00 just to get the permit for the driveway. This does not include the consultant, application, and many other costs.

I know that my constitutional rights have been violated. I had to pay and someone else profited just for me to use my own land. The mitigation process is wide open for corruption. The inconsistent enforcements of the Corps have devastated many landowners. The mitigation bank owners have no limit of what they can charge. This process has made patriotic Americans angry with their government. Our government is for all the people, this mitigation process allows private entities the means to get rich on the backs of law abiding citizens. The red tape, lengthy process, and cost are completely out of hand. Today the costs are upward of \$15,000.00 per acre in our area.

Additionally; when I was in Mr. Farrabe's office in New Orleans, I was offended by the framed comic artwork over his desk that portrayed the Corps declaring deserts wetlands. It seemed that Mr. Farrabe enjoys the power that he used while sending me on a wild goose chase and holding my land hostage.

Sincerely,



David Henderson

Executive Order 12630
Governmental Actions and Interference With
Constitutionally Protected Property Rights

March 15, 1988

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to ensure that government actions are undertaken on a well-reasoned basis with due regard for fiscal accountability, for the financial impact of the obligations imposed on the Federal government by the Just Compensation Clause of the Fifth Amendment, and for the Constitution, it is hereby ordered as follows:

Section 1. Purpose. (a) The Fifth Amendment of the United States Constitution provides that private property shall not be taken for public use without just compensation. Government historically has used the formal exercise of the power of eminent domain, which provides orderly processes for paying just compensation, to acquire private property for public use. Recent Supreme Court decisions, however, in reaffirming the fundamental protection of private property rights provided by the Fifth Amendment and in assessing the nature of governmental actions that have an impact on constitutionally protected property rights, have also reaffirmed that governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just compensation is required.

(b) Responsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights. Executive departments and agencies should review their actions carefully to prevent unnecessary takings and should account in decision-making for those takings that are necessitated by statutory mandate.

(c) The purpose of this Order is to assist Federal departments and agencies in undertaking such reviews and in proposing, planning, and implementing actions with due regard for the constitutional protections provided by the Fifth Amendment and to reduce the risk of undue or inadvertent burdens on the public fisc resulting from lawful governmental action. In furtherance of the purpose of this Order, the Attorney General shall, consistent with the principles stated herein and in consultation with the Executive departments and agencies, promulgate Guidelines for the Evaluation of Risk and Avoidance and Unanticipated Takings to which each Executive department or agency shall refer in making the evaluations required by this Order or in otherwise taking any action that is the subject of this Order. The Guidelines shall be promulgated no later than May 1, 1988, and shall be disseminated to all units of each Executive department and agency no later than July 1, 1988. The Attorney General shall, as necessary, update these guidelines to reflect fundamental changes in takings law occurring as a result of Supreme Court decisions.

Sec. 2. Definitions. For the purpose of this Order: (a) "Policies that have takings implications" refers to Federal regulations, proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, or other Federal policy statements that, if implemented or enacted, could effect a taking, such as rules and regulations that propose or implement licensing, permitting, or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property. "Policies that have takings implications" does not include.

- (1) Actions abolishing regulations, discontinuing governmental programs, or modifying regulations in a manner that lessens interference with the use of private property;
 - (2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations;
 - (3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings;
 - (4) Studies or similar efforts or planning activities;
 - (5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority;
 - (6) The placement of military facilities or military activities involving the use of Federal property alone; or
 - (7) Any military or foreign affairs functions (including procurement functions thereunder) but not including the U.S. Army Corps of Engineers civil works program.
- (b) Private property refers to all property protected by the Just Compensation Clause of the Fifth Amendment.
- (c) "Actions" refers to proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, applications of Federal regulations to specific property, of Federal governmental actions physically invading or occupying private property, or other policy statements or actions related to Federal regulation or direct physical invasion or occupancy, but does not include:
- (1) Actions in which the power of eminent domain is formally exercised;
 - (2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations;
 - (3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings;
 - (4) Studies or similar efforts or planning activities;
 - (5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority;
 - (6) The placement of military facilities or military activities involving the use of Federal property alone; or
 - (7) Any military or foreign affairs functions (including procurement functions thereunder), but not including the U.S. Army Corps of Engineers civil works program.
- Sec. 3. General Principles. In formulating or implementing policies that have takings implications, each Executive department and agency shall be guided by the following general principles:
- (a) Governmental officials should be sensitive to, anticipate, and account for, the obligations imposed by the Just Compensation Clause of the Fifth Amendment in planning and carrying out governmental actions so that they do not result in the imposition of unanticipated or undue additional burdens on the public fisc.
 - (b) Actions undertaken by governmental officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use, may constitute a taking of property. Further, governmental action may amount to a taking

even though the action results in less than a complete deprivation of all use or value, or of all separate and distinct interests in the same private property and even if the action constituting a taking is temporary in nature.

(c) Government officials whose actions are taken specifically for purposes of protecting public health and safety are ordinarily given broader latitude by courts before their actions are considered to be takings. However, the mere assertion of a public health and safety purpose is insufficient to avoid a taking. Actions to which this Order applies asserted to be for the protection of public health and safety, therefore, should be undertaken only in response to real and substantial threats to public health and safety, be designed to advance significantly the health and safety purpose, and be no greater than is necessary to achieve the health and safety purpose.

(d) While normal governmental processes do not ordinarily effect takings, undue delays in decision-making during which private property use is interfered with carry a risk of being held to be takings. Additionally, a delay in processing may increase significantly the size of compensation due if a taking is later found to have occurred.

(e) The Just Compensation Clause is self-actuating, requiring that compensation be paid whenever governmental action results in a taking of private property regardless of whether the underlying authority for the action contemplated a taking or authorized the payment of compensation. Accordingly, governmental actions that may have a significant impact on the use or value of private property should be scrutinized to avoid undue or unplanned burdens on the public fisc.

Sec. 4. Department and Agency Action. In addition to the fundamental principles set forth in Section 3, Executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when implementing policies that have takings implications:

(a) When an Executive department or agency requires a private party to obtain a permit in order to undertake a specific use of, or action with respect to, private property, any conditions imposed on the granting of a permit shall:

- (1) Serve the same purpose that would have been served by a prohibition of the use or action; and
- (2) Substantially advance that purpose.

(b) When a proposed action would place a restriction on a use of private property, the restriction imposed on the use shall not be disproportionate to the extent to which the use contributes to the overall problem that the restriction is imposed to redress.

(c) When a proposed action involves a permitting process or any other decision-making process that will interfere with, or otherwise prohibit, the use of private property pending the completion of the process, the duration of the process shall be kept to the minimum necessary.

(d) Before undertaking any proposed action regulating private property use for the protection of public health or safety, the Executive department or agency involved shall, in internal deliberative documents and any submissions to the Director of the Office of Management and Budget that are required:

- (1) Identify clearly, with as much specificity as possible, the public health or safety risk created by the private property use that is the subject of the proposed action;
- (2) Establish that such proposed action substantially advances the purpose of protecting public health and safety against the specifically identified risk;
- (3) Establish to the extent possible that the restrictions imposed on the private property are not disproportionate to the extent to which the use contributes to the overall risk; and

(4) Estimate, to the extent possible, the potential cost to the government in the event that a court later determines that the action constituted a taking.

In instances in which there is an immediate threat to health and safety that constitutes an emergency requiring immediate response, this analysis may be done upon completion of the emergency action.

Sec. 5. Executive Department and Agency Implementation. (a) The head of each Executive department and agency shall designate an official to be responsible for ensuring compliance with this Order with respect to the actions of that department or agency.

(b) Executive departments and agencies shall, to the extent permitted by law, identify the takings implications of proposed regulatory actions and address the merits of those actions in light of the identified takings implications, if any, in all required submissions made to the Office of Management and Budget. Significant takings implications should also be identified and discussed in notices of proposed rule-making and messages transmitting legislative proposals to the Congress, stating the departments' and agencies' conclusions on the takings issues.

(c) Executive departments and agencies shall identify each existing Federal rule and regulation against which a takings award has been made or against which a takings claim is pending including the amount of each claim or award. A "takings" award has been made or a "takings" claim pending if the award was made, or the pending claim brought, pursuant to the Just Compensation Clause of the Fifth Amendment. An itemized compilation of all such awards made in Fiscal Years 1985, 1986, and 1987 and all such pending claims shall be submitted to the Director, Office of Management and Budget, on or before May 16, 1988.

(d) Each Executive department and agency shall submit annually to the Director, Office of Management and Budget, and to the Attorney General an itemized compilation of all awards of just compensation entered against the United States for takings, including awards of interest as well as monies paid pursuant to the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601.

(e)(1) The Director, Office of Management and Budget, and the Attorney General shall each, to the extent permitted by law, take action to ensure that the policies of the Executive departments and agencies are consistent with the principles, criteria, and requirements stated in Sections 1 through 5 of this Order, and the Office of Management and Budget shall take action to ensure that all takings awards levied against agencies are properly accounted for in agency budget submissions.

(2) In addition to the guidelines required by Section 1 of this Order, the Attorney General shall, in consultation with each Executive department and agency to which this Order applies, promulgate such supplemental guidelines as may be appropriate to the specific obligations of that department or agency.

Sec. 6. Judicial Review. This Order is intended only to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

RONALD REAGAN
THE WHITE HOUSE,
March 15, 1988.

Exec. Order No. 12630, 53 FR 8859, 1988 WL 311191 (Pres.)

**Testimony of Mr. Charles M. Tebbutt, Attorney
Western Environmental Law Center**

**Before the House Committee on
Transportation and Infrastructure's Water Resources and the
Environment Subcommittee**

March 30, 2004

Mr. Chairman, members of the Committee, my name is Charlie Tebbutt, I am a staff attorney with the Western Environmental Law Center (WELC). The Western Environmental Law Center is dedicated to defending the West. We provide free and reduced rate legal assistance to individuals, Native American tribes, conservation groups and local governments who seek to protect and restore the forests, rivers, grasslands, wildlife, and human communities of the West. Thank you for inviting me to testify at today's hearing. I would also like to thank the Natural Resources Defense Council, National Wildlife Federation, Earthjustice, Sierra Club and the Clean Water Network for making it possible for me to be here today to testify.

I have been involved in enforcing the Clean Water Act since 1988. I have worked on pollution issues in every region of the United States, from the abundant waters of the Great Lakes and St. Lawrence River to the arid regions of the interior West, and consequently have seen all types of waterways that have been affected by pollution and dredge and fill activities. Whether the rivers and streams used for pollution discharge are 300 feet deep and accommodate international shipping or whether they are only 3 inches deep part of the year and may barely be able to float a child's toy boat, each provides the lifeblood to its region. The seasonal streams, playa lakes and wetlands of the West provide the precious, life-sustaining water sources that are taken for granted in the East and so many other parts of the country. Each and every one of them deserves and requires the protections intended to be afforded by the Clean Water Act.

My purpose for presenting testimony to you today is three-fold: First, I will briefly discuss the history of the Clean Water Act in order to provide context for the issues we are considering in today's hearing and, particularly, the problems with the Bush administration's current policies on clean water. Second, I will discuss the findings and recommendations of the GAO report and explain why the report reinforces that the current law must be clearly understood and enforced. Third, I will provide you with examples from two of my recent cases that have direct bearing on the issues under discussion today. I hope that at the end of my testimony you will share my conclusions that it is of the utmost importance for our country's health and safety that we continue to maintain strong Clean Water Act protections for all of the nation's waters.

Importance of the Clean Water Act

Almost 32 years ago, Congress revolutionized our country's approach to controlling and, ultimately, eliminating water pollution, when it enacted wide-ranging reforms to the Federal Water Pollution Control Act. The vision of the 92nd Congress in enacting what is now known as the Clean Water Act stands as one of the legislative pinnacles in the history of this Congress and our country.

Based on decades of experience, Congress recognized in 1972 that relying on states to fund, implement and enforce effective water pollution control (and resource protection) policies, without the financial, technical, and political assistance of a strong federal program was doomed to continued failure. Congress created a broad but flexible federal "floor" of clean water safeguards, a mandatory but innovative system for protecting the nation's waters and the public's health.

As the legislative history of the Act reflects, for example, "[S]ection [301] clearly establishes that the discharge of pollutants is unlawful. Unlike its predecessor program which permitted the discharge of certain amounts of pollutants under the conditions described above, this legislation would clearly establish that no one has the right to pollute--that pollution continues is because of technological

limits, not because of any inherent right to use the nation's waterways for the purpose of disposing of wastes."

The critical sections affecting water quality and quantity are set forth in sections 301, 303, 311, 401, 402 and 404. As all thoughtful courts have recognized, these are the provisions that depend on a comprehensive understanding of the natural water cycle to give the statute real effect.

Under the Clean Water Act, great advances have been made in reducing water pollution as well as the rate of wetland destruction. Of course, the successes have been fewer, and slower in coming than the 92nd Congress envisioned. This is due to several factors, including recalcitrance and opposition of regulated industries to strong implementation and enforcement of the provisions of the Act to achieve the law's goal of restoring and maintaining the chemical, physical and biological integrity of the nation's waters.

As a result, while significant progress has been made, there is still a great deal to be done in order to reach the goals set for us by the 92nd Congress.

Roughly half of our waters still do not meet basic water quality standards for fishing, swimming and drinking. Agricultural run-off continues to be the major source of impairment of our nation's waters. Renewal of expired NPDES permits continues to be backlogged. In its most recent report, the National Wetlands Inventory found that we continued to lose at least 58,000 acres of wetlands a year in the late 1990s, an estimate considered low by many authorities. This estimate was made prior to the U.S. Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*. (SWANCC) which, as described below, in combination with the current administration's policies, has undoubtedly lead to a significant acceleration of wetlands loss. The loss of wetlands, and other waters of the United States that the 92nd Congress intended to be covered by the Clean Water Act, can be expected to get much worse unless the 108th Congress acts.

Americans are very clear that they do not want protection for the nation's waters weakened. By large margins, our fellow-citizens favor keeping protections as strong as they have existed for the past 30 years, or they want to see even greater protections. I suspect most members of the subcommittee, and indeed the Congress as a whole, find a similar level of support amongst their constituents that cuts across lines of race, religion, gender, political affiliation and economic status.

To offer just two of many examples:

In a December 2002 poll from Greenberg et.al., 76% of respondents indicated that there should be stronger regulation of clean water (as opposed to 14% of respondents who believe there should be less). This correlates with the finding of Luntz Research Companies in their 2003 memo concerning voter attitudes on environmental issues that "***the number one hot button to most voters is water quality.***" (emphasis, bold and italics in original)

With this clear public consensus in mind, I will turn to addressing the recent legal and political developments leading up to publication of the GAO report.

The SWANCC decision

On January 9, 2001, the U.S. Supreme Court issued its 5-4 decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 121 S.Ct. 675, 531 U.S. 159 (2001),

(SWANCC). The case involved a challenge to the agency's denial of a permit to fill a complex of approximately 17.6 acres of ponds and small lakes. The Corps asserted jurisdiction based upon the sites' extensive use by 100-plus species of birds, including many endangered, water-dependent, and migratory birds.¹ The Corps' use of one element of the "migratory bird rule"² was challenged in federal district court by the SWANCC. The District court and the 7th Circuit Court of Appeals rejected the challenge. However, the Supreme Court narrowly held that the Corps could not assert its authority over an undefined category of "intrastate, isolated, non-navigable waters" *solely* on the basis of their use by migratory birds. The court's holding in SWANCC was narrow. The Court did not reach all aspects of the migratory bird rule.³ Nor did it overturn the central tenets of its unanimous 1986 decision in *United States v. Riverside Bayview Homes Inc.*, 474 U.S. 121 (1985), (and reaffirmed by the recent *Miccossukee* decision), which held that non-navigable waters, including wetlands, were within the jurisdiction of the Clean Water Act. Perhaps most relevant for purposes of this hearing, the SWANCC decision did not hold that the existing regulations defining the term "waters of the United States" needed to be amended by EPA or the Army Corps. The definition of "waters of the United States" that has been on the books and relied upon since it was finalized in 1977 was untouched by the SWANCC decision.

That SWANCC did not overturn the existing Clean Water Act rules is a view shared by the Department of Justice, which has argued in more than two-dozen cases around the country that the decision is narrow, and that nothing in the opinion requires weakening the existing definitions.

The vast majority of federal courts that have interpreted the scope of the Clean Water Act both pre- and post-SWANCC agree with the Department of Justice, rejecting numerous subsequent challenges to the scope of the Act in specific instances, and confirming that many types of waters, including seasonal streams, tributaries and manmade conveyances continue to be protected from unrestricted filling or discharges of pollution as they have since 1972. I have attached a summary of post-SWANCC cases to my testimony.

The Administration's ANPRM and Policy Directive (Guidance)

Despite the prevailing view of the Department of Justice and most federal courts, in January 2003, the administration announced its intent to conduct a rulemaking to amend the existing definition of "waters of the United States" in order to remove Clean Water Act protections for some of our nation's waters. The administration opened a public comment period for its advance notice of proposed rulemaking (ANPRM), seeking comment on several issues including whether a new category of "isolated" waters should be adopted and, if so, whether such waters should remain

¹ "Among the species that [had] been seen nesting, feeding, or breeding at the site are mallard ducks, wood ducks, Canada geese, sandpipers, kingfishers, water thrushes, swamp swallows, redwinged blackbirds, tree swallows, and several varieties of herons. Most notably, the site is a seasonal home to the second-largest breeding colony of great blue herons in northeastern Illinois, with approximately 192 nests in 1993." Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 191 F.3d 845 (7th Cir. 1999).

² Despite its name, the "migratory bird rule" is not part of the existing rules that define the scope of the Clean Water Act. Rather, it is a policy elaborated in preamble language by the Army Corps and EPA accompanying federal register notices 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986), and 53 Fed. Reg. 20764, 20765 (June 6, 1988).

³ The "migratory bird rule" contained several bases for asserting jurisdiction over waters of the United States. In addition to those addressed by the SWANCC decision, (the actual or potential use by birds protected by Migratory Bird treaties, actual or potential use as habitat by other migratory birds which cross state lines), the "rule" also included use of a water as habitat by an endangered species, and use of a water to irrigate crops to be sold in interstate commerce.

protected under the Act.⁴ In addition, the ANPRM sought comment on whether the existing bases for asserting jurisdiction over a large number of the nation's waters, including their connection to interstate commerce via travel, recreation, production of fish or shellfish, and their potential use for industrial purposes, were still valid after the SWANCC decision. In fact, *none of these issues were implicated by the holding of the SWANCC case.*

Attached to the ANPRM notice was a policy directive (also called a "guidance") to EPA and Army Corps field staff, outlining how staff should be treating questions of Clean Water Act jurisdiction pending the outcome of a rulemaking. The directive instructs the agencies to stop protecting so-called "isolated" waters without first obtaining "project specific" approval from headquarters in Washington, DC. This policy directive remains in effect today and continues to allow widespread destruction and pollution of wetlands, streams, ponds, and other waters, with no notice to (or oversight by) the public.

Specifically, the directive:

- tells staff not to assert Clean Water Act jurisdiction over so-called "isolated" waters on the basis that the water is used as habitat for federally protected endangered or threatened species or to irrigate crops sold in interstate commerce.
- presumes that all so-called "isolated" intrastate, non-navigable waters are no longer protected, even if the water is used in interstate commerce or the pollution or destruction of the water would affect interstate commerce. This means the agencies' default position is that such waters are not protected. It tells field staff that if they plan to assert jurisdiction over isolated, intrastate, non-navigable waters based on other factors listed in long-standing federal regulations, they must seek "formal project-specific approval" from Army Corps or EPA headquarters prior to doing so. Agency staff are not required to get permission to allow pollution of these waters without any federal permit or limitations.
- says that "generally speaking" the agencies will continue to protect tributaries of navigable waters and wetlands directly adjacent to those tributaries. (The exceptions to this "generally speaking" policy are not spelled out.)

Very few waters are truly "isolated" from a scientific perspective (since pollution in or destruction of even small wetlands, headwater streams, and seasonal waterways will have serious effects on the biological, chemical and physical integrity of other waters). Nevertheless, key officials in the Bush administration as well as developers, mining companies, the oil industry and other polluters are saying that **any wetland, small stream, non-navigable pond or other water that does not have an above ground, year round, natural connection directly touching a commercially navigable waterway should be treated as if it were "isolated."** Under this definition, even some tributaries could be treated as "isolated." This policy will allow destruction and pollution of waters that have been protected by the Clean Water Act and its regulations for over 30 years.

EPA itself has estimated that some 20 million acres of wetlands in the continental U.S. are at risk of losing Clean Water Act protection under the administration's policy directive. In addition, tens of thousands of miles of seasonal and headwater streams as well as small lakes and ponds are also at risk of being deemed "isolated" and becoming discharge sites for toxics, sewage, animal waste, oil or other pollution, as well as being dredged or filled.

⁴ 68 Fed.Reg. 1991 (January 15, 2003).

Widespread opposition to administration policies

Reaction to the administration's plans to narrow the scope of the Act was overwhelmingly negative. EPA and the Corps received 135,000 comments, 99% of which opposed narrowing the scope of the Clean Water Act. Thirty-nine of the 42 states whose resource agencies commented on the plan rejected it as bad policy that would significantly harm state interests. Many of the states wrote in great detail regarding the additional costs that would be borne by them, the need for maintenance of the federal "floor" of Clean Water Act protections,⁵ and the critical importance of maintaining protections over even the smallest wetlands and streams in order to prevent greater pollution, flooding, or loss of water quantity from occurring throughout their state.

