S. HRG. 105–328

WETLANDS: REVIEW OF REGULATORY CHANGES

HEARING

BEFORE THE

SUBCOMMITTEE ON
CLEAN AIR, WETLANDS, PRIVATE PROPERTY AND
NUCLEAR SAFETY

OF THE

COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ONE HUNDRED FIFTH CONGRESS

FIRST SESSION

TO CONDUCT OVERSIGHT OF WETLANDS NATIONWIDE PERMIT PROGRAMS ADMINISTERED BY THE CORPS OF ENGINEERS AND THE ENVIRONMENTAL PROTECTION AGENCY

JUNE 26, 1997

Printed for the use of the Committee on Environment and Public Works

U.S. GOVERNMENT PRINTING OFFICE
45–801 CC WASHINGTON : 1998

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington DC 20402

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

ONE HUNDRED FIFTH CONGRESS

JOHN H. CHAFEE, Rhode Island, *Chairman*

JOHN W. WARNER, Virginia
ROBERT SMITH, New Hampshire
DIRK KEMPTHORNE, Idaho
JAMES M. INHOFE, Oklahoma
CRAIG THOMAS, Wyoming
CHRISTOPHER S. BOND, Missouri
TIM HUTCHINSON, Arkansas
WAYNE ALLARD, Colorado
JEFF SESSIONS, Alabama

MAX BAUCUS, Montana
DANIEL PATRICK MOYNIHAN, New York
FRANK R. LAUTENBERG, New Jersey
HARRY REID, Nevada
BOB GRAHAM, Florida
JOSEPH I. LIEBERMAN, Connecticut
BARBARA BOXER, California
RON WYDEN, Oregon

JIMMIE POWELL, *Staff Director*
J. THOMAS SLITER, *Minority Staff Director*

SUBCOMMITTEE ON CLEAN AIR, WETLANDS, PRIVATE PROPERTY, AND NUCLEAR SAFETY

JAMES M. INHOFE, North Carolina, *Chairman*

TIM HUTCHINSON, Arkansas
WAYNE ALLARD, Colorado
JEFF SESSIONS, Alabama

BOB GRAHAM, Florida
JOSEPH I. LIEBERMAN, Connecticut
BARBARA BOXER, California

(II)

C O N T E N T S

WETLANDS: REVIEW OF REGULATORY CHANGES

THURSDAY, JUNE 26, 1997

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON CLEAN AIR, WETLANDS, PRIVATE PROPERTY, AND NUCLEAR SAFETY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m. in room 406, Dirksen Senate Office Building, Hon. James M. Inhofe (chairman of the subcommittee) presiding.

Present: Senators Inhofe, Hutchinson, Sessions, Graham, and Chafee (ex officio).

OPENING STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator INHOFE. The hearing will come to order.

I'd like to welcome everyone at the hearing today. This is the first Senate hearing on wetlands issues in this Congress. The focus of today's hearing is recent changes on wetlands program.

Over the last year there have been two major changes in the wetlands program. The first major change occurred last December when the Army Corps of Engineers reissued the nationwide permits beginning the elimination of Nationwide Permit 26.

The second major change happened in January of this year when the U.S. District Court of the District of Columbia invalidated the Tulloch rule. Both of these changes have major impacts on our Nation's wetlands policy.

Last December the Corps issued new regulations reauthorizing the Nationwide Permit program. In doing so, they drastically changed the Nationwide Permit 26 and announced its elimination within 2 years. This permit had been in place since 1977 and has been reauthorized every 5 years.

They also announced that they would develop replacement permits over the next 2 years.

My major concern is when did the Corps decide to eliminate this permit and why. I know the environmental community has been calling for the permit to be eliminated for years, but the Corps had the opportunity to work on replacement permits since they last reauthorized the program in 1991.

Particularly disturbing to me is the fact that the elimination of the program was not mentioned at all in the proposed rulemaking last June. The Administration did not propose this program change. It did not solicit any comments. In my opinion, they have

not followed the Administrative Procedures Act. I hope the Administration witnesses can shed some light today as to why they felt compelled to change this program without proper notice and without comment and procedures.

I'm also concerned about the burdens this change will place on the Corps as they work to approve wetlands permits. At a hearing in the last Congress, the Corps defended the slow process time of the individual permits by saying that most applicants used the Nationwide Permit program. Of course, if they change this permit program then that's going to—they're going to lose that argument. They've also placed themselves under the gun regarding elimination of Nationwide Permit 26 in under 2 years.

If they don't have adequate replacement permits in place, the number of individual permits will cripple the Corps. If it looks like this will happen, I will introduce some "push-through legislation" that continues the old Nationwide Permit 26 program until the replacement permits take effect.

Regarding the Tulloch decision, I do believe the Corps overstepped its authority to issue the Tulloch rule. This is an issue that should be left to Congress to decide, and I think the court was correct in recommending that Congress should take up this issue. My major concern for the Administration today is to learn how they are implementing the court order, what the district offices are doing, and to ask the Corps for legislative language regarding the underlying problem with the Tulloch rule.

We have two panels today. The first panel has just two witnesses. We will have six witnesses in the second panel. Since this hearing will be concluded at precisely 11:40, we will devote a little more time to the second panel. We'll try to get through the first panel by—let's say by 10:20.

With that, I'll turn to the chairman of our full committee. I'm delighted to have Senator Chafee here with us today.

OPENING STATEMENT OF HON. JOHN H. CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator CHAFEE. Thank you very much, Mr. Chairman.

I look forward to participating in this, the first hearing of the 105th Congress on section 404 of the Clean Water Act.

I'd like to join you in thanking all of the witnesses that will appear before the subcommittee this morning.

Today's hearing, as you indicated, Mr. Chairman, is important, as it will give us a better understanding of some very contentious issues surrounding the scope and jurisdiction of our Federal wetlands program.

During the 104th Congress, this subcommittee and the full committee held a number of hearings on wetland reform. These hearings demonstrated some of the difficulties experienced by section 404 permit applicants, ranging from delays in the processing of permit applications to the rigid and inconsistent application of 404 standards.

Although I agree that 404 is in need of reform, any reform must ensure that the key protections of section 404 are not undermined. Despite the widespread disagreement over contentious issues like the Tulloch rule and Nationwide Permit 26, there is one thing on

which I believe we can all agree: wetlands and the functions they serve and the benefits they provide are critical. These functions include, amongst others: water purification, flood control, recharging of groundwater aquifers, and waterfowl and wildlife habitat.

Another factor that we cannot ignore is that more than half of the wetlands that existed in the lower 48 States during colonial times already have been substantially degraded or lost totally.

Section 404 has helped to improve dramatically the integrity and vitality of our Nation's waters.

I look forward to working with you, Mr. Chairman, chairman of the subcommittee, and Ranking Members Baucus and Graham and others to address the difficulties of the wetlands regulatory program in a manner that maintains the important protections of section 404.

Thank you.

Senator INHOFE. Thank you, Mr. Chairman.

Senator Hutchinson, I have enjoyed your Stuttgart, AR, hunting areas for quite some time, so it's appropriate that you be here to talk about wetlands.

OPENING STATEMENT OF HON. TIM HUTCHINSON, U.S. SENATOR FROM THE STATE OF ARKANSAS

Senator HUTCHINSON. Thank you, Mr. Chairman. I appreciate the opportunity to be here and to express my views on this issue in my opening statement, realizing that we may have votes scheduled through the morning.

Let me begin by saying that this hearing comes at an opportune time for me, as an Arkansan, for one of the agencies that receives the most complaints in Arkansas is the Army Corps of Engineers. Honestly, they are right up there with the IRS when it comes to not being respected within the State. There are a lot of complaints in regard to public relations, which we're in the process of working on, and we've received cooperation from the Corps in that regard.

Many of the problems, however, deal with the permitting processes of the Corps. In meetings with the constituents, I've heard the Corps described as arrogant, they've been described as uncooperative, and these are very much common themes, not isolated incidents. So we already have a huge problem in Arkansas with the public's perception of the Corps, and now the Corps has changed the regulations that exist to protect our wetlands, the Nationwide Permit 26.

It is one thing for the Corps to make the changes they see fit with regard to wetlands, but they made many of these changes without regard to public comment.

It is my understanding that three of the provisions changing Nationwide 26 were not in the proposed ruling, yet they were in the final rule. And if I understand the Administrative Procedures Act correctly, this is not in compliance with that Act.

But even if it were not a violation of the Act, one of the most basic tenets of proposing a regulation is to notify the public and to allow comment. It's amazing to me that this process was not followed.

It is not as if these changes were minor, either. One of the largest changes is to require an individual permit if 500 linear feet of

a river bed is disturbed. There's no definition for what a river bed is. Its definition may be left up to the districts to decide.

Another change in the final rule is to eliminate the Nationwide Permit 26 altogether. The other change was to prohibit stacking of nationwide permits.

Prior to this rule, someone could use multiple nationwide permits if multiple permits were necessary. Now even if someone is doing something unrelated to the rest of the project they cannot use multiple nationwide permits.

This is the type of arrogance that I've seen in the districts in Arkansas. An agency that is supposed to serve the public ignores common courtesy when implementing regulations, and it certainly should not even appear to be skirting the law.

A big part of the frustration that my constituents faced with the Corps is a lack of an appeals process. If their request is denied and they want it reconsidered, it is simply sent back to the same group that reviewed it in the first place.

In 1993 the Administration set out its goals for a wetlands plan, and one of these goals was to establish an administrative appeals process. I don't know what has been done to this point, but it's my impression that very little has been done.

I understand this issue also came up in the April House hearing. Mike Davis, who is here today, testified that the Congress had not appropriated money for the Corps to implement an appellate process. To me, that's an unsatisfactory answer. We should not be debating in congressional hearings why there is not an appellate process. This process should exist, and it should exist, period.

Considering the level of contact that the Corps has with constituents, an appellate process should be standard operating procedure. Agencies cannot continue to blame Congress for inaction. Many agencies are facing the same budget difficulties as the Corps of Engineers, and yet they have appellate processes available.

I understand that Congressman Young indicated in the House hearing that he would introduce legislation to require the Corps to implement an appellate process, and I intend to take corresponding legislation in the Senate and introduce it here.

It's time that the Corps respond to the public's concern. Since the Corps of Engineers cannot keep their own promises, it is time for Congress to take action. I commend our subcommittee chairman for calling this hearing and for expressing his concern about this issue and ensuring that the Corps is more responsive to the needs of our constituents and to the constituents around the country.

Thank you, Mr. Chairman.

Senator INHOFE. Thank you, Senator Hutchinson.

We'd ask Mr. Davis and Mr. Wayland to approach the table.

As I said, we may have some votes today. It's my hope we can get by the first panel without having to be interrupted with votes. If they are, I won't make the mistake I made last time by continuing. In frustration, Mr. Chairman, we allowed some of them to continue to testify when we were voting. I won't make that mistake again. It didn't go unnoticed.

We'll ask you, all witnesses in the first and the second panel, to make an opening statement not to exceed 5 minutes. We've got the red and the yellow and the green lights, which are self-explanatory,

and if you would comply with that we'll try to do the same when answering your questions.

We'll start with Mr. Davis.

STATEMENT OF MICHAEL DAVIS, DEPUTY SECRETARY OF THE ARMY FOR CIVIL WORKS, U.S. ARMY

Mr. DAVIS. Good morning, Mr. Chairman, members of the committee. I am Michael Davis. I'm the Deputy Assistant Secretary of the Army for Civil Works for Policy and Legislation.

I am pleased to be here today to provide testimony on behalf of the Department of the Army and the Administration on this very important issue of wetlands protection and, in particular, the issue of the reauthorization of the Corps' Nationwide Permit program.

My colleague from EPA, Mr. Bob Wayland, will follow me and discuss the Tulloch rule that has already been mentioned here and the recent judicial decision affecting that regulation.

I will summarize my comments and, with your permission, I'll submit a more-detailed statement for the record.

Senator INHOFE. All statements will appear in the record in their entirety.

Mr. DAVIS. The Corps and EPA have been given the authority under section 404 of the Clean Water Act to ensure the chemical, physical, and biological integrity of the Nation's waters, in part through the protection of wetlands.

Senator Chafee alluded to the importance of wetlands in reducing floods, providing habitat, and maintaining water quality. We also know that we've lost more than half of our wetlands since the era of European settlement.

The maintenance of a viable and effective regulatory program is vital to the protection of our Nation's wetlands resources. The Administration's 1993 wetlands plan has provided a much-needed road map and strategy for improving wetlands programs. We have implemented many of the 40 initiatives in the plan, and wetlands programs are now more fair, more flexible, and more effective than ever before.

Based on the principles in the President's wetlands plan, this past December the Corps issued on its normal 5-year cycle a package of revised nationwide permits. These permits became effective on February 11 of this year.

The Corps and EPA worked with others in the Administration to develop a package of nationwide permits to reflect the need to protect important wetlands, and also the need to allow activities that are truly minor to go forward with little or no review.

It is important to understand the authority of the Corps of Engineers to issue general permits. This authority is found in Clean Water Act section 404(e). The authority prescribes two explicit requirements for all general permits, including nationwide permits.

First, general permits must be based on categories of activities which are similar in nature. Second, the activities authorized must not result in more than minimal adverse environmental effects, either individually or cumulatively. These are two statutory thresholds.

General permits can be issued on a State, regional, or nationwide basis for a period not to exceed 5 years.

Clearly, the general permit program has become a very integral part of the Corps' overall regulatory program. In fact, over 85 percent of all the section 404 actions are authorized by general permit. The average time for a final decision under these general permits is 14 days. Yes, over 85 percent of the people who have to get 404 permits are covered under a general permit in an average time of just 14 days.

In June 1996 the Corps published for public notice and comment a proposal in the "Federal Register" to issue, reissue, and modify the nationwide permits. In December 1996, the Corps announced the reissuance of 37 permits and the issuance of two new nationwide permits. These permits provide a balanced package that incorporates over 4,000 public comments, years of State and Federal experience with the nationwide permits, and many months of discussions with the Government, private, commercial, and nonprofit entities.

Over two-thirds or 25 of the nationwide permits were reissued without any changes. Less than one-third of the nationwide permits were modified. The vast majority of these modifications were made to increase their applicability and scope. Finally, two new nationwide permits were issued for some activities that formerly required individual permits.

As you have alluded to, by far the most controversial issue was the proposal to reauthorize Nationwide Permit 26 for activities in isolated and headwater systems. This nationwide permit, alone, accounts for approximately 30 percent of all the activities authorized by nationwide permits, and, perhaps more importantly, 75 percent of the total impact resulting from all of the nationwide permits.

The most recent data and scientific literature indicate that isolated and headwater wetlands play an important ecological role—in fact, as important as other types of wetlands—in protecting water quality, reducing flood flows, and providing habitat for fish and wildlife species.

The National Academy of Sciences in its 1995 report on wetlands noted, "The scientific basis for policies that attribute less importance to headwater areas and isolated wetlands than to other wetlands is weak."

In light of the above and in response to public comment, several substantive changes were made to Nationwide Permit 26. These include: reduction of the upper threshold from 10 acres to 3 acres, addition of a 500 linear foot limitation for stream bed impacts, prohibiting the use of Nationwide 26 with other nationwide permits when the total impacts exceed 3 acres, and the expiration and subsequent replacement of Nationwide 26 within 2 years.

The Corps determined that these provisions were necessary to ensure minimal individual and cumulative impacts to the statutory threshold.

We made these changes based on surveys from our field offices and discussions with the public and others. For example, the data shows that of the nearly 14,000 projects that are authorized annually under Nationwide 26, these resulted in about 5,000 acres of impacts annually. That's only part of it. These are the ones we knew about. We estimate that there are many more, perhaps as many as 20,000 other activities that were allowed to go forward

under Nationwide 26 that we didn't even know about, bringing the total projects to nationally just about 34,000 acres.

Senator INHOFE. Mr. Davis, I'd ask you to conclude your opening statement.

Mr. DAVIS. I'll summarize. OK.

In conclusion, we strongly believe that the changes in the Nationwide Permit program were needed in order to continue to ensure that the tens of thousands of activities authorized result in no more than minimal adverse environmental effects either individually or cumulatively. Our experience with administering the nationwide permit indicated that the form of limitations on Nationwide 26 could no longer ensure that these thresholds were met.

An essential part of the Corps' experience with implementing the nationwide permit includes an increase in scientific information. It clearly indicates the important functions and values of headwaters and isolated waters to the Nation's overall aquatic system. At the same time, the Corps recognizes that activities that involve only minor impacts should be allowed to proceed with little or no review and no delay.

The nationwide permit replacements will ensure better that the environmental effects of the Nationwide Permit program are minimal and more clearly identify the activities covered.

Senator INHOFE. In conclusion?

Mr. DAVIS. I'll conclude there, Mr. Chairman, and I'll be happy to answer any questions.

Senator INHOFE. Thank you very much.

We have been joined by the Ranking Member of our committee, Senator Graham.

Senator Graham, did you have an opening statement?

OPENING STATEMENT OF HON. BOB GRAHAM, U.S. SENATOR FROM THE STATE OF FLORIDA

Senator GRAHAM. Thank you, Mr. Chairman.

Just some brief comments.

The items on our agenda today to me raise the basic question of the Federal/State partnership for the protection of wetlands. The Federal Government became involved in wetlands protection originally through the desire to be able to give greater protection to what I would describe as *de facto* navigable waters—those waters such as, in States of Senator Sessions and myself, the Appalachicola, to be able to protect those waterways and allow the Federal Government to exercise its national responsibilities for navigation.

From that beginning idea, the wetlands policy has expanded into the areas that are the source of discussion today.

The States have traditionally had responsibility for land-use planning, and much of national wetlands policy now is essentially an attempt to have a Federal land use planning imposed on very small parcels of land that are often disassociated from the original goal of the 404 program.

I think the appropriate question for the Federal Government in wetlands policy today is how can it use its influence to encourage a cohesive, respectful partnership between the Federal Government

and the States, and that that question should be a focus of this subcommittee's activities.

I know it's an issue of great concern to our chairman, and I look forward to working with you in seeing that we can forge that partnership which will both protect our Nation's wetlands and also be respectful of our traditions of local responsibility for local land use.

Senator INHOFE. Thank you, Senator Graham. I have here a statement for the record from Senator Boxer.

[The prepared statement of Senator Boxer follows:]

PREPARED STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR FROM THE STATE OF CALIFORNIA

Mr. Chairman, today we will hear about the future of our country's wetlands, an issue of vital concern to the people of California.

When California became a State in 1850, the State had an estimated five million acres of wetlands. Today there are less than 450,000 acres left, a loss of more than 90 percent. These 4.5 million acres of wetlands were lost to urbanization, agricultural expansion, and flood protection measures.

Most people agree that wetlands are important. They function as a conveyance for floodwaters, as barriers to erosion and in sediment control. They are vital for the continued existence of both waterfowl and many important fish species. Wetlands are treasured for their aesthetic properties and as recreational sites. They provide some of the most biologically diverse ecosystems in our country.

Most of our country's remaining wetlands are on private lands. Understandably, these private land owners have a keen interest in the future of these lands.

The focus of the national debate then is not should we protect wetlands, but rather how do we best balance the protection of wetlands with an individual's right to manage his or her property?

Today we will hear how effectively the Army Corps of Engineers and the Environmental Protection Agency is finding this balance.

We will hear about Nationwide Permit 26. This permit was established by the Corps in 1977 to allow certain activities with minor environmental effects to be conducted in headwaters and isolated waters with little or no individual review by the Corps. Unfortunately, the environmental effects of these activities have not been minor. The California Department of Fish and Game says ". . . Nationwide Permit 26 has resulted in significant adverse environmental impacts in California." The U.S. Fish and Wildlife Service has found that in northern California alone, more than a thousand acres of wetlands have been filled between 1987 and 1994, under Nationwide Permit 26.

In December, 1996, the Corps issued an interim Nationwide Permit 26 that will expire in 2 years. Today we will hear how implementation of the permit has affected wetlands and development activities. I support the Corps' efforts to assess the effects of this permit and I look forward to working with them during the interim period on development of a final rule due in 1998.

Another issue we will hear about today is the Tulloch Rule, which was established jointly by the Corps and the EPA to close a major loophole in the Clean Water Act.

The loophole allowed a developer in North Carolina, using sophisticated ditching techniques, to drain and destroy 700 acres of valuable wetlands to build a golf course and related facilities, all without a Clean Water Act permit. This activity not only destroyed wetlands, but also flooded neighbors' property and polluted nearby streams.

In response to a lawsuit brought by the North Carolina Wildlife Federation over this particular development, the Corps and the EPA developed the Tulloch Rule in August 1993. This rule was designed to protect wetlands from unrestricted destruction. The rule was immediately challenged in a lawsuit by the American Mining Congress. The U.S. District Court for the District of Columbia overturned the Tulloch Rule earlier this year. The Department of Justice has appealed that decision.

I hope that the Appeals Court will reinstate the Tulloch Rule because I see it as an important tool to be used by the Corps in meeting the stated purpose of the Clean Water Act: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

Today, I look forward to hearing and discussing the pertinent facts.

I also think it is critical that we look at how to make the permitting process more efficient for legitimate activities.

Lastly, I believe we need to look at ways to help the enforcement agencies in carrying out their important mandates for the protection of the waters of the United States.

Finding the proper balance between streamlining the permitting process while at the same time protecting our water resources will continue to be a challenge. But it is a challenge that we must meet to ensure a sound economy and a healthy environment.

As we listen to our panelists and as we engage in our discussions, let us never lose sight that the Clean Water Act was enacted to protect the lakes, rivers, streams, and wetlands of this country. For the sake of our children and all the generations yet to be born, we have a sacred obligation to protect what is left of this very precious resource.

Thank you Mr. Chairman.

Senator INHOFE. We have been joined also by Senator Jeff Sessions from Alabama.

Senator Sessions, do you have an opening statement?

OPENING STATEMENT OF HON. JEFF SESSIONS, U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. I do, and I'll make it a part of the record. I would just like to say this is a matter of some interest. As a Federal prosecutor, we worked with the Corps of Engineers and the U.S. attorney, and sometimes got a lot of complaints. Sometimes people were very unhappy with things.

It's a difficult area. We must remember that the fifth amendment to the Constitution is quite clear, unambiguous: private property cannot be taken without just compensation being paid.

That's the fundamental principle we have to consider: whether a regulation becomes a taking. I hear a lot of concerns in my State about this.

There are good relationships, Senator Graham, I think, between the Federal and State regulatory agencies, I think we should build on that. I think you're exactly correct. And sometimes the States are much more strict than the Federal agencies and sometimes they're not as strict. That positive relationship—that trust in the States to make some judgments about their properties and environment—is important.

Thank you, Mr. Chairman.

Senator INHOFE. Thank you, Senator Sessions.

[The prepared statement of Senator Sessions follows:]

PREPARED STATEMENT OF HON. JEFF SESSIONS, U.S. SENATOR FROM ALABAMA

I would like to begin by thanking Chairman Inhofe for calling this hearing today to discuss the recent series of administrative and judicial changes that have occurred with regard to the regulation of wetlands under section 404 of the Clean Water Act. These changes have generated a great deal of comment within both the regulated community and the environmental community, and I think it is appropriate that this committee takes this opportunity to address these issues at this time. By focusing today on both the recent judicial invalidation of the "Tulloch Rule", and also on the modified re-issuance of Nationwide Permit 26 by the Army Corps of Engineers, this committee will be effectively concentrating it's time and energies on the two issues that have generated the lion's share of criticism by individuals on either side of the current regulatory debate.

I would also like to take this opportunity to thank the witnesses who will be testifying before the committee today. I am certain that the knowledge that they bring forward and the opinions that they possess will add greatly to our discussion of these issues.

Mr. Chairman, in a broader sense, today's hearings will vividly illustrate the tension that exists as we try to maintain the balance between two competing priorities. The first of these priorities concerns the preservation of private property rights as

a fundamental right of American citizenship. As we all know, the fifth amendment to the Constitution protects against the taking of private property for public use without just compensation. With some estimates of wetland acreage placing as much as 75 percent of our countries remaining wetlands on privately-owned property, any change which serves to expand the government's regulatory authority over such land or any change which seeks to limit a property owners ability to develop their land must be carefully evaluated to ensure that basic property rights have not been improperly infringed upon.

The priority that we place on maintaining property rights often seems to be at odds with the priority that we have placed on environment stewardship. Certainly, we all recognize that there are significant environmental benefits to be derived from the existence of wetland regions. In fact, recognition of these benefits led Congress to enact specific legislative protection for these areas. The Clean Water Act, which gave rise to the Nationwide Permitting Process that will be discussed today, serves as a prime example of the enactment of specifically tailored legislation to further a particular environmental goal. As the recent judicial invalidation of the "Tulloch Rule" illustrates, however, the careful balance between these dual priorities can become blurred when Federal agencies enact regulatory changes that seemingly expand their regulatory authority beyond its carefully enacted limits.

That is why hearings such as the one we are attending today are important. We have an oversight responsibility to ensure that actions taken by Federal agencies do not result in improper obstructions of one's ability to enjoy the benefits of private property ownership. I commend the Chairman for his recognition of this oversight responsibility and I look forward to today's discussion of these important issues.

Senator INHOFE. Mr. Wayland.

STATEMENT OF ROBERT H. WAYLAND III, DIRECTOR, OFFICE OF WETLANDS, OCEANS, AND WATERSHEDS, OFFICE OF WATER, ENVIRONMENTAL PROTECTION AGENCY

Mr. WAYLAND. Thank you, Mr. Chairman.

I appreciate the opportunity to be here this morning with you.

My prepared testimony and this greatly abbreviated summary statement address four issues: the importance of wetlands, the so-called "Tulloch rule," mitigation banking, and the agency's interagency Alaska initiative.

Any discussion of the 404 program needs to begin by emphasizing the values and importance of wetlands as part of the Nation's aquatic resources. They provide a multitude of services to society: flood control, water quality improvement, groundwater recharge, and fish and wildlife habitat, just to name a few. And they also form the basis for many thousands of jobs and contribute billions of dollars to the economy. Just think of the importance of commercial fishing and recreational hunting to our Nation, to name just two of those values.

Recognizing the importance of wetlands protection and restoration to realizing the goals of the Clean Water Act, the Administration set out to ensure that our wetlands programs are fair, flexible, and effective. The result was the 1993 Administration wetlands plan.

Implementation of many of the plan's administrative initiatives have produced tangible results by making the 404 program more fair and flexible, while continuing to ensure effective protection of the Nation's human health and the environment.

An important component of the plan was the EPA/Corps issuance of a rule revising three section 404 regulatory definitions. Let me emphasize that the district court decision addressed only one part of that rule, the revised definition of "discharge of dredged material."

As a result, in the Government's view, the rest of that rule, the so-called "Tulloch rule," remains valid and in effect. It provides that the placement of pilings is regulated under section 404 when such placement has the effect of a discharge of fill material. In addition, it also codified the agencies policy that prior converted crop lands are not subject to Clean Water Act regulation.

As you know, in response to a challenge brought by several industry groups, the Federal district court invalidated the Corps/EPA revised definition of "discharge of dredged material," frequently referred to as the "Tulloch rule."

EPA and the Corps respectfully disagree with the decision. On April 10 the Department of Justice filed a notice of appeal, and on April 22 a motion for stay of judgment in the district court. On May 27 the district court issued a decision rejecting our request for a stay. On May 30, DOJ filed a motion for stay pending appeal in the court of appeals and requested, in the alternative, that the court of appeals expedite consideration of the case.

However, unless or until the district court's decision is stayed or overturned, the Government is fully committed to complying with the court's injunction.

On April 11, EPA and the Corps issued joint guidance to our field staffs explaining the decision and its effect on the section 404 program. The agency's decision to issue the Tulloch rule was based on our increased understanding of the severe environmental effects often associated with activities covered by that rule, the increasing sophistication of developers who seek to convert waters of the United States to uplands without being subject to subject 404 environmental review, and litigation brought to address these issues, notably *Avoyelles Sportsman's League* v. *Marsh*.

EPA and the Corps continue to believe that the regulatory clarification expressed in the Tulloch rule is within our statutory authorities and was, in fact, consistent with the practice of many Corps districts and EPA regions as they sought to apply the Avoyelles decision.

The case that gave rise to the Tulloch rulemaking provides a graphic illustration of the type of environmental harm that occurred in the absence of 404 review prior to issuance of the Tulloch rule. Developers in New Hanover, NC, drained, cleared, and destroyed 700 acres of valuable wetlands to prepare a site for residential and commercial development and a golf course. This is an illustration of the activities that were underway on that site.

[Indicates photographs in exhibit.]

This environmental destruction was not subject to review because the developers went to great lengths to ensure that the operation of their drag lines, backhoes, bulldozers, and dump trucks allowed only a small amount of material to be discharged into wetlands.

Moreover, these impacts were virtually identical to those resulting from less-sophisticated projects, where the only difference is the amount of material falling back into the wetlands. These developers had sought a 404 permit, withdrawn their permit application, and elected to proceed in a way they felt would not be subject to regulatory review.

We're extremely concerned that our inability to provide 404 regulatory review of activities covered by the court's decision will weaken our ability to ensure effective and consistent protection of the Nation's health and the environment.

The decision creates an incentive for persons to once again take advantage of regulatory loop holes. They'll be able to design large projects that destroy hundreds of acres of wetlands, harm neighboring property, and pollute streams and rivers in a way that precludes effective Clean Water Act review.

This review is not aimed at preventing development, but instead is intended to minimize pollution and ecological damage, as well as provide appropriate mitigation to offset environmental harm.

To quickly update you on two other areas covered in the Administration's wetland plan, wetlands mitigation banking is an innovative, market-based way for landowners to effectively and efficiently compensate for unavoidable wetland impacts. Our issuance in November 1995, of a Federal mitigation banking policy has facilitated the establishment of mitigation banks nationwide. There are now about 200 mitigation banks that have been approved or are under development. We believe that well-designed, professionally managed mitigation undertaken by persons with a strong incentive to achieve lasting results will substantially improve the disappointing record of compensatory mitigation to date.

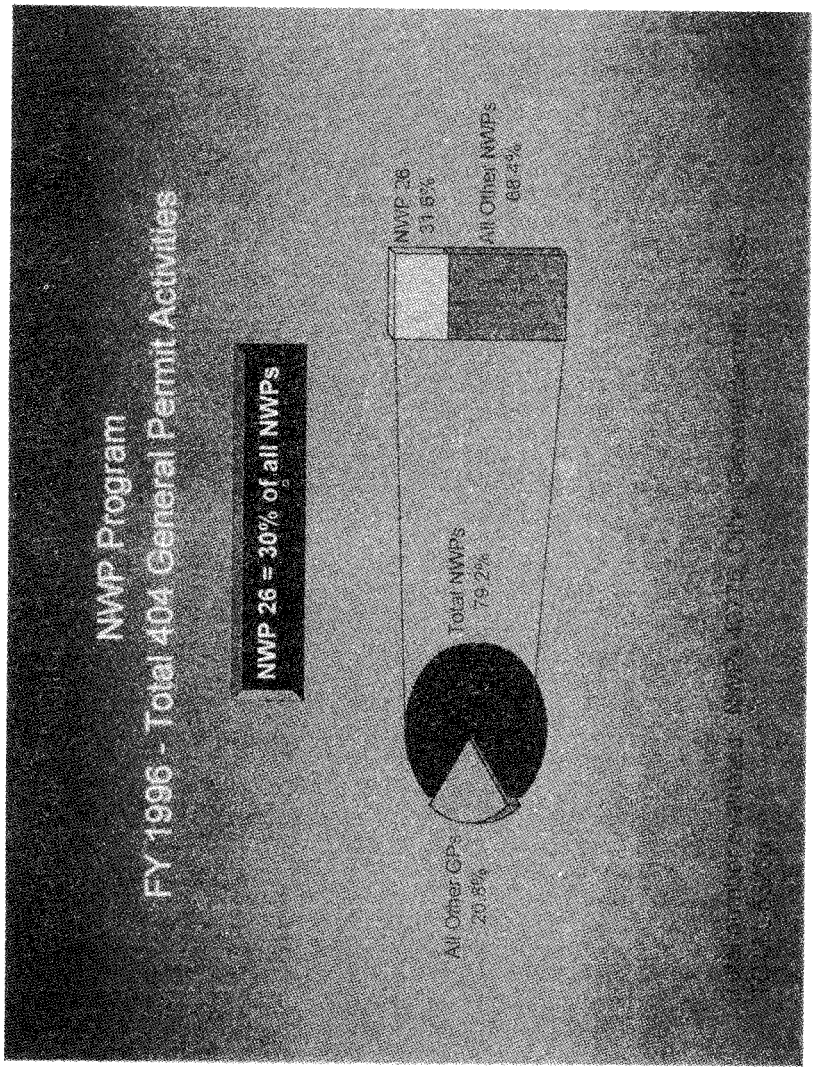
I'll conclude at this point, Mr. Chairman.

Senator INHOFE. Thank you, Mr. Wayland.

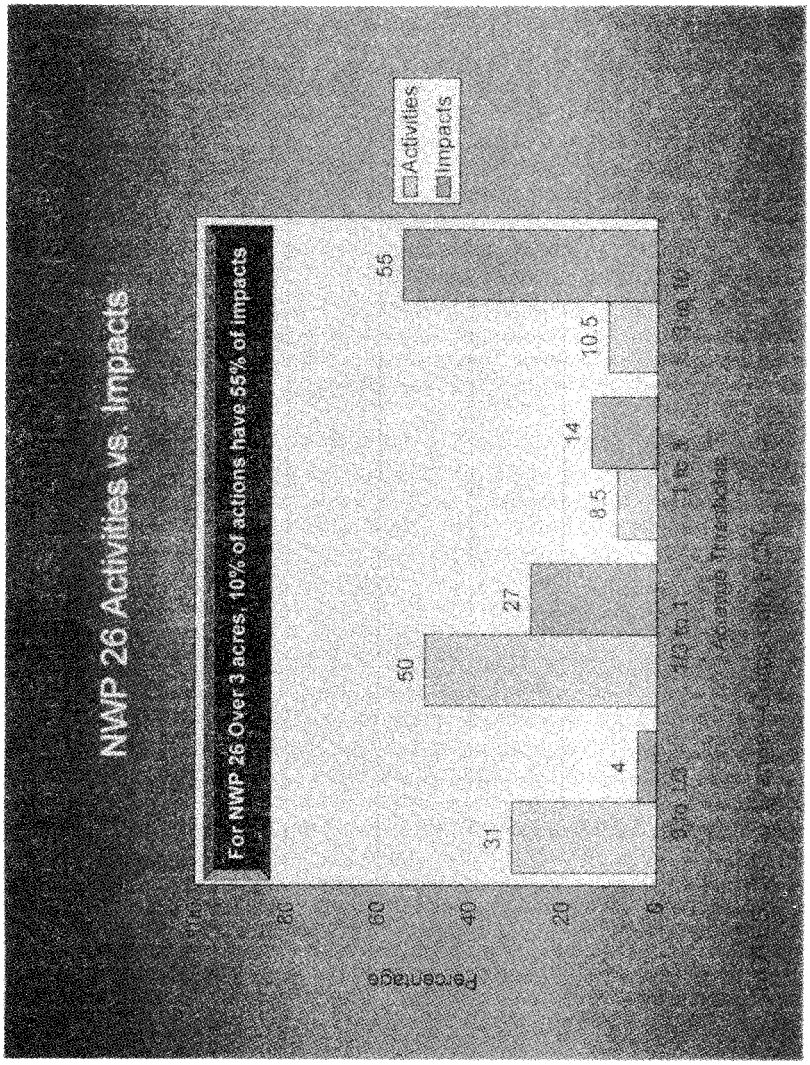
[Charts supplied by the Corps of Engineers follow:]

FY 1996 - 404 Applications - Types of Decisions
General Permits = 85% of All Actions
General Permit 85.8%
Withdrawn 8.4%
Denial 0.3%
Standard 5.1%
Letter Permit 1.7%

General Permits
FY 1996 - 404 Applications - Types of Decisions
NWPs = 80% of All General Permits
NWPs
79.2%
Other GPs
20.8%
General Permit 86.6%
Withdrawn
Denial
Standard
Letter Permit


NWP Program
FY 1996 - Total 404 General Permit Activities
NWP 26 = 30% of all NWPs
NWP 26
31.6%
All Other NWPs
68.4%
Total NWPs
79.2%
All Other GPs
20.8%

NWP Program
FY 1996 - NWP Activities vs. Impacts (in acres)
NWP 26 = 30% of All NWP Actions with 77% of Impacts
NWP 26 21.6%
All Other NWPs 78.4%
NWP 26 76.8%
All Other NWPs 23.2%
NWP Activities
NWP Impacts


NWP 26 Activities vs. Impacts
For NWP 26 Over 3 acres, 10% of actions have 55% of impacts
Activities
Impacts
Percentage
0
20
40
60
80
31
4
50
27
8.5
14
10.5
55
Acreage Thresholds

Senator INHOFE. As you probably heard the bells ringing, Senator Hutchinson is going to go and vote and come right back, so we're going to go ahead and continue for a few more minutes here.

Let me start by asking Mr. Davis the question. In your testimony, both your written testimony and your oral testimony, you talked about the 14 days as the average time it takes the Corps to approve a general permit and 104 days for the approval of individual permit, but I've heard all kinds of scary stories from the field saying it has been much, much longer than that.

One of the reasons that I understand is that it takes the Corps quite a number of days before it decides when an application is complete, so that you don't start the clock running until that point, and then maybe after that point it's 104 days.

Now, I would like to ask you, have you done any studies to determine how long it is from the time the application is first submitted and is granted, not when it's accepted as an application of proper form?

Mr. DAVIS. I don't think, Mr. Chairman, we've done any specific studies. We have, though, encouraged our field, through training and guidance, to expedite the process and to not allow this initial phase, which is obviously very important to get a complete application before we can go out with a public notice and advertise to the public the proposed project, we have encouraged them to keep that moving.

If you look at the literally tens of thousands of actions a year, I'm sure there are some abuses of that. But, on balance, when you look at the way the program is working——

Senator INHOFE. It's striking an average here. If it's 104 days, do you think that maybe at an average it would take 200 additional days from the time it's submitted until it's considered to be complete?

Mr. DAVIS. Absolutely not. The law requires us to publish a public notice within 15 days of complete application. My experience has been that a large majority of them come in relatively complete and we're ready to go with that and we meet that 15-day requirement. So I think it would be much less than 200 days.

Now, there are projects that are very large projects——

Senator INHOFE. No. I'm talking about just average, because——

Mr. DAVIS. No. On average it would not be 200 days.

Senator INHOFE. This is my concern. I know there are exceptions. All right.

Mr. Davis, I'm concerned also about the decision to eliminate Nationwide 26 permits. This option was not included in the proposed regulations last June, yet you went forward with it in December without requesting any comments, so I'd have to say: when did the Corps first consider eliminating the permit, and when was that decision made?

Mr. DAVIS. You really have to go back to 1993 when an interagency team put together the Administration's wetlands plan. One of the 40 initiatives in that plan was to eventually move away from Nationwide 26, as we had it in a nationwide permit format, and move to more regional activity-type permits.

Senator INHOFE. But if it was considered before June 1996, then why was that not included in that report as an option, listed as an option?

Mr. DAVIS. That's a good question. We laid out what we thought was a starting point for a reasonable approach. In fact, we did propose various options for Nationwide 26 in the proposal, and that involved various scenarios for acreage thresholds and a way that we could potentially consider ratcheting down on Nationwide 26.

We were becoming increasingly concerned that that permit didn't meet the plain words of section 404(e) that I described in my oral statement.

Senator INHOFE. Well, let me ask you, Mr. Wayland, a question concerning the Tulloch rule.

In your testimony—and I'll quote this now—it says, "The Government is compelled to comply with the terms of the court's injunction." And, "The agencies are continuing to coordinate closely with our field staffs to ensure that we comply with the injunction, pending any further rulings in the case."

There have been reports that field staff are saying, "Yes, Tulloch was overturned, but the Government is appealing, and if you engage in any activity during this period of time, then if they're successful in this appeal we'll go back and find you in violation."

Is this accurate or inaccurate?

Mr. WAYLAND. That's completely inconsistent with the guidance that the Corps and EPA have jointly issued. I'd certainly be interested in any specific indication of those problems, because we would like to follow up with field staff in those instances.

Senator INHOFE. In the event that you are found to be wrong in this case, would you say that it's a matter of fairness, it would not be fair?

Mr. WAYLAND. I think for individuals to proceed on reliance of the court's decision where a regulation has been set aside by injunction, it certainly would not be fair at a later date to penalize them should the district court decision be overturned.

Senator INHOFE. If they started the process in accordance with their understanding at that time—in other words, if the court has not already overruled the activity you would consider that to be a fairness issue if the Government went back later and said you're in violation?

Mr. WAYLAND. Yes, Mr. Chairman, I would consider that.

Senator INHOFE. All right. We're going to stand in recess for not more than 3 or 4 minutes, and I would instruct the staff that when Senator Hutchinson, who I understand is coming back right now, he'll continue, and at that point it will be a matter of questions to the two of you.

So if we can recess for about 4 minutes, we'll be right back.

[Recess.]

Senator HUTCHINSON [assuming the chair]. It's my understanding, in order to expedite and allow us to continue, that I'm being permitted to begin some questions until the chairman returns.

First of all, let me—in my opening statement I made reference to a couple of issues that I would like you to address. No.1, in the 1993 Administration proposal, part of the administrative proposal, as I understand it, which you've made reference to, was that there

would be an administrative appeals process established, and that that was originally announced in 1993.

What has been done in the last 4 years to implement this proposal, because, as I said in my opening statement, the Corps of Engineers has, for whatever reason, engendered a lot of resentment on the part of my constituents. We've got a lot of Corps lakes. We've got a lot of wetlands, as the chairman made reference to, in south and east Arkansas on the Delta. And the permitting process has engendered a lot of frustrations, and the lack of an appeals process has been, I think, a big source of the frustration that my constituents have experienced.

And so, since this was recommended 4 years ago, what steps have been taken to see that become a reality?

Mr. DAVIS. Senator those are good questions and very important questions, and I have to say I guess I'm troubled that we are up there with the IRS now in the image of the Corps.

Senator HUTCHINSON. At least in Arkansas. I don't know. We're working on it.

Mr. DAVIS. But I'd like to work with you to help rehabilitate that image a little bit.

But we believe very strongly that an appeals process is very important and, in fact, a lot of work has been done since we announced that in August 1993. There were a lot of infrastructure that had to be put into place or needed to be put into place, and a regulation for things like job descriptions for these positions. This is something brand new to the Corps of Engineers.

Most of that work has been completed. We have proposed a regulation a couple years ago. We are very near to being in a position to finalizing that regulation. We could do that very quickly. So a lot of work has been done.

But it truly does go back to how do we pay for this and how do we balance this very good objective with other good objectives. If we do this without a relatively small increase in funding to staff this initiative, then we take away from other parts of the program, and that means additional delays for other segments that have to get permits and have to engage the program.

So, as we looked at balancing these two things, we felt that without additional resources, it would not be good for the public.

We're talking about a relatively small amount of money—about $5 million—to fund these positions and bring this up to speed. We've been asking for it for about 2 to 3 years now. It's in the President's 1998 budget. And if we get that, we're in a position to move out very quickly and implement this very important piece of the Administration's initiative. We think it's very important.

Senator HUTCHINSON. If I heard you correctly, while you may be saying it's very important, you're saying it's less important than most everything else; that you went ahead—that this was dropped on the priority list; that you felt that, in the scheme of things of what you have to do in order to fund this within your budget, that it wasn't all that important; therefore, in 4 years it hasn't been done.

Is that an unfair characterization?

Mr. DAVIS. It's a matter of several very important things.

If you look at the beneficiaries of the appeals process, it would be relatively few people, because relatively few people get permits denied. We're talking about maybe 250 to 300 people a year who have their permits denied who would then enter this appeals process, and some other number who might challenge a jurisdictional determination.

If you take people away from the permit evaluation or processing piece then to implement this, then those people who would never have a need to engage or enter into the appeals process then will pay that price because there will be less people to work on their permits, and that's the point.

Senator HUTCHINSON. Mr. Davis, I'm sorry, but, I mean, if we're talking only 250 to 300 people per year that are going to be appealing, it seems to me it would be a relatively simple and inexpensive process to establish that kind of opportunity.

If, in fact, it is that small——

Mr. DAVIS. It's more than that, because there are two pieces, Senator. There are two pieces, and that's the permit denial piece, and then the administrative appeal proposal that we have ready to go also allows individuals to challenge a wetlands jurisdictional determination. That could literally be—we do about 40,000 of those a year, so that could be a lot of additional work on the Corps, and we're very concerned that if we have to shift the resources to do that, then on balance the people who are coming in and getting the permits——

Senator HUTCHINSON. We don't have it both ways here. So we're not talking 250 to 300 people, we're talking 40,000 potential——

Mr. DAVIS. Potentially, if both pieces are implemented.

Senator HUTCHINSON. So when we talk about the importance of an appeals process, we're talking about thousands of people who would be impacted. And when we talk about the poor image that the Corps has and the poor public relations that it has demonstrated and the frustration that my constituents feel, this is a much bigger issue than 250 to 300 people.

Mr. DAVIS. It's bigger than 250 to 300 people, but, again, we've very carefully looked at this and tried to make some good decisions based on how we can run the program, given the resources we have, and looked at the positive sides and the negative sides of doing both. Our determination right now is that it would not be a good thing without additional resources. We are very interested in doing this.

Senator HUTCHINSON. Mr. Chairman, I've got other questions, but I'll be glad to yield back to you.

Senator INHOFE [resuming the chair]. Go ahead and continue any questions you have.

Senator HUTCHINSON. You've given your conclusion that you're very interested in it but you decided it's not important enough to do right away until Congress gives you more money. I will say that if you're really interested in public perception, public relations, and improving the way the Corps is perceived around the country, then I think this should be a high priority. It is to me and it is to obviously a lot of individuals in Congress. I will be introducing that legislation.

The other thing I mentioned in my opening statement was in regard to the 500 linear feet and the change in the regulations regarding the stream beds.

It is my understanding that that regulation, which will be, I think, very difficult for many to comply with, was not in the original proposed draft regulation upon which public comment was received.

Was there an opportunity for the public to give comment on that new regulation?

Mr. DAVIS. You are correct in saying that it was not in the original proposal. It was an outgrowth of the process, however. Many people raised that. Our own field staff at times had raised that as an issue.

Let me give you an example why it was important. Under the——

Senator HUTCHINSON. Mr. Davis, I don't mean to be rude, and I have limited time, but my question was: did the public have an opportunity to comment on that proposed—not the validity of it, not the merits of it, but whether or not the public had the opportunity to comment on it.

Mr. DAVIS. The public did, on their own initiative, comment on it, and we had six or seven public hearings. I'm not sure, and I can check if——

Senator HUTCHINSON. Was there a proposed regulation submitted to the public in which they had opportunity to comment on a proposed regulation?

Mr. DAVIS. No, sir. Not for that particular piece.

Senator HUTCHINSON. Mr. Chairman, thank you. I'll yield.

Senator INHOFE. Well, let me just get back. I've already asked my questions, but, Mr. Wayland, I am still concerned about the reports that we get from the field saying that the Tulloch rule was overturned, but since the Government is appealing it, and if somebody on that overturn is out doing a project and it is overturned you'll go back—at least the threats are in the field you'll go back and cite them for a violation. And you were saying you didn't believe that was true.

Let me read to you from written testimony, one we'll be hearing from, from Stormwater Management. "Irrespective of the guidance, NAFSMA—" that's the stormwater organization, and we'll have that in the second panel—"member agencies and others have been informed by the Corps that, although a permit would not be needed at this time, the agency would have to cease operations and apply for a permit if the decision was stayed or overturned on appeal or faced potential enforcement actions.

"A copy of the letter from the Corps's Omaha district to a local agency notes clearly that if the ruling is stayed or reversed the Corps would again regulate activities such as those proposed. The letter further stated that if this occurs and your project has already begun, the Agency would be required to stop work and obtain authorization."

Of course, at that point any number of things could happen. They could find that the permit wouldn't be granted and they would be found then in violation.

Do you still feel that your response to the question was accurate?

Mr. WAYLAND. Absolutely, Senator. Let me submit a copy of our guidance to you for incorporation into the record.

[The document referred to follows:]

APR 11 1997

Department of the Army
U.S. Army Corps of Engineers

United States Environmental Protection Agency

CORPS OF ENGINEERS/ENVIRONMENTAL PROTECTION AGENCY GUIDANCE REGARDING REGULATION OF CERTAIN ACTIVITIES IN LIGHT OF *AMERICAN MINING CONGRESS V. CORPS OF ENGINEERS*

A. INTRODUCTION AND SUMMARY OF AGENCY GUIDANCE

1. On January 23, 1997, the U.S. District Court for the District of Columbia handed down a decision in American Mining Congress v. United States Army Corps of Engineers, No. 93-1754 SSH, a lawsuit challenging the agencies' revisions to the definition of "discharge of dredged material," which were promulgated jointly by the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) on August 25, 1993 (58 FR 45008) ("Excavation Rule"). The District Court held that the rule was outside the agencies' statutory authority and contrary to the intent of Congress to the extent that it asserted Clean Water Act (CWA) jurisdiction over activities where the only discharge associated with the activity is "incidental fallback." On this basis, the Court declared that the rule is "invalid and set aside, and henceforth is not to be applied or enforced by the Corps of Engineers or the Environmental Protection Agency." The Court defined "incidental fallback" as "the incidental soil movement from excavation, such as the soil that is disturbed when dirt is shoveled, or back-spill that comes off a bucket and falls into the same place from which it was removed. 'Incidental fallback' does not include soil movements away from the original site. Sidecasting . . . and sloppy disposal practices involving significant discharges into waters have always been subject to section 404." Slip opinion at 5. The District Court did not invalidate provisions adopted by the agencies addressing prior converted croplands and the placement of pilings; those provisions remain in full force and are not addressed in this guidance. In addition, the Court's opinion does not address or in any way affect the Corps' jurisdiction or authority under Section 10 of the Rivers and Harbors Act of 1899.

2. The Army and EPA respectfully disagree with the District Court's decision. The government has filed a notice of appeal with the U.S. Court of Appeals for the District of Columbia and intends to file a motion for stay of the District Court's judgment. Nevertheless, unless and until the decision is stayed or overturned, EPA and the Corps are compelled to comply with the terms of the Court's injunction.

3. The following constitutes interim guidance until such time as the District Court or Court of Appeals issues any additional ruling affecting the matters addressed in this guidance. This guidance supersedes any earlier guidance addressing the American Mining Congress decision. It is intended to assist Corps and EPA field staff to comply with the Court's injunction during this interim period by providing a general explanation of the decision and its effect on the Section 404 program. It is important to emphasize, however, that the applicability of the decision to a particular project, or part thereof, will depend largely on the particular facts of each case. To the extent that Corps or EPA field staff have questions about whether the Court's decision could be applicable to a particular case, they are directed to contact their respective headquarters office to review the case more completely and reach an appropriate decision.

4. ENFORCEMENT ACTIONS. During this interim period, Corps and EPA field personnel shall not undertake any administrative or judicial enforcement actions for CWA Section 404 violations where the only grounds for jurisdiction over the activities in question are the types of "incidental fallback" discharges of dredged material defined by the Court and quoted in paragraph 1, above. Moreover, if the Corps has issued a permit where the only basis for jurisdiction was "incidental fallback," and the permittee is not complying with the permit terms or conditions, the Corps shall not undertake any enforcement action for such noncompliance during this interim period. If a Corps or EPA field office believes that an enforcement action should be brought or continued to deal with activities causing environmental damage, but the discharger might argue that the activities involve only "incidental fallback," that field office should consult with its respective agency headquarters. In the case of pending administrative penalty actions potentially affected by the Court's decision, EPA and Corps field offices, as appropriate, should notify the Administrative Law Judge or Presiding Officer of the Court's opinion, the government's pending notice of appeal and intent to seek a stay pending appeal, and provide the Judge or Officer with a copy of this guidance. With regard to pending judicial actions, EPA and Corps field staff should coordinate closely with DOJ and the U.S. Attorneys' offices, as appropriate.

5. NEW OR PENDING PERMIT APPLICATIONS. During this interim period, consistent with the Court's decision, activities involving only "incidental fallback" do not require a Section 404 permit. If a Corps district office receives an application for a permit covering activities involving only "incidental fallback," or is already processing such a permit application, the Corps office should inform the permit applicant that, based on the American Mining Congress decision, no permit is presently required for the activity. Nevertheless, the Corps should state that, as an accomodation to the applicant, the Corps will process the permit if the applicant requests in writing that the Corps do so. Accordingly, Corps district personnel should invite the applicant to choose one of the following options: (1) withdraw the permit application; (2) request the Corps to retain the permit application without processing it pending a ruling on any motion to stay the District Court's decision; or (3) request in writing that the Corps process the permit application (in which case the Corps will process the application and issue the permit, with any necessary conditions, if appropriate). If a permit applicant fails to express any preference for how the application should be handled, the Corps will retain the application without processing it during this interim period.

6. RESPONDING TO QUESTIONS FROM THE PUBLIC. During this interim period, and pending further guidance, Corps and EPA field offices will not issue any additional guidance documents relating to the District Court's decision. However, in responding to questions from the press or the regulated public on the subject of the District Court's decision, it is appropriate to recognize that the Corps and EPA disagree with the District Court's decision, and that the government has filed a notice of appeal with the U.S. Court of Appeals for the District of Columbia and intends to file motion to stay the District Court's judgment. Any person who is contemplating undertaking any of the activities specified below in this document should be encouraged to consult with the appropriate Corps District office before proceeding.

7. During this interim period, the following considerations are provided to assist Corps and EPA field offices in making determinations whether specific enforcement actions and permit applications might be affected by the District Court's decision.

B. SCOPE OF COURT'S DECISION

The Court's decision only has implications for a particular subset of discharges of dredged material, i.e., those activities where the only discharges to waters of the U.S. are the relatively small volume discharges described by the Court as "incidental fallback," i.e., "the incidental soil movement from excavation, such as the soil that is disturbed when dirt is shoveled, or the back-spill that comes off a bucket and falls into the same place from which it was removed." Slip opinion at 5. Enforcement actions and permit processing covering activities that the Corps and EPA would clearly regulate because they involve discharges of dredged or fill material to waters of the U.S. other than "incidental fallback" should continue and should not be delayed by this guidance.

1. Types of Discharges Covered by the Court Decision

Examples of "incidental fallback" include: dredged material that falls from a dredge bucket as it is raised up through the water column; dredged material that falls from a dredge cutterhead or clamshell bucket as it is moved through the sediment to pick up and remove soil; and the movement of dredged material around a backhoe bucket as it is moved through the soil in its normal, routine use in lifting and removing sediment.

2. Types of Discharges Not Addressed by Court Decision

The Court's decision states that, "Incidental fallback does not include soil movements away from the original site. 'Sidecasting,' which involves placing removed soil alongside a ditch, and sloppy disposal practices involving significant discharges into waters, have always been subject to Section 404. 58 Fed. Reg. At 45,013." Slip opinion at 5, n. 4. Consistent with the Court's decision, examples of activities involving discharges other than "incidental fallback" include ditching activities where the excavated material is sidecast into waters of the U.S., and

activities that result in either the temporary or permanent stockpiling or disposal of dredged material in waters of the United States.

If an activity results in the movement of substantial amounts of dredged material from one location to another in waters of the United States (i.e., the material does not merely fall back at the point of excavation), then the regulation of that activity is not affected by the Court's decision. For example, based on many years of experience, the Corps and EPA believe that mechanized landclearing typically involves pushing and moving substantial amounts of soil with bulldozer blades and other equipment from one location to another in waters of the United States in amounts that are greater in volume and different in kind from the "incidental fallback" defined in the District Court's decision. Nevertheless, during this interim period, determining whether a proposed mechanized landclearing activity is affected by the American Mining Congress decision should be made on a case-by-case basis. To assist the regulated public, agency field staff should be available to consult with any member of the public who believes that he or she can conduct mechanized landclearing activities in waters of the U.S. with no discharges other than "incidental fallback," as defined by the District Court.

3. Activities Potentially Affected by Court Decision

Discharges associated with the following activities might, in certain specific circumstances, consist entirely of "incidental fallback"; alternatively, these activities can also be associated with more substantial discharges that would trigger Section 404 even under the Court's decision. (Note that any of these activities that occur in traditionally navigable waters of the U.S., i.e., Section 10 waters, requires a permit under Section 10 of the Rivers and Harbors Act of 1899.) Each situation should be carefully evaluated to determine whether, and to what extent, the activity is potentially affected by the Court's decision. The following activities are among those that require case-by-case examination to determine whether they are affected by the Court's decision. The list is not intended to be exhaustive of the types of activities potentially covered by the Court's decision.

- mining activities, including sand and gravel mining, aggregate mining, precious metals and gem mining, recreational mining, and small-instream hydraulic dredges;
- ditching and draining activities, including ditching to lower the water table, ditching to drain wetlands, and removal of beaver dams;
- maintenance dredging activities and excavation for currently used flood control projects or for previously abandoned flood control, and irrigation or drainage projects;
- channelization and the reconfiguring or straightening of streams;
- other excavation activities.

In sum, if the activity in question involves only "incidental fallback," as defined by the District Court, it is covered by the Court's injunction. However, if the activity is associated with other discharges of dredged or fill material in waters of the United States, it is not affected by the Court's injunction and should continue to be regulated. Corps and EPA field staff are advised to contact their respective headquarters office if additional guidance is desired.

FOR THE COMMANDER:

Robert H. Wayland, III
Director, Office of Wetlands, Oceans,
and Watersheds
Office of Water
U.S. Environmental Protection Agency

Charles M. Hess
Chief, Operations, Construction
and Readiness Division
Directorate of Civil Works
U.S. Army Corps of Engineers

Eric V. Schaeffer
Director, Office of Regulatory Enforcement
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency

Senator INHOFE. It will be placed in the record, but the letter that I'm referring to, are you saying that you agree with that letter?

Mr. WAYLAND. Senator, you posed a question about the vulnerability of a project sponsor to enforcement. The description you have just read pertains to whether or not a permit would be required if the—and we're making—I'm making a distinction. Our guidance makes a distinction between enforcement—that is to say penalties or administrative actions to rectify a violation of the Clean Water Act—versus the permit requirements, again attaching to the activities that may have begun during the term of the district court's decision but which might be—where the state of the law might very well change after the appeals court rules.

So if activity was started on a project for which the appeals court later determines that section 404 applies and a permit is required, yes, we would require a permit, and that's stated clearly on page 2 of the guidance under the caption, "New or pending permit actions."

Paragraph 4 of our guidance memorandum addresses enforcement actions.

Senator INHOFE. This is something that is a very serious thing that we must consider. It might even precipitate some legislation on our part.

I thank the panel very much. I'm not sure, but I think there is another—Senator Sessions.

Senator SESSIONS. I don't really have any questions at this time, Mr. Chairman, but I would just associate myself with the concerns that have been addressed.

I think, when you're dealing with people's property and the Government sets new regulations that impact the use of the land, I think we ought to have an appropriate opportunity for people with interests in that regard to express themselves.

In my State people are very concerned about these matters. We'll be looking at them very carefully. I thank you for the leadership that you are giving us in discussing it openly and so we can make some good decisions regarding these issues.

Senator INHOFE. Thank you, Senator Sessions.

We thank the panel very much.

We'd now like to call the second panel. We have Mr. Darrel Seibert, president of the Seibert Development Corporation, Hudson, OH, and the National Association of Homebuilders; Mr. James Noyes, assistant director, Los Angeles County Department of Public Works and the organization I just referred to in a question—I hope that you'll address that in your remarks; Professor Donald Siegel, professor of earth sciences in Syracuse; Mr. Don McKenzie, conservation policy coordinator, Wildlife Management Institute; Mr. Derb Carter, Southern Environmental Law Center, Chapel Hill, NC; and Mr. Thomas W. Winter, president, Winter Brothers Material Company, St. Louis, MO, for the National Aggregates Association.

We'll go ahead and start in that order. We'll first recognize Mr. Seibert.

STATEMENT OF DARREL SEIBERT, PRESIDENT, SEIBERT DEVELOPMENT CORPORATION, HUDSON, OH, ON BEHALF OF THE NATIONAL ASSOCIATION OF HOMEBUILDERS

Mr. SEIBERT. Thank you very much, Mr. Chairman.

Ladies and gentlemen, my name is Darrel Seibert from Akron, OH. I'm here to testify today on behalf of the 190,000 member firms of the National Association of Homebuilders. The vast majority of NAHB members are small business owners.

I would like to talk about two related but separate issues involving recent regulatory and judicial developments concerning wetlands. The two issues are the regulatory decision by the U.S. Army Corps of Engineers to eliminate Nationwide Permit 26 and the recent court decision overturning the Tulloch rule. I will address them in that order if I have time.

First, I would like to talk to you about the economic impact to our industry resulting from the Corps' changes made to NWP 26. Since the NWP 26 was first authorized in 1977, it has remained essentially the same, allowing the wetland conversions from 1 to 10 acres using the NWP 26 permit.

But the Corps' recent change to NWP 26 has created a great deal of uncertainty for our industry. The Corps received over 400 comment letters on changing NWP 26. I'm told that 70 percent of these letters agreed with NAHB's position—to leave the permit as it has been since 1977.

The majority of the local Corps districts who filed comments also supported no changes to NWP 26. Nonetheless, the Corps ignored those comments and on December 13, 1996, issued a final rule that reduced the threshold limits, as you know from testimony, from 1 acre and 10 acres to ⅓ and 3 acres.

The Corps also decided that the new, much more restrictive NWP 26 will be completely eliminated in 18 months.

I want to emphasize that, without these permits or a viable alternative solution, many of our members will be forced out of business. The scarcity of lots and homes that will be caused by this rule change will cause home prices to dramatically escalate and cause many Americans to lose the opportunity to own a home.

I would like to emphasize that most of the wetlands that builders convert are marginal pot holes in fields. They are created many times by a truck or dozer leaving ruts or blocked small swales where cattails grow. As a developer, I assemble a number of these small depressions, the marginal wetlands, that in total can add up to an acre and be filled to allow road or lots to be created.

I believe most people envision big dozers filling many acres of pristine water when they think about the NWP 26. The vast majority of wetlands are not pristine wetlands being dozed full of dirt.

The Corps decided to make many of these important and substantial changes to NWP 26 without public notice or hearing, which is a violation of SBREFA.

The Corps claims that it made a decision to phase out NWP 26 based on comments to the proposed rule expressing concern that the old NWP 26 allowed unacceptable wetland losses. Our numbers from three reliable sources show there was actually a net increase in wetlands created under the old NWP 26.

In place of the 6,500 acres of wetlands converted under the old NWP 26 in 1995, 7,800 new acres of wetlands were created or restored. The net increase was even better in 1996.

If the old NWP 26 created or restored more wetlands than were impacted, how can the Corps also argue that the permit allowed too great an impact on wetlands?

The Corps suggests the new rule will increase the number of individual permits it will have to process by 10 percent. NAHB believes the number will be far greater. We believe the Corps did not consider the potentially significant increase in individual permit applications resulting from the maximum 500 linear feet of stream disturbance rule change that they added at the very end.

Mr. Davis from the Corps indicated that if no action under NWP 26 was taken within 45 days you could proceed and that the general permits are processed in 13 days. This is not my experience in Ohio.

Why did NAHB file suit on NWP 26 rule change? NAHB filed suit because the U.S. Army Corps of Engineers chose to significantly modify and eliminate NWP 26 without proper public notice, comment, or review, or showing us workable replacement permits which would assure us that we could continue our businesses.

Further, NAHB feels it is necessary to support a legislative solution to the problem caused by the modification and elimination of NWP 26.

Congressman Neumann is working on the legislation in the House, as I understand it.

On a proactive basis, to create more wetlands and to meet the national goal of no-net-loss, NAHB is pursuing a mitigation banking program which promotes restoring wetlands while giving builders the degree of certainty needed to conduct our business.

Builders have demonstrated they have the knowledge and ability to restore and create new wetlands to create those lost in the growth process.

Senator INHOFE. Mr. Seibert, we're running out of time here. If you could make a real quick conclusion, we'll go on with the other witnesses.

Mr. SEIBERT. Well, we feel it's essential that we are allowed to continue. To put a mitigation banking program in effect is going to take us a minimum of 5 years. We're working on that as hard as we possibly can, but we feel that we have an opportunity to work with the environmental lobby and the community and to allow us to continue to work on our mitigation banking program, and also to extend the period of time. The 18 months that they want to cut-off our permits creates the uncertainty that we feel is devastating to our industry.

Thank you.

Senator INHOFE. Thank you, Mr. Seibert.

Mr. Noyes.

STATEMENT OF JAMES NOYES, ASSISTANT DIRECTOR, LOS ANGELES COUNTY DEPARTMENT OF PUBLIC WORKS, ON BEHALF OF THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES

Mr. NOYES. Thank you, Mr. Chairman. Good morning. It's a pleasure to be here today.

One of the problems that flood control agencies around the Nation face is the maintenance of what we call "natural channels." These are channels with levees typically on either side where the ground in between is natural in origin. Over a period of time, what will happen is deposition of sediment will occur in these channels, vegetation growth will occur in these channels. For the older channels in the country, they were not designed to accommodate these kinds of features.

It's essential that, if those facilities are to provide the intended flood protection, that that material must be removed, and for years we have been able to do that.

With the introduction of the Tulloch rule in 1993, the ability of flood control agencies to maintain those channels became greatly impaired. When the channels aren't maintained, their ability to carry floodwaters decreases with the corresponding increase in the flood hazard threat to adjoining communities. We find that this is an intolerable situation, and we must go out and we must do the work.

We felt, along with the plaintiffs, that the Tulloch rule was, in fact, our exceedance of the Corps' understanding of the Clean Water Act. The Association filed an *amicus* brief in support of the plaintiffs and were very relieved as to the court action thus far in the proceedings. We are following those developments very closely.

What we propose is that the Congress enact an exemption to flood control agencies for flood control facilities that are manmade. In those instances where we've gone in and have constructed a flood control facility, that we would be exempted from the provisions of 404 and, in fact, be allowed to maintain those facilities such that we maintain the ability of them to provide the flood protection to the community.

Such an exemption, in fact, was approved by the House a couple years ago in one version of the Clean Water Act.

We have talked a little bit this morning about nationwide permits. When the new nationwide permit was announced here a year and a half or so ago, we were very excited because there was to be a nationwide permit that we thought would cover our situation, Nationwide Permit 31. However, the way the rule has been published and my interpretation of the rule, it puts us in no better position, I feel, than where we were a couple of years ago.

We have a case in my county, Los Angeles County, where we began discussions with the Corps and other Federal and State regulatory agencies in November 1995 to come up with a permit and a program to allow us the maintenance of these channels. We are now currently almost in July 1997, 20 months later, and we still don't have any indication from the Corps or the regulatory agencies as to what any permit requirement might be.

Furthermore, the Corps has told us that they feel in our situation it's better to go ahead and try to get a general permit instead of trying to use Nationwide Permit 31.

So we are very anxious and, like I say, we strongly recommend that there be a Federal law exempting flood control facilities from the 404 provisions.

The ironic fact about this is that in many cases these channels were built by the Corps of Engineers with counties and other local government being what's called the local sponsoring agency, which assume maintenance responsibility upon completion of the project. Now we find—the Corps finds themselves in the position where I get documents from the maintenance staff of the Corps telling me, "Clear out the channels, remove the vegetation, you're losing flood protection, you're causing a threat to the community," yet the regulatory people in the Corps are telling me, "No, you can't do that," or we're going to have to go through some lengthy permit process with who knows what kind of expensive and time-consuming mitigation measures.

That concludes my statement. Thank you very much.

Senator INHOFE. Thank you, Mr. Noyes.

Dr. Siegel.

STATEMENT OF DONALD SIEGEL, PROFESSOR OF EARTH SCIENCES, SYRACUSE UNIVERSITY, SYRACUSE, NY

Mr. SIEGEL. Mr. Chairman and members of the committee, I'm Donald Siegel, professor of earth sciences at Syracuse University. My academic and research specialization is wetland hydrology and chemistry, the study of how water and chemical substances move in and out of wetlands systems.

I was a member of the National Academy of Science panel on wetland characterization, which completed its report in late 1995, and I gather that I was invited today to answer questions on the scientific conclusions reached by NAS panel related to the science and the regulation of headwater and isolated wetlands.

Although I have been in formal contact with other members of the former committee regarding the issues at hand, I do submit this testimony entirely on my own behalf.

The major issue regards Nationwide 26, recently reauthorized and revised by the Corps. Nationwide 26 regulates headwaters and isolated wetlands separately from wetlands directly connected to navigable surface water bodies. The implication of this regulatory separation is that headwater and isolated wetlands are scientifically less valuable with respect to maintaining habitat, protecting water quality, and controlling floods than are wetlands directly connected to streams and rivers.

