

**COMPLETE STATEMENT OF
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**BEFORE THE
COMMITTEE ON GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES**

**FEDERAL WETLANDS POLICY: PROTECTING THE ENVIRONMENT OR BREACHING
CONSTITUTIONAL RIGHTS**

INTRODUCTION

Mr. Chairman and members of the Committee, thank you for the opportunity to provide information on the Department of the Army Regulatory Program. I am Michael Davis, Deputy Assistant Secretary of the Army for Civil Works. As the Deputy Assistant Secretary responsible for Army Civil Works policy and legislation, I am directly involved in the regulatory initiatives of the Army Corps of Engineers, which has full responsibility for the administration of Sections 9 and 10 of the Rivers and Harbors Act of 1899 and primary responsibility, along with the U.S. Environmental Protection Agency (EPA), for implementing Section 404 of the Clean Water Act (CWA).

In this statement I will provide an overview of the Section 404 regulatory program, including enforcement responsibilities and recent changes to improve the program. Throughout the testimony I will address how the Army manages the regulatory program to protect the rights of all property owners.

To say that the protection of wetlands through regulation has engendered considerable controversy in the past 28 years may be one of the few points of common ground between those who believe that the Section 404 program is no more than a Federal rubber stamp allowing the destruction of wetlands and those who suggest that the program tramples on the rights of private property owners. We believe however, that this dichotomy between property rights and environmental protection does not reflect the way the program really works --- and reflects opinions based on anecdotes instead of the facts. In fact, through this Administration's initiatives, the Section 404 program has been successful in reconciling the interests of all property owners, allowing reasonable development to proceed, while protecting our Nation's aquatic resources.

When evaluating how a program affects the public, it is important to understand why the program was established, how it developed, and how it has operated over the years. With this background information we can assess objectively and fairly program performance and whether landowners are affected in beneficial or adverse ways. Recent statistics and information on key Administration wetlands initiatives show that the regulatory program is, on the whole, fair, flexible, and effective, and that property rights are protected.

SECTION 404 OF THE CLEAN WATER ACT

HISTORICAL CONTEXT

Section 404 of the CWA provides that discharges of dredged or fill material into waters of the United States, including wetlands, require a permit from the Corps. The Army has been administering the Section 404 program since 1972. The Corps has a long history of protecting the Nation's water resources, and promoting their responsible use through the regulatory program established under Section 10 of the Rivers and Harbors Act of 1899. Protecting the rights of applicants, adjacent property owners and other waterway users is a keystone principle in the regulatory decision-making process. Allowing public involvement in the Corps decision-making process is one way that principle has been put into practice. Since 1912, the Corps' administration of the Section 10 regulatory program has included public notices to adjacent property owners and surrounding communities as a way to collect information upon which to formulate permit decisions. This practice was just the beginning of the many changes that have been made to improve the Corps permit evaluation process for all property owners.

In 1968, the Corps added a public interest review to its evaluation process. This review requires an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. It also predicates any decision to authorize a proposal on the outcome of a general balancing process reflecting the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered including conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people. In short, the benefits that are expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. At the conclusion of this evaluation a permit may be granted unless the district engineer determines that it would be contrary to the public interest, or in non-compliance with the environmental criteria contained in the CWA section 404(b)(1) Guidelines.

With the passage of the National Environmental Policy Act in 1969, and the CWA in 1972, the regulatory process was again enhanced by requiring the full consideration of all short-term and long-term environmental consequences of proposed discharges. The practices from the Section 10 program formed the basis for the program to implement the new responsibilities established by Section 404 of the CWA. The Army recognizes that water resource management, in the CWA regulatory context, involves more than just issuing or denying permits based on an evaluation of the materials to be discharged into the water. The Section 404 regulatory program also is responsive to the broad range of public interest factors including property ownership,

along with the requirements found in other environmental protection laws. Even though the Corps operates its regulatory program in a manner that is highly respectful of the rights of private property owners, upon rare occasion an incident may occur where landowners have been treated unfairly or in an untimely manner. The Corps regrets those rare deviations from the normal operation of the program, and corrects them whenever they are discovered.