In addition, numerous state and regional authorities, including the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA), Tennessee Valley Authority (TVA), New England Interstate Water Pollution Control Commission (NEIWPCC), National Association of Floodplain Managers, and Association of State Wetlands Managers wrote in opposition to the administration's plans.

The scientific community, including the Society of Wetlands Scientists, and a group of 85 preeminent stream scientists, strongly opposed the administration's efforts, as did many of the nation's most important organizations representing hunters and anglers including Ducks Unlimited, Delta Waterfowl Association, Wildlife Management Institute, the National Wildlife Federation, Izaak Walton League, BASS, and Trout Unlimited.

Last but not least, members of Congress, including a bi-partisan group of 218 House members – amongst them 20 of the 34 members of this subcommittee – urged the administration to abandon the rulemaking and withdraw the policy directive.

Notably, the major trade associations representing industries including mining, oil, developers, and farming took a different approach. Their consistent position is that, after the SWANCC decision, only "traditionally navigable waters" and their immediately abutting wetlands should remain protected under the Clean Water Act. This radical effort to cut Clean Water Act protections would result in complete loss of Clean Water Act protections for the vast majority of the nation's streams and wetlands.

Rulemaking abandoned, policy directive still in effect, existing rules being ignored

Public opposition to the administration's rulemaking efforts increased when a draft of the proposed rule was obtained by the Los Angeles Times. The draft showed that at least some officials in the administration saw the opportunity to go a long way toward adopting the radical reduction of the Act promoted by industry. In essence, the draft rule scrapped the key provision of existing regulations that extends protections to most of the nation's intrastate waters.⁶

⁵ In some instances the "floor" is actually a ceiling, since many states have adopted "no more stringent than" provisions barring adoption of standards more protective or far-reaching than the Clean Water Act.

⁶ In particular, the draft rule jettisoned a critical component of the existing rules, which defines waters protected under the Act to include: "All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use degradation or destruction of which could affect interstate or foreign commerce including any such waters: which are or could be used by interstate or foreign travelers for recreational or other purposes; or from which fish or shell

Presumably as a result of the national outcry, in December the administration announced that it was abandoning plans for a rulemaking to officially narrow the scope of the Clean Water Act. However, the policy directive was not withdrawn and EPA and the Army Corps have given no indication if or when they intend to do so.

It appears that the administration plans to continue operating under the policy directive which goes far beyond the dictates of the SWANCC decision, relies in large part on an unbalanced and outdated discussion of recent case law to justify the policy of backing away from long-standing Clean Water Act protections, and is flatly inconsistent with the White House decision to drop the rulemaking in favor of keeping the existing regulatory definition of waters intact.

Even more disturbing, based upon its response to the GAO report, it appears that the Army Corps has *de facto* adopted that aspect of the draft rule that abandons protection for intrastate waters (as well as many interstate waters) – just without going through the legal and public process required by a rulemaking. In his letter to the GAO, Assistant Secretary of the Army for Civil Works John Paul Woodley, Jr. states that “following the SWANCC decision, it may generally be said that a water (and associated aquatic resources) will be subject to Clean Water Act jurisdiction if the water is either a territorial sea, a traditional navigable water, a tributary to a traditional navigable water, or an adjacent wetland.” This view of the scope of the Clean Water Act is dramatically at odds with the existing rules that are untouched by the SWANCC decision and have not been amended by public rulemaking.

Preliminary evidence gathered via Freedom of Information Act (FOIA) requests suggests that many Corp Districts are abandoning protections for waters clearly protected by the Clean Water Act and existing rules. For example:

Since the SWANCC decision in 2001, the St. Paul Corps District, responsible for Minnesota and Wisconsin, has decided in some 840 cases that Clean Water Act protections do not apply because of the SWANCC decision. While only two-thirds of cases document the acreage of waters to be impacted, this has totaled almost 4,000 acres that did not require any federal authorization. The District has withheld jurisdiction from at least 20 large lakes, and a 300 acre wetlands complex. While it is unlikely that these lakes are actually “isolated” from other waterways, even if they were, many feature boat ramps and fishing piers that demonstrate their use in interstate recreation, a factor that should ensure protection under the Clean Water Act.

The Port of Houston Authority proposed to construct a container port called Bayport on the northwest shoreline of Galveston Bay. The impacted area includes 146 acres of freshwater wetlands adjacent to the Bay (it was noted that one can stand in the wetlands and throw a stone into Galveston Bay). Additionally, the project will bring enough saltwater into the ecosystem to destroy the current populations of plants and wildlife. The Corps determined there are approximately 15 acres of jurisdictional wetlands and are allowing the project to proceed.

The Galveston Corps District is interpreting the SWANCC decision so broadly that state officials estimate more than 10,000 acres have lost all protections under the Clean Water Act in this district alone. Many developers don’t bother to even check with the Corps to see if they require a permit.

fish are or could be taken and sold in interstate or foreign commerce; or which are used or could be used for industrial purposes by industries in interstate commerce.” 33 CFR 328.3 (a)(3).

A company wants to mine titanium and zircon on a 6,100-acre site in the Satilla River basin in southeast Georgia containing over 302 acres of wetlands that are deemed to be "superior" in wildlife habitat, scenic beauty, and as a floodplain. Roads intersecting the area have many culverts and ditches beneath and beside them, connecting all wetlands to each other and creating a single wetlands complex. Instead of recognizing this, the Corps claimed that the 302 acres of wetlands were "isolated," allowing the mining company to pollute and destroy the area at will.

The impacts of removing Clean Water jurisdiction for the nation's waters are enormous

Keep in mind that for any water that loses jurisdiction as a result of decisions in the field by the Army Corps or EPA, *all* Clean Water Act protections would be lost, including the central principle, established in section 301, that nobody may discharge into a water of the United States without a permit. The law has one definition of waters that applies to the entire Act, so whatever waters the rulemaking and guidance put aside would no longer receive federal legal protection against *any* pollution or destruction.

The waters put at risk by the administration's actions are critical to public health, our natural environment, and the U.S. economy. Abandoning these waters to destruction and degradation will:

- **Pollute more waters;** EPA's most recent data show that the nation's waters are already getting dirtier and almost half of the rivers, streams, lakes and coastal estuaries are not safe for fishing, swimming, or boating. Even where waters are deemed "fishable" there are dietary restrictions on fish consumption.
- **Increase flooding,** as wetlands – nature's sponges – are no longer available to absorb excess water.
- **Threaten public health** from contact with bacteria, pathogens, toxics, and other pollutants from waters that would no longer be regulated for all types of industrial discharges.
- **Place community water supplies at risk,** and increase treatment costs to remove pollutants.
- **Deplete drinking water sources** (like the Ogallalla aquifer in Texas) that are recharged by playa lakes, and other wetland and stream systems.
- **Reduce and potentially extinguish endangered or threatened wildlife species** – 43 percent of which (including the whooping crane) rely on wetlands for survival.
- Place at risk the **breeding habitat used by over half the ducks** in North America.
- **Eliminate** many seasonal wetlands that serve as **nurseries for juvenile frogs, toads, salamanders** and other species, and small streams that also are essential to sustain healthy populations of **fish, amphibians and other aquatic species.**

The threats posed to the nation's waters are not limited simply to small "insignificant" wetlands, and they are not merely hypothetical. I would like to give you examples from two of my recent cases representing citizens.

In a series of cases, I represented life-long residents, mostly farmers and orchardists, in the Yakima Valley in south-central Washington in several suits against industrial dairies. My clients were traditional farmers that had been making their living in the Yakima Valley for decades before the industrial dairies began to move in from California and other more populated areas. They soon began to see and smell the damage that these industrial operations were causing in their community. The dairies were, among other things, using natural drains to convey manure-contaminated

wastewater to holding pits, as well as over-irrigating manure wastewater that ran off into the natural drains. These drains were intermittent or ephemeral streams that are tributaries to the Yakima River, between two to five miles downstream of the facilities, just the types of waters many in the regulated community would argue should not receive Clean Water Act protections. See *CARE v. Henry Bosma*, 65 F. Supp. 2d 1129, 1138, 1144 (E.D. Wa. 1999).

One of the cases involved the then-largest dairy CAFO in the State of Washington (over 5,000 milking cows), the Bosma Dairy. The highest fecal coliform (pollution associated with animal manure) readings in the entire region were found in the drains that ran through Bosma's property. See *Community Association for Restoration of the Environment v. Henry Bosma Dairy*, 2001 WL 1704240 at *10 (E.D. Wa. 2001). The case took five years for the citizens to prosecute through the federal courts, involving four reported decisions, including the two cited above. See also 54 F. Supp. 2d 976 (1999); 305 F.3d 943 (2002). The defendant, Henry Bosma, had manipulated the state and federal agencies for two decades before CARE took action through the citizen suit provisions of the Clean Water Act.

After the initial lawsuit under section 402 of the Clean Water Act was underway, the polluter, Mr. Bosma, placed nearly two acres of manure piled as high as eight feet on land adjacent to a stream. (See Pictures 1-7). The pictures provided with this testimony, some of which are best viewed pasted together as a panorama, tell one small part of the story about the need to protect all of the nation's waters. The first pictures were taken in May 1998 before we knew whose property it was. We discovered shortly before taking Mr. Bosma's deposition in November 1998 that the property in question was his. When presented with evidence of his polluting activity, rather than acknowledge the offense, Mr. Bosma's response was to try to destroy the stream that ran through his property. (See Pictures 7 and 8). That seasonal stream ran about seven miles through farmland to the Yakima River. See *CARE v. Bosma*, 65 F. Supp. 2d at 1150. We then filed a second complaint for violating the dredge and fill permitting requirement of section 404 of the Clean Water Act. Of course, water has a way of reestablishing itself and the stream began to reform itself only months after literally being plowed under. (See Picture 9). That case settled the day before we were to pick a jury and Mr. Bosma agreed to protect the waterway that ran through his property with a buffer on either side. If the regulated community got its way, such streams would be subject to unlimited pollution and filling and downstream clients, like mine, would suffer the consequences.

Another example involves another Bosma dairy in Idaho. In that case the dairy CAFO (well over 2000 animals) was located on a plateau above two adjacent ranches. The Western Environmental Law Center represented the Idaho Rural Council, whose members included the ranch families. One ranch was homesteaded by the Butler family nearly a century ago and the family still ranches that property. Each ranch was dependent on springs whose source was the shallow aquifer that ran beneath the CAFO. Bosma had for years simply bulldozed dead animals, calf fetuses, medical waste, syringes, and manure into a ravine where one of the springs surfaced. (See Pictures 10-18); *Idaho Rural Council v. Jacob Bosma*, 143 F. Supp. 2d 1169, 1176 (D. Id. 2001). The spring ran down through one rancher's property (and was used for watering free-ranging livestock) into an irrigation canal that led to a nearby creek, a downstream recreational reservoir, and then to the Snake River. *Id.* at 1179. As the court itself noted in *IRC v. Bosma*, "...whether pollution is introduced by a visible, above-ground conduit or enters the surface water through the aquifer matters little to the fish, waterfowl, and recreational users which are affected by the degradation of our nation's rivers and streams." *Id.* at 1180.

These small, intermittent streams are the lifeblood of the arid West. Pollution discharged into these tributary arteries pollutes the larger bodies of water, and if allowed to be destroyed, reduces the already limited quantity of surface water upon which people and wildlife depend.

Destruction or pollution of seasonal streams, small springs, wetlands and other waters inevitably leads to greater degradation and pollution of the largest and most treasured of our nation's waters, including the Great Lakes, Chesapeake Bay, Everglades, Gulf of Mexico, and Mississippi, Ohio, Illinois, Tennessee, Snake, Columbia, Colorado and Rio Grande Rivers, to name a few.

Water flows downhill, and there can be no doubt that pollution, whether it is animal waste, raw sewage, or industrial chemicals, will flow downstream from the upper reaches where it may be discharged. In addition, as unprotected small streams and wetlands are filled and lost, their ability to filter or absorb sediment, nutrients, and floodwaters will also be lost, ensuring even greater harm to downstream waters (and the business and recreational interests that rely on them). In the West, where the mighty Colorado already often dries up before reaching the Pacific Ocean, this means that many critical sources of water would disappear completely.

Molecules matter

Industry supporters of restricting Clean Water Act protections to only the nation's largest waters (and their immediately adjacent wetlands) seek to discredit this fact of hydrology -- that all the waters and pollution run down hill and will ultimately reach these larger waters -- by dismissing it as a concern about "migratory molecules." This "flat earth" argument is either remarkably ignorant or remarkably disingenuous. It is well established that upstream contaminants eventually contaminate larger water bodies, and that low-level exposure to numerous toxins, ranging from heavy metals to industrial chemicals to microbes, can pose serious health risks.

Health officials are rightly alarmed about the amount of lead be found in the drinking water of the nation's capital, at levels which are measured in mere parts per billion.

The country has recently received warnings from federal officials and public health experts that pregnant women and small children should limit the amount of tuna fish they eat (or avoid it altogether) because of mercury content. As the Washington Post noted in its report on the public health warnings, "[e]ven in trace amounts, mercury, a toxin, can cause neurological and developmental problems in infants and young children."⁷ It is well known that the air deposition of "migratory molecules" of mercury into our waterways is the greatest source of the contamination that is finding its way into the food supply.

For another example of a microscopic pollutant, not a toxic chemical, that can wreak havoc on public health, consider the parasite cryptosporidium, most commonly found in animal waste, and responsible for the deaths of more than 100 people and the illnesses of over 400,000 people in Milwaukee, Wisconsin in 1993 when it reached the public's drinking water. Water utilities are now spending millions of dollars to upgrade their treatment systems to prevent further outbreaks of death and illness from this pernicious microbe. See also, *CARE v. Henry Bosma Dairy*, 2001 WL 1704240 at *9 ("[T]he Court finds that there are significant public health risks from the presence of human pathogens--disease causing organisms--such as salmonella, *E coli* 0157:H7 ("E coli"),

⁷ Mark Kaufman, *Limits Urged on Eating Tuna*, WASHINGTON POST, Mar. 20, 2004, at A1, A8.

Cryptosporidium parvum, and Giardia lamblia which are found in the dairy cow or calf manure of infected cattle. When dairy cow or calf manure, or manure wastewater, or manure water is used for irrigation and discharges into the public waters of the state, the public is exposed to significant health risks. Given the health risks to the public from exposure to manure contaminated water, Congress acted wisely in enacting the CWA, which requires CAFO's like the Bosma Defendants to obtain NPDES permits and forbids any discharge of manure contaminated water to the waters of the United States or waters of the state.")

Just these few contemporary examples make clear why making light of concern over "migrating" pollution is not only bad policy but grossly insensitive to the real world public health and economic impacts of uncontrolled pollution in the nation's waters.

The GAO Report

We concur with the GAO's findings that, to the extent public information is available, there appear to be significant differences amongst Corps Districts in how they determine which waters remain protected under the Clean Water Act. In addition, we agree that the Corps has done a poor job of documenting their practices and making the information available to the public.⁸ We support the GAO's recommendations that the Corps and EPA: 1) conduct a survey of all district office practices in making jurisdictional determinations to determine if significant differences exist, 2) evaluate whether and how these differences need to be resolved, 3) require districts to document their practices and make this information publicly available (and, we would suggest, accessible by internet).

The inconsistencies discovered by the GAO are of great concern to the public because they provide additional evidence that waters long-protected by the Clean Water Act are being abandoned by the Army Corps. To make matters worse, these *ad hoc* decisions are being made without any notice to the public.

Developers and others interested in removing Clean Water Act protections from as many waters as possible will seek to use the GAO reports as justification for their agenda; suggesting that somehow the Corps' inconsistent practices are proof that waters should "consistently" lose protections. There is no logic to this argument.

Moreover, the permitting statistics revealed in the GAO report severely undercut the argument that developers and others are being harmed by the Corps' current permitting practices, whatever their inconsistencies. The report notes that in FY 2002, the Corps denied only 128 permits out of 85,445 that were submitted, a total of .15%.⁹

What is the appropriate response to the GAO's findings?

We anticipate that industry representatives, at today's hearings and elsewhere, will argue that the GAO's findings underscore the need for a rulemaking to "clarify" which waters remain protected under the Clean Water Act, post-SWANCC, to provide the regulated community with much-needed

⁸ Indeed, this is a perennial problem with the way the Army Corps administers the 404 program which we have sought to correct for many years to no avail.

⁹ The GAO notes that 4,143 applications were withdrawn in FY 2002. If withdrawn applications are combined with the 128 permit denials, the percentage of permits not granted rises to 5%.

“certainty” as to whether specific waters are or are not protected from projected discharges of toxics, sewage, dredged or fill materials or other pollutants. We disagree with these conclusions.

Congress has been clear since 1972 that the purpose of the Clean Water Act is to “restore and maintain the chemical, physical and biological integrity of the nation’s waters.” To that end, it was the intent of Congress to give the Act’s jurisdictional scope “the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.”¹⁰ The current Clean Water Act rules, proposed in 1975 and finalized in 1977, fully reflect Congress’ intent, by extending protection to those intrastate waters, “the use, degradation or destruction of which could affect interstate or foreign commerce...”

The SWANCC decision did not necessitate amending the existing rules that have governed implementation of the Clean Water Act for more than 25 years, and there is no reason to change those rules now.

Another popular response to opposition to the administration’s current policies has been to urge reliance on the states to step-in and provide protections that will substitute for lost Clean Water Act jurisdiction. As noted above, 39 of the 42 states that commented on the ANPRM and policy directive, as well as range of state-based associations including ASIWPCA and others, rejected this notion as impractical and unwise. Loss of Clean Water Act jurisdiction will mean that all the federal protections of the Clean Water Act are lifted. So unless a state has comprehensive protection for discharges into streams and other waters from dredging and filling, point sources, oil spills, etc. then the loss of CWA protection would still be significant.

In addition, loss of CWA protections will shift a great deal of the financial and resources burden of the federal protections onto the state, which is one reason so many states oppose narrowing the scope of the Clean Water Act. Most states rely heavily on the federal agencies to fund enforcement, and will not have resources available to pursue their own enforcement activities. Finally, even if a particular state adopts strong protections, if its neighboring states are not so protective, pollution from those neighboring states may still affect the waters of the protected state. Of course, wildlife does not recognize state (or international) boundaries, and many bird species, especially waterfowl and shorebirds, rely on healthy wetland habitats across their migratory routes. A loss of one link in the chain of migratory, breeding, or wintering habitat can severely impact these species.

The financial and personnel costs for a state to absorb all of the protections and programs currently covered by the Clean Water Act would be enormous. In addition, many states prohibit their state laws from being any more protective than the federal law. Finally, numerous states pointed out that, even if they could have laws more protective than the federal Clean Water Act, financial and political pressures within their state would make enactment of such protections almost impossible. Indeed, although one state, Wisconsin, has enacted a law to fill the SWANCC gap, two states, Ohio and Indiana, have weakened existing protections, and South Carolina may soon do the same. The states were very clear that they need and want the federal protections provided by the Clean Water Act.

Instead, the Bush administration should take the following steps to ensure full and proper protection for the nation’s waters:

¹⁰ 92D CONGRESS - FLOOR ACTIVITY: House Agreement to Conference Report on S. 2770, Oct. 4, 1972; 92 Cong. House Debates 1972; FWPC72 Leg. Hist. 13 CONGRESSIONAL RECORD Vol. 118 -- House of Representatives -- Oct. 4, 1972, Statement of Rep. Dingell.

- **Withdraw the policy directive (guidance) that was issued in January 2003.**
- **Direct agencies, particularly the Army Corps, to implement fully current regulations.**
- **Require all agencies to keep track and make publicly accessible any decision not to assert jurisdiction over a water.**
- **Support passage of the Clean Water Authority Restoration Act (CWARA), H.R. 962.**¹¹

The Clean Water Authority Restoration Act (H.R. 962)

The Clean Water Authority Restoration Act, which currently has 118 co-sponsors, including 12 members of the subcommittee, reaffirms the historic scope of the Clean Water Act, as it was commonly understood for the last thirty years, prior to the Supreme Court's SWANCC decision and this administration's efforts to reduce protections.

The legislation has three main components:

First, it contains a series of findings articulating the important values of our waters, including wetlands and seasonal streams, as sources of drinking water, recreation, habitat and their many functions including filtering pollution, absorbing floodwaters, and recharging groundwater aquifers.

Second, it includes a definition of "waters of the United States," the term that determines the scope of the entire Clean Water Act. This definition is taken from the existing *regulatory* definition of "waters of the United States," shared by both EPA and the Army Corps in their regulations (see 33 CFR 328.3 and 40 CFR 230.3(s)). This is the same definition that has been on the books since at least 1977, and which reflects the understanding of Congress when the Clean Water Act was passed in 1972.

Third, it deletes the use of the word "navigable" from the Clean Water Act to clarify that the law pertains to "waters of the United States," that would then be defined using the definition described above. This change is in response to the SWANCC decision, in which some members of the Court suggested that Congress only intended to protect "navigable" waters when it passed the Clean Water Act. Deletion of the word "navigable" from the Act would clarify this serious misreading of Congress' intent.

Conclusion

In closing, Mr. Chairman, I want to thank you and the Ranking Member for holding this hearing. The scope of jurisdiction of the Clean Water Act is a critical issue of national import; affecting the quality and safety of all of our waters for purposes of drinking, fishing, swimming, recreation, irrigation, food production and industrial use. You have seen examples from real people's lives today that underscore the significance of protecting all of our nation's waters. There are three critical points in this regard that I wish to leave you with today:

¹¹ We also urge all members of the subcommittee to co-sponsor H.R. 962.

First, the administration's policies are far-reaching, and bear upon the health of the nation's wetlands, streams, lakes and other waters, including all downstream waters that could be impacted by loss of Clean Water Act protections of these waters.