Wetlands science in the past 10 years or so has shown otherwise. The NAS wetlands panel recognized that small, isolated wetlands can be very important to maintain regional ecosystem health and surface water quality and control some flooding. For example, isolated prairie pothole wetlands in the north central States constitute less than 5 percent of the geographic area but support a large percentage of the total populations of the most abundant waterfowl.

Isolated wetlands and headwater areas, in general, effectively remove suspended sediment contaminants and harmful nutrients

from surface waters. Indeed, there is mounting scientific evidence that small-scale wetland disturbance in the watersheds of the smallest tributaries of streams affects stream water quality proportionately more than the same amount of disturbance along larger reaches of streams.

In wetlands scientific circles, it is now being argued that the greatest emphasis on wetland protection should, in fact, be placed on maintaining headwater and isolated wetlands, and that wetland size may be less important than wetland length. However, headwater and isolated wetlands may be less important or have "less value" in some regions than in other regions of the country with respect to sustaining biological resources deemed important by society.

For example, the NAS Wetlands Committee felt that it is important to preserve prairie pothole wetlands in the Great Plains States and playa lakes and vernal ponds in the arid western states because these places are effectively the wettest parts of a generally dry landscape; therefore, they have very special and important biochemical and water quality functions within the entire watershed context. However, some isolated wetlands in the humid northeastern or north central States may be less important than those in dry places with respect to water quality and biological habitat because these wetlands occupy a much larger part of the regional landscape.

Previous to the Corps' 1996 revision to Nationwide 26, wetlands less than 1 acre in size could be effectively filled without notifying the Corps, and the cap on maximum allowable acreage for each wetland fill was 10 acres. The 1996 revision, effective for 2 years, now requires that the Corps be notified of any proposed filling greater than ⅓ of an acre in size, and a maximum allowable fill is 3 acres.

The Corps' intent in the Nationwide 26 revision is to replace the current 2-year provisional regulations with activity-specific replacement general permits, regionalized to best-achieve balanced wetland protection. I agree with replacing the current permit process with regional activity-specific general permits. The Corps has moved in the right direction to produce a scientifically credible permit system while maintaining fairness to wetland users. However, the Corps' task to regionalize and develop activity-based permitting will be scientifically formidable.

First, it is difficult to assign quantitative thresholds governing acceptable limits to water quality, habitat health, and potential for flooding caused by individual wetland loss. Impacts on these wetland "functions" are often cumulative and unidentifiable until substantive loss has already occurred. Second, regionalization can be scientifically made according to ecological, hydrologic, landscape, and climatic criterion. I urge the Corps to actively solicit scientific advice on which classification method of these best suits the regulatory process. The Corps should also quickly and publicly define what activities they expect to consider in their evaluation process in the future.

In summary, I think that the new provisional changes to Nationwide 26 are appropriate and will lead to a more scientifically meaningful and politically sound regulation of our Nation's wetlands. I

applaud the Corps' effort to both constrain the piecemeal loss of isolated and headwater wetlands by temporarily implementing stricter wetland regulations while concurrently working to develop scientifically meaningful activity-based regionalization of Nationwide 26.

I think the Corps has struck a balanced position with respect to wetland regulation somewhere between what I view are extreme positions of preventing all further nationwide wetland loss to allowing unrestricted filling of isolated and headwater wetlands.

I thank the Committee on Environment and Public Works for soliciting my views, and I welcome any questions.

Senator INHOFE. Thank you, Doctor Siegel.

Mr. McKenzie.

STATEMENT OF DONALD F. MCKENZIE, CONSERVATION POLICY COORDINATOR, WILDLIFE MANAGEMENT INSTITUTE

Mr. MCKENZIE. Thank you, Mr. Chairman.

The Wildlife Management Institute appreciates this opportunity to support the conservation of wetlands of national and international importance.

I am before you today as a professional waterfowl biologist and as a private landowner. I own and reside on nine rural acres in rural Loudoun County, VA. One-third of my property is wetlands, thus I am now subject to some of the very regulations that are under consideration here today. Yet, wetland regulations have not impeded my or my family's use of our property at all. We've met all our personal goals for the property in the several years we've lived there.

WMI's primary points are simple. First, drainage and excavation of wetlands needs to be clearly regulated by section 404 of the Clean Water Act.

Second, small wetlands are vital habitat for many species of wetland-associated wildlife and also should be protected by section 404.

Third, the interests of millions of American sportsmen and sportswomen are directly affected by the fate of wetlands.

WMI is disappointed that the Tulloch rule was overturned. While we have no opinion on the legal merits of that case, our professional resource management judgment is that drainage and excavation are leading causes of wetland degradation and can be as damaging to wetland functions as deposition of fill materials.

Therefore, we strongly believe that the Clean Water Act should regulate drainage and excavation of wetlands, whether by administrative or legislative action.

WMI applauds the recent action of the Corps to phaseout Nationwide Permit 26, which has provided virtual automatic approval for all activities on wetlands smaller than 10 acres. This permit constituted the single largest and most damaging loophole in the Clean Water Act's regulatory program and has been largely responsible for impeding the achievement of no-net-loss of wetlands.

Furthermore, Nationwide Permit 26 has been a source of inconsistency between the Clean Water Act and USDA's Swampbuster authority, which does not provide an acreage exemption. WMI supports efforts to make section 404 and swampbuster as consistent in

favor of conservation as reasonably possible, given the fundamental differences between those two programs.

Suitable habitat is the fundamental requirement of all wildlife. For example, ducks require duck habitat. During the breeding season, duck habitat consists of a mixture of small, medium, and large wetlands with water, along with upland nesting cover in the same places at the same time. If any of these habitat elements is missing, ducks and other wetland wildlife cannot survive, much less thrive.

History proves that abundant duck habitat depends on Federal measures to protect wetlands. Intensive wetland drainage in the United States that peaked during the 1960's and 1970's, combined with new fencerow-to-fencerow farming techniques, resulted in two decades of declining duck populations that reached historic lows in the 1980's. Only in the last 4 years has the duck decline apparently been stemmed and even reversed.

The United States recently is enjoying increasing duck numbers, improved duck hunting, and liberalized hunting seasons, which demonstrates that conservation does pay off.

Two actions of the Federal Government have been responsible for ensuring that adequate habitat was in place when the water finally returned to the prairies. First, Federal protection of remaining wetlands has greatly reduced the rate of wetland losses. Section 404 protects the public interest by prohibiting the filling of wetlands. The USDA disincentive program, known as "swampbuster," attaches wetland conservation strings to the voluntary receipt of public agriculture subsidies.

While neither program individually provides adequate protection for all important wetland types, the two programs have been mutually reinforcing, with positive conservation results.

Second, Federal investments in restoration of degraded wetland habitat are making meaningful progress toward rebuilding the Nation's wetland habitat base. Wetland conservation programs such as the North American Wetlands Conservation Act, the conservation reserve program, the wetland reserve program, and Fish and Wildlife Service's Partners For Wildlife program are nearly offsetting the remaining rate of wetland losses.

The United States now is approaching the hard-earned national goal of no-net-loss of wetland functions. This combination of Federal actions—protection, and investment—is proving successful at rebuilding important public resources; however, this hard-earned progress can be lost quicker than it was gained. A reduction in either of these Federal actions is certain to catalyze the resumption of net loss of wetlands. That development would, in turn, cause populations of ducks and other wetland wildlife to decline once again.

The interests of duck hunters are directly dependent on duck populations, which, in turn, are directly dependent on abundant duck habitat. A foundation of scientific wildlife management is that harvest by hunters must not exceed the ability of the species to sustain itself. Thus, the Fish and Wildlife Service is charged with carefully regulating hunting seasons depending on the best available data on population status and trends.

I have attached to my written testimony the Service's adaptive harvest management framework that is used to determine how liberal or how restrictive the hunting season will be each year based on that year's waterfowl populations.

I see that my time is up. I will cut my testimony short here, merely concluding that those who support hunting, hunters, and other wildlife enthusiasts cannot have it both ways. Waterfowl hunting cannot be maintained without continued Federal protection and investment in wetland resources.

Thank you.

Senator INHOFE. Thank you, Mr. McKenzie.

Mr. Carter.

Senator CHAFEE. Mr. Chairman, I have to go and will be in and out. First I wanted to note that Professor Siegel is a University of Rhode Island graduate, so we welcome you. Second, I think the points that have been made here have been excellent. Mr. Chairman, I regret that I kind of will be back and forth. I think it's interesting that the protection of the small wetlands, the stress that's given to that seems to be very important. It isn't just the big wetlands that count, it's the small wetlands.

Thank you very much.

Senator INHOFE. Thank you, Senator Chafee.

I'm going to go ahead and continue this. I believe that Senator Hutchinson will be back, and then I'll run and vote and make this happen.

Mr. Carter.

STATEMENT OF DERB S. CARTER, JR., SOUTHERN ENVIRONMENTAL LAW CENTER, CHAPEL HILL, NC

Mr. CARTER. Mr. Chairman, members of the subcommittee, thank you for the invitation and opportunity to testify today.

My name is Derb Carter. I'm an attorney with the Southern Environmental Law Center in Chapel Hill, NC. For over 15 years, I've represented citizens, communities, and the fishing industry to protect wetlands in the southeast. I've seen the Federal wetlands protection program up close and on the ground. I was a lead attorney in the Tulloch case in North Carolina.

What I would like to do today is focus on the Tulloch rule and, in any remaining time I have, give you a few perspectives on Nationwide Permit 26.

But even before I do that, let me give you a quick overview and perspective of things going on in North Carolina as we speak.

Looking back historically, we've lost, as many States, a great number of wetlands. North Carolina has lost about one-half of its historic wetlands. The remaining wetlands are primarily coastal, surrounding the Nation's second-largest estuary and the primary fish nursery area for the entire mid-Atlantic region.

Like the Chesapeake Bay to the north, our estuaries are suffering from excessive pollution, particularly nutrient runoff from the surrounding lands. This is leading to extensive algae blooms, massive fish kills now in the millions of fish in our coastal estuaries, and the recent emergence of a toxic algae form that is not only killing fish but leading to public health advisories in the coastal area of North Carolina.

We're in the third year of a total moratorium on the issuance of commercial fishing licenses in North Carolina due to precipitous declines in fish stocks, much of it related to water quality degradation and habitat loss, including wetland loss.

The remaining wetlands in North Carolina, as many other coastal States, are the first line of defense to protect our remaining wetland quality and fisheries habitat. The State of North Carolina has recently issued comprehensive rules under section 401 of the Clean Water Act for the first time to put in place a wetland protection and mitigation program.

The State of North Carolina is working in full partnership with the Corps under its section 404 authorities to protect, mitigate, and restore wetlands in the State.

This is the setting in which the Tulloch case arose in coastal North Carolina, and it's important to understand the facts of that case to understand the reason for the rule. In that case, developers with the specific intent to circumvent permit requirements ditched and drained hundreds of acres of wetlands adjacent to North Carolina's estuaries. They used modified equipment and took great care to discharge only small amounts of dredged material back in the wetlands during their ditching and clearing of the site.

When this case was brought to our attention after the Corps determined that these were no longer wetlands and development could proceed with no environmental review or permits, we examined the law, and it appeared clear to us that these wetland drainage activities should require a permit. To reach this conclusion, one need not go beyond the plain language of the statute.

Section 301 of the Clean Water Act prohibits the discharge of any pollutant. Section 502 defines the discharge of pollutant to include any addition of any pollutant, specifically including dredged material from any point source into a water of the United States, including wetland. Section 404 authorizes the Corps to issue permits for the discharge of dredged or fill material, with no exemptions based on the quantity discharged.

Moreover, section 404(f) states that any discharge of dredged or fill material in a wetland that is incidental to any activity having as its purpose bringing a wetland into a use in which it was not previously subject, where the flow and circulation is impaired or the reach of the water is reduced, shall be required to have a permit.

Certainly the law required a permit for the discharges of even small amounts of dredged material in these coastal North Carolina wetlands to convert them to uses that not only eliminated the wetlands but harmed the estuaries.

We were able to settle the case with the promulgation of the Tulloch rule. We believe it's an imminently sensible rule, fully consistent with the purpose of section 404 to protect our remaining wetlands from unregulated and unmitigated destruction.

The decision in the AMC case was unexpected and, to our minds, unfortunate. And, like the Corps, we disagree with that district court decision and are appealing it.

One need not look further than the two developments that gave rise to the Tulloch rule to forecast the environmental damage that will result if this decision is upheld. The impacts of drainage and

conversion of the 700 acres of wetlands of these two developments destroyed important fish and wildlife habitat. The State of North Carolina has permanently closed the adjacent waters to the taking of shell fish. Neighboring properties are being flooded. The persons who bought property at these two drained developments are suffering extensive flooding and are turning to the county for public assistance to address their flooding problems.

So, in conclusion, I would say: what should Congress do? As this case proceeds through the courts, my respectful recommendation is to let the judicial process take its course. But when Congress does reauthorize section 404, don't draw a distinction between filling and excavating and a regulatory program and explicitly include these activities that have resulted in the destruction——

Senator INHOFE. Thank you, Mr. Carter.

We're going to have to recess at this point or I'm going to miss this vote. I thought that perhaps Senator Hutchinson would make it back in time.

So, Mr. Winter, we'll hear your testimony as soon as he returns. He'll be right back.

We're in recess.

[Recess.]

Senator SESSIONS [assuming the chair]. We're going to start. Senator Inhofe has asked that I chair the committee and finish hearing the testimony, and he'll be back shortly. It's just going to be one of those days with the votes. I guess that's what they pay us for.

I believe, Mr. Winter, we'll be glad to hear from you at this time.

STATEMENT OF THOMAS W. WINTER, PRESIDENT, WINTER BROTHERS MATERIAL COMPANY, ST. LOUIS, MO, ON BEHALF OF THE NATIONAL AGGREGATES ASSOCIATION

Mr. WINTER. Thank you, Senator.

I'm Thomas W. Winter, president of Winter Brothers Material Company in St. Louis, MO, and chairman of the board of the National Aggregates Association.

First, I want to thank Chairman Inhofe, Senator Graham, and the members of this subcommittee for providing me with the opportunity to appear here today.

As chairman of the board of directors of National Aggregates Association, NAA, I am here today to speak on behalf of the member companies that make up our association. I want to emphasize our willingness, not only as an association but as an industry, to be helpful to the members of this subcommittee, as well as the entire House and Senate.

We are committed to providing you with any information you may need or in answering any questions in this process. We regret that the short notice to which we have been given an invitation to testify has not provided us with the time we would normally need to provide detailed information. We are, however, preparing a detailed submission for use in the official record of this hearing.

We are truly an organization focused on the delicate balance between the interests of small business and its agenda and the interests of sound policymaking in our Nation.

NAA is an international trade association representing producers of construction aggregates, which is the largest mining industry in the United States.

Our industry produces over two billion tons of sand, gravel, crushed and broken stone sold annually in the United States dedicated to the maintenance and development of our Nation's infrastructure. Of course, wetlands is a very sensitive issue to our industry, and laws and regulations pertaining to activities that may impact them are important to us, as well.

Today I would like to touch on two related issues involving recent wetlands regulatory and judicial developments, not because we as an industry have mastered our position on these issues, but because, due to the grave uncertainties and confusion surrounding these issues, we as an industry have not.

Members of the subcommittee, I would like to briefly address the controversy surrounding the Tulloch rule and the Nationwide Permit 26. These two issues serve as a very real example of the many uncertainties and confusion that we as an industry must operate under in a regulatory system that has become all too overburdensome and over-cumbersome.

The Tulloch rule and Nationwide Permit 26 are symptoms of the overall problem and are merely emblematic in nature. This confusion and uncertainty are of great concern to the aggregates industry and, unfortunately for our industry, the communities we serve. Confusion in the sense of misinformation or no information often comes from Federal agencies to State and field representatives. As alarming and also of great concern to us is the sense of uncertainty and confusion we believe exists among those who actually regulate us.

Can I continue to operate, prosper, and continue to be an important part of our Nation's highway and infrastructure program should this environment adversely affect our trust and confidence in the system?

As such, I'm here to ask for consideration of the following:

Congress should consider the elimination of the bureaucratic labyrinth in which our industry currently operates as it relates to wetlands.

Congress should clarify current law and regulations which have been poorly implemented and communicated to the regulated community.

And Congress should take notice of NAA's sincere and dedicated commitment to work and participate in this process.

The first issue I'd like to mention is the Tulloch rule. The statutory foundation of the Federal wetlands program, section 404 of the Clean Water Act, regulates the discharge of dredged or fill material into the water of the United States at specific disposal sites. In August 1993, the Corps of Engineers adopted the Tulloch rule, thereby redefining the term discharge of dredged material to include incidental fall-back. Because excavation and land clearing almost inevitably results in some sort of incidental fall-back, and because under the rule that fall-back now constitutes a discharge of dredged material, the Tulloch rule made all removal activities subject to a permit requirement.

The Tulloch rule is an example of just one of the many uncertainties that has caused confusion and stymied our industry's growth and prosperity.

While NAA supports the notion that additional activities harmful to wetlands should be regulated, the association opposes illegal effort to go beyond the statutory authority of the Clean Water Act and expand through regulation of a program not promulgated by the Nation's elected representatives.

The proper forum to expand protection for wetlands is in Congress, where the expanded coverage can be combined with reasonable reform of the current regulatory program and to receive congressional oversight. Only then can we provide more protection for environmentally sensitive wetlands, balancing the economics and the environmental tradeoffs, as well as more-efficient permitting process.

NAA, along with the American Forest and Paper Association, the American Road and Transportation Builders Association, the National Association of Homebuilders, and the National Mining Association challenged this rule by successfully making the argument that Tulloch was contrary to the intent of Congress and went beyond the scope of authority provided by Congress to the Corps of Engineers under the Clean Water Act.

NAA is pleased with the decision of the Federal district court, and we will continue to work with allied organizations to ensure that it is upheld.

Let me, however, be clear: the decision does not mean that we are not regulated as an industry. We are regulated by a myriad of local and State permits and regulations. We view the court's decision as a reasonable judicial opinion and we concur with the Court's ruling that the regulation expanded beyond the intent of the Clean Water Act.

As alarming, the NAA has received numerous complaints and inquiries, all gravitating around the notion or misinformation that stated the ruling only applied to plaintiffs in the lawsuit or was only applicable in the District of Columbia. This serves as an example of the confusion under which we must operate and attempt to succeed in providing the vital raw material needs of our communities.

We need, we rely, and we very much depend on district representatives from the Corps to convey timely and accurate information. The Corps and EPA issued formal guidance in April 1997, and I thank the other plaintiffs in the lawsuit for their efforts to compel the Corps to issue this guidance to alleviate some of the confusion.

Senator SESSIONS. If you can wrap up as you are able. That's all right. Take a minute.

Mr. WINTER. I was going to make some comments on Nationwide 26, but I——

Senator SESSIONS. You have a minute or two.

Mr. WINTER. The National Aggregates Association represents business interests whose focus embrace the interests of the American economy. A large part of our industry, which is in every State and nearly every congressional District, are small producers. If for no other purpose, we would like to make this subcommittee aware of our strong desire to work with you in the development of clear,

concise, progressive legislation that lends itself to reasonableness and responsible policymaking.

The aggregates industry is committed to working with all sectors and interests in wetland preservation. We look forward to working with each of you and your respective staff in this regard.

Again, I thank the members of this subcommittee for holding these hearings. We appreciate your time and consideration of our views.

Senator SESSIONS. Thank you very much.

We appreciate those remarks. You're out every day doing the kind of work that I know causes you to confront these regulations, and we appreciate your insight into it.

I don't know if—Mr. Winter has just finished. I believe that's the last panel member, Mr. Chairman.

Senator INHOFE [resuming the chair]. That's correct. It is. We'll begin now with our questions. I thank you for coming back.

Mr. McKenzie, I am an avid waterfowl hunter and have been for quite some time, and in your testimony—and I think we all know it's true the duck population is pretty healthy right now and has increased, and yet you said you can't have it both ways during the time that we experienced that increase and Nationwide 26 was in full force. Are we having it both ways now?

Mr. MCKENZIE. No, we're not. Duck populations depend on the small wetlands, middle-sized wetlands, big wetlands, upland nesting cover, and water all being present in the same place at the same time.

During the years 1985 and forward, Swampbuster was protecting small wetlands and the Conservation Reserve Program was in operation restoring wetlands and millions of acres of upland nesting cover in the prairie pothole region. The only thing that was lacking during the years 1985 through about 1991 or 1992 was the water. We were in several years of pretty serious drought then. And that drought, on top of the intensive farming techniques and the wetland drainage of the 1960's and 1970's, the cumulative effects of all those impacts were too much for waterfowl populations. They hit historic lows during the late 1980's.

When the water finally returned to the prairies in the 1990's, there were, indeed, still small wetlands remaining, thanks to Swampbuster. There were millions of acres of upland nesting cover, thanks to the Conservation Reserve Program, amid those wetlands in the prairie potholes, and the water was finally there, so the ingredients were present and the ducks have responded.

If any of those ingredients were to be taken away, the ducks will respond accordingly and we'll have declining populations and then more-restrictive hunting seasons once again.

Senator INHOFE. So we're not having it both ways?

Mr. MCKENZIE. I don't believe so.

[Additional information submitted for the record follows:]

Wildlife Management Institute
1101 14th Street, N.W. • Suite 801 • Washington, D.C. 20005
Phone (202) 371-1808 • FAX (202) 408-5059

ROLLIN D. SPARROWE
President
LONNIE L. WILLIAMSON
Vice-President
RICHARD E. McCABE
Secretary

June 27, 1997

The Honorable James M. Inhofe, Chairman
Subcommittee on Clean Air, Wetlands, Private Property and Nuclear Safety
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I am writing to supplement my answer to a question you asked me in yesterday's hearing on *Administrative Changes and Judicial Decisions Relating to Section 404 of the Clean Water Act.* I respectfully request that this letter be appended to the text of my remarks for the record.

In response to my conclusion that the U.S. cannot enjoy continued good duck hunting without protecting small wetlands, you asked whether we aren't *already* having it both ways, since duck hunting has been improving while the Nationwide Permit 26 loophole was in effect. I, in turn, responded "No, we are not having it both ways," but then provided an incomplete explanation. Because your astute question is so fundamentally central to the point that WMI is making, it deserves a more complete answer.

During the 1960s through early 1980s, U.S. agriculture was attempting to feed the world by fencerow-to-fencerow farming. This intensification stimulated unprecedented wetland impacts, with the result that agriculture was responsible for more than four-fifths of all wetland drainage in the U.S. Prior to 1985, Section 404 of the Clean Water Act was the only substantial federal protection for wetlands. However, Nationwide Permit 26 provided a loophole for virtually unconstrained drainage of wetlands less than 10 acres. On top of this widespread drainage and conversion of land to agriculture, an extended drought struck the prairies during the 1980s. During this period--from the 1970s through the 1980s--continental duck populations declined to their lowest levels on record and duck hunting seasons were restricted accordingly.

The Food Security Act of 1985 turned the tides. Two landmark provisions have converted this grim situation into a modern-day conservation success story. First, the "Swampbuster" disincentive program attached wetland conservation strings to the voluntary receipt of federal agriculture subsidies. Because Swampbuster provided no exemption for small wetlands, it was quickly effective in dramatically slowing the agricultural drainage of small

wetlands that Section 404 long has allowed, via Nationwide Permit 26. Second, the Conservation Reserve Program (CRP) restored millions of acres of suitable upland nesting cover--in addition to restoring several hundred thousand wetland basins--amid the now-protected small wetlands of the prairie pothole duck breeding grounds.

Because Swampbuster protected small wetlands, and CRP invested in restoration of small wetlands and adjacent upland nesting cover, ideal habitat was ready for the ducks when water finally returned to the prairies in the early 1990s. The response by ducks has been dramatic. The 1996 breeding ground counts were the highest on record, and the fall flight was the highest since the early 1970s. Duck hunting seasons and bag limits have been liberalized and hunters are once again enjoying high-quality experiences.

WMI is convinced, from long experience and on-the-ground evidence, that this success would not have occurred without the protection for small wetlands provided by Swampbuster. Wetland conservation is analogous to filling a bathtub--no matter how hard the faucets are turned on, the tub will not fill until the drain is plugged. WMI strongly supports a continued aggressive combination of protection and investment because neither one, by itself, can accomplish the nation's waterfowl restoration goals.

The future of this successful combination of protection and investment is uncertain. The 1996 Federal Agriculture Improvement and Reform Act set agriculture subsidies to phase out by the year 2002. Because the subsidies are Swampbuster's foundation, its effectiveness at protecting small wetlands seems likely to fade with the subsidies' phaseout. Thus, Section 404 will remain the only possible barrier to resumption of widespread drainage of small wetlands. By the year 2002, if Section 404 continues to be ineffective at protecting small wetlands, the plug will have been pulled from the bathtub drain, and continental duck populations are certain to decline, once again. Thus the strong support from WMI, on behalf of at least ducks and duck hunters, for phasing out Nationwide Permit 26.

As an avid waterfowler, yourself, you can understand how much I would rather spend my time hunting ducks than fighting unpopular political battles on behalf of the Section 404 regulatory program. However, my professional judgment, combined with my appreciation for waterfowl and passion for duck hunting, leaves me no choice but to continue pushing for effective federal protection for small wetlands.

Mr. Chairman, thank you for soliciting WMI's views on wetland conservation and for accepting this supplemented answer to your question, "Aren't we having it both ways now?" In short, "No, Sir, we aren't."

Best regards,

Donald F. McKenzie
Conservation Policy Coordinator

DFM
cc: Senator Bob Graham

Senator INHOFE. Mr. Winter, first of all I apologize for not being here, but we did have an opportunity to look at your written testimony. You stated in that testimony that the Corps was late in reissuing existing permits and issuing new permits in the last 5 years—last two 5-year cycles. What were the effects of the Corps' delays on your member companies?

Mr. WINTER. Well, there's tremendous uncertainty. We obviously—all of our members are—most of our members are operating in all the communities of the United States, and we have to provide those raw material needs in those communities. Our industry is a highly capital-intensive industry. And delays in securing permits or extensions of existing permits only creates more of the uncertainty and the burdens on our association members.

Senator INHOFE. In projecting forward, would you say what will be the consequences of delays of the NWP replacement permits? What would be those consequences?

Mr. WINTER. Beg your pardon?

Senator INHOFE. Are you going to have similar problems if we experience delays in replacement permits? You know, right now there is—part of the controversy of this hearing is whether we are going to be able to get the replacement permits in the 2-year period that began in last December.

Mr. WINTER. Well, we're going to be faced with a situation where a lot of producers that may be involved in activity that has minimal effect or minimal acreage will have to go through the individual permit process, which is going to, of course, create extensive burdens, expense and time on that, and I'm not sure that—we are of the opinion that the Corps probably does not have the personnel to deal with those additional individual permit processes if we find a situation here in 2 years where we don't have the national permit 26 and we don't have in place existing individual replacements for the Permit 26.

Senator INHOFE. I see.

Senator Sessions, I know that you had indicated you have to get to another hearing, so I'd like to have you go ahead and ask questions, and I have quite a few more questions for later on.

Senator SESSIONS. Thank you.

There was not a second vote ongoing while you were over there, was it?

Senator INHOFE. No. It will be 20 minutes debate and then a second vote.

Senator SESSIONS. OK.

Senator INHOFE. I think we can be finished by then.

Senator SESSIONS. Mr. Noyes, I appreciate the fact that you are concerned about flood control.

Dr. Siegel, I think you are exactly correct that what may be a good rule for the West may not be a good rule for the Southeast. Alabama, Mobile I believe, has 70-plus inches of rain per year. The terrain is different. It just does not make sense to do that if we're going to reach the level of environmental protection we want.

I understand—I don't know if any of you are aware of this, but I understand there are problems with actually cleaning out ditches or streams that have been there for many, many years for just nat-

ural protection of maybe residential areas or farmland. Are you familiar with that, Mr. Noyes?

Mr. NOYES. Yes, Senator. There are many instances, not only in our county and the State of California, but throughout all of the NAFSMA organization where there have been time delays and obstacles put up with respect to mitigation measures, expensive mitigation measures that would be required by the regulatory agencies in order to get the permits to take the necessary maintenance measures and to clean those channels out and to restore them to their original flood control capabilities.

Senator SESSIONS. Mr. Seibert, are you familiar with any complaints or problems in cleaning or removing obstructions from long-existing drainage ditches or streams?

Mr. SEIBERT. Yes, sir. I know that our county engineer where I'm from in Ohio pulls his hair out every time he has to go out and try to clean out a drainage ditch to stop flooding that has been occurring in the areas. Before they've always had the easements and right to go in and clean out the silt and the weeds and the debris and put them back in good operating order, but with the new rule they are dealing with today they are having a lot of problems.

Senator SESSIONS. Mr. Winter, I appreciate your comments and your concern for the environment. It is most noteworthy. I think, however, in Alabama you'd be what we call a "gentleman farmer." That's a person whose income really does not depend on the productivity of the land and are able to do things with it that someone who is trying to feed his family with it may not be able to. It's a real serious problem when persons have been conducting their farming operations with certain techniques and then are just told no longer can you do that, which, in fact, takes from that person the beneficial use of that property.

Let me ask this. I have a sense that many landowners who would be willing and be open-minded about setting aside certain properties if there was some compensation for it, sort of delegating it to environmental uses, which perhaps is not very profitable for them at this time at any rate, but they do not and resist very strongly the principle that the Government can, just by taking a regulation, remove from them the beneficial use of that property.

Have you given—has the Wildlife Association given any thought to encouraging, through the principles we do now—we encourage people through crop support programs not to plant. We pay them money not to plant. Perhaps we could pay them not to clear timber on certain lands or to not drain certain properties. It may not be a very costly prospect to me. Have you given any thought to that?

Mr. MCKENZIE. Yes, sir. We've given a lot of thought to that, and I spend 90 percent of my time working with agriculture programs to promote incentive programs, just as you described, for conservation of habitat.

There are several in place right now: the Conservation Reserve Program that I mentioned, the Wetlands Reserve Program, which is designed specifically to restore and protect wetlands on farmland. There are new ones now. There's the Wildlife Habitat Incentives Program, Environmental Quality Incentives Program. There's a collection of more than $2 billion a year worth of conservation programs that USDA administers now.

So yes, I think it is important.

Senator SESSIONS. How does that work? Let's say for a farmer who has a stream bed area that is not particularly productive but he could plant timber there and harvest it at a given time, which would have some degradation to the stream bank, how would that work? Do you know?

Mr. MCKENZIE. The clean and concise answer is it depends on what kind of land it is, what the situation is, the farmer's interest, and whether he wants a simple cost-share arrangement with the Government or whether he's willing to give up a long-term or permanent easement with the Government.

There is an array of programs that can take care of an even broader array of needs.

Senator SESSIONS. I'm intrigued by that. I think that has potential and I would like to see more of that done because we have a serious Constitutional problem, in my opinion, of taking property without just compensation.

Mr. Winter, would you share with us some of the stories that you have heard or maybe personally experienced in which these regulations have caused—been applied in an irrational manner and has made unnecessary and costly expenses to construction projects?

Mr. WINTER. Well——

Senator INHOFE. And let me throw this in, as well—the confusion of the application of this law should have been just the five plaintiffs or just in Washington, DC, and how your membership was inconvenienced by that misinterpretation.

Mr. WINTER. Well, our members are confused. That's the major point of our concern here is that we're dealing with a law that was apparently intended to deal with the discharge of filled material into designated areas, and over a period of time, if you try to expand that, to regulate wetlands. It really wasn't a law written and designed to regulate wetlands, and what we're finding as a result of that is that there is confusion amongst those who we have to deal with, the representatives from the various agencies, as to what the law is and how it applies and what applies to what particular situation.

I think that confusion probably also adds to a lot of the delays in obtaining permits.

A number of our members—it takes quite a bit of time to obtain a permit. And it takes quite a bit of time even to obtain a renewal or an extension of an existing permit. We're talking a number of years just to obtain an extension on an existing permit. We're not talking weeks or months.

It's very frustrating because we have a lot of capital invested and we're providing a vital need for our communities. They need the raw materials. And it's—we have to go where God put the product and so in that endeavor we will—our activities will, of course, impact certain areas that may or may not be wetlands or waters of the United States.

We would be very interested—our main concern is to have a program, a set of regulations which are clear, concise, and are administered on the local level in a consistent manner so that we can provide guidance to our companies around the country in how to deal

with this, what is obviously—would naturally be a very complicated regulatory apparatus.

Senator SESSIONS. Did I understand that you suggested that even after the Tulloch ruling that you were being told by Governmental officials that that only applied in one court and you could still be applied to other people around the country? Did you hear——

Mr. WINTER. Our association has received a number of calls and complaints from individual member companies in which these statements were being made to them on the local level, and I think what it reflects is the confusion of those agency representatives on the local level, and that confusion then overflows into confusion of us who have to operate under these regulations and continue to operate. So yes, we have received a number of those complaints.

Senator SESSIONS. Well, I think, when you have a court order like that, the word ought to go through the Department, the agency, and they ought to get the word out and it ought not to be a confused message being sent, but I can understand how sometimes those things happen, but it's not a justifiable procedure.

That's all I have, Mr. Chairman.

Senator INHOFE. Thank you, Senator Sessions.

I think, Mr. Noyes, you—I am sympathetic, having been a former mayor. We've faced some of the same confusion. Do I understand that you're in a situation where Tulloch would have prevented you from maintaining your various channels, at the same time, if you didn't do it, you have another bureaucracy that is telling you that you have to do it, whether it's FEMA or the national flood insurance. So tell us what do you do when you have two bureaucracies telling you two diametrically opposed——

Mr. NOYES. We try to work out as best we can, Senator, and we're going through that process now with the local Corps people that we deal with.

As I indicated earlier, we've been in discussions with the Corps and the other regulatory agencies for several months now. We're hopeful that we'll get that resolved, but it is an expensive and time-consuming process.

I can't give you an exact figure, but I can certainly tell you that we have spent well into six figures resource time in our agency providing information to the regulatory agencies, and still we don't have anything. We're fearful of what the cost might be when that does come out.

Meanwhile, we're talking to the Corps. We're saying, "What are we supposed to do, because part of your organization is telling us to clean it out and the other part is telling us we can't do it without going through the permit process."

Senator INHOFE. Would you consider this an unfunded mandate?

Mr. NOYES. Definitely it's an unfunded mandate.

Senator INHOFE. Yes. Mr. Carter, how would you respond to this? Do you think that Tulloch should apply to routine maintenance and flood control operations by local governments and should they be required to get permits from the Corps for these routine maintenance functions?

Mr. CARTER. It would probably, Mr. Chairman, boil down to the facts of that specific case and circumstance. My understanding of

the law is that there is an exemption for maintenance of currently serviceable drainage structures that currently exists in the law.

Senator INHOFE. There is an exemption, Mr. Noyes? I don't want to—are you aware of——

Mr. NOYES. There is an exemption for levees, per se, a levee being a structural piece of unit that is part of the system. What we're concerned about is what is between the two levees in terms of the sedimentation that occurs and reduces flood capacity and the vegetation that grows in there and the need to remove that. That's what's subject to permit in the law.

Senator INHOFE. Mr. Carter, I didn't mean to interrupt. I just was not——

Mr. CARTER. I think, Mr. Chairman, again it would boil down to the facts of the specific case. If it were a situation in which you had existing levees, ditches, canals, and structures that needed to be cleaned out to their original extent in order to provide the flooding relief that's sought, my understanding is that that's absolutely exempt from any permitting requirement in the law.

If you're going beyond that to, in essence, put in new drainage, what would amount to new drainage that would have effects on wetlands, that's the type of activity that should be subject to some type of environmental review to determine the extent of the environmental impact and who is benefited, who is being harmed, because channeling floodwater downstream affects other people downstream, too.

I'm reminded in the Tulloch case of Mr. Thunderbird, who was not a gentleman farmer, who was a farmer who happened to live next to this development who received the drainage water from the drainage of those wetlands that harmed his property and interfered with his farming operation.

Senator INHOFE. Yes.

Mr. CARTER. So it's a complex question.

Senator INHOFE. Thank you, Mr. Carter.

Dr. Siegel, you said in your testimony that some of the headwaters and isolated wetlands provide important benefits, but isn't it true that some do not?

Mr. SIEGEL. Yes, that's correct.

Senator INHOFE. And isn't it also true that under the system the Corps can make a determination that if they—can reject these permits based on the fact that something significant—some problem would exist?

Mr. SIEGEL. Yes, they can.

Senator INHOFE. And they have 30 days to do it, and they're increasing that now to 45 days.

Mr. SIEGEL. Yes.

Senator INHOFE. I would ask why doesn't that offer enough protection in terms of what you're concerned with and we are all concerned with, and that is the wetlands that do provide the beneficial or the important benefits?

Mr. SIEGEL. I think the issue is a regionalization issue, in that in some parts of the country in some wetland systems, such as a prairie pothole region of the Dakotas, for example, that I mentioned, I think there might be justification for far more stringent

types of regulatory practice to control wetland loss. In other regions there would be less so.

Without providing a sound and cohesive scientific justification for this, though, on a regional basis, I think historically it's difficult for people in the Corps to make these sorts of calls in a way that's defendable.

Senator INHOFE. I'd like to pursue that, because I don't quite understand why it would be different from region to region, and we've got another vote in progress. I'm going to stay as long as I can here. But I would like to have you submit for the record, when you say from region to region, kind of say how the effect in different regions and why uniformity, since it's a discretionary thing—the Corps can, at its own discretion, make that determination—why it would be different from region to region.

Do you have any quick answer or would you like to——

Mr. SIEGEL. I could give my own personal view on this.

In upstate New York, for example, there are quite a few small parcels of cattail-type swamp and a common sort of perception of it which probably don't form as much of a protective——

Senator INHOFE. But wouldn't the Corps be able to determine that in that area?

Mr. SIEGEL. I don't think the Corps right now has the body of knowledge prepared in the proper way in order for them to determine this. I think they could—as in many regulatory agencies, the letter of the law is followed rather than the spirit of the law.

Senator INHOFE. OK. One other question I wanted to ask you. You had implied that 2 years may not be long enough insofar as these replacement permits, to get them in place. How long do you think it will take?

Mr. SIEGEL. I really can't—I really don't know.

Senator INHOFE. More than 2 years?

Mr. SIEGEL. I think it could take longer than 2 years.

Senator INHOFE. OK. Mr. Seibert, you heard the Corps and EPA both testify earlier concerning the amount of time that it generally takes on these permits—14 days for a general permit and 104 days for an individual permit. My question that I had to him was: you don't start at the time you make the application but when the permit is received and it is considered to be credible and in proper form. I further asked him, in that timeframe, would you estimate an average of some 200 days, and of course he said no.

Do you have any kind of documentation as to how long it takes, from the time the application is made to the time a permit is issued individual?

Mr. SEIBERT. I don't personally have any documentation. I'm sure that we could round that up. I know, from experience and working with the individual permits, that it talks about the percentage that was approved, but it doesn't talk about all those people who were so frustrated they give up. Many times 30, 40, or 50 percent of the people who are applying just throw up their hands and give up in frustration, and those numbers are not reflected in those numbers that were presented to you today, I think.

I think that many of the other people, as you say, the time starts ticking when they have a perfect permit.

Senator INHOFE. But it's my understanding that in December 1998 it's going to have to be replacement permits or individual permits. Do you think they're going to be able to have time, as we've asked some of the other witnesses, to have those in place by December 1998, replacement permits?

Mr. SEIBERT. Absolutely not.

Senator INHOFE. And a question that I guess anyone could respond to, if that's the case—and we all seem to agree that is the case—and the Corps found themselves in a position to be reliant upon individual permits for that period of time, is the Corps adequately staffed to give the attention to individual permits on all these? Does anyone have a thought about that? Just kind of yes or no as we go?

Mr. WINTER. I don't think so, in my opinion.

Senator INHOFE. What do you think, Mr. Winter?

Mr. WINTER. I don't think so. I think that's where the main problem is, because there have been so many added responsibilities to the Corps of Engineers. I'm not sure that they—they just don't have the capacity to deal with all these additional permits and additional activities which they claim are coming within the purview of the Clean Water Act, and they just don't have the manpower to deal with them. It's just going to exacerbate the problem even more if we get rid of Nationwide 26 and don't have replacement permits in hand.

Senator INHOFE. Mr. McKenzie.

Mr. MCKENZIE. They certainly will have to adapt to the work load, without a doubt.

Senator INHOFE. Mr. Noyes, anybody else?

Mr. NOYES. Couldn't say it any better than Mr. Winter did.

Senator INHOFE. All right. We only have 4 minutes left on the vote and then there's another one after that, so while we said we'd go to 11:40 it's going to have to be 11:35.

I know that Senator Chafee and I believe Senator Hutchinson and maybe some on the Democrat side have questions they'd like you to answer, and they will submit those questions to you, and we'd like to have you respond to those questions in writing, if you would.

I thank you very much and I do apologize for the two interruptions we've had during the course of this meeting. Thank you very much.

We're adjourned.

[Whereupon, at 11:35 a.m., the subcommittee was adjourned, to reconvene at the call of the chair.]

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF ROBERT H. WAYLAND III, OFFICE OF WETLANDS, ENVIRONMENTAL PROTECTION AGENCY

Good morning, Mr. Chairman and members of the Subcommittee. I am Robert H. Wayland III, Director of the Environmental Protection Agency's (EPA's) Office of Wetlands, Oceans, and Watersheds. I am pleased to be here today to provide this statement addressing the important issue of wetlands protection.

At the outset, I would like to emphasize EPA's commitment to the administration's 1993 Wetlands Plan to assure that wetlands protection is fair, flexible, and effective. Implementation of many of the Plan's administrative initiatives has produced tangible results by making the Clean Water Act's Section 404 program more

fair and flexible, while continuing to ensure effective protection of the Nation's human health and the environment.

Consistent with the focus of this hearing, this statement addresses three recent developments in the Section 404 program: ongoing litigation concerning activities subject to Clean Water Act (CWA) permitting; mitigation banking; and, our Alaska wetlands initiative. EPA and the Corps of Engineers have coordinated closely in the preparation of agency testimony. To help to facilitate our presentations, EPA's testimony focuses on issues related to the "Tulloch rulemaking" and the recent Federal District Court decision, while the Corps' testimony discusses the recent improvements to the Section 404 nationwide permit program. Before turning to these specific matters, I want to review why we believe wetlands protection and restoration are so important in realizing the CWA objective to "restore and maintain the physical, chemical, and biological integrity of the Nation's waters."

IMPORTANCE OF WETLANDS

Wetlands are among our Nation's most critical and productive natural resources. Wetlands are the vital link between land and water. They provide a multitude of services to society, are the basis of many thousands of jobs, and contribute billions of dollars to the economy. Wetlands fulfill vital functions across the landscape. They protect private property from flooding, and provide shoreline erosion control. They are critical areas for recharge of aquifers that provide drinking water for communities across the country. Wetlands are primary habitat for wildlife, fish, and waterfowl, and, as such, provide opportunities for recreation, education, and research, as well as the basis for many economic opportunities. Waterfowl hunters spend over $600 million annually in pursuit of wetlands-dependent birds. In the southeastern United States, over 90 percent of the commercial catch of fish and shellfish depend on coastal wetland systems. In fact, wetlands contribute over $15 billion annually to our economy for fisheries alone. Also, a high percentage of the Nation's threatened and endangered species rely on wetlands for their survival and recovery.

Wetlands are part of our Nation's waters and their protection is important to achieving the goals set forth in the CWA. Wetlands are integral to the functioning of watersheds and aquatic ecosystems. Protection and restoration of wetlands reduce non-point source pollution and provide other benefits throughout watersheds, including improved aquatic habitats and floodwater control. For example, forested riparian wetlands along the river's edge provide important sediment stabilization, habitat corridors for aquatic and terrestrial species, and water quality improvement by reducing nutrient loading into water bodies. One study found a riparian forest in a predominantly agricultural watershed removed approximately 80 percent of the phosphorus and 89 percent of the nitrogen from the water before it entered a tributary of the Chesapeake Bay. Excess nutrients can cause algal blooms, oxygen depletion, fish kills, and biological dead zones.

THE AMERICAN MINING CONGRESS DECISION

As part of the 1993 Administration Wetlands Plan, the Corps and EPA jointly issued a rule that revised three key definitions contained in the agencies' CWA Section 404 regulations. One part of the rule defined the term "discharge of dredged material" within the meaning of the Section 404 program to include discharges associated with excavation activities that destroy or degrade wetlands or other waters of the United States. A second component of the joint rule defined the term "discharge of fill material" for purposes of Section 404 to include the placement of pilings to construct structures in waters of the U.S. when such placement has the effect of a discharge of fill material. Third, the rule incorporated into the Section 404 regulations the existing EPA/Corps policy that prior converted croplands are not waters of the U.S. and, therefore, not regulated under the CWA.

In *American Mining Congress* v. *U.S. Army Corps of Engineers*, No. 93–1754 SSH (D.D.C., Jan. 23, 1997) (hereafter "AMC") a Federal District Court invalidated the agencies' revised definition of "discharge of dredged material" (hereafter "Tulloch Rule"), holding that Congress did not intend to regulate "incidental fallback" discharges under Section 404. The plaintiffs did not challenge the other two components of the 1993 joint rule and, in the Government's view, they are in no way affected by the decision. "Incidental fallback" typically includes the material that drops from a backhoe being used to drain wetlands or channelize a stream. The Court ordered the agencies not to apply or enforce the invalidated rule.

For the reasons explained below, we respectfully disagree with the decision. On April 10, 1997, the Department of Justice filed a Notice of Appeal and, on April 22, 1997, a Motion for Stay of the Judgment in the District Court. On May 27, 1997, the District Court issued a decision rejecting the government's request for the Stay.

On May 30, 1997, the Department of Justice filed a Motion for Stay pending appeal in the Court of Appeals and requested that the Court of Appeals expedite consideration of the case. Although we continue to appeal the District Court decision, unless and until the District Court decision is stayed or overturned, the government is compelled to comply with the terms of the Court's injunction. To that end, on April 11, 1997, EPA and Corps Headquarters issued joint written guidance to our field staffs that explains the decision and its effect on the Section 404 program. In addition, the agencies are continuing to coordinate closely with our field staffs to ensure that we comply with the injunction pending any further rulings in the case.

I would like to focus this part of my testimony on the purpose of and basis for the 1993 Tulloch Rule, and then turn to the implications of the AMC decision, especially in terms of its effect on the ability of the Corps and EPA to ensure effective protection of human health and the environment.

Purpose of the Tulloch Rule: Ensuring Fair and Effective Environmental Protection

Consistent with the CWA's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," EPA and the Corps issued the Tulloch Rule in 1993 to ensure that discharges of dredged material that are associated with activities that destroy or degrade wetlands or other waters of the United States are reviewed in the Section 404 permitting process. This environmental review is not aimed at preventing development, but, instead, is designed to ensure that these discharges do not result in unacceptable adverse environmental impacts that can otherwise be avoided, minimized, or mitigated. Prior to the Tulloch Rule, Section 404 regulatory jurisdiction over discharges of dredged material in many parts of the country turned on the amount of material redeposited in the water of the U.S. If the amount of dredged material redeposited was incidental and small, the discharge was not regulated by many Corps districts even where it was associated with an activity that caused substantial adverse environmental impacts. As a result of this regulatory loophole, a person could construct drainage ditches in a wetland in order to lower the area's water table, and thereby eliminate the area's wetland hydrology and convert the area to dry land, as long as the dredged material excavated from the ditches was not "sidecast" (*i.e.*, redeposited alongside the ditch or otherwise discharged to waters of the U.S.). Once the area had been converted in this fashion, it would be removed from the jurisdiction of the CWA. At the same time, the courts were being asked to address the scope of activities regulated under Section 404. For example, in 1983 in *Avoyelles Sportsmen's League* v. *Marsh*, the Fifth Circuit Court of Appeals agreed with the plaintiff sportsmen's group that the Corps could regulate under Section 404 the mechanized landclearing activities at issue in that case. The property owners in Avoyelles converted forested wetland to agricultural use, which involved land leveling and the filling of sloughs.

The agencies' decision to issue the Tulloch Rule was based on our increased understanding of the severe environmental effects often associated with the activities covered by the rule, and the increasing sophistication of developers who seek to convert waters of the U.S. to uplands without being subject to Section 404 environmental review. The Corps and EPA continue to believe that the regulatory clarification expressed in the Tulloch Rule is within the authorities provided to our agencies pursuant to Section 404 of the CWA, and was in fact consistent with the practice of many Corps districts as they sought to apply the Avoyelles decision in the field. Moreover, to the extent that the rule represented a change of previous administrative practice, such a change was warranted in order to ensure that the Section 404 program can effectively protect our aquatic resources from the degradation that can result from unregulated ditching, channelization, and other excavation activities. The agencies have learned increasingly over the last decade how these activities can severely impact our Nation's aquatic resources, and therefore view the Tulloch Rule as an important means of achieving the objective of the CWA—to "restore the chemical, physical and biological integrity" of those resources.

Pocosins are a relatively rare and valuable type of wetland found only in the Southeast that owe their existence to limited drainage and abundant rainfall. Pocosin wetlands provide a multitude of functions and values. They provide abundant water capacity, acting as storm buffers by greatly reducing flood peaks. In addition, pocosins help stabilize water quality and balance salinity in coastal waters. This is especially important for maintaining productive estuaries for commercial and recreational fisheries. This valuable wetland type also serves as habitat for many animals, especially black bear along the coast.

The case that gave rise to the Tulloch rulemaking involved a project in New Hanover, North Carolina, that converted a 700-acre tract of pocosin wetlands to a residential/commercial development and golf course through carefully conducted actions that drained and cleared the wetlands, while only causing incidental, small volume

redepositions of dredged material. In that case, the Corps had initially determined that the 700 acres of wetlands were subject to the jurisdiction of the CWA, and, therefore, that discharges of dredged or fill material into the area would require a section 404 permit. While the developer originally applied for a section 404 permit for the development, it subsequently withdrew the application after comments from other Federal agencies, including EPA, raised concerns about the adverse effects of the project.

Rather than pursue the permitting process, the developer decided to try to remove the site from CWA jurisdiction through the construction of drainage ditches that would convert the wetland to dry land without triggering the need for a permit. The developer accomplished this by constructing ditches using backhoes with welded buckets, and placing excavated material directly on uplands or in altered sealed containers resting on truck beds adjacent to the site. The excavation was, for the most part, performed in such a manner that only drippings from the buckets of the excavation machinery were allowed to fall back into the wetland. The ditches were constructed at locations and to a depth that computer modeling indicated would be sufficient to lower the water table and convert the wetlands to dry land. The ditches achieved their purposes, and the local Corps office subsequently concluded that the area no longer constituted a wetland for purposes of CWA jurisdiction. The developer was thereafter free to construct the project without the need to obtain a section 404 permit. As a result of this operation, hundreds of acres of environmentally-valuable pocosin wetlands were converted without Section 404 environmental review, eliminating opportunities to avoid and mitigate adverse environmental effects.

The Corps and EPA also issued the Tulloch Rule to reduce the inequities in the existing regulatory structure. Prior to the rule, sophisticated developers who had the financial resources and technical expertise, like those in the North Carolina case, could attempt to convert wetlands without causing more than incidental, small volume discharges of dredged material. Even though the impacts of these activities could be equally as severe as similar projects involving "sloppy" disposal practices associated with large volume redepositions of dredged material, such developers could avoid Section 404 review, while those undertaking less sophisticated projects were subject to the permitting process. The facts in the North Carolina case help demonstrate the necessity of the Tulloch Rule by revealing how one developer with the technical expertise and financial resources was able, under past agency policies, to avoid Section 404 review for activities that destroyed ecologically-valuable pocosin wetlands.

EPA and the Corps also believe that the approach in the Tulloch Rule is consistent with the statutory scheme set forth in CWA Section 404(f)—the provision under which discharges associated with particular activities, including certain ditching activities, are exempt when they do not result in significant environmental impacts. Section 404(f) includes strict limitations with respect to the types of activities and their impacts, and whether the exemption applies. The agencies believe that it is, therefore, reasonable that the Tulloch Rule regulates similar types of activities that are outside the scope of the Section 404(f) exemption and that result in the destruction or degradation of wetlands.

Implications of the AMC Decision

We are very concerned that the inability of the Corps and EPA to provide Section 404 review of activities covered by the AMC decision will weaken our ability to ensure effective and consistent protection of the Nation's human health and the environment. The decision creates an incentive for persons to take advantage of the regulatory loopholes that are once again available as a result of the District Court's invalidation of the Tulloch Rule, and to design large projects that destroy hundreds of acres of wetlands, harm neighboring property, and pollute streams and rivers in a manner that precludes effective CWA review. Such review is needed to minimize pollution and ecological damage, as well as provide appropriate mitigation to offset environmental harm.

The District Court's decision immunizes from Section 404 review various activities that can have devastating impacts on wetlands and other waters of the U.S., even though the physical amount of discharges from those projects may be small. Excavation projects of particular concern include drainage ditch construction, stream channelization, and mining activities undertaken in waters of the U.S. in a manner that results in only incidental, small volume discharges and therefore avoids Section 404 review.

As one example among many, the AMC decision will result in significant environmental impacts associated with mining activities in waters of the U.S. that would go unregulated under Section 404. In the southwestern United States, the acreage adversely affected by sand and gravel mining activities, for example, dwarfs those

of other activities typically regulated under Section 404. In particular, in the Arid West, riparian areas have already suffered significant loss or degradation: estimates place riparian habitat loss between 75 and 95 percent in most western States. While riparian areas are not geographically large, their environmental importance is immense. For example, riparian areas comprise less than 1 percent of the land area of most western States, yet up to 80 percent of all wildlife species in this region of the country are dependent upon riparian areas for at least part of their life cycles.

With almost 50 percent of all commercially-viable deposits of sand and gravel located in or near riparian habitats, these areas remain extremely vulnerable to excavation activities. In addition to the loss of valuable fish and wildlife habitat, such excavation can lead to reduced water quality, channel instability, and increased bank erosion. Extraction of sand and gravel from within or near a stream bed, for example, can significantly alter the natural flow of a stream or river and subsequently lead to excessive scouring of both the stream channel and its banks. This instability spreads both upstream and downstream from the excavation site, in some cases miles in either direction, until the stream or river is able to reach a new equilibrium. In the process, the stream channel and its banks may be relocated anywhere across the floodplain, potentially placing important infrastructure such as bridges, utility lines, and roads at risk.

ADVANCES IN MITIGATION BANKING AND ALASKA WETLANDS

In addition to the 1993 joint rulemaking, the administration's Wetlands Plan contained numerous other administrative initiatives intended to improve the effectiveness of the Section 404 program. I am pleased to provide the following update on two of the initiatives—mitigation banking and Alaska wetlands.

Wetland mitigation banks are an innovative, market-based way for landowners to effectively and efficiently compensate for unavoidable wetland impacts. Previously, landowners had to undertake mitigation projects themselves which had proven to be a costly and time-consuming process for both landowners and regulators. Moreover, there has been limited benefit to the environment because many of these projects have failed to meet their ecological objectives. Through mitigation banking, the responsibility for providing mitigation is transferred to an entity that has the financial resources, scientific expertise, and incentives necessary to ensure that the mitigation will be ecologically successful.

In November 1995, the Federal agencies issued guidance promoting the establishment and appropriate use of mitigation banks within the Section 404 and "Swampbuster" programs. The new mitigation banking policy encourages proper siting and design of mitigation banks and requires that bank sponsors provide the necessary financial assurances and commit to long-term monitoring and management of the wetlands that will ensure there is greater environmental benefit from mitigation efforts. Release of the guidance has facilitated interest in the establishment of mitigation banks nationwide. Recent survey information indicates that there are approximately 200 mitigation banks that have been approved or are under development.

With regard to Alaska, EPA and the Corps continue to recognize that circumstances in Alaska are different than those in the lower 48 States, and that administration of the Section 404 program should reflect those differences. As part of the administration's Wetlands Plan, EPA and the Corps convened a panel of stakeholders and solicited public input in the State of Alaska in 1993–1994 to identify and address specific concerns with the implementation of the Section 404 program in that State. Three years later, a number of measures point to the success of this effort.

Permitting figures demonstrate that evaluation times for individual and general permits have declined each year and are lower than the National average. Some 60 general permits authorize 1,000 activities (over 75 percent of all permitted activities in the State) in wetlands each year in an average of only 9 days. Of those activities with potential impacts that warrant individual review, the average processing time has been cut from 106 days to 68 days. Abbreviated Permit Processing procedures have expedited the evaluation and issuance of 24 permits for discharges into wetlands associated with the construction of water, wastewater, and sanitation facilities in Alaskan villages (in calendar 1996, 16 of these permits were issued in an average time of only 20 days).

The administration also evaluated concerns with compensatory mitigation requirements and the "No Net Loss" of wetlands goal as part of the 1993–1994 Alaska Wetlands Initiative. The agencies issued Alaska-specific mitigation flexibility guidance and also now specifically recognize that the "No Net Loss" of wetlands goal must account for Alaska's unique circumstances. Mitigation is practicable and provided

for only about 12 percent of Alaska's individually permitted wetlands acreage losses, as compared with over 150 percent for the U.S. as a whole. While these and other administrative steps have been taken by the Corps and EPA to improve the Section 404 program in Alaska, we continue to look for additional opportunities to make the program more fair and flexible while continuing to ensure effective protection for the State's valuable aquatic resources.

CONCLUSION

In conclusion, Mr. Chairman, through implementation of the 1993 Wetlands Plan, the Clinton administration has demonstrated its commitment to meaningful improvements to the Section 404 program, while maintaining effective environmental protection. The purpose of the Tulloch Rule was to close a regulatory loophole that allowed those with sufficient resources and technical expertise to destroy and degrade significant acreage of valuable wetlands. The administration is optimistic that the Appellate Court will overturn the District Court and reinstate the rule, thereby allowing the Corps and EPA to once again ensure effective protection of human health and the environment.

Thank you, Mr. Chairman.

PREPARED STATEMENT OF MICHAEL L. DAVIS, DEPUTY UNDER SECRETARY OF THE ARMY FOR CIVIL WORKS

Mr. Chairman and Members of the Committee: Thank you for the opportunity to provide the Department of the Army's views on recent Clean Water Act Section 404 regulatory and judicial developments. I am Michael Davis, Deputy Assistant Secretary of the Army for Civil Works. As the Deputy Assistant Secretary responsible for Civil Works policy and legislation, I am directly involved in the regulatory initiatives of the Army Corps of Engineers, which has primary responsibility for the administration of Sections 9 and 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act (CWA), which is co-administered by the Environmental Protection Agency. The Section 404 program is the primary Federal regulatory program for wetlands protection and will be the focus of my testimony today. The Corps of Engineers and the EPA have coordinated closely in the preparation of agency testimony. To help to facilitate our presentations, the Corps testimony focuses on issues related to the Nationwide Permit Program, while the EPA's testimony discusses the "Tulloch rulemaking" and the recent Federal District Court decision.

When deciding whether changes to a particular program are needed or desirable, it is important to first understand how a program actually performs. Before discussing the recent regulatory changes due to the reauthorization of the nationwide general permits and a recent court decision, I will highlight recent CWA Section 404 statistics and a few other wetlands initiatives currently being implemented by the administration.

SECTION 404 STATISTICS—HOW THE PROGRAM WORKS

As noted in Figures 1 and 2, in Fiscal Year 1996, over 64,000 landowners asked the Corps for a Section 404 permit to discharge dredged or fill material into the waters of the United States, including wetlands. Over 85 percent received authorization under a general permit in an average time of 14 days. Less than 10 percent were subjected to the more detailed individual permit evaluation, where the average time was 104 days. Less than ½ of 1 percent of the 64,000 applications were denied. It may be that in a few cases the Corps took too long to evaluate an application and perhaps subjected landowners to an unnecessarily lengthy evaluation process. However, these cases are very rare compared to the ones that go forward in a timely manner with minimal regulatory burdens. Finally, it should be noted that many more thousands of landowners proceed under the authority of general permits that do not require notifying the Corps.

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. However, the Corps has been very successful in reducing wetlands impacts, and adverse effects on other landowners, through the regulatory evaluation and conditioning process, including the general permit process. Most applicants are willing to "avoid, minimize, and/or compensate" for the adverse effects on wetlands or other landowners that their projects could cause. 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.

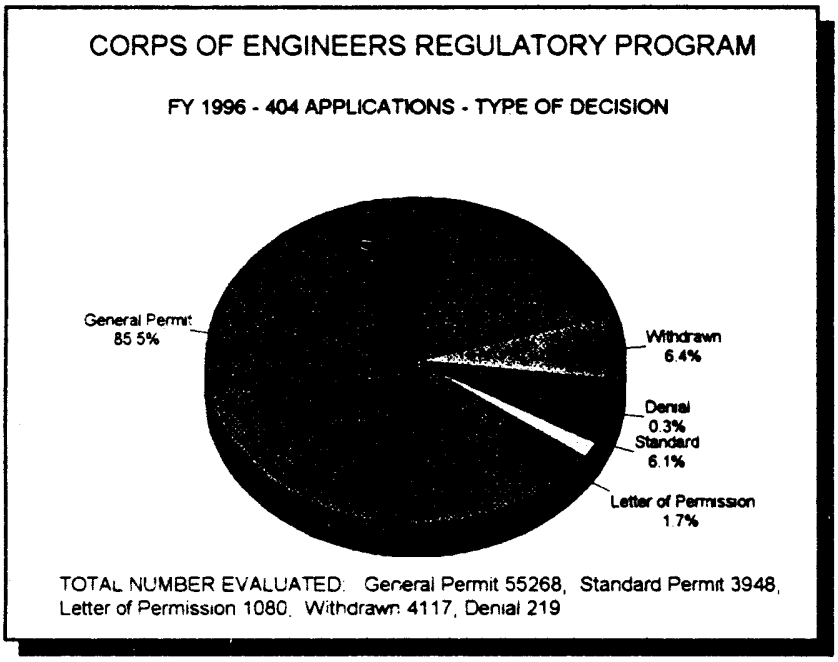


Figure 1

Administration Wetlands Initiatives—A Fair, Flexible, and Effective Approach

Notwithstanding the statistics noted above, the Section 404 Program is not perfect—from either the environmental protection standpoint or the regulatory burden perspective. There are a few real problems, and improvements can and should be made. In this regard, the administration is using its August 1993 Wetlands Plan as a policy roadmap for making all wetlands policy by:

- streamlining the wetlands permitting program to eliminate unnecessary regulatory burdens;
- increasing cooperation with private landowners to protect and restore wetlands;
- basing wetland protection on good science and sound judgment; and
- increasing participation by States, Tribes, local governments, and the public in wetlands protection.

The administration's Wetlands Plan includes over 40 specific initiatives. The Corps, the Environmental Protection Agency (EPA), and other agencies have completed many of these initiatives since 1993 to help meet the administration's wetlands goals. For example, in 1993, and also in 1995, the Corps and EPA issued guidance (Regulatory Guidance Letters (RGL) 93–2 and 95–1) clarifying the need for flexibility in processing permit requests, emphasizing that small projects with minor impacts do not need the same detailed review as large projects. In June 1995, the Corps issued Nationwide Permit 29 for single family homes impacting less than ½ acre of non-tidal wetlands. In November 1995, the Corps, along with four other agencies, issued joint Federal guidance concerning the establishment of wetland mitigation banks. Finally, the Corps has developed an administrative appeals process which is ready to be finalized. This program will allow landowners to appeal a Corps wetland jurisdictional determination or permit denial without the trouble and expense of going to court. Lack of funding for the appeals process has delayed its implementation. As was the case in the past 2 fiscal years, President Clinton's 1998 budget requests funding for this important initiative. The Corps will implement this program if this funding is approved. These are some of the program initiatives that

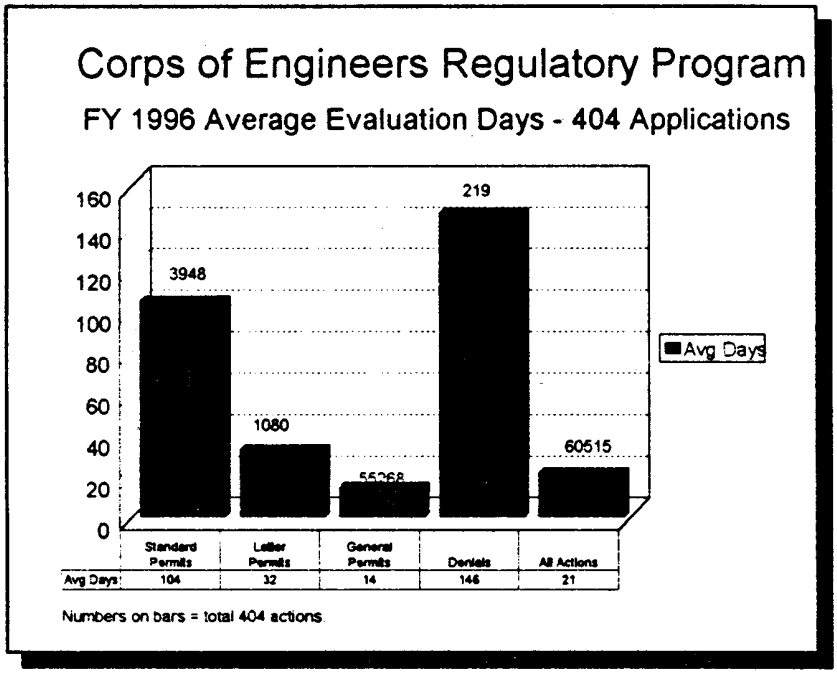


Figure 2

demonstrate our commitment to implementation of the administration's Wetlands Plan.

GENERAL PERMIT PROGRAM—NATIONWIDE PERMITS

Nationwide Permits—An Overview

The authority for the Corps of Engineers to issue general permits for activities involving discharges of dredged or fill material into wetlands and other waters of the U.S. is found in CWA Section 404(e). This authority prescribes two explicit requirements for all general permits: (1) the permits must be based on categories of activities which are similar in nature; and, (2) the activities authorized must not result in more than minimal adverse environmental effects either individually or cumulatively. General permits can be issued on a State, regional, or nationwide basis for a period not to exceed 5 years. The Nationwide Permit (NWP) Program has become an integral part of the Corps regulatory program and, currently, approximately 65 percent of all Corps permit actions are authorized as nationwide permits. Through NWPs, activities that have minimal environmental impacts are allowed to proceed with little or no review by the Corps. Yet, under current approaches, activities that exceed the statutory requirements are effectively screened out for more detailed evaluation.

One nationwide permit in particular, nationwide permit 26 (NWP 26), has engendered considerable controversy since its inception in 1977. NWP 26 is used to authorize 30 percent of all NWP activities, yet this 30 percent accounts for over 75 percent of the impacts attributed to all NWPs (see Figure 3). This information, in part, highlighted the need for changes and eventual replacement of NWP 26, which will be discussed in more detail later.

In the December 13, 1996, Federal Register, the Corps announced the reissuance of the 37 existing NWPs and the issuance of two new NWPs. These NWPs provide a balanced package that incorporates over 4000 public comments, years of Corps ex-

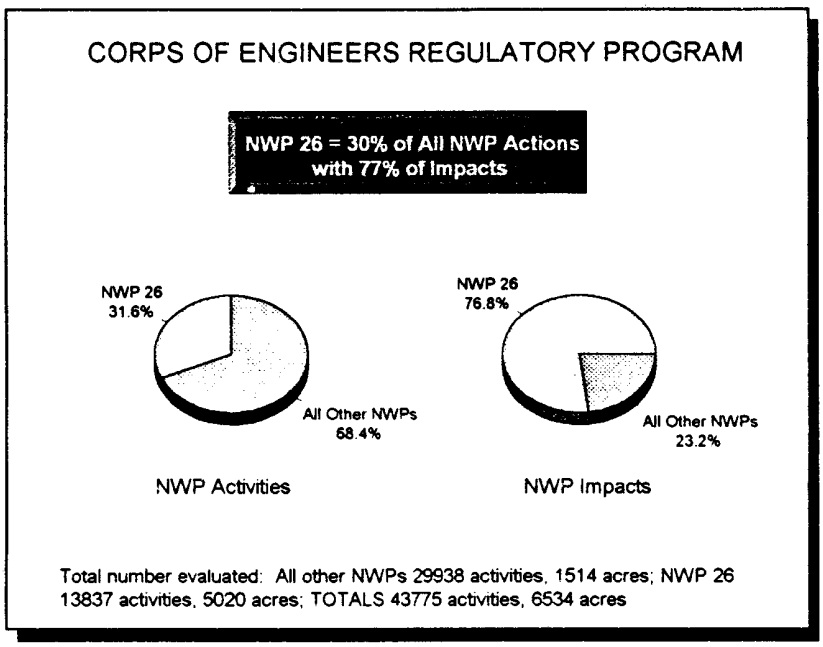


Figure 3

perience with the nationwide permits, and many months of discussions with government, private, commercial and non-profit entities. Over two-thirds of the nationwide permits were reissued without change. These nationwide permits have proven to be useful and effective in their current form. Less than one-third of the nationwide permits were modified; the vast majority of those modifications were made to increase their applicability and scope. Finally, two new NWPs were issued to allow for a more rapid evaluation of some activities where the adverse effects are minimal. These activities formerly required an individual permit.