One of the successful aspects of the Section 404 program is the ability of the Corps to reconcile the objectives of an individual landowner with the interests of other landowners that could be adversely affected by the destruction of aquatic areas, and by other development-related impacts. In over 99 percent of cases, permit applicants are allowed to accomplish their objectives in a manner that protects the interests of other landowners and the public. It is standard procedure for the Corps to consider fully how proposed activities could affect the environment, and other people and their properties. For example, the loss of important wetlands may harm the quality of water in the Chesapeake Bay, which in turn could reduce blue crab and oyster populations, resulting in economic harm to the region. In addition, we have observed first hand numerous examples around this Nation where the Section 404 program has protected the rights of property owners. For example, in Georgia, through the Section 404 program, a developer was required to avoid, minimize, and compensate for the illegal, unauthorized filling of wetlands that resulted in the flooding of adjacent property owners. The homeowners in the affected subdivision expected, and in fact demanded, that the Corps and EPA enforce the Section 404 program in this case.

Experience with challenges in the Federal Claims court demonstrates that only in very rare and exceptional cases has a Corps regulatory permit decision been determined to have deprived property owners of the use of their land, so as to constitute a constitutional "regulatory taking." Furthermore, in practically every other case, the Corps regulatory decision has been determined to allow property owners to carry out proposed projects and to make economically viable use of their land. For any case where a landowner feels aggrieved, the Tucker Act and the U.S. Constitution guarantee the right to bring suit in the Federal courts to seek compensation under the Fifth Amendment, or other legal relief. If the property owner's claim of a "regulatory taking" is meritorious, the owner will not only receive just compensation, with interest, but also reimbursement for reasonable attorneys' fees and costs under 42 U.S.C. 4654(c). Clearly, the Tucker Act, the U.S. Constitution, 42 U.S.C. 4654(c), and the Federal courts protect property owners. The fact that over the years very few court decisions have held that the Corps regulatory permit decisions resulted in a constitutional taking reflects the fact that the Army has balanced successfully legitimate development goals of the regulated public and important environmental protection mandates of the CWA.

While a case can be made that generally the program is fair and working well from a landowner's perspective, some continue to criticize the Corps for issuing too many permits. While the Corps recognizes the need to continue to improve

environmental protection, it disagrees with this claim. Through the regulatory evaluation and conditioning process, including the general permit process, the Corps has been very successful in reducing impacts to the Nation's waters, including wetlands, as well as reducing adverse effects on other landowners. Most applicants are willing to "avoid, minimize, and/or compensate" for the adverse effects that their projects could cause on waters of the U.S., including wetlands. Additionally, most applicants are willing to work with the Corps to avoid causing impacts to other landowners. Through effective application of the environmental criteria and the public interest review, the Corps believes that it has been successful in striking the correct balance between protection of the overall public interest and reasonable development of private property.

SECTION 404 PROGRAM STATISTICS

The statistics accompanying this statement regarding the performance of the Section 404 program support our belief that the Army has been successful in balancing environmental protection and development goals. During Fiscal Year (FY) 1999, over 74,000 landowners asked the Corps for a Section 404 permit to discharge dredged or fill material into the waters of the United States, including wetlands. This was the largest number of Section 404 permitting decisions made during one year since the program's enactment in 1972. Of those decisions, 90 percent received an authorization through a general permit in an average time of 18 days. Only 5 percent of applications were evaluated using the more detailed standard individual permit evaluation process. The average processing time for these applications was 118 days. Less than one percent of the 74,000 applications were denied. It may be that in a few cases the Corps subjected landowners to an unnecessarily lengthy evaluation process. However, those cases are very rare, compared to the number that proceed in a timely manner with minimal regulatory. Finally, it is estimated that there are tens of thousands of additional landowners who could proceed with their projects under the authority of general permits that do not require them to notify the Corps.

In FY 1999, the Section 404 general permit program authorized over 66,000 activities, most with little or no delay or expense to the regulated public. Even for the larger-scale proposals that must be authorized by individual permits, the Corps granted over 4,100 individual permits, and denied only 165 applications. The majority of those denials are made "without prejudice." "Without prejudice" means that if applicants can make necessary modifications to their projects, or obtain required permits from the State, the Corps could make favorable decisions and authorize the proposed activities. Denials "without prejudice" typically occur when the State denies a water quality certification or coastal zone management certification. Thus, in the vast majority of cases, the Corps regulatory decision authorizes owners of private property to use their land profitably, subject to reasonable conditions to protect the rights and property values of others, and the overall public interest. Only rarely is a project so detrimental to the environment that the Corps denies the project "with prejudice".

SECTION 404 ENFORCEMENT PROGRAM

The philosophy underlying the Corps enforcement of its regulatory responsibilities is to resolve enforcement actions by gaining compliance in the least confrontational and burdensome manner. The decision to proceed with enforcement measures is based on three factors, the legal requirements, the nature of the violation, and the extent to which the violator was aware of CWA requirements. The basic Corps enforcement practice is to gain compliance, with the least amount of conflict, seeking civil or criminal action when a violation is willful, flagrant, or of substantial impact.