Second, for those waters that are declared to be outside the jurisdiction of the Clean Water Act, *all* of the Act's protections would be lost, including the blanket prohibition on discharging without a permit, permit requirements for discharging from a point source, and a duty to take adequate steps to prevent spills of oil or other hazardous substances from reaching the nation's waters.¹²

Third, every member should consider the potential loss of truly unique aquatic resources in his or her district that could take place if the administration's policies are not reversed. Every region of the country has unique types of wetlands and streams, many of which support unique species, including some that are endangered or threatened, that may exist only in a very small section of the country (and the world). These waters, including arroyos, prairie potholes, bogs, playa lakes, forested vernal pools, or desert springs are part of each region of the country's cultural heritage. These imperiled treasures should be passed on for generations to appreciate and enjoy, not bulldozed or polluted as quickly and cheaply as possible.

Whether the protections of the Clean Water Act are maintained or weakened will have an affect on every citizen throughout the country. We respectfully urge the subcommittee to ensure that the Clean Water Act is fully implemented as the 92nd Congress intended and as the public so clearly desires and deserves.

¹² In addition, oil spills into non-waters of the United States would no longer be eligible for cleanup funds from the Oil Spill Liability Trust Fund (OSLTF), resulting in a potentially enormous shifting of cleanup costs to the states.



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Testimony of the National Association of Flood and
Stormwater Management Agencies

Presented by Dusty Williams
General Manager, Riverside Flood Control
and Water Conservation District, California

Inconsistent Regulation of Wetlands
and Other Waters Hearing

U.S. House of Representatives
Transportation and Infrastructure Committee

Water Resources and Environment Subcommittee
Rep. John Duncan, Chairman

March 30, 2004

I am very pleased to present this testimony on inconsistent regulation of wetlands and other waters on behalf of the National Association of Flood and Stormwater Management Agencies (NAFSMA).

Background on NAFSMA

NAFSMA represents more than 100 local and state flood control and stormwater management agencies serving a total of more than 76 million citizens and has a strong interest in this important issue.

NAFSMA's members are public agencies whose function is the protection of lives, property and economic activity from the adverse impacts of storm and flood waters. NAFSMA member activities are also focused on the improvement of the health and quality of our nation's waters.

The mission of the association is to advocate public policy, encourage technologies and conduct education programs to facilitate and enhance the achievement of the public service functions of its members. Many of NAFSMA's members are currently involved in ongoing water resources projects with the Corps of Engineers, including flood management and environmental restoration projects.

Since the organization was formed in 1979, NAFSMA has worked closely with the U.S. Army Corps of Engineers and other federal agencies, including the U.S. Environmental Protection Agency and the Federal Emergency Management Agency. Many of our members are local sponsors on Corps-partnered flood control and environmental restoration projects with the Corps. We appreciate this committee's efforts to move a Water Resources Development Act last year and hope that we will see a water resources bill enacted this congressional session. NAFSMA members are on the front line protecting their communities from loss of life and property and therefore the organization is keenly aware that flood management measures are a necessary investment required to prevent loss of life and damages to people's homes and businesses. Flood management has proven to be a wise investment that pays for itself by preserving life and property and reducing the probability of repeatedly asking the federal government for disaster assistance.

NAFSMA Relationship with the Corps and the U.S. Environmental Protection Agency

Over the past twenty years of NAFSMA's existence, our relationship and the role of our agencies and the Corps of Engineers have changed. Our members are dedicated to looking at both non-structural and structural approaches to flood management. Environmental restoration is a key focus of our member agency missions as well as the Corps. Urban stream restoration and other similar projects have been undertaken and have been quite successful.

NAFSMA participated on both of the U.S. EPA's Stormwater Phase II and Urban Wet Weather Federal Advisory Committees. We continue to work closely with the agency on Phase I and Phase II NPDES Stormwater Management issues.

We are proud of the commitment of our member agencies to protect and restore the environment. The Corps and U.S. EPA are important partners to state and local water resource management agencies in carrying out environmental protection and restoration initiatives.

Throughout the last decade, however, one of the areas where our member agencies have experienced significant roadblocks and expensive and dangerous delays has been that of wetlands regulation. As a result, NAFSMA has been involved in a number of legal activities aimed at assisting our members to carry out their local responsibilities. Our most significant issue has involved the inability of flood control districts and public works agencies to carry out normal routine maintenance on flood control channels, and debris control and detention facilities.

Tulloch Litigation

In 1993, the Corps of Engineers promulgated a regulation that has come to be known as the Tulloch Rule. The rule resulted from a settlement reached between the government and an environmental group in litigation (the "Tulloch litigation") that challenged the application of the Corps' dredge and fill permitting authority to land clearing and excavation that affected a wetland in the course of a private developer's project. When the Corps translated the terms of the settlement into regulatory language, the significance of the policy changes went well beyond the issues originally in litigation, and had a profound affect on the ability of public agencies to engage in routine maintenance activities. Whereas previously the Corps had not required dredge and fill permits for routine maintenance, under the Tulloch rule virtually any activity that resulted in a redeposit of dredged material in a jurisdictional water or wetland required a permit.

NAFSMA and many other interests challenged the Tulloch rule in litigation in the federal District Court for the D.C. Circuit. That court, and subsequently the U.S. Court of Appeals for the D. C. Circuit, held that the Tulloch rule exceeded the Corps' authority under the Clean Water Act. This sent the issue back to the agencies, and in 1999, the Corps issued an interim regulation that excluded from permit requirements "incidental fallback" from activities that it might otherwise consider jurisdictional. Unfortunately, neither the appellate court's decision, nor the rule which purported to implement it, provided clear and consistent guidance on which public agencies could rely. Questions continue to arise as to what constitutes "fallback" and when it is "incidental". Implementation of these regulatory terms has not been uniform from one case and one Corps district to the next.

Worse, the fundamental question of when the results of routine maintenance activities constitute “additions” to jurisdictional waters, thereby requiring permits, remains very elusive. As a result, public agencies pursuing public functions have no regulatory certainty, and are frequently forced to incur significant delays and added costs before undertaking needed facility maintenance, or alternatively to proceed with needed projects and expose themselves to regulatory and enforcement risks. Current questions about the definition of what activities are jurisdictional remain problematic for flood management agencies trying to keep their systems operable.

In many of the flood control systems in the western United States, natural channels play an integral role in flood protection while supporting habitat and natural water quality functions. The flood control systems in a number of communities were built around and included these natural channels. Unfortunately, in arid and semi arid climates, natural channels lack sufficient flow to maintain a clear waterway and they tend to support thick vegetation growth from bank to bank. If these channels cannot be cleared the community is placed in harm’s way.

The flood risk is very real and at one point, a number of our California member agencies were told by the Federal Emergency Management Agency’s National Flood Insurance Program that any claims due to flooding in these areas where the channels were blocked would be subrogated against the flood control agencies, since the channels had not been adequately maintained. So while two federal agencies were telling the flood control agencies they could not clear the channels, another federal agency was clearly sending the message that the channels must be cleared. FEMA requires local governments to assure the maintenance of flood carrying capacity of flood management projects, such as enlarged channels, as a condition of revising FIRMs to reflect the effects of the projects. At the same time the Corps of Engineers, under its 404 permit process, makes it more difficult and expensive for local governments to perform the required, and necessary, maintenance. FEMA’s Technical Mapping Advisory Council, in its 1998 annual report, encouraged FEMA to work with the Corps of Engineers to develop 404 permit regulations which exempt maintenance of FEMA credited flood management projects.

Many man-made flood management facilities are classified jurisdictional and require permits prior to routine maintenance critical to the public’s health and safety. The current regulations require that if these facilities are allowed to have vegetation established within them, then the responsible public agencies must mitigate for the removal of such vegetation, suffer unnecessary delays, and excessive maintenance and administrative costs. This practice, in essence, promotes the ‘scorched earth policy’. Instead of getting credit for the temporal development of this vegetation between maintenance cycles, public agencies are forced not to allow the establishment of it in the first place to avoid being penalized when the facility requires maintenance. We strongly recommend the establishment of guidance allowing public agencies the ability to properly manage their public infrastructure without having to implement the scorched earth policy. This would provide greater value to the watersheds by

providing water quality functions as well as habitat functions for the species that could use these facilities.

Since the Tulloch decision, NAFSMA has become involved in a number of additional cases that involved Clean Water Act permitting issues. Most recently, NAFSMA filed an amicus brief along with a number of other national water organizations in the case just remanded by the Supreme Court involving the South Florida Water Management District and the Miccosukee Tribe, and the Deaton case, where NAFSMA and a number of regional water agencies requested the Supreme Court to review this case because of our concerns about the possible broadening of permitting jurisdiction.

Unless something changes in the regulatory arena, funds that could be directed to stormwater management activities will need to be directed to meeting legal challenges. The organization like many other national groups urged U.S. EPA and the Corps to issue a rulemaking following the SWANCC decision that would clarify a number of the key definitions used in the regulatory arena. Just coming up with a consistent definition across the federal agencies for such key terms as “navigable waters,” “waters of the United States,” “isolated waters” and “tributaries” would go far in freeing up legal dollars that could be directed toward achieving true environmental benefits. It is also important that a universal understanding of jurisdictional bases related to traditional navigable waters and interstate and foreign commerce be established. Since the process of requiring a 404 permit triggers the involvement not only of U.S. EPA and the U.S. Army Corps of Engineers, but also the U.S. Fish and Wildlife Service, the states in some cases, and the Regional Water Quality Boards in California’s case, just issuing a consistent set of definitions that could be supported by all the agencies would be a much welcomed accomplishment that would help significantly to address such inconsistencies as identified by the U.S. General Accounting Office and others.

NAFSMA was very disappointed that the Administration failed to issue a rulemaking in response to the Solid Waste Agency of Northern Cook County vs. U.S. Army Corps of Engineers Decision, commonly referred to as the SWANCC Decision. We believe the Administration is obliged to adjust its CWA rules to come in line with the Supreme Court’s decision and not dismiss this obligation by a tally of comments as if they were votes on the issue. We are concerned that this was a missed opportunity to clarify some of the very broad and overly subjective definitions that necessarily lead to different interpretations by different permit writers and federal, regional and local agencies.

General Accounting Office Report

The report from the General Accounting Office on Waters and Wetlands dated February 2004 clearly demonstrates numerous differences between 16 Corps District offices in the interpretation of what constitutes a jurisdictional waters of the US. NAFSMA members can attest to these differences, especially those of us within the arid southwest. Within our

generally dry region, jurisdictional delineations have gone so far as to determine that stormwater running down a paved street makes that street jurisdictional and warrants mitigation if that water is placed in a storm drain. Agricultural drainage ditches constructed by farmers within areas that historically had flows traversing in a sheet flow condition, have also been classified as jurisdictional and an ephemeral river. This “river” which only receives flows in direct response to rainfall, has had its 20 year floodplain classified as problematic and potentially jurisdictional, despite the absence of any ordinary high water mark, hydric soils, hydrology or hydric vegetation beyond that found within the minimal levees where stormflows are confined.

The report points to various differences within the Corps’ Districts. While we believe that is true, significant differences can occur within the Districts themselves depending on which staff member is working on your project. This is due to the lack of uniform guidance on the definition of waters of the U.S., what constitutes an ordinary high water mark, and for the implementation of jurisdictional delineations. We recognize that the need for regional differences is important and support the establishment of clear guidance to provide uniformity within regions and districts and consistency that reflect the true intent of the Clean Water Act.

NAFSMA members understand that environmental issues must be addressed and/or mitigated to allow flood control projects to be constructed. One of NAFSMA’s concerns has been the reasonable application of Section 404 permits and their related requirements nationwide.

NAFSMA’s flood management policies state the following:

NAFSMA supports the development of reasonable guidelines, standards and mitigation requirements that recognize regional differences.

NAFSMA supports the practice of including federal permitting as a part of operation and maintenance manuals upon turnover of federal projects to local sponsors and the use of a watershed or watercourse plan that allows the local agency to perform the required maintenance and/or construction of locally financed flood management facilities without the need to obtain additional federal permits.

NAFSMA encourages the Corps of Engineers to better coordinate with all local, state and Federal agencies to streamline the issuance of Federal permits.

NAFSMA supports adequate funding of resources for regulatory permitting. Although NAFSMA supports many of the changes outlined by the Corps in the USACE 2012

report, the organization is concerned that recent changes will further stretch the Corps ability to process much needed regulatory permits.

NAFSMA supports the General Accounting Office's recommendation for the Corps to survey its Districts to solicit information on differing approaches to determining wetlands jurisdiction, but we urge that national stakeholder groups representing those impacted by these decisions to play a role in the interpretation and understanding of the findings. NAFSMA would welcome the opportunity to participate in a national stakeholder discussion of these issues.

I welcome questions and also urge you to contact Executive Director Susan Gilson at 202-218-4133 for additional information.

STATEMENT OF

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BEFORE THE
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT
OF THE
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
U.S. HOUSE OF REPRESENTATIVES

March 30, 2004

Good morning Mr. Chairman and Members of the Subcommittee. We welcome this opportunity to speak to you about Clean Water Act (CWA) jurisdictional issues and practices. As part of responding to your March 9, 2004 letter of invitation, our testimony also will provide background information on the roles and responsibilities of the Army Corps of Engineers (Corps) and Environmental Protection Agency (EPA) under section 404 of the CWA, address the current regulatory and legal status of federal jurisdiction in light of the issues raised by the Supreme Court ruling in Solid Waste Agency of Northern Cook County v. the U.S. Army Corps of Engineers, 531 U.S. 159 (2001) (SWANCC), briefly summarize the most recent Army and EPA guidance on CWA jurisdiction – including the regulation of wetlands and other waters, and address the steps the two agencies are undertaking to enhance consistency of CWA jurisdictional determinations.

Overview of the CWA Section 404 Program and the SWANCC Decision

A primary goal of the CWA is to restore and maintain the physical, chemical, and biological integrity of the Nation's waters, including wetlands, through programs such as

section 404. Wetlands are among the Nation's most valuable and productive natural resources, providing a wide variety of functions. They help protect water quality, support commercially valuable fisheries, and provide primary habitat for wildlife, fish, and waterfowl. In the 32 years since its enactment, the CWA section 404 program – together with Swampbuster, ongoing public and private wetlands restoration programs, and active State, Tribal, local, and private protection efforts – has helped to prevent the destruction of hundreds of thousands of acres of wetlands and the degradation of thousands of miles of rivers and streams. The annual rate of wetland loss, from development as well as subsidence and other natural causes, is estimated to have been reduced from 460,000 acres per year during the 1950s to 60,000 acres annually between 1986 and 1997. Since 1990, the federal government has endorsed a no net loss of wetlands policy and this policy remains in force. In terms of the section 404 program, this goal is being accomplished through avoidance, minimization, and compensation for unavoidable impacts to aquatic resources. Protection of wetlands has reduced downstream flooding, and protected fish and wildlife habitat and water quality.

The Corps and EPA coordinate to administer the CWA section 404 regulatory program which covers discharges of dredged and fill material into waters of the United States, including wetlands. Under section 404 of the CWA, any person planning to discharge dredged or fill material into 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 that activity. In practice, the vast majority of projects (95% in 2003) are authorized under general permits, which require less paperwork by the project proponent than an individual permit application. The Corps is responsible for the day-to-day administration of the section 404 program, including reviewing permit applications and deciding

whether to issue or deny permits. EPA's role under CWA section 404 includes coordinating with States or Tribes that choose to administer the section 404 program, interpreting statutory exemptions from the permitting requirement, and sharing enforcement responsibilities with the Corps. EPA also develops, in consultation with the Corps, the section 404(b)(1) Guidelines, which are the environmental criteria that the Corps applies when deciding whether to issue section 404 permits. Under these 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.

EPA and the Corps have a long history of working together closely and cooperatively in order to fulfill our statutory duties. For example, in 1989, the agencies entered into a Memorandum of Agreement (MOA) allocating responsibilities between EPA and the Corps for determining the geographic jurisdiction of the section 404 program. The MOA recognizes that EPA will have the ultimate authority to determine the scope of geographic jurisdiction and the Corps performs the majority of the geographic jurisdictional determinations as an integral part of its permitting responsibilities.

In 2001, the Supreme Court rendered a decision in the Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC) case. This decision has affected the scope of federal jurisdiction under the CWA and the section 404 regulatory program. SWANCC involved a challenge to Clean Water Act jurisdiction over certain isolated, intrastate, non-navigable ponds in Illinois that were part of an abandoned sand and gravel mining operation, but which, over time functioned as habitat for migratory birds.

In SWANCC, the Supreme Court held that the Corps had exceeded its authority in asserting CWA jurisdiction pursuant to section 404(a) over isolated, intrastate, non-navigable waters under 33 CFR Part 328.3(a)(3), based solely on their use as habitat for migratory birds pursuant to the so-called "Migratory Bird Rule," 51 Fed. Reg. 41217 (1986). At the same time, the Court in SWANCC did not disturb its earlier holding in United States v. Riverside Bayview Homes, 474 U.S. 121 (1985), which found that the Congressional concern for the protection of water quality and aquatic ecosystems was evidence of its intent to regulate wetlands "inseparably bound up with" jurisdictional waters. 474 U.S. at 134.

Although the SWANCC decision did not expressly invalidate any part of the CWA or of the regulations (the so-called "Migratory Bird Rule" is not a regulation but is actually an excerpt from the preamble to the Corps 1986 rule), it does have important implications for the scope of waters protected by the section 404 program, as well as implications for other Clean Water Act programs whose jurisdiction depends upon the meaning of "navigable waters." The Corps' and EPA's interpretation of the scope of CWA geographic jurisdiction since SWANCC seeks to achieve the goals and objectives of all CWA programs, including section 404, while at the same time maintaining consistency with the Court's decision.

The Supreme Court's invalidation of the use of the "Migratory Bird Rule" as a sole basis for CWA jurisdiction over certain isolated waters has focused greater attention on CWA jurisdiction generally, and, specifically, over tributaries to jurisdictional waters and over wetlands that are "adjacent wetlands" for CWA purposes. This attention to tributary and adjacent status is largely due to the fact that the "Migratory Bird Rule" criteria were often applied in the field since 1986 as a basis for jurisdiction over aquatic areas; whether or not these areas were jurisdictional on some other basis (e.g., as adjacent wetlands) did not need to be addressed.

"Navigable waters" are defined in section 502 of the CWA to mean "waters of the United States, including territorial seas." In SWANCC, the Court determined that the term "navigable" had some significance in indicating the authority Congress intended to exercise in asserting CWA jurisdiction. After reviewing the jurisdictional scope of the statutory definition of "navigable waters" in section 502, the Court concluded that neither the text of the statute nor its legislative history supported the Corps' assertion of jurisdiction over the waters involved in SWANCC.

In SWANCC, the Supreme Court recognized that "Congress passed the Clean Water Act for the stated purpose of 'restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters'" and noted that "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.'" Expressing "serious constitutional and federalism questions" raised by the Corps' interpretation of the Clean Water Act, the Court stated that "where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear statement from Congress that it intended that result." Finding "nothing approaching a clear statement from Congress that it intended CWA jurisdiction to reach an isolated sand and gravel pit," the Court held that the "Migratory Bird Rule," as applied to petitioners' property, exceeded the Corps authority under section 404.

Since the SWANCC decisions, courts of appeal in five judicial circuits have addressed the scope of CWA jurisdiction. The 4th, 6th, 7th and 9th circuits have upheld jurisdiction over tributaries (including non-navigable tributaries) and adjacent wetlands, finding that the SWANCC decision does not affect the scope of CWA jurisdiction over such waters. Several of these decisions are currently the subject of petitions for certiorari pending before the U.S. Supreme Court. Two 5th Circuit decisions, although

not squarely in conflict with the other Circuits, reasoned in non-binding discussion that SWANCC narrowed jurisdiction over tributaries to include waters that are actually navigable or waters adjacent to an open body of navigable water.

Corps and EPA Activities to Improve Consistency, Transparency, Predictability, and Best Available Science in Section 404 Implementation

Since SWANCC, the Corps and EPA have re-emphasized the need to ensure that the section 404 program is implemented with appropriate consistency, transparency, predictability, and the best available science. In January 2003, following coordination with the Department of Justice, the EPA and Army General Counsels issued clarifying guidance regarding the Supreme Court's decision in SWANCC. The guidance recognizes that jurisdictional decisions will be based upon Supreme Court cases, including Riverside Bayview Homes and SWANCC, relevant regulations, and applicable case law in each jurisdiction. Because the January memorandum is internal guidance, it does not impose legally binding requirements on EPA, the Corps, or the regulated community. Moreover, its applicability depends on the specific facts of individual proposals. The guidance was provided to agency field offices and also published as Appendix A to the agencies' *Advance Notice of Proposed Rulemaking* (ANPRM), soliciting public comment, information and data on issues associated with the definition of "waters of the United States" (68 Fed. Reg. 1991, January 15, 2003). The guidance was distributed in this manner to ensure its availability to interested persons and to help better inform public comment.

The January 2003 guidance makes a number of key points with regard to assertion of Clean Water Act jurisdiction, providing that:

- ▶ Field staff should not assert jurisdiction over isolated wetlands and other isolated waters that are both intrastate and non-navigable where the sole basis for asserting jurisdiction is based on the following factors which were contained in the preamble language known as the "Migratory Bird Rule":

- Use as habitat by birds subject to Migratory Bird Treaties or which cross State lines;
 - Use as habitat for endangered species; or
 - Use to irrigate crops sold in commerce.
- ▶ Field staff should continue to assert jurisdiction over traditional navigable waters (and adjacent wetlands) and, generally speaking, their tributary systems (and adjacent wetlands).
- The guidance discusses the agencies' regulations which define traditional navigable waters as waters that are subject to the ebb and flow of the tide, or waters that are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.
- ▶ Field staff should seek formal project-specific headquarters concurrence prior to asserting jurisdiction over isolated, non-navigable, intrastate waters based on the following factors which are listed in 33 CFR section 328.3(a)(3):
- Use by interstate or foreign travelers for recreation or other purposes;
 - Production of fish or shellfish sold in interstate or foreign commerce; or
 - Use for industrial purposes by industries in interstate commerce.