The changes made to the nationwide permit program in December 1996, will allow the Corps to implement a more fair, flexible and effective regulatory program in accordance with the CWA and the administration's Wetlands Plan. The Corps published the proposed changes to the nationwide permit program in the June 17, 1996, issue of the Federal Register. In response, the Corps received approximately 4000 comments from Federal, State and local agencies, private industries, the environmental community, and the general public. Additionally, many meetings were held with interested parties to share ideas on the proposal. Ideas from the meetings, together with the comments, assisted us in evaluating the proposed changes. For example, some NWPs still require applicants to submit a Preconstruction Notification (PCN) to the Corps for evaluation of certain projects. This allows the Corps to ensure that the adverse effects of those projects will not be greater than minimal. Conversely, many NWPs do not require notification to the Corps and allow an applicant to conduct his or her project so long as it meets the nationwide permit terms and conditions. While the scope of Nationwide Permit 26 decreased, in many cases, we increased the scope of activities covered under other nationwide permits. For example, NWP 12 can now be used to authorize overhead transmission lines and can be used to authorize projects in Section 10 waters in addition to Section 404 waters. We also added two new nationwide permits to cover activities that previously required an individual permit. We believe that on balance the decreased scope of some of the NWPs, including NWP 26, in conjunction with the increased scope of other NWPs and the two new NWPs, will not substantially increase the Corps workload or the overall burden on the regulated public, while, at the same time, will provide

better protection to landowners and the environment. We also believe these changes will not substantially effect the districts responsiveness to the regulated public. Accordingly, we feel the changes are fair and were needed and made in a reasonable and open manner.

The Corps has continued to remain flexible in its regulation of the waters of the United States. In reviewing PCNs for nationwide permit authorization, the Corps works with the applicants to allow, where possible, authorization under a nationwide permit. The changes to the NWPs still allow the Corps to consider mitigation to reduce the impacts so as to bring the project within the minimal impact threshold for nationwide permits.

The Corps believes that it is critical that Federal, State and local agencies work together to maximize environmental protection of the various regulatory programs involved in protecting the Nation's aquatic system, while minimizing duplication and delay for the regulated public. One important element of such intergovernmental cooperation is the State and tribal action to certify the Corps NWPs under CWA Section 401, and their determination of consistency with the coastal State's coastal zone management plans. The revised NWPs received more State certifications and concurrence positions because the Corps made changes to some key NWPs, such as NWP 26, and because the Corps districts more assertively worked with the States to develop regional conditions that would further reduce State and tribal concerns for protection of the environment on a regional basis. For example, 23 States denied water quality certification of the previous NWP 26, while only 14 States denied water quality certification of the new NWP 26. Although the States and tribes were more receptive to the reissued NWPs, there remain several States who continue to believe that the Corps should further restrict the NWPs. The Corps will continue to work closely with States and tribes to develop the most effective replacement NWPs that we can.

As for effectiveness, the nationwide permits are an effective way to authorize, in a timely fashion, activities with minimal adverse effects, thus not overburdening or over-regulating the public while protecting the integrity of the Nation's waters. Since projects authorized by nationwide permits must, by law, have minimal individual and cumulative adverse effects, the high environmental standards of the CWA can be maintained. In addition, by utilizing the NWP program, the Corps can issue permits without the added complexity or delays of unnecessarily requiring an individual permit.

Nationwide Permits—NWP 26 Changes

In 1977, the Corps developed the headwaters and isolated waters nationwide permit, also known as NWP 26, as we extended Section 404 jurisdiction to all waters of the United States (including isolated and headwaters areas). Prior to 1977, the Corps did not require Section 404 permits for discharges of dredged or fill material into waters in these geographic areas. Over the past 20 years NWP 26 has been revised in an attempt to ensure that activities are not authorized under NWP 26 if such activities would result in more than minimal adverse effects, either individually or cumulatively, to the waters of the United States, including wetlands. While the Corps had to assure compliance with this statutory requirement, it also had to consider the constraint of an extremely heavy regulatory workload resulting from obtaining compliance and from Congress constricting the program's funding.

The most recent data and scientific literature indicate that isolated and headwater wetlands often play an ecological role that is as important as other types of wetlands in protecting water quality, reducing flood flows, and providing habitat for many species of fish and wildlife. For example, in many parts of the Nation, isolated and headwater wetlands comprise a significant portion of the functioning wetlands that remain in existence. The National Academy of Sciences concluded in its 1995 report on wetlands that "the scientific basis for policies that attribute less importance to headwater areas and isolated wetlands than to other wetlands is weak".

In light of the above, and in response to public comments, several substantive changes were made to NWP 26 during the 1996 reauthorization. These include the reduction of the upper threshold from 10 acres to three acres, addition of a 500 linear foot limitation for streambed impacts, prohibiting the use of NWP 26 with other NWPs when the total impacts exceed three acres, and the expiration and subsequent replacement of NWP 26 within 2 years. The Corps determined that these provisions were necessary to ensure minimal impacts either individually or cumulatively. These changes were supported by public comment as follows:

Lowering of the upper threshold from 10 acres to 3 acres. Surveys of our districts were conducted to determine the use of NWP 26 and NWPs in general for fiscal year 1994 and fiscal year 1995 respectively. The most complete data was collected for fiscal year 1995. We only collected wetland acreage impacts (which does not include

other waters of the U.S.) from the fiscal year 1995 data. That data shows that of the 13,800 projects for which a NWP 26 verification was requested and granted, approximately 5,020 acres of wetlands were lost or adversely affected nationwide. The overall number of projects allowed under NWP 26 is an estimate simply due to the nature of NWP 26, which allowed applicants to proceed with activities with less than one acre of impact without contacting the Corps. The estimated number of projects allowed to proceed under NWP 26 for fiscal year 1995, for which no verification from the Corps was required or requested, is approximately 20,000. The fiscal year 1994 data contains information on the use of NWP 26 at different acreage thresholds. The most important conclusions reached through the evaluation of these data involved the impacts to the resources and the regulated public by the reduction of the NWP 26 thresholds. Evaluation of these data resulted in a conclusion that a reduction of the upper threshold of NWP 26 to three acres would move only 10 percent of the verified activities normally authorized under NWP 26 into the individual permit review process. Yet, this 10 percent accounted for over half of the adverse effects caused by NWP 26 activities (see Figure 4). We expect over two-thirds of those applicants with activities impacting greater than 3 acres to reduce the amount of impact so as to allow for authorization of their project under the reissued NWP 26.

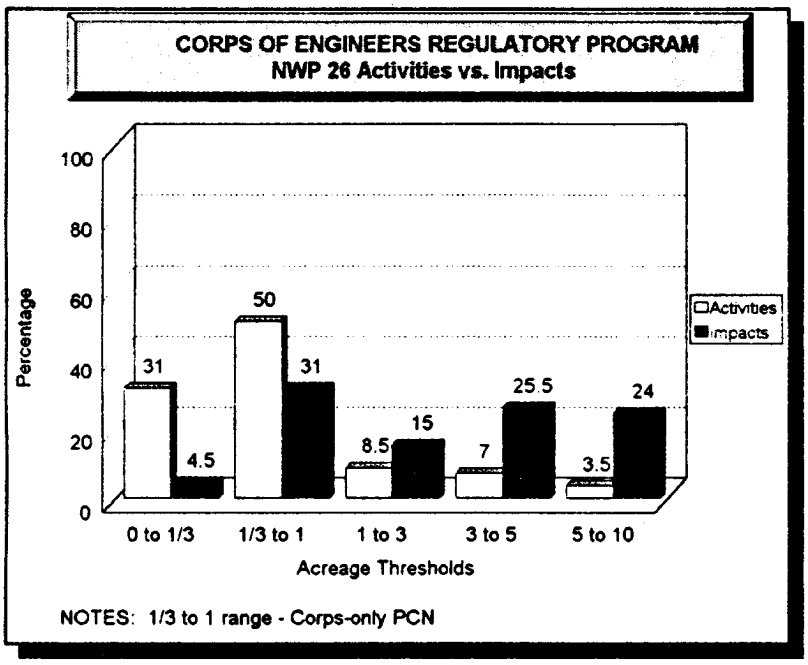


Figure 4

It is important to note that many Corps districts have limited, through regional conditioning or by exerting discretionary authority on a case-by-case basis, the impacts allowed under NWP 26 to acreages much lower than the national threshold due to the possibility of individual and cumulative impacts becoming greater than minimal in that district. For example, a project was proposed in one of our districts that would have impacted approximately 7.6 acres of wetlands. This project was a multi-use housing development with high-density and low density housing units and an industrial access road to a main road located adjacent to a main waterway in an urbanizing area. It was determined that this project, if approved, would have greater than minimal cumulative adverse effects within the watershed. Con-

sequently, meetings with the applicant revealed that some of the wetland impacts were avoidable through the relocation of the housing and roads. The reconfiguration did not decrease the economic value of the development and the final project retained the same number of homes and townhouses. The reconfiguration of the development changed the location of the townhouses and the homes and avoided impacts to approximately 3.5 acres of forested wetlands while increasing the green area/playing areas within the development. Relocation of the roadway and stormwater detention ponds avoided another 1.4 acres of wetlands. The final project was authorized with 2.7 acres of impact, which was considered to be within the limitations of a nationwide permit.

The 2-year expiration of NWP 26. The Corps received substantial comment on NWP 26. Many commenters wanted NWP 26 to remain as it was issued in 1991 with one and 10 acre limits, while many others recommended that, at a minimum, the Corps needed to reduce the acreage thresholds to the ⅓- to 3-acre level to ensure that no more than minimal adverse effects would occur. Many others recommended total elimination of NWP 26 because of the impacts that they believed were occurring. Numerous commenters also stated that, since NWP 26 covers a category of waters, rather than a category of activities, that the NWP is illegal under the CWA. The Corps received a wide range of comments regarding reissuance of NWP 26 and thus obtained a clear picture of the public's concerns regarding this NWP. After careful consideration of all comments, the Corps determined that NWP 26 should be replaced by activity-based NWPs. However, in fairness to the regulated public, the Corps determined that a 2-year transition period was needed rather than a decision not to re-issue NWP 26 at all. The Corps believes that the 2-year period is sufficient to develop and issue necessary replacement NWPs for activities with minimal adverse effects on waters of the U.S. In order to ensure that no more than minimal adverse environmental effects occur during the transition period, the Corps also determined that the ⅓- and 3-acre thresholds needed to be put in place as previously discussed.

Although NWP 26 will expire on December 13, 1998, the Corps is already moving forward to develop replacement, activity-specific NWPs to authorize many activities previously covered under NWP 26. We have met with development and environmental interests to listen to their ideas for replacement NWPs. We are continuing to receive recommendations and are eager to work with all interested parties on this effort. Additionally, we have our field personnel collecting data on the current use of NWP 26 to assist in the analysis. This is just the informal part of the process. The public will have a formal opportunity to participate when we publish the proposed replacement permits in the Federal Register for comments.

An example of the type of activity based NWPs we are considering already exists. Nationwide Permit 29, also known as the Single Family Housing nationwide permit, was issued in June 1995. This NWP was established to meet the needs of "mom and pop" property owners wishing to fulfill their "American Dream" of owning a home, while simultaneously protecting the Nation's waters and reducing regulatory constraints on these home owners. NWP 29 allows for up to ½ acre of impact to nontidal wetlands for the construction of a single family home, not housing subdivisions, but single homes, and their attendant features. To date, this NWP has been utilized to authorize the construction of 385 homes throughout the nation with total impacts of only 70.76 acres of waters of the U.S. Through the notification process required for authorization under NWP 29, the Corps has been able to avoid impacts on-site to the extent practicable and to ensure the impacts remain minimal while allowing projects to go forward in a timely manner. We envision replacement NWPs for similarly defined minor activities with practical, environmentally sound restrictions.

It is important to note that these new activity specific nationwide permits, similar to the other nationwide permits, generally will not be restricted to isolated waters or above headwaters areas. While the scope of activities authorized by NWP 26 may decrease, the geographic scope of coverage will increase. Furthermore, the existing NWPs which are not geographically restricted, will now be used above headwaters and in isolated waters, where NWP 26 was used previously. For example, NWP 29, mentioned in the previous paragraph, will now serve as a replacement for NWP 26 for single family homes above the headwaters and in isolated waters.

Finally on replacement NWPs, I would like to give you an idea of the projected course of action over the next 12–18 months that will ensure the issuance of replacement NWPs prior to the expiration of NWP 26. These replacement NWPs will only authorize activities that the Corps determines would have minimal impact on the aquatic environment. We will continue to work with interest groups and Federal, State and tribal agencies to further develop NWPs this summer and fall. We will publish the proposed replacement NWPs in the Federal Register by February 1998

for formal public review and comment. We expect to issue the replacement NWPs in August 1998. The new permits would become effective 60 days from the date of final publication.

The prohibition on the use of NWP 26 for projects affecting more than 500 linear feet of a streambed. The Corps received several comments regarding the adverse impact of NWP 26 projects that affect lengthy sections of flowing streams. In response to these comments and based on Corps experience, the Corps determined that to ensure that the adverse environmental effects of NWP 26 remain minimal, it was necessary to limit the length of project impacts on the stream bed as well as to limit the overall acreage. The Corps believed applying this restriction to only direct impacts of filling or excavating the streambed was sufficient to ensure that the impacts would be minimal. The restriction does not limit the ability of the Corps to authorize projects that cause the inundation of more than 500 linear feet of a stream, nor filling in areas of wetlands in areas adjacent to the stream for more than 500 linear feet, provided the impacts are not more than minimal. The limitation restricts projects that could have, under the 3-acre limitation (and without the 500 linear foot limit), totally filled a 10 foot wide streambed for nearly 2.5 miles.

The prohibition against "stacking" (the use of NWP 26 with other nationwide permits on the same project), if the total adverse effects on waters of the U.S. would exceed the 3-acre limit applicable to activities authorized solely by NWP 26. The Corps received numerous comments suggesting that there were cumulative impacts caused by the practice of stacking or multiple use of NWPs for a single and complete project. Such stacking was authorized under the previous NWPs. However, during the Corps review of the comments and the Corps review of the implementation of the NWPs, it became apparent that more than minimal impacts were possible when stacking occurred. This was particularly apparent when considering stacking additional NWPs with NWP 26. The Corps, after careful consideration, established the 3-acre limit for NWP 26, and thus any additional impact would likely increase impacts beyond the minimal level. That is, to ensure that the minimal impact level threshold is not exceeded, other NWPs may not be combined with NWP 26 in a manner that results in more than 3 acres of impact.

These last three issues, the two-year limit, 500 LF prohibition and stacking of NWP 26, are the subject of a law suit brought by the National Association of Home Builders against the Corps. The plaintiffs' claim that the Corps violated the Administrative Procedure Act in adopting these three changes. We believe, as discussed above, that we have complied with all legal requirements for reissuing and modifying the nationwide permits.

CONCLUSION

The Corps believes that the changes in the NWP program were clearly needed in order to continue to ensure that the thousands of activities authorized result in no more than minimal adverse environmental effects, either individually or cumulatively. Our extensive experience with administering the NWP program indicated that the former limitations of NWP 26 could no longer ensure that only minimal impacts to the aquatic environment would occur. An essential part of the Corps experience with implementing the NWPs includes an increase in scientific information that clearly indicates the important functions and values of headwaters and isolated waters to the Nation's overall aquatic system. At the same time, the Corps recognizes that activities that do involve only minimal impacts should be allowed to proceed with minimal review and delay. The Corps has ensured that such projects can be authorized under the reissued interim NWP 26. Over the next one and one half years, this interim approach will be replaced with a more focussed group of activity specific NWPs. The replacement NWPs will ensure that adverse environmental effects of the NWP program are only minimal, and more clearly identify the activities covered to assist the regulated public. Furthermore, the changes to NWP 26 should be considered in the overall context of all NWP changes. We believe that the reduction in the regulatory burden on landowners will, on balance, offset the increases. Our approach to NWP 26, along with the other NWP changes, ensures sound environmental protection and the efficient authorization of development resulting in minimal adverse environmental effects.

While I have not discussed the recent opinion in *American Mining Congress* v. *U.S. Army Corps of Engineers*, I will note that we support fully the comments expressed in EPA's written statement on this case. As discussed in their statement, the Tulloch Rule was issued by the Corps and EPA because of an increase in the number of cases where important waters of the United States were being destroyed or severely degraded, by activities that involved excavation with incidental discharges. Such activities were being regulated inconsistently nationwide by the

Corps, resulting in inequitable treatment of various permit applicants, depending on their geographic location. We continue to believe that the CWA provides the authority for the Corps to regulate excavation activities involving discharges in all waters of the U.S. Because of the substantial impacts that such excavation activities can cause to the Nation's waters, we intend to vigorously defend our position in an appeal of the D.C. District Court's decision.

Mr. Chairman that concludes my statement. I would be pleased to address any questions that you or the committee may have on the important subject of wetlands protection and regulation.

PREPARED STATEMENT OF DARREL SEIBERT, NATIONAL ASSOCIATION OF HOME BUILDERS

Good morning. My name is Darrel Seibert and I am here to testify today on behalf of the 190,000 member firms of the National Association of Home Builders. The vast majority of NAHB members are small business owners. Approximately 93 percent of the sales revenues in our industry are derived from companies qualifying as small businesses. I would like to talk about two related but separate issues involving recent regulatory and judicial developments concerning wetlands. The two issues are the regulatory decision by the U.S. Army Corps of Engineers to eliminate Nationwide Permit 26 and the recent court decision overturning the Tulloch Rule. I will address them in that order.

Nationwide Permit 26

Recently, the U.S. Army Corps of Engineers issued a final rule on the nationwide permit program under section 404 of the Clean Water Act, which regulates the discharge of dredged or fill materials into the waters of the United States. NAHB believes that the Corps acted inappropriately and irresponsibly in its final rulemaking and failed to adequately consider the impact of its decision on small businesses. Specifically, I am here to talk about the economic impact resulting from changes made to Nationwide Permit 26.

Nationwide permits (NWPs) are a type of general permit, authorized under the Clean Water Act. NWPs provide an expedited permitting process for developers performing certain activities in wetlands that, individually or cumulatively, will produce only minimal environmental impacts without the delay that usually accompanies the more extensive individual permit process. For comparison, obtaining a nationwide permit generally takes about a month while an individual permit usually takes more than a year to process and is far more burdensome for the Corps and for small businesses. Unnecessary delays in construction add significantly to the cost of a new home. The most common permits used by builders and developers are NWP 12 for installing utility lines, NWP 14 for minor road crossings, and NWP 26 for discharges into isolated or headwaters wetlands and waters of up to 10 acres (individually or cumulatively).

According to the Clean Water Act, NWPs must be reauthorized by the Corps at least every 5 years. Since it was first authorized in 1977, NWP 26 has remained essentially the same—allowing impacts of up to 10 acres. Impacts under 1 acre were deemed so minimal those projects could proceed without prior notification to the Corps. However, during the last reauthorization process which began last summer, the Corps proposed three options for changing NWP 26: (1) leaving the threshold limits at 1 acre and 10 acres, (2) reducing the threshold limits to ½ acre and 5 acres, or (3) reducing the threshold limits to acre and 3 acres.

The Corps received over 400 comment letters on these threshold options—70 percent of those letters agreed with NAHB's preference for the first option. Likewise, a majority of the local Corps districts who filed comments also supported making no changes to Nationwide Permit 26 and retaining the 1 and 10 acre thresholds.

Nonetheless, the Corps ignored these comments and, on December 13 of last year, issued a final rule that chose the most restrictive option, Option 3, reducing the threshold limits to ⅓ acre and 3 acres. Additionally, the Corps imposed further restrictions that were not even part of the proposed rule, including new restrictions on combining Nationwide Permit 26 with other nationwide permits. Another new limitation, invalidating the use of Nationwide Permit 26 on projects affecting more than 500 linear feet of a streambed, will prevent many projects from being eligible for a Nationwide Permit 26 at all. The impact of this change will be particularly devastating in the West.

Finally, the Corps also decided in its final rule that the new, much more restrictive Nationwide Permit 26 would be gone in 2 years. All other NWPs were reauthorized for 5 additional years. The Corps claims it will have issued up to a dozen new

targeted replacement permits to be available when NWP 26 expires, but NAHB has serious doubts the Corps will achieve this goal. The Corps was late in reissuing existing permits and issuing new permits in the last two cycles, when the changes were comparatively simple and there was 5 years to complete them. Accordingly, there is no reason to believe that the Corps will be able to finalize brand new permits in only 2 years. Without these permits, many of our members could be forced out of business while their projects are put on hold waiting either for new permits to be issued or dealing with the more lengthy and expensive individual permitting process.

The Corps decided to make many of these important and substantial changes to NWP 26 without public notice, despite the fact that it has worked well for the last 20 years. There will be minimal if any environmental benefit from the changes. The old Nationwide Permit 26 included numerous environmental safeguards such as water quality certification, permit standards and conditions. The Corps claims that it made the decision to phase out NWP 26 based on comments to the proposed rule expressing concern that the old NWP 26 allowed unacceptable impacts. At the same time, the Corps acknowledges that there was actually a net increase in wetlands under the old Nationwide Permit 26. In place of the 6500 acres of wetlands disturbed under the old Nationwide Permit 26 in 1995, 7800 new acres of wetlands were created or restored—a ratio of 1 to 1.15. If the old NWP 26 created or restored more wetlands than were impacted, how can the Corps also argue that the permit allowed too great an impact on wetlands?

Significantly, the Corps did not inform the public that it was even considering these fundamental changes to NWP 26. Instead, it made that decision after hearing only one side of the story. NAHB feels strongly that the Corps issued its final rule on NWP 26 without fully considering the impact on small business and without weighing those significant costs against the minimal benefits that may result. The decision will cause a significant increase in time, money, and paperwork required to complete a project. Builders, property owners, municipalities, and first time home buyers will all be impacted.

The Corps admits the rule will increase the number of individual permits it will have to process by 10 percent, although NAHB believes that number will be far higher, slowing the approval process even more. The data used by the Corps for its estimate of a 10-percent increase in individual permit applications only accounted for the reduction in the threshold acreage from 10 acres to 3 acres. The Corps did not adequately consider the potentially significant increase in individual permit applications resulting from the 500 linear feet rule, which will have a significant impact particularly in the west, or from the prohibition on stacking NWP 26 with other NWPs. Neither of these elements were part of their proposed rule and were made without opportunity for public comment, nor was the 2-year expiration of the reissued permit.

Because the U.S. Army Corps of Engineers chose to significantly modify and eliminate Nationwide Permit 26 without proper public notice, comment, or review period, NAHB filed suit against the Corps on March 6 for violations of the Administrative Procedures Act and the Clean Water Act. NAHB further believes that Congress has a responsibility to ensure that the Corps meets the requirements of the Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) last year. NAHB feels strongly that the Corps has not, and NAHB has provided testimony to the House Small Business Committee to that effect.

In addition to our lawsuit against the Army Corps, NAHB is strongly supporting legislation introduced in the House by Representative Mark Neumann, H.R. 2155, which would restore Nationwide Permit 26 to the original thresholds before the Corps illegally modified them on December 13. The Corps should have to provide evidence for the need for change before changing a permit which has been so effective at protecting and increasing wetlands while providing regulatory flexibility for builders. Congress has a responsibility to ensure that Federal agencies abide by the rules when making significant regulatory decisions. Again, this issue is about playing fair, not protecting the environment. NAHB's members have a strong interest in protecting the environment, including wetlands, in a way that makes sense.

Tulloch Rule

The second issue I would like to address is the recent court opinion that invalidated the Army Corps regulation commonly known as the "Tulloch rule." This rule required developers to get permits for the incidental fallback that accompanies dredging and landclearing activities in wetlands under the theory that this incidental fallback should be considered a "discharge" under the Clean Water Act. In other words, the Tulloch rule attempted to make "taking out" material the same as "filling

in." Five trade associations—NAHB, the National Mining Congress (formerly known as the American Mining Congress), the American Road and Transportation Builders Association, the National Aggregates Association, and the American Forest & Paper Association—sued the Corps and the EPA arguing that this regulation went beyond the authority granted to the Corps by Congress under the Clean Water Act. In January, Judge Harris of the United States District Court for the District of Columbia ruled that the Tulloch rule was inconsistent with the intent of the CWA and the legislative history and he invalidated that regulation.

In response, the Justice Department, representing the Corps and the EPA, attempted to have the District Court's ruling limited—in a creative, but highly questionable motion to the court—asking that the ruling only apply to the litigants in the case. In other words, the Justice Department argued that the rule was only invalid for members of the trade associations that sued them, but the District Court's ruling did not apply to everyone else. Although that argument could be considered a great recruiting tool for NAHB, it flies in the face of justice. The Justice Department's argument essentially was that the Army Corps of Engineers could continue to enforce an illegal regulation against a citizen until and unless he brought a successful suit against the Corps. As you might expect, the Justice Department's attempt to limit the ruling was soundly rejected by the court.

NAHB is very concerned with the fact that District Court invalidated the Tulloch rule in January of this year, but local Corps districts continue to try to avoid and ignore the ruling. First, the Justice Department argued that the Corps should not have to issue guidance to local districts about how to comply with the ruling until its attempt to limit the District Court's decision to the members of the trade associations was ruled on. This was clearly a stall tactic, since the District Court's ruling was effective immediately and the Corps should have been complying with it. Because there was no guidance from the Corps to the local districts to tell them how to comply with the court's ruling, there was significant confusion and false information around the country. We have reports from our members that local Corps officials made such statements as, "the Court's decision only applies in the District of Columbia," "the decision does not apply to applications already in process at the time of the decision," and "the decision had been stayed." All of these statements were patently false.

Furthermore, Corps personnel "encouraged" builders and developers to apply for permits for incidental fallback anyway, even though the Tulloch rule had been overturned. The Corps suggested builders apply for the permits "just in case" warning that if the District Court's opinion were later overturned on appeal, any excavation done without a permit would be subject to vigorous enforcement actions applied retroactively. For 2½ months after the Court's ruling, the Corps failed to give formal guidance to local Corps districts on compliance with the invalidation of the Tulloch rule. NAHB reported all of these problems to the Corps with little result.

Finally, with all other options exhausted, NAHB and the other plaintiffs filed a motion on April 8 asking the court to compel the Corps to issue guidance. The Corps issued its formal guidance on April 11.

The 2½-month delay in obtaining formal guidance from the Corps and EPA strongly illuminates the problem of having a program run by two different agencies. The Corps did draft interim guidance within the first few weeks following the Court's ruling, but the formal guidance—which had to be issued by both the EPA and the Corps was not finalized until last week. The Corps and the EPA failed to effectively coordinate their activities, leading to confusion, delay, and error. For the record, I have submitted a number of documents showing the lengthy and laborious efforts by NAHB and the other plaintiffs to get the Corps and EPA to follow the Court's ruling and to issue formal guidance.

In short, the recent pattern of decisions by the Corps and the EPA demonstrates either a lack of willingness or the inability to follow the instructions of Congress or of the Federal Courts. By significantly changing the nationwide permit program without proper notice or input from small businesses; by enforcing regulations beyond the authority granted to them by Congress; by failing to provide clear and timely guidance on a Federal court ruling; and by attempting to enforce a rule, clearly invalidated by the courts, for those members of the public who did not sue them directly for relief—the Corps and the EPA have behaved inappropriately and irresponsibly. On behalf of the 190,000 member firms of NAHB, thank you for this opportunity to address these very serious concerns.

Appendix 1

Letter from Corps erroneously stating that the ruling applied only to the District of Columbia

DEPARTMENT OF THE ARMY

February 10, 1997

Construction-Operations
Regulatory (97-02139-SP-JAW)

Mr. Joe Kimmes
J. Kimmes Construction Inc.
6327 Tower Avenue
Superior, Wisconsin 54880

Dear Mr. Kimmes:

We have reviewed information about your project to excavate drainage ditches in and around the isolated wetlands west of Tower Avenue and north of 52nd Street in the City of Superior. The project site is in Sec. 34, T. 49N., R. 14W., Douglas County, Wisconsin.

In your telephone conversation with Mr. James A. Weinzierl, of my staff on February 7, 1997, you indicated that you had been informed that a Department of the Army permit would no longer be needed for your proposed project. The basis of this belief is the ruling in a recent court case in Washington DC. The regulation of mechanized landclearing, ditching, channelization, and other excavation activities in waters of the United States by the Corps of Engineers under Section 404 of the Clean Water Act has only been overturned within the District of Columbia. We believe that you will need a Department of the Army permit for this activity.

Because we must notify certain other agencies about your project and provide them a reasonable opportunity to comment, our review for most projects may take at least 90 days. You can help expedite this procedure if you --

- Fill out the application completely and specifically.
- Send accurate drawings, including smaller, 8 1/2 by 11 inch, copies for our public notice.
- Please describe any alternatives considered when planning the project. This consideration should include other potential sites and other methods of accomplishing the desired result. Our regulations often prevent issuance of permits when there are less-environmentally-damaging alternatives available. For instance, if the project involves placing fill in a water or wetland, there may be a way to accomplish the project purpose but without filling, or without filling as large an area.

If your project would include any temporary placement of excavated or fill material into a waterbody or wetland, you may also need authorization for that work. Be sure to include that information in your permit application.

You may also need state, county, and/or city permits for this project.

Please return this information as soon as possible. Replies may be addressed to the U. S. Army Corps of Engineers, Regulatory Branch, Box 120, State Road, Two Harbors, MN 55616.

If you have any questions, contact James A. Weinzierl in our Two Harbors office at (218) 834-6630. In any correspondence or inquiries, please refer to the file number shown above.

Sincerely,

James A. Weinzierl

for Dan A. Wopat
Chief, Regulatory Branch

Appendix 2

Correspondence between plaintiff's counsel and the Corps about the need for formal guidance to be jointly issued by the Corps and the EPA

LAW OFFICES
BEVERIDGE & DIAMOND, P. C.
SUITE 700
1350 I STREET, N. W.
WASHINGTON, D. C. 20005-3311
(202) 789-6000
TELECOPIER (202) 789-6190

VIRGINIA S. ALBRECHT
DIRECT DIAL NUMBER
(202) 789-6030
VALBRECHT@BDLAW.COM

40TH FLOOR
437 MADISON AVENUE
NEW YORK, N. Y. 10022-7380
(212) 702-5400

BEVERIDGE & DIAMOND
SUITE 400
ONE BRIDGE PLAZA
FORT LEE, N. J. 07024-7502
(201) 585-6162

BEVERIDGE & DIAMOND
SUITE 3400
ONE SANSOME STREET
SAN FRANCISCO, CA 94104-4436
(415) 397-0100

March 17, 1997

VIA FACSIMILE

Stephen L. Samuels, Esquire
Assistant Chief
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-3986

Re: Corps' Response to AMC Decision

Dear Mr. Samuels:

As we have discussed with you several times over the past few weeks, we have been besieged by reports from all over the country that the Corps districts are either disregarding the *American Mining Congress* decision entirely, misinforming the regulated community about its impact or encouraging regulated entities to proceed as if the decision had never been written, thereby stripping the Court's ruling of any practical effect.

As reported to us, Corps districts have

- Told applicants that the Court's decision applies only in the District of Columbia (see the letter from the St. Paul District Office, which we faxed to you on February 28; other examples have been reported by clients located in the Southwest and in the Midwest)
- Advised permit applicants that the decision does not apply to applications that were already in process at the time the decision was handed down
- Stated that the decision has been stayed

- Encouraged parties to apply voluntarily for permits that cannot be required under the Court's Order "just in case"

- Warned that excavation in reliance upon the decision would lead to a vigorous enforcement action if the Corps later won the case on appeal

Threats of future enforcement and "friendly advice" encouraging voluntary applications are wholly improper coming from a government agency with vast powers over the lives and livelihoods of permit applicants. Misrepresentations about the scope and status of the Court's Order are similarly improper. At best, these actions by the Districts are just the misguided flounderings of field personnel acting without proper guidance from Headquarters. But the absence of formal guidance from Headquarters in the face of consistently inaccurate statements from the field suggests a conscious decision to allow confusion to subvert the Court's ruling. Moreover, we understand someone at Corps headquarters has sent out "informal interim" guidance (which is not available to the public) stating that excavation is not now subject to regulation but that land-clearing remains regulated. We have also been told that, shortly after the decision came down, EPA distributed on its intra-governmental web site an informal interpretation of the decision which quoted a law professor to the effect that the decision was effective only in the District of Columbia.

It is not the Court's decision that has created this situation. The decision is crystal clear. It strikes down the Corps' and EPA's attempt to use "incidental fallback" as a jurisdictional hook to regulate excavation, land-clearing and other activities that do not constitute discharges of dredged material as Congress contemplated that term. It does not draw a distinction between land-clearing and excavation. As the court stated, "Incidental fallback associated with excavation or landclearing does not add material or move it from one location to another; some material simply falls back in the same general location from which most of it was removed." Only if an activity involves more than incidental fallback may it be subject to regulation. Likewise, there can be no doubt that the decision applies nationwide. Even the government's recent motion to alter or amend the judgment acknowledges that the decision applies nationwide, at least with respect to the plaintiffs and all of their members.

While we appreciate your willingness to address personally individual cases that we bring to your attention, that is not adequate to comply with the Court's Order. Many regulated entities may be either deceived by the misinformation coming out of the Corps districts or too intimidated to come forward or to allow their identities to be disclosed.

It is no answer to say that guidance has not been issued because the Court's Judgment is now subject to a motion to modify or amend. The Judgment is in effect and must be complied

with. If it is modified, then modified guidance can be issued when appropriate, but formal guidance that is true to the terms of the Court's Opinion and Judgment is necessary now.

We request that you send us a copy of the "informal" guidance(s) that has already been issued. We also request that the Corps immediately issue formal guidance properly instructing the Districts on the full scope of the Court's Opinion and Order. Unless we hear from you by the morning of Thursday, March 20, 1997, that the Corps is prepared to take such action, we will bring the Corps' non-compliance with the Judgment to the attention of the Court.

Sincerely,

Virginia S. Albrecht

VSA:dms
Enclosure

U.S. Department of Justice

Environment and Natural Resources Division

Stephen L. Samuels
Assistant Chief
Environmental Defense Section
P.O. Box 23986
Washington, DC 20026-3986

Telephone (202) 514-3219
Facsimile (202) 514-8165

VIA FACSIMILE

March 20, 1997

Virginia S. Albrecht, Esquire
Beveridge & Diamond, P.C.
Suite 700
1350 I Street, N.W.
Washington, D.C. 20005-3311

Re: Corps' Response to AMC Decision

Dear Ms. Albrecht:

Thank you for your letter dated March 17, 1997. In response to your request, I am attaching copies of informal interim guidance that the Corps of Engineers has sent to its district offices concerning compliance with the court's injunction in AMC. The latest memo, dated March 18, 1997, should clarify any ambiguity that might have existed in the earlier documents.

In addition, I have requested that the Corps and EPA renew their effort to issue formal joint guidance to their field offices. That action was placed on hold when the court granted our motion for expedited consideration of our motion to alter or amend the judgment, which sought clarification of the intended scope of the injunction. However, because the court has not yet issued a decision on the motion to alter or amend, the Corps and EPA intend to issue formal guidance as soon as possible. In the interim, of course, the prohibition on the regulation of incidental fallback is being followed with respect to all entities, not just members of the plaintiff trade associations. The only exception is where a permit applicant expressly requests that a pending application for the discharge of incidental fallback continue to be processed.

Please be assured that the United States takes compliance with the injunction very seriously. This is why I have requested that you bring to my personal attention any situation where you believe that a Corps district is not complying with the injunction. To date, you have specifically

informed me of only one such incident, which involved information that had been distributed by a Corps district prior to the receipt of interim guidance. I have been informed by the Corps that that situation has been rectified.

Sincerely,

Stephen Samuels

Stephen Samuels

Attachments

Appendix 3

Various documents from the Corps to local districts offering "Interim Guidance" until formal guidance can be issued jointly by the Corps and EPA

From: Larry Barnett
To: X400.HENRY_BLACK_CELMK-OC, X400.David_Sirmans_CELM...
Date: Thursday, January 30, 1997 10:36 am
Subject: Tulloch Rule

This is interim interim guidance. I have discussed subject decision with Martin and Lance. Interim agency guidance is being held up for coordination with EPA. So I am giving you unofficial interim guidance until the written iterim guidance is issued.

This guidance applies only to actions that would only be regulated by application of the Tulloch rule. If an activity is regulated without the need to apply Tulloch, such as changing the contour/elevation of land during landclearing operations (which would exceed the old de minis standard under the pre-Tulloch regs. and thus would constitute deposition of fill - see Aveyelles), it is business as usual. For any action , however, which we would not regulate but for Tulloch, all enforcement actions and the processing of all such permits should cease immediately. No further processing and no acceptance of such permits should take place, unless the applicant requests in writing that processing proceed.

Inquiries should be handled as follows*:

"We are awaiting instructions from HQUSACE as to how the American Mining decision should be implemented. The Corps of Engineers has requested that the Department of Justice seek a stay of the court order. We have no further comment or information upon the effect of this ruling at this time. In the interim, if you, the applicant, wish to seek a permit that will be required only if the American Mining decision is stayed or overruled, we are allowed to begin processing such an application only upon your written request to do so. We will provide additional instruction as appropriate, as additional guidance is received."

Note: Explanations of the Tulloch rule itself are OK. Obviously, we must explain to prospective applicants a distinction in jurisdictional activities based on our "old policy" versus the Tulloch rule, if it is relevant to their activities and would not be covered by 404 but for the Tulloch rule.

Query: What do we do about permits that are within days of being issued, while we await the interim guidance? I suggest that we not issue any such permit. I recommend to regulatory that the individual application be submitted to HQ Regulatory with a request for guidance/clearance as to issuing the permit. (Not for a public interest decision on the merits of the application but for a decision on issuing the permit in view of Am. Mining, pending written guidance.) It may be that the HQ ruling will be that we not issue such a permit without the written request of the applicant. The issue then is whether we notify the applicant that we are ceasing processing without a written request to issue. So this is unresolved and I suggest the above solution of raising the issue formally with HQ Regulatory if we have such a case.

* This message is not intended to preempt guidance issued through regulatory channels.

13 February 1997

MEMORANDUM FOR: CORPS DISTRICT AND DIVISION COUNSELS

FROM: Lance D. Wood, Assistant Chief Counsel, Environmental Law and Regulatory Programs, Corps Headquarters

SUBJECT: "INTERIM, INTERIM INFORMATION" REGARDING THE "EXCAVATION RULE" COURT DECISION, AMERICAN MINING CONGRESS V. CORPS

1. As many of you know, on January 23, 1997, the U.S. District Court for the District of Columbia (Judge Stanley Harris) handed down a decision in the subject case, to the effect that certain parts of the Excavation Rule, promulgated on Aug. 25, 1993, went beyond the statutory authority of the Corps and EPA. Since that time I have been working with the EPA to try to develop joint agency guidance for our field offices. Unfortunately, that guidance is not yet available, and I don't really know just when it will be available. Meanwhile, Corps field office personnel have been asking me for information on this subject. I can only provide this as UN-OFFICIAL, INFORMAL INFORMATION from me for the moment, but perhaps it will be of more use to you than no information from headquarters at all. Needless to say, this information will be superseded by any official guidance that the Corps and EPA put out, whenever that happens.

2. KEY POINT TO REMEMBER: In his decision Judge Harris ruled that the Corps and EPA exceeded their statutory authority when, and to the extent, that we asserted authority under Clean Water Act (CWA) Section 404 over activities (such as excavation) based ONLY on "incidental fallback" discharges of dredged material, which the Court defined as "the incidental soil movement from excavation, such as the soil that is disturbed when dirt is shoveled, or back-spill that comes off a bucket and falls into the same place from which it was moved. Incidental fallback does not include soil movements away from the original site. Sidecasting ... and sloppy disposal practices involving significant discharges into waters have always been subject to section 404." (Slip opinion at 5, nt. 4.)

3. Thus, remember that many of the general types of activities addressed in the Excavation Rule, such as mechanized landclearing, ditching, channelization, etc., involve discharges of dredged or fill material greater in amount than or different in kind from the minimal, "incidental fallback" discharges addressed by and defined by the subject Court decision. For example, it is my understanding that practically all mechanized landclearing involves the pushing and movement and re-deposit of substantial amounts of soil (i.e., "dredged material") from one place to another within waters of the United States. The soil is moved from one place to another in waters of the U.S. by bulldozer blades, while the logs and limbs are being pushed into windrows, etc. Based on those "re-deposits" of dredged or fill material that inevitably occur during mechanized landclearing operations, the Corps issued RGL 90-5 in 1990, well before the Excavation Rule was promulgated in 1993, to conform with the Fifth Circuit's decision in Avoyelles Sportsmen's League v. Marsh. Similarly, many drainage, ditching, or channelization projects involve substantial discharges of dredged or fill material, such as sidecasting. Moreover, many projects that could be built with only "incidental fallback" as the District Court defined that term, also need Corps authorization for access roads or other parts of the project, and the excavation part of

the overall project can be treated as secondary impacts of the parts of the overall project that we do regulate. In my opinion, the Corps can and should continue to regulate all such activities involving more than "incidental fallback" discharges from dredge buckets, backhoe buckets, etc., even if we do not get a stay pending appeal. I hope and expect that the joint agency guidance will address this point.

4. In my opinion it is safe to say that the Corps and the EPA disagree with the District Court's decision regarding the Excavation Rule, and have already asked the Department of Justice (DOJ) to appeal the decision and to seek a stay pending appeal.

5. On February 5, 1997, the DOJ filed a Motion to Alter of Amend the Judgment with the District Court, seeking to clarify the scope of the District Court's injunction. That motion requests that the Court clarify that its injunction is limited to the Court's jurisdiction, i.e., the geographic area of the District of Columbia, plus the members of the specific trade groups that were plaintiffs in the subject lawsuit. The motion also requests that those plaintiff groups provide a list of all of their members as of the date that the lawsuit was filed. If and when the Court provides that clarification, then the Government will still be able to enforce the Excavation Rule against all other persons, even if we do not obtain a stay pending appeal. However, until we do obtain that clarification, I suggest that you defer taking or prosecuting enforcement actions against anyone WHERE THE ONLY BASIS YOU CAN LOCATE FOR JURISDICTION IS THE MINIMAL, "INCIDENTAL FALLBACK" DISCHARGES OF DREDGED MATERIAL DEFINED BY THE COURT. Similarly, for new or pending permit applications where the only basis for jurisdiction is incidental fallback, I suggest that you put those on hold, unless the applicant requests in writing that you accept and process the application notwithstanding the doubts caused by the subject court decision. Many permit applicants might make such requests, to remove doubts about the legality of their activities until this litigation is resolved.

6. Remember that the District Court did not address the parts of the Excavation Rule that addressed pilings or prior converted croplands, so those parts of that rule are not in doubt or affected in any way. Similarly, the Court's decision does not address or affect in any way the Corps' authority or jurisdiction under Section 10 of the Rivers and Harbors Act of 1899.

7. If I can be of further help during this interim period, please call me at (202) 761-8556.

CECC-E 20 February 1997

MEMORANDUM FOR: ALL CORPS DISTRICT AND DIVISION COUNSELS

FROM: Lance D. Wood, Assistant Chief Counsel, Environmental Law and Regulatory Programs, Corps Headquarters

SUBJECT: ADDITIONAL INTERIM GUIDANCE REGARDING THE "EXCAVATION RULE" COURT DECISION, AMERICAN MINING CONGRESS V. CORPS

1. On 13 February 1997 I sent by E-mail interim information on the subject court decision. Before I sent that memo, I provided a draft copy to the appropriate attorneys of the U.S. Department of Justice (DOJ), who had no objection to its content or to my sending it to all Corps field offices as interim guidance. Consequently, that memo and this supplement to it constitute the best advice that we can offer at this moment regarding the subject lawsuit. Nevertheless, I am told by various district and division attorneys that some confusion still exists regarding conflicting interim guidance documents. This memo is intended to resolve any such confusion.

2. I understand that some Corps field offices have received a copy of a memo written by Larry Barnett on 1/30/97, addressed to LMVD district counsels. That was appropriate interim guidance for that time, but Larry's memo has been superseded by my memo of 13 February and by this memo. So far as I know, my two memos are now the only guidance that should now be followed by any Corps field office regarding the subject District Court decision; the recommendations of my two memos have been coordinated with the DOJ.

3. If a permit applicant applies for a permit, or has a permit application pending, involving activities for which the only basis for Section 404 jurisdiction is the "incidental fallback" defined by the District Court (and quoted in my Feb. 13 memo), the Corps district may accept that application, process that application, continue to process a pending application, and issue a permit based on such an application, but only after the Corps has obtained a written request from the permit applicant that we do so notwithstanding any doubts about Corps jurisdiction occasioned by the subject District Court decision. Many prudent and responsible members of the regulated public may choose to apply for and receive Section 404 permits notwithstanding the doubts occasioned by the subject District Court decision, because they may wish to protect themselves from delays, enforcement actions, and other problems that could arise if they proceed with work in waters of the U.S. without a Section 404 permit, based on whatever they may have heard about the subject District Court decision. For example, Corps inspectors could discover that a developer's work in waters of the U.S. involves discharges of dredged or fill material greater in volume than, or different in kind from, the minimal "incidental fallback" discharges defined in the District Court decision, even though the developer claimed that his work would involve only "incidental fallback" discharges. This disagreement could subject the developer to an enforcement action, penalties, and costly delays in obtaining permit authorization. In addition, once the Government's motion to alter or amend the judgment is resolved, or if the Government obtains a stay pending appeal, and/or wins on appeal, we could bring an enforcement action for any unauthorized work done during this current period of uncertainty.

Many prudent persons would prefer to avoid such doubts and risks by obtaining Corps permits for activities involving only "incidental fallback" discharges during the period while this lawsuit is being contested and resolved. The DOJ agrees that the Corps can process and issue such permits with a written request from the applicant that we do so. Of course, where a permit applicant proposes to conduct activities that involve "incidental fallback" plus other activities requiring authorization from the Corps, we can process and issue such permits, addressing the activities involving only "incidental fallback" discharges as secondary effects of the overall project.

4. Please remember that my first memo explained the current position regarding mechanized landclearing. Ever since we put out RGL 90-5 in 1990, based on the Fifth Circuit's decision in Avoyelles Sportsmen's League v. Marsh, the Corps has asserted jurisdiction over all mechanized landclearing, based on our experience that mechanized landclearing in wetlands virtually always moves and "redeposits" substantial amounts of soil in waters of the U.S. In our experience, mechanized landclearing does not merely involve the minimal "incidental fallback" defined by the District Court's decision. Of course, the Corps is always willing to consult with any member of the public who may claim that he has discovered some form of mechanized landclearing of wetlands that does not move substantial amounts of soil. Such claims would be considered on a case-by case basis. However, the experience and conclusions reflected in RGL 90-5 and the Avoyelles decision remain the Corps position at this time, and the District Court's holding and definition regarding "incidental fallback" is consistent with that Corps position.

5. While we await results from the Government's motion to alter or amend the judgment, if any district believes that some special circumstance warrants an enforcement action for an unauthorized activity where the only basis for Section 404 jurisdiction that you can find is the sort of minimal, "incidental fallback" discharges defined by the District Court, you should defer that enforcement action, but consult with Corps Headquarters (myself or Martin Cohen) regarding how to proceed.

6. Please share this interim guidance with your Regulatory Branch.

CECC-E 18 March 1997

MEMORANDUM FOR: CORPS DISTRICT AND DIVISION COUNSELS

FROM: Lance D. Wood, Assistant Chief Counsel, Environmental Law and Regulatory Programs, Corps Headquarters

SUBJECT: THIRD INTERIM GUIDANCE MEMO REGARDING THE "EXCAVATION RULE" COURT DECISION, AMERICAN MINING CONGRESS V. CORPS

1. It is my understanding that every Corps district and division office has a copy of the subject District Court decision, and has been implementing that decision. Although the Corps and EPA do not agree with the decision, we must comply with the current injunction that accompanied the District Court's decision unless and until the Government gets that injunction modified, stayed, or overturned. This memo is intended to correct two possible misunderstandings that may have resulted from the two earlier memos that I sent out by E-mail on the subject of the American Mining Congress v. Corps decision.

2. First, regarding the first of the two E-mail memos, sent out on 13 February 1997, paragraph 5 attempts to summarize the Motion to Alter or Amend the Judgment, filed by the DOJ with the District Court on February 5, 1997. That motion did not refer to the geographic area of the District of Columbia as a limitation on the District Court's jurisdiction, but instead suggested that the Court's injunction should be limited to the members of the specific trade groups that were plaintiffs in the subject lawsuit. Unless and until the District Court grants the United States' motion to alter or amend the judgment, the Court's injunction must be applied with respect to everyone, nationwide, not just to the plaintiff trade organizations and their members.

3. Second, in the second interim memo, sent by E-mail on 20 February 1997, paragraph 3 contains one sentence that could be misunderstood. That sentence was the following: "In addition, once the Government's motion to alter or amend the judgment is resolved, or if the Government obtains a stay pending appeal, and/or wins on appeal, we could bring an enforcement action for any unauthorized work done during this current period of uncertainty." I intended that sentence to refer back to the thought that preceded it (i.e., that an enforcement action could result if the Government believes that unpermitted work in waters of the U.S. involved discharges of dredged or fill material greater in volume than "incidental fallback", even though the person performing the work believed that only "incidental fallback" was involved.) Similarly, the Government's motion to alter or amend the judgment, or motion for a stay pending appeal, could be granted while unpermitted work in waters of the U.S. is ongoing and uncompleted. If this were to happen, the person undertaking the work would probably have to stop work and seek authorization before continuing, possibly subjecting that person and his project to substantial delays and expenses. Moreover, once unpermitted work in waters of the U.S. has taken place, factual findings are hard to make regarding precisely what kind of discharges occurred and when they occurred.

4. Nevertheless, the sentence quoted above could be interpreted to mean that the Government

could or would try to bring an enforcement action for work in waters of the United States that took place while the District Court's injunction was in place, and that work actually did involve only incidental fallback discharges, and thus was the sort of work subject to the District Court's injunction. We should not suggest that the Government might bring an enforcement action for any work that takes place while the District Court's injunction is in effect, if the only basis for Corps jurisdiction over that work is the "incidental fallback" type of discharges defined by the District Court. In any discussions with the regulated public, please be sure that no one speaking for the Government states or implies anything contrary to the position just described, and please correct any such misunderstanding that you believe may exist.

5. The Corps and EPA are still working to develop joint, formal guidance, which we intend to issue to our respective field offices as soon as possible. When issued, such formal guidance will supersede my three interim guidance memoranda. Nevertheless, for the time being, please be sure that a copy of this memo is provided to your district or division regulatory branch, along with the two memos sent earlier.

Appendix 4

Additional correspondence between plaintiff's counsel and the Corps urging the issuance of formal guidance from the Corps and the EPA

LAW OFFICES
BEVERIDGE & DIAMOND, P. C.
SUITE 700
1350 I STREET, N.W.
WASHINGTON, D. C. 20005-3311
(202) 789-6000
TELECOPIER (202) 789-6190

VIRGINIA S. ALBRECHT
DIRECT DIAL NUMBER
(202) 789-6030
VALBRECHT@BDLAW.COM

40TH FLOOR
437 MADISON AVENUE
NEW YORK, N.Y. 10022-7380
(212) 702-5400

BEVERIDGE & DIAMOND
SUITE 400
ONE BRIDGE PLAZA
FORT LEE, N.J. 07024-7502
(201) 585-6162

BEVERIDGE & DIAMOND
SUITE 3400
ONE SANSOME STREET
SAN FRANCISCO, CA 94104-4438
(415) 397-0100

March 24, 1997

VIA FACSIMILE

Stephen L. Samuels, Esq.
Assistant Chief
Environmental Defense Section
U.S. Department of Justice
Environment and Natural Resources Division
P.O. Box 23986
Washington, D.C. 20026-3986

Re: Corps of Engineers' Informal Interim Guidance on AMC Decision

Dear Mr. Samuels:

Thank you for your letter of March 20, 1997, enclosing copies of the "informal interim guidance" memoranda that the Corps has issued.

You advise that the Corps and EPA will issue formal guidance "as soon as possible" and you indicate that the process for preparing formal guidance was "placed on hold" when the Court granted the motion for expedited briefing and consideration of your motion to alter or amend the judgment. We find it difficult to comprehend why a motion addressed only to defining who is protected by the Court's injunction should be the basis for suspending the process for preparing formal guidance. We would expect the guidance to address primarily the scope of the Corps' and EPA's regulatory authority. Thus, the central message of the guidance would be unaffected by the outcome of the motion to alter or amend. Moreover, even if the motion were to be granted, the Judgment would still extend to several hundred thousand parties nationwide. In short, the pendency of the motion seems a poor excuse for not providing field personnel guidance that, based upon reports reaching us, is sorely needed.

The issuance of informal interim guidance is a welcome step in the right direction but it is well short of an adequate response to the Court's Order. From what we are hearing of the confusion in the field, the informal guidance is not reaching all those who need it and the Court's

order is being violated by field personnel who either do not understand or do not accept the Court's limits on their authority. Moreover, so far as we understand, the present "informal interim" guidance has been directed only to Corps staff, with the result that EPA staffers continue to make it up as they go along. Given the overlapping authorities of the Corps and EPA, any "guidance" that does not bind both agencies can be subverted by the competing views of staffers within the other agency.

Your letter repeats your request that we bring to your attention situations in which Corps districts are not complying with the injunction. You state your understanding that the situation involving Mr. Joe Kimmes, who was told that the Tulloch Rule "has only been overturned within the District of Columbia," has now been rectified. Upon investigation, however, we learned that the Corps had taken no action to correct its February 10, 1997, letter to Mr. Kimmes. Based on your March 20 letter, Mr. Kimmes contacted the Corps the afternoon of March 21 and was advised then that the Corps is no longer claiming the authority to regulate ditching involving the removal of soil by backhoe and the trucking of the soil for offsite disposal. This is fine as far as it goes, but it took many telephone calls, plus formal correspondence between our offices, to get this one situation "rectified." This is not a model for good government, and it is no way to resolve all the other problem situations referenced in our March 17 letter. The regulated public is entitled to formal guidance directed to both the Corps and EPA.

With regard to the substance of the interim informal guidance memoranda that you provided to us, we have two major objections. First, by focusing narrowly on Section 404 jurisdiction over activities "based ONLY on 'incidental fallback'" (Feb. 13, 1997 Memorandum, ¶¶ 2, 5; Feb. 20, 1997 Memorandum, ¶ 3; March 18, 1997 Memorandum, ¶ 4), the memoranda obscure the removal/addition distinction that undergirds the Court's decision. Building on that distinction, the Court's holding is that activities designed to remove material from wetlands are not subject to Section 404 regulation, even if those activities incidentally involve fallback of the material being removed. Regulation is appropriate only for the placement of material in a location other than the general area from which it was removed. Determining the point at which landclearing ceases to be an unregulated removal operation and instead becomes a regulated deposit of material in a new location requires much finer analysis than the presumption that "practically all mechanized landclearing involves ... re-deposit of substantial amounts of soil ... from one place to another." Feb. 13, 1997 Memorandum, ¶ 3.

Second, the memoranda assert that, if portions of a project involve regulated activities, excavation involving only incidental fallback that cannot be regulated directly should be treated as a secondary impact of the portions of the project that are subject to regulation. Feb. 13, 1997 Memorandum, ¶ 3; Feb. 20, 1997 Memorandum, ¶ 3. This statement precisely embodies what Judge Harris characterized as "unjustified regulatory overreaching." AMC Opinion at 18 n. 18.

The Court's lengthy discussion in footnote 18 leaves no room for doubt that the Corps' jurisdiction over certain activities gives it no authority whatsoever over other aspects of the project of which the regulated activity is a part.

We request that you provide us a date certain by which the Corps and EPA will issue formal guidance. Otherwise, we fear that this guidance to which the public is entitled will become a casualty of the divided jurisdiction over the wetlands program. Further, we insist that the guidance when issued adopt an overall approach that is true to the spirit of the Court's opinion and correct the erroneous advice given in the "interim informal" guidance provided to date.

Please let us have your response by Wednesday, March 26.

Sincerely,

Virginia S. Albrecht

VSA:rs

O:\CLI\12\57\30914\LTR\30914GJS.04

U.S. Department of Justice

Environment and Natural Resources Division

LJG:RMS
90-7-2-138
Environmental Defense Section
P.O. Box 23986
Washington, DC 20026-3986

Telephone (202) 514-3977
Facsimile (202) 514-8168

March 26, 1997

BY FACSIMILE AND REGULAR MAIL
Virginia Albrecht, Esq.
Beveridge & Diamond
Suite 700
1350 I Street, N.W.
Washington, D.C. 20005-3311

Re: American Mining Congress, et al. v. EPA, et al.

Dear Ms. Albrecht:

This is in response to your letter of March 24, 1997 to Steve Samuels. Steve is out of the office this week and has asked me to respond.

As indicated in Steve's previous letter, the Corps and EPA are working diligently to prepare formal guidance concerning the Court's decision in this case. The proposed guidance document is now under review by management. We expect it to be issued in the near future, possibly as early as next week. However, as the guidance is currently under review by management, it is not possible to provide you with a specific date by which it will necessarily be issued.

If you wish to discuss this matter further, I suggest you contact Steve when he returns to the office next week.

Assistant Attorney General
Environment and Natural
Resources Division

By:

Ronald M. Spritzer
Environmental Defense Section

BEVERIDGE & DIAMOND, P. C.
SUITE 700
1350 I STREET, N.W.
WASHINGTON, D. C. 20005-3311
(202) 789-6000
TELECOPIER (202) 789-6190

40TH FLOOR
437 MADISON AVENUE
NEW YORK, N. Y. 10022-7380
(212) 702-5400

BEVERIDGE & DIAMOND
SUITE 400
ONE BRIDGE PLAZA
FORT LEE, N. J. 07024-7502
(201) 585-6162

BEVERIDGE & DIAMOND
SUITE 3400
ONE SANSOME STREET
SAN FRANCISCO, CA 94104-4438
(415) 397-0100

VIRGINIA S. ALBRECHT
DIRECT DIAL NUMBER
(202) 789-6030
VALBRECHT@BBLAW.COM

April 1, 1997

VIA FACSIMILE

Mr. Stephen L. Samuels
Assistant Chief
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-3986

Re: Continuing Need for Guidance

Dear Mr. Samuels:

On Friday I heard from a company in the West that they had been told, *that morning*, that the Corps was continuing "business as usual," notwithstanding the American Mining Congress decision. Yesterday, a lawyer from the Southeast told me that the Corps had advised him (*after* Mr. Wood's most recent guidance) that although they were not currently enforcing the Tulloch rule, if the government prevails on appeal, the Corps will enforce against anyone who relies on the decision during the interim period.

Sincerely,

Virginia S. Albrecht

Virginia S. Albrecht

VSA:dms

O:\CLI\12573\3091\LTR\3091VSA.04

Appendix 5

Motion to compel compliance filed on April 8

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN MINING CONGRESS, et al.,

Plaintiffs,

v.

U.S. ARMY CORPS OF ENGINEERS, et al.,

Defendants.

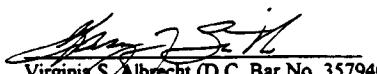
Civil Action No. 93-1754 SSH

PLAINTIFFS' MOTION TO COMPEL COMPLIANCE WITH THE COURT'S INJUNCTION

On January 23, 1997, this Court ordered that the Tulloch rule "henceforth is not to be applied or enforced by the Corps of Engineers or the Environmental Protection Agency." Plaintiffs are informed that field offices of the agencies continue to apply the Tulloch rule in violation of the Court's injunction. The unlawful actions of field personnel are no doubt due to the fact that, more than two months after the Court's Order, EPA and the Corps have still not issued formal guidance instructing their field offices on compliance with the injunction. Plaintiffs have sought to secure the prompt issuance of guidance without the Court's intervention but we have been unsuccessful. Accordingly, plaintiffs respectfully request that the Court direct the agencies immediately to issue formal guidance which fully and faithfully reflects the substance of the Court's January 23, 1997 Opinion and Judgment.

On April 8, 1997, plaintiffs' counsel attempted to contact lead counsel for the defendants, Stephen L. Samuels, to determine whether defendants oppose the relief requested in this Motion, as required by Local Rule 108(m). Mr. Samuels did not return the call before the filing deadline. Therefore, plaintiffs are unable to state at this time whether defendants will oppose the relief requested in this motion.

Respectfully submitted,



Virginia S. Albrecht (D.C. Bar No. 357940)
Gary J. Smith (D.C. Bar No. 245258)
BEVERIDGE & DIAMOND, P.C.
1350 I Street, N.W., Suite 700
Washington, D.C. 20005
(202) 789-6000

Attorneys for Plaintiffs

Dated: April 8, 1997
O:\CLI\12573091\PLG\3091GJS.08

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN MINING CONGRESS, et al., Plaintiffs, v. U.S. ARMY CORPS OF ENGINEERS, et al., Defendants.	Civil Action No. 93-1754 SSH

ORDER

It is this _____ day of _____, 1997, by the United States District Court for the District of Columbia, ORDERED:

That Plaintiffs' Motion to Compel Compliance With the Court's Injunction is GRANTED;

Defendants are directed forthwith to issue formal guidance which fully and faithfully reflects the substance of the Court's January 23, 1997 Opinion and Judgment.

SO ORDERED.

Stanley S. Harris
UNITED STATES DISTRICT JUDGE

O:\CLI\12\57\3091\PLG\3091GJS.09

PERSONS ENTITLED TO BE NOTIFIED OF ENTRY OF ORDER

VIRGINIA S. ALBRECHT
GARY J. SMITH
Beveridge & Diamond, P.C.
1350 I Street, N.W.
Suite 700
Washington, D.C. 20005

HOWARD FOX
Sierra Club Legal Defense Fund, Inc.
1625 Massachusetts Avenue, N.W.
Suite 702
Washington, D.C. 20005

RONALD A. ZUMBRUN
ROBIN L. RIVETT
GERALYNN PATELLARO
Pacific Legal Foundation
2151 River Plaza Drive, Suite 305
Sacramento, CA 95833

PAUL D. KAMENAR
Washington Legal Foundation
2009 Massachusetts Avenue, N.W.
Washington, D.C. 20036

LAWRENCE R. LIEBESMAN
Linowes & Blocher, L.L.P.
1010 Wayne Avenue
Silver Spring, MD 20910

ROBERT J. SANER, II
Powers, Pyles, Sutter & Verville, P.C.
1275 Pennsylvania Avenue, N.W.
Third Floor
Washington, D.C. 20004-2404

ALICE L. MATTICE, Attorney
RONALD M. SPRITZER, Attorney
Environment and Natural Resources Division
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-3986

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN MINING CONGRESS, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 93-1754 SSH
U.S. ARMY CORPS OF ENGINEERS, et al.,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL COMPLIANCE WITH THE COURT'S INJUNCTION

On January 23, 1997, this Court declared the Tulloch rule invalid and set aside. It ordered that the rule "henceforth is not to be applied or enforced by the Corps of Engineers or the Environmental Protection Agency." The agencies are not complying with the Court's injunction. Indeed. just two weeks ago one of the plaintiffs' members was told by a Corps official in the West that, the Court's decision notwithstanding, it was "business as usual" at the Corps.

Field offices are not complying with the Court's injunction because, in the more than two months that have passed since judgment was entered against them, the Corps and EPA have not issued formal guidance to field personnel instructing them how to comply with the Court's Order. As the "business as usual" remark demonstrates, formal guidance is unquestionably needed. Since the Court's Order issued, Plaintiffs have been besieged by reports from all over the country that the agencies continue to adhere to the invalid rule. As reported to us, Corps and EPA staff have:

- Told applicants that the Court's decision applies only in the District of Columbia ;

- Advised permit applicants that the decision does not apply to applications that were already in process at the time the decision was handed down;
- Stated that the decision has been stayed;
- Encouraged parties to apply voluntarily for permits that are not legally required under the Court's Order -- "just in case;"
- Warned that excavation in reliance upon the decision would lead to vigorous enforcement action if the Corps later won the case on appeal;
- Advised applicants that, although the Court's decision precludes the regulation of "pure" excavation, the Corps and EPA may continue to regulate "mechanized land-clearing."

Starting in February, Plaintiffs have brought these misguided and misleading statements to the attention of the defendants and urged them to issue joint formal guidance, but to no avail.[1] Two weeks ago we were told that guidance might be issued "next week" but that week came and went without the guidance appearing. Now we are told that the guidance should be out early this week, but defendants cannot commit to issuing guidance by any date certain. Although we have tried to resolve this issue between the parties, it appears only the Court's intervention will force the issuance of guidance and bring compliance with the injunction.

Although formal guidance has not been forthcoming, one Corps official has sent to attorneys in the field offices three unofficial, informal informational memoranda.[2] These memoranda may well be one individual's good faith effort to clarify a situation made extremely

---

[1] The correspondence between counsel for plaintiffs and defendants is collected in Exhibit A.

[2] The memoranda are enclosures to Stephen L. Samuels' March 20, 1997 letter to Virginia S. Albrecht which is included in Exhibit A.

confusing by the defendants' refusal (or perhaps inability) to issue real guidance, but these unofficial documents have only compounded the problem. First, they have no official status and therefore bind no one because, under a Corps and EPA "understanding," guidance is not effective unless it is issued jointly by the two agencies. Second, these informal efforts are not available to the public and apparently are not even widely distributed within the Corps. Third, and most important, these memoranda are not faithful to the Court's decision and, as long as they are left uncorrected, will thwart the injunction.

The memoranda myopically read the Court's Order only to bar regulation that is based "ONLY" on incidental fallback.[3] Nowhere do these documents explicate for regulatory staff the fundamental distinction which forms the heart of the Court's opinion -- that disposal activities are regulated under Section 404 of the Clean Water Act, but removal activities are not, even if they involve incidental fallback. Thus, the Corps asserts the authority to regulate "mechanized" landclearing on the presumption that it will "inevitably" involve "re-deposit of substantial amounts of soil,"[4] even though the Court's opinion repeatedly and consistently linked landclearing with excavation and other kinds of activities that could not properly be regulated. January 23 Opinion at 3, 4 n.3, 5, 7, 9, 13, 14, 16, 20, 25.

Furthermore, the Corps memoranda claim the authority to regulate what even the Corps would characterize as incidental fallback, if it is part of a larger project involving some regulated activity. The memoranda claim these unregulated activities can be swept within the agencies'

---

[3] Memorandum for: Corps District and Division Counsels ¶ 2 (February 13, 1997)(included in Exhibit A).

[4] Id. at ¶ 3. See also, Memorandum for: All Corps District and Division Counsels ¶ 4 (February 20, 1997)("the Corps has asserted jurisdiction over all mechanized landclearing, based on our experience that mechanized landclearing virtually always moves and 'redeposits' substantial amounts of soil in waters of the U.S.").

regulatory jurisdiction as "secondary impacts" of any regulated activity involved in the project. This is exactly the "unjustified regulatory overreaching" condemned in footnote 18 of the Court's Opinion.

Accordingly, plaintiffs request that the Court order the defendants immediately to publish formal guidance instructing all EPA and Corps personnel on the line between disposal and removal actions which defines the limit of their regulatory authority under Section 404. The Court's Order requires the Corps to do more than substitute "inevitable redeposit" for "incidental fallback" in a statement of jurisdiction. Formal guidance should instruct the field personnel on the analysis necessary to determine what activities may be regulated. The guidance the Corps issued to accompany its 1986 pre-Tulloch regulations was cited approvingly by the Court and offers a model for what the new post-Tulloch guidance should be. There the Corps focused on the intent behind the activity:

> The purpose of dredging is to remove material from the water, not to discharge material into the water.... If the intent is to remove material from the water and the results support this intent, then the activity involved must be considered as a "normal dredging operation" that is not subject to section 404.

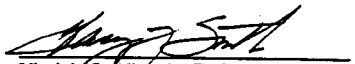
51 Fed. Reg. at 41,210, quoted in January 23 Opinion at 15-16.