As noted in the statistics provided with this statement less than 2 percent of all enforcement actions result in any kind of civil or criminal penalty. However, much has been said and written about a few highly publicized wetland enforcement cases. These are cases that mostly involved individuals who intentionally challenged the validity of the Federal Government's right to regulate activities in wetlands, or to regulate activities on private property in general. In these cases the Corps, EPA, and Department of Justice have acted in ways that they believe are appropriate.

The Army shares CWA Section 404 enforcement responsibilities with the EPA. The EPA has authority to issue Administrative Civil Penalties for violations of Section 404 and exercises its authority to pursue violations of the CWA. The Army also has available Administrative Civil Penalties, for use when there are violations of Corps Section 404 permit conditions. The Army Corps of Engineers' enforcement regulations were originally for the enforcement of Section 10 of the Rivers and Harbors Act of 1899. The enforcement practice that grew out of the Section 10 program was adopted for the Section 404 program and is very flexible. Army enforcement policies are focused on ways to bring the violation into compliance without reliance on the judicial system. The Department of Justice acts as the Government's attorney in court actions involving Corps regulatory program cases.

The Corps' enforcement regulations provide the necessary flexibility to accept restoration, or accept other measures that resolve the violation to the satisfaction of the Corps District Engineer, or to accept applications for after-the-fact permits. The Corps typically does not pursue fines or penalties, unless the case involves a willful, flagrant, or knowing violation. As shown in statistics accompanying this statement, less than 1 percent of all violations known to the Corps result in litigation. Another 1 per cent result in a civil penalty. These usually involve repeat offenders, or those who have been involved in an activity or enterprise where knowledge of the Corps regulatory program is widespread or the need for permits is common. Looking at alleged violations reported to the Corps, 60 percent resulted in a finding that there was no violation or that a permit had been issued. Over 38 per cent of the cases turn out to be violations that are resolved through an administrative action, such as the acceptance of restoration or the acceptance and processing of an after-the-fact permit application. These administrative resolutions result in environmentally responsible projects that allow landowners to use their property in compliance with the law. The Army believes that administrative

resolutions are in the public interest and further environmental goals. Legal action is generally undertaken when there is a genuine concern about the integrity of the government's program, the need for a deterrent, or there are particularly egregious environmental impacts associated with the violation.

PROGRAM IMPROVEMENTS

Shortly after coming into office, the Clinton Administration convened an interagency working group to address concerns with Federal wetlands policy. After hearing from States, tribes, developers, farmers, environmental interests, members of Congress, and scientists, the White House Wetlands Working Group developed a 40-point comprehensive plan to enhance wetlands protection, while making wetlands regulations more fair, flexible, and effective for everyone, including America's small landowners. The plan emphasized improving Federal wetlands policies for all Federal programs. For the Corps regulatory program the challenge has been to improve environmental protection while maintaining program efficiency. The regulatory initiatives in the President's plan, which have been successful in meeting this challenge, include improvements to the nationwide permit program, an interagency mitigation banking policy and an administrative appeals process. All of these new program initiatives provide benefits for landowners seeking to use their properties while promoting protection of environment and other landowner's rights.

A central tenet of the Administration's wetlands plan is to ensure that the Section 404 program is administered in a manner that is fair to all landowners and to the general public. There are some who believe that the Corps treats all wetlands the same or that the Corps regulates all wetlands with the same rigor. While neither of these notions is true, those misunderstandings have led some to believe that we permit the destruction of too many wetlands, and led others to call for less regulation of wetlands. This administration has been unequivocal in stating that all wetlands are not the same and that regulatory responses to a proposed project in wetlands should be commensurate with the relative functions and values of the resource and with the nature of the impacts associated with the particular project. For example, if a project involves a low-value wetland resource and has minor impacts, we should not require as rigorous an evaluation of a permit application. In the alternative, if moderate to high value wetland resources are involved and the project impacts are substantial, we should require a detailed evaluation. This approach has been emphasized through regulatory guidance, and is the way the program currently works.

NATIONWIDE PERMITS (NWP)

No facet of the program reflects this basic fairness approach to resource management better than the contrast between the activities authorized through the nationwide general permit program and those authorized by standard permits. The use of general permits to authorize activities having minimal impacts on the environment was authorized in the 1977 amendments to CWA. General permits, which authorized

90 percent of all Section 404-regulated activities during FY 1999, did so through an abbreviated process, in order to provide streamlined decisions. This is possible because the standards are set in advance, and environmental considerations have been made in advance of the issuance of the general permit. Individual permits take into account the specifics of the resource and the development project. This evaluation process facilitates more informed decision making which takes into account specific project impacts and risks to environmental resources.