As mentioned earlier, the guidance was an appendix to an ANPRM intended to solicit public comment, information, and data on issues associated with the definition of "waters of the United States" in light of SWANCC. Specifically, the ANPRM asked for comment on (1) whether "isolated waters" should be defined by regulation, and if so what factors should be considered, and (2) whether links to interstate commerce for isolated intrastate non-navigable waters provide a basis for CWA jurisdiction. Issuance of the ANPRM was an extra measure, not required by the Administrative Procedures Act, to provide an early opportunity for public comment on this important issue. As is often the case with ANPRMs, we did not seek to limit comment on the specific questions raised. The ANPRM did not pre-suppose any particular substantive or procedural outcome. At the close of the public comment period on April 16, 2003, over 133,000 comments had been received, with the vast majority apparently the result of email or write-in campaigns, producing identical or substantially similar letters. Of the approximately 3,600 unique individual letters received, approximately 500 discuss specific issues in some level of detail. The commenting parties included a variety of

stakeholder groups, such as: Tribes; States, and related associations; local governments; academia; research and scientific associations; industry and the regulated public; environmental groups and other non-profit organizations; and, private citizens.

The comments reflect a wide breadth of opinion, ranging from assertions that SWANCC affects only jurisdiction based solely on use by migratory birds that cross State lines to assertions that SWANCC limits CWA jurisdiction to navigable-in-fact waters and those tributaries and wetlands shown to have an actual effect on navigable capacity. Many commented on whether rulemaking was needed. Some commenters supported further rulemaking to clarify CWA jurisdiction, some favored clarification through the use of guidance instead, while others supported no action at all or withdrawal of the current guidance. Some commenters expressed the view that the nature and extent of aquatic resource impacts was irrelevant to determining CWA jurisdiction, while others expressed concern for such impacts and the need to consider this when determining how to proceed. Several emphasized the difficulty in developing a scientifically defensible definition of "isolated waters" because the concept reflects legal concepts rather than natural systems. Others felt that workable definitions could be developed through rulemaking and lessen regulatory uncertainty. Many States and other commenters provided information and data regarding the ecological value of various aquatic resources, including wetlands and ephemeral and intermittent streams.

On December 16, 2003, EPA and the Corps announced that we would not issue a new rule on federal regulatory jurisdiction over isolated wetlands. At the same time, President Bush, EPA, and the Corps reiterated the Administration's commitment to the goal of "no net loss" of wetlands in the United States.

The Corps and EPA have undertaken a variety of actions to increase coordination on section 404 program implementation and jurisdictional determinations.

For example, field and headquarters staff from both the Corps and EPA came together at a national wetlands program meeting in November 2003 to discuss scope and implementation of section 404. The meeting had representatives from all 38 Corps districts and all 10 EPA regions, as well as headquarters. Multiple joint action items resulted from that meeting, and the agencies plan to continue such interagency program meetings. Similarly, EPA, the Corps, and the Department of Justice held a conference in July 2003 which resulted in an ongoing dialogue among staff to increase interagency coordination.

EPA and Corps headquarters coordinate on requests from the field, in accordance with the January 2003 guidance, for formal approval of jurisdictional calls involving isolated intrastate, non-navigable waters based solely on commerce links other than those in the migratory bird rule. Furthermore, a number of EPA Regions and Corps districts currently coordinate on jurisdictional calls that raise challenging issues. EPA, Corps, and DOJ staff continue to have biweekly meetings to discuss jurisdictional issues and questions that arise in the field.

As EPA and the Corps jointly implement the Section 404 program, post-SWANCC, a variety of issues have arisen due to the differences in climate, geology, and geography throughout the country. The current regulations establish a framework that provides useful detail and consistency for applying best professional judgment on a case-by-case basis. We will seek to ensure that approaches and results are consistent for similar aquatic resources, and are legally defensible. Headquarters and field office staff will selectively conduct joint visits to sites that may involve complex jurisdictional determinations regarding the scope of the waters of the United States, in order to work towards a common understanding of jurisdictional issues and potential approaches. Visited sites would be illustrative of the hydrologic regime in the area, and would assess field conditions independent of any particular permitting actions.

The agencies also have agreed to coordinate and share jurisdictional data. The Corps routinely collects information on jurisdictional calls and has agreed to collect and share information on district jurisdictional calls with EPA and the general public, including findings of no-jurisdiction. The Corps and EPA also are coordinating to expand and improve the utility of the Corps' Operations and Maintenance Business Information Link (OMBIL) Regulatory Module (ORM), the permit-tracking database currently being installed in all Corps districts. ORM will provide the Corps with more detailed information on permit impacts and mitigation and will be linked to a Geographic Information System (GIS) in the near future to provide spatial data for all permits. These data will be made available to the public through the Corps website and updated daily. These will provide an excellent foundation for providing greater accessibility to information and help ensure consistency based on credible data.

The Corps initiated a project to make Corps data available for water quality and watershed managers by integrating it with other information systems. The objective is to enable geographically-referenced data on section 404 permits, compensatory mitigation, and compliance and enforcement actions to be evaluated along with data on water quality condition, impairment, and habitat in streams and other water bodies. This will facilitate the development and implementation of comprehensive watershed plans that address issues such as wetlands and water quality. The resulting data also will be available to the local entities, States, and general public to assist with their watershed and land use planning efforts.

Corps and EPA staff are working together to explain to stakeholder groups the scope of CWA geographic jurisdiction in light of SWANCC. For example, EPA and Corps staff earlier this month spoke at a national meeting of the National Association of Counties (NACo), and at a widely attended meeting in Texas sponsored by the Texas General Lands Office.

The agencies also recognize the importance of State and Tribal roles in implementing the Clean Water Act, which was noted by the Supreme Court in the SWANCC decision. The Administration supports strengthening the federal/State/Tribal partnership in wetlands protection, and the President has requested a \$5 million increase in funding in Fiscal Year 2005 to fund State and Tribal wetlands programs, including those that address waters affected by SWANCC.

The agencies recognize that additional steps are needed to contribute to improved coordination and provision of information to the public and the regulated community, some of which were highlighted in the recent General Accounting Office (GAO) report.

The GAO Report Conclusions and Recommendations

The section 404 regulatory program continues to face legal and technical challenges as jurisdictional determinations are made in a post-SWANCC environment. The President has asked that the agencies continue their ongoing efforts to achieve regulatory clarity and predictability. The General Accounting Office Report, entitled "*Waters and Wetlands: Corps of Engineers Needs to Evaluate its District Office Practices in Determining Jurisdiction*," released in March 2004, focuses on implementation by the Corps of the section 404 program and geographic jurisdiction issues after SWANCC. The report makes several recommendations intended to increase predictability and openness of jurisdictional decisions, and the Corps and EPA are looking forward to working together to implement those recommendations, and other improvements.

The report emphasizes some of the challenges faced by Corps districts since SWANCC, and observes that conditions that could affect jurisdiction vary geographically across the country. The GAO report notes that current regulations are

not so specific that Districts use the exact same practices when making jurisdictional calls in all areas of the country. As the GAO report observes, the existing regulations do not contain a definition of the term "tributaries", nor do they explain how "adjacency" is to be established for purposes of CWA jurisdiction. Regulations, by their very nature, set out a framework that is then interpreted and applied to various factual circumstances. This is particularly the case with regulations such as those defining "waters of the U.S.," which the CWA recognizes are to be applied to a wide variety of geographic and climactic situations.

In terms of the inconsistencies in CWA jurisdictional determinations noted by GAO, we would like to note that it is not surprising that some level of variation has been observed. The Corps makes more than 100,000 jurisdictional determinations annually. These determinations are spread across 38 Districts, and are made by some 1,200 regulators, who must exercise on the ground judgment in a wide variety of factual and ecological settings.

While the GAO report found some difference in Corps *practices* for making jurisdictional determinations, the report did not dispute the Corps' explanation that differences in climate, geology, geography, and other factors required some flexibility in the definitions used to make jurisdictional determinations, and that it would not be possible to achieve absolute nationwide consistency in making jurisdictional determinations. The GAO report did not identify differences in *results* among the selected Corps districts that it examined. Indeed, the report states that "whether or to what degree individual differences in Corps district office practices would result in different jurisdictional determinations in similar situations is unclear..." In the Corps response to the GAO report we pledged to undertake the recommended reviews and assessments with District personnel to determine if and how their respective office

practices might affect jurisdictional determinations. As a result of their observations, the GAO made three recommendations:

- (1) A survey of all district offices should be conducted to determine if significant differences exist in jurisdictional practices nationwide.
- (2) The Army, in coordination with EPA, should evaluate whether and how any differences in jurisdictional practices should be resolved.
- (3) Districts should document their jurisdictional practices and make this information available to the public.

The Corps and EPA agree with GAO's recommendations. The Corps will conduct a comprehensive survey in 2004 to assess District jurisdictional practices – and will use the information gained from this comprehensive survey to make an informed judgment about national jurisdictional practices and to determine, in coordination with EPA, what, if any, actions should be taken to promote greater consistency in CWA jurisdictional determinations nationwide. That judgment will of course take into account controlling legal precedents. Should we conclude that further action is required to promote national consistency, we will employ the appropriate procedural tools to communicate this information to regulatory personnel and the public. Our goal will be to build a comprehensive and accurate information base that will assist us to make jurisdictional determinations consistent with the CWA as interpreted by the courts.

EPA and the Corps are developing a strategic approach to increase our ability to make consistent and predictable jurisdictional determinations. In addition to the GAO responses noted earlier, the agencies are pursuing: (1) the use of District level case studies to further evaluate and clarify standard operating procedures; (2) the development of appropriate policy guidance and training to promote consistency in problem areas; (3) the convening of joint agency field visits to review sites and circumstances that present challenging jurisdictional determinations; (4) the preparation of a program to track consistency across geographic regions and CWA programs; and

(5) the conduct of these activities in a manner that makes our practices and progress available to the general public.

Conclusion

EPA and the Corps remain fully committed to protecting CWA jurisdictional waters, as intended by Congress and expected by the American people. Safeguarding these waters is a critical federal function because it ensures that the physical, chemical, and biological integrity of these waters is maintained and preserved for current use and for future generations.

We agree with the GAO that it is very important to document jurisdictional determinations and ensure such information is publicly available. While the Corps and EPA have determined that we will not pursue rulemaking, we remain committed to the goal of making section 404 jurisdictional decisions consistent, open, predictable, and based on best available science. We believe that the initial steps recommended by the GAO report will assist us to reach our goal, as well as help the regulated public achieve full compliance with the CWA and increase the effectiveness, efficiency and responsiveness of the CWA section 404 program.

Mr. Chairman, this concludes our testimony. We appreciate your interest in these important national issues, and would be pleased to answer any questions you or the Members of the Subcommittee may have.

* * *



**STATEMENT OF THE NATIONAL ASSOCIATION OF HOME BUILDERS TO THE HOUSE WATER
RESOURCES AND ENVIRONMENT SUBCOMMITTEE ON THE TOPIC OF INCONSISTANT
REGULATION OF WETLANDS AND OTHER WATERS**

March 30, 2004

Thank you for the opportunity to submit a statement for the record presenting the 215,000 members of the National Association of Home Builders' (NAHB) views regarding federal jurisdiction of navigable waters under the Clean Water Act (CWA). The Supreme Court, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, presents many issues related to the current regulatory and legal status of these waters under the CWA.

NAHB's membership is involved in home building, remodeling, multifamily construction, property management, housing finance, building product manufacturing and other aspects of residential and light commercial construction. Because NAHB's members must often obtain Clean Water Act Section 404 permits for the "discharge of dredged or fill material" as they construct their residential, commercial, and mixed-use projects, the geographic extent of jurisdiction under the CWA is an issue of high importance to NAHB's members.

In 1972, Congress passed the Federal Water Pollution Control Act Amendments, which, after subsequent amendments, became known as the Clean Water Act (CWA). The CWA forms the current framework for federal regulation of water pollution. Section 301(a) of the CWA prohibits the discharge of pollutants into "navigable waters," except in compliance with permits issued by the federal government or a qualifying state agency. The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." One exception to the discharge prohibition is found in section 404 of the CWA. Section 404 authorizes the U.S. Army Corps of Engineers to issue permits for the "discharge of dredged or fill material into the *navigable waters* at specified disposal sites."

The U.S. Environmental Protection Agency (EPA) oversees the U.S. Army Corps of Engineers' (the Corps) (collectively, the Agencies) section 404 permit program. Unfortunately, the Corps and the EPA frequently exceed the congressional intent of the CWA by requiring NAHB's members to apply for and obtain Section 404 permits where no statutory "navigable water" exists.

To complicate matters, jurisdictional determinations regarding whether a particular aquatic resource is a "navigable water" vary wildly from Corps district to Corps district. In fact, one Corps' field officer may deem an aquatic resource jurisdictional, while another field officer

in the same Corps district may decide that the same resource falls outside the jurisdiction of the CWA.

A recent example of the above inconsistency is occurring along the eastern seaboard in the Corps' Philadelphia District. The Philadelphia District has arbitrarily reversed its previous position on wetlands jurisdiction and has begun asserting jurisdiction over manmade ditches; including ditches that can fail to meet the regulatory wetland definition, fail to have a bed or a bank, and fail to contain flowing water. In a document obtained through a Freedom of Information Act request, a Corps district regulatory branch official directs field staff to assert jurisdiction over ditches that were previously considered non-jurisdictional (please see attachment). Further, this directive has allowed the Corps to assert jurisdiction on sites that were previously considered by the Corps to lack any jurisdictional areas. NAHB is concerned that previously non-jurisdictional, dry ditches are being defined as "waters of the United States."

As evidenced by recent litigation, the current definition of "waters of the United States" does not provide the regulated community with the clarity and consistency necessary to determine whether a water body is federally regulated. In addition, violations of the CWA carry criminal penalties. For example, section 33 U.S.C. § 1319(c)(1) provides for up to a \$27,500 fine and up to one year in jail for a negligent violation. It is unfair for the federal government to hold its citizens liable for violations of the CWA when the government itself has not clearly defined those areas that fall within federal jurisdiction. Due to the seriousness of the criminal penalties, it is important landowners know, in clear and objective terms, when their property is federally regulated, and when it is not. To avoid further litigation, which wastes the resources of both the federal government and the development community, the Agencies need to develop a definition of "waters of the United States" that allows the regulated community to clearly determine whether their property is covered by the CWA or not.

In light of these issues, NAHB believes that the Agencies must move ahead with a rulemaking on CWA jurisdictional issues. Unfortunately, the Agencies recently have decided against this course of action and abandoned their effort to draft a rule on CWA jurisdictional issues. The result of this unfortunate decision is the perpetuation of litigation will continue to determine the CWA's reach. De facto rulemaking through litigation is not good for the environment, the landowners who seek clarity in regulation, or the Agencies that have scarce resources to litigate jurisdiction claims. In the absence of a federal rulemaking, it is incumbent upon the Congress to establish a practical set of criteria that allows landowners and regulators to determine, in the field and with relative ease and consistency, whether a particular aquatic resource is within or outside CWA jurisdiction.

There are a number of principles that emerge from the two Supreme Court opinions addressing the CWA's geographic reach. First, in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), the Corps asserted jurisdiction over "low-lying marshy land" that was adjacent to a traditionally navigable water. At issue was whether the Corps' jurisdiction over "navigable waters" gave it authority to regulate "adjacent wetlands."

The Court decided that the Corps was correct to assert CWA jurisdiction over "adjacent wetlands." In its decision, the Court reasoned that Congress, in defining "navigable waters" as

"waters of the United States," intended to regulate "at least some waters that would not be deemed 'navigable' under the classical understanding of that term." The Court also held that it is "reasonable" for the Corps "to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined," where it is difficult to tell where the water ends and the land begins.

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (*SWANCC*), the issue centered on 18 acres of ponds that the owners wanted to fill to construct a landfill. The ponds were not hydrologically connected to any other waters. However, the Corps claimed jurisdiction over the isolated ponds by asserting that migratory birds utilized the ponds and required the landowners to apply for a section 404 permit, which was denied. In its decision, the Court ruled that a section 404 permit was not necessary because the ponds could not be considered "navigable waters." The Court ruled that CWA jurisdiction begins with Congress' "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."

The principles established in these two Supreme Court opinions must remain the centerpiece of any legislative or regulatory action. These principles are:

Navigation: "Navigation" must remain the focal point to jurisdiction under the CWA. The CWA's geographic scope today remains consistent with the boundaries that the Agencies asserted in 1974—namely, over the traditionally navigable waters of the United States.

Clear Statement: To the extent that the Agencies seek jurisdiction upstream from traditionally navigable waters, there must be a clear statement from Congress that it intended to extend the federal arm of jurisdiction that far. Such a clear statement was found to cover the "adjacent" wetlands in *Riverside Bayview*. But no such clear statement of principle exists to cover the isolated ponds in *SWANCC*, thus they cannot be regulated.

Inseparably Bound Up: Waters that are not navigable in fact must be "inseparably bound up" with, and have a "significant nexus" to, traditionally navigable waters. Wetlands that "actually abutted" the navigable waterway, such as those in *Riverside Bayview*, would satisfy the "adjacency" standard contemplated by the Court.

Open Waters: Adjacent wetlands that are jurisdictional under the CWA must be adjacent to "open waters."

Non-Navigable, Isolated, Intrastate Waters: Non-navigable, intrastate waters that have no surface water connection to traditionally navigable waters fall outside the CWA.

NAHB submits that the Congress must employ all of these principles in its current effort to craft a rule to ensure that any resulting regulation or guidance is faithful to the U.S. Supreme Court's directives. At a minimum, the Agencies, as they consider the rulemaking, should consider the following issues:

Isolated Waters: Any rule proposed by the Agencies must clearly state that the Agencies do not have federal jurisdiction over “isolated waters” following the Court’s decision in *SWANCC*. In NAHB’s opinion, *SWANCC* held that waters that do not have a surface water connection to traditionally navigable waters are not subject to CWA requirements. If an isolated water does not meet the test for “navigability” then it falls outside the Agencies’ jurisdiction.

Tributaries: Any rule proposed by the Agencies must address the extent of the Agencies’ authority over “tributaries.” Since the *SWANCC* decision, the current legal battleground has moved from “isolated waters” to tributaries, and most of the Agencies’ recent enforcement actions assert CWA authority under the theory that the area at issue is a “tributary.” NAHB believes it is imperative that the Agencies address their tributary jurisdiction. In this regard, the Agencies should develop practical guideposts that objectively determine when a resource is a jurisdictional “tributary” and when it is not. As explained below, we believe that more clearly defining traditional regulatory concepts such as “headwaters” and “ordinary high water mark” may lead to the consistent assertion of jurisdiction by the Agencies over “tributary” that reflects Congress’ intent under the CWA.

Adjacency: Like “tributaries,” the extent of federal authority over “adjacent” wetlands has puzzled courts, regulators, and NAHB’s members since the *SWANCC* decision. When the Court decided *Riverside Bayview*, it stated that federal authority extended to wetlands adjacent to “open waters.” Moreover, the wetlands at issue in *Riverside Bayview* “actually abutted” and were “inextricably intertwined” with a traditionally navigable water. To this end, the Agencies should clarify that federal jurisdiction under their “adjacency” authority applies only to wetlands that actually abut waters of the United States. Additionally, the Agencies should clarify the types of “open waters” that can appropriately provide the foundation for federal authority, and the type of geographic and aquatic relationship between a navigable water and its “adjacent” wetlands.

Any rulemaking that fails to address the areas that currently lack clear regulatory definition, as presented above, will be incomplete and result in the continuation of regulatory inconsistencies and burdensome litigation. As the Agencies move ahead with a rulemaking on CWA jurisdictional issues, Congress must ensure that the rule addresses these areas of regulatory ambiguity and provide landowners and regulators a practical and consistent regulatory regime.

Thank you for allowing NAHB the opportunity to share its views on the federal jurisdictional issues relating to navigable waters under the Clean Water Act. NAHB applauds the efforts of this subcommittee to tackle this difficult issue. We look forward to working with members of the committee on these issue and other issues of concern to the building industry.



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Statement of
THE NATIONAL ASSOCIATION OF REALTORS®

Submitted to the

**Subcommittee on Water Resources and the Environment
House Committee on Transportation and Infrastructure**

on

"Inconsistent Regulation of Wetlands and Other Waters"

**Tuesday, March 30, 2004
Washington, D.C.**

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Introduction

The NATIONAL ASSOCIATION OF REALTORS® (NAR) greatly appreciates the opportunity to present our perspectives on the issue of “Inconsistent Regulation of Wetlands and Other Waters”. NAR would like to thank Chairman Duncan, Ranking Member Costello and members of the subcommittee for shedding light on this important subject.

NAR is the nation’s voice for Real Estate on Capitol Hill. With one million members, including affiliated institutes, societies and councils, representing all facets of the real estate industry, NAR leads the way in creating, protecting, and enhancing the value of commercial and residential real estate, as well as promoting effective public policy related to real estate development. REALTORS® have an interest in preserving and protecting high-value wetlands because of the environmental benefits they provide. However, REALTORS® also have an interest in streamlining the wetlands regulatory system, to ensure economic growth and development in the communities where they sell homes. As sellers and developers of commercial and residential real estate, we have an interest in regulatory and legislative efforts aimed at protecting and preserving wetlands, while providing an environment for vigorous economic development activity.