In addition to faithfully capturing the essence of the Court's opinion, the guidance should address the other points on which the actions of field personnel indicate their need for clear direction. In particular, EPA and Corps offices should be instructed that the Court's injunction applies nationwide, has been in effect since it was issued on January 23, 1997, and has not been stayed or appealed. Local officials should be warned that threats of future enforcement against anyone who acts in reliance upon the Court's Order and suggestions that landowners obtain

permits for removal activities "just in case" are intimidating and should be discontinued immediately.

Only if the Court compels the agencies to issue formal guidance immediately will plaintiffs and the rest of the regulated community enjoy the full benefits of the Court's injunction.

Respectfully submitted,



Virginia S. Albrecht (D.C. Bar No. 357940)
Gary J. Smith (D.C. Bar No. 245258)
BEVERIDGE & DIAMOND, P.C.
1350 I Street, N.W., Suite 700
Washington, D.C. 20005
(202) 789-6000

Attorneys for Plaintiffs

Dated: April 8, 1997

O:\CLI\12573091\PLG3091G.JS.07

PREPARED STATEMENT OF JAMES NOYES, ASSISTANT DIRECTOR, NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES, LOS ANGELES COUNTY DEPARTMENT OF PUBLIC WORKS

INTRODUCTION

The National Association of Flood and Stormwater Management Agencies (NAFSMA) is a national organization representing flood control and stormwater management agencies serving a total population of more than 100 million citizens.

The mission of the Association is to advocate public policy, encourage technologies and conduct education programs which facilitate and enhance the achievement of the public service functions of its members. The Association'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 appreciates this opportunity to share our views on issues concerning recent wetlands regulatory and judicial developments. The recent judicial developments are of particular concern to NAFSMA members since the Association was an amicus in the legal challenge to the Tulloch rule filed by the American Mining Congress and others in January 1994.

Background on Flood Control and Stormwater Management Systems

Flood control and stormwater management systems are complex and interdependent networks of structures and watercourses which typically include some combination of dams, dikes, levees, drainage ditches, channels, reservoirs and wet or dry stream beds.

As examples, Riverside County, California alone has an extensive flood control system including 35 dams, debris basins and detention basins, 48 miles of levees, 188 miles of open channel and 182 miles of underground storm drain. Los Angeles County Department of Public Works operates or maintains 15 reservoirs, 143 sediment retention facilities, 228 stream bed stabilization structures, 33 storm water pumping plants, 29 groundwater recharge facilities, over 100 miles of soft bottom flood control/groundwater recharge channels, 350 miles of reinforced concrete channels and some 97,000 inlets and catch basins. Some of the facilities were constructed for the sole purpose of sediment entrapment, and others cannot function effectively and at design capacity without periodic sediment removal.

The Flood Control District of Maricopa County maintains over 30 miles of channel and over 60,000 acres of floodways, spillways and pooling areas. New York State maintains 150 miles of flood control channels in upstate New York alone, with more in the metropolitan area and Long Island. Other NAFSMA members are responsible for comparable facilities, generally scaled to the size, population and climate of the geographic area served.

Accumulation of vegetation and sediment in flood control structures and systems is a reoccurring and predictable occurrence. Flood control system maintenance removes these deposits to maintain the character and flow capability of the systems. Such work is required periodically for both man-made and natural features which are involved in passing and controlling flood flows.

The failure to provide such maintenance results in serious consequences. Accumulated vegetation and sedimentation directly reduce the volumetric and flow capacity of streams, channels, reservoirs and other devices which carry, divert and/or hold storm and flood water. Encroaching vegetation and sediment also affect the "friction factor" [1] of moving water in both natural and man-made channels. Reduced volumetric capacity and increased friction both serve to reduce the effectiveness of flood control systems, thus reducing protection of life, health and property.

In order to maintain the optimal functions of these systems at their original design capacity, vegetation and sediment must periodically be removed. Routine maintenance is especially critical for older systems which were frequently designed to lower protection standards and which are therefore even more critically dependent on continuing maintenance. These older systems were not designed to handle build up of sedimentation and vegetation. Especially for agencies with older systems and facilities, the public is being put at risk whenever normal maintenance activities are delayed or restricted.

[1] The resistance to water flow caused by vegetation and other obstacles in the ditch, stream or channel reduces the speed by which water moves through the conveyance, and thus its capacity to handle peak flows. The reduced flow rate also promotes sediment deposition which in turn inhibits infiltration.

Federally Mandated Maintenance of Flood Control Facilities

In addition to the fact that proper operation and maintenance of flood control systems is critical to protect the life and property of the residents served by NAFSMA member agencies, in many cases maintenance work is federally mandated. For projects constructed with Federal partners, such as the U.S. Army Corps of Engineers, local sponsors are mandated by Federal law and performance contracts to operate and maintain these projects to standards dictated by the Federal agencies. Moreover, the local flood control entity is also required to indemnify and hold these agencies harmless from all liability and damages.

There are also additional Federal mandates for flood control maintenance. In order to participate in the National Flood Insurance Program (NFIP), the Federal Emergency Management Agency (FEMA) requires the participating community to maintain the carrying capacity of all flood control facilities, and in some cases even semi-natural creeks and rivers. In most cases, this responsibility ultimately falls on local governments. It's important also to note that communities that fail to meet their maintenance responsibilities are subject to expulsion from the National Flood Insurance Program, loss of other Federal aid, and even exposure to suits by FEMA for recovery of flood insurance and disaster payments.

Tulloch Rule Litigation

NAFSMA members believe that the government's August 25, 1993 excavation rule inappropriately expanded the scope of section 404 of the Clean Water Act in such a way that routine maintenance and operation of flood control and related water management systems is severely hampered. The rulemaking also intruded on local management functions and imposed additional costs and regulatory burdens on local governments without any measurable corresponding environmental benefit.

Language in the so-called Tulloch rule expanded the definition of "discharge of dredged material" to include "any addition, including any redeposit of dredged material including excavated material into waters of the United States which is *incidental to any activity* including mechanized landclearing, ditching, channelization, or other excavation." The new requirement meant that flood control and other local government agencies would have to obtain a section 404 permit from the Army Corps of Engineers for even the most routine maintenance and operation activities, despite the lack of any such requirement in the statute itself, and in fact contrary to existing provisions of the statute.

With this rulemaking, the government for the first time was requiring a permit for certain routine maintenance activities that resulted in incidental fullback into jurisdictional waters. The scope was thus changed from regulating the addition of materials to the waters of the United States, including wetlands, to regulating the removal of materials from these waters.

The result of the rule is that formerly routine maintenance activities of existing flood control facilities, many built in Federal partnership, are now subject to onerous Federal permit and mitigation requirements, along with the attendant delays, increased costs, and ongoing threat to the public health and safety.

NAFSMA and its member agencies do not suggest that all of their projects and activities were unregulated prior to August 25, 1993. Many activities undertaken for flood control and other water management purposes, such as significant new construction affecting waters and wetlands and the discharge of excavated sediment at specific disposal sites, have always required section 404 permits and would continue to require protective oversight regardless of the Tulloch rule.

What was new and particularly burdensome about the Tulloch rule was the extension of jurisdiction of section 404 to excavation and other routine operation and maintenance activities undertaken at thousands of sites throughout the country.

In response to the serious adverse effects that the August 25, 1993, regulation had on flood control and water conservation activities across the country, NAFSMA filed an amicus curiae brief in support of the American Mining Congress challenge to the Tulloch regulation.

Judge Harris Rules To Strike Tulloch Regulation

In his January 23, 1997 ruling, U.S. District Judge Stanley S. Harris struck down the excavation rule and expressed his legal opinion that the Corps and EPA had "unlawfully exceeded their statutory authority in promulgating the Tulloch Rule" and reiterated that the agencies authorities are limited to adopting regulations that effect the will of Congress as expressed in the statute.

In his decision the Judge also refers to an earlier Federal Register notice for the Corps 1986 regulations that stated:

> Section 404 clearly directs the Corps to regulate the discharge of dredged material, not the dredging itself. Dredging operations cannot be performed without

some fallback. However, if we were to define this fallback as a "discharge of dredged material," we would, in effect, be adding the regulation of dredging to section 404 which we do not believe was the intent of Congress.

NAFSMA also finds it of interest that Judge Harris referenced in his decision an August 24, 1993 White House press release announcing the Tulloch rule that states: "Congress should amend the Clean Water Act to make it consistent with the agencies' rulemaking." The press release, provided as an example in the plaintiff's original motion for summary judgment, clearly illustrated the government's awareness that the Tulloch rule exceeded the congressional intent and authorization.

Government Moves to Narrow Judgment

On February 6, 1997, the government filed a motion to alter or amend the Court's January 23 judgment and asked the Judge for expedited consideration. The agencies argued that the Judge's decision, and subsequent injunctive relief, should apply only to members of the plaintiff organizations. In addition, they sought to narrow the ruling only to those who were members at the time of the original motion for summary judgment (January 1994) and further only to those who were involved in excavation activities at the time.

NAFSMA again responded as an amicus in the litigation.

The Judge rejected the government's motion on April 2 once again reiterating the point that the agencies had gone beyond their statutory authority in promulgating the Tulloch rule. The government filed its notice of appeal from the District Court's January 23 and April 2 decisions on April 10. The government has also filed a motion to stay the court judgment pending appeal and NAFSMA has filed again to be considered as an amicus at the Circuit Court of Appeals.

Formal Interim Guidance Issued

In the meantime, the Corps and EPA on April 11 issued formal interim guidance on regulating certain activities in light of the *American Mining Congress* v. *Corps of Engineers* decision. This guidance makes it clear that this is an interim period and that currently no permit is needed for activities involving only incidental fallback. The guidance directs Corps offices receiving or already processing such a permit application to respond back to the applicant that "as an accommodation to the applicant, the Corps will process the permit if the applicant requests in writing that the Corps do so."

Irrespective of the guidance, NAFSMA member agencies and others have been informed by the Corps that although a permit would not be needed at this time, the agencies would have to cease operations and apply for a permit if the decision was stayed or overturned on appeal or face potential enforcement actions.

A copy of a letter from the Corps' Omaha District to a local agency notes clearly that if the ruling is stayed or reversed, the Corps would again regulate activities such as those proposed. The letter further stated that if this occurs and your project has already begun, the agency would be required to stop work and obtain authorization.

As described in the April 11 guidance, the letter goes on to suggest that the agency may request in writing that the Corps process their permit application to verify that the project would not otherwise be subject to regulation and that processing the application now should ensure that there would be no unnecessary delays in the event that regulation of the activity resumes.

NAFSMA Urges Congress to Oversee the Government's Efforts To Carry Out Judge's Ruling

NAFSMA applauds the Committee's commitment to gather testimony on this critical issue and we urge members to continue their oversight of this situation. Our hope is that congressional involvement can help to clarify what is at best a confusing and uncertain time for our local flood control agencies.

Although we are gratified by the Court's recent decision, our members need to know that they can carry out their maintenance responsibilities, especially in light of the court's recent decision, without fear of enforcement action by the Corps or challenges by other organizations.

As examples of some of the difficult situations that have resulted from the Corps wetland regulations, a Southern California Department of Public Works in 1993 was informed by the Corps that its long-established (50-years) maintenance practices to restore design capacity of existing facilities could create significant impacts and that the agency needed to obtain permits. These same maintenance practices are also exercised by the Corps and in some cases were required of the local agency when the Corps transferred many of the facilities to the local sponsor to maintain.

In conjunction with the Corps annual inspection of these facilities, the Corps notified the Public Works Department that it must clear various channels of debris and vegetation. The Corps then required the Department to obtain permits from the Corps, which in turn solicited comments from U.S. EPA, the U.S. Fish and Wildlife Service and the Regional Water Quality Board.

On the one hand the Corps is demanding that the Public Works Department remove the vegetation, while on the other hand the Corps is demanding that the Department secure a permit from the Corps, respond to any opposition to the permit, and mitigate for the encroaching sediment and vegetation removal.

In another case, the local agency is required to obtain new permits annually from the Corps to perform preseason channel clearing activities to remove vegetation that grows in certain channels during the dryer season, and which needs to be removed prior to the rainy season to reduce potential flood events. Requiring local agencies to go through this permit application process on an annual basis is not only costly to the local agency, it is also time-consuming and hampers the agency's ability to clear the channels in sufficient time to protect the health and safety of its residents.

In another example, San Bernardino County in California began to have problems getting permission to remove vegetation from the Mojave River in late 1980's. In 1993, the county faced a fairly sizable flooding event on the river. In one locality, Victorville, the flood waters went over the top of the levee and flooded out a small part of the city. As part of the same event on another channel, flow couldn't follow its normal pattern because of vegetation, took a sharp right turn from path and flooded out many backyards and caused problems for residences in Spring Valley Lake. Had the county had the ability to continue removing debris and vegetation, it possibly could have avoided at least the second flooding event.

As part of the Spring Valley event, the county was forced to go into flood fighting mode and lost at least a half day in this action by waiting for Fish and Wildlife approval, which was eventually granted. Once the emergency was over, the Federal Government came back and notified the agencies that they would have to mitigate for vegetation lost in the flood fighting effort.

Had the county had the ability to continuously remove vegetation and debris, the flooding event may have been avoided.

In Riverside County, California, in January 1993, the Old Town area of the City of Temecula was subjected to major flooding by overflow from Murrieta Creek. Flows raged through shops, stores and restaurants several feet deep, resulting in over 10 million dollars of property damage. Miraculously no one was killed as a direct result, but in a number of cases citizens escaped their cars just before they were swept away. Some of the businesses never fully recovered and no longer exist. Prior to the flood, Federal officials had refused to allow mechanical clearing of vegetation and removal of accumulated sediment on the creek. Only after the flooding, was the District able to get an emergency 404 permit. The expiration date of the permit was April 30, 1993. Work then proceeded on Stage 1 and then in August, when work on Stage 2 was ready to proceed, the District requested an extension but the Corps said that a new Individual permit would be needed for this work since there was no emergency at the time. Finally in October after many discussions and much negotiation, an extension to the original permit was granted.

Ironically, FEMA later reimbursed the District and the City of Temecula for much of the cost of the post cost flood maintenance under a Federal Disaster Declaration, and also paid flood insurance and damage claims to those who were flooded.

NAFSMA Urges Congress To Reaffirm Its Intent To Exempt Flood Control Activities

NAFSMA very strongly agrees with the Court's recent decisions that the Corps Tulloch rule does not properly reflect congressional intent behind the section 404 legislative language and the association is urging that Congress help the public agencies charged with the protection of lives and property by reaffirming the specific intent concerning the ability to operate and maintain flood control channels and engineered flood control facilities.

NAFSMA believes that Congress has already recognized the importance of maintaining flood control systems by providing a special exemption from regulation in section 404(f)(1)(B) stating "for the purpose of maintenance, including emergency reconstruction of recently damaged parts of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches and transportation structures.

We urge Congress to reaffirm this exemption to ensure that whatever the outcome of the Tulloch rule litigation these critical public functions are not impaired.

NAFSMA urges that legislation be adopted as early as possible, to reaffirm its exemptions for flood control operations by clearly stating exemptions for operations and

maintenance of flood control channels and engineered flood control facilities from the section 404 permitting process.

PREPARED STATEMENT OF DONALD I. SIEGEL, SYRACUSE UNIVERSITY

Mr. Chairman and Members of the Committee, I am Donald I. Siegel, Professor of Earth Sciences at Syracuse University (New York). This is my first testimony before this committee on scientific matters related to the Corps of Engineers Nationwide No. 26 provision of the Clean Water Act. My research specialization background includes wetland hydrology and chemistry. I served as a member on the National Academy of Science (National Research Council) panel on Wetland Characterization (NRC, 1995). This testimony is submitted entirely on my own behalf, although I have been in informal contact with several other members of the NRC committee regarding my position.

The topics I will address in my testimony relate to the scientific validity of the Nationwide No. 26 provision of the Nationwide Permit Program, recently reauthorized and revised by the U.S. Corps of Engineers (13 December 1996, FR 61:241, 65874–65922).

CREDENTIALS AND WORK EXPERIENCE

I received my bachelor's degree in geology from the University of Rhode Island, my master's degree in geology from Pennsylvania State University, and my doctorate in Hydrogeology from the University of Minnesota. After receiving my master's degree I was employed by Amerada Hess Petroleum Corporation as an exploration geologist where I conducted geological studies to locate oil and gas in the Rocky Mountains and Southwestern United States. During my subsequent doctoral studies, I joined the U.S. Geological Survey (USGS) as a district hydrogeologist in the Minnesota District. There, I managed and supervised projects designed to: Determine how copper and nickel mining might contaminate or otherwise affect surface groundwater in a wetland-rich region of Minnesota, determine how much groundwater enters and leaves wetlands and lakes, and how "acid rain" affects surface groundwaters.

Following my doctorate, I was promoted to a regional hydrogeologist/geochemist position. In this capacity, I supervised and conducted studies including ones on regional wetland hydrology. Following my employment with the USGS, I joined Syracuse University where I was promoted to Professor of Earth Sciences. At Syracuse University, I teach elementary graduate level courses in geology, hydrogeology, and geochemistry and conduct a broad research program including projects designed to evaluate how wetland hydrology (the flow of water in and out) affects wetland vegetation, surface-water quality, and release to the atmosphere of carbon dioxide and methane ("swamp gas"). My research has been substantively funded by the National Science Foundation and the Department of Energy. I have published widely in peer-reviewed journals on these topics as well as topics related to groundwater contamination.

In recognition of my expertise and experience in wetland hydrogeology and geochemistry, the Hydrogeology Division of the Geological Society of America (GSA) selected me as the *1994 Birdsall Distinguished Lecturer in Hydrogeology*. I was elected and served as the *1995 Chairman of the Hydrogeology Division of GSA,* and was selected by the National Academy of Science (National Research Council, NRC) as a member of panels to determine the *vulnerability of aquifers to potential groundwater contamination* and, at the recommendation of the National Groundwater Association, the recent *wetlands characterization committee*. I have served as associate editor for the peer-reviewed journals, *Water Resources Research* and *Wetlands*. I also review articles and books for many other peer-reviewed journals publishing in hydrology and geochemistry and have offered short courses and graduate-level courses in *Wetland Hydrology and Geochemistry*.

INTRODUCTION

The U.S. Army Corps of Engineers (COE) administers section 404 of the Clean Water Act that regulates fill activities in wetlands and other waters of the United States. The COE recently revised and re-authorized this program (13 December 1996, FR 61:241, 65874–65922). The NWP No. 26 of the Nationwide Permit Program contains wetland size restrictions related to the extent to which the wetland modification is regulated. Previous to the 1996 revisions, wetlands less than 1 acre in size could be effectively filled without notifying the COE (through the pre-con-

struction process) and the cap on maximum allowable acreage for each wetland fill was 10 acres.

The 1996 previsional revision, effective for 2 years from February 11, 1997 to February 11, 1999, now requires that the COE be notified of any proposed wetland filling greater than ⅓ acre in size and the maximum allowable fill allowed is 3 acres. The COE's intent is to replace the current two-year provisional NWP No. 26 with activity-specific replacement general permits and has directed its districts to:

> "* * * carefully review * * * NWP 26 to revoke applicable NWPs in high value aquatic ecosystems, and to add regional conditions to limit the applicability of the NWPs to ensure that no more than minimal adverse effects occur in each district." (FR, 1996, p. 658776).

Explicit in the revised COE approach is the eventual setting of regional limitations to specifically address protection of specific environmental "assets." The COE emphases that the purpose of the NWP is to authorize activities that cause only minimal and individual cumulative adverse environmental effects and that evaluating such effects needs to be done on an individual watershed basis. In their 1996 revisions, the COE states that defining minimal impact is difficult on a nationwide basis because environmental effects geographically can vary significantly "from resource to resource, State to State and county to county, and watershed to watershed." The COE further argues that tightening the NWP No. 26 for an interim two years is appropriate because headwater and isolated wetlands may be as valuable or even more valuable than other wetlands, a conclusion reached by the National Research Council Committee (NRC) on Wetland Characterization.

Finally, the COE argues that there are benefits to be gained from a future regionalization approach with respect to wetland regulation, a conclusion also reached by the NRC committee. As I understand it, the controversies over the revised NWP No. 26 pertain to a perceived restrictive nature of having to apply for a COE permit to fill wetlands as small as ⅓ acre and whether headwater and isolated wetlands should be separately regulated as a distinct wetland class.

THE SCIENTIFIC ISSUES RELATED TO HEADWATER AND ISOLATED WETLANDS

Isolated wetlands in the context of NWP No. 26 are defined as nontidal waters that are not a part of a river or stream tributary system to interstate or navigable waters of the United States and that are not adjacent to such tributary waters. Examples of such wetlands are the vernal pools and playas in the arid western States, prairie pot-hole wetlands of the Great Plains, alpine wet meadows, and small wetlands in headwater regions of streams in the humid Eastern States. All these wetlands qualify for protection under section 404 jurisdiction, although historically many have been filled, resulting in large cumulative loss.

Scientifically, the NRC wetland characterization panel recognized that small isolated wetlands can be very important to maintain regional ecosystem health and surface-water quality (NRC, 1995). For example, isolated prairie pot-hole wetlands constitute only 4 percent of the geographic area in the Dakotas while supporting a large percentage of the total populations of the most abundant waterfowl (*e.g.* Kantrud *et. al.*, 1989). The shallowest pot-holes, often the "least wet," provide the best invertebrate forage for waterfowl in the Mississippi flyway. In the more arid West, intermittently flooded wetlands have distinctive biota that depend upon water. These biota persist and reestablish themselves quickly after flooding. A well known example is California's vernal pool fairy shrimp. Intermittently flooded wetlands in coastal areas, such as bottomlands in Louisiana, clearly provide critical habitat for fish and shellfish (*e.g.* Lambau, 1990).

Some isolated wetlands in the prairie pot-hole region and elsewhere also can replenish local underlying groundwater resources, and many isolated wetlands help attenuate the onset of flooding and maintain water quality. In particular, streamside wetlands and isolated wetlands in headwater areas can remove suspended sediment, contaminants, and harmful nutrients from surface waters. Brinson (1993) shows that longer lengths of stream floodplain are more affected by small-scale wetland disturbance where streams are small than where they are large, and argues that the greatest emphasis should be placed on maintaining the integrity of small (technically, first- and second-order) streamside environments and their watersheds to maintain water quality. The surface area of a wetland is less important than it's length, relative to the dimensions of the resource being affected (Brinson, 1993). Johnston *et. al.* (1990) studies support Brinson's by showing that shallow and isolated wetlands in Minnesota effectively remove suspended solids, phosphorous and ammonia during high flow while removing more nitrate during low flow when anoxic (no oxygen) conditions can be established.

Isolated wetlands can remediate poor water quality more effectively than do wetlands directly connected to streams and lakes because more time is available for settling out of sediment and biological removal of nutrients. The chemical processes and biological communities found in shallow wetlands, isolated wetlands, and intermittently flooded wetlands are similar to those found in larger wetlands. Headwater wetlands and isolated wetlands in headwater watersheds partly control the extent to which non-point nutrients and contaminants reach major surface water bodies. Headwater and isolated wetlands protect navigable waters from water quality degradation far more than do wetlands associated with larger streams. Also, with respect to stream flooding, small depressions in landscapes must first fill up with water before there can be substantial overland flow to headwater streams.

APPLICABILITY OF NATIONWIDE NO. 26

Applying Nationwide No. 26 still is jurisdictionally and scientifically problematic despite the general scientific consensus that headwater and isolated wetlands, large and small alike, can substantively control surface-water quality and to some extent, attenuate flooding. First, as the COE readily acknowledges, it is difficult to assign quantitative thresholds governing acceptable impacts on water quality and quantity caused by individual wetland loss. For individual small wetlands, these impacts are very difficult to determine because they are cumulative and water quality effects may not be identifiable until substantive loss has already occurred.

Depending upon landscape geography and climate, headwater and isolated wetlands may be less important or have less "value" in some regions than in other regions of the country with respect to sustaining biological resources deemed important by society (*e.g.* wildfowl) and maintaining legislated quality of water. For example, the NRC wetlands committee felt that it is important to preserve remaining prairie pot-hole wetlands in the Great Plains States and playa lakes and vernal ponds in the arid Western States because it is well documented that these wetlands are critical for migratory wildfowl habitat in such arid regions. Playa lakes and vernal ponds are effectively the wettest parts of a generally dry landscape, and therefore have very special and important biochemical and water quality functions within the watershed context. In contrast, some isolated wetlands in the humid Northeastern or North Central States may be less important with respect to water quality and biological habitat because these wetlands occupy a much larger part of the regional landscape.

A major question is how to take Nationwide No. 26 and regionalize it so that it is scientifically credible and is fair to users of wetlands. The revised NWP No. 26 indicates after the current provisional two-year period, the COE will further revise NWP No. 26 to regionalize the permitting process. During the initial two years, the COE will:

> "* * * gather interested parties at the national level as well as the district division levels, to develop replacement permits for NWP 26. The replacement permits will be activity-specific rather than the geographic based approach of NWP 26 (FR, 1996, p. 65876)."

and

> "Once the Corps establishes activity-specific replacement permits that have clear national conditions to ensure the aquatic environment is protected and the impacts will be no more than minimal, each district, working with the Corps divisions, will establish regional conditions for the activity-specific replacement permits. This may result in the revocation of certain NWPs in aquatic environment of particularly high value, and the addition of regional limitations to specifically address the need for protection of specific environmental assets (FR, 1996, p. 65876)."

The NAS Wetlands committee fully recognized the need for regionalization of wetland regulatory practices, including NWP No. 26. It recommended that proposals for (and review) of regional practices should be solicited from scientific experts in the private and public sectors, both within and outside the region being considered. It also recommended that all Federal agencies involved in wetland regulatory practice be involved in the regionalization process.

Several regionalization approaches for wetland classification are available, based on ecological, hydrologic, geomorphologic and climatic factors. How the COE will regionalize Nationwide No. 26 is perhaps the most pressing issue to resolve, and I urge the COE to actively solicit scientific advice on which classification method best suits the regulatory process. I also urge the COE to quickly and publicly define what "activities" they expect to consider in their evaluation process and to similarly solicit

as much opinion and discussion as possible. Based on my understanding of the diverse opinions and concerns related to wetland regulation, I am concerned that the two years provisional NWP No. 26 revision is an insufficient time to resolve regionalization and activity issues.

In summary, I think that the new provisional changes to NWP No. 26 are a step in the right direction to a more scientifically meaningful and sound regulation of our Nation's wetlands. I applaud the COE's effort to both constrain the piece-meal loss of small isolated and headwater wetlands by temporarily implementing stricter wetland regulations while concurrently working to develop scientifically meaningful "activity-based" regionalization of NWP No. 26. I think the COE has struck a balanced position with respect to wetland regulation, somewhere between the extreme positions of preventing any further nationwide wetland loss to allowing relatively unrestricted filling of isolated and headwater wetlands. There remains the issue whether the COE has the staffing available to address what surely will be increased regulatory caseloads at the district level, but this issue is a personnel issue, not a policy or scientific issue. This ends my testimony at this hearing. I thank the Committee on the Environment and Public Works for soliciting my views and I welcome any questions.

References Cited

Brinson, M.M., 1993, Changes in the functioning of wetlands along environmental gradients: Wetlands, 13:65–74.

Johnston, C.A., N.E. Detenbeck, and G.J. Niemi, 1990, The cumulative effect of wetlands on stream water quality and quantity: a landscape approach: Biogeochemistry, 10:105–141.

Kantrud, H.A., G.L. Krapu, and G.A. Swanson, 1989, Prairie basin wetlands of the Dakotas: a community profile, U.S. Fish and Wildlife Service Bio. Rep. 85.

Lambou, V.W., 1990, Importance of bottomland hardwood forest zones to fishes and fisheries: the Atchafalaya Basin, a case history. pp. 125–193 in G. Gosselink, L.C. Lee, and T.A. Muir, eds., *Ecological Processes and Cumulative Impacts: Illustrated by Bottomland Hardwood Wetland Ecosystems.* Chelsea, MI: Lewis Publ. Inc.

National Research Council, 1995, *Wetlands: Characteristics and Boundaries,* National Academy Press, 307 pp.

RESPONSES OF DONALD SIEGEL TO ADDITIONAL QUESTIONS FROM SENATOR CHAFEE

Question 1. When Nationwide Permit 26 first was issued in 1977, there was little or no knowledge about the scientific value of headwater and isolated wetlands. Since that time we have learned that these isolated wetlands provide a number of valuable functions, including waterfowl habitat, flood control and water quality. Is there any scientific support for treating wetlands located in isolated waters or headwaters less protectively than other types of wetlands, as NWP 26 does?

Response. There is not really very much scientific information to my knowledge documenting that isolated wetlands are less "valuable" functionally than wetlands directly connected to surface waters. I think that perhaps it was simply assumed in 1977 that those wetlands directly connected to streams would best control water quality, provide the best wildlife habitat and so on. Also, managing directly connected wetlands might logically fit in better with regulating "navigable" surface waters. But, I think that the scientific knowledge gained on wetland functions in the 20 years since 1977 shows that isolated and headwater wetlands may be as important and often can be even more important with respect to water quality, wild fowl habitat, and flood control than wetlands connected to streams further downslope. How important isolated and headwater wetland are to these and other wetland functions depends on regional factors.

Question 2. One of the major controversies surrounding NWP 26 is the fact that it covers categories of waters rather than categories of activities. Is there any scientifically sound basis for regulating a category of water or wetlands under the "general permit" scenario, or do you believe that regulating categories of waters is by its nature, bound to result in more than minimal adverse environmental effects.

Response. This is an interesting question. As I said in my testimony, I agree with the idea to regulate according to activities rather than stick to the "general permit" scenario. The problem with a general permit scenario, is that it completely neglects the matter of scale (how big). For example, one could logically remove a moderate amount of wetlands next to a large lake or river of much greater size and not affect flood control in a measurable way, whereas removing them in headwater reaches, where proportionately they are a large part of the watershed would cause measurable harm. I would like to see the COE and/or other agencies develop and support

the kinds of investigations that lead to scientifically tenable models of wetland-surface water interactions on a regional basis. This way, wetland regulation would be based on scientifically valid grounds, rather than on operationally easy grounds that logically lead to controversial decisions unsupported by facts that all can understand. Using activity-based regulations is more logical than a nationwide general permit scheme because activity-related degradation can be scientifically assessed more easily. For example, dredging and filling wetlands in a small headwater stream area could result in clear evidence of cause and effect—a muddying of the waters, so to speak. Conversely, filling and dredging of wetlands of the same size next to a large river might not result in any measurable effect if the river water was naturally laden with sediment. It all depends on the region of the country and the characteristics of the surface-water watersheds. It doesn't make sense to regulate North Dakota prairie pothole wetlands in the same way that you regulate bogs and fens in northeastern Minnesota. They are "apples and oranges" in the context of wetland science. It is about time that the regulatory process recognizes this.

Finally, I certainly do not believe that regulating categories of waters is "by its nature, bound to result in more than minimal adverse environmental effects." Such regulation, however, is bound to be regionally erroneous from a scientific standpoint and consequently confounding to the regulated public. For example, if every fen and swamp in upstate New York is rigorously saved from filling and dredging by NWP 26, then there will no measurable adverse effect. But, it is also likely that some fens and swamps could be lost to development and there still will be no measurable adverse effects. It all depends on where the wetlands are located in the watershed on an individual and cumulative basis.

PREPARED STATEMENT OF DONALD F. MCKENZIE, WILDLIFE MANAGEMENT INSTITUTE

Mr. Chairman: The Wildlife Management Institute (WMI) appreciates this opportunity to support the conservation of wetlands that are vital habitat for wildlife resources of national and international importance. WMI is a non-profit, scientific, and educational organization staffed by professional natural resource managers. It has been dedicated since 1911 to the restoration and improved management of wildlife. We request that this testimony and the accompanying attachments be included in full in the record of this hearing.

I am before you as a professional waterfowl biologist and as a private landowner. I own and reside on nine rural acres in northern Loudoun County, VA. One-third of my property is wetland, subjecting me to the very regulatory changes under review today. However, my wife and I are able to use our land extensively within the limits of both its natural capability and the government regulatory system. We have planted wildlife food plots and trees, cut trails, cleared brush, cut firewood, added onto our house. I use tractors, chain saws, herbicides, fertilizers, and prescribed fire to manage habitats. I hunt big and small game and target shoot. In short, wetland regulations have not impeded us at all from using and enjoying our land and meeting all our personal goals for the property.

WMI's primary points are simple. First, drainage and excavation of wetlands needs to be clearly regulated by section 404. Second, small wetlands are vital habitat for many species of wetland-associated wildlife, and should be protected by section 404 of the Clean Water Act. Third, the interests of millions of American sportsmen and sportswomen is directly affected by the fate of wetlands.

WETLAND DRAINAGE AND EXCAVATION SHOULD BE REGULATED

WMI is disappointed that the "Tulloch Rule" was overturned. While we have no opinion on the legal merits of the decision, our professional resource management judgment is that drainage and excavation are leading causes of wetland degradation and can be as damaging to wetland functions as deposition of fill materials. Therefore, we strongly believe that the Clean Water Act should regulate drainage and excavation of wetlands, whether by administrative or legislative action. If current law does not allow administrative action to regulate wetland drainage and excavation, WMI supports congressional action to amend the law to do so. WMI is not, however, willing to accept other amendments to the Clean Water Act that would result in overall weaker protection for wetlands, merely in order to add drainage and excavation to the list of regulated activities.

SMALL WETLANDS ARE VITAL HABITAT THAT MUST BE PROTECTED

WMI applauds the recent action of the U.S. Army Corps of Engineers to phase out Nationwide Permit 26, which has provided virtual automatic approval for all ac-

tivities in wetlands smaller than 10 acres. This permit constituted the single largest and most damaging loophole in the Clean Water Act's section 404 regulatory program, and has been largely responsible for impeding the achievement of no net loss of wetlands.

Furthermore, Nationwide Permit 26 has been a source of substantial inconsistency between section 404 and the U.S. Department of Agriculture's (USDA) wetland conservation authority known as Swampbuster, which does not provide an acreage exemption. WMI supports efforts to make section 404 and Swampbuster as consistent as reasonably possible, given the fundamental differences between the programs. Regarding the topic of wetland acreage exemptions, WMI always has advocated that the Corps adopt for section 404 the stricter Swampbuster standard. The Corps' decision to promote consistency in favor of conservation, rather than in favor of destruction, will help foster continued improvements in wildlife populations and other environmental conditions for the American public.

Suitable habitat is the fundamental requirement of all wildlife. For example, ducks require duck habitat. During the breeding season, duck habitat consists of a mixture of small, medium, and large wetlands with water, along with upland nesting cover, in the same places at the same time. If any of these habitat elements is missing, ducks and other wetland wildlife cannot survive, much less thrive.

History proves that abundant duck habitat depends on Federal measures to protect wetlands. Intensive wetland drainage in the U.S. that peaked during the 1960's and 1970's, combined with new fencerow-to-fencerow farming techniques, resulted in two decades of declining duck populations that reached historic lows in the 1980's. Only in the last four years has the duck decline apparently been stemmed and even reversed. The U.S. recently is enjoying increasing duck numbers, improved duck hunting and liberalized hunting seasons, which demonstrate that investments in conservation do pay off. Total duck numbers have reached quarter-century highs. A few duck species are even approaching the continental population goals established by sportsmen and wildlife managers in 1986 in the North American Waterfowl Management Plan.

Two resource conditions are primarily responsible for this ongoing success story—the return of water to the ducks' prairie breeding grounds, and the abundance of habitat in the form of small wetlands and upland nesting cover. The Federal Government has not yet found a way to control the precipitation, but it can have substantial influence over the habitat. Two actions of the Federal Government are most responsible for ensuring that the habitat was in place when the water returned.

First, *Federal protection of remaining wetlands* has greatly reduced the rate of wetland losses. Section 404 of the Clean Water Act protects the public interest by prohibiting the filling of wetlands. The USDA disincentive program, Swampbuster, attaches wetland conservation strings to the voluntary receipt of Federal agriculture subsidies. While neither program individually provides adequate protection for all important wetland types, the programs have been mutually reinforcing with positive conservation results.

Neither would be as effective without the other. For example, two of the major weaknesses of section 404 are that it does not regulate drainage and it provided a general permit—Nationwide Permit 26—for filling wetlands less than 10 acres. Swampbuster, on the other hand, governs both drainage and conversion of wetlands smaller than 10 acres. However, Swampbuster only applies to the land in agricultural production that is owned or farmed by current participants in Federal agriculture programs, while section 404 applies to all land ownerships.

Second, *Federal investments in restoration* of degraded wetland habitat are making meaningful progress toward rebuilding the Nation's wetland habitat base. Wetland restoration programs such as the North American Wetlands Conservation Act, the Conservation Reserve Program, the Wetlands Reserve Program and the U.S. Fish and Wildlife Service's Partners for Wildlife program—together with their non-Federal partners—collectively are nearly offsetting the remaining rate of wetland losses. The U.S. now is approaching the hard-earned national goal of no net loss of wetland functions. Furthermore, the Conservation Reserve Program established millions of acres of upland nesting cover among wetlands in the prairie pothole region, to create ideal conditions for ducks to breed successfully when the water returned.

As the ongoing turnaround in duck populations demonstrates, this combination of Federal actions—protection and investment—is proving successful at rebuilding important public resources. However, the hard-earned progress of the last several years can be lost quicker than it was gained. A reduction in either of these Federal actions is certain to catalyze the resumption of net losses of wetlands. That development would cause populations of ducks and other wetland wildlife, along with the myriad human interactions with these resources, to decline once again.

Duck Hunting Depends on Wetlands

The interests of duck hunters are directly dependent on abundant duck populations, which in turn are directly dependent on abundant duck habitat. A foundation of scientific wildlife management is that harvests by hunters must not exceed the ability of the species to sustain itself. Harvest is carefully controlled by setting hunting regulations such as season dates, season length, and bag limits, according to the best available data on each species' population status and trends.

The direct effects on hunting of habitat and population changes can be illustrated by the "Adaptive Harvest Management" framework used by the USFWS as a guide to setting duck-hunting seasons. The season length and bag limits in each flyway are tied directly to that year's estimated duck populations. The lower the duck populations, the more restrictive the hunting regulations. The currently proposed season length and bag limit guidelines for each of the four flyways under four categories of duck populations levels are attached.

ADAPTIVE HARVEST MANAGEMENT

Proposed Options for Duck Hunting Season Lengths and Bag Limits for the 1997–1998 Season
(Federal Register Vol. 62, No. 109, pp. 31298–31306; June 6, 1997)

	Very Restrictive	Restrictive	Moderate	Liberal
Atlantic Flyway:				
Season Length	20	30	45	60
Daily Bag Limit	3	3	4	4
Mississippi Flyway:				
Season Length	20	30	45	60
Daily Bag Limit	3	3	6	6
Central Flyway:				
Season Length	25	39	60	74
Daily Bag Limit	3	3	6	6
Pacific Flyway:				
Season Length	38	60	86	107
Daily Bag Limit	4	4	7	7

The severe duck decline of the 1970's and 1980's resulted in some of the most restrictive hunting regulations in this half-century during the late 1980's and early 1990's. Thus, we have witnessed recently some impacts on humans of wetland losses—restricted and even closed hunting seasons for certain species and sexes, that reduced 2.9 million Americans' recreational opportunities.

In anticipation of upcoming congressional attempts to neutralize the Corps' phase-out of Nationwide Permit 26 by codifying a small-wetland exemption in section 404, I offer the attached assessment. In 1995, WMI—with the aid of the USFWS, using the best-available scientific data—estimated the impact on hunters of a simple 1-acre exemption from Federal wetland protection.

Because breeding ducks are territorial, ten 1-acre wetlands will attract and support more duck pairs than one 10-acre wetland. In the U.S. portion of the prairie pothole region (Montana, North and South Dakota, Minnesota, and Iowa), 78 percent of the wetland basins are one acre or smaller. The loss of these small wetlands in the U.S. would reduce the breeding pair carrying capacity of that portion of the region roughly *by half*. In turn, the annual production rate of young ducks from the region would be reduced *by about half*.

In turn, the loss of Federal protection for just 1-acre wetlands would cause reduced duck harvests in the short term by causing fewer bird encounters, shorter hunting seasons, and reduced bag limits. In the long term, a 1-acre exemption also would impact wetlands in migration and wintering areas, further reducing duck habitat and duck numbers and hunting opportunities nationwide. Ultimately, these cumulative impacts of a simple 1-acre exemption from Federal wetland protection could pose a risk to the very existence of duck hunting and its associated economic, sociological, and even ecological benefits.

The $1.6 billion duck-hunting "business" once again is expanding to provide greater stimulus to America's rural economies and outdoor recreation industries. I soon will be moving to Arkansas, arguably the duck hunting capital of the country. In anticipation of this move, I recently acquired a new duck-hunting parka, and soon will purchase new waders, decoys, a duck call, and shotgun shells before the upcoming waterfowl hunting season. I may even have to lease hunting rights from the owner of wetland habitat. These expenditures, magnified over millions of hunters add up to big business—business that is dependent on wetlands. The long-term vi-

tality of this economic activity depends on sustained Federal action to protect and invest in wetlands.

CONCLUSION

WMI does not oppose a reasoned, rational refinement of section 404 that would continue to meet public resource needs in ways that minimize private problems. However, only a reauthorization bill that uses current law as the starting point for debate and which relies on the best available science to meet national goals for public trust resources is acceptable to us.

Those who support hunting, hunters, and other wildlife enthusiasts cannot have it both ways. Waterfowl hunting and watching cannot be maintained while eliminating protection for small wetlands. WMI wants to be sure that Congress understands this price of weakened wetland protection, as it contemplates changes to the Clean Water Act. The loss of small wetlands is a much graver threat to the future of duck hunting than any possible actions of the animal rights movement. We hope that, given this information, you can help avoid decisions that will adversely affect duck populations, duck hunting, and millions of outdoor enthusiasts in the U.S.

Mr. Chairman, thank you for this opportunity to present WMI's views on the importance of protecting wetlands. Please do no hesitate to call on WMI for any reason regarding this important issue.

Wildlife Management Institute
1101 14th Street, N.W. • Suite 801 • Washington, D.C. 20005
Phone (202) 371-1808 • FAX (202) 408-5059

EFFECTS ON DUCKS AND DUCK HUNTING OF REMOVING FEDERAL PROTECTION OF SMALL WETLANDS

The biological necessity of small wetlands to duck populations in North America has been known to scientists since the 1950s. Their high biological value, along with other important functions, led the federal government to enact needed protective measures ranging from disincentives to regulations that have been effective in slowing their losses. However, many landowners perceive little value in small wetlands and even less merit in protecting them. Therefore, political pressure is building to weaken federal protections.

The Wildlife Management Institute believes in informed debate. Thus, we attempt here to portray some of the probable consequences, based on the best available scientific information, of only one of several proposed scenarios by which federal protection for small wetlands might be weakened. *The loss of one-acre wetlands in the prairie pothole region, alone, would have profound and lasting negative impacts on duck hunting in the United States.*

- For successful breeding, dabbling ducks require wetlands of all sizes interspersed within expansive upland nesting cover. The prairie pothole region provides more of these crucial ingredients than any other region of North America.

- As a result, fully *half of all of North America's ducks historically* were produced in the prairie pothole region of the U.S. and Canada.

- In the U.S., the prairie pothole region includes parts of North and South Dakota, Montana, Minnesota and Iowa. In this region:
  - 78 percent of wetland *basins* are 1 acre or less;
  - 91 percent are 5 acres or less;
  - 95 percent are 10 acres or less.

  The attached map of a portion of Sheridan County, North Dakota illustrates the effect of the loss of one-acre wetlands on the prairie pothole landscape. The prevalence of small wetlands in the prairie potholes region is exactly why that region is the most important waterfowl breeding area on the continent.

- Small wetlands occupy a critical link in the breeding biology of such common ducks as the mallard, pintail, blue-winged teal, gadwall and shoveler. Because breeding ducks are territorial, ten 1-acre wetlands provide habitat for many more duck pairs than does one 10-acre wetland. Small wetlands also thaw faster and provide more high-protein foods for nesting hens earlier than larger wetlands.

- A century of drainage for agricultural production already has greatly impacted prairie pothole wetlands. In Iowa, 90+ percent of pothole wetlands acreage has been lost; in Minnesota, 80 percent; North Dakota, 50 percent; South Dakota, 36 percent; and Montana, 27 percent.

- A consequence of these past wetlands losses is that surveyed breeding duck populations *declined by one-third* between the 1950s, when surveys began, and the late 1980s. As a result of this decline, severe restrictions on duck hunting became necessary to prevent overharvest.

- However, the prairie pothole region's existing and potential productivity still is vital to continental duck populations. Since the Conservation Reserve Program (CRP) was established, duck production from the U.S. portion of that region, alone, boosted continental populations high enough to allow expanded hunting seasons in the U.S. in 1994.

- Based on the best waterfowl population models, professional biologists estimate that destruction of the remaining 1-acre potholes would reduce the region's breeding duck carrying capacity *by 50 percent.* In turn, the duck production of that region would be reduced *by at least 50 percent.* These losses would negate the recent gains made under CRP.

- Therefore, in the short term, the continental fall flight of ducks would *decline by at least 9 percent* without one-acre wetlands in the region. Additional losses of all potholes less than 5 acres or less than 10 acres, per some Congressional proposals, would have much higher immediate impacts.

- The reduction in duck populations due to loss of one-acre wetlands *ultimately would be markedly more than 9 percent*, because wetlands losses also would occur on important migration areas in mid-latitude states and wintering areas in the South.

- Nine percent of the fall flight of ducks can make the difference between a liberal hunting season and a very restrictive one. In 1993, for example, such a decline would have reduced the fall flight from 60.7 million to 55.1 million, a level equivalent to the all-time record low. Such a reduction certainly would evoke restrictive hunting regulations, which would cost hunters 10 to 20 fewer days of hunting per year, at least one less bird in the daily bag and other possible restrictions.

- As a result of the loss of one-acre wetlands in the prairie pothole region, the average annual duck harvest in the United States would fall by 428,000 birds in the short term, representing the loss of 630,000 days of hunting opportunity.

- According to the *1991 National Survey of Fishing, Hunting and Wildlife-Associated Recreation*, duck hunters spend an average of $35.30 per day. The loss of 630,000 hunter days thus represents a loss of more than $22.2 million dollars in direct hunter expenditures.

- *The biggest losers* in terms of hunter opportunity include Arkansas, Arizona, Colorado, Illinois, Louisiana, Minnesota, Nebraska, New Mexico, North Dakota, South Dakota, Texas and Wisconsin. The attached table shows that very few states would be unaffected.

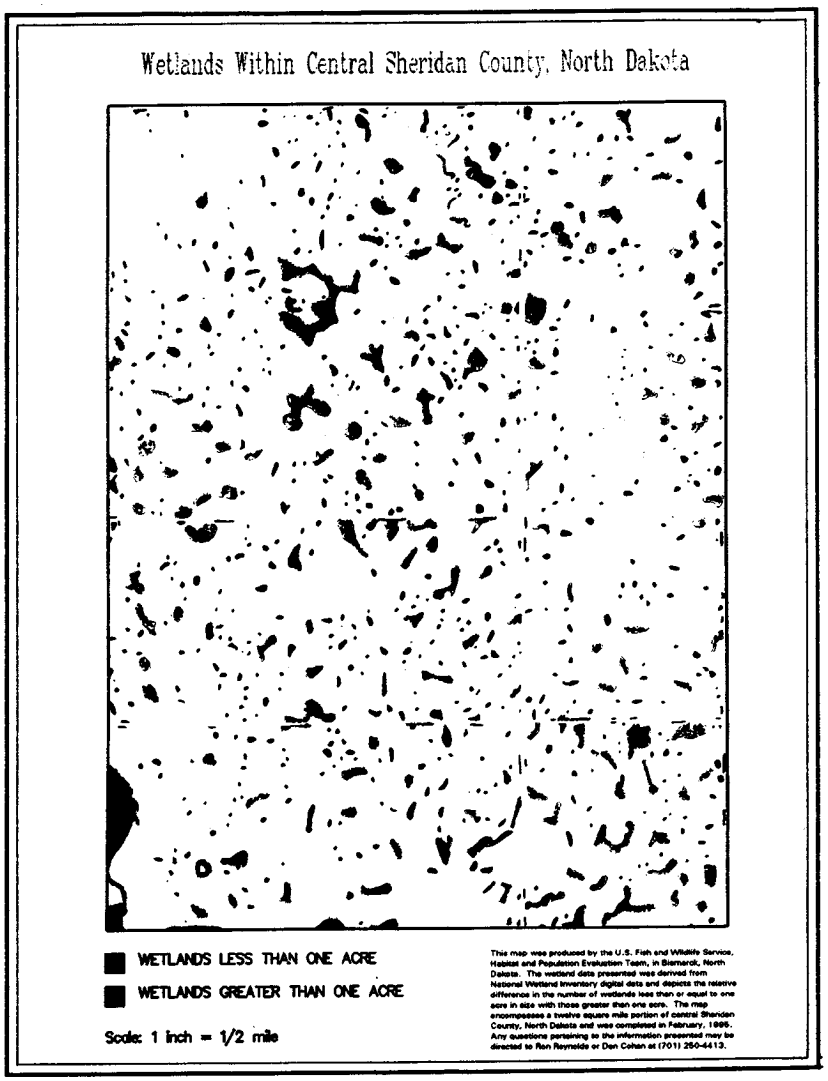
- The magnitude of these projected impacts depends on continuation of CRP in the prairie pothole region. Without CRP to provide the critical upland nesting cover component of duck breeding habitat, reductions in duck production would be substantially higher.

As decision makers deliberate on the future of Swampbuster and Clean Water Act provisions that protect small wetlands, they should be aware of the very high costs to sportsmen and sportswomen of America. Significant weakening of these wetland protections could negate the progress in habitat restoration and increased waterfowl populations made in the past decade through CRP and the North American Waterfowl Management Plan. Loss of these protections would, in turn, greatly raise the cost of meeting that plan's goals and would diminish future prospects for ducks and duck hunting. The Wildlife Management Institute believes these costs are too high a price to pay.

Effects of loss of protection for small wetlands in the prairie pothole region of the U.S. on duck harvest and hunting opportunity.

State	Mean total duck harvest (1985-94)	Percentage harvest derived from MT, ND and SD	Projected decline in harvest (percentage)	Mean days hunted	Projected loss of hunter days
Alabama	64225	11.45	3677 (5.73)	73558	4211
Arizona	34040	41.2	7012 (20.6)	33876	6978
Arkansas	379856	10.51	19961 (5.26)	319996	16816
California	787136	0.53	2086 (0.27)	572535	1517
Colorado	86191	76.85	33119 (38.43)	252098	96869
Connecticut	23010	2.04	235 (1.02)	59001	602
Deleware	36602	2.29	419 (1.15)	63883	731
Florida	135380	13.02	8813 (6.51)	101747	6624
Georgia	57105	8.07	2304 (4.04)	72127	2910
Idaho	138009	1.95	1346 (0.98)	147626	1439
Iowa	136005	15.05	10234 (7.53)	199525	15014
Illinois	212381	12.06	12807 (6.03)	438949	26469
Indiana	51847	12.76	3308 (6.38)	112024	7147
Kansas	90186	12.18	5492 (6.09)	145047	8833
Kentucky	43453	12.74	2768 (6.37)	101228	6448
Louisiana	884545	11.03	48783 (5.52)	634910	35015
Maine	57820	0	0	61403	0
Maryland	123969	2.84	1760 (1.42)	235036	3338
Massachusetts	60741	2.24	680 (1.12)	110431	1237
Michigan	207110	6.35	6576 (3.18)	380967	12096
Minnesota	491344	44.53	109398 (22.27)	714082	158990
Mississippi	116604	11.77	6862 (5.89)	98820	5816
Missouri	132771	11.34	7528 (5.67)	226499	12842
Montana	73278	9.54	3495 (4.77)	88052	4200
Nebraska	108202	14.91	8066 (7.46)	225041	16777
Nevada	36693	4.07	747 (2.04)	47465	966
New Hampshire	19448	0	0	42940	0
New Jersey	67447	2.23	752 (1.12)	103375	1153
New Mexico	21028	69.4	7297 (34.7)	31561	10952
New York	178587	1.1	982 (0.55)	252081	1386
North Carolina	130949	5.63	3686 (2.82)	145684	4101
North Dakota	117528	28.68	16854 (14.34)	171905	24651

Ohio	78902	6.49	2560 (3.25)	208822	6776
Oklahoma	96893	9.66	4680 (4.83)	100195	4839
Oregon	218713	0.31	339 (0.16)	200838	311
Pennsylvania	80831	2.32	938 (1.16)	258416	2998
Rhode Island	9963	0	0	15666	0
South Carolina	107511	7.2	3870 (3.6)	117057	4214
South Dakota	107822	17.86	9629 (8.93)	205326	18336
Tennessee	112507	10.39	5845 (5.2)	192812	10017
Texas	469901	14.8	34773 (7.4)	516910	38251
Utah	106639	18.66	9949 (9.33)	138108	12885
Vermont	22794	0	0	35856	0
Virginia	80641	7.33	2955 (3.67)	107147	3927
Washington	274224	0.17	233 (0.09)	259087	220
West Virginia	4518	12.83	290 (6.42)	7019	450
Wisconsin	285192	7.69	10966 (3.85)	539169	20731
Wyoming	28420	32.42	4607 (16.21)	55685	9027
Totals	7188961		428681	9221585	629112


Wetlands Within Central Sheridan County, North Dakota
WETLANDS LESS THAN ONE ACRE
WETLANDS GREATER THAN ONE ACRE
Scale: 1 inch = 1/2 mile
This map was produced by the U.S. Fish and Wildlife Service, Habitat and Population Evaluation Team, in Bismarck, North Dakota. The wetland data presented was derived from National Wetland Inventory digital data and depicts the relative difference in the number of wetlands less than or equal to one acre in size with those greater than one acre. The map encompasses a twelve square mile portion of central Sheridan County, North Dakota and was completed in February, 1995. Any questions pertaining to the information presented may be directed to Ron Reynolds or Dan Cohen at (701) 250-4413.

PREPARED STATEMENT OF DERB S. CARTER, JR., SOUTHERN ENVIRONMENTAL LAW CENTER

Chairman Inhofe, members of the subcommittee, thank you for the opportunity to testify today. I am testifying on behalf of the Southern Environmental Law Center, a public interest, environmental law firm working to protect the environment and natural resources of the Southeast. As a conservationist and attorney with over 15 years of experience representing citizens across the Southeast as they fought to protect wetlands in their communities, I have seen the Federal wetlands protection program up close and on the ground. I was one of the lead attorneys on the *Tulloch* case, and my client, the North Carolina Wildlife Federation, is a party to the *AMC* case, now before the Court of Appeals for the D.C. Circuit.

I will address two subjects today: The Corps' decision to phase out Nationwide Permit 26, and the January 1997 decision in the *AMC* case that declared invalid the so-called *Tulloch* rule. The basic thread that ties these two subjects together is that, in each case, wetlands developers and their attorneys are grasping at legal technicalities to keep profitable loopholes open—long after the damaging environmental consequences of those loopholes are beyond doubt.

THE TULLOCH RULE

The first of those loopholes, the periodic failure of the Corps to regulate excavation activities in wetlands, was closed by the *Tulloch* rule. That rule arose out of a case in coastal North Carolina that illustrates why it is important and appropriate for the Corps to regulate the discharge of dredged material resulting from digging in wetlands.

The facts that gave rise to the *Tulloch* case were brought to our attention by a neighbor of one development whose property was being flooded by diverted drainage water from the wetlands, and by a fisherman who was concerned about the dumping of drainage water from wetlands at another development into a tidal creek from which he took clams and oysters. When we investigated we found that at both sites the developers had excavated in wetlands a system of ditches to drain the wetlands so as to avoid the normal permitting requirements for the proposed residential and commercial developments in wetlands. The developers employed extraordinary means to limit the amount of dirt discharged back into the wetland from the ditch excavation. When we examined files maintained by the Corps of Engineers, we found that frequent site inspections of both developments by Corps staff had determined that some amounts of dredged dirt had been discharged in the wetlands from the excavation of the drainage ditches, but the Corps had determined that this discharge was *de minimus*, and not subject to permitting requirements. Once drained, the Corps determined that the former wetlands were not jurisdictional and no permits or environmental review was required prior to development.

When we examined the law, it appeared clear that these wetland drainage activities should require a permit. To reach this conclusion, one need not go beyond the plain language of the statute. Section 301 of the FWPCA prohibits the "discharge of *any* pollutant." Section 502(12) of the FWPCA defines the discharge of pollutant to include "*any* addition of any pollutant [including dredged and fill material] to navigable waters from any point source." Section 404 of the FWPCA authorizes the Corps to issue permits "for the discharge of dredged or fill material" with no exemptions based on the quantity discharged or the source of the dredged material. Moreover, section 404(f)(2) states "*any* discharge of dredged or fill material" that is "incidental to any activity" having as its purpose bringing a wetland into a use to which it was not previously subject, where flow and circulation of waters is impaired or the reach of waters reduced, "*shall be required to have a permit.*" Certainly the law required a permit for the discharges of dredged material associated with the installation of ditches at these developments to convert hundreds of acres of critical wetlands adjacent to North Carolina's coastal estuaries.

We settled the case with the promulgation of the *Tulloch* rule which requires a permit for any discharge incidental to an activity whose purpose is to destroy or degrade a wetland. It is an eminently sensible rule, fully consistent with the purpose of section 404 to protect our remaining wetlands from unregulated and unmitigated destruction.

No sooner did the Corps issue the *Tulloch* rule than the American Mining Congress (AMC) filed suit against it, claiming that Congress never intended the Corps to regulate excavation activities when it asked the Corps to protect wetlands, and that the Corps had therefore exceeded its authority in issuing the *Tulloch* rule. The decision in January was unexpected, and, to our minds, unfortunate. Like the Corps, we disagree with the District Court decision and are appealing it. We are also seeking a stay pending appeal of the order striking down the *Tulloch* rule.

Substantial environmental damage will result if the *Tulloch* rule is not enforced. The Corps estimates that in the absence of *Tulloch*, some 6,500 excavation projects will go unregulated, with impacts on 10,000 acres of wetlands, 10,000 acres of open water, and 1,500 miles of streams and tributaries.

At the same time, it is important to be clear about what the *AMC* decision does not do. It does not change the regulated status of most mechanized land clearing activities—those were regulated before *Tulloch*, and they should be regulated even if incidental discharge is not. You can't take a bulldozer in to clear trees off a wetland without doing substantial damage to the wetlands, and you can't do it without moving a significant amount of dirt around. Similarly, taking heavy equipment into a creek to dig it up and dump material on the banks is still regulated—and it should be, given the way it destroys aquatic life and habitat and usually contributes to flooding downstream.

One need not look further than the two developments that gave rise to the *Tulloch* rule to forecast the environmental damage that will result if the *AMC* decision stands. The impacts of the drainage and conversion of wetlands at the two "Tulloch" developments are substantial and lasting. The State of North Carolina has permanently closed to shell fishing the tidal creeks now receiving runoff and drainage from the developments in the former wetlands. Neighboring properties are still being flooded during even moderate rain events. Not surprisingly, the developments in the former wetlands, experience extensive flooding. The unsuspecting homeowners that invested their savings in houses built on these drained wetlands are now seeking public assistance and funding to alleviate the flooding problems.

What should Congress do as this case proceeds through the courts? My respectful recommendation is to let the judicial process take its course. However, when Congress does reauthorize the FWPCA, everyone has agreed for years that to draw a distinction between filling and excavating in the regulatory program is senseless and unfair, and Congress should explicitly include "excavation" in list of regulated activities to remove all doubts.

NATIONWIDE PERMIT 26

If excavation was a major source of unregulated wetlands loss before promulgation of the *Tulloch* rule in 1993, Nationwide Permit 26 has been the biggest hemorrhage within the 404 program, and that is why conservationists have opposed it. Until the most recent reissuance last December, Nationwide Permit 26 allowed the destruction of up to 1 acre of isolated wetlands and headwater streams with no notice to anyone, and up to 10 acres with notice to the Corps, but not to the public or even necessarily to the Federal resource agencies. Science has shown that isolated wetlands are among the most important types of wetlands for protecting water quality, serving as habitat, and recharging underground drinking water supplies in various parts of the country; headwater streams are the smallest streams in the watershed, and are the most important parts of river systems for protection of water quality in the watershed. The National Research Council of the National Academy of Sciences recommended in 1995 that NWP 26 be reviewed because "[t]he scientific basis for policies that attribute less importance to headwater areas and isolated wetlands than to other wetlands is weak." National Research Council, *Wetlands: Characteristics and Boundaries* (May 1995). We've known that NWP 26 was allowing the destruction of tens of thousands of acres of these wetlands and streams each year.

Wetlands, particularly headwaters wetlands, are a first line defense in removing pollutants, including excessive nutrients, from runoff entering surface waters. In the rapidly-developing Piedmont region of North Carolina that drains into the Nation's second largest estuary the average size of a wetland is less than one acre. Thus, under the previous version of NWP 26, half of these wetlands and their critical nutrient removal functions could be destroyed with no notice or permit. Meanwhile, the State is currently considering a billion dollar expenditure to upgrade sewage treatment systems primarily to address excessive nutrient enrichment of coastal waters. Existing wetlands provide this service free.

When the Corps proposed to reissue NWP 26 last year, conservationists urged the Corps to eliminate the loophole. NWP 26 violates the legal standards for general permits; it covers a *category of wetlands* while the Clean Water Act authorizes general permits to cover narrow *categories of activities.* More importantly, NWP 26 violates both the letter and the spirit of the Corps' general permit authority by authorizing projects with far more than minimal cumulative impacts.

The Corps should have eliminated NWP 26 sooner. Although the Corps has issued NWP 26 with lower thresholds, the permit remains illegal and significantly destructive. Any way you count it, it will allow the unregulated and unmitigated destruction of thousands of acres of isolated wetlands and headwater streams over the next

two years. Nonetheless, conservationists are looking to the future, trying to work with the Corps and the regulated community to find alternative nationwide permits that will protect the environment and work for us all.

Not so the National Association of Homebuilders, who have taken to the courts in an effort to hang onto this scientifically bankrupt loophole a little longer. They apparently believe that a general permit issued under fully discretionary authority now amounts to legal entitlement. The Homebuilders claim that the Corps could not decide to eliminate NWP 26 in two years because it did not specifically solicit comments on that option in its original proposal to reissue the nationwide. The law requires the Corps to make an affirmative decision to reissue any nationwide; the default option when a nationwide is up for reauthorization, is for it to expire and not be reissued. That is no secret, particularly since at public hearings throughout the comment period the Homebuilders heard repeatedly the recommendations of State and local officials and ordinary citizens that NWP 26 not be reissued, or that it be severely limited in the very ways the Corps has done—with limits on the linear impacts permitted to streams, and on the practice of stacking NWP 26 with other nationwides to smuggle projects through with no review.

So the Corps is collecting data to come up with alternative permits, and the Homebuilders are in court. What should Congress do? Again, I'd recommend that this subcommittee let the administrative and judicial processes take their course. As an advocate experienced in dealing with the Corps, I know the Corps will benefit from prodding to keep to its schedule, and to have the replacement permits ready by the time NWP 26 expires. I also know that conservationists are unlikely to brook further delay in closing that loophole.

The final question to ask is, why are the wetlands developers fighting so hard to avoid meaningful environmental review of their projects? It is not as though most projects don't get a permit; today, between 95 and 97 percent of individual permits are granted—between 99.5 and 99.7 percent of projects when general permit authorizations are included. What is really at stake here is time—not whether the developers get to make their money, but how fast, and with what disregard for the environmental consequences.

Ultimately, excusing activities like excavation from review under the 404 program, or approving projects with significant cumulative impacts without real review as NWP 26 does, feeds the profits of a few at the expense of everyone else. Last Congress, some developers tried to persuade this body to increase loopholes in the wetlands program and decrease public protections. They failed. Now they have turned to the courts. I urge this subcommittee to let the judicial process run its course, and, in the next reauthorization, to strengthen the section 404 program so that these loopholes can never be reopened again.

Thank you, and I'll look forward to answering your questions.

PREPARED STATEMENT OF THOMAS W. WINTER, NATIONAL AGGREGATES ASSOCIATION

Good morning, I'm Thomas W. Winter, President of Winter Brothers Material Company of St. Louis, MO, and chairman of the board of directors of the National Aggregates Association.

First, I want to thank Chairman Inhofe, Senator Graham, and members of this subcommittee for providing me with the opportunity to appear here today. As chairman of the board of directors of the National Aggregates Association (NAA), I am here today to speak on behalf of the member companies that make up our association. NAA appreciates the time and consideration of this subcommittee and I want to emphasize our willingness, not only as an association, but as an industry, to be helpful to the members of this subcommittee, as well as the entire House and Senate, as you continue to revise and reform our Nation's water quality programs as well as any other legislative initiative to be considered by the Congress.

I would also like to offer to this subcommittee, as well as the full Senate Environment and Public Works Committee, the continued support of the staff of the NAA. We are committed to providing you with any information you may need or answering any questions you may have in this process. We are truly an organization focused on the delicate balance between the interests of small business and its agenda and the interests of solid policymaking in our Nation.

NAA is an international association representing the producers of construction aggregates, which is the largest mining industry in the U.S. Its members produce a majority of the two billion tons of sand, gravel, crushed and broken stone sold annually in the United States dedicated to the maintenance and development of our Nation's infrastructure. Of course, wetlands is a very sensitive issue to our industry, and its consideration and preservation are important to us.

I would like to address two related issues this morning involving recent wetlands regulatory and judicial developments:

No. 1, NAA's support for the recent court decision on the "Tulloch" rule, and,

No. 2, NAA's views on the U.S. Corps of Engineers reissuance and decision to end Nationwide Permit 26.

"TULLOCH" RULE

As you know, the statutory foundation of the Federal wetlands program, section 404 of the Clean Water Act, regulates the "discharge of dredged or fill material into the water of the United States at specific disposal sites."

In August 1993, the Corps of Engineers adopted the "Tulloch" rule thereby redefining the term "discharge of dredged material" to include "incidental fallback." Simply stated, the "Tulloch" rule provided the Corps the ability to regulate what is "extracted," and not just what is "added" to the waters of the United States. Because excavation and land-clearing almost inevitably result in incidental fallback, and because, under the rule, that fallback now constitutes a discharge of dredged material, the "Tulloch" rule made all removal activities subject to a permit requirement.

NAA, along with the American Forest and Paper Association, the American Road and Transportation Builders Association, the National Association of Home Builders, and the National Mining Association, challenged this rule by successfully making the argument that "Tulloch" warped the intent of Congress, and went beyond the scope of authority provided by Congress to the Corps of Engineers under the Clean Water Act.

On January 23 of this year, the Federal district court in Washington issued a decision which held that the government acted illegally when it adopted the "Tulloch" rule. The court held that the Corps of Engineers and the Environmental Protection Agency acted illegally and declared that the "Tulloch" rule is invalid and set aside, and is therefore not to be applied or enforced by the agencies. The court observed, and I quote "the appropriate remedy for what the agencies now perceive to be an imperfect statute * * * is congressional action; [the agencies' administrative] authority is limited to adopting regulations that affect the will of Congress as expressed in the statute."

NAA applauds the decision of the Federal district court, and we will continue to work with allied organizations to ensure that it is upheld. We view the court's decision as a reasonable, judicial opinion of wetlands policies.

Following the court's ruling, the Corps and EPA attempted to limit the magnitude of the decision to only those who served as plaintiffs. This attempt, in and of itself, was not sound policy on the part of the Justice Department, and was rejected by the court.

As alarming NAA received numerous complaints and inquiries, all gravitating around the notion, or misinformation, that stated the ruling only applied to the plaintiffs in the lawsuit, or was only applicable in the District of Columbia. NAA will provide documentation of this information upon request from members of this subcommittee.

Members of this subcommittee, NAA is an international trade organization consisting of many small aggregate producers. We need, we rely, and we very much depend on district representatives from the Corps to convey timely and accurate information.

The Corps and EPA issued final formal guidance in April 1997, and I thank the other plaintiffs in the lawsuit for their efforts to compel the Corps to issue the guidance and eliminate the confusion on the "Tulloch" decision.

Again, NAA is supported by members whose interests are consistent with the small business agenda of our Nation. We are, as an association and as an industry, committed to our ideals, and fiercely loyal to our beliefs. Our paramount objective is to work with local, State, and Federal officials and cooperate as we can in the development of sound public policymaking at the State and Federal levels.

In this regard, we respectfully request the "Tulloch" rule remain invalid. NAA also asks that Congress again consider what is reasonable in terms of businesses interests as you continue to reauthorize the Clean Water Act and revise our Nation's wetlands policy.

NATIONWIDE PERMIT 26

The second issue I would like to address is Nationwide Permit 26.