Recently, the Corps put into place new and revised nationwide permits to increase environmental protection and reduce flooding from development in the Nation's flood plains. Specifically, after reviewing thousands of public and agency comments, on March 9, 2000, the Corps issued five new Nationwide Permits, modified six of the existing Nationwide Permits, modified nine NWP conditions, and added two new NWP conditions. These new and modified NWPs imposed several new requirements or restrictions which include: a one-half acre upper limit on impacts, a one-tenth acre threshold for the requirement of a Pre-construction Notification to the Corps, a '100 year floodplain' restriction, and a 300 linear foot limit on loss of perennial or intermittent stream beds. Such changes reflect our commitment to making decisions that consider fully property rights and environmental impacts. While these changes will increase the Corps workload, we believe this is justified by the additional protection provided to the environment and the public, especially landowners.

MITIGATION BANKING

Another successful regulatory initiative is the interagency mitigation banking program. Mitigation banking is an innovative, market-based alternative enabling landowners to compensate effectively and efficiently for unavoidable wetland impacts. Mitigation banking provides the regulated public additional flexibility in meeting their mitigation requirements.

Most landowners applying for permits do not wish to become wetland experts or to undertake the long-term management efforts needed to ensure the success of wetlands compensatory mitigation projects. Rather, they are simply seeking authorization to move forward with their development projects. Mitigation banks provide an option for the regulated community when compensatory mitigation at development sites is not practicable or when use of a mitigation bank is environmentally preferable to on-site compensation. In practice, restored or created wetlands are expressed as "credits," which may subsequently be withdrawn to offset wetlands impacts, or "debits," incurred at a development site. This flexibility for complying with mitigation requirements often has advantages over individual on-site mitigation projects.

ADMINISTRATIVE APPEALS

Perhaps one of the most far-reaching initiatives for improving the regulatory programs fairness is the development of an administrative appeal process. Over the

years, some have suggested that the few individuals denied permits had no course of action available short of Federal court, which can be expensive and time consuming. To address this concern, the Corps has established an administrative appeals process. Under this process, there is opportunity to appeal denied permits, permit conditions, and jurisdictional determinations. The process allows for some third party participation. The process provides a "one-step" review by the Corps division commander. Upon receiving a permit denial, a proffered individual permit or an approved jurisdictional determination the applicant or landowner has 60 days to request an appeal. The division commander then has 90 days to evaluate the issues, conduct a site visit and appeal conference, and reach a decision on the merits of the appeal. The division commander will either uphold the district commander's decision or instruct the district commander on correcting policy or procedural errors and to make a new decision. If the applicant is still dissatisfied, he/she may sue the Corps.

The appeals program for permit denials is underway in all division offices. Annually there are about 200 permit denials, 60,000 jurisdiction determinations and 5,000 standard individual permits issued. Not all of these are appealable decisions, and most will not be appealed. We have estimated that about 40 to 50 person years of effort will be utilized per year for the full appeals process. To date there have been 21 requests for appeals. Of these, 5 have been found to have merit, 7 have been found to have no merit and 9 are pending. The program is still relatively new and the numbers are lower than expected. We do expect that there will be an increase in the appeal of permit and jurisdiction decisions.

CONCLUSION

As indicated by the facts presented in this statement, we strongly believe that the administration of the Section 404 program occurs in a manner that respects the rights of the Nation's property owners. The program helps the vast majority of landowners to use their property and realize their development expectations in a manner that protects important aquatic resources. An often overlooked aspect of the "property rights" debate is the impact on other property owners of filling wetlands. We have observed first hand where the Section 404 program has protected the rights of adjacent and downstream property owners from flooding and other problems. In this regard, we must recognize that fairness to landowners extends to all landowners and that individuals do not have a right to harm their neighbors or the environment.

As previously discussed, the philosophy underlying the Corps enforcement of its regulatory responsibilities is to resolve potential enforcement actions by seeking compliance in the least confrontational manner. Effective enforcement is based on consideration of three factors, the legal requirements, the nature of the violation, and the extent to which the violator was aware of CWA requirements. The Corps seeks strong enforcement options when a violation is severe, or the violation is willful, flagrant or knowing.

This Administration, like no other before it, has taken the initiative to address the legitimate concerns of all landowners. Our efforts at regulatory reform have been directed at making wetlands regulations more fair, flexible, and effective for everyone. We believe that we have been successful in meeting these objectives. Mr. Chairman that concludes my statement. I will be happy to answer any questions you or the Committee members may have.