The timing of this hearing is particularly relevant, as there have been a number of recent disturbing legal and regulatory developments in the area of wetlands that have led to the creation of an extremely uncertain regulatory environment, both for the protection of wetlands and for a thriving real estate community. Only Congress can bring rationality to what has become an irrational regulatory process.

Background

Wetlands provide vital ecological benefits, including flood control, groundwater filtration and recharge, and habitat for a unique variety of plants and animals. Section 404 of the Clean Water Act establishes a program, overseen by the Army Corps of Engineers (Corps), with participation by the Environmental Protection Agency (EPA), to regulate the discharge of "dredged or fill material" into "waters of the United States", including wetlands. This program is administered by the Corps through a system of permits and enforcement activities. The Corps and the EPA have interpreted this program broadly regarding areas that are covered and permitted activities.

Legal Developments

In January, 2001, the U.S. Supreme Court, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC) ruled that "isolated wetlands" are not subject to regulation under the Clean Water Act. The Court's decision effectively left the protection of isolated wetlands to state and local governments. This ruling freed an estimated 5-10 million acres of land that had been under regulatory jurisdiction of the federal government.

Section 404 of the CWA requires a permit for the discharge of dredged or fill material into "navigable waters." Section 502(7) of the Act defines "navigable waters" as "waters of the United States, including territorial seas." Under Corps and EPA regulations, "waters of the United States" include not only interstate and traditionally navigable waters and their adjacent wetlands, but all other waters, including intrastate lakes, streams and wetlands, "the use, degradation and destruction of which could affect interstate commerce." The Corps asserted jurisdiction over the site chosen by SWANCC on grounds that use of the area as

habitat for migratory birds established the necessary connection to interstate commerce under Corps regulations.

The Supreme Court held that the Corps' assertion of jurisdiction over isolated waters on the basis of the "migratory bird rule" exceeded the authority of the CWA. The court based its decision on the CWA alone, thereby avoiding the constitutional question of whether the regulation was within Congress' power under the Commerce Clause of the Constitution.

The court held that the agencies' expansive definition of the term "waters of the United States" was so broad that the term "navigable" was effectively eliminated from the statutory term "navigable waters." According to the court, in enacting the CWA, Congress had in mind "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonable be made so."

Regulatory Developments

Not surprisingly, the Supreme Court's SWANCC decision has been the subject of considerable discussion and dispute within the federal agencies, states and the regulated community. Memoranda and guidance documents issued from the Corps and the EPA subsequent to the Supreme Court decision have served to muddy the waters even further. These subsequent documents interpreted the SWANCC opinion as applying only to isolated, intrastate, nonnavigable waters. NAR and other real estate and development organizations have disagreed with that narrow reading of the decision, and believe that, under SWANCC, the Corps also lacks authority to regulate such bodies of water as nonnavigable tributaries, ditches, and wetlands adjacent to these bodies of water.

EPA and Corps regulations defining waters of the United States provide the framework for determining which waters fall within federal jurisdiction. However, these regulations leave room for interpretation by officials in the district offices of the Corps when considering jurisdiction over (1) adjacent wetlands; (2) tributaries; (3) ditches and other man-made conveyances.

It has been said that jurisdictional determinations of wetlands is more art than science, and since SWANCC the EPA and the Corps have made jurisdictional determinations of wetlands even more difficult to make. Specifically, the Corps instructed its district offices to no longer assert jurisdiction over any waters solely on the basis of use by migratory birds and prohibited them from developing new local practices for determining jurisdiction.

In addition, in January 2003, the Corps and the EPA published an Advanced Notice of Proposed Rulemaking (ANPRM), soliciting comments on a variety of issues, including whether regulations should define the term isolated waters and whether any other revisions are needed to the regulations defining waters of the United States. The NATIONAL ASSOCIATION OF REALTORS, along with several other real estate, development and agricultural organizations, submitted detailed comments in response to the questions, issues and concepts posed in the ANPRM. These comments highlighted the inconsistencies inherent in the current wetlands regulatory program and concluded that two activities were needed to make the program both more protective of the environment and more efficient for members of the regulated community: (1) EPA and the Corps must conduct a rulemaking to define “isolated waters” and provide certainty in the regulations; and (2) legislation is needed to streamline the program and clarify federal jurisdiction.

Unfortunately, in December 2003 the Bush Administration, after receiving thousands of letters and other communications from the American public to move forward with a rulemaking, decided not to proceed with a rulemaking (a rulemaking which was *supported* by the regulated community). In doing so, the Administration missed a historic opportunity to clarify the current wetlands regulatory program, and bring some certainty and rationality to the process.

Finally, the General Accounting Office recently published a report that describes in detail the extent to which Corps district offices differ in how they interpret and apply the federal regulations when determining what wetlands and other waters fall within the jurisdiction of the federal government. According to the GAO report, the Corps district offices often make decisions that conflict with current law and conduct these activities with little or no public comment, oversight or input. According to the GAO analysis, only 3 of the 16 districts made their determination policies and procedures available to the public. Other districts generally relied on oral communication to convey their practices to interested parties. NAR strongly supports the GAO's recommendations to: (1) to encourage the Corps to survey their district office practices in making jurisdictional determinations to determine if significant differences exist; (2) evaluate whether and how these differences need to be resolved; and (3) require districts to document their practices and make this information available to the public.

A Legislative Solution

The title of this hearing is "Inconsistent Regulation of Wetlands and Other Waters." NAR believes these inconsistencies arise from a variety of basic sources: (1) faulty interpretation of the law and Congressional intent; (2) a federal agency pushing the boundaries of their regulatory authority; and (3) the complexity and

ecological sensitivity of wetlands, and the environmental differences and diversity that are inherent in these kinds of waters.

Our statement has outlined recent legal and regulatory developments that have contributed to and exacerbated the current inconsistencies that exist in the wetlands regulatory program. NAR believes it is time for Congress to act to remedy this situation in such a way that contributes to enhanced wetlands protection without inhibiting economic growth and development. NAR believes that legislation that incorporates some of the following principles will provide the authority that federal agencies require to protect this country's highest value wetlands while providing definitional clarity that the private sector needs to proceed with economic development projects in a timely manner. Some of these these principles include:

- Streamlining the permitting process by placing a single agency, the Corps, in charge of the program, and by allowing greater use of general permits.
- Clarifying federal jurisdiction to conform with the SWANCC decision.
- Asserting jurisdiction over "waters of the U.S." that are: (1) navigable in fact; (2) adjacent to such navigable waters; or (3) hydrologically connected to such navigable waters through a continuous, naturally occurring surface connection.
- Excluding from jurisdiction: (1) normal runoff from precipitation; (2) ephemeral washes; (3) manmade ditches and pipelines; and (4) groundwater.
- Promoting mitigation banking.

STATEMENT OF THE NATIONAL WETLANDS COALITION
TO THE
WATER RESOURCES AND ENVIRONMENT SUBCOMMITTEE
OF THE
HOUSE COMMITTEE ON TRANSPORTATION & INFRASTRUCTURE

Inconsistent Regulation of Wetlands and Other Waters
March 30, 2004

I. Introduction

The National Wetlands Coalition (Coalition) was formed in 1989 for the sole purpose of participating in the national debate over federal wetlands policy. The Coalition is an incorporated group of companies, state and national trade associations, Native American groups, business and agricultural interests, and others that have joined together to advocate a balanced federal policy for conserving and regulating the Nation's wetlands.

The Coalition acknowledges the importance of functioning wetlands, supports the existence of a federal regulatory program, and supports the national goal of "no overall net loss of wetlands" when expressed in terms of functions rather than acres. Yet even on the basis of acreage, the Coalition observes that we as a nation are close to achieving the goal of "no net loss" of wetlands.

At the same time, the Coalition believes that actions by federal agencies have created a national regulatory program that far exceeds Congress' intent in enacting the Federal Water Pollution Control Act of 1972 as well as the Clean Water Act of 1977. The Coalition believes that Congress can and should act legislatively to improve the federal wetlands permitting program.

II. Concern Over Inconsistent Application of the Federal Wetlands Permitting Program

Members of the Coalition are concerned about the report issued in February, 2004 by the General Accounting Office that found numerous inconsistent jurisdictional decisions among the U.S. Army Corps of Engineers (Corps) district offices in light of the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC).

The Supreme Court in *SWANCC* held that intrastate, non-navigable, isolated waters are not jurisdictional “waters of the United States” where the sole basis for asserting CWA jurisdiction is the use of such waters by migratory birds. Read in its entirety, however, the opinion of the Court is broader than the immediate holding in the *SWANCC* case, excluding from CWA jurisdiction not only all “isolated waters” but all waters except traditionally navigable waters, their tributaries, and adjacent wetlands.

Shortly after the Supreme Court’s decision, the Corps and the Environmental Protection Agency (EPA) issued limited guidance to the field. In January 2003, the agencies issued an Advance Notice of Proposed Rulemaking to clarify jurisdiction after *SWANCC*. In December, 2003, however, the Administration cancelled the rulemaking, leaving the earlier guidance in place. But as the GAO reported, the guidance does not provide detailed information to the Corps districts or field personnel on making jurisdictional determinations.

The GAO studied the jurisdictional calls made by 16 of the Corps 38 district offices from April, 2003 to January, 2004. The study found that Corps districts differ in how they interpret and apply the federal regulations when determining what wetlands and other waters fall within the jurisdiction of the federal government. The GAO concluded that the inconsistencies stemmed primarily from the Corps and EPA regulations concerning:

- A. adjacent wetlands;
- B. tributaries; and
- C. ditches and other man-made conveyances.

Members of the Coalition believe that Congress should act to resolve the confusion surrounding the jurisdiction of the federal wetlands permitting program.

III. Principles for Defining Jurisdictional Waters

The Coalition advocates the following basic principles in order to achieve a consistent application of federal program jurisdiction

- A. “Adjacent” wetlands are those wetlands that “abut” jurisdictional waters.

The Supreme Court held in *United States v. Riverside Bayview Homes, Inc.*¹⁸ that wetlands “adjacent” to navigable waters are subject to federal jurisdiction under the CWA. The Corps and EPA currently have identical regulations in place that define “adjacent” to mean:

bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands.’¹⁹

According to the GAO report, some Corps districts deem any wetland within the 100-year flood plain to be “neighboring,” and therefore jurisdictional as an adjacent wetland.

In contrast, Corps headquarters policy has historically been that it is the second sentence of the existing regulation that defines “neighboring” as wetlands separated from navigable waters by narrow linear features. Moreover, “neighboring” should be defined in the context of the other terms used in the definition: “bordering” and “contiguous.” This interpretation of “adjacent” is the one that is supported by the previous decision of the Supreme Court in *Riverside Bayview Homes* as explained by the Court in *SWANCC*. The Court in *Riverside* observed that Riverside’s property “is part of a wetland that actually *abuts* on a navigable waterway.” On this basis, the Court upheld regulation of the wetland as an “adjacent” wetland within the Corps’ jurisdiction. The Court in *SWANCC* reinforced this opinion when it stated that in *Riverside*, “we held that the Corps had 404(a) jurisdiction over wetlands that actually *abutted* on a navigable waterway.”²⁰

- B. A non-navigable “tributary” of a traditional navigable water means (a) that it must be part of a natural, continuous surface tributary system, and (b) must have a minimal stream flow beyond simple drainage of surface water for federal jurisdiction to attach.

¹⁸474 U.S. 121 (1985).

¹⁹33 C.F.R. § 328.3 (c); 40 C.F.R. § 230.3(b).

²⁰531 U.S. at 167.

Non-navigable tributaries of navigable waters must be part of a natural and continuous surface tributary system in order for jurisdiction to attach. As the GAO report indicated, many Corps districts are not requiring a continuous surface connection in order to assert jurisdiction. Moreover, EPA has claimed subsequent to the *SWANCC* decision that surface tributaries include underground storm water drainage systems.

Historically, however, the Corps has never regulated groundwater or waters in subsurface storm drains as providing a continuous surface tributary connection between navigable waters. Nor have non-tidal drainage ditches excavated on dry land normally been considered "navigable waters."²¹ Such a change would actually trigger an expansion of jurisdiction over pre-*SWANCC* limits, and is not supported by *SWANCC*. The Court in *SWANCC* stated that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the [Clean Water Act]: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonable be made so."²² Regulation of waters connected to navigable waters only by groundwater tributaries, underground storm systems, or man-made ditches constructed in uplands is not consistent with the Court's opinion in *SWANCC*.

Congress should make clear that the following areas are not jurisdictional and may not be used to connect an isolated water or wetland to a surface tributary system:

- ephemeral areas (erosion features, areas that only drain rainwater, rain puddles);
- man-made ditches in uplands;
- groundwater;
- surface water runoff (sheet flow); or
- underground stormwater drainage systems (except short culverts that direct a tributary under a manmade structure such as a road).

²¹See Rules and Regulations Department of Defense, U.S. Army Corps of Engineers, 51 *Fed. Reg.* 41,206, 41,256-57 (Nov. 13, 1986).

²²531 U.S. at 174.

The courts have been divided over these jurisdictional issues in the wake of SWANCC. Not surprisingly, court decisions have reflected the confusion found by GAO concerning the regulatory definitions of adjacent wetlands, tributaries, and man-made ditches and other conveyances.

For example, the U.S. Court of Appeals for the 5th Circuit held that subsurface waters and ephemeral “streams” were not jurisdictional waters under the Oil Pollution Act or the CWA.²³ According to the 5th Circuit, federal jurisdiction attaches only if the “body of water is actually navigable or adjacent to an open body of navigable water.”¹

Another example involved 38 acres of wetlands in Virginia over which the Corps asserted jurisdiction, arguing that surface water flow from the property was connected to traditionally navigable waters by a series of man-made ditches and underground pipes that ran for several miles before connecting to a tributary of the James River.²⁵ The U.S. District Court for the Eastern District of Virginia ruled that wetlands connected to traditionally navigable waters by man-made drainage ditches and underground culverts are not subject to federal jurisdiction under the Clean Water Act.²⁴ The court reasoned that if such a connection were allowed to suffice for jurisdiction, “*any property connected by a drainage pipe or culvert to navigable waters would fall under the Corps’ jurisdiction . . .*”²⁶ Although members of the Coalition find the district court’s reasoning highly persuasive, a panel of the U.S. Court of Appeals for the 4th Circuit did not, and reversed the lower court’s ruling. The court of appeals held that the Corps could appropriately assert jurisdiction over non-navigable waters as long as they had “some connection to navigable ones.” A writ of certiorari has been filed with the U.S. Supreme Court for review of the 4th Circuit’s decision in *Newdunn*.

²³*Rice v. Harken Exploration Co.*, 250 F. 3d 264 (5th Cir. 2001). Common in the West, so-called “ephemeral streams” are drainage areas through which water flows for a short period of time only after a substantial rainfall.

¹ *Id.*

²⁵No evidence of pollution was presented, other than silt from “clean fill” exiting the property. The court found no evidence that the silt exiting the property as a result of *Newdunn*’s construction activities actually reached any natural watercourse or caused harm to the Chesapeake Bay or its “natural” tributaries.

²⁴*United States v. Newdunn Associates*, 195 F. Supp. 2d 751 (E.D. Va. April, 2002), *rev’d*, 344 F.3d 407 (4th Cir. 2003).

²⁶*Id.* (emphasis added).

Another federal district court in New Jersey held that wetlands adjacent to a non-navigable creek that fed into the Hackensack River were not jurisdictional.¹³ The court ruled that in light of SWANCC a “mere hydrologic connection” is no longer enough; there must be a “significant nexus” between the wetlands and the navigable water. Yet other courts have found that existence of a hydrologic connection between a wetland and a navigable water, no matter how remote, is enough for federal jurisdiction to apply.²

These brief examples demonstrate the repercussions of a fractured regulatory jurisdiction that extends beyond the Corps’ 38 district offices all the way through the federal judiciary.

IV. Conclusion

The National Wetlands Coalition appreciates the opportunity to share its views with the subcommittee. The members of the Coalition encourage the subcommittee, the full committee, and the House to act legislatively to craft a wetlands regulatory program that achieves the national goal of no net loss of wetlands functions and values, that is applied consistently throughout the nation, and that earns the support and cooperation of the regulated community.

For additional information, please contact Bob Szabo, Howard Bleichfeld or Paula Dietz.

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¹³*FD&P Enterprises, Inc. v. U.S. Army Corps of Engineers*, 239 F. Supp. 2d (D. N.J. 2003).

² See *United States v. Rapanos*, 2003 WL 21789241 (6th Cir. 2003) (wetlands connected to navigable river 20 miles away by a drain sluice and non-navigable creek found jurisdictional); *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001) (two releases in 13 years of water containing pesticides from irrigation canal to creek deemed sufficient hydrologic connection for federal jurisdiction over canal).



**SUMMARY OF POST-SWANCC
COURT DECISIONS**
(as of MARCH, 2004)

U.S. COURTS OF APPEALS

Headwaters, Inc. v. Talent Irrigation District, 243 F. 3d 526 (9th Cir. 2001).

The U.S. Court of Appeals for the Ninth Circuit considered whether a Clean Water Act (CWA) National Pollution Discharge Elimination System (NPDES) permit was required to apply an aquatic herbicide to non-navigable irrigation canals. The Court found that the canals were not isolated, and were connected as tributaries to other "waters of the United States," because they "receive water from natural streams and lakes, and divert water to streams and creeks." The Court further concluded that even tributaries that flow intermittently are "waters of the United States."

In explaining its reasoning, the Court quoted favorably the Eleventh Circuit decision in U.S. v. Eidson, 108 F. 3d 1336, 1342 (11th Cir. 1997):

Pollutants need not reach interstate bodies of water immediately or continuously in order to inflict serious environmental damage.... It makes no difference that a stream was or was not at the time of the spill discharging water continuously into a river navigable in the traditional sense. Rather, as long as the tributary would flow into the navigable body [under certain conditions], it is capable of spreading environmental damage and is thus a "water of the United States" under the Act.

Community Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 305 F. 3d 943 (9th Cir. Sept. 16, 2002)

In a CWA § 402 citizen suit, the Ninth Circuit held that unpermitted discharges from a concentrated animal feeding operation (CAFO) were to "waters of the United States" subject to CWA jurisdiction. Following Headwaters v. Talent Irrigation District, the Court concluded that a drain that carried return flows and other waters either directly or by connecting waterways into the Yakima River was jurisdictional under the CWA. The Court noted that the Ninth Circuit held in Headwaters that "irrigation canals are waters of the United States because they are tributaries to other waters of the United States," that, "[a] stream which contributes its flow to a larger stream or other body of water is a tributary," and that "[e]ven tributaries that flow intermittently are 'waters of the United States'."

Applying this law to the facts in the case, the Court affirmed the district court findings that: the Yakima River falls within the definition of "waters of the United States;" the Sunnyside Valley Irrigation Drain (SVID) takes water out of the Yakima River at Parker Dam in the Spring of each year; and that the water runs through the Canal bringing water to the land serviced by the Canal, and back to the Canal through a series of returns composed of water not used by irrigators and irrigation runoff. The Court concluded that, "the evidence suggests that J.D. [Joint Drain] 26.6 drains, either directly or by connecting waterways, into the Yakima River. Therefore, the district court did not clearly err in holding that J.D. 26.6 qualifies as a navigable water under the CWA." 305 F. 3d at 954-955.

Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001).

The U.S. Court of Appeals for the Fifth Circuit determined the extent of "navigable waters" under the Oil Pollution Act (OPA), not the CWA. The Court ruled that the term should have the same meaning under both the OPA and the CWA. In the context of this oil spill clean up case, the Court suggested that SWANCC limited CWA jurisdiction to waters that are "actually navigable or ... adjacent to an open body of navigable water," and found that "navigable waters" under the OPA does not include intermittent streams which flowed into a creek which went underground before reaching an "actually" navigable water. The Court's reference to an "open body of navigable water" relies on the Supreme Court's statement in SWANCC that it would not extend CWA jurisdiction to "ponds that are not adjacent to open water." See SWANCC, 531 U.S. at 168. However, the Court in Rice v. Harken inserted the "navigable water" qualifier to the term "open water" without support from SWANCC.

United States v. Interstate General Co., 152 F. Supp. 2d 843 (D. Md. 2001) affirmed, 2002 U.S. App. LEXIS 13232 (4th Cir. 2002).

The U.S. District Court expressly rejected the argument that, after SWANCC, CWA jurisdiction is limited to traditionally navigable waters and wetlands and waters immediately adjacent to traditionally navigable waters. The Court wrote,

The SWANCC case is a narrow holding in that only 33 CFR §328.3(a)(3), as applied to the Corps creation of the Migratory Bird Rule, is invalid pursuant to a lack of congressional intent Because the Supreme Court only reviewed 33 CFR §328.3(a)(3), it would be improper for this Court to extend the SWANCC Court's ruling any farther than they clearly intended.

The Fourth Circuit U.S. Court of Appeals affirmed the District Court decision on July 2, 2002 in an unpublished opinion. The Fourth Circuit held that SWANCC dealt exclusively with 33 C.F.R. § 328.3(a)(3), did not address wetlands "adjacent to headwaters" or "hydrologically connected" wetlands, and did not address the regulation at issue in IGC: 33 C.F.R. §328.3 (a) (1), (5), and (7). The Court concluded, therefore, that SWANCC provided no change in decisional law requiring it to overturn the District Court's finding of Corps' wetland jurisdiction. IGC, 2002 U.S. App. LEXIS 13232, at *5-6

United States v. Deaton, 332 F.3d 698 (4th Cir. June 12, 2003).