On December 13, 1996, the U.S. Army Corps of Engineers published its reissued and revised nationwide permits (NWPs) in the Federal Register. The reissued NWPs became effective on February 11, 1997. The NWPs regulate the discharge of dredged or fill materials into the waters of the United States through a general type permit

authorized under the Clean Water Act. NAA considers the Corps acted in a manner inconsistent with public opinion in reissuing the NWPs. I am specifically here to discuss the Nationwide Permit 26.

Nationwide Permit 26 authorizes the discharge of dredged or fill material into the headwaters and isolated waters of the United States. Since the permit was first authorized in 1977, NWP 26 has remained unchanged by allowing up to 10 acres of wetland impact. During the recent reauthorization, which occurs every 5 years, the Corps reduced the threshold limit to ⅓ acre and 3 acres. Additionally, the Corps imposed the restrictions on NWP 26 being used in combination with other nationwide permits. Another limitation, invalidating the use of the NWP 26, are projects involving the disturbance of more than 500 linear feet of a stream-bed.

The Corps also decided that NWP 26 will be effective for two years and expire on December 13, 1998, while all other nationwide permits will expire in five years. The plan is to put in place up to a dozen targeted replacement permits prior to expiration. There is no reason to believe the Corps can complete the task in two years when it was late in reissuing existing permits and issuing new permits in the last two 5-year cycles.

NAA believes the Corps reissued its final rule on NWP 26 without fully considering the impact on small producers of aggregates and without considering the significant time factors involved in obtaining individual permits for the same activity. This puts an unjustifiable economic burden on small business. NAA is committed to protecting the waters of the United States but the process needs to be economically sound and legislatively reasonable.

CONCLUSION

The National Aggregates Association represents business interests whose focus embrace the interests of the American economy. Though the companies NAA represents are small, they are in every State, and nearly every congressional district. We are not an industry concerned with winning and losing, but much of the time merely surviving.

The members of the National Aggregates Association very much support the Federal court's decision on the "Tulloch" rule, and we ask that Congress respect the court's decision.

The aggregates industry is committed to working with all sectors and interests in wetlands preservation. We look forward to working with each of you, and your respective staff, in this regard.

Again, I thank the members of this subcommittee for holding these hearings. The National Aggregates Association appreciates your time and consideration of our views.

PREPARED STATEMENT OF CYNTHIA M. SARTHOU, GULF RESTORATION NETWORK

Dear Chairman Inhofe: The Gulf Restoration Network requests that this written testimony be included in the record of the June 12, 1997 hearing on Recent Administrative and Judicial Developments in the Clean Water Act 404 Permit Program, held before the Clean Air, Wetlands, Private Property, and Nuclear Safety Subcommittee of the Senate Environment and Public Works Committee.

The Gulf Restoration Network (GRN) is a diverse coalition of over 30 local, regional, and national organizations concerned about the short- and long-term health of the Gulf of Mexico, and committed to restoring it to an ecologically and biologically sustainable condition. Members of the Network are located in each of the States along the Gulf of Mexico.

I. WETLANDS LOSS IN GULF STATES

Gulf States have suffered substantial losses of wetlands. Information available to the GRN establishes that:

Alabama has lost over 50 percent of its original wetlands (over 3.78 million acres lost).

Florida has lost over 46 percent of its original wetlands (over 9.29 million acres lost).

Louisiana has lost over 46 percent of its original wetlands (over 7.41 million acres lost). In addition to other losses, Louisiana is losing 35 square miles of valuable coastal wetlands each year as a result of subsidence, dredging, and increased human intervention and use of the waters of the Mississippi River. The continuing loss of Louisiana wetlands threatens a thriving commercial and recreational fishery and the communities dependent on those resources.

Mississippi has lost over 59 percent of its original wetlands (over 5.81 million acres lost).

Texas has lost over 52 percent of its original wetlands (over 8.39 million acres lost).

All fish and wildlife, including many endangered and threatened species, dependent on the Gulf system are at increasing risk due to this habitat loss. This includes 75 percent of the Nation's migratory waterfowl, for which the Gulf and its associated estuaries and wetlands provide critical habitat. The tremendous wetlands losses also place at risk 98 percent of all seafood species commercially harvested in the Gulf. These species rely on wetlands to provide habitat for part of their lives.

Wetland losses place the Gulf States at increased risk from flooding and hurricanes. Wetlands provide valuable protection from damage associated with floods and hurricanes. The remaining U.S. wetlands are estimated to save tens of billions of dollars in flood damage costs each year.

The GRN strongly opposes the continued destruction of wetlands throughout the Gulf region, and nationwide permits (NWPs) that contribute to this loss. This is particularly true with regard to NWP 26.

II. NATIONWIDE PERMIT 26

Prior to it recent amendment, NWP 26 authorized the discharge of dredge and fill material into wetlands, resulting in destruction of up to one acre of isolated and headwater wetlands without notice, and up to 10 acres if notice requirements were satisfied. NWP 26 authorized more than minimal adverse environmental impacts, both singularly and cumulatively.

In reissuing NWP 26 with lower thresholds, the U.S. Army Corps of Engineers (Corps) has attempted to reduce the destruction attendant to the use of this permit. Nevertheless, even as amended, NWP 26 flies in the face of existing law. Section 404(e)(1) requires that NWPs be focused on categories of activities. NWP 26 is not category specific, rather it exempts activities on the basis of where they are located. Thus, even as amended, NWP 26 clearly violates the Clean Water Act. NWP 26 must, therefore, be eliminated.

We urge the subcommittee to support the decision of the Corps to eliminate NWP 26 within two years. The continuing destruction of tens of thousands of acres of isolated wetlands and headwater streams, without notice to the public and virtually no environmental review, is not in the public interest and simply must not continue.

III. PROBLEMS ASSOCIATED WITH ALL NWPs

The GRN also asks that the subcommittee address factors which exacerbate the negative impacts attendant to the use of all NWPs.

A. Statutory Requirements

Section 404(e)(1) of the Clean Water Act, 33 U.S.C. § 1344(e)(1) (hereinafter section 404(e)(1)), authorizes the Corps to issue general permits that provide blanket approval to narrow categories of activities that are "similar in nature" and "will have only minimal adverse environmental impacts" both separately and cumulatively. Historically, the Corps has ignored the plain language of section 404(e)(1).

Section 404(e)(1) specifically provides that the Secretary of the Army may issue nationwide permits only if he/she determines that the activities in any category will have "only minimal cumulative adverse effect on the environment." In blatant disregard for this unambiguous requirement, the Corps has issued NWPs which authorize a wide range of activities that result in significant individual and cumulative adverse environmental impacts.

The Corps cannot establish that nationwide permits, particularly NWP 26, meet the requirements of section 404(e)(1), for they have failed to track the cumulative impacts attendant to the use of NWPs. Indeed, Michael L. Davis, Deputy Assistant Secretary of the Army for Civil Works, has admitted that no documentation of the cumulative impacts of NWPs exists. According to Mr. Davis, the Corps merely has:

> a general sense of the impacts for those where reporting is necessary. For the most part, the ones that have effects on wetlands are reported. So we have an idea of the amount of activity that's going on in the general permit program. In terms of cumulative impacts, it's an area we could probably make some improvement. (sic) 18 National Wetlands Newsletter 4:19 (July-August 1996).

The Corps must establish a system of meaningful recordkeeping of all environmental impacts attendant to the use of NWPs and the success of efforts to mitigate those impacts. Only in this way can the Corps comply with its statutory duty to in-

sure that NWPs truly have "only minimal adverse environmental impacts" both separately and cumulatively.

B. Consultation With State and Federal Agencies

The United States Environmental Protection Agency (EPA), the United States Fish and Wildlife Service (FWS), and the National Marine Fisheries Service (NMFS), have been accorded a role in reviewing and commenting on proposals which contemplate the destruction of wetlands. 33 U.S.C. § 1344(m). The Corps has often ignored the requirement for interagency consultation. Thus, Federal agencies must be kept informed of the use of nationwide permits, and their comments accorded the utmost deference.

Section 401 of the Clean Water Act, 33 U.S.C. § 1341, also requires that States be afforded the opportunity to review applications for Federal wetlands permits to determine whether the permit would allow impacts that violate State water quality standards. The statute further requires that, as a condition for issuance of a permit, a State has the right to certify whether the proposed project complies with State water quality standards. A State's denial of certification prevents issuance of the permit. In spite of the clear authority conferred upon States by section 401, the Corps has continued to allow the use of NWPs in States that have denied certification of those permits. This must stop.

C. Independent Verification and Monitoring

In the past, where an NWP required reporting of wetlands impacts, the Corps has placed great reliance on the data supplied by NWP applicants. Rarely has the Corps independently verified this information. As a result, there has been significant abuse of NWPs, especially with regard to under-reporting of wetlands impacts so that applicants can fall under the NWP. The GRN believes that the Corps must attach reporting requirements to all NWPs. Moreover, the Corps must commit to establishing a system for independent verification of applicant data.

The Corps has now attached conditions to several NWPs which limit their use. Although in theory, satisfaction of the stated conditions might avoid the potential for significant adverse impacts on wetlands, the Corps has rarely monitored or enforced compliance with existing permit conditions. For those NWPs that are reissued, the Corps must establish a system for monitoring and enforcing permit conditions. Moreover, where violations are found, the Corps must vigorously pursue penalties against the violators.

D. Stacking of Nationwide Permits

The Corps has in many circumstances allowed applicants to combine, or stack, NWPs (*i.e.* simultaneously rely on more than one NWP for a single project.). NWPs that are often stacked include, but are not limited to, NWP 12, NWP 14, NWP 18, NWP 19, NWP 26, and NWP 33. Although separately each action may have only minimal impacts on wetlands, when combined the impacts may be quite significant. Moreover, by stacking these permits both the permittees and the Corps have avoided the full environmental and public review that would otherwise be required for impacts of this magnitude. In order to comply with its statutory duties, the Corps must prohibit stacking of NWPs. Only in this way will the Corps be able to ensure that NWPs do not, separately or in combination, result in adverse environmental impacts.

E. Mitigation

One of the "Section 404 Only Conditions" provides that discharges of dredge and fill materials into wetlands must be minimized unless the District Engineer approves a compensatory mitigation plan for the specific regulated activity. The Corps seeks to modify the language of this condition to require that a permittee need not comply with minimization requirements if the District Engineer determines that a compensatory plan "is more beneficial to the environment than on-site minimization or avoidance measures."

Mitigation is far from the panacea that some contend. Mitigation measures frequently fail to live up to their promise and often are never implemented at all. The most egregious flaw in present mitigation approaches is the preservation of existing wetlands as mitigation and compensation. Preservation of existing wetlands in order to allow the destruction of other existing wetlands guarantees that there will be a net loss of wetlands. Additionally, existing mitigation agreements far too often allow replacement of one wetland community type with another community type, or allow for mitigation in a different watershed or drainage. This allows for the complete destruction of specific wetland types, preventing efforts to achieve no net loss of wetland functions. Mitigation of this type also fails to compensate for the destruction suffered by a particular watershed or drainage. Finally, mitigation agreements fre-

quently fail to include monitoring requirements. Without monitoring, the Corps cannot determine the success of mitigation efforts.

Applicants must always be required first to avoid and minimize destruction of wetlands. Mitigation should be allowed only where avoidance and minimization are not possible. Additionally, District Engineer approval of mitigation plans should be allowed only where the plan requires both in-kind compensation for wetlands destruction and monitoring.

IV. CONCLUSION

The GRN urges the subcommittee to support the Corps decision to eliminate NWP 26. We would also ask that the subcommittee address those problems attendant to the use of all NWPs as you consider reauthorization of section 404 of the CWA. Finally, we request that in reauthorizing section 404 the subcommittee commit to the avoidance of the unnecessary destruction of wetlands, and substantial improvement in government accountability.

We appreciate your attention to this important matter.

PREPARED STATEMENT OF THE NATIONAL ASSOCIATION OF REALTORS

INTRODUCTION

Thank you for the opportunity to submit comments from the NATIONAL ASSOCIATION OF REALTORS® (NAR) for the record on your hearing on recent regulatory and judicial developments concerning the section 404 permitting program of the Water Pollution Control Act. NAR, comprised of nearly 730,000 members involved in all aspects of the real estate industry, has a keen interest in the Clean Water Act, wetlands, and private property rights. The NAR commends Chairman Inhofe and the subcommittee for taking a leadership role on this issue.

The Association believes that development should be encouraged as it is a stimulus to the economy, increases the tax base, provides places to live and work, and offers economic opportunities to the citizens of a community. However, we also realize the responsibility we have to work with government officials to plan for responsible development which balances transportation, housing, agriculture, commercial, industrial, and environmental concerns.

RECENT CHANGES TO THE SECTION 404 PROGRAM

Two recent changes to the section 404 program underscore the need for legislative action and congressional oversight. First, on December 13, 1997, the U.S. Army Corps of Engineers (USACE) reissued its nationwide permit program, which included major policy changes. Second, on January 23, 1997, a D.C. Federal District Court nullified the so-called *Tulloch* rule as exceeding the statutory limits of the section 404 program. Both of these policy decisions affect thousands of development and construction activities and REALTORS® nationwide.

Regarding the issues surrounding the *Tulloch* decision, we look forward to the opportunity to work with the committee toward the development of balanced legislation that will improve the section 404 program to ensure that it will achieve its goals while addressing the concerns of those subject to its regulation.

The changes to the Nationwide Permit Program, in particular NWP 26, were also significant. NWP 26 allows development at the headwaters of streams and lakes, and in isolated and small wetlands. Three programmatic changes to NWP 26—the 3-acre size limit, the 500-linear-foot limit along streambeds, and the "no permit-stacking" rule—severely restrict the application of NWP 26. NWP 26 is the most widely-used nationwide permit. In addition, NAR is concerned that sunsetting NWP 26 on December 13, 1998 in favor of "activity specific" replacement permits may have a much narrower application and that the number of individual permits required annually will increase substantially, slowing the program down dramatically. The NAR has joined the National Association of Homebuilders in a lawsuit to sue the USACE for violating the U.S. Administrative Procedures Act in implementing the changes to NWP 26.

NAR believes the time is right for the 105th Congress to legislate improvements to the section 404 program and NAR stands ready to play a constructive role in the development and enactment of any such legislation.

NAR LEGISLATIVE RECOMMENDATIONS

The NATIONAL ASSOCIATION OF REALTORS® supports passage of legislation which includes:

• a standardized wetlands definition applicable to all Federal agencies and which requires clear scientific evidence of each wetland indicator (hydrophytic vegetation, hydric soils, and hydrology);
• a streamlined permitting process which allows those seeking permits to make application to and receive a response from a single Federal agency;
• the creation of a priority wetlands ranking system, which provides for protection of ecologically significant wetlands but allows permits to be issued in the case of wetlands of lesser environmental importance;
• a requirement that all local authorities and affected property owners be notified of wetlands inventories to be conducted in their States, and of proposed wetlands jurisdictional determinations;
• the use of wetlands mitigation banking as an alternative to the prohibition on the use of wetlands;
• increased public participation in Federal, State, and local wetlands decision-making; and
• man-made wet areas, such as ditches, culverts, ponds, or waste lagoons that were intentionally or accidentally created where non-wetlands once existed should be exempt from wetlands regulation.

NAR supports a policy which will provide for a classification system for wetlands. We agree that the most environmentally sensitive and useful wetlands should be protected because they serve vital ecological functions, such as storm buffers, flood control, and habitat spawning areas. However, current Federal policy lacks the flexibility to differentiate between vital ecological wetlands and lands which serve a marginal environmental purpose.

NAR supports a ranking system that protects the most valuable wetlands, while allowing private landowners of less ecologically sensitive properties the right to develop lands as they see fit, within local planning and zoning parameters.

NAR AND PRIVATE PROPERTY RIGHTS

NAR's concerns extend beyond the immediate interests of the real estate industry. Because over 70 percent of our Nation's wetlands are owned by private citizens, we also wish to direct attention to the larger issue of protecting private property rights.

The NATIONAL ASSOCIATION OF REALTORS® has worked for years to encourage a balanced approach to environmental protection that accommodates the need for both conservation and economic opportunity. To balance the efforts of government to protect public health by controlling pollution and protecting natural resources with the economic and property rights secured by the Constitution, we believe that the cost of the benefits to the general public achieved by such regulation should be borne by the beneficiaries—the general public. We oppose those aspects of environmental and natural resource legislation that amount to uncompensated condemnation of private property through government action. It is essential that the rights of private property owners be fully recognized in local, State, and Federal programs and laws.

In this context, the NATIONAL ASSOCIATION OF REALTORS® believes that Federal wetlands regulation must acknowledge that the prohibition of all reasonable use of a property by denial of a required wetlands permit results in a "taking" of the property within the meaning of the Fifth Amendment's "just compensation" clause, which requires compensation to be paid to the affected property owner. This result is made clear by the decision of the Court of Appeals for the Federal Circuit in *Loveladies Harbor Inc.* v. *the United States*, as well as holdings of the United States Claims Court in *Formanek* v. *United States* and *Bowles* v. *United States.*

In each of these cases, the Army Corps of Engineers denial of a permit to place fill on wetlands so diminished the owner's property interest as to result in a "taking," entitling the property owner to the just compensation mandated by the Fifth Amendment. Moreover, the Supreme Court's decision in *Lucas* v. *South Carolina Coastal Council* reaffirms the vitality of the protection of property rights provided by the Fifth Amendment by establishing what the Court termed a "categorical" rule requiring compensation when all economically viable use of a property is eliminated. The Court made it clear that compensation is a constitutional requirement except in those rare cases where regulation merely implements limitations on use of the property already imposed by the common law of nuisance or property.

To prevent other property owners from becoming embroiled in years of litigation and spending huge sums of money, Federal wetlands regulation should require the regulating agency to expressly consider the implications of permit denials on private property rights. In particular, the law should require that any wholesale denial of use be carefully analyzed to determine the extent of compensation to be provided to the affected property owner. In a few cases, such analysis may determine that

the action falls within the unique circumstances suggested by *Lucas* where the government need not provide compensation because the proposed use would constitute a common law nuisance.

Just as importantly, Federal wetlands legislation should require that complete denials of use be clearly justified and imposed only where the affected area is of such extreme ecological significance and vulnerability as to justify such drastic action. Regulation should require the regulator to permit beneficial uses of wetlands which do not present a real and significant threat to substantial public interests. Preservation of important wetlands can also be accomplished by providing financial incentives for property owners to leave wetlands on their land undisturbed. This would also relieve builders, for example, from unfairly bearing the cost of environmental improvement or protection, the cost of which is generally passed on to homebuyers.

The NATIONAL ASSOCIATION OF REALTORS® strongly believes that Federal wetlands regulation should be strengthened to preserve the fundamental right of all private property owners, working through local government, to determine and enjoy the highest and best use of their land. To be sure, NAR recognizes that the application of some restrictions on property use serves the interests of all, but NAR believes that all citizens have the right to acquire and use real property with the confidence and certainty that the value of their property will not be unduly diminished or jeopardized by governmental action at any level without the owner's express consent.

SUMMARY AND CONCLUSIONS

The recent administrative and judicial changes that have occurred will have far-reaching impacts on the economy, our communities and the environment. NAR believes legislation that protects private property while balancing environmental concerns with the needs of communities to grow and prosper would be an appropriate vehicle to reform the Water Pollution Control Act. The changes that have occurred to section 404 place in jeopardy the right of property owners to maximize the value of their property. NAR is prepared to work closely with this subcommittee to ensure that future wetlands policy is environmentally sensitive, yet allows our Nation to be economically competitive. Thank you for the opportunity to express our views.

PREPARED STATEMENT OF H. LEIGHTON STEWARD, NATIONAL WETLANDS COALITION

Mr. Chairman, my name is H. Leighton Steward. I am the chairman, president, and chief executive officer of the Louisiana Land and Exploration Company and also serve as the chair of The National Wetlands Coalition. A list of our members is attached. Thank you for calling this important hearing on recent administrative and judicial changes to section 404 of the Water Pollution Control Act and allowing the Coalition to submit this testimony, which we request be made part of the record of the hearing.

The National Wetlands Coalition was formed in September 1989 for the single purpose of participating in the national debate regarding the operation of the Federal section 404 "wetlands" permitting program. We acknowledge the importance of functioning wetlands, support the existence of a Federal wetlands permitting program, and support the proposed national goal of "no overall net loss of wetlands functions and values." Nevertheless, we are concerned that Federal court decisions and agency actions have created a national program that far exceeds congressional intent as expressed by legislative action in both 1972 and 1997. Therefore, we believe that the 105th Congress can and should act legislatively to improve the section 404 program. We look forward to working with the Senate Environment and Public Works Committee to that end.

The subject of this hearing underscores the need for legislative action regarding the section 404 program. Two recent actions by the judiciary and an agency have changed the section 404 program substantially. First, on December 13, 1996, the Army Corps of Engineers reissued its nationwide permits, effective February 11, 1997, for 5 years. The Corps included significant policy changes in the Nationwide Permit Program, the most prominent of which is to "sunset" Nationwide Permit 26 on December 13, 1998. Then, on January 23, 1997, a Federal District Court in the District of Columbia, in *American Mining Congress* v. *Army Corps of Engineers*, nullified the so-called *Tulloch* rule as exceeding the statutory limits of the section 404 program. The *Tulloch* rule was issued on August 24, 1993, as the centerpiece of President Clinton's package of proposed section 404 reforms and extended, in a very indirect fashion, the section 404 permitting program to cover "excavation and drainage" of jurisdictional wetlands.

Both of these major policy decisions affect directly tens of thousands of activities nationwide annually and directly affect tens of thousands of American citizens. Neither policy decision was initiated or sanctioned by the elected representatives of our Nation: the United States Congress.

Let us address each of these major policy changes.

THE TULLOCH RULE

The National Wetlands Coalition agrees with both the general intent of the *Tulloch* rule and the Federal District Court's decision in *American Mining Congress* v. *Army Corps of Engineers*. In the context of broad programmatic reform, the Coalition agrees that the section 404 permitting program should be expanded to require a permit for "drainage" or "excavation" of a jurisdictional wetland. However, we also agree strongly that this expansion of the section 404 program can only be achieved through legislation.

In April, U.S. District Judge Stanley Harris remarked that "even apart from the Court's conclusion that the agencies exceeded their statutory authority in promulgating the *Tulloch* rule, the Court interprets the rather remarkable White House press release announcing the rule, which stated that "Congress should amend the Clean Water Act to make it consistent with the agencies' rulemaking" in effect as an acknowledgment by the Executive Branch that the rule exceeded permissible statutory bounds." *American Mining Congress* v. *U.S. Army Corps of Engineers*, No. 93–1754 SSH (D.C.D.C. April 2, 1997) (order denying defendant's motion to alter or amend judgment). Clearly, defining the jurisdictional reach of a Federal regulatory program is a job for our elected representatives.

The National Wetlands Coalition stands ready to support legislation that expands the section 404 program to cover "excavation" and "drainage," but only if certain reforms sought by the Coalition are included in such legislation. This has been the consistent position of the Coalition since we endorsed H.R. 1330, the Comprehensive Wetlands Conservation and Management Act when it was first introduced in the House of Representatives in early 1991. The Coalition has supported later versions of this legislation that was introduced in the U.S. Senate in several past Congresses. We look forward to the opportunity to work with the committee toward the development of balanced legislation that will improve the section 404 program to ensure that it will achieve its goals while addressing the concerns of those subject to its regulation.

THE NATIONWIDE PERMIT PROGRAM

The Importance of the Nationwide Permit Program

An effective and available nationwide permit program, augmented where appropriate with regional and local general permits, is essential to the operation of the section 404 permitting program. The definition of a jurisdictional wetland under the section 404 program is so expansive and the definition of a jurisdictional activity requiring a permit is so broad, particularly if expanded to cover "drainage" and "excavation," that hundreds of thousands of activities nationwide annually could require a section 404 permit. The 1,150 Corps of Engineers employees that are deployed nationwide could not possibly process hundreds of thousands of individual section 404 permits annually. The result would be chaos. Either thousands of Americans would be in violation of the program or long delays would precede the most routine activities—either of which would bring political pressure to bear to repeal or substantially scale back the section 404 program.

The Frequency of Use of NWP 26

According to the notice filed by the Corps of Engineers in the December 13, 1996 Federal Register, approximately 7,000 individual section 404 permits were issued nationwide in fiscal year 1995. However, the Corps provided written authorization for over 43,000 activities under nationwide permits in 1995. Interestingly, according to this notice, Nationwide Permit (NWP) 26 was used to authorize approximately 34,000 activities in fiscal year 1995. NWP 26, prior to December 13, 1996, allowed the disturbance of up to 10 acres of isolated wetlands or wetlands located in headwaters areas of streams. Of course the Corps retained the right, as with all nationwide permits, to deny the use of the nationwide permit in any instance where Corps officials judged the wetlands impacts of the proposed activity to be greater than *de minimus* on an individual or cumulative basis.

Three changes to NWP 26 will limit its availability. First, prior to December 13, 1998, NWP 26 is limited to 3 acres of disturbance, rather than 10 acres. Second, the Corps for the first time has imposed in NWP 26 a 500-linear-foot limit along stream beds. Finally, NWP 26 will disappear completely on December 13, 1998. A

further change, requiring pre-discharge notification whenever one-third acre of wetland would be affected by use of NWP 26, will also delay access to the permit.

We can all speculate on how many of the estimated 34,000 annual uses of NWP 26 will now require individual section 404 permits in the period between February 11, 1997 (the effective date of the new NWPs) and December 13, 1998, the expiration date of NWP 26. How many activities in previous years impacted headwaters and isolated wetlands from 3 to 10 acres in size? How many activities will fail to qualify due to the 500-linear-foot rule? How many activities previously using NWP 26 will qualify for another NWP?

However, beginning December 13, 1998, an estimated 34,000 additional activities annually (those currently permitted under NWP 26) could require individual permits. This number will be reduced by the number of activities that can qualify for other nationwide permits either in existence today or which may be issued by the Corps of Engineers prior to December 13, 1998. To state the obvious: the section 404 permitting program will grind to a halt if the number of individual 404 permits processed annually increases from 7,000 to 41,000. A huge outcry for the repeal of the program would follow this development.

Two other actions taken by the Corps under the Nationwide Permit Program will further limit access to these permits. First, the Corps has stated its intention to review its policy on compensatory mitigation in the context of the Nationwide Permit Program. Specifically, the Corps intends to review whether it should continue to allow applicants to provide compensatory mitigation in order to reduce the impacts of proposed projects to a minimal level in order then to qualify for a nationwide permit. Canceling this "buy-down" policy could require significantly more projects to apply for individual section 404 permits, further adding to the current strain on Corps resources.

Also during the reauthorization of the nationwide permits in December of last year, the Corps placed limitations on the use of multiple nationwide permits for a single project, a practice known as "stacking." Now, for example, NWP 14, which authorizes fills of up to one-third of an acre for road crossings, cannot be combined with NWP 26, which now authorizes fills of up to 3 acres. Previously, stacking" these two permits would allow activities on 3⅓ acres of wetlands. This change has further limited the availability of the Nationwide Permit Program to permit applicants.

Coalition Recommendations

The National Wetlands Coalition understands that the Corps of Engineers intends to issue perhaps a dozen or more new "activity specific" nationwide permits to replace NWP 26. We encourage the Congress to ensure that these permits are in place before December 13, 1998, the date NWP 26 expires.

We are concerned that the "activity specific" replacement permits may not be sufficient and that the number of individual permits required annually will still increase substantially, despite the best efforts of the Corps. We note that President Clinton's proposed wetlands reforms of August 1993 include a recommendation that Congress amend section 404 to clarify that general (nationwide) permits may be issued for "categories of waters" as well as for "specific activities." This legislative change would end the debate over whether the Corps has the authority to issue a general permit for "headwaters" or "isolated wetlands." Of course, the Corps would retain the power to deny use of such permits where the proposed activity would result in more than minimal adverse environmental effects either individually or cumulatively.

The NWC encourages the committee to report legislation in this Congress that provides authority to the Corps to issue general permits for "categories of waters," as recommended by the President on August 24, 1993.

SUMMARY

The National Wetlands Coalition believes that the time has come for the 105th Congress to legislate improvements to the section 404 program for the first time since 1977. Twenty years of program evolution through judicial decisions and agency interpretations should give way to considered judgments about this program by the elected representatives of the Nation. The National Wetlands Coalition stands ready to play a constructive role in the development and enactment of any such legislation.

The National Wetlands Coalition

Membership

June 25, 1997

Adam's Rib Recreational Area
Eagle, Colorado
American Consulting Engineers
Washington, D.C.
American Farm Bureau Federation
Washington, D.C.
American Petroleum Institute
Washington, D.C.
American Road & Transportation Builders Association
Washington, D.C.
American Sugar Cane League of the U.S.A., Inc.
Thibodaux, LA
ARCO Alaska
Anchorage, Alaska
Arctic Slope Regional Corporation
Barrow, Alaska
Audubon Institute
New Orleans, Louisiana
Berry Brothers General Contractors, Inc.
Berwick, Louisiana
China Clay Producers Association
Atlanta, Georgia
Conoco, Inc.
Lafayette, Louisiana
El Paso Energy
Houston, Texas
Exxon Company, U.S.A.
Houston, Texas
Fina Oil and Chemical Company
Dallas, Texas
First Commerce Corporation
New Orleans, Louisiana
Florida Wetlandsbank
Pembroke Pines, Florida
Freeport-McMoRan Inc.
New Orleans, Louisiana
Georgia Association of Realtors
Atlanta, Georgia
Georgia Transmission Corporation
Tucker, Georgia
Hospital & Building Equipment Corporation
St. Louis, Missouri
Houma-Terrebonne Chamber of Commerce
Houma, Louisiana
Hunt Oil Company
Dallas, Texas
International Council of Shopping Centers
Alexandria, Virginia
Los Conchas Partnerships
Slidell, Louisiana
The Louisiana Land and Exploration Company
New Orleans, Louisiana
Louisiana Landowners Association, Inc.
Franklin, Louisiana
Metropolitan Water District of Southern California
Los Angeles, CA
Michael Zunich and Associates
North Ridgeville, Ohio
Mobil Exploration and Producing, U.S., Inc.
Houston, Texas
Municipality of Anchorage
Anchorage, Alaska
Murphy Exploration and Production Company
New Orleans, Louisiana
NANA Regional Corporation
Kotzebue, Alaska
National Aggregates Association
Silver Spring, Maryland
National Association of Home Builders
Washington, D.C.
National Association of Industrial and Office Properties
Herndon, Virginia
National Association of Realtors
Washington, D.C.
National Cotton Council
Memphis, Tennessee
National Mining Association
Washington, D.C.
National Rural Electric Cooperative Association
Washington, D.C.
National Stone Association
Washington, D.C.
National Utility Contractors Association
Arlington, Virginia
Natural Gas Supply Association
Washington, D.C.
North Slope Borough
Barrow, Alaska
Northern Virginia Association of Realtors
Merrifield, VA
Occidental Oil & Gas Corporation
Tulsa, Oklahoma
PanEnergy
Houston, Texas
Parker Drilling Company
Tulsa, Oklahoma
Pennsylvania Landowners Association
Harrisburg, Pennsylvania
R. L. Field Greenhouse
Georgetown, Delaware
Sealaska Corporation
Juneau, Alaska
Shell Oil Company
Houston, Texas
T. Baker Smith and Son, Inc.
Houma, Louisiana
Terrebonne Parish Consolidated Government
Houma, Louisiana
Texaco U.S.A.
Houston, Texas
Union Pacific Resources Company
Ft. Worth, Texas
U.S. Silica
Berkeley Springs, West Virginia
Virginia Peninsula Chamber of Commerce
Hampton, Virginia
Waldemar S. Nelson and Company, Inc.
New Orleans, Louisiana
Walk, Haydel and Associates, Inc.
New Orleans, Louisiana
M.E. Graham
Manassas, VA

PREPARED STATEMENT OF THE NATIONAL WILDLIFE FEDERATION

I. INTRODUCTION

The National Wildlife Federation (NWF) presents this written testimony to the Clean Air, Wetlands, Private Property, and Nuclear Safety Subcommittee of the Senate Environment and Public Works Committee. NWF is the Nation's largest conservation, education, and advocacy organization. Founded in 1936, NWF works to educate, inspire, and assist individuals and organizations of diverse cultures to conserve wildlife and other natural resources and to protect the environment in order to achieve a peaceful, equitable, and sustainable future. Our members are deeply concerned about continuing losses of wetlands, and have long worked to protect and conserve our Nation's valuable wetland resources and other waters.

America's wetlands provide vital environmental, cultural, and economic services. Millions of Americans depend on the services wetlands provide for their jobs, including those in the commercial fishing, tourism, and recreation industries. Millions more have found a sense of self, of family, of community rooted in the experience of hunting, fishing, birdwatching, or boating in wetlands that are now threatened with development. The official subjects of this hearing—a recent decision by the U.S. Army Corps of Engineers to close the single largest loophole in the permitting program (Nationwide Permit 26), and an unrelated court decision striking down another important Corps regulation (the Tulloch Rule)—are esoteric and technical. A single thread does however connect the two issues. In each case, the pursuit of private gain has led a few wetlands developers to try to block the Corps' efforts to prevent needless waste of wetlands, and to defy both science and balanced conservation ethics.

Historic mismanagement of the Nation's wetlands resources has been costly, in both social and ecological terms. In 1949, the great conservationist Aldo Leopold observed that:

> Our present problem is one of attitudes and implements. We are remodeling the Alhambra with a steam shovel, and we are proud of the yardage. We shall hardly relinquish the shovel, which after all has many good points, but we are in need of gentler and more objective criteria for its successful use. (The Land Ethic, in *A Sand County Almanac*, 263–264 (1966)).

Indeed, steam shovels, backhoes, and tiles have filled or drained well over 100 million acres of wetlands since the 1780's, over half the wetlands in the contiguous United States.

The Clean Water Act (CWA) has provided Leopold's "gentler and more objective criteria." Since its passage, and because of it, wetlands loss has been greatly reduced, though we continue to lose many more wetlands annually than we recover through restoration efforts, and we continue to lose wetlands that cannot be replaced within our lifetimes or perhaps ever. The thrust of the CWA section 404 wetlands program is concise and modest: To prevent unnecessary wetlands loss, and, where possible, to replace those wetlands that must be destroyed. To meet this goal, the section 404 program requires applicants for permits to *avoid* destruction where possible; to *minimize* destruction that cannot be avoided; and, *where practicable*, to *compensate* for remaining losses. These steps, taken in order, are known as "mitigation sequencing," and they are the heart of the wetlands program.

Over the last 25 years, the Corps has implemented mitigation sequencing with only limited success. Over time, with much pressure from outside the agency, the Corps has slowly become more responsive both to its mandate from Congress to protect wetlands and other water resources, and to the need to deal fairly and conscientiously with the public it regulates. Nonetheless, the Corps is hamstrung by meager budgets and a fragmented structure that undermines consistent implementation of wetlands protections.

The public also has come to appreciate the value of wetlands. Voters know the vital role wetlands play in recharging underground aquifers, which nearly half of us rely upon for drinking water. The public also knows that wetlands protect water quality; that they slow flood waters, protecting people and property. Millions of Americans have fished or hunted, or simply enjoyed wetlands, streams, and lakes as open space. For many, these memories are deeply tied to our sense of personal and social continuity: Where we grew up, and what we will leave behind for future generations. Moreover, many citizens have become alarmed as the wetlands and other waters we have known and loved were drained, or filled, or paved over for sprawl. This is why 70 percent of Americans list loss of open space, of personally special places, as a top conservation concern.

America's growing appreciation of the need to avoid unnecessary destruction of wetlands and other waters makes application of section 404's core principle of mitigation sequencing a matter of common sense. Yet, at every step along the way, a limited set of regulated industries has fought tooth and nail against the most moderate protections, first by characterizing the wetlands program as oppressive and unfair; then by trying to downplay the value of wetlands. Most recently, opponents of wetlands protections have tried to argue that the problem of wetlands loss simply does not exist. This myth is refuted by the experience of homeowners who have seen their communities flooded as a result of drainage of wetlands upstream. In making these arguments, wetland developers have taken increasingly greater liberties with mainstream science and real-world data, and have come to rely increasingly on political and legal claims that have little relation to real-life wetlands or to the section 404 program as it actually operates on the ground.

Of course, industry does have a real-world motive for throwing these roadblocks in the Corps' path: Even a balanced regulatory process has a price. To be sure, regulation halts few projects: Between 95 percent and 97 percent of individual permit applications are approved. But wetlands developers can realize even greater private gain by eliminating responsible environmental review. Activities that pass through individual review are subject to at least 30 days of public notice and comment and are also reviewed by other Federal resource agencies with greater experience and expertise than the Corps in wildlife and environmental resources. Without that public notice, without that resource agency review, mitigation sequencing does not occur. But whereas abbreviated permitting, with no public notice and little review takes less than one month, the individual review process does take, on average, between 3 to 4 months. A few projects take much longer, usually because the project sponsor proposes a great deal of unnecessary wetlands loss and has to be convinced to reduce impacts by the Corps, other agencies, and the public.

The tendency of some members of industry to grab any tool at hand to stave off common-sense regulation has reached a new level regarding the two issues before this subcommittee: NWP 26 and the Tulloch Rule. In each case, wetland developers have brought suit against the Corps, not because the Corps has abandoned science or sound conservation policy, but because the Corps has attempted to meaningfully apply mitigation sequencing to their activities. Both Nationwide Permit 26 and the Corps' inconsistent regulation of excavation before 1993 caused significant ecological harms, and the regulated industries have not challenged the scientific basis for the Corps' decision in either case.

This testimony addresses the Corps' decision to phase out Nationwide Permit 26 (NWP 26), an administratively-created loophole that has allowed tens of thousands of acres of potentially unnecessary development in isolated wetlands and headwater streams. It then discusses the Tulloch Rule, in which the Corps asserted its authority to regulate excavation activities in wetlands. Two documents cited below are attached and are submitted as part of this testimony: NWF's September 3, 1996 comments on the Corps' proposal to reissue the nationwides, including most importantly our comments on NWP 26; and NWF's August 14, 1992 comments on the Corps' proposal to issue the Tulloch Rule.

A special note is in order on the discussion of the Tulloch Rule. On the day after the June 26, 1997 hearing for which this testimony is submitted, the D.C. Circuit temporarily reaffirmed that the Corps can equitably regulate excavation that destroys wetlands. As discussed below, NWF has joined with the Corps and EPA in appealing the January 1997 decision of the D.C. District Court striking down the Tulloch Rule. On June 27, 1997, the D.C. Circuit granted our motion for a stay of the District Court's order, recognizing the irreparable harm that can attend unregulated excavation activities. The stay does not decide the underlying question—whether the Corps has authority to regulate excavation activities—but it does indicate that the Corps has not overreached in asserting its authority to prevent real harms to the Nation's rivers and wetlands.

II. THE ELIMINATION OF NWP 26: A STEP IN THE RIGHT DIRECTION

The Corps' decision to phase out NWP 26 has produced dire and overheated rhetoric from certain wetlands developers. On the contrary, the 2-year phase out of NWP 26 is a cautious and modest step toward reasonable wetlands protection, and it will not cause growth and development to grind to a halt. To understand why conservationists, State and local officials, and other Federal agencies have supported the Corps' decision to eventually eliminate this permit, it helps to understand what nationwide permits are, and the adverse impacts of NWP 26 that warrant its retirement.

In 1977, Congress reauthorized the 1972 Clean Water Act, in the process affirming that the section 404 dredge and fill program applied to wetlands in addition to more traditionally "navigable" rivers, lakes, and estuaries.[1] During the reauthorization process, Congress recognized that there were activities that take place in wetlands and other "waters of the United States" that have few or no impacts. Classic examples of these types of projects are mooring or navigational buoys, or boat ramps on the sides of streams and lakes. Rather than forcing these projects go through the individual permit process, with public notice and comment and resource agency review, Congress gave the Corps authority to issue "general permits." General permits (GPS) amount to blanket, up-front authorizations for categories of activities, and they displace the requirement for an individual permit for qualifying activities. The statutory criteria for general permits, listed in CWA 404(e), are that they must cover activities that are "similar in nature," and that those activities must have "minimal individual and cumulative impacts."

Over the last two decades, the Corps has issued general permits well beyond the bounds set by CWA 404(e), and now processes 90 percent of projects through general permits. There are 39 general permits that are issued by Corps headquarters; these known as "nationwides." In addition, there are hundreds of local or regional general permits issued by one or more Corps Districts. Most States in New England, and also Pennsylvania and Maryland, have had the Corps' program unofficially delegated to them through State programmatic general permits; in those States, the nationwides have been revoked and are not available. All general permits, including the nationwides, do not offer citizens any warning or any chance to influence projects, and few provide for meaningful resource agency review.

NWP 26 is the worst of a mixed lot of general permits. Until last December, NWP 26 authorized any type of activity with under 10 acres of impacts in isolated wetlands or headwater streams, so long as notice was provided to the Corps first. Projects with under one acre of direct impacts were authorized with no requirement of notice to the Corps.

A wide range of projects have been approved under NWP 26, in clear violation of the "similar in nature" stricture of CWA 404(e). Only when this stricture is respected can the Corps and the public accurately evaluate the likely impacts of proposed general permits. NWF's review of Corps District records on the use of NWP 26 (as incomplete as those records are), indicates however that the permit was used for a wide variety of activities, including: "bridge construction, dam construction, golf course construction, bank stabilization, placement of riprap, placement of culverts, road construction, road widening, sports field construction, Wal-Mart construction, drainage of wetlands for hay production, the dumping of tires, sawdust, wood debris, concrete, and vegetable matter into wetlands, stock pond construction, trout pond construction, conversion of forested wetlands to farming, residential subdivision construction, townhouse complex construction, mobile home construction, juvenile detention home construction, service station construction, septic tank drain field creation, sand mining, gravel mining, placer mining, fill for stream crossing for cattle, drilling of exploration wells, railroad spur line construction, and chicken composter construction." (*NWF comments*, 40). These activities are not "similar in nature."

NWP 26 also violates the "minimal impact" limitations on general permits. The National Academy of Sciences noted in 1995 that NWP 26's removal of protections for isolated wetlands and headwaters lacked scientific justification. (National Research Council, *Wetlands: Characteristics and Boundaries*, 138 (1995), hereafter, *NAS Study*). Indeed, as the attached NWF comments on NWP 26 describe in detail, scientific research has shown that isolated wetlands protect water quality of surface and groundwaters; recharge groundwater; provide vital habitat and breeding grounds for waterfowl, amphibians, and other game and non-game wildlife; and retain flood waters. Headwater streams improve water quality throughout entire watersheds; provide vital habitat, and serve as critical corridors for the passage of wildlife between other, more isolated habitats.

---

[1] The fiction that Congress never intended the CWA section 404 program to regulate wetlands, though still periodically invoked by wetlands developers, was laid to rest in 1977. Indeed, in 1975, when the Corps first issued its regulations to implement the section 404 program and limited its jurisdiction to traditionally navigable waters, it was firmly reproved in the courts. Deciding on summary judgment, the court in *NRDC* v. *Callaway*, 392 F. Supp. 685 (D.D.C. 1975) held that Congress in 1972 had intended CWA protections to be read expansively. In 1977, legislative proposals to limit the jurisdiction of CWA section 404 to exclude many wetlands were rejected in favor of reaffirming the broad reach of the program: "the legislation as ultimately passed, in the words of Senator Baker, retained the comprehensive jurisdiction over the Nation's waters exercised in the 1972 Federal Water Pollution Control Act." *United States* v. *Riverside Bayview Homes Inc.*, 106 S. Ct. 455, 464 (1985).

Indiscriminate permitting of wetlands destruction under NWP 26 has in fact resulted in significant impacts. Projects with "small" direct impacts can still eliminate important wetlands functions. Many isolated wetlands and headwaters are themselves small: In the Prairie Pothole region, some 79 percent of the wetlands are less than 1 acre in size, and could be destroyed under NWP 26 without notice to anyone. (Thomas E. Dahl, *Status of Prairie Pothole Wetlands in the United States*, Table 8 (1990)). Similarly, in central North Carolina, at least 50 percent of the wetlands and headwaters are less than 1 acre in extent. Even in larger wetlands, an impact of ⅓ acre can destroy or degrade habitat, water quality, and flood control functions. Further, the Corps' tendency to look only at the footprint of a project—ignoring such inevitable impacts to surrounding waters as runoff and erosion—means that the official "impact size" consistently understates the damage done by wetlands development. Given the importance of isolated wetlands and headwaters, and the impact thresholds of the permit, NWP 26 has authorized thousands of projects with more than minimal impacts, in violation of CWA 404(e).

If some individual impacts have been more than minimal, the cumulative environmental impacts of NWP 26 have been huge. Corps records that have captured only a small fraction of the impacts of NWP 26 document over 32,000 acres of direct destruction in 8 years. The resulting destruction is far worse than the mere sum of individual losses. As the National Academy of Sciences has recognized: "Wetlands often occupy only a small proportion of the watershed in which they lie, yet they often maintain exceptional biodiversity and process a large proportion of the dissolved and suspended materials leaving uplands, which typically occupy greater areas. When wetlands are removed, their collective functions are likely to decrease faster than the rate of reduction in surface area." (*NAS Study*, 34). Yet NWP 26 opens both isolated wetlands and headwater streams to unrestricted cumulative loss, without any requirement that project proponents look first for alternatives that do not require wetlands destruction.

Faced with the fact that NWP 26 violated the CWA both by authorizing diverse activities in a category of waters rather than authorizing a limited category of activities, and by permitting massive cumulative impacts, the Corps properly declined to reissue NWP 26. NWF and other conservation organizations urged the Corps not to reissue NWP 26 at all. Instead, the Corps has chosen the quite modest course of reissuing NWP 26 with reduced acreage thresholds for 2 years while it develops legal, environmentally acceptable alternatives. For the intermediate 2 years, the Corps has lowered the medium and upper thresholds of NWP 26 from 1 and 10 acres to ⅓ and 3 acres, respectively, and imposed other restrictions on the use of the permit.

NWF is monitoring the drafting of replacement permits with care. It will be difficult to find many activities with only minimal impacts that are not already covered by one of the 38 other nationwides in existence. Indeed, a substantial share of projects currently authorized by NWP 26 will likely fit under one or another of these existing nationwides. NWF has advised the Corps that if the NWP 26 replacement permits resemble the unnecessarily damaging and duplicative "single-family home" nationwide (NWP 29), NWF will challenge them in court, as it has NWP 29. Nonetheless, we are optimistic that, working together, we can move ahead with the Corps, the other Federal agencies, the States, and the regulated community, to design alternative nationwide permits we can all support. Although NWF has been frustrated by the Corps' delay in beginning to draft the new nationwides, and by its failure to collect and share with the public detailed information about its permits, NWF has remained committed to the administrative process, trying to make it work for everyone.

The National Association of Homebuilders (NAHB), in contrast, has headed into court to challenge the Corps' decision to phase out NWP 26. The basic claim of NAHB—that the Corps failed to provide adequate notice of the possibility it might decline to reissue the illegal and destructive NWP 26 for a full 5 years, or that it might attach other restrictions to the use of the permit—is disingenuous at best. By law, nationwides expire by default, and cannot be replaced without affirmative action by the Corps. Thus, all interested parties were on notice during the reissuance process that the Corps could legally choose simply through inaction not to reissue a given nationwide. In fact, the Corps never succeeded in making the affirmative showings required of it before the agency could legally reissue NWP 26, even with the lowered thresholds. In essence, the Corps has flouted the Clean Water Act and violated its own regulations by reissuing NWP 26 for even these 2 years, and it has done so to ease the transition for industry.

At this point, Congress can best assure the effective and efficient functioning of the Federal wetlands protection program by funding the Corps adequately. The NAHB challenge will wend its way through the courts; the Corps will proceed on

its course of phasing out NWP 26 and replacing it with narrower alternatives. Whatever the form of those permits, better funding for the Corps' regulatory branch will both speed the permit process for the regulated community and better protect America's remaining wetlands, streams, and rivers. Finally, NWF urges Congress, when it does reauthorize CWA section 404, to reaffirm the clear limits CWA 404(e) places on the use of nationwide and other general permits, and to emphasize the Corps' accountability to the citizens and communities its regulations are intended to protect.

III. THE TULLOCH RULE AND THE AMERICAN MINING CONGRESS CASE

The other official subject of this hearing is the Tulloch Rule, issued in 1993, and the District Court opinion, *American Mining Congress* v. *USACE* (D.D.C. 1997), that struck down the Rule in January 1997. On June 27, 1997, the day after this hearing, the D.C. Circuit stayed the District Court's order, so the Tulloch Rule is now back in effect, protecting wetlands and waters from needless loss.

In the Tulloch Rule, the Corps officially asserted its jurisdiction to regulate under CWA 404 most activities involving excavation in wetlands, streams, rivers, and other waters. The Corps recognized that even where those activities did not involve massive discharges of dredged or fill material, they almost always involved at least "incidental fallback" of the soil being removed by excavation. Alert to the widespread damage to wetlands and other waters that results from excavation activities, the Corps announced that this fallback would trigger the CWA requirement of a dredge and fill permit for "the discharge of any pollutant." The AMC opinion rejected this rationale.

Both the government and an array of intervenors, including NWF, are appealing the decision. Together, the government and the intervenors also sought a stay of the District Court's order striking down the Tulloch Rule, and we were delighted to see the stay granted. The Corps has acted to forestall confusion in the regulated community by promptly directing its Districts to regulate excavation activities.

For several Congresses, no one, including the regulated industries, has seriously disputed that excavation activities are as damaging as filling to wetlands and other protected waters. Even those legislative proposals most hostile to science-based wetlands protection, including H.R. 1330 and the wetlands provisions of H.R. 961 in the 104th Congress, would have explicitly included "excavation" in the list of regulated activities. It is easy to see why. The Corps has estimated that, in the absence of the Tulloch Rule, excavation activities would destroy *annually* at least 10,000 acres of wetlands, 10,000 acres of open waters, and 1,500 miles of streams and rivers. (Declaration of John Studt, Chief of the Corps Regulatory Branch, Defendants' Exhibit A, Defendants Motion of Points and Authorities in Support of their Motion for Stay Pending Appeal, *AMC* v. *USACE*). These activities would include sand and gravel dredging, which, when not subject to Corps conditions on how the activities are to be carried out, can result in significant water quality impacts and can kill aquatic life and destroy habitat along whole river segments. Other excavation activities can include wetland drainage and stream channelization, both of which destroy aquatic habitats and water quality, and contribute directly to downstream flooding.

The case that gave rise to the Tulloch Rule represents a third type of excavation project. Starting in 1987, developers on the coast of North Carolina began to develop 700 acres of wetlands near Wilmington, NC. Knowing that the Corps would regulate earth-moving and sidecasting activities, the developers took special precautions. Rather than clearing forests off the wetlands with a bulldozer (mechanized land clearing moves large volumes of dirt and traditionally has been regulated) the developers generally pushed over trees one at a time and generally carried, rather than dragged, them off the wetland. The developers then used computer models to design ditches to drain the wetlands, and welded shut the scoops and buckets used to dig the ditches, carrying most excavated soil out of the wetlands to an upland site before putting it down. Of course these precautions could not keep all excavated material from being deposited in the wetlands; dirt fell from bulldozer treads and blades, uprooted trees, and excavation buckets back into the wetlands. (NWF Comments on Proposed Tulloch Rule, 5–7 (1993), hereafter *NWF Tulloch Comments*). However, the Wilmington District of the Corps refused to regulate the excavation activities, claiming that this "incidental fallback" was *de minimis*, and did not amount to a regulated discharge of dredged and fill material under CWA section 404.

Though it cost the developers considerably more to excavate this way than simply to bulldoze and sidecast dirt, the environmental impacts were equally severe. Following excavation of the site, water quality suffered; nearby lakes exceeded State and Federal water quality standards, and increased runoff damaged the salinity balance of the Cape Fear River and its estuary, threatening the commercially impor-

tant local shellfish industry. Wildlife also suffered; before excavation, one wetland supported herons, wood ducks, river otters, raccoons, coots, and kingfishers. The U.S. Fish and Wildlife Service described the site as providing "high quality feeding, nesting, rearing, and cover sites for large and small mammals, avifauna, reptiles, and amphibians." Following excavation, "observers witnessed a moonscape—trees and shrubs removed and all soil graded down to the waterline with only sediment fences and sediment-filled ponds demarking where the wetlands used to be." (*NWF Tulloch Comments*, 12–13 (1993)).

NWF and its State affiliate, the North Carolina Wildlife Federation, brought suit against the Corps for failing to assert jurisdiction over the excavation activities. The case settled; the Corps agreed to develop and propose, through the full course of public notice and comment, a rule that would assert jurisdiction over excavation activities. The Tulloch Rule is the result. After full airing before the public, the Tulloch Rule was published in the Federal Register on August 25, 1993 (58 FR 45,008), and NWF and NCWF agreed to dismiss its suit with prejudice.

In the AMC decision, the Federal District Court of the District of Columbia held that the CWA does not give the Corps the authority to regulate excavation, and that the only remedy for this omission is for Congress to legislate that authority in the CWA reauthorization. NWF disagrees, and has appealed the judge's decision. It is clear that Congress intended CWA 404 to cover activities with incidental discharge. Indeed, when Congress explicitly exempted activities (such as normal ongoing farming practices and ditch maintenance), it noted these activities are *not* exempt where they involve an incidental discharge and affect the flow or reach of U.S. waters. Given that Congress did not provide any express exemption for excavation activities, the Corps was correct to conclude that Congress intended the agency to protect wetlands and other waters from wholesale ruin through excavation.

Left unappealed, the AMC decision would set the clock on regulation of excavation activities back to a time when there was no clear standard for which earth-moving activities constituted a discharge of dredged or fill material. Before the Tulloch Rule, many Corps Districts would not regulate the many damaging activities that resulted in only small volume fallback of excavated material. Districts were, however, still instructed to regulate all activities that resulted in more than *de minimis* movement of earth in wetlands and other waters. Overall, the Corps regulated such activities as drainage ditch excavation, stream channelization, and some land clearing inconsistently and on a case-by-case basis. As a result, an ironic consequence of industry's effort to invalidate the Tulloch Rule is that, in the unlikely event that the Homebuilders' challenge succeeds, businesses involved in excavation activities will face great uncertainty about whether specific excavation projects require permits.

Neither the AMC decision in January, nor the stay of that decision by the D.C. Circuit, create a situation that demands congressional intervention. With the stay granted, the Tulloch Rule has been reinstated until the appeal settles the question one way or the other, and the court has set out an expedited briefing schedule to resolve the appeal in comparatively short order. At the hearing, witnesses for the aggregates industry testified that their members are uncertain of the reach of the initial AMC decision; the stay conclusively answers that question, and the Corps has unhesitatingly spread the word through its districts, so the community should be well-informed of the need to obtain a CWA 404 authorization before excavating in wetlands.

Long term, when CWA 404 is reauthorized, it is important that the statute clarify that it covers excavation and drainage activities. NWF does not believe, however, that such an amendment is necessary before the Corps can legitimately regulate excavation activities, and NWF would not in any case be prepared to accept a weakening of other wetlands protections to obtain this clarification. If Congress proposes a strong reauthorization of CWA 404, NWF will actively support it. A strong reauthorization must stress the primacy of avoiding the unnecessary destruction of any wetland; the need for explicit curbs on Corps abuse of its general permit authority; and tough, science-based reforms of mitigation practices.

NWF will not acquiesce to extreme or unscientific proposals. Proposals of this kind were circulated this spring by the National Wetlands Coalition, calling for categorization of wetlands, weakening EPA's role in the CWA 404 program, and mandating ad hoc revisions in the use of plant species to identify wetlands. These kinds of proposals have invariably led to deadlock in the past, and will consistently in the future when they are offered.

IV. CONCLUSION

Both NWP 26 and the Corps' pre-Tulloch practice of regulating excavation on a case-by-case basis have allowed the needless waste of tens of thousands or acres of

wetlands, streams, and other waters. The Corps has been faithful to the intent of the Clean Water Act in choosing to close these avenues of wetlands destruction. NWF supports protection of the Nation's heritage of aquatic ecosystems, upon which our society depends for drinking water, flood control, and fisheries.

Moreover, we cannot replace these wetlands and waters. In his 1953 essay, "the Round River," Aldo Leopold observed,

> the outstanding scientific discovery of the twentieth century is not television, or radio, but rather the complexity of the land organism. Only those who know the most about it can appreciate how little is known about it. * * * If the biota, in the course of aeons, has built something we like but do not understand, then who but a fool would discard seemingly useless parts? ("The Round River" in *A Sand County Almanac*, 190 (1966)).

Four decades later, we know more of wetland functions and of our need for them; yet we still do not understand them well, and surely not well enough to squander them:

> The status of scientific knowledge about wetland restoration and creation differs by wetland function, type, and location. It is still uncertain if the full suite of functions provided by a particular wetland type can be replaced. Full functional replacement has not yet been demonstrated. * * * Complete restoration might be impossible in some systems. (U.S. Geological Survey, National Water Summary on Wetland Resources, 90 (1997)).

The wetlands we destroy are, in significant part, lost forever.

As a nation, we will respond to the need to conserve wetlands in one of two ways: First, as the Clean Water Act urges, with careful confidence, destroying no more of our waters than necessary, striving to replace those that are unavoidably lost. Or second, as some members of the regulated community have urged, by putting private gain first, and pity the good citizens downstream. The Corps has chosen the first and more responsible course of action—reasonable regulation to protect the common good. NWF urges Congress to endorse the Corps' choice, and to oversee the agency to ensure that its proposals for permits to replace NWP 26 truly will "restore, protect, and maintain" America's wetlands and other waters.

ADDITIONAL MATERIAL SUBMITTED BY THE NATIONAL WILDLIFE FEDERATION

NATIONAL WILDLIFE FEDERATION,
Washington, DC, September 3, 1996.

SAM COLLINSON,
Acting Chief, Office of the Chief of Engineers,
U.S. Army Corps of Engineers.

DEAR MR. COLLINSON: The National Wildlife Federation (NWF), the Nation's largest conservation education organization, welcomes this opportunity to comment on the U.S. Army Corps of Engineers' (Corps') Proposal to Reissue, Modify, and Issue the Nationwide Permits, 61 Fed. Reg. 30784, June 17, 1996.

For the last five years, in the guise of issuing nationwide permits (NWPs) with "minimal" impacts, the Corps has abdicated its duty under the Clean Water Act (CWA) to protect many of the Nation's most vulnerable wetlands and waters. The Corps' nationwide permit system has resulted in massive but uncounted wetlands losses, direct violation of CWA § 404(e) and the CWA's mandate to protect wetlands and other "waters of the United States." Many of the wetlands lost under the Corps' current nationwides have been among the most ecologically important in the Nation. Others are merely irreplaceable.

It is time for the Corps to change course. If the Corps intends to carry out its duty to protect waters and wetlands, it must respect the limits CWA § 404(e) places on the use of nationwides. It is time for the Corps to cull the nationwide permits, to eliminate or revise those that are illegal, and to implement a comprehensive nationwide tracking system that collects meaningful impact information and is acceptable to the public.

Unfortunately, neither the Corps' Proposal to Reissue, Modify, and Issue the Nationwides [reissuance proposal], nor the decision documents prepared by the Corps to justify that proposal, signal any intent to change course. The reissuance proposal not only fails to offer significant improvements to the flawed nationwide permit system; it proposes to expand it by issuing four new nationwides, including several with potentially huge cumulative impacts. The decision documents reveal an

improbably cavalier attitude towards the task of assessing both the historical and the prospective impacts of the nationwide permit system.

The Corps has often defended its issuance of illegal nationwide permits by painting them as a legitimate tool to prioritize the agency's efforts in the face of tight resources. We do not accept this rationalization. The Corps has no authority to renounce its responsibility to protect wetlands and other waters. Resources are always scarce, and NWF stands ready and willing to help the Corps get the resources it needs from Congress. We also continue to believe the Corps can increase efficiency in less damaging ways: through improved computer technology, increased reliance on private delineators, permit fees, and increased coordination. We are not prepared to let the Corps abandon America's wetlands to the ravages of the existing and proposed nationwides.

Our comments begin by identifying three core faults of the nationwide permit program: that the nationwide permits have unleashed the discretion of District Engineers from the checks and balances built into the individual § 404 permit program; that the nationwide permits have resulted in significant environmental destruction; and that the nationwides have severely reduced the ability of ordinary citizens to influence the projects most likely to affect wetlands in their communities. These three flaws add up to a telling indictment of the nationwide permit program as the Corps currently runs it. It eliminates the accountability of regulators at the expense of the resource and the public.

Part II of our comments provides an overview of the showings the Corps must make—and has without exception failed so far to make—before it can legally reissue the nationwide permit system. Part III comments on overarching problems that plague the nationwide permit system and must be cured, including the Corps' treatment of state water quality and coastal programs, the inadequacies of the Corps' reporting and monitoring system, and the Corps's failure to consult with the federal resource agencies to protect endangered or threatened species.

Part IV comments on the nationwides individually, noting those that cannot be reissued lawfully and suggesting ways to redraw others. NWF notes that we are implacably opposed to the reissuance of NWP 26, for isolated wetlands and headwaters; NWP 29, for the construction of single-family residences; and proposed NWP B, for yet-to-be-determined Swampbuster exemptions under the 1996 Farm Bill. NWF also notes that NWPs 7, 15, 17, 21, 23, 32, 34, 38, 40, and proposed NWPs C and D are illegal and beyond salvage, and we urge the Corps not to reissue them. Finally, we hold that NWPs 8, 12, 13, 14, and 33 are currently illegal and must be reworked before they may be reissued.

We close our comments looking towards a brighter day when the nationwide permit program truly authorizes no more than minimal impacts and NWF and the Corps can work side by side to implement the protective vision of the CWA. NWF has attached to our comments several large appendices, containing information on endangered and threatened species that are dependent on wetlands and on the implementation and impacts of NWPs 26 and 29. We ask that these be entered into the record of the nationwide rulemaking along with and as a part of these comments.

I. THE CORPS HAS ABUSED THE NATIONWIDE PERMIT SYSTEM TO ESCAPE ACCOUNTABILITY FOR ALLOWING WETLANDS DESTRUCTION

The Corps' nationwide permit system must surely rank as one of the most complex networks of partial or total exemptions under any of America's environmental laws. The reissuance proposal advances 37 existing nationwides, 4 new proposed nationwides, and 25 conditions, some but not all of which apply to some but not all projects authorized under the nationwides. In addition, several of the nationwides implicate laws and regulations applied by other federal, state, and even local agencies. It is easy to become lost in the minutiae of the nationwides, and even easier to turn from them as the Corps' decision documents have done, without conducting a thorough analysis.

Nonetheless, against this complex background, the CWA provides a clear standard for what the nationwides are supposed to be. Under the CWA, the Corps' and EPA's jurisdiction extends over a huge area. CWA § 404(e)'s purpose in authorizing nationwide and general permits was to allow the rapid processing of activities with virtually no wetlands impacts. The plain language of CWA § 404(e) is explicit as to this purpose: a nationwide or other general permit may be issued for a category of activities that "are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only a minimal cumulative impact on the environment."

The Corps' nationwide permit program has corrupted the plain meaning of CWA § 404(e) and its place in the CWA as a whole in three ways. First, the Corps' use of nationwides has eroded the accountability of District Engineers—to other agencies, to the statutes the Corps implements, and especially to the public. Second, the losses of wetlands and waters authorized by the nationwides have been significant and enduring. Finally, whether intentionally or inadvertently, the Corps' nationwide permit system has trampled on the right of ordinary citizens to know or influence the most basic decisions concerning the fate of wetlands in their communities.

Defended by the Corps as a tool to reduce the Districts' workloads, the nationwide permit system also reduces their accountability. In the individual CWA § 404 permit process, the Corps' judgments are reviewed and commented on by the Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service (USFWS), the National Marine Fisheries Service (NMFS), state agencies, and members of the public. Moreover, the Corps must adhere to its own regulations and to EPA's 404(b)(1) Guidelines—and can be sued by citizens if it does not. In contrast, projects authorized under nationwides are seen rarely by the agencies and never by the public, and a state agency that attempts to hold the Corps accountable risks having the Corps' workload dropped on its shoulders. To boot, the Corps does not formally apply either its own public interest test nor EPA's 404(b)(1) Guidelines on a case by case basis to projects under the nationwides. The Corps vaunts the discretion of its District Engineers to require more formal review of projects under the nationwide; but that discretion does not replace the checks and balances lost when the Corps deserts the standard permit process.

The consequence of reducing the Corps accountability? Projects with more than minimal impacts on wetlands and waters have been approved in droves. Although the data in the Corps regulatory database (RAMS) underreports the use of the nationwides and their impacts, the picture it paints is appalling. Throughout these comments we rely for historic usage data on the RAMS data obtained by the National Wildlife Federation and the Environment Working Group (EWG) in independent Freedom of Information Act (FOIA) requests of the Corps (since this data is not otherwise publicly available).[1] According to the incomplete data given to EWG, between January 1988 and June 1996, the nationwide permit system authorized at least 16,000 acres of wetlands loss. Many projects recorded in RAMS did not include impact acreages; assigning those an average impact based on the recorded impacts for other projects, the nationwide permit system authorized at least 80,000 acres of impacts. That yet does not account for the Districts that did not respond to FOIA requests, or for the numerous other projects that were reported to the Districts but never placed on RAMS. Nor does that figure begin to include the impacts under nationwides that do not require reporting to the Corps at all.

All these impacts received authorization without public notice or any opportunity for public comment This is wrong. The destruction of wetlands and waters imposes costs on all citizens, and we should all have a say in and knowledge of the consequences of, any decision that has more than a negligible effect on these resources. Moreover, the CWA ensures to the public the right to know and comment on projects with more than minimal impacts on wetlands and waters: the statute explicitly restricts general permits, including nationwides, to categories of activities with minimal individual and minimal cumulative impacts.

The present reissuance proposal coed end these faults; but it does not the need for a major overhaul of the nationwide permit program is the gravamen of our comments, the theme which our more specific objections and recommendations elaborate below.

II. THE CORPS' REISSUANCE PROPOSAL AND DECISION DOCUMENTS FAIL TO MAKE ANY OF THE SHOWINGS REQUIRED BEFORE THE CORPS CAN LEGALLY REISSUE THE NATIONWIDES

Clean Water Act § 404(e) gives the Corps the authority to issue nationwide and other general permits for activities that are "similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment." Both EPA and the Corps have issued regulations to implement CWA § 404(e), at 40 CFR § 230.7 and 33 CFR 330. Under these regulations, before the Corps can issue or reissue the nationwides, it must demonstrate that they comply with CWA § 404(e); with the Corps' public in-

[1] We understand that EWG is submitting as a part of its comments on the reissuance proposal the full data it has received from the Corps, along with EWG's website on which it is made accessible to the public. We incorporate the RAMS data in EWG's comments into these comments by reference.

terest test; and with EPA's 404(b)(1) Guidelines. In addition, in reissuing the nationwides, the Corps must comply with the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and the Fish and Wildlife Coordination Act (FWCA). Some of these standards are substantive; others are procedural; the current reissuance proposal and the decision documents fail to comply with any. This section of our comments reviews the showings the Corps must make before reissuing the nationwides, and describes in broad terms how the Corps has failed to make them.

A. The Corps has not complied with EPA's regulations governing the issuance and reissuance of the nationwides

40 CFR § 230.7 requires the Corps, before issuing a nationwide, to determine that it covers a category of activities that are similar in nature and impacts and that have minimal individual and cumulative impacts essentially to show in writing that the nationwide complies with CWA § 404(e). 40 CFR § 230.7(b) (1) and (3) explicitly require the Corps' documentation to address the individual and cumulative impacts of each nationwide, and to predict the number of authorizations likely to occur under each nationwide as well. Finally, 40 CFR § 230.7(b)(2) requires "a precise description of the activities to be permitted under the General permit, explaining why they are sufficiently similar in nature and environmental impact to warrant regulation under a single general permit based on Subparts C through F of the Guidelines."

The reissuance proposal and the decision documents meet these requirements with brazen noncompliance. Few of the decision documents list the full range of activities that their subject nationwides authorize, and none include an explanation of why these can all be considered "like in nature and impact." Many of the documents include projections of the potential use of various nationwides over the next five years, but offer no account of how these were derived. We know they could not have been based on the Corps' survey of the Districts, since the Corps did not conduct this survey until *after* the decision documents were written.

Finally, the decision documents make no effort to evaluate the individual or cumulative impacts of projects authorized under the nationwide. Instead, the documents merely repeat boilerplate assertions that the nationwides are "expected" to result in no more than minimal impacts. The frailties of the Corps' RAMS data are discussed above and below, but it is worth noting here that without some attention and response to the recorded cumulative impacts of the existing nationwides, the Corps has no legal basis on which to reissue them, let alone to issue the four new proposed nationwides.

B. The Corps has not demonstrated that the nationwides comply with the § 404(b)(1) Guidelines

In addition to the showings described above, 40 CFR § 230.7 requires the nationwides to be consistent with EPA's 404(b)(1) Guidelines. These guidelines articulate the alternatives analysis test and mitigation sequencing, the touchstones of the individual permit process. More relevant to the nationwides, the Guidelines also prohibit projects that would "cause or contribute to significant degradation of waters of the United States" (40 CFR § 230.10(c)). Significant degradation can take several forms, including impacts to human health; to aquatic ecosystems and the organisms dependent on them; and to recreational, aesthetic, and economic values (40 CFR § 230.10(c)).

The Corps reissuance proposal and decision documents take compliance with the 404(b)(1) Guidelines for granted. The documents do not consider the potential impacts of the nationwides to human health, aquatic ecosystems, human values in any detail. The substantial diversity among the nationwides is reflected by little more than the Corps' choice of which standard paragraphs to paste into each document. Calling this an analysis does not make it one, and it does not demonstrate compliance with 40 CFR § 230.10(c).

The 404(b)(1) Guidelines also state that "no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem" (40 CFR § 230.10(d)). In response, the Corps has inserted verbatim into every nationwide decision document the rote statement that "as demonstrated by the information contained in this document as well as the terms, conditions and provisions of this nationwide, actions to minimize adverse affects (Subpart H) have been thoroughly considered and incorporated into the authorization." This will not suffice. Subpart H of the 404(b)(1) Guidelines sets out a detailed list of steps that may be taken to minimize impacts of an authorization. To comply with EPA's nationwide regulations and the 404(b)(1) Guidelines, the Corps must demonstrate, for *each* na-

tionwide, that *each* of the measures in Subpart H have been adopted to the extent practicable.

C. The Corps has not demonstrated that the nationwides satisfy the Corps' public interest test

Perhaps the most lenient of any of the standards the nationwides must meet, the public interest test merely requires the Corps to determine, on the record, that the proposed authorization does not run against the public interest—or if the project might affect a special aquatic site (such as a wetland), that the project runs in the public interest. Nonetheless, the decision documents chokes this showing, too. Almost without exception, the documents list quicker permit processing times as a benefit to the public, but do not consider the impacts felt by the public as wetlands are lost under the nationwides, or the cost to the public of losing the public notice and comment opportunities. The decision documents assert but do not document the public benefits of each nationwide, and ignore the public costs altogether.

D. The Corps has not complied with the National Environmental Policy Act

The Corps has made only rudimentary efforts to comply with the National Environmental Policy Act (NEPA), which requires as a prerequisite of any "major Federal action significantly affecting the quality of the human environment," the preparation of a detailed environmental impact statement (EIS) (NEPA § 102(C)). Given that the reissuance proposal would likely result in tens or even hundreds of thousands of acres of impacts to waters of the United States, a full EIS would seem in order. Instead, the Corps has provided a pastiche billed as a set of Environmental Assessments, one for each existing or proposed nationwide, concluding each with a finding of no significant impacts (FONSI). Since all the EAs result in FONSIs, the Corps has determined not to produce a full EIS.

The Corps' actions have violated NEPA on several counts. First, the Corps has improperly segmented the nationwide permit program into 41 different environmental assessments. These nationwides are being reissued together and are often (illegally) stacked together, with the encouragement of Corps regulations (33 CFR § 330.6(c), (d)). The reissuance proposal is one action and should be evaluated as such.

Moreover, even taken individually, the EAs are grossly inadequate. Composed of nearly interchangeable stock paragraphs, few of the EAs make any effort to identify the unique impacts of the activities they consider. None of the EAs discusses in any depth the historical impacts of the nationwides, or uses these to estimate future impacts, thus violating Council on Environmental Quality (CEO) regulations governing the implementation of NEPA (15 CFR § 1508.7, § 1508.25(a), and § 1508.25(c)). Finally, the EAs make no effort to imagine alternatives—either in the form of more tightly drawn nationwides, or in the no-action form of the individual permit program.

Were the Corps inclined to prepare a meaningful environmental assessment of the nationwides, it would, admittedly, face an uphill battle. The Corps' records on the impacts of the nationwide permit system are so fragmented that they will serve as a poor foundation even for a conscientious analysis. We note above and below the flaws in the data NWF and the EWG have independently obtained through FOIA requests of the Corps.

One set of data seems to deserve particular attention, as it will otherwise likely become a cornerstone of the Corps' revised reissuance documents: the survey of the Divisions and Districts. The EAs cite this mysterious survey again and again, extracting from its estimates of the number of future authorizations under the nationwides (though not of the impacts of these authorizations). We are puzzled by the references to the survey, which we recall the Corps did not send out until *after* the reissuance proposal and decision documents were placed on notice for public comment. Indeed, it is our understanding that the Districts were not required to have their responses in to Corps headquarters until July 26, over a month after the reissuance proposal appeared in the Federal Register.

NWF also requested copies of the survey, and called a number of Districts directly to obtain copies of the forms they were returning to headquarters. We are deeply skeptical that these responses can be relied upon to justify any agency decision. The responses diverged wildly; in some Districts, "estimated" authorizations consistently outnumbered "recorded" authorizations under each nationwide by a factor of three or more, suggesting that these Districts do not believe their official RAMS statistics (though what basis they had for estimating permit numbers is also unclear). In others, "recorded" authorizations far exceeded estimated actual authorizations; what this means is anyone's guess. A few Districts, including the Louisville District, re-

sponded with forms that listed *only* recorded authorizations, with no estimated authorizations, no recorded or estimated impacts, and no mitigation.

What should the Corps do about its environmental assessments? It must rework them essentially from scratch, with attention to the full range of impacts that could be authorized under each nationwide. It must find better historical data on the use of the existing nationwides, and must prepare thorough analyses evaluating the experiences of the existing nationwides. To prevent this from happening again, the Corps must require preconstruction notifications (PCNs) for all nationwides, and must faithfully store up all the PCN data to serve as the basis for the next evaluation in five years. More immediately, given the absence of reliable records to date, the Corps will only be able to defend its final reissuance legally if it scrupulously declines to reissue or issue any nationwide with more than minimal impacts or that covers dissimilar activities.

E. The Corps has not complied with the Endangered Species Act

Section 7(a)(2) of the Endangered Species Act (ESA) states that "each agency shall, in consultation with, and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species. * * *" Thus, where a Corps authorization might affect an endangered species or its habitat, the Corps must consult with the USFWS and the NMFS, and must seek alternative methods of carrying out the action that will not jeopardize protected species.

The nationwide permit system as a whole directly threatens protected species that are dependent on wetlands. An NWF report found in 1992 that one-third of endangered plants, and two-thirds of endangered animals, depend on wetlands for their survival (*Endangered Species, Endangered Wetlands: Life on the Edge*, National Wildlife Federation, 1992.) Exhibit 1 includes a copy of this report, as well as several more recent USFWS Federal Register notices proposing or finalizing the listing of endangered species that are dependent on wetlands and could be harmed by projects authorized under the nationwides.

Despite the importance of wetlands to the fate of endangered species, neither the reissuance proposal nor the decision documents discuss the potential impacts of the nationwides on endangered species. The only concession the Corps makes to its duty to consult and to protect endangered species is general condition 11, that no authorization under a nationwide may affect a protected species. This condition is effectively nullified by the fact that several nationwides require no reporting to the Corps; that the Corps does not report others to USFWS; and that some Corps Districts have refused to consult with NMFS and USFWS over the potential effects of specific projects authorized under the nationwides.

Merely pointing to condition 11 does not satisfy the ESA. Before the Corps can legally reissue the nationwides, it must conduct, with the help of USFWS and NMFS, a thorough assessment of the cumulative impacts of the nationwide permit system on all the endangered and threatened species that depend on wetlands. This analysis does not substitute for project by project compliance with the ESA; below, we describe how the Corps must change the way it authorizes projects in order to comply with the ESA—by requiring a PCN for every authorization and by offering to consult with FWS whenever a project affects a protected species. Nonetheless, a broad analysis of the potential endangered species impacts of the nationwides is necessary on its own terms and lays the groundwork for project by project compliance.

F. The Corps has not complied with the Fish and Wildlife Coordination Act

The Fish and Wildlife Coordination Act (FWCA) directs the Corps to consult with the USFWS with a view to the conservation and improvement of wildlife resources whenever a body of water is "modified for any purpose whatever" under a Corps permit or license (16 U.S.C. 662(a)). Corps regulations acknowledge this duty, and state that the Corps will give "full consideration to the views of [the FWS] on fish and wildlife matters in deciding on the issuance, denial, or conditioning of individual or general permits" (33 CFR 320.4(c)). However, neither the reissuance proposal nor the decision documents for the nationwides give any indication that the Corps has consulted with the USFWS for FWCA on the nationwide reissuance. The same consultation may satisfy the ESA and the FWCA; but it must occur before the nationwides can be legally reissued.

G. The shortcomings of the Corps' decision documents have tainted this public comment period

The failures outlined above jeopardize the entire reissuance package, including the nationwides to which no one has traditionally objected. Moreover, whatever the

Corps does between now and the final issuance of the reissuance package, much damage has already been done. When the documents the public must comment on are as superficial as these, major impacts and issues will almost inevitably go unrecognized and unaddressed. EPA's regulations do note that "some of the information necessary for this evaluation can be obtained from potential permittees and others through the proposal of general permits for public review" (40 CFR § 230.7(b)). However, given that Corps *could* have taken a stab at meaningful description of the nationwides and analysis of their impacts in its proposed and draft documents, it surely had an obligation to do better than it has. Whatever the ultimate product of the reissuance process, placing only a mock analysis on review, as the Corps has done, has defeated the letter and spirit of the public notice and comment provisions of the CWA, NEPA, and the ESA.

III. THE CORPS MUST CORRECT IMPLEMENTATION FLAWS IN THE NATIONWIDE PERMIT PROGRAM BEFORE IT CAN LEGALLY REISSUE THE NATIONWIDES.

The Corps must reform *both* the flaws of individual nationwides (addressed in the next section) and the implementation of the nationwide permit system as a whole. Lax monitoring and enforcement, and the practice of allowing projects with significant impacts to be processed under multiple nationwides ("stacking"), have allowed substantial and unnecessary wetlands losses. Poor recordkeeping and a lack of reporting requirements for many nationwides have made it impossible to calculate with any accuracy the losses authorized by the nationwide permit system, or to evaluate their impacts as required by NEPA and by Corps and EPA regulations. In this section, we consider the most significant implementation failures of the current nationwide permit system and the reissuance proposal, and recommend solutions to these problems.

A. The Corps should require a preconstruction notification for every nationwide

One bar to measuring the full impact of the nationwide permit system is the set of authorizations that are never reported even to the Corps. The nationwides that authorize potentially significant impacts without notice to the Corps include NWP 8 (for offshore oil and gas operations); NWP 26 (in headwaters and isolated wetlands) for impacts under one acre; and NWP 40 (for construction of farm buildings). Reporting cannot render legal a nationwide that authorizes more than minimal impacts. However, only if a pre-construction notice (PCN) is required for most or all nationwides can the Corps show that these nationwides have no more than minimal impacts.

Compliance with the Endangered Species Act also hinges on the PCN reporting requirement. When an applicant does not notify the Corps, neither the Corps nor the other federal resource agencies have any practical ability to enforce the universal condition of the nationwides that projects are not to affect threatened or endangered species or their critical habitat. This makes a mockery of ESA compliance, and is a problem that attaches even to those nationwides that would, in almost all other respects, be considered truly minimal in impact. For instance, concerns have been raised about the impacts on endangered and other whales of scientific measuring devices that send out subsonic sound waves through the ocean to measure global temperature variations. Currently, NWP 5, would appear to authorize these without requiring reporting, thus violating the exclusion for projects with potential endangered species impacts. Only by requiring a virtually universal PCN for projects authorized under the nationwides can the Corps comply with the ESA and the FWCA.

We note that PCNs need not be equally complicated for all nationwides. However, all PCNs should include detailed information about where a proposed action is to take place (not just the address of the applicants or the county and waterbody of the project), for without this the Corps cannot identify endangered species implications, assess cumulative impacts on specific waterbodies, or conduct field verification of the applications it receives. Allowing applicants to submit their PCNs to the Corps electronically could speed the process for applicants and regulators.

B. The Corps must notify the other federal resource agencies of all PCNs

For universal PCNs actually to screen out all projects that have unexpected impacts or that are subject to exclusions (such as the endangered species exclusion), the resource agencies must see all the PCNs. Currently, the resource agencies see only a limited set of them, and the reissuance proposal plans to shrink that set. Specifically, the proposal plans to continue notification on 14, 21, 26, 33, 37, and 38; but it proposes to discontinue notification for NWPs 5, 7, 13, 17, 18, and 34. This is a mistake: NWPs 7, 13, 17, 18, and 34 are all either illegal or have significant impacts, or both; notification is entirely appropriate in these cases. Further, there are several NWPs on which notification does not currently occur but clearly should,

including NWPs 8, 12, 15, 19, 23, 32, and 40. The easiest solution is for the Corps to send all the PCNs it receives on to the resource agencies; this may be accomplished with particular ease if the PCNs are online in electronic versions.

Online notification would also help resolve the question of when to mark the beginning point of the resource agencies' 30-day review period. For the time being, we urge the Corps to start the clock not when the applicant's materials arrive at the Corps, but when the Corps sends the materials to tile resource agencies. If the proposal undergoes significant changes during the review process, to 30 day period should begin to run from scratch again.

C. The Corps must distinguish between its discretionary authority to require individual permit review at any time and its duty to require individual permit review for all projects where the PCN indicates more than minimal impacts

As the Corps processes applications for nationwide permits, two administrative safeguards come into play: the automatic kickout to individual review of projects whose PCNs show more than minimal impacts; and the District Engineers' (DE) discretion to require individual permit review for any project. Although the discretion seems more flexible—it can apply to any project, not just to those with more than minimal impacts—it is in fact so encumbered by Corps regulations that it is virtually never used. It is essential that the Corps respect the distinctions between these two internal safeguards.

Throughout the Corps' decision documents on the proposed nationwides, the Corps calls attention to the ability of the District Engineers to yank a nationwide authorization and require a project to obtain an individual authorization at any time. Although this DE's discretion cannot substitute for the checks and balances of the individual permit process for activities with more than minimal impacts, the discretion to require individual review has a place in the program. However, Corps regulations greatly curtail the District Engineer's discretion. Before the District Engineer can boot a project from nationwide into individual review, the District Engineer must consider a long list of factors, including whether requiring pulling a nationwide authorization would "adversely affect plans, investments, and actions the permittee has taken or made in reliance on the permit" (33 CFR §330.5(d)). The DE must also consult with the applicants *twice.* No doubt in part because of these procedures, DE's discretion is used by the Corps in less than 1% of nationwide permit authorizations.

PCN kickout is a very different tool. Like DE's discretion, a PCN requirement cannot cure an illegal nationwide. However, PCN kickout involves no discretion; under CWA §404(e), no nationwide can legally authorize a project with more than minimal impacts. Hence, when the Corps receives a PCN suggesting greater than minimal impacts, it *must* shift that project over to individual review. It remains unclear how seriously the Corps has taken this statutory duty in practice, but as a matter of the law, the distinction between DE discretion and PCN kickout (or a kickout based on any of other nationwide exclusions and conditions) is clear. The Corps' final reissuance document should confirm this distinction. In addition, the Corps should reiterate the Districts' duty under the CWA to screen every PCN and to require individual review for all projects with more than minimal impacts.

D. The Corps should verify applications and PCNs for the nationwides

As far as we have been able to discern, Corps regulators rarely independently verify information submitted to the agency on nationwide permit applications. As a result, the nationwides are vulnerable to significant abuse, with applicants underreporting impacts. Resources are a concern. Though the Corps defends the nationwide permit system as conserving agency resources, the easy availability of nationwide authorizations encourages new applicants, generating a greater need for verification, monitoring, and enforcement. Issuing nationwides without verifying them invites fraud. At a minimum, the Corps must commit to a system of spot checks frequent enough, and backed by sufficiently severe penalties for non-compliance, that applicants are strongly encouraged to comply.

E. The Corps must improve monitoring of compliance with the nationwide conditions

Beyond verifying the data submitted by applicants, the Corps must also commit to monitor applicant compliance with the terms and conditions of the nationwides. To date, however, even where Corps Districts have managed to record authorizations and anticipated impacts of the RAMS database, there are few or no records indicating whether the Corps has monitored those projects. Without records in RAMS, it is hard to see how Corps regulators could build any sense of an applicant's track record or could collect the information needed to support an enforcement action against a violator.

F. The Corps must enforce against violations of the nationwides

Without enforcement, the terms or conditions of the nationwides will be ignored. The Corps' reissuance proposal and decision documents do not discuss the Corps' enforcement record for violations of the nationwides. Nor does the RAMS database provide usable records of Corps enforcement actions against projects violating the nationwides. The Corps' statistical summary for enforcement under the § 404 program is no help here either, since it breaks up enforcement actions by method of resolution rather than by type of permit violated. The Corps needs to commit both to enforce the terms and conditions of the nationwides, and to keep records that allow this information to be used to evaluate the oversight the Corps exercises over the nationwide permit program.

G. The Corps must make all of its PCN's, verification, monitoring, and enforcement records available to the public over the Internet

All of the information collected by the Corps—the PCNs, the records of verification, monitoring, and enforcement actions—is a matter of public record. Further, the public (and the other resource agencies and the states) need access to these to evaluate the impacts of the nationwides. The Corps can anticipate that if the nationwides are reissued in anything approximating their current form, members of the public will again be submitting FOIA requests to the Corps asking for these materials. The Corps should save resources, and begin collecting truly reliable data, by beginning this year to record *all* this information in the RAMS database and by making the RAMS database available on the World Wide Web.

H. The Corps should continue to publish all the nationwides in the Code of Federal Regulations

The Corps must renounce its plan, buried in the preamble to the reissuance proposal, to take the nationwides completely out of the Code of Federal Regulations (CFR), the only place they can currently all be found printed together. The proposal states that from this reissuance forward, the Corps will publish the nationwides one by one in the Federal Register, leaving it up to interested citizens to scan the Register each day for new nationwides to keep a running collection. Most county and university law libraries carry the CFR, but not back issues of the Federal Register. The Corps has been repeatedly criticized by the business community and by conservationists for not publishing the rest of its wetlands regulations in one place; this will just exacerbate "the problem."

I. The Corps should prohibit the stacking of nationwide permits

The Corps consistently abuses nationwides to allow projects with significant impacts to proceed by combining several nationwides ("stacking" them) for a single project. For instance, a housing development may use one nationwide for houses; another each time a road is crossed; and a third to put in water, sewer, and power lines. The impacts add up quickly, and if the entire project can be fit under various nationwides, it can avoid public notice or full environmental review. NWPs that are often abused by stacking include NWP 12, NWP 14, NWP 18, NWP 19, NWP 26, and NWP 33. No stacking ought to be the rule for all the NWPs.

J. The Corps cannot allow mitigation to "buy down" the impacts of illegal nationwides

Mitigation should in theory have no place in a system of legal, truly minimal impact nationwides. Since § 404(e) authorizes nationwides only for activities with virtually no impacts, the nationwides should not create any demand for mitigation, and we look forward to the day they do not. In the meantime, if the Corps insists on issuing nationwides with more than minimal impacts, it must improve the performance and monitoring of mitigation required under them. The track record for mitigation under the § 404 individual permit program is bleak, and no available data suggests mitigation under the nationwides has fared better. The reissuance proposal and the decision documents omit any discussion of the success or failure of mitigation required under nationwide permit in the last five years, and are silent on the Corps' plans for monitoring or evaluating future mitigation.

Most Corps Districts currently authorize projects that have more than minimal impacts on the grounds that the applicants have proposed mitigation that makes the net impacts of the project no more than minimal. The Corps' regulations allow applicants to use mitigation to "buy down" project impacts to make their net effect minimal; however, even Corps regulations are explicit that the Districts should not be allowing applicants to buy down the impacts of projects that do not meet the terms and conditions of any nationwides. *See* Preamble to the Final 1991 Rule to Amend the Nationwide Permit Program Regulations and Issue, Reissue, and Modify Nationwide Permits, 56 Fed. Reg. at 59125.

NWF reiterates our opposition to the practice of buying down impacts in any form. Allowing applicants to offer mitigation and in turn receive authorization under a nationwide means that these projects are never subjected to an alternatives test, to public notice and comment, or even to review by the other federal resource agencies if the mitigation proposal is received after the PCN has already been distributed to these agencies. This reduces Corps accountability; under the CWA and its own regulations, the Corps should be conducting individual permit review on every project whose gross impacts exceed the threshold of a nationwide.

The reissuance proposal resolves to limit the nationwide condition requiring mitigation to projects that involve discharges in special aquatic sites. This is imprudent; first, there are waters of the United States that serve important ecological, economic, or recreational functions, but that are not special aquatic sites. Second, even those projects that do not involve discharges into special aquatic sites, such as those under NWP 13, which explicitly excluded projects in wetlands and other such sites, may nonetheless have significant indirect impacts that require mitigation. The Corps should not limit the mitigation condition as it has proposed.

K. The Corps must treat state denial of § 401 water quality certification as invalidating the nationwide within that state

For years, the Corps has violated CWA § 401, which empowers states to review every federal wetlands permit—whether individual or nationwide—to decide whether that permit would allow impacts that violate state water quality standards. In the case of an individual permit, if the state denies § 401 certification, that effectively vetoes issuance of the § 404 permit. Similarly, when a state denies certification to a federal nationwide, that nationwide cannot legally apply in that state.

However, the Corps continues to authorize § 404 authorizations under nationwides that have been denied certification, telling applicants that they have received their federal authorization under the nationwide, but must obtain § 401 certification from the state. This places state § 401 programs in a quandary, since they technically have no basis on which to grant certification: the Corps has not approved an individual § 404 permit; and the state has already denied certification for the nationwide. Worse, if a state fails to deny individual certification within 60 days, the Corps treats the state as having waived its objections to the project, even though the state has clearly spelled out its opposition to all authorizations under the nationwide by refusing to certify it.

The Corps' practice has three harmful results. First, it usurps the ability of states, guaranteed to them by CWA § 401, to protect water quality. Second, it misleads applicants, who often fail to read the fine print on Corps nationwide authorizations that requires them to get individual certification from the state. Finally, the Corps' practice drops the Corps' workload under the offending nationwide squarely onto the shoulders of the state, without providing any funds to help the state meet the new responsibility. The Corps' treatment of state water quality certification denials violates CWA § 401, confuses applicants, and makes the state do the Corps' job. This practice must end.

L. The Corps must respect state conditions placed on nationwide permits and must not treat those as permit denials

The Corps has also wronged states by rejecting state conditions on the nationwides. CWA § 401(d) grants states the right to include in any certification conditions that will ensure a project meets state effluent guidelines and other state standards. These conditions then attach to the federal authorization. However, the Corps has, without statutory authority, arrogated the power to unilaterally reject these conditions. That rejection converts state conditions to a state denial, dumping the Corps' workload once more upon the state. As a result, many states have become wary about placing all the needed conditions on the nationwides. This practice violates § 401, hamstrings the state programs, and results in projects with more damaging impacts.

M. The Corps should treat state determinations that a nationwide is inconsistent with the State's coastal zone management plan as an invalidation of the nationwide within that state

States with coastal zone management plans, like states with § 401 water quality certification programs, can reject Corps nationwides. However, the Corps also mistreats these programs, treating a state determination that a nationwide is inconsistent with a coastal plan not as an invalidation of the nationwide but as a state promise to review each project authorized under the nationwide individually. Worse, the state must continue to make determinations of inconsistency every time the Corps sends it a new draft of the nationwide, or the Corps deems the state to have waived its objections.

N. The Corps must consult with USFWS and NMFS over authorizations that might affect threatened or endangered species

In addition to the programmatic consultation required before the Corps can reissue the nationwide, Corps Districts have a duty under the ESA to consult with USFWS and NMFS any time an authorization under a nationwide might affect a protected species. Our discussions with USFWS and NMFS personnel suggest that this rarely happens. For example, in Montana, the Corps has repeatedly granted nationwide authorization projects within the nesting territory of threatened bald eagles, even through a database accessible to the Corps lists each of the over 200 known bald eagle nests in the state. In Utah, we understand that without consulting with USFWS, the Corps has granted authorization wider NWP 3 to a project that threatens the endangered June sucker.

Consultation often does not occur because the Corps does not know or has not shared the other federal resource agencies information about projects authorized under the nationwides. A universal PCN requirement would place before the Corps the information the ESA requires it to know. A deeper problem lies in the reluctance of Corps regulators to consult with the resource agencies once a project has been identified as posing a potential threat We urge the Corps to instruct the District Engineers that all PCN data on the location of projects are to be shared with the resource agencies, and that the Districts are to request information from the resource agencies on the location of and potential impacts to protected species. The Corps should also instruct the District Engineers to consult with the federal resource agencies on projects that implicate protected species, and, as the nationwide conditions require, to process each of these projects under an individual permit rather than a nationwide.

O. The Corps must consult with the USFWS over projects that affect the Nation's water and wetlands resources

Similar to its duty to consult under the ESA, the Corps also bears a duty to consult under the Fish and Wildlife Coordination Act (FWCA). The plain language of the FWCA specifies that coordination must take place whenever a body of water is modified. Given the breadth of projects authorized by many of the nationwides, it seems clear that as in the case of the ESA, consultation under the FWCA will only be meaningful if it takes place on a project by project basis. Again, this requires that the Corps receive a PCN for every project that the Corps share these with the USFWS, and that the Corps instruct its Districts to consult with the USFWS over projects as the FWCA requires.

III. COMMENTS ON INDIVIDUAL NATIONWIDES

In this section we comment on those nationwides most in need of repair or elimination. Several of the current and proposed nationwides suffer from the same incurable legal defects. NWPs 23, 32, B, and D all share the flaw of authorizing procedures for future exemptions rather than categories of activities. No way exists to meaningfully assess the potential use or environmental impacts of such open-ended nationwides, let alone to establish their compliance with 404(e). NWPs 15, 17, and 21 are illegal because they delegate the Corps' job of protecting wetlands and waters to other agencies respectively, the Coast Guard, the Federal Energy Regulatory Commission, and federal and state Offices of Surface Mining. But while these agencies have responsibilities that overlap the Corps', they do not duplicate, and have no legal authority to displace, Corps regulation of waters and wetlands.

NWP 3 Maintenance

NWP 3 allows the repair, rehabilitation, or replacement of damaged or destroyed structures or fills. The nationwide requires a PCN only when issued to authorize a project where the previous structure or fill has been destroyed for more than two years. The Corps' RAMS database records NWP 3 as having been used over 14,000 times between 1988 and June 1996, but includes acreage impacts for only about 1,100 of these projects. Those Districts that fully responded to the Corps' survey of nationwide usage during 1995 (hereinafter the 1995 District survey) estimated that RAMS underrecorded NWP 3 authorizations by a factor of between 2 and 20. Further, NWP 3 does not require a PCN to the Corps unless the project is the repair damage more than two years old, so there are many NWP 3 authorizations that Corps never sees at all.

While NWP 3 is probably not illegal as written, it encourages reconstruction of structures in flood plains that are damaging for private citizens and inefficient for society as a whole. A few modest changes to NWP 3 would make it much more beneficial and would bring it into line with the Administration's flood damage prevention policies.

Compliance with CWA §404(e). NWP 3 authorizes the replacement of existing or recently destroyed structures or fills. Where structures and fills are indeed limited to the same purposes and size as those they replace, the impacts may in fact be minimal. However, NWP 3 is somewhat ambiguous about just how similar a new project must be to previous projects, saying only that the "repair, rehabilitation, or replacement does not result in a substantial change in the filled area or an increase in adverse impacts. * * *" When reissuing NWP 3, the Corps should omit the "substantial change" standard and say instead: "* * * in any increase in the filled area or in adverse impacts."

Other comments. NWP 3 is often used to repair damage after natural disasters specifically, we suspect floods. It thus seems odd that the Corps' decision document specifically excludes "flood hazards," "flood plain values," "current patterns/water circulation," and "normal water level fluctuations" from the list of wetlands functions and characteristics affected by NWP 3 authorization. More than most other nationwides, NWP 3 directly affects flood plain values.

More importantly, NWP 3 encourages rebuilding in many places where rebuilding should be discouraged. Where a property has been flooded out repeatedly, it makes good economic sense to look for alternatives before rebuilding, even where the direct impacts of reconstruction are minimal. The Corps RAMS database does not reveal how many of the sites of NWP 3 projects are repetitive loss properties insured by the Federal Emergency Management Agency (FEMA), or even how many of those sites have had other projects under NWP 3 at least once before. However, the Corps might consider conditioning the nationwide so that a property may not invoke NWP 3 more than once every ten years. Of course, that does not mean that a house in a floodplain that is repeatedly flooded could not be rebuilt; it means only that the applicants would be asked to consider the practicable alternatives before imposing on society the costs of future flooding.

Recommendation: When the Corps reissues NWP 3 it should clarify that the nationwide does not authorize structures or fills that are larger than those they replace or repair. Further, thee Corps should condition NWP 3 to prevent its use by repetitive loss properties in the floodplain.

NWP 7 Outfall Structures

NWP 7 allows for the construction of outfall structures and associated intake structures where the effluent from the outfall structure is in compliance with National Pollutant Discharge Elimination System (NPDES) regulations.

NWP 7 allows for significant impacts to wetlands and waters as written, and should not be reissued in its current form.

Compliance with Section 404(e). NWP 7 violates CWA section 404(e)'s requirement that the activities it authorizes be "similar in nature." Placing no limits on the length or width of outfall structures, NWP 7 allows a wide variety of projects of all sizes. For example, an outfall structure can be a small pipe that discharges its contents half a mile from shore, as does a current outfall structure in the Boston Harbor; or a medium sized twenty-six foot diameter tunnel that travels over ten miles of wetlands offshore, as in the new proposed outfall tunnel for the Boston Harbor; or even a large pipe like White's Point sewage outfall, the largest in the U.S., which discharges an average of 330 million gallons per day into Santa Monica Bay. Nor does nationwide 7 distinguish between the diverse types of outfall structures sewage outfalls, stormwater outfalls, nuclear power plant cooling water outfalls, lake outfalls, ocean outfalls, and river outfalls even though these have substantially different characteristics and impacts. Without restrictions on the size, length and type of outfall structures, NWP 7 fails to meet section 404(e)'s, "similar in nature" requirement.

NWP 7 also violates CWA section 404(e)'s requirement of minimal individual and cumulative impact. There are no restrictions on the amount of wetlands that may be destroyed under NWP 7; the Corps cannot demonstrate that it will cause only "minimal adverse environmental effects."

Similarly, NWP 7 also breaches the requirement that projects have only "minimal cumulative adverse effects" on the environment. With no impact limitations on individual activities, cumulative effects will not be minimal. The Corps believes (on what basis is unclear), that NWP 7 will be used approximately 1,600 times per year. 1,600 projects with no size or impact limitations will have much more than a minimal cumulative effect. In addition, the Corps does not factor in the possibility of fractures and leaks during the construction and operation of the outfalls; these would also contribute to cumulative impacts.

Compliance with NEPA and the 404(b)(1) Guidelines. The NWF 7 decision document does not consider the full impacts of the outfall structures it authorizes. By issuing NWP 7, the Corps is essentially permitting both the outfall structure and

the effluents it will ultimately discharge. However, the decision document fails to consider what outfall structures authorized under NWP 7 will carry. Outfall structures are designed to funnel treated waste, runoff and stormwater through a diffuser into a moving body of water. It is necessary to know what substances are being transported through these structures since there is always a possibility of breaks or cracks in the pipe itself. If the structure fractures before the contents reach the diffuser, they will seep into the wetland around the outfall structure and may leach into groundwater. The proper time to evaluate these possibilities is before NWF 7 is issued. By failing to address these concerns, the Corps' decision document falls short of meeting the standards of NEPA and the 404(b)(1) Guidelines.

Only once does the decision document address the impact of those outfall structures built across coral reefs, mudflats and seagrass beds which are designated as special aquatic sites in the 404(b)(1) Guidelines. Again, the decision document fails to offer enough information to allow for a knowledgeable assessment of the full environmental impact of NWP 7, or to demonstrate that NWP 7 will comply with the 404(b)(1) Guidelines.

It is no cure for the shortcomings of NWP 7 that outfall structures must often obtain NPDES permits; NPDES permits do not require compliance with any of the factors mentioned above, including the 404(b)(1) Guidelines. In addition, a NEPA analysis is only required for new sources, or where construction grants are involved. NWP 7 would thus allow many NPDES-permitted outfall structures, including those with significant impact potential, to slip through without the level of impact assessment associated with the existing section 404 permit process.

Finally, the decision document advocates the stacking of the NWP 7 with other NWPs and regional permits. By encouraging the "multiple use of NWPs," the Corps is supporting activities with more than minimal impacts.

Recommendation: The Corps should not reissue NWP 7 in its current form.

NWP 8 Oil and Gas Structures

NWP 8 authorizes structures for the exploration, production, and transportation of oil, gas, and minerals on the Outer Continental Shelf (OCS) within areas that are leased by the Department of the Interior, Minerals Management Service. The Corps' RAMS database reports only one use of this nationwide between 1988 and 1996; however, NWP 8 does not require applicants to provide a PCN to the Corps. The lack of recorded uses suggests the Corps has made no effort to track or evaluate the impacts of projects authorized under NWP 8.

Compliance with CWA § 404(e). NWP 8 fails to comply with CWA Section 404(e)'s requirement of minimal individual impacts. There are no restrictions on the acreages of jurisdictional waters that may be affected under NWP 8. In the absence of any impact ceiling, the Corps cannot reasonably conclude that NWP 8 projects will cause only "minimal adverse environmental effects." Because the Corps cannot assure minimal individual impact NWP 8 also violates section 404(e)'s "minimal cumulative impact standard."

In addition, because NWP 8 authorizes exploration, production and transportation of oil, gas *and* other minerals, it does not meet CWA section 404(e)'s "activities similar in nature" requirement. Exploration, production and transportation cover a broad spectrum of activities that differ greatly in their impacts. Moreover, with no size or length limitations mentioned in the permit a wide variety of projects of all shapes and sizes could be authorized. Without such restrictions and a narrower definition of the authorized projects, NWP 8 fails to comply with the "similar in nature" requirement.

Compliance with NEPA and the 404(b)(1) Guidelines. The decision document for NWP 8 does not consider the full impacts of the oil and gas structures that it authorizes. The environmental assessment of NWP 8 is not complete without a review of the possible impacts of leaks, spills or other ecological disasters. Moreover, without such a reassessment, NWP 8 does not comply with the 404(b)(1) Guidelines.

Although the information would seem directly relevant to the question of the likely impacts of NWP 8, the decision document omits any discussion of the acreage of the Outer Continental Shelf that has been leased by the Department of the Interior, Minerals Management Service and remains available for development The Corps' mysterious survey of Division and District offices leads it to believe that NWP 8 will be used to authorize only 114 activities per year. However, according to Minerals Management Service data, there are approximately 160 million acres of OCS in the Gulf of Mexico region. As of June 1996, 25.1 million of those 160 million acres had been leased. The decision document offers no insight into how many of these may be developed, and with what impact.

Recommendation: In order to comply with CWA section 404(e), NWP 8 needs to be overhauled and rewritten. NWP 8 must be given specific size and length require-

ments. It must not authorize large facilities with the potential to significantly pollute the Nation's coastal waters. In addition, a PCN must be required for every project issued under NWP 8. Finally, the Corps must prohibit the stacking of NWP 8 with other nationwide and regional general permits. If these criteria cannot be met, NWP 8 should not be reissued by the Corps.

NWP 12 Utility Line Backfill and Bedding

NWP 12 allows the clearing and excavation of wetlands for the placement of utility lines and pipes. The Corps' RAMS. database records NWP 12 as having been used over 17,000 times between 1988 and 1996. The estimates of NWP 12 use in the 1995 District survey range wildly, with the Districts generally estimating that twice as many projects were authorized under NWP 12 as indicated in the RAMS database (and 1995 was a year with better-than-average recordkeeping in RAMS). In addition, NWP 12 does not require a PCN unless the applicant intends to keep sidecast materials in waters of the United States for more than three months, and Corps' figures provide no estimate of the number of projects that are never reported.

NWP 12 currently allows (and has resulted in) far more than minimal wetlands impacts. The Corps should not reissue NWP 12 without tightening it up considerably.

Compliance with § 404(e). NWP 12 violates CWA § 404(e)'s requirement of minimal individual and cumulative impacts both as written and as implemented. NWP 12 authorizes "the minimum impacts necessary" not necessarily minimal impacts. Moreover, it lacks any upper threshold limit on the acreage of wetlands that may be destroyed. Further, although the nationwide requires contours to be returned to preexisting levels, it does not require revegetation. Utilities and pipeline owners usually keep utility lines clear of vegetation, so the effects of projects authorized under NWP 12 on wetlands ecosystems are often permanent and substantial.

The cumulative impacts of NWP 12 are similarly more than minimal. The Corps offers no explanation of how it arrived at its estimate that NWP 12 will be used 60,500 times over the next five years. However, if each use directly affects an average of even .1 acres of waters or wetlands, the total loss over the life of the nationwide would be 6,050 acres. That is surely not minimal, and does not even consider the indirect impacts. Further, no Corps District figures appear to include the inevitable impacts of pipeline leaks or spills, although these too contribute to cumulative impacts.

NWP 12 also violates CWA § 404(e)'s requirement that nationwides authorize only "categories of activities similar in nature." With no limit on the size or length of pipes or utility lines that may be placed in a wetland, NWP 12 covers a huge variety of activities and project purposes. NWP 12 appears to authorize underground public sewer lines, giant power line towers, ground-level private oil or hazardous material pipelines, and perhaps even slurry pipelines for peat, coal, or other milling operations.

Compliance with NEPA and the 404(b)(1) Guidelines. The Corps' NEPA analysis of the impacts of NWP 12 is inadequate and conclusory. For instance, the document explains that "because of the temporary nature of the discharge the adverse affects of removing or covering the riparian vegetation are expected to be minimal." However, the discharge is not temporary; NWP 12 may require that a site be returned to its original contour, but the material on the finished site is different, and includes a utility line that may significantly alter hydrological conditions. Since many project proponents keep utility line right-of-ways free and clear of all natural vegetation, the chemical and physical consequences of putting in the utility line can be quite enduring.

The NEPA analysis of biological impacts (to benefit life and vegetation) is similarly myopic. Again, the document ignores the permanent stripping of vegetation an integral and foreseeable part of placing the utility line and suggests that the changes in ecosystem structure or species diversity are likely to result only from "compacted subsoils" at the site.

Other aspects of the decision document are simply incomplete. The analysis recognizes the danger that construction of a utility line may create a "french drain" that inadvertently destroys a wetlands, but the permit offers no safeguards to avert this. Also, although the nationwide does not allow drainage tile to be placed, it does authorize the laying of pipes carrying drainage. Combined with the fact that NWP 12 authorizes "intakes and outfall structures," this nationwide seems to clearly authorize the construction of storm drains *through and into* wetlands and other waters. These flows can represent significant and destructive changes from natural conditions. NWP 12 should not be reissued until this flaw is addressed.

Another baffling omission in the decision document is its failure to consider what substances will run through the pipes placed under the nationwide. The purpose of

environmental assessment is to assist decision makers and the public in evaluating the environmental merits of a proposal by understanding its full implications. By definition, a pipeline spill in a wetland will release the contents of the pipeline into a wet environment with existing surface or groundwater flows. Spills in wetlands are therefore more likely to result in widespread contamination than spills in uplands. Since once a pipeline is built, there will not be an alternative route for the materials flowing through it, the proper time to consider the potential impacts of a spill is clearly when the route for a pipeline including its route through waters of the United States is being chosen. By itself this factor argues for excluding any pipeline or utility line that carries hazardous or disease-causing substances from NWP 12, requiring an individual § 404 permit (including an alternatives analysis) instead. In any event, in failing to deal with the prospect of utility line breaches and spills, the Corps' NEPA analysis of NWP 12 falls far short of the requirements of the statute.

Although the Corps' records on the use of NWP 12 to date do not reveal the forts of projects authorized under the nationwide, the clusters of NWP 12 authorizations in Wyoming, Texas, Oklahoma, North Dakota, South Dakota, and Montana suggest that oil and gas pipelines are primary beneficiaries of NWP 12 in a number of states. Thus there is particular reason to be concerned about what the pipes are carrying.

Like the decision documents for many of the other nationwides, the document for NWP 12 biases its estimate of the benefits of the nationwide by ignoring the alternative to NWP 12 authorization: individual permit review. The analysis wrongly claims as a benefit of NWP 12 the "positive effect on the local economy" of building a pipeline or utility line. But these benefits would in almost every case also occur under an individual permit Nearly all projects that gain approval under NWP 12 that would not be approved in the same form if NWP 12 did not exist are projects with routes for which there exist less-damaging, practicable alternatives. It thus makes no sense to credit NWP 12 with promoting economic growth, since these alternatives would have produced the same spur to the economy. In addition, the negative economic effects that stem from poor siting will more likely be averted by thorough individual review than by authorization under a nationwide.

In an act of faith, the Corps asserts that "time savings associated with the use of the NWP will encourage applicants to design their project within the scope of the permit rather than to request an individual permit which could have a greater adverse impact." No doubt applicants will seek authorization under NWP 12 rather than an individual permit. However, given that the "scope" of NWP 12 is wide open, why should an applicant make any effort to reduce project impacts?

Finally, the Corps fails to explain why utility lines constructed under NWP 12 do not pose a threat to flood control functions. It offers two rationales: (1) that the Corps retains discretion to condition the use of NWP 12 in any specific case; and (2) that impacts under NWP 12 are only temporary. As, noted above, the second of these is false. The first is irrelevant; the test for gauging the impacts of a nationwide must not be what the Corps could do at its best, but what impacts the proposal would routinely approve.

Additional comments. The loose standards of NWP 12 actually create an incentive to locate utility projects in wetlands where development for other purposes has,been properly discouraged. The text of the nationwide acknowledges that utility lines authorized under it can run parallel to waters of the United States. As a result, various projects authorized under NWP 12 have been designed to run through flood plains or other wetlands for great lengths.

NWP 12 is also often stacked with NWP 14 and NWP 26 to facilitate the authorization of development projects. Thus large projects with significant impacts are allowed to avoid the individual permit process, including its public notice and comment provisions. Allowing NWP 12 to be stacked with NWPs' 14 and 26 invites developers to run sewer, water, or other utility lines straight down the streambeds of new developments, saving uplands for houses and roads.

Finally, NWP 12 demonstrates the need for universal PCNs. As written, NWP 12 only requires an applicant to notify the Corps where the applicant intends to keep sidecast material in jurisdictional waters for over three months (the District Engineers can extend this time for up to 6 months). Corps records provide no way to tell how many applicants show up to request this extension *after* having completed their projects without reporting. At that point, the Corps can still perform a mandatory kickout if the PCN shows more than minimal impacts; but the damage to wetlands or waters has been done. The best way to avoid this situation is to require a PCN up front for *all* NWP 12 authorizations.

Recommendations: NWP 12 needs substantial reining in if it is to have any chance of complying with CWA § 404(e). First, the Corps should explicitly exclude from cov-

erage under NWP 12 all long, linear utility projects; these are appropriately permitted only under the individual permit process. Second, the Corps should explicitly require revegetations to pre-project conditions (same type of vegetation), not just retention of original contours. Finally, the Corps must prohibit the stacking of NWP 12 with itself or other nationwides.

NWP 13 Bank Stabilization

NWP 13 authorizes bank stabilization activities aimed at preventing erosion. The nationwide includes a set of conditions, but these operate as a floor, rather than a ceiling: projects within these conditions are authorized with no PCN, while projects that exceed these limits can be authorized at the discretion of the District Engineer.

The permit has been widely used: the Corps' RAMS database estimates that 17,951 projects were authorized under NWP 13 between 1988 and June 1996. This figure represents only the tip of the iceberg; the surveys sent by the Districts on their use of nationwides in 1995 suggest that even in the most accurate year of recording, the Districts underrecorded known uses of NWP 13 by a factor of 2 to 5 (the Fort Worth District estimated it had undercounted by a factor of almost 20). Moreover, since NWP 13 requires a PCN only for projects that exceed its impact ceiling, innumerable uses of the nationwide may have occurred without being recorded. None of the statistics suggests how many uses of NWP 13 were never reported to the Corps.

As written, NWP 13 violates CWA § 404(e); as applied, it is poorly enforced and widely abused. If it is to be reissued at all, it must be tightly redrawn.

Compliance with CWA § 404(e). NWP 13 violates CWA § 404(c)'s prohibition of general permits that authorize more than minimal individual and cumulative impacts. While NWP 13 including set size and length limitations, its also provides that the District Engineer may use his or her discretion to approve larger bank stabilization projects under NWP 13 as well. There is no legal distinction between setting an impacts ceiling to prevent minimal impacts but letting DE discretion approve projects beyond that ceiling, and setting a ceiling too high but relying on DE discretion (or PCN kickout) to screen out projects with more than minimal impacts. Both violate CWA § 404(e).

To comply with CWA § 404(e), a nationwide must be written in terms that cannot authorize more than minimal individual and cumulative impacts, without relying on the DE's discretion. Else, nothing would prevent the Corps from issuing a nationwide to cover all discharges, so long as the terms of the nationwide called for the DEs to screen out projects with more than minimal impacts. That reduces the many safeguards of the individual permit process to one Corps discretion and sabotages the plain meaning of CWA § 404(e). At a minimum, in reissuing NWP 13, the Corps must eliminate the DE's discretion to approve projects that exceed the impact ceiling of the nationwide.

Even NWP 13's current impact ceiling violates § 404(e) cumulative impact ceiling. Statistics discussed above indicate that NWP 13 is widely used; they provide no basis to say that projects within NWP 13's impact ceiling have only minimal individual and cumulative impacts. Anecdotal evidence suggests they do not. Moreover, NWP 13 leaves it to project applicants to choose appropriate stabilizing materials and to estimate average amounts of fill below the plan of ordinary high water. Sparse Corps monitoring of project compliance with NWP 13 has meant that in practice, projects authorized under NWP 13 have regularly had far more than minimal impacts.

Compliance with NEPA and the 404(b)(1) Guidelines. The decision document for NWP 13 includes one of the more bizarre features of any of the nationwide decision documents. Section 3(d), "Public Review and Comments," reviews and rejects public comments urging the Corps to reduce the impact ceiling on NWP 13 and provide more protective conditions. Since the comment period is still running, this section would appear to be either a response prepared before any of the public comments have been received, or a set of paragraphs cut and pasted here out of the final 1991 rule as the Corps prepared this document. This is the sort of mistake that one would think an agency even, mildly attentive to its NEPA responsibilities would avoid.

The decision document is inadequate in other respects. For example, the documents do not list "wetlands" as a factor relevant to issuance of NWP 13. Although NWP 13 does not apply in special aquatic sites, it does have impacts on them. Projects authorized under NWP 13 have been reported to result in erosion into wetlands and other special aquatic sites, and bank stabilization can lead to changes in waterflows that damage wetlands downstream. The decision document remains oblivious to these impacts, and thus fails to demonstrate that NWP 13 complies with the 404(b)(1) Guidelines.

In another puzzling statement, the document notes that "the NWP should be applied within two years of an erosion event caused by storms or floods (33 CFR 330.5(a)(3))." Nowhere in NWP 13 does this condition, or any like it, appear. Nor is it clear what connection this condition has to the CFR citation, which is the section that requires Corps compliance with the 404(b)(1) Guidelines.

Those likely impacts on NWP 13 that the decision document does describe (in general terms), it fails to demonstrate will be minimal or to propose remedies for them. For example, the document notes that bank stabilization projects may interfere with recreation, but concludes, "the temporary nature of the structure or work is expected to minimize this impacts." Applicants rarely intend riprap to be temporary; when it turns out to be, it generally creates other serious problems—which the document also does not address.

Other comments. Like many other of the nationwides, NWP 13 applies to tidal as well as nontidal wetlands and waters. NWP 13 usage statistics bear out the anecdotal evidence that bank stabilization projects have caused significant problems along estuaries and coasts. Inland, NWP 13 has been used to facilitate channelization.

Recommendation: If NWP 13 is to be reissued, it should have a firm, clearly minimal impact ceiling, above which projects must obtain individual review. Also, unless the Corps can document that the current length of 500 feet is in fact minimal in all eases, it should shorten the ceiling. In any event, the Corps must improve its monitoring of NWP 13 projects and its enforcement efforts against applicants who violate NWP 13 conditions, and must initiate a meaningful assessment of the cumulative impacts of NWP 13 authorizations.

NWP 14 Road Crossing

NWP 14 authorizes fills in wetlands and other waters for the construction of road crossings, with a variety of limiting conditions. The Corps' RAMS database suggests that, at a minimum, over 13,000 projects were authorized under NWP 14 between 1988 and 1996. Districts responding to the 1995 District survey estimated that in 1995 RAMS undercounted the actual number of NWP 14 authorizations by a factor of at least 2 to 3.

NWP 14 lacks critical safeguards to ensure that projects authorized under it cannot have more than minimal individual and cumulative impacts most notably, the .3 acre fill ceiling is too high, and the Corps needs to prohibit the stacking of NWP 14 with other permits.

Compliance with CWA §404(e). NWP 14 has authorized more than minimal individual and cumulative impacts, and its reissuance will violate CWA 404(e) unless it is narrowed. As written, the conditions of NWP 14 restrict only the acres of *fill,* not the acreage of impacts. As a result, in the Savannah District alone, some 14 out of 25 projects under NWP 14 that were recorded in 1995 as having any acreage impacts, have impacts over the fill ceiling of the nationwide (no acreage impacts are recorded at all for another 13 projects). We note this not to condemn the Savannah District, which has been more forthcoming with its permitting data than many Districts, but as an indication that NWP 14 is far looser a permit than it at first appears.

The decision document suggests that NWP 14 meets the minimal impacts standards because the District Engineer remains free to require mitigation for projects under the nationwide and to attach additional conditions to NWP 14 authorizations as he deems necessary. However, these expedients do not cure NWP 14's ills. Corps regulations are clear that, without regard to mitigation, a project must fall within the impact ceiling of a nationwide before it can be authorized under it. *See*, general condition 13(f), 33 CFR §330 Appendix A. By the same token, without regard to mitigation, a nationwide must fall beneath the minimal individual and cumulative impact ceiling before it can be legally issued under CWA §404(e). Even were mitigation theoretically permitted to "buy down" the cumulative impacts of projects under NWP 14, the bad track record of Corps-supervised mitigation provides no grounds on which to believe mitigation actually *would* keep net impacts minimal.

Finally, the discretion of the District Engineer exercised at the rushed paced of nationwide authorization cannot substitute for thorough environmental review and comment by the Corps, the federal resource agencies, and the public in tide context of the individual permit process. The Corps offers no statistics on the District Engineers' use of discretion, and the Corps rarely enforces the conditions of the nationwides anyway. Where projects have more than minimal individual or cumulative impacts, no degree of Corps discretion can make a nationwide legal.

Compliance with NEPA and the 404(b)(1) Guidelines. The decision document for NWP 14 leaves much to be desired as an environmental assessment and does, little to demonstrate compliance with the 404(b)(1) Guidelines. The document does admit

that vegetation and habitat may be destroyed when roads are put in. However, the unsubstantiated claim that restricting the width of fill to the minimum necessary and the length to 200 linear feet will minimize impacts is inadequate. The showing needed to satisfy the Guidelines and CWA § 404(e) is not merely that the impacts of projects under NWP 14 have been minimized, but that they are minimal.

Further, the decision document offers no reason to believe that projects authorized under NWP 14—particularly where these projects are being authorized under a combination of NWP 14 stacked with other nationwides—will not substantially degrade the aquatic environment. NWP 14 cannot comply with the 404(b)(1) guidelines without such a showing. Moreover, the decision document cannot serve as an adequate NEPA analysis until the Corps looks hard enough at the question to make a defensible decision.

Other comments. NWP 14's most serious flaw inheres in the Corps' practice of allowing it to be stacked with other nationwides and with individual permits, to shield projects with more than minimal impacts from public notice and comment and searching environmental review. The RAMS database indicates that NWP 14 is one of the most commonly stacked nationwides. Most often, NWP 14 seems to be used to authorize half of a project whose other half gets approved under NWP 26; sometimes NWP 14 is joined with NWPs 33 (temporary construction and access) or 17 (Coast Guard approved bridges).

Recommendation: The Corps should lower the fill ceiling on NWP 14 as necessary to ensure that direct and indirect impacts of projects authorized under NWP 14 are truly minimal. Further, the Corps must explicitly ban the practice of stacking nationwide permits that exceed the conditions of any one nationwide.

NWP 15 U.S. Coast Guard Approved Bridges

NWP 15 authorizes impacts resulting from the construction of bridges across navigable waters of the United States, provided that the U.S. Coast Guard has permitted the bridge. NWP 15 requires a PCN to the Corps, including a delineation of affected wetlands and a proposal for mitigation.

NWP 15 illegally delegates the Corps' CWA § 404 responsibilities and should not be reissued

Compliance with CWA § 404(e). NWP 15 violates the minimal individual and cumulative impacts standards of CWA § 404(e). The nationwide imposes no limit on the impacts that may be authorized under NWP 15. The fact that the PCN must include mitigation plans to offset lost functions does not render the impacts minimal, since, as the Corps acknowledges in general condition 11, offers of mitigation cannot be used to "buy down" impacts before the judgment of whether a project's impacts are minimal is made.

Even were "buying down" impacts permissible, NWP 15 fails to do it successfully. The decision document relies heavily on "the requirement to propose appropriate and practicable measures to mitigate the loss of special aquatic sites. * * *" However, actual mitigation in the § 404 program consistently falls far short of proposed,mitigation. Moreover, many impacts' of NWP 15 projects cannot practicably be mitigated, including the destruction of peat wetlands or bottomland hardwoods. NWP 15 simply writes these impacts off, yielding much more than minimal losses.

Compliance with NEPA and the 404(b)(1) Guidelines. The Coast Guard approval process that NWP 15 substitutes for § 404 authorization lacks most of the safeguards of the 404(b)(1) Guidelines, including the requirement of alternatives analysis and the prohibition of substantial degradation. Since there is no way to demonstrate in advance that the projects authorized by the Coast Guard (and therefore by NWP 15) will not violate the 404(b)(1) Guidelines, NWP 15 cannot be issued.

The Corps' answer to this problem makes matters worse. The NWP 15 decision document notes, "the NWP 15 notification procedures will allow the District Engineer to ensure that adverse environmental impacts of the proposed activity are minimal." This suggests that, short of discretionary intervention by the District Engineer, NWP 15 will not have minimal impacts. However, even if the Corps could be relied upon to perform a searching review of projects under NWP 15, the nationwide essentially replaces the individual § 404 permit process with one that excludes the public and the other federal resource agencies, and that leaves the Corps accountable to no one.

The decision document also violates the 404(b)(1) Guidelines and NEPA by ignoring several significant impacts of bridge construction, including alteration of flood flows and fish and wildlife impacts resulting from the long term presence of bridge structures. The decision document does admit that bridges may have damaging impacts on the recreational values of a stream, river, or wetland. These impacts can result in the significant degradation of wetlands and other special aquatic sites, and

the projects that would cause them are supposed to be prohibited under the 404(b)(1) Guidelines. Nonetheless, NWP 15 authorizes them.

Other comments. An intrinsic flaw of NWP 15 is that although it is issued as a nationwide permit, it is in function a programmatic permit, granted to another federal agency. NWP 15 does not authorize a narrow category of similar activities with minimal impacts; it authorizes any bridge project permitted by the Coast Guard's regulatory program, on the (erroneous) grounds that that program provides comparable protections to the resource.

Even interpreted as a programmatic permit, NWP 15 is inadequate. Only where the non-Corps program applies standards that are virtual reflections of the 404(b)(1) guidelines can a programmatic permit have any chance of avoiding significant wetlands loss. As noted above, the U.S. Coast Guard has no regulations remotely similar to the 404(b)(1) Guidelines. Further, programmatic permits must have low impact thresholds and must provide for Corps and federal resource agency review of all projects with more than slight impacts. NWP 15 does neither.

The public interest justification offered for NWP 15. In the decision document presents a peculiar justification for the nationwide: "the need for the NWP is based upon the large number of permit applications related to highway projects. It can also be used in conjunction with several other proposed NWPs for minor activities." These two statements strongly suggest that NWP 15 will have more than minimal cumulative impacts, since it will be used again and again and in conjunction with other NWPs (no doubt NWPs 14 and 23, in particular). Beyond confirming that NWP 15 will violate CWA § 404(e), the Corps' public interest discussion indicates just how far off course the Corp's' sense of its CWA duties has veered. Bridges over navigable water *are* usually built as part of larger transportation projects. One does not build two halves of a road in one place and the bridge connecting them in another. The proper time for considering alternatives and planning how to minimize impacts is when the entire transportation project is being planned. CWA § 404 demands that kind of comprehensive analysis. For the Corps to "end duplication" and save money by splitting transportation projects up under the nationwides, in the process eliminating alternatives analysis, is penny wise and pound foolish. What the CWA requires, and what the Corps should do, is process transportation projects, without segmentation, under the individual permit process.

Recommendation: The Corps should not reissue NWP 15. If there exists a limited category of bridge projects the impacts of which are individual and cumulatively minimal, considered separately and apart from proposed mitigation, then the Corps might consider issuing a carefully tailored nationwide to cover just those activities.

NWP 17 Hydropower Projects

NWP 17 authorizes the discharge of dredged or fill material associated with hydropower projects, including their discharge, as authorized by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920, provided the permittee notifies the District Engineer 30 days prior to starting the project.

Compliance with CWA § 404(e). NWP 17 fails to meet CWA § 404(e)'s requirement that all activities issued under a nationwide be "similar in nature." Without size limitations, plant requirements, or discharge regulations, projects issued under NWP 17 cover a broad spectrum of activities. Hydropower projects come in all shapes and sizes with a large variety of discharges and effects on the surrounding waters and wetlands. Without size and discharge limitations, NWP 17 fails to meet 404(e) standards.

Similarly, because these limitations and requirements are absent in NWP 17, "minimal individual impact" cannot be assured. If a hydroplant of any size can obtain a NWP 17, the Corps cannot demonstrate that there will be minimal adverse environmental impacts for even one project. As a result, NWP 17 also violates 404(e)'s "minimal cumulative impacts" standard.

Compliance with NEPA and the 404(b)(1) Guidelines. We note that the NWP 17 decision document does not analyze the current NWP 17. Instead, it evaluates the wording proposed by the Corps for NWP 17 in 1991 and rejected in the face of hostile public comments. This is an improbable mistake and suggests the Corps has not taken its responsibility to assess the environmental impact of the NWPs seriously. In any event, given that the relevant decision document was not made available to the public, the Corps has failed to meet the NBPA analysis requirement in regards to NWP 17.

Although NWP 17 was modified in 1991 when reissued, we will respond to the decision document by reiterating our comments concerning the prior permit NWP 17 as it was proposed in 1991, applied to *all* hydropower projects licensed by the FERC. Because virtually all FERC-licensed projects result in significant adverse impacts, allowing the FERC to grant projects through NWP 17 would have violated

every standard of section 404(e). In addition, FERC standards do not coincide with those of 404(b)(1) and there is no assurance that there would be an equivalent review.

As proposed to be reissued without change in the June 17, 1996 reissuance proposal, NWP 17 has been given size limitations. However, it still delegates permitting decisions to FERC, leaving the issue of discrepancies between FERC guidelines and 404(b)(1) Guidelines unresolved. Unlike the 404(b)(1) Guidelines, FERC guidelines are vague and authorize projects that have the potential to significantly degrade "waters of the United States." Finally, the CWA grants the Corps no authority to delegate its regulatory responsibilities to FERC, so NWP 17 would be illegal even if FERC applied the 404(b)(1) Guidelines.

Specific problems relating to the NWP 17 decision document, aside from its analyzing the wrong permit, mirror those found in all of the other NEPA documents. First, the Corps encourages the stacking of nationwide 17 with other NWPs and regional permits, thus advocating large projects without individual permit review. In addition, the Corps also cites its faceless survey that "expects" NWP 17 to be used 20 times a year. Lastly, the document, in many places, is just a carbon copy of sections of other decision documents. For example, section 4(d)(ii), "Physical, chemical and biological characteristics of the aquatic ecosystem," is fungible with the same section in at least 20 of the other decision documents. A factual and trustworthy NEPA analysis of each individual permit is not the clone of 20 other documents, but one which details how each specific permit will impact the surrounding environment By copying complete sections of previous documents, the Corps has failed to produce a thorough decision document for both NWP 17 and many, other nationwide, permits.

In closing, we question the need for nationwide 17. Could the activities authorized under NWP 17 not be authorized under NWPs 18 and 19? If not, the Corps must explains how projects with larger, impacts that those allowed by NWPs 18 and 19 can be considered minimal in individual and cumulative impacts.

Recommendations: NWP 17 should not be reissued.

NWP 21 Surface Mining Activities

NWP 21 authorizes surface mining activities on any scale and with any level of wetlands impacts so long as the applicant holds a reclamation plan approved by the federal Office of Surface Mining or one of its state counterparts.

NWP 21 illegally delegates the Corps responsibilities to the federal and state mining agencies that apply weaker standards; in addition, the nationwide relies upon mitigation to "buy down" the individual and cumulative impacts of projects under the nationwide. NWP 21 is a special interest nationwide designed to excuse the surface mining industry from compliance with the individual § 404 permit review process. It should not be reissued.

Compliance with § 404(e). NWP 21 includes no cap on impacts to wetlands or other waters. Instead, it relies on federal or state mining programs, coupled with the discretion of District Engineers, to place restrictions on surface mining projects that ensure their effects are minimal. On its terms, NWP 21 authorizes huge surface mining projects that destroy large areas of wetlands and waters, and can only be permitted under § 404 because they are accompanied by reclamation and mitigation plans. That is precisely the sort of project that the individual § 404 permit process, with its call for review by the federal resource agencies and its public notice and comment provisions, is intended to cover.

Nor, does the requirement of mitigation bring NWP 21 into compliance with § 404(e). As noted above, CWA § 404(e) requires that the gross (not net) impacts of a nationwide be minimal. Otherwise, the entire § 404 program could be reduced to a nationwide, cutting the other federal resource agencies and the public out of wetlands protection altogether, on the assumption that Corps' imposed mitigation requirements would result in no net loss of wetlands overall.

Compliance with NEPA and the 404(b)(1) Guidelines. The decision documents for NWP 21 include no analysis of those projects authorized under NWP 21 in the past, and address the utter destruction of the surface environment that attends strip mining with the same stock paragraphs used for all the other nationwides. This does not satisfy either NEPA or EPA's nationwide issuance regulations, both of which demand a reasonably definite articulation of the impacts of the projects NWP 21 authorizes.

In addition, the decision document does nothing to demonstrate that NWP 21 will comply with the 404(b)(1) Guidelines' prohibition of significant degradation of waters of the United States. The decision document raises only two safeguards to counter the varied threats to waters of the United States: mitigation and the discretion of District Engineers to add appropriate conditions to prevent upstream flood-

ing. As noted above, mitigation cannot bring a project with more than minimal impacts within the purview of a legitimate nationwide. But even if it could, the decision document fails to explain how, given its terrible track record, mitigation can reasonably be expect to fully offset the impacts of surface milling. Further, the document makes no effort to address the temporal gap between the destruction of wetlands and waters as mining activities commence, and the reclamation of the site when mining is finished.

As for the discretion of the DE to prevent upstream flooding, if compliance with 404(b)(1) turns on that, issuance of NWP 21 is illegal. Further, the decision document does not describe what conditions can avert flooding, even where the DE is inclined to impose them.

Other comments. In addition to violating CWA § 404(e) by authorizing projects with huge impacts on wetlands and waters, NWP 21 also violates § 404(a) by delegating to the federal Office of Surface Mining and its state counterparts the duties of the Corps under the individual permit process. NWP 21 is in essence another programmatic general permit, relying on these other regulatory programs to ensure that surface mining projects comply with the standards of the § 404 program. However, the federal and state surface mining programs are not bound by EPA's 404(b)(1) Guidelines or by the Corps' public interest test, and have very different agency missions than the Corps. In any event, the Corps has no statutory authority to delegate its responsibilities to these other agencies.

We also note that the Corps' hoary explanation that tight resources require the agency to stretch CWA § 404(e) past its breaking point has even less merit here than usual. The Corps' RAMS database appears to include no NWP 21 authorizations; the surveys of the 1995 activities of the Districts reveal only a handful: 3 in Baltimore; 4 in Fort Worth; 2 in Louisville; 2 in Kansas City; 1 in Albuquerque; 9 in Omaha; 5 in Pittsburgh; 3 in Tulsa; and none in any other District that shared its responses with us. Given that each of these projects likely had more than minimal individual impacts, there is no excuse for not requiring an individual permit for each.

Recommendation: The Corps should not reissue NWP 21.

NWP 23 Approved Categorical Exclusions

NWP 23 authorizes projects with any level of impacts that other agencies have categorically exempted from NEPA, and that the District Engineer agree should fall under the nationwide.

NWP 23 illegally delegates to all other federal agencies the ability to decide which of the projects they conduct or permit will need to meet the individual review standards of § 404. NWP 23 projects also violate the minimal impact standards of CWA § 404(e). NWP 23 should not be reissued.

Compliance with CWA § 404(e). Since NWP 23 places no substantive limits on what projects can be labelled as having categorically minimal impacts, the nationwide effectively has no ceiling on individual or cumulative impacts, and covers a broad range of activities. NWP 23 thus violates all three prongs of CWA § 404(e). Since the Corps lacks authority under the CWA to delegate the determination of minimal impacts to other agencies, NWP 23 would be illegal even if the criteria for NEPA categorical exclusions mirrored the minimal impact standard of § 494(e). In fact, the criteria for NEPA categorical exclusions and for CWA general permits do differ. One glaring example of this difference lies in the Department of the Army's recent proposed modifications to its minimal effect regulations. These modifications, proposed at 61 Fed. Reg. 37865, July 22, 1996, would amend 33 CFR § 651.21(c) to include a new categorical exclusion for construction and road building causing up to five acres of disturbance. Although the exclusion would not apply to the Corps as an actor (i.e., when the Corps dredges), it would operate under NWP 23 to shield Army projects with less than five acres of wetlands impacts from individual § 404 review. That is a far greater than minimal impact; but NWP 23 makes it possible for the Corps to authorize this under a nationwide.

NWP 23 does require other agencies to notify the Corps of their categorical exclusions (at least 30 days in advance of work in wetlands) and instructs the Chief of Engineers to solicit public comments. Whether these comments are intended to address the adoption of a particular categorical exclusion under NWP 23, or instead just the authorization of a particular project under NWP 23, is unclear. In any event, a thorough search of the 1994, 1995, and 1996 Federal Registers uncovers no public notices for categorical exclusions or projects under NWP 23, even though Corps RAMS database records indicate that more than 1,730 projects were authorized under NWP 23 between January 19,94 and June 1996. Further, our inquiries have failed to unearth any list of categories of activities eligible for NWP 23. How-

ever the requirement of public notice is intended to work, it does not appear to reach a wide audience.

On the other hand, authorizations under NWP 23 clearly do happen, with significant impacts. The incomplete data available from the Corps' RAMS database suggests that projects authorized under NWP 23 have larger individual impacts than those under perhaps any other nationwide. Given the state of the data, it is impossible to know for sure; for example, out of 524 NWP 23 authorizations in South Dakota between 1988 and 1996, only 4 records include acreage impact information. Nonetheless, on average, NWP 23 projects with recorded acreage impacts have larger average impacts than projects with recorded acreages under NWPs 12,13, 14, 26, or 29.

Compliance with NEPA and the 404(b)(1) Guidelines. The decision document largely recognizes the impossibility of conducting, a detailed assessment of the possible impacts of a nationwide as broadly drawn as NWP 23: "Numerous scenarios involving many possible combinations of activities along with combinations of site specific data could be considered here. However, only "typical" situations will be evaluated in order to address impacts of these activities." That is not an adequate basis on which to issue a nationwide. Even taking it on its own terms, however, the decision document is inadequate, as it never suggests what a "typical" situation might be.

At a minimum, the decision document should have given some indication of the set of activities the Corps intends this nationwide to cover. Does that set include Army activities with up to 5 acres of impacts? Highway projects that a state Department of Transportation has decided are environmentally benign? If not, what guidelines *does* the Corps intend to use to winnow appropriate categorical exclusions from ones that will not he adopted under WP 23? Faced with the blank slate of the language in the proposal, the decision document should at a minimum have analyzed thoroughly the types of projects that have been authorized under NWP 23 in the past, and used these as a basis from which to project future impacts. Instead, the decision document repeats the Corps' full set of boilerplate bullets, confirming that these bear no relation to any specific set of conditions likely to occur under this or any other nationwide.