On June 12, 2003, the U.S. Court of Appeals for the Fourth Circuit affirmed a lower court finding of CWA jurisdiction over Maryland wetlands adjacent to a roadside ditch ultimately connecting to the navigable Wicomico River and the Chesapeake Bay. The Fourth Circuit published its opinion in which all three panel members joined. Deaton is the first to be decided of three "waters of the United States" cases pending before the Court. The other two are Treacy v. Newdunn Assocs., Civ. No. 02-1480, 02-1594 and United States v. RGM Corp., Civ. No. 02-2093.

At issue in the Deaton case are headwater wetlands that the lower court found flow through a drainage ditch, to Perdue Creek, to Beaverdam Creek, and from Beaverdam Creek to the Wicomico River, a tidal and navigable-in-fact tributary of the Chesapeake Bay. The lower court found a distinct "hydrologic connection between the surface water on the Parcel and the Chesapeake Bay" that was demonstrated in a dye study conducted by the Corps, and held that the wetlands on the Deatons' property are "adjacent wetlands" under 33 C.F.R. §328.3 because of this surface water connection. The lower court rejected the Deatons' argument that the wetlands could not be considered adjacent because a small part of the hydrologic connection was through what the Deatons characterized as a man-made roadside ditch.

The Fourth Circuit decision focused on whether the Corps has jurisdiction over the roadside ditch. The Court first addressed the constitutional argument and held that the Corps' assertion of CWA jurisdiction over the roadside ditch as a "tributary" pursuant to the Corps' tributary regulation at 33 C.F.R. §328.3(a)(5) "fits comfortably within Congress's authority to regulate navigable waters." As a result, the Court concluded, the tributaries regulation does not raise a "serious constitutional question" warranting a narrow construction of CWA jurisdiction, and is entitled to deference under Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984). The Court emphasized that the CWA is grounded in the broad Commerce Clause power to regulate channels of interstate commerce, and that that power extends to regulating nonnavigable tributaries and their adjacent wetlands in order to protect navigable waters. The Court concluded:

Congress passed the Clean Water Act 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,' 33 U.S.C. §1251(a), and gave the Corps, along with the Environmental Protection Agency, the job of getting this done. The Corps has pursued this goal by regulating nonnavigable tributaries and their adjacent wetlands. This use of delegated authority is well within Congress's traditional power over navigable waters.

The Court next held that the Corps' tributaries regulation represents a reasonable interpretation of the CWA that is entitled to deference. The Court found that the CWA definition of "waters of the United States" is "sufficiently ambiguous" with respect to the extent to which nonnavigable tributaries are covered to constitute an implied delegation of authority to the Corps to determine which waters are covered "within the range suggested by *SWANCC*." The Court concluded:

The Corps argues, with supporting evidence, that discharges into nonnavigable tributaries and adjacent wetlands have a substantial effect on water quality in navigable waters. The Deatons do not suggest that this effect is overstated. This nexus, in light of the 'breadth of congressional concern for protection of water quality and aquatic ecosystems,' *Riverside Bayview*, 474 U.S. at 133, is sufficient to allow the Corps to determine reasonably that its jurisdiction over the whole tributary system of any navigable waterway is warranted.

The Court also found that the Corps' interpretation of the word "tributary" in its tributaries regulation as covering the roadside ditch is reasonable and entitled to deference. It found that the Corps "has always used the word [tributary] to mean the entire tributary system, that is, all of the streams whose water eventually flows into navigable waters." The Court concluded that this interpretation is long-standing and not inconsistent with the regulation, and is therefore entitled to deference. The Court affirmed the Corps' judgment that since the tributaries rule extends to *all* tributaries of navigable waters, it extends to the roadside ditch connecting the Deaton wetlands to downstream navigable waters.

On November 10, 2003, the Deaton's filed a Petition for a Writ of Certiorari with the United States Supreme Court.

Treacy v. Newdunn, 344 F.3d 407 (4th Cir. September 10, 2003).

Overturing a ruling by the U.S. District Court for the Eastern District of Virginia, United States v. Newdunn Associates, 195 F.Supp.2d 751 (E.D.Va. 2002), the Fourth Circuit Court of Appeals ruled that the U.S. Army Corps of Engineers had jurisdiction under the Clean Water Act to require a developer to obtain a permit prior to filling approximately 38 acres of wetlands. The court ruled that the wetlands, which historically had a natural hydrological connection to the navigable-in-fact waterway Stony Run prior to the construction of an interstate, maintained a connection to Stony Run through 2.4 miles of intermittent surface water flow through natural streams and manmade ditches.

In reaching its ruling, the Court relied heavily upon its earlier ruling in Deaton to conclude that, "[T]he Corps intends to assert jurisdiction over 'any branch of a tributary system that eventually flows into a navigable body of water.'" Newdunn, slip op. at 15 (citations omitted). The Court found that this regulatory scope of the Corps was clearly supported by the Clean Water Act:

In sum, the Corps' unremarkable interpretation of the term "waters of the United States" as including wetlands adjacent to tributaries of navigable waters is permissible under the CWA because pollutants added to any of these tributaries will inevitably find their way to the very waters that Congress sought to protect.

Id. at 15.

The Court, again relying on Deaton, found that the term “tributary” “include[s] ‘the entire tributary system,’ including roadside ditches.” Id. at 16 (citations omitted). The Court further ruled that, “If this Court were to conclude that the I-64 ditch is not a ‘tributary’ solely because it is manmade, the CWA’s chief goal would be subverted. Whether manmade or natural, the tributary flows into traditional, navigable waters. Accordingly, the Corps may permissibly define that tributary as part of the ‘waters of the United States.’” Id. at 16 (citations omitted).

The Court also overturned the District Court’s ruling that the Virginia Water Control Board did not have authority to regulate the fill of the wetlands under state law and remanded a state enforcement action to state court. In so ruling, the Court found that the Virginia Nontidal Wetlands Resources Act of 2000 clearly extended Virginia’s authority to regulate wetlands beyond the scope of the Clean Water Act and that the Act’s jurisdictional mandate did not depend on the Clean Water Act. The Court strongly rejected the District Court’s finding that because the Virginia law borrowed from the Corps regulations’ scientific definition of wetlands, that the jurisdictional scope of the Virginia Act was therefore dependent on the jurisdictional scope of the Clean Water Act. The Court instead ruled that:

Nothing in the Virginia Act refers to the CWA’s definition of “navigable waters” or the “waters of the United States.” A plain reading of the Virginia Act, therefore, makes it inconceivable that the term “wetlands” as it is used in the state legislation could necessarily turn on the resolution of a question of federal law. ... In sum, in light of the Virginia Act’s clear statutory language, it is apparent that “Virginia now regulates activities in wetlands beyond its federal mandate.” It would be perverse, therefore, for this court to conclude that the jurisdictional limits of the Virginia Act depend upon the CWA.

Id. at 9 and 12 (citations omitted).

In October, 2003, Newdunn Associates et al. filed a Petition for a Writ of Certiorari with the United States Supreme Court.

United States v. Krilich, 152 F. Supp. 2d 983 (N.D. Ill. June 22, 2001), affirmed, 303 F. 3d 784 (7th Cir. 2002), cert. denied 123 S. Ct. 1782 (2003).

The U.S. District Court denied defendant’s motion to vacate a 1992 consent decree in light of SWANCC. In holding that the defendants were bound by their stipulations in the consent decree regarding “waters of the United States,” the Court found that a “colorable basis” for jurisdiction probably still existed after SWANCC, noting that “[c]ases subsequent to SWANCC have not limited the definition of waters of

the United States to those immediately adjacent to navigable (in the traditional sense) waters.” (citations omitted). The Court also recognized that, even assuming the wetlands at issue in this motion were not within the government’s authority to regulate after SWANCC, other wetlands subject to the consent decree unquestionably continued to be subject to CWA regulation. Therefore, the government had authority to enter into the consent decree to enforce the CWA as to those wetlands.

Defendants Krilich et al appealed this decision to the Seventh Circuit U.S. Court of Appeals. On September 9, 2002, the Seventh Circuit affirmed the lower court opinion, concluding that the SWANCC holding was limited to the federal agencies’ authority to define navigable waters under the migratory bird rule, and was not a significant change in the law requiring it to modify or vacate the consent decree. The Seventh Circuit also ruled that even if SWANCC had made a significant change in the law, it was irrelevant because it was clear from the consent decree that the migratory bird rule was not the sole basis of the agencies’ authority to assert jurisdiction over the developer’s property. Defendants’ petition for writ of certiorari was denied by the U.S. Supreme Court on April 21, 2003.

United States v. Rapanos, 339 F.3d 447 (6th Cir. August 5, 2003).

The Sixth Circuit overturned a lower court decision in ruling that wetlands adjacent to a non-navigable manmade drain which eventually flowed 11 to 20 miles before emptying into a navigable waterway are subject to Clean Water Act jurisdiction. The case, United States v. Rapanos, 2003 WL 21789241 (6th Cir. Aug. 5, 2003), concerned a property owner who filled several acres of wetlands on his property in flagrant disregard of a state agency determination that he needed a permit to do so. Mr. Rapanos was convicted, but his conviction was remanded back to district court on appeal for consideration in light of the United States Supreme Court ruling in Solid Waste Agency of Northern Cook County v. Army Corp of Engineers, 531 U.S. 159 (2001). In SWANCC, the Supreme Court ruled that certain isolated wetlands where the only claim for federal jurisdiction was that they were used by migratory birds were not covered under the Clean Water Act.

The district found that under SWANCC, Mr. Rapanos’s wetlands, which were connected to a man-made drain which flowed into a non-navigable stream which then flowed for several miles before flowing into the navigable Kawkawlin river were not covered under the Clean Water Act and overturned Mr. Rapanos’s conviction. The lower court broadly interpreted SWANCC to mean that wetlands not directly adjacent to navigable waters were not jurisdictional under the Clean Water Act.

On appeal, the Sixth Circuit relied on a recent decision by the Fourth Circuit in United States v. Deaton, 332 F.3d 698 (4th Cir. June 12, 2003), which found that the Clean Water Act covered a non-navigable roadside ditch, to reject the lower court’s broad interpretation of SWANCC. The circuit court found that wetlands adjacent to non-navigable waters that are connected, even if remotely, to navigable waters are covered under Clean Water Act. The Court ruled that:

Although the *Solid Waste* opinion limits the application of the Clean Water Act, the Court did not go as far as Rapanos argues, restricting the Act's coverage to only wetlands directly abutting navigable water. ... The evidence presented in this case suffices to show that the wetlands on Rapanos's land are adjacent to the Labozinski Drain, especially in view of the hydrological connection between the two. It follows under the analysis in *Deaton*, with which we agree, that the Rapanos wetlands are covered by the Clean Water Act. Any contamination of the Rapanos wetlands could affect the Drain, which, in turn, could affect navigable-in-fact waters. Therefore, the protection of the wetlands on Rapanos's land is a fair extension of the Clean Water Act. *Solid Waste* requires a "significant nexus between the wetlands and 'navigable waters,'" for there to be jurisdiction under the Clean Water Act. Because the wetlands are adjacent to the Drain and there exists a hydrological connection among the wetlands, the Drain, and the Kawkawlin River, we find an ample nexus to establish jurisdiction.

339 F.3d at 453 (citations omitted).

The court also ruled against Rapanos's objection to jury instructions that were based on the Corps rules governing the definition of waters of the United States. These rules include coverage of intermittent streams, tributaries to waters of the United States, and wetlands. See 33 C.F.R. § 328.3(a)(3). The court took this opportunity to reiterate the narrowness of the holding in *SWANCC*, finding that, "*Solid Waste* invalidated the 'Migratory Bird Rule' but it did not invalidate the agency's regulations [33 C.F.R. § 328.3(a)(3)] upon which the jury instruction was based." *Id.* at 454.

Although the court recognized that *SWANCC* does not require all non-navigable waters to be covered in order to protect navigable waters from the pollution, the court affirmed the policy need for broad Clean Water Act protection, stating that, "[T]he Clean Water Act cannot purport to police only navigable-in-fact waters in the United States in order to keep those waters clean from pollutants." *Id.* at 451. The court further stated that, "Although wetlands are not traditionally navigable-in-fact, they play an important ecological role where they exist." *Id.*

Rapanos filed a Petition of Certiorari with the United States Supreme Court on December 30, 2004.

United States v. Harold G. Rueth, 335 F.3d 598 (7th Cir., July 10, 2003).

Affirming a lower court ruling, the U.S. Court of Appeals for the Seventh Circuit denied a development company's request to vacate a consent decree requiring the company to restore wetlands it had illegally filled. The company, which was assessed

\$6,750,000 in penalties for failing to comply with the decree, alleged that the decision in SWANCC constituted a material change in the law that affected the decree's validity. Without addressing the specific facts at issue, the Court ruled that SWANCC did not constitute a material change in the law because the basis for the Corps' determination that the wetlands were jurisdictional was that the wetlands were adjacent to navigable waters and SWANCC did not cast doubt on the Clean Water Act's jurisdiction over adjacent wetlands. Moreover, the Court refused to look at whether the wetlands at issue were indeed adjacent, finding that the defendant could have litigated the issue previously and instead choose to settle.

In affirming that adjacent wetlands are still jurisdictional under the CWA, the Court looked to the recent decision in United States v. Deaton, *supra*, as well as the Supreme Court's ruling in United States v. Riverside Bayview Homes, 474 U.S. 121 (1985). The Court said:

[I]t is clear that *SWANCC* did not affect the law regarding the government's alternative asserted basis for jurisdiction adjacency The Corps' jurisdiction adjacency is well-established; it was upheld by the Supreme Court in *United State v. Riverside Bayview Homes*, and was reaffirmed by *SWANCC*. ... And recently, in *United States v. Deaton*, the Fourth Circuit upheld the Corps' exercise of adjacency jurisdiction over a parcel of land whose only connection to navigable waters was surface runoff that, after a "winding thirty-two mile path," emptied into the Chesapeake Bay.

2003 U.S. App. LEXIS 13892, at 15 (citations omitted).

However, in dicta, the Court stated that it did not believe that the ruling in SWANCC was so narrow as to do "nothing more than invalidate the Migratory Bird Rule." The Court went on to discuss instances other than use migratory birds where it believed waters would not be jurisdictional after SWANCC:

The Court's concern with the Migratory Bird Rule was that it conferred regulatory jurisdiction over waters that were not actually or potentially "navigable";... [T]hat fish or shellfish can be taken from a water and sold in interstate commerce does not make that water any more navigable than it would be if it were frequented by migratory birds. The same holds true for intrastate waters that are used by interstate travelers or for industrial purposes by industries in interstate commerce.

Id. at 12-13.

Rueth has filed a Petition for a Writ of Certiorari with the United States Supreme Court.

In re: Needham, 354 F.3d 340 (5th Cir. Dec. 16, 2003).

This case involves the Oil Pollution Act. In an action to collect clean up costs in bankruptcy court, the Needhams argued they were not liable for clean up costs under the OPA because their oil spill – which was pumped from a containment basin into a drainage ditch that then spilled into Bayou Cutoff and then into Bayou Folse, a water body adjacent to Company Canal, which eventually flows into the Gulf of Mexico – was not into “navigable waters” and therefore not covered under the OPA. The bankruptcy court and the U.S District Court for the Western District of Louisiana agreed with the Needhams and ruled that the Needhams were not responsible for the clean up costs because the spill did not occur into a body of water that is actually navigable or adjacent to an open body of navigable water. The Fifth Circuit Court of Appeals reversed the District Court decision, but left intact the District Court’s interpretation of the meaning of navigable waters and expressed disagreement with the rulings in Deaton, supra and Rapanos, supra (both of which found that non-navigable ditches with surface water connections to navigable waters were covered by the Clean Water Act) in strongly worded dicta.

The actual holding of this case is narrow and does not directly contradict other Circuits interpreting SWANCC and the scope of CWA jurisdiction. The Fifth Circuit held that because the oil spill leaked into Bayou Folse, which is adjacent to Company Canal, a navigable-in-fact water, the spill was covered under the OPA and the Needhams were responsible for cleanup costs. 354 F.3d at 347.

However, in dicta, the Court left little doubt on how it would interpret SWANCC and the scope of CWA jurisdiction. Citing the Fifth Circuit’s previous reasoning in Rice, supra, the Court stated that:

The CWA and OPA are not so broad as permit the federal government to impose regulations over “tributaries” that are neither themselves navigable nor truly adjacent to navigable waters. Consequently, in this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under SWANCC “a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water.”

Id. at 345-346 (citing Rice, supra, at 269).

The Court further shed light on its interpretation of the meaning of adjacency and indicated that SWANCC invalidated the Corps’ regulatory definition of the term, see id. at footnote 12:

Under *Rice*, the term “adjacent” cannot include every possible source of water that eventually flows into a navigable-in-fact waterway. Rather, adjacency necessarily implicates a “significant nexus” between the water in question and the navigable-in-fact waterway.

Id. at 347. The Court found that Bayou Folsé was adjacent to Company Canal because water flowed directly from the bayou into the canal.

U.S. DISTRICT COURTS

Aiello v. Town of Brookhaven, 136 F. Supp. 2d 81 (E.D. N.Y. 2001).

The U.S. District Court concluded that non-navigable tributaries are within CWA jurisdiction, including a pond and creek that flow into a lake which, in turn, flows in a bay, a “classical interstate navigable body of water.”

United States v. Buday, 138 F. Supp. 2d 1282 (D. Mont. 2001).

The U.S. District Court, in a criminal case, declared jurisdictional a creek located about 235 miles from the nearest navigable-in-fact water. The Court concluded that the creek is jurisdictional because it is a tributary that ultimately flows into waters that are navigable-in-fact. The Court reasoned that:

[T]ributaries that are distant from but connected to navigable waters are ecologically capable of undermining the quality of the navigable water The water quality of tributaries like Fred Burr Creek, distant though the tributaries may be from navigable streams, is vital to the quality of navigable waters. Therefore, Congress must have intended to reach them.

This case also includes a detailed analysis of why the Commerce Clause supports such an attenuated connection to interstate commerce.

Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169 (D. Idaho 2001).

The U.S. District Court ruled that discharges from a concentrated animal feeding operation (CAFO) were to “waters of the United States” subject to CWA jurisdiction. The Court found to be jurisdictional discharges of dairy waste into Walker Spring, which “runs into a pond, across a pasture and then into the Northside Canal, which runs into Clover Creek [waters of the United States] at some point downstream.” The Court found discharges into Butler Spring to be jurisdictional because, “Butler Spring discharges into Clover Creek, at least seasonally, by means of a head gate.”

Importantly, the Court also found to be jurisdictional discharges of dairy waste “through underground hydrological connections between natural ponds and manmade lagoons on the dairy’s property,” to Walker and/or Butler Springs which, in turn,

discharge into Clover Creek, a recognized "waters of the United States." The Court's ruling was contingent on finding that such discharges can, in fact, be traced from their source to the springs. The Court held that the CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States. This case settled during trial proceedings and a consent decree was entered March 22, 2002.

Bobby Joe Colvin v. United States of America, 181 F. Supp. 2d 1050 (C.D. Cal. 2001).

The U.S. District Court denied defendant's motion to vacate, set aside, or correct his sentence for discharging waste into the Salton Sea without a CWA permit. The motion argued that there was no CWA violation because, after *SWANCC*, the Salton Sea could not be considered a "waters of the United States" subject to CWA jurisdiction.

Citing *Headwaters*, and other cases, the District Court interpreted *SWANCC* narrowly, concluding that it did not invalidate "non-Migratory Bird Rule interpretations" of navigable waters. The Court noted that the trial record demonstrated that the Salton Sea ("actually a lake, not a sea") is used by out-of-state and foreign tourists "who fish and recreate in and on its waters and shoreline," and by visitors who "water ski, fish, hunt ducks, and race boats and jet skis on the Sea." The record shows that the Salton Sea ebbs and flows with the tide. "Under most any meaning of the term, the Salton Sea is a body of "navigable water" and "water of the United States."

The Ninth Circuit Court of Appeals (No. 02-55245) denied plaintiff's certificate of appealability August 30, 2002.

U.S. v. Lamplight Equestrian Center, Civ. No. 00-C-6486, 2002 U.S. Dist. LEXIS 3694 (N.D. Ill. March 8, 2002).

The District Court for the Northern District of Illinois recently upheld CWA jurisdiction over a wetland adjacent to a tributary to navigable waters. The wetland at issue in the case drained through a man-made drainage ditch, then through a 50 foot "delta" or "meandering drainage swale," and then into Brewster Creek, a non-navigable stream. Brewster Creek flows, in turn, to the Fox River, a traditionally-navigable water. The defendant agreed that there was at least an intermittent hydrological connection between the wetland and Brewster Creek, but disputed whether this arguably intermittent hydrological connection was sufficient to establish CWA jurisdiction over the wetland after *SWANCC*.

The district court, following *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F. 3d 526 (9th Cir. 2001) and similar cases, focused on whether there was a "significant nexus" between the wetland and the Fox River. "Water need not flow in an unbroken line at all times to constitute a sufficient connection to a navigable water or its tributaries" the court concluded. Slip Op. at 15.

The court also held that the "drainage connection" could establish the wetland's adjacency because the Corps' regulation defines adjacency as "bordering, contiguous, or neighboring," and contiguous means "being in actual contact: touching along a boundary or at a point." Consequently, "[b]y virtue of the path of water, whether it be a delta, a meandering swale, or a drainage connection, the wetlands come into actual contact with the tributary to Brewster Creek." Slip Op. at 17.