The decision document for NWP 23 also fails to make any of the showings required by EPA and Corps regulations. Issuance of NWP 23 on the basis of this decision document would violate 40 CFR § 230.7(a) (requiring compliance with the minimal individual and cumulative impacts and similar in nature and impacts standards of CWA § 404(e)); 40 CFR § 230.7(b)(12) (requiring a complete evaluation of the potential impacts of the nationwide, including "a precise description of the activities to he permitted under the General permit, explaining why they are sufficiently similar in nature and in environmental impact to warrant regulation under a single general permit * * *"); and 40 CFR § 230.7(b)(3) (requiring an evaluations of the cumulative effects of the nationwide, including "the number of individual discharge activities likely to he regulated under" the nationwide). Though the decision document makes little effort to comply with these standards, NWP 23 is so unfocused that it seems doubtful any decision document on this nationwide could.

The NWP 23 decision document also fails to demonstrate that NWP 23 will not violate the 404(b)(I) Guidelines' prohibition of significant degradation of waters of the United States. Thus, reissuance of NWP 23 would also violate the Corps' regulations at 33 CFR § 330.5(b)(3) (requiring "404(b)(1) guidelines compliance analysis"). In addition, 33 CFR § 330.5(3) requires Corps' documentation to "reflect the Chief of Engineers' evaluation of the use of the permit since the last issuance." Since the Corps' records on the use of NWP 23 are poor, that may he difficult, but NWP 23 cannot he legally reissued without it.

Other comments. Although NWP 23 breaks the boundaries of CWA § 404(e) and the Corps and EPA's regulations, it has been shielded from public outrage by its complexity and by the fact that no list seems available of the activities it covers, so the public has no easy way to imagine what impacts it might allow. Nonetheless, reissuing NWP 23 in its current form is a shell game unworthy of the Corps.

It is also unnecessary. Any categories of projects with truly minimal impacts are appropriate candidates for other CWA nationwides or other general permits, whether or not they have been identified as categorical exclusions by other agencies. Rather than reissuing NWP 23, the Corps should pick out the categories of activities currently authorized under NWP 23 that genuinely meet the minimal impacts standards of CWA § 404(e) and then issue a legal nationwide permit for each of those categories.

We are also concerned that, as written, NWP 23 may smuggle into the nationwide permit system many of the same Farm Bill exemptions as proposed NWP B (see

below). NWF is not prepared to tolerate the use of NWP 23 to abdicate EPA and the Corps' CWA authority on agricultural lands.

Finally, we note that the decision document states that NWP 23 may he stacked with other nationwides. NWF feels this is an overly generous gift for the Corps to bestow upon projects whose nature it cannot trouble itself to speculate about in the decision document Anecdotal evidence suggests that a large number of the authorizations under NWP 23 are for highway projects, which are no doubt also benefitting from NWP 14 and perhaps NWP 17. Once again, we urge the Corps to explicitly prohibit stacking of these and all other nationwide permits.

Recommendation: The Corps should not reissue NWP 23. Instead, the Corps should examine each of the categorical exclusions which it has to date adopted under NWP 23, and should issue individual nationwides to cover each of these *if they are truly minimal in individual and cumulative impacts.*

NWP 26 Discharges Into Headwaters and Isolated Wetlands

Nationwide permit 26 (NWP 26) authorizes the discharge of dredged and fill material into non-tidal headwaters and isolated waters of the United States provided the discharge does not cause the loss of more than 10 acres of waters of the United States. Permittees are required to provide a predischarge notification (PDN) to the Corps for all fills between 1 and 10 acres. No notification to the Corps is required for fills of less than 1 acre.

First created in 1977 to reduce the Corps' permitting workload, NWP 26 and its forerunners have consistently authorized the loss of more wetlands than any other general permit. By far the most environmentally destructive and blatantly illegal of the Corps' nationwide permits, NWP 26 violates CWA 404(e), the 4O4(b)(1) guidelines, and plain common sense and should not be reissued.

1. Broken Promises of Monitoring

When the Corps proposed issuing the nationwide permits in 4991, NWF and many other organizations expressed reservations about a number of the permits, but were especially concerned that NWP 26 would authorize far more than the minimal individual and cumulative environmental impacts permitted by law. Some environmentalists called NWP 26 the "black hole" of wetlands destruction, but hard information on the permit's wetlands impacts was scarce. In an attempt to allay the public's fears, the Corps pledged to "monitor" the activities authorized by the permit and make necessary revisions:

> The Corps will continue to monitor the effects of NWP 26 and the appropriateness of the acreage limitations as well as the categories of waters that are appropriate for coverage under NWP 26. If, in the future, the Corps determines that lowering the acreage limits or eliminating categories of activities may he appropriate, the Corps will propose such changes for public comment 56 Fed. Reg. 59126.

In March of 1996, anticipating the Corps' proposed reissuance of NWP 26, NWF submitted a FOIA request to Corps Headquarters requesting the information necessary for a complete analysis of the impacts of the permit (Attached as Exhibit 2). There were several components to this request. First, NWF straightforwardly requested: "All studies, reports, assessments, evaluations, summaries, and other records indicating or estimating the direct or indirect cumulative environmental effects of NWP 26." To determine the acreage and environmental value of the wetlands filled under NWP 26, NWF requested: "All predischarge notifications (PDNs) received by the Corps' Districts of Divisions pursuant to NWP 26."

NWP 26 does not require a PDN for fills under 1 acre. The Corps therefore is not notified of all fills of under 1 acre that would qualify for NWP 26. To determine, as best as possible, the probable environmental impact and acreage of such fills, NWF requested: "All records, including verification requests and confirmations, individual water quality certifications, and individual coastal management consistency statements, pertaining to discharges authorized by NWP 26 causing the loss of less than one acre of waters of the United States."

Finally, to determine how often discretionary authority was used by the Corps to "safeguard" the environment, and to determine what criteria was used, NWF requested: "All records pertaining to every exercise of discretionary authority by the Corps Districts or Divisions to require individual authorizations for specific discharges, otherwise eligible for authorization under NWP 26, because the discharge

would potentially have more than minimal individual or cumulative adverse environmental effects."[2]

In each case, NWF noted that the Corps could substitute a summary of the requested records as long as it included the necessary informational description of the activities causing the loss of the wetlands, a description of the environmental effects of each activity, a description of the aquatic ecosystem affected by each activity, etc. In light of the Corps' commitment to monitor NWP 26's effects and the approaching proposal to reauthorize the permit, NWF presumed that the Corps would be able to quickly and efficiently process and reply to this request. This was not the case.

As of the date of submission of these comments, only 20 of the 36 Corps' Districts had responded with information to NWF's request. Most tellingly, not one District was able to provide any studies, reports, assessments, evaluations, summaries, or other records estimating the direct or indirect cumulative environmental effects of NWP 26.

A few Districts were able to provide some information concerning the assertion of discretionary authority, but most did not have or were unable to access the information. The Rock Island District had no records responsive to the request for assertions of discretionary authority. The Walla Walla District did not recall any exercise of discretion, and its database did not contain the information. The Baltimore District had apparently exercised discretionary authority, but its database did not contain that information and "an extensive review of all our individual permit files would be required to determine those that resulted from exercising discretionary authority.

In general, the Districts that responded to NWF's request indicated that they could not collect whatever information they possessed to answer NWF's queries within a reasonable time-frame. For instance, the Omaha District stated:

> The materials you have requested are voluminous, and are located at field offices located in Helena, Montana; Cheyenne, Wyoming; Pierre, South Dakota; Bismarck, North Dakota; Kearney, Nebraska; Littleton, Colorado; and Omaha, Nebraska Because there is no database that contains the requested information and there are no summaries of the requested information, the files at each of the aforementioned field offices would have to be manually searched file by file in order to provide you with copies of the requested documents. There are approximately 3,580 NWP 26 actions which would have to be reviewed. Such a manual search would require many man-hours and would not be completed by June, at which time it is expected that the proposed modified NWP 26 will be published in the *Federal Register* for review and comment.

Presumably, it will be necessary for these searches to be done in order for the Corps to make a good-faith attempt at assessing NWP 26's impacts, but the replies of Omaha and the other Districts suggest that these searches will never take place.

In order to preserve the Corps' resources and make it possible for Corps Districts to respond to the FOIA within the five months prior to the expiration of the comment period on NWP 26, NWF ultimately agreed to accept a RAMS computer printout summarizing the information the Corps had on each fill. Despite this, less than 2/3 of the 28 Districts that have RAMS records for NWP 26 responded before these comments were submitted.[3] Copies of all of the computer printouts submitted to NWF are attached as Exhibit 3.

The RAMS queries the Districts ran for NWF generally listed all NWP 26 authorizations recorded on a district's database since 1991. They provided the permit number, the applicant's name, the name of the waterway a portion of which was to be filled, the county, section, township and range of the fill, a short description of the action authorized, the requested and approved acreage of wetlands directly impacted, and the acreage of compensatory mitigation provided.

The Rams database does not contain much of the information most relevant to a determination of NWP 26's impacts. The database does not record the value of the wetlands that are filled, secondary impacts of fills, or the types of mitigation provided, making it impossible to determine the permit's full impacts. The database does not record NWP 26 requests over which the Corps assumed discretionary au-

---

[2] In its preliminary decision document, the Corps notes that "an additional safeguard [to protect the environment] is a provision that allows the Chief of Engineers, division engineers and/or district engineers to: assert discretionary authority and require an individual permit for a specific action; modify NWPs for specific activities by requiring special conditions on a case by case basis; add special conditions on a regional basis for certain NWPs; or take action to suspend or revoke a NWP" reply to this request. This was not the case.

[3] Sixteen districts with RAMS compatible databases responded. Two additional districts provided computer summaries from databases incompatible with the RAMS system.

thority, making it impossible to determine the validity of the Corps' 1991 claim that significant effects on the environment would be prevented by the Districts' exercise of their discretionary authority. Finally, the database does not document resource agency participation in NWP 26 authorizations, making it impossible to judge the Corps' claims that such participation is ineffective and does not result in resource protection.[4]

Generally, the categories of information that are recorded in the RAMS database provided incomplete data due to district record-keeping practices. The usefulness of the print outs NWF received varied widely with the care and attention with which districts had input data into their databases. For issuance, several districts made no attempt to record the nature of the fills authorized. Thus, the Detroit District's unhelpful description of the nature of activities authorized varied primarily between "discharge of fill material" and "discharge of dredged material," while the Philadelphia District more laconically limited its description in most instances to "NWP 26" or "fill."

None of the Districts' RAMS replies provided complete acreage information The Kansas City District's reply provided acreage figures for only 58 of the 3,305 NWP 26 fills it recorded. *See* Exhibit 3. There was no record of the acreage filled by 492 of the Philadelphia District's 789 recorded fills. *Id.* In all, of the 39,227 NWP 26 permit authorizations recorded on the RAMS database since 1988, only 14,468, 37%; had valid acreage figures recorded with them. Environmental Working Group, *Nationwide Permitting Summary for 1988–1996* (1996) (attached as Exhibit 5).

Ultimately, the RAMS database allows us to make some estimates regarding the impacts of NWP .26. It falls far short, however, of any kind of comprehensive "monitoring" of impacts and fails to provide the information the Corps will need to determine that fills authorized under NWP 26 are having minimal individual and cumulative effects on the environment. On the whole, the Corps' response to NWF's FOIA request suggests that the Corps is approaching its appointed task of evaluation with less than good faith.

2. NWP 26 Authorizes Activities that Are Not Similar in Nature

A general permit can only be issued for categories of discharges that are similar in nature. 33 U.S.C. § 1344(e). This similarity must exist for both the nature and impact of the activity. 40 CFR § 230.10(a)(1). In fact, the Corps must justify a general permit with a written evaluation of the activities to be authorized, including an explanation of "why they are sufficiently similar in nature and in environmental impact to warrant regulation under a single general permit." 40 CFR § 230.7(b)(2).

In enacting the "similar in nature" requirement for general permits, Congress intended to limit the Corps to issuing permits for activities for which it could accurately predict the environmental impacts. General permits were supposed to be a narrowly circumscribed exception to the normal rule that dischargers obtain individual section 404 permits. The exception applies only when the adverse impacts from a specific type of fill activity are minimal. The similar activities requirement provides assurance that those discharges authorized by general permit will be frilly anticipated and their impacts accurately assessed. *See generally* H.R. Conf. Rep. No. 830, 94th Cong., 1st Sess. (1977), *reprinted in* 1977 U.S.C.C.A.N. 4424, 4475.

NWP 26 straightforwardly authorizes "discharges of dredged or fill material into headwaters and isolated waters." Since the Corps' duty is to regulate the discharge of dredged or fill material, NWP 26 encompasses the entire realm of activities Congress charged the Corps with regulating. Corps records indicate that a wide variety of activities have indeed been authorized under the permit, including: bridge construction, darn construction, golf course construction, bank stabilization, placement of riprap, placement of culverts, road construction, road widening, sports field construction, Wal-Mart construction, drainage of wetlands for hay production, the dumping of tires, sawdust, wood debris, concrete, tires, and vegetable matter into wetlands, stock pond construction, trout pond construction, conversion of forested wetlands to faring, residential subdivision construction, townhouse complex construction, mobile home construction, juvenile detention home construction, service station construction, septic tank drain field creation, sand mining, gravel mining, placer mining, fill for stream crossing for cattle, drilling of exploration wells, railroad spur line construction, and chicken composter construction. *See* Exhibit 3. In its preliminary decision document, the Corps notes that "[b]ecause NWPs authorize activities on a nationwide basis, it is difficult to predict all of the indirect impacts

[4] The Sacramento field office of the U.S. Fish and Wildlife Service has suggested that its comments on NWP 26 are ineffective because the Corps routinely ignores them. U.S. Fish and Wildlife Service, *Wetland Losses Within Northern California from Projects Authorized under Nationwide Permit No. 26* (1992). Attached as Exhibit 4.

that may be associated with each individual action." This problem becomes far more acute when there are no limitations on the types of activities that are authorized under the permit Neither the Corps, the resource agencies, nor the concerned public can predict the nature and impacts, particularly the secondary impacts, of the limitless categories of fill authorized by NWP 26.

The geographical limitation on fills authorized under NWP 26 to headwaters and isolated wetlands is not a substitute for a limitation on the nature of the activities authorized. Legally, limiting fill to a specific type of wetlands does not address the "nature" of the categories of fill authorized. Scientifically, limiting fill to headwaters and isolated waters as a method of limiting the impacts of the fill is unjustified. A 1995 National Academy of Sciences' National Research Council Report on the scientific basis for the characterization of wetlands found that "[t]he scientific basis for policies that attribute less importance to headwater areas and isolated wetlands than to other wetlands is weak." "Many functions of wetlands can be independent of isolation or adjacency * * * [and] headwaters affect water quality downstream and perform many of the other functions of wetlands." National Research Council, *Wetlands: Characteristics and Boundaries* (1995), p. 138 (attached as part of Exhibit 15). NWP 26 violates the "similar nature" requirement of section 404(e).

3. NWP 26 Authorizes Activities that Have More than Minimal Individual and Cumulative Effects on the Environment

(a) Individual Impacts

There is little debate over the general values of wetlands and the importance of wetlands to the environment. Corps regulations recognize wetlands as special aquatic sites and state that "[m]ost wetlands constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest," 33 CFR §320.4(b)(1). As noted above, there is no scientific basis for differentiating headwater areas and isolated waters from other wetlands on the basis of wetlands value.

Indeed, there is ample evidence of the value of vernal ponds, prairie potholes and playa lakes—all examples of isolated wetlands. The isolated groundwater wetlands of the Cimarron Terrace in Northcentral Oklahoma provide habitat for migratory waterfowl and some in mammals, and protect groundwater by filtering and detoxifying excess nutrients and organic matter resulting from feedlot operations and local heavy reliance upon fertilizers. Thomas J. Naylor, Nanette E. Erickson, Renn Tumlison, J. Allen Ratzlaff, and Kurt D. Cunningham, *Groundwater Wetlands of the Cimarron Terrace Northcentral Oklahoma,* June 1, 1984 (attached as part of Exhibit 15).

The Southern Great Plains playa region sustains up to 1 million overwintering waterfowl a year. Fish and Wildlife Service, *Playa Wetlands and Wildlife on the Southern Great Plains: A Characterization of Habitats,* September, 1983 (attached as part of Exhibit 15). The playa lakes are the second most important habitat fob winter waterfowl in the Central Flyway—exceeded only by the Gulf Coast—and provide valuable watering, roosting, and foraging sites. *Id.* at 85. Prairie potholes recharge groundwater and help maintain high water tables, provide abundant forage for livestock, and are critical to the maintenance of continental waterfowl populations. They also provide habitat for furbearers, resident game species, and many species of non-game wildlife, and store runoff water, thus serving as potential floodwater storage reserves. Fish and Wildlife Service, *Glaciated Prairie Wetland Functions and Values: A Synthesis of the Literature* (1988). *See also Wetland Values in Prairie Pothole Region of North America* (1982) (presented at the Great Plains Agricultural Council, North Platte, Nebraska); Daniel E. Hubbard & Raymond L. Linder *et al, Spring Runoff Retention in Prairie Pothole Wetlands,* Vol. 41, No. 2 Journal of Soil and Water Conservation 122–125 (March-April 1986); National Audubon Society, *Small and Farmed Wetlands: Oases for Wildlife* (1996). These documents are all attached as part of Exhibit 15.

Small, isolated wetlands in the Northeast play an important role in reducing isolation among patches of wetlands habitat, therefore decreasing extinction rates of megapopulations of wetlands organism such as turtles and small birds. James P. Gibbs, *Importance of Small Wetlands for the Persistence of Local Populations of Wetland-Associated Animals,* Vol. 13, No. 1, Wetlands 25–31 (1993) (attached as part of Exhibit 15). Northeastern vernal pools provide critical breeding habitat for wood frogs and mole salamanders, including the rare Blue-spotted, Jefferson, and Marbled Salamanders. Steven M. Roble, Ph.D., *Life in Fleeting Waters,* Massachusetts Wildlife 22–28 (attached as part of Exhibit 15). California vernal pools provide habitat for several specialized and rare plants and animals. U.S. Fish and Wildlife Service, *Wetland Losses Within Northern California from Projects Authorized under Na-*

tionwide Permit No. 26. See also Susan Wynn, *Southern California Vernal Pools and Species* (1993); *Native Bee Pollinators of Vernal Pool Plants,* Vol. 23, No. 2 Massachusetts Wildlife 22–28 (Spring 1989) (attached as part of Exhibit 15).

Headwater systems include alpine tundra, bogs, some Carolina bays, fens, nonalluvial swamps, palm oases, pocosins, sedge meadows and spring seeps. These systems provide a permanent or seasonal source of water within the landscape, typically creating higher plant biomass. They maximize wildlife diversity, provide a greater diversity of microhabitats, and are important movement corridors for fish and wildlife. They also provide water quality functions and export detritus to downstream systems. R. Wilson Laney, *Preliminary Assessment of the Cumulative Effect of Nationwide Permit 26 on Headwater and Isolated Wetlands and Deepwater Area and Functions, and Policy Implications* (1990). Attached as Exhibit 6.

In short, isolated wetlands and headwaters are often ecologically valuable. The destruction of ⅓, 1, 3, 5, or 10 acres of such wetlands can and has had more than a minimal individual effect on the environment. For instance, one California project authorized under NWP 26 eliminated over 500 vernal pools, causing what the U.S. Fish and Wildlife Service termed "tremendous adverse impacts on wetlands." *Wetlands Losses Within Northern California.*

The effects of the direct fills of headwaters and isolated wetlands are multiplied by the secondary impacts of those fills. Secondary impacts are unpredictable at the best of times, but particularly when associated with the limitless categories of activities authorized under NWP 26. The Corps' NWP 26 records provide no information on the secondary effects of NWP 26 fills.

(b) Cumulative Impacts

Determining the precise cumulative effect of NWP 26 on the environment is difficult due to the structure of the permit. Under NWP 26, a PDN is not required for fills under 1 acre, so the Corps is unable to keep track of all such fills. However, the Corps estimates that 50,000 projects authorized under general permits were conducted without notice to the Corps in 1995 alone, suggesting that a great number of NWP 26 fills are taking place without the Corps' knowledge. Attached as Exhibit 7.

The Corps' record-keeping also makes determining cumulative effects difficult. Twenty-eight of the thirty-six Corps Districts are now using the RAMS database to attempt to track wetlands fills authorized under section 404. However, as noted above, much of the relevant data for many of the PDNs have not been entered into the Corps' RAMS database. The Districts that do not use the RAMS system apparently rely on their own database or their permit files to determine the cumulative impacts of the permits. Only four of these Districts had responded to NWF's March FOIA request at the time of the submission of these comments.

Despite these difficulties, some general estimates of the direct acreage impacts of fills authorized under NWP 26 can be made. Since 1988, the Corps has recorded the authorization of 16,464.9 acres of fill under NWP 26 in its RAMS database. Personal Communication with Clark Williams, Environmental Working Group. The Environmental Working Group estimates that the direct cumulative impact authorized under NWP 26 by the Corps' Districts which have used the RAMS system is 32,405.5 acres. Environmental Working Group, *NWP 26 Permitting Summary for 1988–1996* (1996). This figure is extremely conservative. It does not include secondary impacts of fills or the acreage authorized by the Districts that are not using the RAMS database. Even more importantly, it does not include fills of under 1 acre that were not reported to the Corps.

It is almost certain that the loss of 32,405.5 acres under NWP 26 has had more than a minimal cumulative impact on the environment. The few studies that have been done of NWP 26 impacts in local areas support this conclusion. In California, the U.S. Fish and Wildlife Service found that over 700 acres of wetlands were filled under NWP 26 within the work area of the Sacramento field in six years. The Service concluded that "from a cumulative loss perspective, the loss of over 700 acres is significant." *Wetland Losses Within Northern California from Projects Authorized under Nationwide Permit No. 26.* Similar studies of impacts in North Carolina and a portion of Colorado reached similar conclusions. *Preliminary Assessment of the Cumulative Effect of Nationwide Permit 26 On Headwater and Isolated Wetlands and Deepwater Area and Functions and Policy Implications;* U.S. Fish and Wildlife Service, *Section 404 and Wetland Alterations in the Platte River Basin of Colorado* (1992). Attached as Exhibit 8.

Given these studies and the evidence demonstrating that headwaters and isolated wetlands perform valuable functions including providing important wildlife habitat, flood prevention, groundwater recharge, and water quality enhancement, the loss,

at a bare minimum, of 32,305 acres of wetlands over the last eight years must be considered extremely significant. Certainly, the Corps' records and database provide no evidence that would support a determination that the environmental effects of NWP 26 are cumulatively minimal.

4. Proposed Changes in the Acreage Caps of NWP 26

The Corps has requested comments on its proposal to revise NWP 26 to only authorize fills of up to 5 acres, with a PDN required for all fills over ½ acre, or to only authorize fills of up to 3 acres, with a PDN required for all fills over ⅓ acre.

These changes will not significantly alter the impacts of NWP 26. A PDN provides the opportunity for better record-keeping, but it does not provide the environmental safeguards of the individual permitting program or guarantee the elimination of projects that will have more than a minimal individual effect on the environment.

According to the Corps' RAMS database, only 6.6% of the NWP 26 fills the Corps is informed of are for more than 3 acres, and account for only 18% of the acreage filled under the permit. Environmental Working Group Facsimile to Jim Adams, August 26, 1996 (attached as Exhibit 9). Once again, it must be emphasized that these figures do not include the acreage filled by projects of less than 1 acre of which the Corps is not aware. Thus, the elimination of fills of over 3 acres from NWP 26 will not eliminate the permit's more than minimal cumulative effect on wetlands.

5. Endangered Species Act

NWF has discussed the Nationwide permit program's failure to comply with the Endangered Species Act (ESA) elsewhere in these comments. Headwaters and isolated wetlands can and do support rare, threatened and endangered species, and a failure to comply with the ESA may result in the loss of species. *Wetland Losses Within Northern California from Projects Authorized under Nationwide Permit No. 26: Life in Fleeting Waters; Southern California Vernal Pools and Species; Native Bee Pollinators of Vernal Pool Plants.*

6. The Preliminary Decision Document's Analysis of NWP 26

The Corps' Preliminary Decision Document for NWP 26 is entirely inadequate as an analysis of the permit's compliance with 404(e), the 404(b)(1) guidelines and as the environmental analysis required by NEPA.[5] The few portions of the document's discussion that are not boilerplate consist of bland assurances that the permit will have only minimal environmental effects. The Corps does not even bother to estimate the acreage loss of wetlands due to NWP 26, and therefore provides no discussion of how it has reasonably determined that the impact of such a loss is minimal.

The discussion of the characteristics of the aquatic ecosystem is particularly disappointing. It ignores many of the functions and values of isolated wetlands and headwaters, such as their habitat value and role in groundwater recharge, that NWF has detailed above in the individual impacts section of the NWP 26 comments. As the Corps has limited resource agency participation in the nationwide permitting program as unnecessary, the Corps has emphasized its own knowledge of wetlands. Surely, then, a discussion which includes the actual values of the wetlands threatened by NWP 26 is within the realm of the Corps' expertise. Although the decision document offers no details, the Corps appears to at least partially depend upon the conditions attached to NWP 26 to prevent the permit from authorizing fills with significant individual and cumulative impacts. The Corps has disclosed no information concerning the effectiveness of current conditions—whether applicants are following them or whether, when followed, they have reduced impacts to a minimal level—to justify this reliance. Adding conditions that will not be enforced or obeyed to a permit will not reduce the impacts of fills authorized by that permit to a minimal level. The Corps does not have enough information to make a determination that conditions will reduce the impacts of fills authorized under NWP 26 to minimal.

The Corps also suggests that NWP 26 impacts will be minimal because the permit will be regionally conditioned "to reflect the unique environmental conditions within each state or region." The Corps cannot determine that a nationwide permit will have minimal individual and cumulative effects on the environment on the basis of a speculative regional conditioning process. If the Corps wishes to use regional conditions as a basis for a determination that NWP 26 will have minimal individual and cumulative effects, it must first determine what those regional conditions will be.

Ultimately, the embarrassing lack of analysis in the preliminary decision document emphasizes the lack of information available to the Corps on NWP 26. The

---

[5] See the general discussion of nationwides above for more on the Corps' inadequate analysis of the permit's compliance with the 404(b)(1) Guidelines and with NEPA.

Corps' failure to effectively monitor the NWP 26 program and the effects of fills under NWP 26 force it to rely on broad, unsupported statements about NWP 26 and the entire nationwide program to justify a determination that the permit will have no more than minimal effects on the environment. The information that is available on the impacts of NWP 26 clearly demonstrates that the permit will have more than minimal individual and cumulative effects on the environment, and a determination by the Corps that it will not would be arbitrary and capricious.

Recommendation: The Corps should not reissue NWP 26.

NWP 27 Wetlands and Riparian Restoration and Creation Activities

NWP 27 currently authorizes wetland and riparian restoration and creation activities under federal programs managed by USFWS and the Natural Resource Conservation Service (NRCS). The Corps is proposing to modify NWP 27 to apply to all restoration projects on federal lands, and has requested comments on whether NWP 27 should retain its current five-year time limit; whether it should apply to projects on nonfederal lands; and whether it should include enhancement as an option.

NWF opposes the unrestricted extension of NWP 27 to private lands. Restoration programs under USFWS and NRCS supervision at least provide some prospect of oversight and monitoring; NWP 27 authorization for any landowner who decided to "build a wetland" would become an unmanageable loophole. For similar reasons, NWF opposes broadening NWP 27 to include "enhancement." Given the current scarcity of Corps monitoring to ensure compliance with the terms of nationwides, adding "enhancement" would issue an invitation for landowners to convert wetland types back and forth with little scientific rationale and damaging results. In no circumstances should NWP 27 apply to wetlands restored or created in fulfillment of mitigation responsibilities or as part of a mitigation bank.

Finally, NWF strenuously opposes eliminating the five year time limit on the period during which a landowner can destroy a restored or created wetland. The thrust of the CWA is to protect wetlands and their functions present on the landscape. Extending NWP 27 indefinitely would create a class of exempt wetlands that could never again be protected by § 404. For the same reasons, NWF opposes expanding NWP 27 to cover wetlands created during mine reclamation; folding those wetlands in under NWP 27 is particularly inappropriate given that those wetlands are brought into being as part of a reclamation plan, to offset the loss of natural wetlands that where protected under CWA § 404.

Nationwide Permit 29; Single Family Housing NWP

Nationwide Permit 29 (NWP 29) provides a blanket authorization, subject to certain conditions, to discharge dredged or fill material in up to one-half acre of nontidal waters of the United States for the purpose of constructing or expanding single-family residences and "attendant features" such as garages, driveways, septic systems, landscaping, wading pools, and tennis courts. The permit was published on July 27, 1995, and became effective on September 25, 1995. The Corps is now proposing to reissue NWP 29 without change.

NWF opposed NWP 29 when it was issued last year. The permit's legal defects are described in our 60-day notice of intent to sue, dated March 5, 1996, and in the complaint filed in U.S. District Court, District of Alaska, on July 15, 1996. The two documents are attached as Exhibits 10 and 11, respectively. NWF objects to the reissuance of NWP 29 for the same reasons it opposed the permit when it was first issued.

NWF's opposition to NWP 29 also stemmed from the lack of public support or public need for an expansive residential fill permit. Although the Corps suggested it was satisfying an urgent demand, the public itself generally opposed the permit's issuance. Sixty-seven percent of those people commenting on NWP 29 opposed its issuance, while only twenty-eight percent fully supported it. Commentors from the public sector, many with professional wetlands expertise, overwhelmingly opposed NWP 29. Seventy-one government commentors from thirty states opposed the permit while only six government commentors supported it.

NWF urges the Corps to carefully consider these public comments in deciding whether to reissue NWP 29. In addition to demonstrating widespread opposition to the permit, many of the letters contain detailed substantive comments on the one-half acre threshold, the value of smaller wetlands, the potential individual and cumulative impacts, enforcement and procedural problems, "attendant features," and endangered species concerns. Relevant excerpts are attached as Exhibit 12. The comment letters are especially important because many people who commented on NWP 29 when it was first proposed may choose not to write again, less than a year later, on an identical proposal. We have therefore attached copies of all public comments submitted in response to the Corps' notice of March 23, 1995, as Exhibit 13.

The general public was not alone in opposing NWP 29. NWF used the Freedom of Information Act to obtain records concerning the permit from the Corps' district offices. Of 56 comment letters written by the Department of Interior, Fish and Wildlife Service, National Park Service, National Marine Fisheries Service, and Environmental Protection Agency, all but four expressed concern with the proposal to issue NWP 29. Most of the agency commentors opposed the permit stating it would cause more than minimal cumulative environmental impacts. This opinion was frequently shared by the Corps' own staffs. In fact, the large majority of the 28 comment letters and memoranda prepared by Corps personnel expressed concern that NWP 29 was unnecessary, illegal, or would have unacceptable environmental consequences. Copies of comment letters from the federal resource agencies and the Corps are attached as Exhibit 14.

In the public notice, the Corps invited comment on the impacts of NWP 29. We have responded to this request in two ways. First, we have collected studies, articles, and other papers on the functions and values of small wetlands. These documents indicate that small wetlands are not inherently unimportant, and that we cannot assume destruction of small wetlands will necessarily have minimal impacts on the environment. Second, we looked at several fills actually authorized by NWP 29. These examples show that even the smallest of fills can have important adverse effects.

We have attached as Exhibit 15 the following documents describing the functions and values of small wetlands: National Research Council, *Wetlands: Characteristics and Boundaries* (1995); James P. Gibbs, *Importance of Small Wetlands for the Persistence of Local Populations of Wetland-Associated Animals*, Vol. 13, No. 1 Wetlands 25–31 (1993); Ann Robinson, *Small and Seasonal Does not Mean Insignificant: Why It's Worth Standing up for Small Wetlands,* Journal of Soil and Water Conservation 586–590 (November-December 1995); Susan Wynn, *Southern California Vernal Pools and Species* (1993); Fish and Wildlife Service Briefing Statement, *Importance of Small, Shallow Wetlands;* Fish and Wildlife Service Fact Sheet, *Temporarily Flooded Wetlands;* Fish and Wildlife Service Fact Sheet, *Prairie Wetlands Less Than one Quarter Acre in Size;* Fish and Wildlife Service Memorandum and Attachments, *Use of Shallow Wetlands by Breeding Waterfowl;* Memorandum on the Value of Small Wetlands From Billy Teels, Co-Leader, National Wetlands Team, to Doug Williams, Legislative Specialist, Natural Resources Conservation Service; Memorandum From Bill Wilen, National Coordinator, National Wetlands Inventory, to Chief, Fish and Wildlife Service Ecological Services (July 12, 1985); Letter From Rollin Sparrowe, President of Wildlife Management Institute, to Wetlands Stakeholders (May 4, 1995); Wildlife Management Institute Fact Sheet, *Effects on Ducks and Duck Hunting of Removing Federal Protection of Small Wetlands;* Robbin W. Thorp & Joan M. Leong, *Native Bee Pollinators of Vernal Pool Plants,* Vol. 23, No. 2 Fremontia 3–7; Steven M. Roble, *Life in Fleeting Waters,* Massachusetts Wildlife 22–28 (Spring 1989); W.G. Crumpton *et al., Wetlands and Streams as off-Site Sinks for Agricultural Chemicals,* Clean Water-Clean Environment–21st Century, Volume I: Pesticides 49–52 (1995); Taylor A. De Laney, *Benefits to Downstream Flood Attenuation and Water Quality as a Result of Constructed Wetlands in Agricultural Landscapes,* Journal of Soil and Water Conservation 620–626 (November-December 1995); E.A. Colburn, Massachusetts Audubon Society, *Fact Sheet on Vernal Pools and the Clean Water Act* (1993); Memorandum and Attachments from Ann Jennings, Virginia Field Office, Fish and Wildlife Service, to Lauri Zicari, Ecological Services, Fish and Wildlife Service (June 23, 1995); Leo P. Kenney, *Wicked Big Puddles: A Guide to the Study and Certification of Vernal Pools* (1995); Raymond L. Linder & Daniel E. Hubbard, *Wetland Values in Prairie Pothole Region of North America* (1982) (presented at the Great Plains Agricultural Council, North Platte, Nebraska); Raymond L. Linder *et al., Wetlands and Agriculture* (1985) (presented at the Technologies to Benefit Agriculture workshop); Daniel E. Hubbard & Raymond L. Linder, *Spring Runoff Retention in Prairie Pothole Wetlands*, Vol. 41, No. 2 Journal of Soil and Water Conservation 122–125 (March-April 1986); Fish and Wildlife Service, *Glaciated Prairie Wetland Functions and Values: A Synthesis of the Literature* (1988); National Audubon Society, *Small and Farmed Wetlands: Oases for Wildlife* (1996); Fish and Wildlife Service, *Wetlands of the United States: Current Status and Recent Trends* (1984); Fish and Wildlife Service & Environmental Protection Agency, *Wetlands Values and Management* (1981); Thomas J. Taylor *et al., Groundwater Wetlands of the Cimarron Terrace, Northcentral Oklahoma* (1984); Fish and Wildlife Service, *Playa Wetlands and Wildlife on the Southern Great Plains: A Characterization of Habitat* (1983); Fish and Wildlife Service, *Playa Lakes Symposium Proceedings* (1981). These documents demonstrate that small wetlands are often extremely valuable from an environmental and societal standpoint. In particular, small wet-

lands provide water quality enhancement, flood control, and biodiversity and wildlife habitat.

The large environmental effects of filling small wetlands are easily seen in the discharges already authorized by NWP 29. For instance, the Corps has authorized the filling of a small forested wetland adjacent to Mullett Lake in Cheboygan County, Michigan (File Number 95–030–010–0B). Mullett Lake is a world-class aquatic resource. It has excellent water quality, is an important fishery, and is critical to the resort and tourism industries of Cheboygan County and the State of Michigan. Wetlands surrounding Mullett Lake, while often small, act as a natural filtration system that removes nutrients and sediment, and maintains clean, swimmable waters. In addition, these wetlands have aesthetic values that are enjoyed by residents and visitors to the lake, and provide habitat for birds and other wildlife. The destruction of small wetlands adjacent to Mullett Lake, such as that authorized by NWP 29, has negatively affected water quality, eliminated wildlife habitat, contributed to soil erosion, and has adversely affected the natural beauty of the Mullett Lake area.

Fills authorized by NWP 29 are also causing the fragmentation and isolation of historically productive wetlands complexes. The Corps has granted approval for the construction of several residences and their "attendant features" in the Fleming Plantation subdivision in Crown Point, Louisiana. The wetlands at two sites are hydrologically connected to wetlands adjacent to Bayou Barataria and Jean Lafitte National Historical Park and Preserve. Similar piecemeal destruction of wetlands complexes under NWP 29 has occurred in the nearby Bayou Bonfouca Estates subdivision, Oak Knoll Estates subdivision, Pineview Heights Farms subdivision, Bayou Liberty Estates subdivision, Red Gap Acres subdivision, Green Woods subdivision, Holiday Acres subdivision, Southwind subdivision, and Acadian Estates subdivision. Although the surface area of the individual fills is relatively small, the cumulative effects of these fills is significant. Moreover, fragmentation and exposure to development have degraded the remaining wetlands complexes and diminished their ability to function productively.

Recommendation: The Corps should not reissue NWP 29.

NWP 32 Completed Enforcement Actions

NWP 32 currently substitutes for after-the-fact (ATF) individual authorization of an illegal fill that remains in place as part of a court-approved settlement or court order. The Corps reissuance proposal expands NWP 32 to cover administrative settlements between the Corps and violators of § 404.

NWP 32 in its current form authorizes dissimilar activities with any level of impacts and is therefore illegal. The Corps' reissuance proposal is even worse, expanding NWP 32 to cover situations where the only public notice of a violation is the ATF permit application that NWP 32 eliminates. The Corps should not reissue NWP 32, and should certainly not expand it.

Compliance with § 404(e). NWP 32 flatly violates both the "similar in nature" and the "minimal impact" standards of CWA § 404(e). Projects authorized under NWP 32 can be of any type—and, so long as they are part of a court-approved settlement, of any size. The proposed expansion of NWP 32 would cover projects in nontidal wetlands with up to 5 acres of impacts and projects in tidal wetlands with up to one acre of impacts. This can amount to more than minimal impacts, and will certainly accrete to more than minimal cumulative impacts.

Compliance with NEPA and the 404(b)(1) Guidelines. Like several other illegal nationwides, NWP 32 authorizes not a category of activities, but a procedure for exempting activities from individual review, with the nature of those activities to be worked out later. In the case of NWP 32, that "later" is the time when a violation of § 404 is settled. As in the case of NWPs 21, 23, and proposed NWPs B and D, the decision document for NWP 32 faces the twin hurdles of trying to evaluate the potential impacts of projects about which nothing can be known until well after the nationwide is issued, and of trying to demonstrate that these unknown impacts will not violate the 404(b)(1) Guidelines. Inevitably, it fails.

The futility of trying to estimate the impacts of a nationwide whose terms are not defined reveals itself it the Corps' assessment of the extent and permanence of the impacts of a project under NWP 32: "the nature and scope of the work authorized by the NWP will most likely restrict the extent of the beneficial and detrimental effects to the area immediately surrounding the activity." The Corps cannot possibly know this to be true, particularly when the Corps has proposed to let *any* administrative settlement with up to five acres of inland wetlands impacts fall under NWP 32.

The Corps' boilerplate assessment becomes particularly inapposite as the decision document tries to explain why NWP 32, which as a nationwide does not require any

consideration of alternatives, is in the public interest: "most situations in which there is an unresolved conflict as to resource use, arise when environmentally sensitive areas are involved (e.g. special aquatic sites, including wetlands) or there are competing uses of a resource (e.g. use of a waterway for commercial versus recreational purposes). The nature and scope of the proposed action as well as the terms and conditions of the NWP minimize the likelihood of such a conflict." In fact, however, the Corps exercises its prosecutorial discretion freely to avoid punishing § 404 violators, and is unlikely to be enforcing unless an environmentally sensitive area *is* involved. The rationale for why consideration of alternatives is not necessary thus falls to pieces.

Other comments. A troubling consequence of the proposed *expansion* of NWP 32 is the loss of public notice for the majority of projects that currently receive ATF authorizations by the Corps. In certain regions of the country, that is no small number. A recent study by the National Audubon Society's Great Lakes Regional Office found that of the 32 individual Corps permits issued in Ohio between 1990 and 1995, 12, or 37.5%, were ATF permits (Julie Sibbing, The Impact of Individual § 404 Permits on Ohio Wetlands, 1990–1995). Clearly, in parts of the Nation, replacing the ATF permits with NWP 32 could cut the public off from a significant chunk of the small set of projects that currently receive individual review.

The lack of public notice for administrative settlements authorized under NWP 32 is particularly disturbing in the light of the great latitude NWP 32 provides for the Corps to agree to poor settlements. Beyond the acreage limits for administrative settlements, the decision document notes only that "the non-judicial settlement agreement must provide for environmental benefits, to an equal or greater degree, than the environmental detriments caused by the unauthorized activity." That standard will melt far too easily under political pressure to allow violators to escape with slap on the hand settlements—settlements that the public has no way of tracking because they are never placed on public notice.

Recommendation: The Corps should not reissue NWP 32 and should not expand it.

NWP 34 Discharges Associated with Cranberry Bogs

NWP 34 allows the destruction of up to 10 acres of wetlands per cranberry grower during each life of the permit (five years). Wetlands may be destroyed under the nationwide for conversions off natural wetlands into cranberry bogs, dikes, and water control structures. NWP 34 does require a PCN to the Corps, who in turn notifies the other federal resource agencies. The Corps' RAMS database records 45 uses of NWP 34 between 1988 and June 1996; the 34 of these with recorded acreage impacts averaged over 3 acres of impacts per authorization.

NWP 34 is a special interest exemption from standard permitting requirements for a powerful industry that has upland alternatives for its activities. NWP 34 violates CWA § 404(e) and the 404(b)(1) Guidelines, and has been rejected by most cranberry-producing states that have had the chance. The Corps should not reissue NWP 34.

Compliance with CWA § 404(e). To convert a natural wetland to a cranberry bed, a grower must completely strip the bed's natural vegetation, build dikes and water control structures around the beds so it can be flooded, and lay down a one to two foot thick carpet of sand across the bottom of the bed, in which the cranberry bushes are planted. An average of more than 3 acres of this sort of impact per authorization suggests that NWP 34 consistently transgresses the minimal impact standards of CWA § 404(e).

Disturbingly, the Corps has dismissed the cumulative impacts of NWP 34 with the explanation that the nationwide requires growers to protect 15 acres of natural wetlands as reservoir acres for every one acre they convert. However, during the growing season, water from the reservoir acres is used to flood the cranberries (for no more than 24 or 48 hours at a time) to prevent or control disease. This means the water level in the reservoir acres fluctuates substantially and unnaturally, disturbing those ecosystems too.

Even if the reservoirs were not periodically drained in the process of cranberry cultivation, the requirement of an offset would not render NWP 34's legal. NWP 34 violates two cardinal principles of the CWA and the § 404 program: first by allowing cranberry growers to "buy down" impacts of conversion with compensatory mitigation; and second by allowing that compensatory mitigation to take the form of preservation.

404(b)(1) Guidelines and NEPA analysis. The Corps' decision document on NWP 34 omits any discussion of most of the substantial adverse impacts of conversion of natural wetlands to cranberry beds. Even the few impacts the document does acknowledge, the permit does nothing to constrain or address. Thus, NWP 34 violates

EPA's nationwide permit regulations and the standards of EPA's 404(b)(1) Guidelines.

Cranberry beds are so intensively managed that they are reduced to biological wastelands, virtually bereft of any flora and fauna beyond the cranberry vines themselves. In fact, because of the thick, artificial layers of sand that underlay them, most cranberry beds do not meet the regulatory definition of wetlands—even though naturally occurring cranberries in the wild are indisputably a wetland plant. Furthermore, the conversion of wetlands to cranberry production can degrade water quality (adding sediments, nutrients, fertilizers, and pesticides to downstream waters, sometimes in acutely toxic amounts); harm fisheries (altering cold water fisheries and impeding migration of anadromous fish); and reduce water quantity (by diverting flows from rivers, streams, and wetlands). Each of these likely impacts of cranberry conversions can significantly adversely affect the aquatic environment.

One would never guess this from the decision document, which relies upon cut and paste analysis to avoid grappling with any of the characteristic impacts of cranberry conversions. For instance, the document repeats the standard paragraphs on deposition of substrate and the turbidity plume that results from layering substrate in water. But the document does not deal at all with the effect of covering an entire bed with at least a foot of sand. That is not a temporary plume, nor does it leave a place for "motile organisms" to return to once the bed is laid. This decision document is simply irrelevant to the nationwide being proposed.

The decision document does acknowledge the changes in hydrology (though not water quality or quantity) that result from conversion of natural wetlands to cranberry beds. Specifically, the document notes that cranberry conversions may stress drier-end wetlands vegetation and may accelerate sedimentation. However, neither the document nor the nationwide suggests that these impacts might be avoided or explains why they do not violate the 404(b)(1) Guidelines.

Even on the basis of the limited analysis included in the decision document, the Corps' determination that issuance of NWP 34 serves the public interest is mystifying. The document states that "the intended benefits resulting from the use of the NWP is the production of cranberries in wetlands areas." However, the destruction of natural wetlands is no benefit. Nor does the document claim that we face a choice between cranberries in wetlands and no cranberries at all. Indeed, upland sites *can* be made into viable cranberry beds; a study by the USFWS in Massachusetts found that between 1977 and 1986, over 66% of new cranberry beds were built in uplands. At base, NWP 34 allows unnecessary wetlands destruction for the production of a private commercial crop. If that rationale can pass the public interest test, few would not.

Recommendation: NWP 34 violates CWA § 404(e); the 404(b)(1) Guidelines; and the Corps' public interest test. It is illegal and damaging to wetlands. Worse, NWP 34 represents precisely the kind of buckling to special interest pressures that the public depends on the federal agencies to resist. When NWP 34 was issued in 1991, the Corps certainly did not buckle alone. But as the agency with the lead responsibility for reissuing the nationwides, the Corps must find the courage not to reissue NWP 34.

NWP 38 Cleanup of Hazardous and Toxic Waste

NWP 38 authorizes any activity directed at containing or removing hazardous waste, so long as the activity has been approved by a government agency with authority to regulate toxic and hazardous waste. NWP 38 does require applicants to notify the District Engineer, and the Corps provides notification to the resource agencies. The Corps is proposing to reissue NWP 38 with an additional sentence "clarifying" that activities approved or required by EPA under Superfund do not require a CWA § 404 or RHA § 10 permit.

NWP 38 illegally delegates the Corps' duty to protect wetlands from unnecessary destruction to federal *and* state agencies with very different missions. It also lacks any impact ceiling. It should not be reissued. Further, the proposed exemption for EPA-approved activities has no statutory basis in either the CWA or CERCLA. Even if NWP 38 is reissued, the Corps' new "clarification" should not be added.

Compliance with CWA § 404(e). NWP 38 displaces the individual permit process for all activities approved or required by EPA (or, apparently, state, or even local government agencies) as part of a hazardous waste clean up or containment. As the decision document notes, "The description does not specify the nature of the activities to which it might apply. * * * No limitations have been placed on the volume of fill material, material to be dredged, or the site of structures which shall be necessary for the completed activity." With no limits on the activities it covers (save that they are related to hazardous waste containment and cleanup) or their impacts, NWP 38 violates all three prongs of CWA § 404(e).

Compliance with NEPA and the 404(b)(1) Guidelines. The decision document repeats the Corps' standard boilerplate on the effects of dredge and fill and makes no effort to evaluate the impacts of cleanup or containment activities, so there is little here to comment on. However, the boilerplate flatly contradicts the reality of NWP 38's terms and implementation. For instance, the decision document takes pains to include the rote caution that "during construction small quantities of oil and gas may be discharged into the watercourse from construction equipment." One would think projects under NWP 38 present the more serious threat of hazardous or toxic substances leaking into waters of the United States; but the decision offers no analysis of these potential impacts.

Likewise, the decision document blithely assures us that the adverse impacts of containing hazardous waste are expected to be short-term. Since most containment technologies have a predictable lifespan, after which they fail, the decision document is simply wrong. A decision document that will not consider specific activities likely to be undertaken under the nationwide or their extended consequences cannot satisfy NEPA.

In addition, the NWP 38 decision document falls far short demonstrating that NWP 38 complies with the 404(b)(1) Guidelines. It seems doubtful whether any document could, since NWP 38 leaves all the standards for approval to EPA or state or local regulators, with only the promise of the District Engineer's discretion to catch what these agencies miss. Almost by definition, a Superfund or other hazardous waste site poses a threat of significant degradation to the environment and to any waters of the United States it abuts.

Other comments. The purpose behind NWP 38 is clearly to remove perceived duplication between the work of agencies regulating cleanup of hazardous waste sites and the Corps. But, while the Corps has duties that overlap with these agencies, these agencies will usually not act from the same standards as the Corps, and cannot replace the Corps. NWF agrees that CWA § 404 and RHA § 10 must not become yet another barrier thrown up by responsible parties to dodge responsibilities for containment or cleanup. However, where a hazardous waste site involves wetlands or other waters, the functions and values of those waters need to be protected, and so the Corps must be involved. Rather than abdicating responsibility under NWP 38, the Corps should coordinate with appropriate federal, state, or local entities and conduct the § 404/§ 10 approval process concurrently with the development of a containment or cleanup plan.

One note on the question of state and local governments: NWF 38 speaks only of "activities * * * performed, ordered, or sponsored by a government agency." Without more, this vague language would seem to embrace any governmental authority, including regional, interstate, state, and local entities. Most of these have no standards comparable to the Corps' public interest test or EPA's 404(b)(1) Guidelines; there is also no guarantee that these programs will provide public access or judicial remedy. NWP 38 thus amounts to a loosely-drawn programmatic permit that eliminates the public access and remedies available under the individual § 404 permit process and replaces them (perhaps) with the discretion of District Engineers.

Recommendation: The Corps should not reissue NWP 38. To save time and resources, and to ensure that wetlands functions and values are protected but that CWA permit compliance does not become a barrier to permit cleanup, the Corps should coordinate with other regulatory entities and run its permit process concurrently with theirs. However, the Corps must not process projects involving hazardous and toxic waste under an abbreviated review that provides no notice or comment opportunities to the public.

NWP 40 Construction of Farm Buildings in Farmed Wetlands

NWP 40 allows the destruction of up to 1 acre of farmed wetlands for the construction of "farm buildings"—more specifically, for "foundations and building pads for buildings or agricultural related structures necessary for farming activities." Although this covers a wide range of possible projects, the Corps has no way to evaluate the historic use of NWP 40 because the nationwide does not require that any notification be provided to the Corps, much less the other federal resource agencies.

NWP 40 is illegal and unnecessary and should not be reissued.

Compliance with 404(e). NWP 40's lack of any notification requirement makes it impossible to evaluate the impacts to date of the nationwide or to project its use into the future. As written, however, NWP 40 authorizes both minimal individual and cumulative impacts. Many farmed wetlands are small and isolated and provide vital habitat for migratory birds. Others are riparian and provide critical water quality benefits to watersheds downstream. A loss of up to one acre can easily destroy these benefits, and can add up to staggering cumulative impacts.

Perhaps of most concern, NWP 40 would allow the construction of major industrial farm operations in farmed wetlands. The "clarification" proposed by the Corps as a part of the current reissuance proposal merely confirms that NWP 40 authorizes "animal housing" and "production facilities" in wetlands. That embraces factory farms. To its discredit, NWP 40 permits unnecessary wetlands destruction of wetlands even where there exist practicable alternative sites for farm buildings. Beyond that, however, one can credibly argue that factory farms should never be built in wetlands and other "waters of the United States," given the prospect of polluting surface and groundwater supplies. Nonetheless, NWP 40 does allow factory farms in wetlands, without alternatives analysis, without public notice, without even any notice to the Corps. This violates the minimal (and cumulative) impact standard of CWA § 404(e).

404(b)(1) Guidelines and NEPA analysis. The Corps' decision document on NWP 40 again illustrates the hazards of cut-and-paste environmental assessment. The document argues that "the notification procedure will allow the District Engineer to ensure that adverse environmental impacts of the proposed activity are minimal." As noted above, NWP 40 *has no notification procedure.* In any event, a notification procedure does not by itself constrain project impacts, and would not cure NWP 40's basic illegality.

The decision document seems to argue that because few farmed wetlands have natural vegetation, farmed wetlands destruction cannot be ecologically significant. However, many farmed wetlands retain seed banks of native plants for up to two decades so long as the wetlands are not converted or built upon. Projects authorized under NWP 40 have a significant potential to alter permanently the biological integrity of farmed wetlands by destroying these seed banks, as well as whatever vegetation is currently growing on the surface.

Moreover, farmed wetlands, even where denuded of native vegetation, can still provide such critical wetland functions as groundwater recharge, flood control, habitat for migratory birds and other wildlife, and filtration of pesticides and fertilizers from agricultural runoff. The analysis for NWP 40 fails to address the impact on these values of building in farmed wetlands. As a result, the NWP 40 analysis fails to satisfy NEPA requirements. More importantly, NWP 40 violates the requirement of 40 CFR § 230.7 that nationwide and other general permits be shown to comply with the 404(b)(1) Guidelines' prohibition of substantial adverse impacts to wetlands.

NWP 40 authorizes projects with dire effects on the human environment also. Hog factory farms and other confined animal feeding operations (CAFOs) are at best regarded by neighbors as highly unaesthetic and a blight on the landscape. The Corps decision document on NWP 40 flatly ignores the foul smell of large scale animal housing operations in evaluating the human effects of the nationwide, thus violating both NEPA and the 404(b)(1) Guidelines prohibition of substantial adverse impacts on aesthetic and economic values.

The claim that NWP 40 may have a positive impact on the local economy is unsupported. As with a number of the other nationwides, NWP 40 merely allows projects to go forward in farmed wetlands that would not go forward under the individual permit program because practicable alternatives exist. Because these projects could go forward in a nearby location in the absence of the nationwide, their economic benefits cannot be attributed to NWP 40. In any event, many of the projects approvable under NWP 40—including the big factory farms—depress nearby property values and slow residential growth, and can hardly be said to have a positive effect on the local economy.

The Corps decision document makes the risible suggestion that "the ease of obtaining" NWP 40 will lead applicants to design smaller projects. Given that NWP 40 requires no reporting, and would appear to involve no monitoring and no enforcement, it is hard to imagine what incentive an applicant has to minimize the impacts of his construction project in farmed wetlands in any way. Further, very few buildings use as much as one acre of space, so the threshold of NWP 40, even if enforced, would hardly create an incentive to squeeze down project impacts.

Finally, the decision document remains entirely silent on the threat posed to groundwater (and through groundwater to other surface waters) by NWP 40. Farmed wetlands often exchange water with groundwater tables. Building in farmed wetlands is a prime way to disturb groundwater flows and contaminate them, particularly when the buildings are animal housing or processing facilities. Corruption of groundwater supplies, which half of our citizens depend upon for drinking water, does not serve the public interest.

Recommendation: NWP 40 has no legitimate purpose, and appears as great a sop to agricultural special interests as NWP 29 is to the development community. NWP

40 authorizes a wide range of structures for a wide range of purposes, with more than minimal individual and cumulative impacts. It should not be reissued.

Proposed NWP B Swampbuster Minimal Effect Exemptions

It is unclear what Proposed NWP B would authorize, since the reauthorization proposal fails to include any specific language. This omission makes it utterly impossible for the Corps, the other federal resource agencies, the states, or the public to evaluate the prospective impacts of NWP B. The specifics of NWP B will apparently not be determined until after new regulations are issued by the NRCS later this fall.

NWP B proposes no specific nationwide, and neither it nor its decision documents comply with any of the showings or procedures required before a nationwide can be issued. Nonetheless, the vague idea advanced in the description of NWP B of exempting whole categories of agricultural activities from the CWA merely because NRCS has exempted them from Swampbuster is pernicious and illegal, and should be renounced, not embraced, by the Corps.

The theme of NWP B, of importing minimal effect and categorical minimal effect exemptions from Swampbuster into the § 404 program, is merely the newest proposed slide on a long decline in the reach and effectiveness of the § 404 program as implemented on agricultural lands. This decline follows a standard pattern: Swampbuster is weakened; agribusiness interests complain that Swampbuster and CWA § 404 are inconsistent; seeking consistency the Administration consents to weaken § 404 to lower it to Swampbuster's level; then agribusiness returns to Congress to seek further weakenings in Swampbuster.

The step of lowering CWA § 404 implementation to match Swampbuster is illegal; it is also bad policy. From the time of its inception in the 1985 Farm Bill, Swampbuster has had a different statutory purpose, different jurisdiction, and different method of operation than CWA § 404. Swampbuster exists to prevent federal farm subsidies from encouraging wetlands drainage; CWA exists to protect wetlands and waters from activities that destroy them. Swampbuster's jurisdiction extends only to farmed wetlands and to natural wetlands that are threatened by conversion; CWA § 404 applies to virtually *all* surface waters in the United States. Finally, Swampbuster works by classifying *categories of land* such farmed wetlands, prior converted croplands, etc.; while CWA § 404 regulates *activities.*

Inattention to the fundamental differences between these two statutes has deeply injured the implementation of CWA § 404 on agricultural lands. The illegal importation of the prior converted cropland exemption into the CWA § 404 program by administrative fiat in 1991 and 1993 is one example; proposed NWP B would become another. The fact that NRCS exempts an activity from Swampbuster has no proper bearing on whether that activity should receive highly abbreviated review under the CWA. Where possible, consistency between statutes is desirable, but never at the expense of the core purpose of the CWA.

Yet, proposed NWP B *would* strike at the heart of the CWA's protections for waters and wetlands on agricultural lands. The 1996 Farm Bill instructs NRCS to set up procedures under which whole categories of agricultural activities will be deemed to have minimal effects and will be categorically exempt from Swampbuster. It is widely anticipated that these categorical exemptions may (illegally) embrace exemptions for categories of wetlands, such as wetlands that are farmed at least six out of ten years. Even if the Swampbuster categorical minimal effect exemptions remain limited to activities, however, NRCS need not apply the 404(b)(1) Guidelines or the Corps public interest test as it frames them. Nor must NRCS (or the state technical committees to which it may delegate its authority) observe any of the procedural requirements established in EPA's nationwide regulations. There exists no guarantee under the 1996 Farm Bill that the NRCS' exemptions will comply with any of the nationwide permit standards.

Moreover, the Corps lacks any authority to delegate to NRCS the determination that activities should be eligible for nationwide rather than individual review under CWA § 404. The discretion of the DEs will not suffice to vet Swampbuster exemptions. The only legal way the Corps can bring categorical minimal effect exemptions into the nationwide permit program is to propose a nationwide for each activity, backed up with a decision document fully evaluating the expected impacts on wetlands and waters, and demonstrating that the proposed nationwide complies with CWA § 404(e), the 404(b)(1) Guidelines, and the other applicable CWA standards. Finally, the nationwide proposal must be subject to full public notice and comment.

Beyond illegally delegating the Corps' authority to NRCS, proposed NWP B would make the egregious mistake of excluding USFWS from § 404 permitting decisions. The 1996 Farm Bill for the first time cut USFWS out of the process of defining categorical minimal effects under Swampbuster, even though USFWS employees have

greater expertise to speak to the wildlife impacts of wetland and water conversions, and to evaluate mitigation proposed to offset these impacts, than do NRCS personnel. By adopting NRCS' categorical minimal effect exemptions, proposed NWP B would extend this exclusion of USFWS into the § 404 program. That must not occur. USFWS must continue to review conversions of § 404 jurisdictional waters, and in all cases where these conversions have more than minimal impacts under CWA standards, an individual permit must be required.

Recommendation: Proposed NWP B functions as a one permit gallery of the legal flaws of the worst of the rest of the nationwides. It delegates the Corps' job to another agency. It authorizes exemption procedures whose product will be determined later, rather than categories of activities. It provides no cap on impacts. Its decision document provides no specifics on likely impacts of projects authorized under the nationwide. The Corps should decline to issue proposed NWP B in any form.

Proposed NWP C Mining Operations

Proposed NWP C actually comprises two distinct nationwides. The first exempts from individual § 404 review sand and gravel mining operations that were in business when the Tulloch Rule was issued in 1993, asserting the Corps and EPA's CWA jurisdiction over these and other activities. The second part of NWP C would excuse from individual permit review activities of "recreational miners" in wetlands and other waters of the United States.

Both halves of proposed NWP C would violate CWA § 404(e). Proposed NWP C should not be issued.

Compliance with CWA § 404(e). The NWP C proposal lacks any specific provisions to guarantee minimal impacts. For part A, it is difficult to see how any impact ceiling that would prevent more than minimal impacts could fulfill the apparent purpose of the nationwide—to continue to exempt from individual review sand and gravel operations in business in August 1993. These businesses do not now have, and have likely never had, minimal impacts. Issuing NWP C will either raise and then dash their expectations, or will guarantee that the nationwide authorizes more than minimal impacts.

If the Corps does intend to eventually go forward with this nationwide, it will need to impose specific conditions to contain impacts. The reissuance proposal currently leaves this up to the District and Division Engineers: "The District Engineers for specific cases or the Division Engineers for geographic areas, will impose quantity, location, timing, or other restrictions, as necessary, to ensure that the effects are minimal." Written this way, NWP C does little more than allow the Divisions and Districts to issue their own regional general permits without going through any public notice and comment or federal resource agency review. That violates CWA § 404(e), NEPA, the ESA, and the FWCA.

Part B of NWP C also violates CWA § 404(e). "Recreational miners," although few in numbers, can wreak havoc on streams, rivers, and other waters. Like Part A, Part B leaves all the specific conditions to the DEs, but does require public notice. Since this would seem to fully duplicate the process for proposing and issuing regional general permits, proposing NWP C part B as a nationwide seems unnecessary. In addition, NWF believes there is no way to condition the use of motorized or mechanical equipment that will keep it from having a more than minimal impact of jurisdictional waters. If NWP C part B is issued at all, it should be limited to recreational activities with hand-held tools, and it should explicitly forbid the use of motorized or mechanical equipment, or explosives.

Compliance with NEPA and the 404(b)(1) Guidelines. The decision document for NWP C fails to describe the impacts of the activities it would authorize under either part with any specificity. Nor could it, since the reissuance proposal places no constraints on the projects that could be authorized under either part. Before the Corps can legally issue NWP C in any form, it will need to prepare a much more thorough description and analysis of what it is proposing, starting virtually from scratch.

Other comments. The Corps' proposed NWP C, Part A, suggests that because sand and gravel mining was not regulated before the 1993 Tulloch Rule, active mining should be allowed to continue with "minimal regulation." NWF reminds the Corps that it granted the sand and gravel industry a very generous grandfather provision in 1993 to help the industry adjust to the rigors of individual permit review. See, 58 Fed. Reg. 45027–45028, 45036 (August 25, 1993), codified at 33 CFR 323.2(d)(3)(iii). At the time, the Corps promised to *consider* certain sand and gravel mining operations for nationwide permits. The Corps has met its promise. But the Corps has only the authority to approve those activities "similar in nature" with truly "minimal impacts." This proposed nationwide is too broad and too vague to meet the requirements of CWA § 404(e).

Recommendation: The Corps should not issue NWP C, Part A in any form, and must not issue NWP C, part B in any form resembling that proposed. In any event, the Corps will need to prepare a meaningful impact analysis and submit that for review and comment by the public and the federal resource agencies, before it can legally issue any part of proposed NWP C.

Proposed NWP D Maintenance of Existing Flood Control Projects

Proposed NWP D would authorize the maintenance of existing flood control facilities. This nationwide could have devastating impacts—never even hinted at by the decision documents—on streambed life in channelized streams. The reissuance proposal and the decision document provide so little information about the projects and impacts that could be approved under this nationwide that it is impossible for the Corps, the federal resource agencies, or the public to comment meaningfully on this proposal.

The Corps should not issue Proposed NWP D in its current form, and in any event must repropose it with a detailed and meaningful environmental assessment before it can issue it legally.

Compliance with CWA § 404(e). Neither the reissuance proposal nor the NWP D decision document provide enough information to identify what sort of projects would be authorized by D, let alone how large the individual and cumulative impacts of these projects would be. The decision document estimates that NWP D would authorize about 5,000 projects each year, but does not explain how this estimate was derived.

In certain regions of the Nation, it seems clear that "clearing of flood channels," interpreted narrowly, would nonetheless have significant individual and cumulative impacts. For example, many of the streams in Southern California are channelized, with concrete walls but dirt bottoms. Plants and some aquatic organisms live in the habitats on the bottom of these streams and rivers; NWP D would appear to allow their wholesale destruction.

On a much bigger scale, NWP D appears to authorize huge maintenance dredging projects in America's largest rivers, as well, so long as the dredging stays within channels that have been dredged before. The individual § 404 review process can often be the only opportunity for public review and comment on these projects; NWP D seems to eliminate that.

Compliance with NEPA and the 404(b)(1) Guidelines. The same lack of specificity that makes it impossible to tell what proposed NWP D actually authorizes also makes it impossible to assess the impacts of these projects. If the Corps knows, its NWP D decision document sure isn't telling: the decision document provides no estimate of how many eligible flood control projects exist in around the Nation or what maintenance of these involves.

The decision document advances one safeguard to avert the unarticulated impacts of NWP D: notification of the Corps for projects over an undefined size threshold or in sites that have been established for at least five years. Notification, of course, cannot substitute for individual § 404 review, which involves the other federal resource agencies and the public. But even if notification thresholds were conditions on the permit, the decision document never explains how these would prevent more than minimal impacts, let alone the significant degradation of waters of the United States.

Other comments. The NWP D decision document includes the perplexing statement that specifically, the purpose of the activity is to provide small watercraft access to the waterway." Is this sentence merely an escapee from the NWP 36 (boat ramps) decision document? It makes particularly little sense here, since "navigation" is the one factor the decision document's public interest review labels irrelevant to NWP D.

Recommendation: Without better documentation and analysis of the impacts of the projects that would be approved under proposed NWP D, none of the Corps, the other federal resource agencies, or the public can know that NWP D is legal, let alone wise. Moreover, unless this analysis is completed and submitted for public review and comment, the Corps cannot legally issue NWPD in any form.

VI. CONCLUSION

Congress has authorized only narrowly drawn general permits. CWA § 404(e) limits nationwide and general permits to categories of activities that are similar in nature and that can be properly assessed and properly conditioned to ensure minimal impacts. The nationwides must cover activities that are invariably and truly minimal in impact. It is time for the Corps to accept its wetlands protection responsibilities and abide by the mandate of Congress as expressed in the Clean Water Act. The Corps should *not* reissue NWPs 7, 15, 17, 21, 23, 26, 29, 32, 34, 38, and 40;

the Corps should *not* issue proposed NWPs B, C and D. The Corps should revise and further condition NWPs 8, 12, 13, 14, and 33.

We appreciate the opportunity to comment on the nationwide reissuance proposal, and we look forward to working with the Corps, the other federal resource agencies, and the states to strengthen implementation of the nationwide permit system after it is reissued.

Sincerely,

GRADY MCCALLIE,
Wetlands Legislative Representative,
Washington, DC Office.

JIM ADAMS,
Legal Associate,
Alaska Natural Resource Center.

TONY TURRINI,
Legal Counsel,
Alaska Natural Resource Center.

NATIONAL WILDLIFE FEDERATION,
Washington, DC, August 14, 1992.

THE CHIEF OF ENGINEERS,
United States Army Corps of Engineers, Washington, DC.

RE: PROPOSED RULE FOR THE CLEAN WATER ACT REGULATORY PROGRAMS OF THE ARMY CORPS OF ENGINEERS AND THE ENVIRONMENTAL PROTECTION AGENCY [57 FEDERAL REGISTER AT 26894; JUNE 16, 1992]

DEAR MR. COLLINSON: The National Wildlife Federation (NWF), the North Carolina Wildlife Federation (NCWF), the Southern Environmental Law Center (SELC), the Natural Resources Defense Council (NRDC), the Izaak Walton League of America (IWLA), and the National Audubon Society (NAS) (hereafter collectively referred to as "the environmental community") respectfully request that the following comments be made part of the public record on the proposed rule published in the June 16, 1992 *Federal Register* regarding the *Proposed Rule for the Clean Water Act Regulatory Programs of the Army Corps of Engineers and the Environmental Protection Agency.* These comments address the portions of the rule which the Army Corps of Engineers (the Corps) and the Environmental Protection Agency (EPA) have proposed pursuant to NWF, NCWF, and SELC's settlement agreement in *North Carolina Wildlife Federation and National Wildlife Federation* v. *Tulloch*, Civil No. C90–713-CIV–5-BO (E.D.N.C. 1992) (*Tulloch*). NWF will comment under separate cover upon the provisions of the rule which were *not* proposed pursuant to the *Tulloch* settlement.