Finally, the court concluded that the wetland need not be adjacent to traditionally navigable waters:

Cases both before and after *SWANCC* have found that a tributary need not have a direct connection to the navigable water, but may be linked through other connections two or three times removed from navigable water and still be subject to the Corps' jurisdiction Even where the distance from the tributary to the navigable waters is significant, the quality of the tributary is still vital to the quality of the navigable waters. Slip Op. at 17-18.

A consent decree terminating the case was entered October 9, 2002. Terms of the decree included payment of a fine for filling wetlands without a permit.

California Sportfishing Protection Alliance v. Diablo Grande, 209 F. Supp. 2d 1059 (E.D. Ca. 2002).

Ruling on cross-motions for summary judgment, the District Court found that the water at issue, Salado Creek, is a "waters of the United States" subject to NPDES permit requirements, regardless of the fact that it flows through an underground pipeline on its way to the San Joaquin River, a navigable-in-fact waterway. The Court ruled that SWANCC did not affect the rule that tributaries are "navigable waters" under the CWA.

The Court distinguished *Rice v. Harken*, *supra*, as not involving a discharge into a surface water, but a more "complicated path involving groundwater." The Court ruled, "[t]he fact that the waters of Salado Creek flow underground, partially through a pipe, does not make them 'groundwater' outside the jurisdiction of the Act." The Court also noted that even if the underground portion of the creek flow were characterized as groundwater, the creek might still be a "navigable water" under the CWA. The Court held:

[W]hen there is sufficient water in Salado Creek it flows into the San Joaquin River. The fact that an underground pipeline conveys the water from one point to the other does not create a hydrological disconnect; nor does it affect Salado Creek's status as a tributary of the San Joaquin River.... [I]t is a tributary hydrologically connected to the San Joaquin River, a navigable-in-fact body of water As a tributary of an actually navigable waterway, Salado Creek is itself a "navigable water of the United States" within the meaning of the Act." (citations omitted).

The Court reaffirmed its decision on defendant's motion for reconsideration. The parties stipulated to dismissal of the case with prejudice in August 2002.

United States v. Phillips, *appeal pending*, Nos. 02-30035, 02-30046 (9th Cir.).

In a federal criminal case brought in the District of Montana, a jury convicted Phillips of knowing violations of the CWA. The district court judge had instructed the jury that the wetlands and streams into which the defendant discharged pollutants were "waters of the United States." The adequacy of the "waters of the United States" jury instruction is an issue on appeal. The case was argued February 13, 2003.

U.S. v. RGM Corp., 222 F. Supp. 2d 780 (E.D. Va. 2002).

Judge Morgan of the U.S. District Court for the Eastern District of Virginia ruled that the Corps lacked jurisdiction to stop unpermitted dredge and fill activity in wetlands on a 658-acre site in Chesapeake Virginia because the wetlands were not adjacent to traditionally navigable waters. The Court found that "surface water drains from the property to the south via the Saint Brides drainage ditch toward Northwest River, a navigable waterway. To the north, water flows from the property to the north via a system of man-made ditches that feed into Cooper's Ditch, which flow into the Intracoastal Waterway, a navigable waterway." The Court rejected the government's argument that the drainage ditches that form part of the hydrological connections between the RGM wetlands and traditionally navigable waters are tributaries that are themselves "waters of the United States."

As in his recently overturned ruling in Newdunn, Judge Morgan's opinion traced changes in the Corps' "navigable waters" and "waters of the United States" regulations from 1974 through 1986, and concluded that the Corps substantially expanded the definition of jurisdictional waters "to areas not contemplated by either the CWA or its own initial [1974] regulations interpreting this legislation." According to Judge Morgan, "[t]he history of CWA regulations suggests that the rights of land owners have been repeatedly invaded by the Corps through bureaucratic fiat," and "the *SWANCC*, *Lucas*, and *Wilson* cases signal ... a recognition that property rights must be protected even if the effect of the failure to do so is not so obvious and immediate as in the human and civil rights arena."

The District Court found that the Corps lacked the CWA authority to adopt the 1986 regulations or regulations adopted thereafter, apparently "by substituting the term 'waters of the United States' for 'navigable waters' as the Corps' basis for jurisdiction." In this case, Judge Morgan rules, in particular, that the Corps impermissibly expanded its jurisdiction over drainage ditches and ephemeral streams by removing limitations on the term Ordinary High Water Mark (OHWM) after 1975:

In its 1975 regulations, the applicable limit of the Corps' jurisdiction was the perceptible OHWM caused by the upstream or landward flow *from* navigable water, but by 2000, and in this case, it is the perceptible OHWM caused by the flow of water *toward* navigable waters. The Court **FINDS** that the Corps'

reinterpretation of the jurisdictional significance of an OHWM is not entitled to Chevron deference, and is an invalid extension of Corps jurisdiction. The facts presented at trial clearly fail to establish jurisdiction based on pre-1986 regulations. Slip Op. at 13.

The Court also found that the Corps lacks jurisdiction even under the 1986 regulations, reasoning that for a water to be a tributary, it must have "an OHWM flowing continuously from the wetlands to navigable water," and that the Corps "fail[ed] to establish a continuous OHWM in the drainage ditches and ephemeral streams." In so finding, the Court dismissed much of the Corps' expert testimony and evidence, and then found the Corps had not met its burden of proof.

The Court entered judgment in this case on July 26, 2002. The United States filed a notice of appeal on September 24, 2002 to the U.S. Court of Appeals for the Fourth Circuit. The Fourth Circuit has ordered the case held in abeyance pending its decision in Newdunn which was recently decided.

USA v. Adam Bros Farming, et al, Civ. No. 00-7409 (C.D. Cal. July 12, 2002).

The U.S. District Court for the Central District of California denied defendants' motion for summary judgment on grounds that the Corps lacked jurisdiction over isolated, non-navigable waterways and any wetlands adjacent to them. The Court found that there was at least a material question of fact as to the sufficiency of the hydrological connection to downstream waters to preclude summary judgment in defendants' favor.

At issue is Orcutt Creek and adjacent wetlands that flow through defendants' property to a depression, and then through and past the depression, either through a system of channels, by pumping, or both, to the Santa Maria River and then to the Pacific Ocean. The government argued that even if the connection was only established through pumping the water past the depression, the pollutants from Orcutt Creek are still capable of damaging the Santa Maria River and the Pacific Ocean, and Orcutt Creek should still be considered a "water of the United States." Relying on Headwaters, Inc. v. Talent Irrigation District, supra, which found an adequate hydrological connection based on irrigation canals, the Court ruled that "there are some circumstances where an artificial structure can create a hydrological connection sufficient to support Corps' regulatory jurisdiction where one did not previously exist." As a result, the Court ruled that "there is a material question of fact as to whether pumping water from the Orcutt Creek channel into a reservoir which sometimes flows onward to the Santa Maria River creates a sufficient hydrological connection to support Corps' regulatory jurisdiction under the CWA." Slip Op. at 15.

The Court also held, again relying on Headwaters, that since non-navigable, intermittent tributaries of navigable waters are still "waters of the United States" post-SWANCC, then, by extension, CWA jurisdiction "extends to wetlands adjacent to any tributary, whether or not it is navigable, which is hydrologically connected under certain conditions with a traditionally navigable body of water." Slip Op. at 18-19.

This case went to trial in February 2003. Post-trial briefs are due in September and October 2003.

United States v. The New Portland Meadows, Inc., No. 00-507, 2002 U.S. Dist. LEXIS 19132 (D. Or. Sept. 9, 2002).

The U.S. District Court, in a CWA §402 enforcement action, adopted the magistrate's July 2002 Report and Recommendation and granted the United States' motion for partial summary judgment, finding that ditches that are hydrologically connected to traditionally navigable waters by means of pumping are CWA "waters of the United States."

This case involved discharges of wastewater and surface water from a racetrack complex, including stabling facilities for 900 horses, through a system of ditches and pipes that discharge through three outfalls into an unnamed drainage ditch. The water and pollutants flow from the ditch approximately one mile to a pond and pump station. The pump forces excess water from the pond through a flood control levee and into the lower Columbia Slough, an undisputed "waters of the United States."

The Magistrate's Report and Recommendation reasoned that, "[t]he mere fact that the water from the District ditches is forced into the Columbia Slough by pumps is irrelevant. All of the water that enters the District ditches eventually ends up in the Columbia Slough, whether it flows naturally or not. Defendants were well aware of the ultimate destination of their wastewater and created their ditch system with the intent that the wastewater be transported to the Columbia Slough." The Magistrate concluded that, "[t]he unnamed ditch at issue is a tributary to waters of the United States and is, therefore, a water of the United States under the Act. Quoting United States v. Eidson, 108 F.3d 1336, 1343 (11th Cir. 1997), the Magistrate added that "[t]o hold otherwise and to allow polluters to contaminate this drainage system would defeat the intent of Congress and would jeopardize the health of our nation's waters." 2002 U.S. Dist. LEXIS 19153, *18 (D. Or. July 30, 2002).

FD&P Enterprises v. United States Army Corps of Engineers, 239 F. Supp. 2d 509 (D. N.J. 2003).

In a motion for summary judgment, FD&P Enterprises challenged the Corps' jurisdiction over wetlands that drain into Penhorn Creek, which in turn flows into the Hackensack River, a traditionally navigable water, just over a mile downstream. The government opposed the motion, arguing that the wetlands are jurisdictional as wetlands adjacent to tributaries of traditionally navigable waters. The government also argued that the Corps' regulation of Penhorn Creek and its adjacent wetlands are within Congress' Commerce Clause Power. Oral argument was heard in July 2001. In December 2002, the Corps issued plaintiff a permit to fill 53.5 acres of wetlands on the site subject to on-site and off-site mitigation requirements.

On January 15, 2003, the Court denied plaintiff's motion for summary judgment, ruling that there remains a genuine issue of material fact as to whether there is a

"substantial nexus between the FD&P wetlands and the Hackensack River." The Court also found that Clean Water Act jurisdiction over the FD&P wetlands was consistent with the Commerce Clause of the Constitution. The court reasoned that FD&P's purpose for seeking a §404 permit was to construct a commercial facility engaged in interstate freight transportation services and thus the filling of wetlands for that purpose would "substantially affect" interstate commerce. On February 6, 2003, the Court entered a stipulation and order dismissing this case with prejudice.

United States v. Bruce Dyer, No. 00-11013 (D. Mass. March 12, 2003).

The U.S. District Court rejected defendants' attempt to reopen a consent decree based upon SWANCC, in a case involving illegal filling of wetlands adjacent to a tributary of the Taunton River. The Court found that the wetlands were "navigable waters" subject to the Clean Water Act under 33 C.F.R. § 328.3(a)(2), (5), and (7). The Court reasoned that the SWANCC decision "has no bearing" on the current case because the wetlands at issue "are analogous to those that confronted the Court in United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 135 (1985), where the Court found wetlands subject to the CWA because they were adjacent to a navigable waterway."

The Court dismissed defendants' argument that portions of the Taunton River are not literally "navigable," citing SWANCC, 531 U.S. at 167 (citing Riverside Bayview Homes, 474 U.S. at 133, where the Court noted that the term "navigable" is of "limited import" and that Congress evidenced its intent to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term.").

San Francisco Baykeeper et al v. Cargill et al, Civ. No. 96-2161 (N.D. Cal. April 30, 2003).

This citizen suit involves the dumping of salt-processing wastes in a bermed pond located directly beside Mowry Slough and the San Francisco Bay. Prior to the SWANCC decision, the District Court granted summary judgment to the plaintiffs, ruling that the waters in question were waters of the United States subject to CWA jurisdiction. On appeal, following SWANCC, the Ninth Circuit ruled that the district court decision had been based on the Migratory Bird Rule, and must therefore be vacated. San Francisco Baykeeper et al v. Cargill et al, 263 F. 3d 963 (9th Cir. August 30, 2001).

Based on arguments presented by both the plaintiff, and the United States as amicus curiae, the Ninth Circuit recognized that there might be alternative grounds for jurisdiction other than the Migratory Bird Rule, and remanded the case to the District Court to determine "whether alternative grounds for jurisdiction exist, and whether, if so, such grounds have previously been waived or abandoned by plaintiffs." The United States' submitted a Supplemental Brief of Amicus Curiae on May 30, 2001 that interpreted SWANCC narrowly, and argued that the ponded area inside the berms where waste was discharged may be subject to CWA jurisdiction as an area subject to the ebb

and flow of the tide (33 C.F.R. 328.3(a)(1)), or as an impoundment (33 C.F.R. 328.3(a)(4)).

On remand, the District Court issued summary judgment in favor of plaintiffs, holding that "the Pond is a body of water adjacent to Mowry Slough, a navigable water, and that therefore, the Pond is a 'water of the United States' and is protected under the Clean Water Act." Slip Op. at 10. Analyzing the divergent Rice v. Harken and Headwaters v. Talent Irrigation appellate court decisions, the Court concluded that "[a] determination that a pond adjacent to a navigable body of water is protected by the Clean Water Act is consistent with both the more limited reading of the Fifth Circuit and the more expansive reading of the Ninth Circuit." Slip Op. at 9. The Court based its factual finding of adjacency on expert statements by both parties demonstrating that "the Pond was adjacent to Mowry Slough at the time that this suit was filed, that the soils between the Pond and Mowry Slough are saturated, and that the berm between the Pond and Mowry Slough leaked and allowed Slough water to enter the Pond at high tide." Slip Op. at 10. Cargill subsequently moved for an immediate appeal of this summary judgment order and for a stay pending the Ninth Circuit's decision.

Carabell, et al v. U.S. Army Corps Engineers, et al, 257 F.Supp.2d 917 (E.D. Mich. March 27, 2003).

Plaintiffs challenged both the Corps' jurisdiction and its decision to deny a §404 permit for their proposed development. Both parties moved for summary judgment. At issue are approximately 16 acres of forested wetlands located about one mile from the traditionally navigable Lake St. Clair in Macomb County, Michigan. The Corps found the wetlands to be adjacent to an unnamed ditch that borders the property, which flows into the Sutherland-Oernig Drain, which flows to Auvase Creek, which flows into Lake St. Clair. The government argued that the wetlands are adjacent to the ditch and Drain, despite the presence of a berm between the wetlands and these waters, and that both the unnamed ditch and the Drain are tributaries within the meaning of 33 C.F.R. 328.3 (a)(5). The government argued for a narrow holding in SWANCC, and that SWANCC applies only to isolated wetlands regulated under 33 C.F.R 328.3(a)(3), not to adjacent wetlands regulated under 33 C.F.R. 328.3(a)(5) and (7).

On March 27, 2003, the District Court granted the Corps' motion for summary judgment and denied plaintiffs' motion for summary judgment, finding the Carabell wetlands to be "waters of the U.S." and upholding the Corps' permit denial. The Court based its decision on a Magistrate's Report and Recommendation filed February 28, 2003. Analyzing SWANCC and the post-SWANCC case law, the Magistrate concluded that the Court's ruling in SWANCC was narrow and preserved CWA jurisdiction over wetlands adjacent to non-navigable tributaries of navigable waters. The Magistrate found that the Carabell wetland is subject to CWA jurisdiction because it is "adjacent to neighboring tributaries of navigable waters and has a significant nexus to "waters of the U.S...." The plaintiffs filed a notice of appeal May 6, 2003. Appellants and Amicus Curiae Pacific Legal Foundation filed their initial briefs in July 2003. The government's initial brief is due September 17, 2003. Final briefs are due October 29, 2003.

United States v. Hummel, 2003 U.S. Dist. LEXIS 5656 (N.D. Ill. April 7, 2003).

The United States sued developer defendants for unpermitted wetland discharges in conjunction with building the Indian Creek Club residential development in Lake County Illinois. Defendants claimed, among other defenses, that the wetlands at issue are not "waters of the U.S." Both parties moved for summary judgment. In a decision issued April 7, 2003, the Northern District of Illinois granted the United States' motion for summary judgment on all jurisdictional issues, including the issue of wetland CWA jurisdiction, and denied defendants' motion for summary judgment in its entirety.

According to the Court, there is no factual dispute over the wetlands' hydrological connection to downstream traditionally navigable waters; the wetlands at issue are adjacent to a non-navigable tributary of a navigable water. The wetland complex is hydrologically connected by a small stream to Sylvan Lake upstream, and to Indian Creek downstream. Water flows downstream from the wetlands to Indian Creek, from Indian Creek through part of the wetland complex and into the Des Plaines River, a traditionally navigable water. The Des Plaines River flows into the Illinois River and then into the Mississippi River.

The Court rejected defendants' argument that CWA jurisdiction is, after SWANCC, limited to only traditionally navigable waters and waters "directly adjacent" to such waters, and agreed with the government that CWA jurisdiction continues to extend to waters adjacent to non-navigable tributaries of navigable-in-fact waters. The Court reasoned that it is bound not by the Fifth Circuit decision in Rice v. Harken, but by the Seventh Circuit precedent in United States v. Krilich. Discussing SWANCC and subsequent case law, the Court concluded that SWANCC requires demonstration of a "significant nexus" between the body of water at issue and a navigable water, and that a "significant nexus" can be demonstrated where a body of water is "linked through other connections two or three times removed from the navigable water." The Court found a significant nexus between the wetlands at issue and the navigable Des Plaines River, despite their being "two steps removed from an actually navigable water...."

North Carolina Shellfish Growers Association and North Carolina Coastal Federation v. Holly Ridge Associates, 278 F.Supp.2d 654 (E.D.N.C. July 25, 2003).

In a decision on motions for summary judgment, the United States District Court for the Eastern District of North Carolina Southern Division ruled that wetlands adjacent to traditionally navigable waters, wetlands adjacent to nonnavigable waters, intermittent streams, manmade ditches connected to navigable waters and impoundments of covered waters are all jurisdictional under the Clean Water Act after SWANCC. In this case, the Court adopted a narrow interpretation of SWANCC, ruling that:

SWANCC involved isolated wetlands lacking any hydrological connection to traditional navigable waters. Rather than broadly restricting the Corps' authority to regulate nonnavigable waters under the CWA, *SWANCC* clarified that the critical factor for the exercise of

jurisdiction under the CWA is a “significant nexus” between the body of water at issue and a traditional navigable water. *SWANCC* reaffirmed the Supreme Court’s position in *Riverside Bayview* that “Congress’ concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands inseparably bound up with the waters of the United States.” *Wetlands need not be directly adjacent to an open body of navigable water to be “inseparably bound up with” navigable waters.* Instead, where bodies of water are hydrologically connected, discharges into wetlands adjacent to a nonnavigable tributary of navigable water can move downstream, degrading the quality of the navigable water.

278 F.Supp.2d. at 674 (citations omitted) (emphasis supplied).

The Court used similarly strong language in holding that tributaries to navigable waters, even intermittently flowing streams, are jurisdictional under the Clean Water Act. Moreover, the court held that lack of channelized flow does not necessarily mean that a tributary is not jurisdictional, so long as such flow is connected to navigable waters. Discussing a stream that may only reach a navigable water during rain events, the Court said that:

An absence of a channelized flow between the two bodies of water does not necessarily prevent Cypress Branch from being considered a tributary of Batts Mill Creek. ... Numerous courts have ... recognized that intermittent streams and tributaries are capable of carrying pollutants downstream during rain events and are therefore subject to regulation under the CWA. ... This position is consistent with the Supreme Court’s holding in *SWANCC*, which stressed that the CWA was enacted under Congress’ “traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.” Where a hydrological connection exists between a body of water and a traditional navigable water such that pollutants discharged into the body can move downstream and degrade the quality of the navigable water, the “significant nexus” required for CWA jurisdiction under *SWANCC* is clearly present.

Id. at 671 (citations omitted). Addressing the question of whether channelized flow is required for a tributary to be jurisdictional, the Court relied on the recent Fourth Circuit decision in *United States v. Deaton*, *supra*, in concluding that it is not:

As the Fourth Circuit recently explained in *United States v. Deaton*, “[t]he power over navigable waters also carries with it the authority to regulate nonnavigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters.” This is true whether the hydrological connection occurs in a channelized flow or a network of flat bottoms and braids, continuously or intermittently.

Id. at 671-672 (citations omitted).

The Court also relied on the *Deaton* decision and other established case law to conclude that manmade ditches flowing into a nonnavigable tributary of a navigable water are also jurisdictional under the Clean Water Act. The Court additionally held that an impoundment of covered waters that drain into navigable waters are jurisdictional under the Clean Water Act. The Court further ruled that it in determining jurisdiction, it is irrelevant whether or not pollutants actually reach the navigable waters. The Court found that, “Although evidence of a discharge is critical to a finding of liability, it is not relevant to the Court’s determination of jurisdiction.” *Id.* at 675.

United States v. Jones, 267 F.Supp.2d 1349 (M.D. Ga. June 4, 2003).

In a ruling on motions for summary judgment, the United States District Court for the Middle District of Georgia found that, under the Oil Pollution Act, a storm drain flowing into a larger ditch that emptied into a wetland adjacent to a navigable river was waters of the United States under the OPA. In reaching this conclusion, the Court looked to the CWA and *SWANCC*. The Court agreed with the ruling in *Headwaters, Inc. v. Talent, supra*, and found *SWANCC*’s effect on the CWA to be limited, stating:

In *SWANCC*, the Court was concerned with the Corps of Engineers’ determination that an abandoned sand and gravel pit was a navigable water because “the water areas are used as habitat by migratory bird [sic] which cross state lines.” This “migratory bird rule” was the only focus of the decision in case. Any other interpretive language in the case was merely *dicta*.

267 F.Supp.2d at 1360 (citations omitted). The Court went on to conclude that, “the *SWANCC* decision did not dramatically alter CWA case law.” *Id.*

Baccarat Fremont Developers v. U.S. Army Corps of Engineers, No C 02-3317 CW (N.D.Ca. August 11, 2003).

In a ruling on motions for summary judgment, the Northern District of California ruled that, after *SWANCC*, the Corps’ current regulatory definition of adjacency, which defines as “adjacent” wetlands which are separated from other waters of the United States

by man-made structures, such as dikes and berms, is still applicable and that wetlands may be jurisdictional as adjacent even absent a surface hydrological or ecological connection.

This case involved just less than 8 acres of seasonal wetlands located about 250 feet from Alameda County Flood Control District (ACFCD) channels that connect to San Francisco Bay. These wetlands are separated from the flood control channel by a berm. While the berm prevents flow of water from the wetlands to the channel, evidence clearly indicated that absent the berm, the wetlands would flow into the channel.

Baccarat argued that the absence of a surface hydrological connection between the wetlands and the channel made the wetlands “isolated.” The District Court disagreed, stating that:

According to ... notes contained in [the] administrative record, [the] wetlands ... would directly connect to the channels but for the berms. The ... notes further state that storm water from [the] wetlands ... would also flow down hill across the site and into the channels, if not for the berms. The Court concludes that the contested wetlands are separated from the channels by the berms, which are man-made barriers, and the contested wetlands are therefore “adjacent wetlands” ... over which the Corps has regulatory jurisdiction.

Slip Op. at 9. The Court went on to hold that:

The Corps’ regulatory jurisdiction over adjacent wetlands under the Clean Water Act does not depend on the existence of an actual hydrological or ecological connection between the wetland and navigable waters.

Id. at 10.

Northern California River Watch v. City of Healdsburg, No. C 01-0486 WHA (N.D. Ca. January 23, 2004).

In a decision by the Federal District Court of Northern California, the Court ruled that an abandoned sand and gravel pit that lacked a surface water connection to the nearby navigable Russian River, but was adjacent to the river, was a “water of the United States” requiring Clean Water Act protection. The case involved a municipality, the City of Healdsburg, which was discharging treated sewage into the pond without a Clean Water Act Section 402 NPDES permit. The sewage, while receiving some treatment in the pond, was eventually entering the Russian River due to substantial subsurface connectivity between the pond and the river. While a berm separates the pond from the river, historic flooding occasionally saturated the pond area.

The Court ruled that the holding in SWANCC was narrow. Citing Headwaters v. Talent, the Court found that, “[T]he Ninth Circuit seems to have read *SWANCC* as only invalidating the migratory-bird rule as applied to isolated waters. At all events, as this Court reads it, *SWANCC* did not impose a rule of ‘hydrological connection,’ much less a rule of ‘*surface* hydrological connection.” Slip Op. at 13 (citations omitted) (emphasis in original). The Court went on to rule that all adjacent wetlands are covered under the Clean Water Act, regardless of hydrological connectivity:

Once adjacency is established, the tributary issue is superfluous. Once wetlands are found to be adjacent to a river actually navigable, there is no need to investigate whether the wetlands are interconnected by surface or groundwaters. The regulation, approved in *Riverside Bayview*, recognizes this in stating that wetlands separated by berms or levees are covered. Plainly, a berm or levee is inconsistent with any surface connection.

Id. at 14.

The Court in this case also held that underground flows are “tributaries,” ruling that such a connection is also grounds for CWA jurisdiction. The Court stated that:

[T]his order also holds that Basalt Pond and the subterranean groundwater that flows through it are “tributaries” of the Russian River. . . . This Court finds persuasive the line of authority represented by *Idaho Rural Council v. Bosna*, holding that the Act extends federal jurisdiction over groundwaters hydrologically connected to surface waters that are themselves navigable waters.

Id. at 17-18 (citations omitted).

The Court additionally held that some abandoned sand and gravel pits are covered by the Clean Water Act and the factors that should be examined in determining jurisdiction are “proximity to the river, the beneficial role of the wetlands, the intertwined ecology and riparian habitat.” Id. at 20. Finally, the Court decided that an agency action declining to assert jurisdiction is not entitled to deference if the decision is unpersuasive on the merits due to a lack of thorough investigation regarding the site or a reasonable, objective analysis of the site.

The case has been appealed to the Ninth Circuit Court of Appeals.

U.S. COURT OF FEDERAL CLAIMS**Robert Brace v. United States, 51 Fed. Cl. 649 (2002).**

The U.S. Court of Federal Claims denied the United States' second motion for summary judgment in this takings case, ruling that there was a factual dispute as to whether, post-SWANCC, a sufficient jurisdictional nexus existed between the wetlands at issue and an interstate water.

Citing Headwaters and other cases narrowly construing SWANCC, the Court observed:

Should the facts indicate that the 30 acres [of wetland] are not connected to an interstate water in any manner, then the Supreme Court's ruling in SWANCC renders the issue of whether a taking occurred moot, as the Army Corps of Engineers no longer has authority to regulate isolated ponds and wetlands not connected to interstate commerce. This lack of authority for the Corps would mean that plaintiff is free to utilize the totality of his property for planting crops.

The Court concluded that it could only grant the government's motion for summary judgment if the evidence indicated that the wetlands on plaintiff's property "were connected to an interstate water." In denying the government's motion, the Court ordered the parties to provide "precise information regarding ... the location of the parcel in relationship to any ditch, canal, or channel that could lead to an interstate water." The Court denied a United States' motion to dismiss on December 18, 2002. Discovery is extending into late 2003.

STATE CASES**Indiana Department of Environmental Management v. Twin Eagle LLC, No. 49S00-0204-CV-237 (Ind. Sup. Ct. September 23, 2003).**

The Indiana Supreme Court decided an important state wetland case in favor of the Indiana Department of Environmental Management (IDEM), reversing the lower court and upholding the agency's authority to regulate Indiana's isolated wetlands and waters.

In the aftermath of the SWANCC, *supra*, Supreme Court decision, IDEM had informed the public that isolated wetlands remained "waters of the state," regardless of whether they were "waters of the United States," and discharges to waters no longer regulated under a Corps § 404 permit would no longer be exempt from the state's National Pollution Discharge Elimination System (NPDES) permit requirement. IDEM had planned on using its NPDES permitting authority to regulate isolated waters as an interim measure until the state could adopt more streamlined rules specific to isolated waters.

The Supreme Court upheld IDEM's authority to require an NPDES permit for discharges in "waters of the state," including isolated wetlands and ponds, regardless of whether those waters remained "waters of the United States" under the federal Clean Water Act (CWA). The Supreme Court concluded that, "[t]he contraction of federal authority did nothing to limit state power." IDEM v. Twin Eagle, slip op. at 9. Interpreting state law defining state "waters," the Court further concluded that "at least some wetlands," including some so-called isolated wetlands, are "accumulations of water" and therefore "waters of the state" subject to IDEM's NPDES permit requirement. Id. at 10. Similarly, the Court found that certain "private ponds" were "waters of the state" subject to state regulation. Id. at 9-10.

The Supreme Court also upheld IDEM's "interim process" of requiring an NPDES permit for discharges of dredged or fill material into isolated waters no longer requiring a federal CWA §404 permit. The Court held that this NPDES permit requirement was not a new rule requiring notice and comment rulemaking. Instead, it was "simply the application of a preexisting process to transactions that were previously thought to be exempt, but are no longer exempt because they no longer meet the federal requirements for the exemption." Id. at 12.

In a pointed concurrence that might give attorneys some pause, two justices noted that Twin Eagle would likely have been far better off exhausting its administrative remedies with IDEM, rather than going straight to court before IDEM had even determined whether the waters on Twin Eagle's property were subject to regulation. Id. at 14.

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SPECIALTY CROPS AND
FOREIGN AGRICULTURE PROGRAMS

**Testimony by the Honorable Devin G. Nunes
before the
Subcommittee on Water Resources and
Environment
Committee on Transportation and Infrastructure**

Inconsistent Regulation of Wetlands and Other Waters
March 30, 2004

Chairman Duncan and Ranking Member Costello;

In recent years, several entities in my District of California have had the necessity of seeking jurisdictional determinations regarding the applicability of Section 404 to waterways. The decisions that have resulted from these requests for jurisdictional determinations have indicated a lack of clear direction from the leadership of the U.S. Army Corps of Engineers and the Environmental Protection Agency. In fact, there have been occasions in which determinations have not been made at all until very late in the process.

The experience of entities within my District is consistent with the findings of the General Accounting Office in its recent report, dated February, 2004. In that report, the GAO concluded that there are significant differences in the way the definition of jurisdictional waters is being applied among the various regions throughout the country. It also found that few, if any, of the regions make their internal guidelines regarding jurisdictional determinations public. The GAO ended by recommending the Corps and EPA conduct further surveys of its regions and provide greater guidance.

My concern is that this recommendation by the GAO addresses a symptom, and ignores the true cause. Clearly, the reason there is confusion and inconsistency among the regions trying to apply the Clean Water Act lies in the fact that the regulations defining jurisdictional waters have not been revised to account for recent court cases.

The regulations that have been promulgated (33 CFR part 328.3) have been struck down, at least in part, by a long line of court cases, including primarily the Supreme Court decision in *SWANCC v. U.S. Army Corps of Engineers*. The substance of these court decisions is that the regulations are overly broad, and have resulted in the exercise of jurisdiction over waters that Congress clearly did not intend to reach, namely isolated, intrastate waters that are not tributary to any navigable waters.

Despite the long line of cases that have expressly invalidated these overly broad regulations, the regulations remain in effect, unchanged by the agencies. In the absence of valid regulations, the regions have no clear direction as to how to address the intricacies of making consistent jurisdictional determinations.

The obvious way of rectifying the uncertainty, confusion and inconsistency identified by the GAO is to promulgate new rules that take the direction of the various courts into account. In fact, the Corps and EPA started to do this very thing one year ago. An Advance Notice of Proposed Rule Making was published and comments were received and reviewed. For some inexplicable reason, however, the agencies then decided to not go forward with the rule making.

An example of this lack of clear direction caused by the use of outdated and invalidated regulations is a recent jurisdictional determination regarding an isolated, intrastate waterway in my District. In asserting jurisdiction, the Corps relied in part on a determination that a portion of the waterway was "navigable in fact," a term that has been used in various court decisions. The Corps was unable to point to a current definition of "navigable in fact." Instead, the Corps appears to have used a very broad and all encompassing definition of that term. This broad and undocumented decision resulted in the Corps concluding that because a canoe had been placed in

a seasonal waterway used primarily for conveying irrigation water during the summer months, the waterway could be considered "navigable in fact." I submit this ad hoc definition of "navigable in fact" is not legally supportable, and in fact that jurisdictional determination has been overturned pursuant to an administrative appeal. The Corps district office is currently reconsidering its initial determination.

The problems identified in the GAO report are real. I encourage the Committee to consider that new rulemaking is the answer to rectifying this situation.

**COMMENTS TO COMMITTEE
CONGRESSMAN ED SCHROCK (VA-02)
MARCH 30, 2004 HEARING**

Thank you, Mr. Chairman, for allowing me to insert these comments into the record of your hearing. I appreciate the opportunity to contribute to the dialogue on this important issue.

In 1985, the Corps of Engineers told the United States Supreme Court that the shoreward extent of its jurisdiction, beyond navigable waters, was “relatively easy” to identify by visual inspection. (*United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) (Br. for the United States)). The Supreme Court accepted the Corps’ representation and proceeded to hold that the Corps could assert jurisdiction shoreward from navigable waters to include adjacent wetlands.

Recently, the GAO found that the Corps’ jurisdictional regulations were anything but easy to follow, and that they were in fact, “intentionally vague”, and produced inconsistent jurisdiction determinations, even within the same Corps’ District. It is clear that the Corps has abandoned its promise of “relatively easy” jurisdictional determinations in favor of intentionally vague and inconsistent practices, which allow the Corps unfettered jurisdiction based on the personal whims of individual regulators.

Even Corps Headquarters’ guidance is routinely ignored by district regulators. In January 2003, the Corps published guidance for regulators to follow in determining jurisdiction. This guidance stated that the Corps would no longer assert jurisdiction over Pocosins. EPA & Corps, *Guidance for Asserting Federal Jurisdiction Over Isolated Wetlands in Response to U.S. Supreme Court Decision in SWANCC Case*, 68 Fed. Reg.

1991, 1995 (Jan. 15, 2003) (a Pocosin is an Indian word meaning “swamp on a hill” and is defined as “A wet area on nearly level interstream divides in the Atlantic coastal plain”). Despite this published guidance from Corps Headquarters, in Virginia the Corps continues to assert jurisdiction over Pocosins.

Inconsistent agency actions are depriving landowners of their basic property rights. The Corps is using its federal jurisdiction over navigable waters to control private property that is nowhere near a shoreline. For example:

A man in Hampton, Virginia owns property approximately 2 miles from, and 17 feet higher than, the Back River, a navigable waterway. Five years ago, Corps’ personnel threatened an enforcement action against him for sidecasting materials while maintaining drainage ditches on his property. The Corps asserted that the property contained jurisdictional wetlands. However, a different Corps’ regulator later determined that the neighboring 20 acre parcel, containing the same type of soil and vegetation, and located at a lower elevation downstream, between the man’s property and the Back River, was not jurisdictional wetlands. The Corps’ claim of “shoreward” jurisdiction apparently jumped over the intervening 20 acres.

In Suffolk, Virginia, a farmer is being threatened with an enforcement action by the Corps after digging a farm pond in his 10 acre pasture. The farm is located 23 miles away from, and 50 feet higher than, the Chowan River, a navigable waterway. The Corps regulator acknowledges that Corps’ regulations “exempt” farm ponds from the Clean Water Act, but says that the exemption only applies where the farm pond is created by blocking a stream. According to this Corps’ regulator, creation of farms ponds by digging a hole is not exempt from the Clean water Act.

By contrast, in Powhatan County, Virginia, a different Corps' regulator takes the exact opposite position and asserts that the farm pond exemption *only* applies to excavated ponds and *not* to impoundments of streams. Accordingly, the Corps has threatened an enforcement action against the Powhatan farmers for building a dam, for the purpose of creating a farm pond, on an intermittent stream on his property. The farm is located more than 6 miles from, and 100 feet above, the James River, a navigable waterway.

The ever increasing expansion of Corp's jurisdiction is the result of intentionally ambiguous regulations combined with bizarre regulatory interpretations. For example, the Corps has taken the term "Ordinary High Water Mark" and stripped it of its historical significance. Historically, the Ordinary High Water Mark of a body of water served to establish the point where a landowner's property rights become subordinate to the government's. However, as a matter of practice, Corps regulators frequently point to a dark streak in a roadside ditch, or a rust stain on the side of a dry concrete culvert, as an Ordinary High Water Mark, so that the roadside ditch, or the concrete culvert, becomes a Water of the United States. By arbitrarily redefining the term Ordinary High Water Mark, the Corps is drastically altering long established private property rights. A water body's Ordinary High Water Mark has been used to determine property rights for centuries and should not be arbitrarily manipulated by the Corps'.

The Corps' ad hoc manipulation of the term Ordinary High Water Mark is fairly recent, and contradicts its published regulations. These regulations state that "Federal regulatory jurisdiction, and powers of improvement for navigation, extend laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and

waters below the ordinary high water mark.” 33 C.F.R. § 329.11(a); *see also United States v. Kansas City Life Insurance Co.*, 339 U.S. 799, 805 (1950) (lands below level of Ordinary High Water Mark are subject to navigable servitude of the United States.) The Corps’ Regulations further state, “The ordinary high water mark on non tidal rivers is the line on the *shore* established by the fluctuations of waters.” 33 C.F.R. § 329.11(a)(1).

The need for the presence of a “shoreline”, on which to find an Ordinary High Water Mark, and thus Clean Water Act jurisdiction, is underscored in 33 C.F.R. § 328.5, “Changes in limits of waters of the United States”, which states, “permanent changes of the *shoreline* configuration result in similar alterations of the boundaries of waters of the United States ... for example, changing sea levels.” 33 C.F.R. § 328.5.

The term “shore” is not defined in Corps’ Regulations, but Black’s Law Dictionary defines “shore” as “land lying between the lines of high- and low-water mark; lands bordering on the shores of *navigable* waters below the line of ordinary high water.” Black’s Law Dictionary, 1384 (7th ed. 1999).

The Corps’ new, arbitrary, *ad hoc*, interpretation of Ordinary High Water Mark, if allowed to continue, will have considerable collateral effects. For centuries, Courts have used an Ordinary High Water Mark to determine title to land. *See, e.g., Shively v. Bowlby*, 152 U.S. 1, 9 (1894) (no title passes in lands below high water mark); *Barney v. Keokuk*, 94 U.S. 324, 336 (1876) (“It appears well settled law of [Iowa] that the title of the riparian proprietors on the banks of the Mississippi extends only to ordinary high water mark.”) Because, title to land is a matter decided by state law allowing Corps employees to subjectively, *ad hoc*, designate water stains on a concrete pipe as an Ordinary High water Mark has the effect of potentially altering a landowner’s title.

There is no indication that Congress intended the Corps to have such far reaching authority.

The Corps' claim of jurisdiction is currently limitless. I hope the Transportation and Infrastructure Committee and this Subcommittee will clarify these rules so that fundamental property rights cannot be summarily deprived by a Corps regulator, making inconsistent, ad hoc claims of jurisdiction, based on intentionally vague administrative regulations.

Thank you.

**REPRESENTATIVE JOHN F. TIERNEY
RANKING MINORITY MEMBER
GOVERNMENT REFORM SUBCOMMITTEE ON
ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS**

**TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT
HEARING ON FEDERAL JURISDICTION OVER WETLANDS AND OTHER
WATERS
MARCH 30, 2004**

Thank you to the Transportation and Infrastructure Subcommittee on Water Resources and Environment for holding this important hearing and for allowing me to submit this statement for the record.

The report issued recently by GAO provides further evidence that the Bush Administration has failed to live up to its promises to protect the nation's wetlands. GAO found in its new report that Army Corps of Engineers' district staff differ in how they determine whether waters are protected by federal jurisdiction.¹ GAO's findings underscore the need for the Administration to reverse the policies it is currently promoting that limit federal jurisdiction, and thereby limit the protection of millions of acres of wetlands. EPA and the Corps, in implementing the Clean Water Act, should live up to the intent of Congress in passing the Act, to protect our nation's waters. Providing more certainty in what waters fall under federal jurisdiction should not equal less federal protection.

Wetlands provide vital habitat for thousands of plant and animal species. In my district specifically, wetlands help support the commercial fishing industry. Wetlands also purify our water and mitigate the effects of floods and droughts. However, we are losing wetlands at an alarming rate of at least 60,000 acres per year. It is the responsibility of the federal government to do all it can to protect wetlands and other waters from disappearing.

The Government Reform Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs held a hearing in September 2002, on federal jurisdiction over wetlands after the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC). I expressed my concern then that federal jurisdiction over wetlands and other waters should not be interpreted by the Administration as being any more limited than is required by the holding in SWANCC. I reiterate that concern now.

In January 2003, EPA and the Corps issued two related documents on the scope of the federal government's jurisdiction over wetlands. EPA and the Corps issued an

¹ U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction* (February 2004) (GAO-04-297).

advanced notice of proposed rulemaking (ANPRM) and a guidance document.² The proposed rulemaking solicited comments on whether the regulations should define the term “isolated waters” and whether any other revisions to the regulations are needed.

EPA received approximately 133,000 comments on the ANPRM, almost all of them opposing new regulation. I submitted a comment letter to EPA urging an unambiguous interpretation of the Clean Water Act. I registered my concern to EPA that too many waters would be restricted from the Clean Water Act’s jurisdiction under the proposed new rulemaking. In December 2003, the Administration announced it would not issue a new rule.

However, EPA and the Corps have not rescinded the guidance issued in connection with the ANPRM last year. EPA and the Corps should rescind this guidance which could have the practical effect of stripping EPA of its authority to protect millions of acres of wetlands and thousands of miles of streams. Specifically, the guidance addresses streams and wetlands that could be considered isolated, intrastate, non-navigable waters, which comprise roughly 20% of the wetlands in the lower 48 states. This equals approximately 20 million acres of wetlands.

The guidance interprets SWANCC very broadly to invalidate the government’s jurisdiction over these types of wetlands in most circumstances. In situations where Corps district staff believe there is a basis for jurisdiction, the guidance requires them to seek formal approval from Headquarters before asserting it. The districts are only required approval to assert regulation, not to decline it.

It was particularly disturbing to read in the Corps’ response letter to GAO that the Corps appears to be using an overly-restrictive definition of what waters fall within the jurisdiction of the Clean Water Act. The definition used in the Corps’ letter appears to be virtually identical to the definition included in the proposed rulemaking that the Administration announced last December that it was abandoning. I am deeply concerned that the Corps is actually using this definition, which is much more restrictive than current law, and not fulfilling the Administration’s promise last December, “to preserve the federal government’s authority to protect our wetlands.”³

We need a clear definition of what waters are within federal jurisdiction that allows for the maximum protection of wetlands, streams, and tributaries. EPA and the Corps should work with Congress to craft legislation rather than unilaterally issuing regulations that limit jurisdiction. I am a co-sponsor of Mr. Oberstar’s bill, H.R. 962, that would provide a clear *and* protective definition of jurisdictional waters.

² Department of Defense and U.S. EPA, *Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States.”* 68 Fed. Reg. 1991 (Jan. 15, 2003).

³ Environmental Protection Agency, *Press Release: EPA and Army Corps Issue Wetlands Decision* (December 16, 2003) (online at www.epa.gov).

Wetlands, streams, tributaries, and other waters are an essential part of our environment. We must do all we can to preserve these precious resources. I hope that EPA and the Corps will move forward in a manner that protects, rather than abandons, the integrity of our nation's waters.