We urge you to adopt the proposed *Tulloch* provisions as written. These provisions will eliminate two loopholes in the EPA and Corps regulations. The regulatory definition of "discharge of dredged material" provided that "de minimis" incidental soil movement occurring during "normal dredging operations" was not a "discharge of dredged material" that triggered the § 404 permitting requirements. Due to lack of guidance, this language was often interpreted to exclude from regulation landclearing, drainage and other excavation activities in wetlands where the actual quantity of redeposited soil was small but where the damage to waters of the United States was often quite large. The facts that gave rise to the *Tulloch* lawsuit are a perfect example of the havoc wrought by the ambiguity in the existing rule. Instead of sidecasting soil while digging ditches, the private defendants modified their backhoes and took other measures to reduce the amount of soil which was redeposited into wetlands during the ditching and draining of *hundreds* of acres of wetlands in North Carolina. It is unsound, unfair and inconsistent with congressional intent for the government to allow, and even assist, developers in deliberately evading the law through these elaborate machinations.

The proposed rule would stop the abuse engendered by the lack of clarity in the current definition of "discharge of dredged material." It would clarify that redepositions of soil which are incidental to any activity, such as ditching, channelization, mechanized landclearing, or other excavation that has or would have the effect of destroying or degrading any area of waters of the United States *are* regulated discharges of dredged material under § 404. This clarification would: eliminate an ambiguity in the regulations that people used to escape regulation and to destroy thousands of acres of wetlands; promote consistent and fair determinations and save administrative resources by providing a clear, easy to apply, bright line as to what is

regulated; make the § 404 program more attractive to states considering taking a greater role in the § 404 program; *and* help effectuate the goals and purposes of the Clean Water Act by staunching the loss of thousands of wetlands through the "de minimis" loophole.

The *Tulloch* rule also closes another loophole—the use of pilings as a substitute for fill. Prior to November 3, 1988, some people were avoiding the § 404 permitting requirements by placing pilings into waters of the United States in lieu of fill. Rather than seek a § 404 permit for fills to construct a building in wetlands or a dam, many individuals have used pilings to evade the § 404 permitting requirements. For example, in the *Tulloch* case, one of the private defendants used closely spaced pilings to construct a wooden weir in jurisdictional wetlands without a § 404 permit. This wooden weir was used to inundate acres of jurisdictional wetlands.

Although the pilings problem was addressed in the Corps' Regulatory Guidance Letter 88–14,[1] the *Tulloch* case exemplifies the need for the proposed rule clarifying the regulation of the use of pilings in lieu of fill. In *Tulloch*, the Wilmington District authorized construction of the weir without a § 404 permit despite instruction in the RGL to the contrary.

The proposed pilings rule will largely prevent the use of pilings for fill. It incorporates the substantive provisions of Regulatory Guidance Letter RGL 90–08.[2] In essence, the proposed rule closes the loophole by specifying that a § 404 permit is necessary for placement of pilings where pilings function in lieu of or have the physical effect of fill. Moreover, unlike the RGLs, which are merely guidance documents, the pilings regulation will have the force and effect of law—thus, preventing the *Tulloch* situation from happening again. Accordingly, it is very important to finalize the proposed language on pilings so that the EPA and Corps regulations will stop people from using pilings to avoid the requirements of the Clean Water Act.

SPECIFIC COMMENTS

I. Closing the "de minimis" loophole

A. The Proposed Language Furthers the Goals and Purposes of the Clean Water Act.

Adoption of the proposed rule not only furthers the goals and purposes of the Clean Water Act, it is *necessary* to further the goals and purposes of the Clean Water Act.

The Clean Water Act constitutes a "*comprehensive* legislative attempt 'to restore and maintain the chemical, physical and biological integrity of the Nation's waters.'" *United States* v. *Riverside Bayview Homes, Inc.,* 474 U.S. 121, 132 (1985) (quoting 33 U.S.C. 1251(a)) (emphasis added); see also, S. Rep. No. 370, 95th Cong., 1st Sess. (1977) at 74–75, reprinted in U.S.C.A.A.N. 4326, 4400. In order to achieve this goal, Congress enacted an *absolute* prohibition against "the discharge of *any* pollutant by *any* person" into waters of the United States *except in compliance with a permit* issued under the Act or with a statutory exemption. 33 U.S.C. 1311(a) (emphasis added); *NWP* v. *Consumers Power,* 862 F.2d 580, 582 (6th Cir. 1988); *United States* v. *Frezzo Brothers. Inc.,* 602 F.2d 1123, 1127 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980); *American Frozen Food Institute* v. *Train,* 539 F.2d 107, 115 (D.C. Cir. 1976); *NRDC* v. *Costle,* 568 F.2d 1369, 1374 (D.C. Cir. 1977); *NWF* v. *Hanson,* 623 F. Supp. 1539, 1543 (D.N.C. 1985).

The redeposit of soil or vegetative matter into jurisdictional wetlands constitutes a discharge of pollutants into waters of the United States. *Avoyelles Sportsmen's League. Inc.* v. *Marsh (Avoyelles III),* 715 F.2d 897, 923–924 (5th Cir. 1983); *United States* v. *M.C.C of Florida, Inc.,* 772 F.2d 1501, 1503 (11th Cir. 1985). There is *no* exemption in the Clean Water Act for "de minimis" discharges. Accordingly, the Clean Water Act's ban on "the discharge of any pollutant by any person" applies to incidental redeposits of soil or vegetative matter into wetlands regardless of the size of these incidental discharges. *Reid* v. *Marsh,* 14 ELR 20231, 20234 (N.D. Ohio 1984); *see generally, Avoyelles III,* 715 F.2d at 919, n.37.

The Clean Water Act broadly sweeps proposed discharges of all sizes dredged or fill material into the § 404 permitting process. *United States* v. *Huebner,* 752 F.2d 1235, 1239 (7th Cir. 1985) (quoting *United States Steel Corp.* v. *Train,* 556 F.2d 822, 829 (7th Cir. 1977) (Congress intended the § 404 permit process to serve as "[t]he cornerstone of the * * * scheme for cleaning up the nation's waters."). The role of the § 404 permitting process is to protect the environment by identifying potential

[1] On November 3, 1988, the Corps issued Regulatory Guidance Letter 88–14, "Applicability of Section 404 to Piles" (RGL 88–14).

[2] Regulatory Guidance Letter 90–08, "Applicability of Section 404 to Pilings," (RGL 90–08) replaced RGL 88–14. 57. Fed. Reg. 6593.

adverse effects of proposed projects and by requiring the permittee to avoid, mitigate or compensate for them pursuant to the § 404(b)(1) Guidelines. 40 C.F.R. § 230.10.[3] Any unavoidable adverse effects must be compensated for through mitigation. 40 C.F.R. § 230.10. Moreover, the Corps examines more than just the "footprint of the discharge;" it evaluates the potential direct, cumulative, indirect, and secondary effects (*i.e.,* the Corps evaluates the potential adverse effects of the overall activity upon the aquatic ecosystem). *See e.g.,* 40 C.F.R. § 230.11(h). Thus, the § 404 permitting scheme focuses upon the *potential effects* of the overall activity rather than *the size* of the proposed discharge.

The statutory exemption and general permitting requirements in § 404 further demonstrate that Congress was concerned with the potential effect of the proposed activity as a whole—not the size of the proposed discharge. Section 404(e) provides, in pertinent part, that the Corps can issue a general permit for a "category of *activities involving discharges* of dredged or fill material if [it] determines that the activities in such category are similar in nature, will cause only *minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.*" 33 U.S.C. 1344(e) (emphasis added). Similarly, in § 404(f)(1), Congress only exempted "narrowly defined activities that cause little or no adverse effects either individually or cumulatively." 3 1978 Legislative History at 474 (statement of Senator Muskie); *Avoyelles III,* 715 F.2d at 926. it further provided that a permit would be required, even for discharges which would otherwise be exempt under § 404(f)(1), if the discharge is "incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters reduced."

Accordingly, the *Tulloch* rule must be finalized as written to implement the Clean Water Act. Congress was not concerned with the size of the proposed discharge. It was concerned with the potential adverse effects of the proposed activity as a whole upon the waters of the United States. The proposed rule would require a § 404 permit for the redeposit of dredged materials into waters of the United States which occurs during "mechanized landclearing, ditching, channelization, or other excavation which has or would have the effect of destroying or degrading any area of waters of the United States." 57 Fed. Reg. 26898. By closing the "de minimis" loophole in the current regulations, the proposed rule will give the permit process a chance to do its job of protecting the integrity of the Nation's waters.

Finally, we note that the proposed rule will *not* regulate *all* "de minimis" discharges. The proposed rule will not regulate "de minimis" discharges that are incidental to activities that would not adversely effect the waters of the United States. We believe that this is consistent with congressional intent. In the proposed rule, EPA and the Corps have only chosen to forgo regulation of "de minimis" discharges of dredged material that have *no* effect upon the integrity of the waters of the United States. Regulating such discharges obviously would do nothing to further the goal of restoring and maintaining the chemical, physical and biological integrity of the Nation's waters.[4] Moreover, the preamble to the proposed rule states that the Corps and EPA will presume that mechanized landclearing, ditching, channelization, and other excavation in wetlands or other waters of the United States *would* adversely effect waters of the United States. 57 Fed. Reg. 26896. Not only is this presumption factually accurate, it also ensures that the Corps will not forgo regulation of a proposed incidental "de minimis" discharge without first examining its potential adverse effects in the § 404 permitting process. This approach reflects a reasonable exercise of EPA and the Corps' discretion in implementing the Act, and should not constitute an impediment to adopting the proposed rule.

B. The Massive Loss of Wetlands Through the "De Minimis" Loophole Demonstrates the Drastic and Urgent Need to Close the "De Minimis" Loophole in the Existing Regulations

It is imperative that EPA and the Corps finalize the proposed modifications to the definition of "discharge of dredged material" as soon as possible. With every day of

[3] "The Corps' permit decisions must be based upon EPA guidelines." *NWF* v. *Hanson,* 859 F.2d 313, 315 (4th Cir. 1988); 33 U.S.C. 1344(b); 40 C.F.R. Part 230. The Guidelines require the Corps to evaluate the potential adverse environmental effects of the proposed activity, and require the permittee to avoid or minimize the adverse effects through use of the least harmful, practicable alternative to the proposed activity. 40 C.F.R. §§ 230.1(c), 230.10.

[4] In contrast to "de minimis" discharges that have an adverse effect upon waters of the United States, "de minimis" discharges that only have small individual and cumulative adverse effects should be handled through general permits under § 404(e). An example of "de minimis" discharges that have *no* adverse effect upon waters of the United States is the dirt that drips off of the boots of a hiker as he walks through wetlands.

delay we lose more wetlands due to ditching, channelization, mechanized landclearing, and other excavation activities.[5] These activities inevitably entail a redeposit of soil into waters of the United States, and their destructive effect on wetlands is incontrovertible.

By 1980, approximately 107 *million* acres of wetlands had been lost in the United States due to unregulated, agricultural drainage. Dahl, T.E., *Wetlands Losses in the United States 1780's to 1980's,* U.S. Department of the Interior, Fish and Wildlife Service, Washington, D.C. at 9 (1990). "Most wetlands could disappear between 2000 and 2200 if the present rate of drainage continues." Weller, M.W., *Estimating Wildlife and Wetland Losses Due to Drainage and Other Perturbations* 337 (Selected Proceedings of the Midwest Conference on Wetlands Values and Management, June 17–19, 1981). From the mid–1950's to the mid–1970's unregulated agricultural drainage accounted for 87% of national wetlands losses. Tiner, R.W., *Wetlands of the United States: Current Status and Recent Trends,* U.S. Department of the Interior, Fish and Wildlife Service, Washington, D.C. at 31–32 (1984). In 1984, agricultural drainage had the greatest impact on forested wetlands and emergent wetlands, with losses of 5.8 and 2.7 million acres, respectively.

The most extensive wetland losses from unregulated, agricultural drainage were in Louisiana, Mississippi, Arkansas, North Carolina, North Dakota, South Dakota, Nebraska, Florida and Texas. Greatest losses of forested wetlands took place in the Lower Mississippi Valley with the conversion of bottomland hardwood forests to farmland. Shrub wetlands were hardest hit in North Carolina where pocosin wetlands are being converted to cropland or pine plantations or mined for peat. Inland marsh drainage for agriculture was most significant in the Prairie Pothole Region of the Dakotas and Minnesota, Nebraska's Sandhills and Rainwater Basin and Florida's Everglades. *Id.* at 32.

Although the instances of wetlands devastation under the "de minimis" loophole are too numerous to catalogue in these comments, we have discussed a few representative samples.

1. *The ravages caused by the "de minimis" loophole are vividly illustrated by the wetlands destruction at issue in the* Tulloch *case.*—The National Wildlife Federation, North Carolina Wildlife Federation and the Southern Environmental Law Center filed the *Tulloch* suit due to their horror over the massive devastation that occurred when two developers, aided by the Wilmington District Office of the Corps, used the "de minimis" loophole to evade the permitting requirements of the Clean Water Act. These developers destroyed hundreds of acres of extremely valuable freshwater wetlands on the Pembroke Jones Park, Landfall Commercial, and Northchase sites in coastal North Carolina.

a. *The Corps' Wilmington District office allowed Landfall Associates to use the "de minimis" loophole in the regulations to destroy hundreds of acres of wetlands on the Pembroke Jones Park and Landfall Commercial sites.*—On November 13, 1986, the Corps issued a public notice describing a permit application for the development of the Pembroke Jones Park site. In the public notice, the Corps described the process by which the developer could clear, ditch and drain the wetlands to dewater them, have them removed from jurisdiction, and then build upon the converted wetlands without resort to a § 404 permit.

On December 16, 1986, Corps personnel met with an engineering firm hired by Landfall Associates (the developer of the Pembroke Jones Park and Landfall Commercial sites). The Corps personnel "reiterated their position" that clearing, ditching and draining the areas as outlined in the November public notice, "would be permissible without a § 404 permit." They advised the engineering firm to begin clearing, ditching, and draining the wetlands. Pursuant to a request from Landfall, Corps personnel then delineated some of the jurisdictional wetlands on the Pembroke Jones Park site with the knowledge that Landfall intended to clear, ditch, and drain the wetlands to remove them from jurisdiction.

In March 1987, Landfall began clearing wetlands vegetation at the Pembroke Jones Park site with skidders, specially modified backhoes, and "bush hogs." Landfall used these machines to push over wetland trees, pull up tree stumps and roots, and drag or push downed trees to upland locations. Throughout the mechanized landclearing process soil was redeposited into wetlands that the Corps had determined were "waters of the United States" subject to § 404. For example, soil was redeposited into wetlands from the treads of machinery, from the roots of trees as they were uprooted and pushed to the uplands, and from the backhoe buckets. By

[5] The environmental community believes that the Corps RGL on mechanized landclearing has been beneficial in clarifying that § 404 permits are required for this activity. However, the proposed rule will add further clarity and will have the force and effect of law.

July 1989, Landfall had cleared approximately 600 wetland acres. Corps personnel spent at least 22 days observing the clearing activities.

Once Landfall finished the mechanized landclearing activities, it began ditching and draining the wetlands on the Pembroke Jones Park and Landfall Commercial sites. Landfall used backhoes and draglines to remove soil from the wetlands to create a network of ditches to drain the water from the wetlands. During the ditching process, soil was redeposited into jurisdictional wetlands from the treads of the backhoes as they moved through the wetlands, from the dragline and backhoe buckets in the course of dredging, and from discharges to support heavy equipment working in wetlands. Landfall ditched over 200 acres of wetlands in order to drain them and remove them from § 404 jurisdiction.

Before the passage of even one growing season, the Corps notified Landfall that two approximately 20 acres of wetlands on the Pembroke Jones Park and Landfall Commercial sites had been sufficiently drained by Landfall's ditches to no longer be considered jurisdictional wetlands subject to § 404, and the Corps removed these areas from jurisdiction. During 1989, the Corps removed more areas from jurisdiction, and now approximately 125 acres have been "removed from § 404 jurisdiction" on the Pembroke Jones Park and Landfall Commercial sites. Ditches on the Landfall Commercial and Pembroke Jones Park sites continue to drain water.

By July 1989, Landfall also excavated at least 15.4 acres of wetlands and other waters of the United States without a § 404 permit. Landfall used backhoes and draglines to remove soil and vegetation from the wetlands to create open water ponds. During this mechanized excavation process, soil was redeposited into jurisdictional wetlands and other waters of the United States.

In May 1990, the Corps District Engineer informed Landfall that it needed a § 404 permit for its ditching and excavation activities due to the incidental discharges into jurisdictional wetlands.

All tolled, Corps personnel allowed Landfall to use the "de minimis" loophole in the regulations to evade the § 404 permitting requirements and to destroy *at least 250 acres of jurisdictional wetlands.* Obviously, we cannot fulfill the mandate of the Clean Water Act to "restore or maintain the chemical, physical and biological integrity of the Nation's waters" if we continue to sustain such massive losses of wetlands through the "de minimis" loophole in the regulations. 33 U.S.C. § 1251(a). Furthermore, we will never obtain the President's goal of no net loss of wetlands unless this loophole is permanently closed. (Speech before Ducks Unlimited's Sixth International Waterfowl Symposium, June 6, 1989).

b. *The Corps' Wilmington District office allowed Ammons Northchase Corporation to use the "de minimis" loophole in the regulations to destroy at least one hundred acres of wetlands on the Northchase site.*—In 1986, Ammons Northchase Corporation (Northchase) began clearing, ditching and draining wetlands on the Northchase site and continued doing so at least through February 1990. Corps personnel advised and authorized Northchase to clear and drain these jurisdictional wetlands without a § 404 permit as long as only "de minimis" amounts of dredged or fill material were redeposited into waters or wetlands. Corps personnel also delineated most jurisdictional wetlands on the Northchase site with the knowledge that Northchase intended to ditch and drain these wetlands and thereby remove them from jurisdiction.

Northchase cleared the wetlands using backhoes in jurisdictional wetlands for the initial land clearing, and "track hoes" to pick up soil and root mat. Wetland trees were pushed over, the stumps and roots were pulled up, the wetland soil was separated from the roots, and the trees were pushed to upland areas. During this mechanized landclearing process, soil was redeposited into wetlands from the treads of bulldozers and backhoes, the bulldozer blades, the roots and stumps of trees, and from backhoe buckets.

Northchase used backhoes and draglines to remove soil from the wetlands to create a network of ditches to drain the wetlands. During the ditching process, soil was redeposited into wetlands from the movement of backhoes in wetlands and from the dragline buckets in the course of dredging. Soil was also redeposited in discharges to support the backhoes working in the wetlands.

The U.S. Fish and Wildlife Service (FWS) observed the ditching and draining at the Northchase site and reported these conversion activities to the Corps. The Corps never responded to the FWS inquiries regarding investigations, authorizations, or enforcement actions.

On several occasions, Corps personnel have removed certain wetlands at the site from § 404 jurisdiction based on the determination that the hydrology of these wetlands had been sufficiently altered by the ditching and draining activities.

Northchase's clearing, ditching and draining, and filling activities destroyed approximately *100 acres of jurisdictional wetlands* at the site. What is perhaps most

disturbing of all is that developers in coastal North Carolina continue to believe this loophole is available to them, despite purported efforts by the Corps to limit its use since 1989. Only closing the "de minimis" loophole in these regulations, can the Corps stop this unregulated, wholesale destruction of wetlands.

c. *The wetlands destruction at the Jones Park, Landfall Commercial and Northchase sites harmed the chemical, physical and biological integrity of North Carolina's aquatic ecosystem.*—The stark fact that the Wilmington District of the Corps allowed Landfall and Northchase to use the "de minimis" loophole in the regulations to evade the § 404 permitting requirements and destroy at least 350 acres of jurisdictional wetlands within the Cape Fear River Basin is appalling. A mere recitation of the number of wetlands acres destroyed, however, is insufficient to convey the magnitude of the loss that North Carolina is suffering from this abuse of the § 404 program.

The wetlands that were destroyed on the Northchase, Pembroke Jones Park, and Landfall Commercial sites were very valuable freshwater wetlands. Most of these wetlands were thick pond pine and evergreen shrub bogs called "pocosins"—the Algonquin Indian term for "swamp-on-a-hill." Richardson, *Pocosins, An Ecosystem in Transition* (hereafter "Richardson") in "Pocosin Wetlands, An Integrated Analysis of Coastal Plain Freshwater Bogs in North Carolina" (ed. Richardson 1980) at 3–6. Other wetlands and waters on the Pembroke Jones Park, Landfall Commercial, and Northchase sites were swamp forest or bottomland hardwood wetlands, natural ponds, and coastal marsh areas. The Pembroke Jones Park wetlands have been referred to by Corps and FWS personnel as having once been "some of the most beautiful, biologically diverse land in North Carolina."

i. *Pocosin wetlands provide a multitude of functions and values.*—The functions and values provided by pocosin wetlands include: providing clean drinking water by filtering polluted runoff; preventing flooding by absorbing excess rainwater; recharging the aquifer by trapping water that seeps into the aquifer; and providing habitat for rare native plant and animal species.

In specific, pocosin wetlands provide abundant water capacity, acting as storm buffers by greatly reducing flood peaks. Water from heavy storms moves slowly and broadly across the swamp surface and through the "very porous tangle of roots and organic debris that comprises the uppermost part of the soil profile." Daniel, *Hydrology, Geology, and Soils of Pocosins: A Comparison of Natural and Altered Systems* (hereafter "Daniel") in "Pocosin Wetlands, An Integrated Analysis of Coastal Plain Freshwater Bogs in North Carolina" (Richardson ed. 1981) at 89. Rather than being funneled quickly through a discrete channel, the storm run-off diffuses gradually over a broad reach of shoreline. "This characteristic has a significant stabilizing influence on the chemical quality of adjacent bodies of water." *Id.* at 89.

Pocosin wetlands slow down and diffuse the influx of freshwater storm run-off into coastal streams and bays that contain saline water and support marine life, allowing these coastal waters to gradually assimilate the fresh water without drastic fluctuations in salinity. This buffering capacity is lost when pocosins are drained and an artificial drainage system channels the freshwater run-off rapidly and directly into coastal waters. Introduced in such concentration to coastal waters, this freshwater run-off can actually become a pollutant, harming shrimp and other valuable marine organisms. Daniel at 100–101; Street and McClees, *North Carolina's Coastal Fishing Industry and the Influence of Coastal Alterations* (hereafter Street and McClees") in "Pocosin Wetlands, An Integrated Analysis of Coastal Plain Freshwater Bogs in North Carolina" (Richardson ed., 1931) at 238–251.

When pocosin wetlands are cleared, ditched, drained, and converted to other land uses, the normally acidic and nutrient poor soil is often treated with nutrients to prepare it for new uses. These nutrients are picked-up by freshwater runoff which is rapidly channeled through the ditches into coastal streams and bays. This contaminates coastal waters with excess nutrients such as magnesium, calcium, bicarbonate, sulfate, nitrate nitrogen, phosphorous, and suspended sediments. The excess nutrients can cause algal blooms, eutrophication, and ultimate disruption of marine habitat along the coastal fringe. Daniel at 101–104; Richardson at 141.

Drainage of pocosins and other freshwater wetlands is a suspected cause of declines in shrimp, oyster and fish production. Street and McClees at 247–249; Postel, *The Economic Benefits of Pocosin Preservation* (hereafter "Postel") in "Pocosin Wetlands, An Integrated Analysis of Coastal Plain Freshwater Bogs in North Carolina" (Richardson ed. 1981) at 290–291. In 1978, North Carolina had a $325 million commercial and recreational fishing industry, 90% of which was comprised of estuarine-dependent species. Street and McClees at 244.

Pocosins provide habitat for endemic wildlife species that were always restricted to pocosin habitat and for native species that once ranged broadly but now are restricted to pocosins due to habitat loss. Wilbur, *Pocosin Fauna* (hereafter "Wilbur")

in "Pocosin Wetlands, an Integrated Analysis of Coastal Plain Freshwater Bogs in North Carolina" (Richardson ed. 1981) at 62–68. For example, pocosins provide the last stronghold for the black bear in coastal North Carolina. Monschein, *Values of Pocosins to Game and Fish Species in North Carolina* (hereafter "Monschein") in "Pocosin Wetlands, An Integrated Analysis of Coastal Plain Freshwater Bogs in North Carolina" (Richardson ed. 1981) at 155–170.

ii. *Swamp forest was also destroyed at the Pembroke Jones Park and Landfall Commercial sites.*—At least 6% of the wetlands destroyed at the Landfall Commercial and Pembroke Jones Park sites were swamp forest, including red maple, sweet gum, black gum, bald cypress, and sweet bay species.

These forested wetlands provide valuable wildlife habitat, store flood waters, and filter pollutants from run-off, thus maintaining downstream water quality. Kuenzler, *Value of Forested Wetlands as Filters for Sediments and Nutrients,* in "Forested Wetland Proceedings" at 85, 93; Harris and Gosselink, *Cumulative Impacts of Bottomland Hardwood Conversion on Wildlife, Hydrology and Water Qnality* (EPA 1986); Harris et al., *Bottomland Hardwoods: Valuable, Vanishing, Vulnerable* (U.S. FWS 1984); Frederickson, *Lowland Hardwood Wetlands: Current Status and Habitat Values for Wildlife* in "Wetland Functions and Values: The State of Our Understanding" (Greeson, Clark and Clark eds. 1979) at 298–303; Wharton et al., *The Fauna of Bottomland Hardwoods in the Southeastern United States,* in "Wetlands of Bottomland Hardwood Forests" (Clark and Benforado eds. 1981) at 87–127; Winger, *Forested Wetlands of the Southeast: Review of Major Characteristics and Role on Maintaining Water Quality,* in "Resource Publication 163" (U.S. FWS 1986) at 2–3. The swamp forest on the Pembroke Jones Park site was of good quality and was essential to maintaining water quality in Graham's Pond and Howe Creek. 1986 Environmental Assessment at 10, 12.

iii. *The wetlands destruction at the Pembroke Jones Park, Landfall Commercial, and Northchase sites has caused significant losses of functions and values that extend well beyond the boundaries of these sites.*—The destruction of the wetlands at the Pembroke Jones Park, Landfall Commercial, and Northchase sites has killed many wetlands plants and animals, eliminated extensive areas of valuable wetlands habitat, and created adverse water quality impacts off-site.

These wetlands used to provide rich and extensive wildlife habitat for a wide variety of creatures. A 1986 Environmental Assessment ("EA") of the Pembroke Jones Park site concluded that the wetlands. there served as "high quality habitat for a variety of wildlife species, both game and non-game." Even though the site visit for the EA was conducted in winter, many important species were observed, including herons, wood ducks, river otters, raccoons, coots, and kingfishers. *Id.* U.S. Fish and Wildlife Service (FWS) biologists made visits to the site beginning in 1985. FWS found that "the overall project site supports diverse and abundant plant and animal communities. The pocosin, swamp forest, pocosin-pine flatwoods, ponds, marshes and their associated upland habitats found on the site provide high quality feeding, nesting, rearing and cover sites for large and small mammals, avifauna, reptiles, and amphibians." *Id.* at 2. FWS gave these wetlands a Resource Category 2 designation—*i.e.,* they provide high-quality habitat and are relatively scarce or becoming scarce on a national or regional basis. *Id.* at 3. The North Carolina Wildlife Resources Commission noted that the Pembroke Jones Park wetlands were "some of the highest quality wildlife habitat remaining in New Hanover County."

By removing the wetlands vegetation and by dewatering the wetlands, Landfall and Northchase destroyed this valuable wetlands habitat. A March, 1990 visit to the Pembroke Jones Park site only revealed evidence of a raccoon and a few ducks in the wettest area of the remaining wetlands that were left on the site. Observers were told that once herons had nested in cypress domes and deer had graced the tidal inlets and freshwater ponds near Horseshoe Lake. By the summer of 1990, observers witnessed a moonscape—trees and shrubs removed and soil graded down to the water-line with only sediment fences and sediment-filled ponds demarking where the thriving wetlands used to be. Other site visits revealed that-erosion caused by the landclearing had smothered many mollusks and other aquatic creatures, leaving far less diversity in the benthic life in the streams.

The wetlands destruction on the Landfall Commercial, Pembroke Jones Park and Northchase sites has caused significant off-site decreases in water quality. The destruction of wetlands on the Pembroke Jones Park and Landfall Commercial sites has eroded water quality in Graham Pond, Howe Creek, Horseshoe Lake, and Middle Sound. Similarly, wetlands destruction at the Northchase site has diminished water quality in Punkin Creek, Prince George's Creek, or Smith Creek, the Northeast Cape Fear River, the Cape Fear River and the Cape Fear estuary. Eroded soil that has run off of cleared wetlands or has been conveyed in water through the drainage ditches on the Pembroke Jones Park site has flowed into Graham Pond

and Horseshoe Lake and has passed, from there, into Howe Creek. Fertilizers, herbicides and sediment have flowed from Pembroke Jones Park into graham Pond, Horseshoe Lake and Howe Creek. Howe Creek has suffered turbidity levels that exceed state and federal water quality standards. Similarly, eroded soil and possibly other pollutants have drained from the Northchase site into Punkin Creek, Prince George's Creek or Smith Creek, which, in turn, drain into the Northeast Cape Fear River and ultimately into the Cape Fear River and estuary. The destruction of the Pembroke Jones Park, Landfall Commercial and Northchase wetlands has also degraded fish, shellfish and wildlife habitats in these and other nearshore coastal waters. The rapid conveyance of freshwater run-off itself from these sites and others like them has disturbed the salinity balance in the estuary and the estuarine life that depend upon it.

Many of the affected waterbodies are sensitive to these perturbations and are highly productive. For example, Howe Creek and Middle Sound are classified as outstanding resource waters by the State of North Carolina for commercial shellfishing, primary recreation, fishing, wildlife, and aquatic life propagation and survival uses. Howe Creek and Middle Sound have also been designated primary nursery areas for fish and shellfish. North Carolina Administrative Code: 15A NCAC 3B.1402 (November 1, 1990).

The Northeast Cape Fear River is a state designated primary nursery area, and both Smith Creek and the Northeast Cape Fear River are high quality streams designated by the state for aquatic life propagation and survival, fishing, wildlife, and secondary recreation. North Carolina Administrative Code: 15A NCAC 2B.0311 (November 1, 1990); North Carolina Administrative Code: 15A NCAC 3B.1402 (November 1, 1990); North Carolina Administrative Code: 15A NCAC 3B.1402(1) (November 1, 1990). The Lower Cape Fear River is a principal shrimp fishery area for brown and white shrimp in North Carolina. Street and McClees at 244–245; Postel at 290–291.

Thus, the massive wetlands destruction engendered by the "de minimis" loophole on the Pembroke Jones Park, Landfall Commercial and Northchase sites has had significant and extensive adverse effects upon the chemical, physical and biological integrity of the waters of coastal North Carolina. The proposed rule must be adopted to finally close the "de minimis" loophole and restore and maintain the integrity of the Nation's waters.

2. *The "de minimis" loophole has been used to destroy wetlands throughout the Nation.*

Hundreds of thousands of acres of wetlands in this country have been destroyed due to the Corps' failure to regulate wetlands destruction that entails small incidental discharges of dredged or fill material into waters of the United States. There are innumerable instances in which Corps personnel have (l) told members of the public that they could destroy wetlands with impunity if the associated discharges into wetlands were small; or (2) ignored incidents in which wetlands have been destroyed through activities which entailed an associated discharge into wetlands. Because Corps Districts have used this loophole to avoid taking jurisdiction, many of these cases are not even documented. Out of the numerous documented cases, however, we only have space here to discuss a few examples that illustrate the harm engendered by this failure to regulate and the compelling need to close this loophole in the wetlands program by adopting the *Tulloch* rule as written.

a. *Wetlands in the Southern United States have been severely impacted by the "de minimis" loophole.*—In the Southeast alone, the failure to regulate mechanized landclearing resulted in the destruction of approximately 430,000 acres of bottomland hardwoods a year from 1960 to 1975. Turner, R.E., et al., *Bottomland Hardwood Forest Land Resources of the Southeastern United States* in "Wetlands of Bottomland Hardwood Forests" (Clark and Benforado eds. 1981). After these wetlands were cleared, they were generally converted into soybean fields. The Corps' Regulatory Guidance Letter 90–05, "Landclearing Activities Subject to Section 404 Jurisdiction," 57 Fed. Reg. 6591, stemmed the tide in part. However, we continue to lose approximately 182,500 acres of bottomland hardwoods a year in northeastern Louisiana alone due to unregulated ditching and mechanized landclearing. The Nature Conservancy of Louisiana, *The Forested Wetlands of the Mississippi River: an Ecosystem in Crisis* (1992).

These large losses of bottomland hardwoods are particularly devastating because bottomland hardwoods are tremendously valuable wetlands. *See generally,* Taylor, J.R., et al., *Bottomland Hardwood Forests: Their Functions and Values* (1990) (hereafter Taylor). "The bottomland hardwoods of the lower Mississippi floodplain are among the Nation's most important wetlands." Tiner at 48. They are prime overwintering grounds for 2.5 million of the 3 million mallards of the Mississippi Flyway and for nearly all.. of. the 4 million wood ducks of the Mississippi Flyway. *Id.* Nu-

merous finfishes depend on the flooded hardwoods for spawning and nursery grounds (*e.g.,* catfish, largemouth bass, and perch). These wetlands also support many furbearers, and they play a vital role in reducing flooding, removing pesticides and fertilizers from the water, recharging groundwater, and trapping eroded soil from farmlands. *Id.* Taylor at 39–56, 59–60.

Bottomland hardwood destruction has had many adverse impacts upon the Southeast. Habitat loss has resulted in dramatic species declines (the agricultural monocultures that replace the bottomland hardwoods provide few niches for wildlife). For example, the cerulean warbler has suffered a *76% decline* largely due to bottomland hardwood habitat loss. Clearing floodplain trees obviously reduces timber resources, but it also has the less obvious effects of reducing detrital input to the aquatic ecosystem and of raising stream temperatures by reducing shading (elevated water temperatures affect biotic communities and decrease the oxygen-holding capacity of water). When bottomland hardwoods are destroyed, important filtering functions provided by these wetlands are lost. Moreover, conversion to agriculture increases the loading of pesticides and herbicides which runoff into local ponds and streams. The removal of wetlands vegetation and ditching eliminate flood-retention benefits from these areas and exacerbate flooding episodes downstream. Finally, bottomland hardwood destruction contributes to lower water tables because the wetlands are no longer there to recharge the aquifer. Taylor at 66–73.

The Melvin Parks case provides an excellent example of the threat the "de minimis" loophole has posed to bottomland hardwoods. The Vicksburg District of the Corps informed Melvin Parks that he did not need to seek a § 404 permit before clearing and converting *1,800 acres* of bottomland hardwood wetlands in Humphreys County, Mississippi (the Belzoni tract) into agricultural fields. These wetlands were Mississippi Delta bottomland hardwoods that seasonally flooded to provide prime habitat for migrating ducks and geese. The Vicksburg District stated that no permit was necessary even though the proposed mechanized landclearing unquestionably would entail a discharge into waters of the United States. Mr. Parks proposed to harvest the merchantable timber, and shear the remaining trees and stumps with a bulldozer equipped with blades to cut the trees near or below the surface of the soil. He planned to rake the roots, push the sheared vegetation to form windrows, and burn the windrows and disc the remaining debris and ash.[6] The upper two to six inches of the soil would have been displaced during the mechanized land clearing. Due to the fact that the landclearing activities would entail redeposits of soil into wetlands, EPA Region IV contradicted the Corps and informed Mr. Parks that he needed to obtain a § 404 permit from the Corps. EPA Headquarters and Corps Headquarters supported Region IV's determination, and Mr. Parks applied for a § 404 permit. If EPA Region IV had not acted and the Vicksburg District determination had been permitted to stand, 1,800 acres of bottomland hardwoods would have been lost.

Similarly, the Chicago Mill and Lumber Company obtained assurances from the Vicksburg District that it could clear approximately 45,000 acres (which consisted mainly of bottomland hardwoods) in the Mississippi alluvial valley without a § 404 permit. The adjacent 65,000 acres was not cleared and is now a wetlands preserve, the Tensas National Refuge. The Vicksburg District also informed International Paper Company that it could ditch and drain approximately 1,000 acres of wetlands in the Homochitto River Delta in Mississippi without a permit as long as most of the excavated soils and vegetation were removed to uplands. The International Paper Company proposed to use draglines on mats and to haul the excavated vegetation and soils to upland areas. The Company abandoned the project when it learned that the Vicksburg District planned to conduct inspections to ensure that only a "de minimis" amount of soils and vegetation were redeposited into the wetlands.

The Charleston District of the Corps informed Larry Hunter that a § 404 permit was not required for his proposed coquina mining operation in Bear Swamp in Horry County, South Carolina (Defender Mine #3). The Charleston District stated that no permit was necessary because Mr. Hunter proposed to load the excavated wetlands onto trucks and dispose of them in uplands off-site. He excavated 16 acres of bottomland hardwoods without a § 404 permit. Mr. Hunter was prosecuted for his activities because he redeposited a significant amount of excavated soils and vegetation into the wetlands.

b. *New England has also suffered from the "de minimis" loophole.*—A notable example of evading the wetlands regulations is happening right now in Maine.

---

[6] Contrary to appearances, *windrows are composed primarily (at least 85%) of redeposited soil* rather than wood. Swindel, B.F., et al., *Windrowing Affects Early Growth of Slash Pine* in Southern Journal of American Forestry" 81–83 (May 1986).

The New England District of the Corps recently informed Dragon Products Company that it did not need a § 404 permit to bulldoze 34 acres scrub-shrub wetlands in Thomaston Maine over a cliff. Dragon Products wanted to remove the wetlands in order to expose underlying limestone which it planned to mine. The New England District stated that it did not believe that the Corps' landclearing RGL applies because the landclearing is not being conducted to convert wetlands to agriculture. EPA Region I informed the New England District that a § 404 permit is required because the bulldozer will inevitably redeposit some soil into the wetlands as it clears them. EPA and Corps Headquarters staff agree that Dragon Products must seek a § 404 permit. At present, Dragon Products, however, is bulldozing these wetlands without a § 404 permit. Moreover, Dragon Products intends to conduct similar landclearing operations in other wetlands in Maine.

c. *Thousands of acres of prairie wetlands have been destroyed in the Midwest through "de minimis" loophole.*—The Midwest has suffered extensive losses of extremely valuable prairie wetlands habitat due to unregulated draining. In just a four year period (from 1964–1968), an estimated 125,000 acres of prairie potholes were drained in Minnesota and North and South Dakota. U.S. FWS, *Report on Drainage Trends in the Prairie Pothole Region of Minnesota, North Dakota and South Dakota* (March 1986). In all, 90% (90 million acres) of potholes in Minnesota have been drained and almost 60% (4 million acres) of potholes in the Dakotas have been converted to cropland. Feierabend, *Status Report on Our Nation's Wetlands* (October, 1987).

Prairie potholes are extremely valuable wetlands. In fact, they are the most valuable inland marshes for waterfowl production in North America. Tiner at 42. Although the prairie pothole region accounts for only 10% of the continent's waterfowl breeding area, it produces 50% of the duck crop in an average year. *Id.* The North American Waterfowl Management Plan targets the preservation and restoration of prairie potholes as a crucial component to waterfowl recovery.

Destruction of prairie wetlands through drainage (or even excavation) has had dramatic adverse effects upon the environment. This habitat destruction has greatly contributed to severe declines in waterfowl and waterbird populations. For example, from 1966–1991, Franklin's gull has experienced a *99% decline* in population. During the same period, there was a *85% decline* in the black tern population. Moreover, the pintail duck population in North and South Dakota *declined by 80%* during this period. Destruction of prairie potholes also increases downstream flooding by eliminating the floodwater retention capacity of these wetlands. Pothole loss also increases flooding, reduces groundwater recharge, and, by removing these natural filters for agricultural chemicals, dramatically degrades drinking water quality (most residents in rural Minnesota and North and South Dakota depend upon groundwater for drinking water). Searchinger, et al., *How Wet Is a Wetland?* 62–64 (1992).

The White Spur case provides an apt example of the magnitude of wetlands destruction under the "de minimis" loophole. In 1986, the Corps' Bismark, North Dakota Regulatory Office informed the Bottineau County Water Management Board (Bottineau County) that it was aware that Bottineau County was planning to drain *2,000 acres of prairie wetlands* in the White Spur subwatershed without a § 404 permit. The Corps stated no § 404 permit would be required for the drainage unless the excavated soil was sidecast into wetlands. In response to a request by Bottineau County, the Corps delineated the wetlands on the property. Several years later, the Corps issued a cease and desist order. The only reason the cease and desist order was issued was because NWF catalogued extensive piles of excavated soils that Bottineau County had sidecast into wetlands as it ditched and drained wetlands.

In another case of wetlands destruction under the "de minimis" loophole, approximately 100 acres of prairie wetlands in Stearns County, Minnesota were ditched and drained without a § 404 permit. The St. Paul District of the Corps did not require a § 404 permit because the landowner stated that the excavated fill would be loaded into trucks and dumped in upland areas. Photographs of the excavation process reveal that excavated soil fell off of the bucket of the backhoe (and into the wetlands) as the backhoe was loading soil into the trucks. The St. Paul District determined that this was "de minimis" incidental discharge and did not require a § 404 permit for this activity.

Finally, in the Yellow County Medicine Ditch #18 case, the St. Paul District determined that a landowner could dig trenches and insert drain tile in order to drain prairie wetlands without a § 404 permit. The St. Paul District determined that no permit was necessary because the landowner planned to haul most of the excavated soils to upland areas. It determined that the small amounts of excavated soil that were redeposited in the trench were "de minimis" and, thus, did not require a § 404 permit.

Thus, these and many other cases demonstrate that the failure to regulate "de minimis" discharges is taking a heavy toll on wetlands and other waters of the United States. The "de minimis" loophole must be closed now before the integrity of more of our waters is degraded or destroyed.

B. The Proposed Rule Promotes Fairness, Consistency, and Improves Administrative Efficiency

The environmental community urges EPA and the Corps to finalize the proposed rule because, in addition to furthering the goals and purposes of the Clean Water Act, it will materially improve the fairness, consistency, predictability, integrity and administrative efficiency of the § 404 program by closing the "de minimis" loophole. As EPA and the Corps explain in the preamble (57 Fed. Reg. 26894), Corps guidance has not been clear or uniform among the Corps district offices regarding activities involving discharges of dredged excavated material into waters of the United States.

The Corps has consistently regulated ditching activities where excavated material was sidecast into wetlands or other waters of the United States. *See e.g., United States* v. *Sargent County Water Resource District,* Civ. No. A3–88–175 (SE ND); *see supra* the White Spur case. Yet, as discussed at length above, many Corps districts have failed to regulate where only "de minimis" discharges occur during ditching or other excavation of wetlands. It is extremely counterproductive and inequitable to discriminate between these two factual situations: both involve a discharge into waters of the United States, both destroy wetlands, and both undermine the CWA goal to restore and maintain the integrity of the waters of the United States.

Furthermore, Corps districts have been inconsistent in regulating activities that involve "de minimis" incidental discharges. For example, from 1979 until 1990,[7] the Vicksburg District of the Corps only regulated landclearing activities that entailed "de minimis" discharges in *western Louisiana;* the exact same activity was *not* regulated by the Vicksburg District in the rest of Louisiana, Mississippi and Arkansas. The Vicksburg District regulated landclearing activities in western Louisiana due to the ruling in *Avoyelles Sportsmen's League, Inc.* v. *Alexander (Avoyelles I),* 473 F. Supp. 525 (W.D. La. 1979), *aff'd,* 715 F.2d 897 (5th Cir 1983), that landclearing activities had involved jurisdictional discharges of soil into waters of the United States. Similarly, the Buffalo, Huntington, and Pittsburgh Districts of the Corps have uniformly determined that incidental "de minimis" discharges trigger the § 404 permitting requirements in *northern,* but *not* southern Ohio. The Corps Districts regulate incidental "de minimis" discharges in northern Ohio due to the ruling in *Reid* v. *Marsh,* 14 ELR 20231, 20234 (N.D. Ohio 1984), that § 404 extends to "de minimis" discharges.

Further inequities have been engendered by the fact that there is no set definition of "de minimis," and, thus, the determination as to what constituted a "de minimis" discharge varies depending upon the staff person. It is patently unfair to tolerate this inconsistency between, and within, Corps districts as to whether or when to regulate activities that involve incidental "de minimis" discharges into waters of the United States—the standard for regulated activity should be consistent throughout the country. Moreover, the arbitrary application of the "de minimis" loophole has decreased the public's respect for the § 404 program. Finally, inconsistent determinations have made the program unpredictable and have, thereby, contributed to the frustration the regulated community feels with the § 404 program.

A further reason to close the "de minimis" loophole is because of the adverse effect it has upon the Corps. Too much Corps staff time has been consumed by numerous inquiries from members of the regulated public who are understandably uncertain as to whether excavation activities they are contemplating are jurisdictional. Moreover, there have been numerous instances, such as in the *Tulloch* case, where Corps staff have been reduced to coaching individuals as to how to use the "de minimis" loophole to evade the § 404 permitting requirements. This is an irrational result for an agency which is charged with responsibility for administering a permit program to *protect* wetlands.[8]

The proposed rule will replace the "de minimis" loophole with a clear, easy-to-apply, bright line rule that Corps districts can consistently and efficiently apply. This will make the program more predictable for the regulated community. It will

[7] In 1990, the Corps issued Regulatory Guidance Letter 90–05, "Landclearing Activities Subject to Section–404 Jurisdiction" (RGL 90–05), 57 Fed. Reg. 6591.

[8] We understand that the proposed rule may create more work initially for the Corps by clarifying that "de minimis" discharges are regulated. However, we believe that any increase in workload will be-more than offset by eliminating the inefficiency and uncertainty engendered by the present rule and by issuing general permits.

also reduce the Corps' workload. Most importantly, however, it will ensure that more wetlands receive the protection they are entitled to under the Clean Water Act.

Finally, by making the § 404 program more effective, the proposed rule will also make participation in the § 404 program more attractive to states. This comes at a critical juncture as many states are determining whether to promulgate wetlands water quality standards for use in § 401 programs prior to the 1993 deadline imposed by EPA.

C. Further Clarification in the Preamble Is Necessary

The preamble invites comment on the definition of the term "degrade" in the proposed rule. 57 Fed. Reg. 26896. The preamble states that "degradation of a wetland or other water of the United States would occur when the activity that involves the discharge results in an identifiable decrease in the functional values of the waters of the United States." *Id.* The preamble further states that "[t]he proposed definition of "degradation" is intended to define a threshold which excludes from regulation certain activities that *would* have *no identifiable adverse effect* on waters of the United States." *Id.* (emphasis added).

The environmental community contends that a better and more consistent approach would be to solely define the threshold test for degradation as an identifiable *adverse effect* that the proposed activity is *likely* to have upon wetlands or other waters of the United States. The preamble should be revised to state that "degradation of a wetland or other water of the United States occurs when the proposed activity that involves a discharge would likely cause an identifiable adverse impact to the water of the United States." This test will be clearer and easier to implement because the § 404(b) (1) Guidelines requires the Corps to focus upon potential adverse effects upon waters of the United States. This is also more consistent with § 404(b), (c), and (e), which focus on adverse effects.

The environmental community supports the agencies' decision to apply a rebuttable presumption that mechanized landclearing, ditching, channelization, and other excavation activities in waters of the United States would have an adverse effect upon waters of the United States. 57 Fed. Reg. 26896. As our prior discussion of the need for the proposed rule amply demonstrates, these activities invariably have adverse effects upon waters of the United States. In fact, as the examples we discussed attest, these adverse effects are often extensive and severe. The environmental community also agrees with the agencies' statement that it is not possible to conduct mechanized landclearing, ditching, channelization, and other excavation activities in waters of the United States without redepositing some excavated material into waters of the United States. 57 Fed. Reg. 26896.

The agencies need to provide further clarification and support if they are going to state that the proposed rule generally will not result in the Corps regulating snagging operations. 57 Fed. Reg. 26897. It is unclear how the agencies are defining "snagging operations" (*e.g.,* how trees and vegetative matter are removed). Furthermore, snagging operations *would* appear to generally entail redeposits of soil *or vegetation* into wetlands. Redeposits of vegetation into waters of the United States constitute discharges that trigger the § 404 permitting requirements. *See Avoyelles III,* 715 F.2d at 923. The agencies need to address the issue of whether snagging operations generally entail redeposits of soil or vegetation into waters of the United States, and they need to clarify that a snagging operation would require a § 404 permit if soil or vegetation is redeposited into waters of the United States (the current language simply provides that snagging operations are jurisdictional if they entail a redeposit of soil into waters of the United States).

Finally, the environmental community requests the agencies to add language in the preamble clarifying that landowners cannot evade the § 404 permitting requirements by using drain tiles to dewater wetlands. Like ditching, channelization and mechanized landclearing, wetlands are excavated in order to insert the tile into wetlands. As the Yellow County Medicine Ditch #18 case discussed above illustrates, incidental discharges occur in digging trenches to insert drain tiles and vast amounts of valuable wetlands are often destroyed. The discharges of excavated soil are inevitable in digging trenches just as they are inevitable in digging drainage ditches or channels. We believe that "de minimis" discharges also occur when drain tiles are plowed or "knifed" into wetlands.[9] Moreover, wetlands destruction is the ultimate, inevitable, and intended result of this draining methodology. Accordingly,

[9] Even if they did not, we contend that the insertion of tiles should, like pilings, be regulated as fill.

the proposed "de minimis" rule should apply to the insertion of drain tiles, and the preamble should clearly state that it does.

II. PILINGS RULE

A. A Final Rule Must Be Adopted To Order to Close the Pilings Loophole

The environmental community urges EPA and the Corps to adopt the proposed pilings rule without change. The proposed pilings rule will close another loophole—the use of pilings as a substitute for fill. Some people have avoided the § 404 permitting requirements by placing pilings into waters of the United States rather than fill. They use the pilings to provide a foundation for homes or other-buildings or use the pilings for dikes or dams. These projects have the same effect as fill. For example, these pilings projects destroy wetlands habitat, flora and fauna and by replacing aquatic areas, by altering the flow or circulation of waters, by increasing sedimentation, and by shading formerly sunny areas. Moreover, such pilings projects often affect valuable coastal wetlands and can affect large tracts of wetlands.

The Corps guidance attempts to close the pilings loophole. *See* Corps Regulatory Letter 90–08, "Applicability of Section 404 to Pilings" (RGL 90–08), 57 Fed. Reg. 6589. To close the pilings loophole once and for all, however, EPA and the Corps need to finalize the proposed pilings rule. RGL 90–08 is only a non-binding guidance document, which will expire in one year, on December 31, 1993. Once finalized, the proposed pilings rule will finally close the pilings loophole because it will have the force and effect of law and no expiration date.

The need to replace RGL 90–08 with a pilings rule is underscored by the *Tulloch* case. In July 1990, the Wilmington District of the Corps authorized Landfall to construct a wooden weir in jurisdictional wetlands on the Pembroke Jones Park site without a § 404 permit. The Wilmington District stated that no § 404 permit was required *even though the current Corps guidance stated that a permit would be required. See* Corps Regulatory Guidance Letter 80–14, "Applicability of Section 404 to Piles" (RGL 88–14) (the predecessor to RGL 90–08). Landfall built the weir in August, 1990. It is made of solid wood construction with horizontal reinforcements that replaces jurisdictional wetlands with solid material. The weir functions as a dam to inundating at least 2.3 acres of wetlands to create open water ponds that function as water hazards on the Pembroke Jones Park golf course, storm water collection devices and sources of irrigation water. This is *not* the type of structure that Corps' guidance advised was not regulated—RGL 88–14 only stated that open pile structures that do not function as fill are not regulated. Replacing pilings guidance with a pilings rule will eliminate this problem.

B. Adopting the Pilings Rule is Necessary to Further the Goals and Purposes of the Clean Water Act

Adoption of the proposed pilings rule is critical to full implementation of the Clean Water Act. As discussed above, the Clean Water Act is a "comprehensive legislative attempt to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *See supra* at 3 (quoting *Riverside Bayview Homes,* 474 U.S. at 132). In order to achieve this goal, the Act *absolutely* prohibits the discharge of dredged *or fill* materials into wetlands or other waters of the United States, except in compliance with a statutory exemption or a § 404 permit. 33 U.S.C. §§ 1311(a), 1344. Accordingly, where the placement of pilings into waters of the United States constitutes fill, this discharge of fill requires a § 404 permit.

C. The Proposed Rule Rationally Defines the Instances in Which Placement of Pilings Constitutes Discharge of Fill

The proposed rule correctly defines when the placement of pilings into waters of the United States constitutes discharge of fill. 57 Fed. Reg. 26898. It provides that pilings projects have the "physical effect of fill" where they "in effect replace an aquatic area or change the bottom elevation of a waterbody as a result of the placement of pilings that are so closely spaced that sedimentation rates are increased or the pilings themselves essentially replace the bottom." *Id.* This directly applies the definition of "fill material" to the placement of pilings. See 33 C.F.R. § 323.2(e); 40 C.F.R. § 232.2(i) ("The term 'fill material' means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody.")

The proposed rule further provides that pilings projects have the "functional use and effect of fill" where they "would result in essentially the same effects as fill (*e.g.,* alter flow or circulation of the waters, bring the area into a new, non-aquatic use, or significantly alter or eliminate aquatic functions and values)." 57 Fed. Reg. 26898. This description of the effects of fill is derived from the § 404(b) (1) Guidelines (40 C.F.R. § 230 Subparts B-F) and § 404(f)(2). Thus, the proposed rule prop-

erly implements the Clean Water Act mandate to regulate the discharge of fill by applying existing law to determine the instances in which placement of pilings constitutes discharge of fill.

D. The Scope of the Proposed Rule Must Not Be Contracted

The proposed rule provides apt examples of instances in which pilings have the physical effect or functional use and effect of fill: (i) "pilings placed in waters of the United States for dams, dikes, or other structures utilizing densely spaced pilings, or as a foundation for large structures;" (ii) "placement of pilings to facilitate the construction of office and industrial developments, parking structures, restaurants, stores, hotels, multi-family housing projects, and similar structures in waters of the United States." 57 Fed. Reg. 26898–26899. Experience demonstrates that these are appropriate examples in which pilings are used as a substitute for fill.

For instance, prior to the issuance of RGL 88–14, the Charleston District of the Corps, helped a landowner evade the § 404 regulations by using pilings to substitute for fill. The landowner applied for a § 404 permit to use fill to repair a millpond dam. The Charleston District denied the § 404 application, but advised the permit applicant that he could evade the § 404 permit requirements by using pilings as a substitute for fill. Moreover, the Galveston District of the Corps does *not* require landowners to obtain § 404 permits when they insert pilings in lieu of fill for foundations of buildings.

The preamble states that the Corps is considering modifying the proposed rule to state that construction of some restaurants on pilings does not entail discharge of fill material to waters of the United States. 57 Fed. Reg. 26897. We can see no basis for exempting construction of certain restaurants from the proposed rule. The agencies provide no rationale in the preamble for deviating from *current* Corps guidance in this manner. 57 Fed. Reg. 6593–6594. There is no variation in pilings placement that we know of that would indicate that some restaurants built on pilings are not built on the equivalent of fill. There must be a sound factual basis for any decision the agencies make not to regulate construction off certain restaurants on pilings. The Clean Water Act cannot be properly implemented absent comprehensive regulation of discharges of fill material. Moreover, failure to evenhandedly regulate restaurant construction on pilings will perpetuate exactly the type of inequity, inconsistency, and administrative confusion that the proposed rule is intended to eliminate.

III. CONCLUSION

The environmental community vigorously endorses the proposed regulations to eliminate the "de minimis" and the pilings loopholes. We strongly support the proposed clarification that § 404 of the Clean Water Act is triggered by excavation activities that involve incidental discharges into waters of the United States. The environmental community contends that this proposed rule is critical to fully implementing the Clean Water Act and to achieving the goal of maintaining the integrity of the Nation's waters. We further contend that now is the time to finalize the proposed rule because, as the *Tulloch* case illustrates, vast amounts of valuable wetlands are being lost through the "de minimis" loophole.

The environmental community strongly supports the proposed codification of current Corps' policy on the placement of pilings as a substitute for fill. in waters of the United States. We contend that replacing the current guidance with a final rule will further implementation of the Clean Water Act by clarifying that, as a matter of law, a § 404 permit is necessary before pilings can be used lieu of fill in waters of the United States.

Respectfully submitted,

APPHIA T. SCHLEY, *Counsel,*
JANICE L. GOLDMAN-CARTER, *Of Counsel,*
Fisheries and Wildlife Division, National Wildlife Federation.

DERB S. CARTER, JR., *Counsel,*
Southern Environmental Law Center.

JOHN ECHEVERRIA, *General Counsel,*
National Audubon Society.

JESSICA C. LANDMAN, *Senior Attorney,*
Natural Resources Defense Council.

MAITLAND SHARPE, *Executive Director,*
Izaak Walton League.

NORTH CAROLINA COASTAL FEDERATION,
Newport, NC, June 13, 1997.

Chairman JAMES INHOFE,
Clean Air, Wetlands, Private Property and Nuclear Safety Subcommittee,
Senate Environment and Public Works Committee, Washington, DC.

RE: SUBMITTED FOR THE RECORD OF THE UPCOMING HEARING ON RECENT ADMINISTRATIVE AND JUDICIAL DEVELOPMENTS IN THE CLEAN WATER ACT SECTION 404 WETLANDS PROGRAM

DEAR CHAIRMAN INHOFE: Please include this written testimony and the enclosed letters in the record of the hearing on Recent Administrative and Judicial Developments in the Clean Water Act 404 Permit Program (CWA 404), held before the Clean Air, Wetlands, Private Property, and Nuclear Safety Subcommittee of the Senate Environment and Public Works Committee.

Coastal North Carolina's economy relies on the fisheries industry and the tourist industry. Both industries rely upon clean, healthy water and productive, viable habitats. Wetlands provide significant protective functions for our water quality. Wetlands serve naturally as a sink for nutrients, sediment and pollutants. They serve as a protective buffer between land and water-protecting the water from our actions on land. Wetlands also protect land from flooding. Losses of wetlands will destroy whole habitats, and ecosystems—all mainstays to our coastal economies.

(1) *We urge this Subcommittee to support the U.S. Army Corps of Engineers' (Corps) decision to eliminate within two years the nationwide permit 26 (NWP 26).* NWP 26 is the largest source of permitted wetlands' loss in the CWA 404 wetlands protection program. NWP 26 authorizes the destruction of isolated wetlands and headwater streams with no warning to the public and virtually no environmental review. Isolated wetlands help purify and recharge drinking water supplies and provide essential habitat for fish and wildlife. Headwater streams protect water quality in our watershed and reduce floods that would otherwise destroy lives and property.

Last December the Corps decided to phase out NWP 26 over the next two years. In reissuing NWP 26 with lower thresholds for the interim, and promising to replace it with legal alternative nationwide permits, the Corps has bent over backwards to minimize inconvenience to the regulated community. The Corps' made a good move forward in their decision to eliminate NWP 26 completely by December 1998. We encourage you to monitor the Corps' progress to ensure they narrowly draft and make environmentally protective as the Clean Water Act requires the nationwide permits offered to replace NWP 26.

(2) *We urge the Subcommittee, when CWA 404 reauthorization takes place, to clarify that the Clean Water Act protects wetlands against destruction by excavation, ditching, and draining, as well as by filling.* Some wetlands developers are relying on a January federal district court case, *American Mining Congress* v. *U.S. Army Corps of Engineers,* to claim that their excavation activities that destroy wetlands are exempt from the Clean Water Act. The Corps, the Environmental Protection Agency, and several environmental groups, believe that the Corps does currently have authority to regulate excavation of wetlands, and are appealing that case. Excavation damages wetlands equally as much as filling them and excavation should be regulated under CWA 404. No scientific controversy exists over this.

(3) *During the reauthorization of the CWA 404, we urge the Senate to commit to preserving wetlands protections, respecting sound science, and increasing government accountability to the citizens.* Proposals to change the definition of wetlands, establish wetland classification schemes, or exempt various special interests, are not a part of responsible wetlands protection. We urge you to stress the primacy of avoiding unnecessary destruction of wetlands of all kinds and of keeping wetlands permitting decisions transparent to the public.

Thank you for your consideration of this testimony.

Sincerely,

TODD MILLER,
Executive Director,

LAURA LYNCH,
Program Associate.

NORTH CAROLINA COASTAL FEDERATION,
Newport, NC, January 29, 1997.

PRESTON HOWARD,
Division of Environmental Management, Raleigh, NC.

JOHN DORNEY,
Division of Environmental Management, Raleigh, NC.

WAYNE WRIGHT,
U.S. Army Corps of Engineers, Wilmington, NC.

STEVE BENTON,
Division of Coastal Management, Raleigh, NC.

DEAR SIRS: The North Carolina Coastal Federation is writing to respectfully request that North Carolina deny state water quality certification to the Army Corps of Engineers' Nationwide Permit 26 (NWP 26) for wetland-filling development activities under section 401 of the Clean Water Act.

The Corps of Engineers has just reissued NWP 26, the single biggest source of wetlands loss in America. This type of permit allows developers to fill wetlands with little or no regulatory review, no analysis of alternatives, and no public input, so long as the wetlands are located in isolated and headwater areas.

The North Carolina Coastal Federation objects to the issuance of the NWP 26. We encourage the Division of Environmental Management to deny the 401 Certification for the proposed NWP. This permit conflicts with Governor Hunts Save Our COAST agenda and the recommendations of the Coastal Futures Committee. Coastal water quality problems and recent fish kills demonstrate the vital importance of wetlands. We should do everything in our power to protect what is left of our wetlands.

Coastal North Carolina's major economic base is in fisheries industry as well as the tourist industry. Both industries rely upon clean, healthy water and productive, viable habitats. Wetlands, which will be destroyed if the NWP is enacted, provide significant protective functions for our water quality. Wetlands serve naturally as a sink for nutrients, sediment and pollutants. They serve as a protective buffer between land and water thus protecting the water from our actions on land.

By interpretation of the North Carolina State Attorney General, wetlands are waters of the State. North Carolina's Antidegredation Policy (15A NCAC 2B .0201) states that existing uses shall be protected. Filling wetlands will cause losses of their uses; filtering nutrients, sediments and pollutants, flood protection and habitat.

We are very pleased that the Corps has decided to abolish Permit 26 after two years, but we are very concerned about the additional unnecessary wetland loss the Permit 26 will cause over the next two years. The Corps's decision to drop from ten to three acres the acreage cap for individual activities authorized under NWP 26 will do very little to protect wetlands, since at least 90% of the development activities authorized by Permit 26 are less than three acres in size and thus will go forward in the next two years as they always have under this permit.

We urge you to deny state water quality certification for Permit 26. Denial of 401 certification will send the strong signal that the Corps must follow through as quickly as possible on its commitment to abolish Permit 26 for good. Denial of water quality certification will also put our state in a position to insist that the Corps add additional conditions to the use of Permit 26 in North Carolina over the next two years, to better protect our wetlands and water quality.

For the same reasons and because wetlands pay such a crucial role in North Carolina's coastal ecosystems, we also urge the state to deny Permit 26 a consistency concurrence under the Coastal Zone Management Act.

We are also enclosing previous comments concerning Nationwide Permit 29. The Federation respectfully requests North Carolina deny water quality certification of Permit 29 based on the points made in the following letter.

LAURA LYNCH,
Program Associate.

NORTH CAROLINA COASTAL FEDERATION,
Newport, NC, September 20, 1995.

WAYNE WRIGHT,
U.S. Army Corps of Engineers, Wilmington, NC.

JOHN DORNEY,
Division of Environmental Management, Raleigh, NC.

STEVE BENTON,
Division of Coastal Management, Raleigh, NC.

DEAR SIRS: I am writing to discuss the Single-Family Housing Nationwide Permit (NWP) the Corps of Engineers published on July 27, 1995 in the Federal Register.

The North Carolina Coastal Federation objects to the issuance of the NWP. We encourage the N.C. Division of Environmental Management to deny the 401 Certification for the proposed NWP. This permit conflicts with Governor Hunts Save Our COAST agenda and the recommendations of the Coastal Futures Committee. Coastal water quality problems and fish kills this summer demonstrate the vital importance of wetlands. We should do everything in our power to protect what is left of our wetlands—not use that power to be issuing new mandates that permit their destruction.

There are numerous points that make this permit unsuitable for North Carolina's coastal zone:

(1) The NWP will have irreparable impacts on the environment and economy of coastal North Carolina;

(2) As waters of the state, wetlands provide existing uses protected by the North Carolina Antidegradation Policy that will not be protected by this NWP;

(3) The subdivisions clause in the NWP will allow greater destruction of wetlands than presently permitted;

(4) Comments made by N.C. Division of Coastal Management staff emphatically state the permit should be denied;

(5) The NWP contains inadequate provisions for monitoring, enforcement or substantial requirements for the protection of water resources.

Coastal North Carolina's major economic base is in fisheries industry as well as the tourist industry. Both industries rely upon clean, healthy water and productive, viable habitats. Wetlands, which will be destroyed if the NWP is enact, provide significant protective functions for our water quality. Wetlands serve naturally as a sink for nutrients, sediment and pollutants. They serve as a protective buffer between land and water thus protecting the water from our actions on land. The NWP will simply allow these resources to be destroyed in small portions with little or no monitoring. The final accumulative impact of the loss of these individual portions will destroy whole habitats, ecosystems and fisheries, all mainstays to our local economies.

The public notice for the NWP gives no meaningful justification for how it will have not have major impacts on our non-tidal waters and wetlands. The only justification is the statement that "this notification is required to ensure that activities authorized by this nationwide permit have no more than minimal individual and cumulative impacts on the aquatic environment." Any impact at all in small portions all along our coast will add up to major destruction of this important habitat. The NWP will allow significant impacts along our state's waters.

By interpretation of the North Carolina State Attorney General, wetlands are waters of the State. North Carolina's Antidegredation Pdlicy (15A NCAC 2B .0201) states that existing uses shall be protected. Filling wetlands will cause losses of their uses; filtering nutrients, sediments and pollutants, flood protection and habitat. The loss of these uses can be protected by avoiding impacts, minimizing impacts and mitigating for losses. This process should be an intricate part of the permit. It is not.

The NWP exempts subdivisions permitted prior to 1991 from the ½ acre cumulative impact restriction. An abundance of projects were permitted before 1991 and are still waiting to build. This exemption will allow large amounts wetlands to be filled. In addition, the lack of monitoring and enforcement will mean that even for projects permitted after November 1991, there will be major wetland losses.

I am enclosing a memorandum from Terry Moore in which he emphatically states this NWP should be denied. He makes 12 points that justify why the NWP should not be allowed. He notes in point (3) and (4) how previously unallowable uses of filled wetlands are possible. He states that septic fields can be placed in poorly drained soil and septic tanks may be placed in filled wetlands.

The NWP process contains no monitoring of impacts prior to, during or after a project. At present we are already losing this important habitat. The permit decision

is based upon the permittee's own assessment. The permittee himself writes his own judgment of what "direct and indirect adverse environmental effects the project would cause" upon which a decision to permit is made. There are not enough staff resources in any division, state or federal, to protect our present resources. We should not allow further permits that will destroy waters and wetlands. This new permit will allow more losses with even less oversight by any regulatory agency.

The NWP for Single-Family Housing allows development to come closer to valuable functioning wetlands than permitted before. Overall, it allows more direct secondary impacts from new homes, more people, and septic systems built too close that will result in wetlands, estuarine and habitat loss.

Sincerely,

LAURA LYNCH,
Program Associate.

MEMORANDUM

TO: Steve Benton

FROM: Terry Moore

DATE: 17 April 1995

SUBJECT: Project Number DCM95–18 Dated 3/30/95; Proposed Single Family Housing Nationwide Permit

I have reviewed the above referenced Nationwide Permit for Single Family Housing and offer the following comments:

(1) ½ acre at a time, this permit will allow consumption of natural storage areas for flood waters in what are already flood prone areas. This applies to areas all over the state, including the coastal area.

(2) Not only will it reduce flood storage capacity, it will deprive the wetlands of one of its significant natural functions, that of nutrient absorption, or from acting as a sink for nutrients, sediments, and other pollutants associated with storm water run off. These nutrients, sediments, and associated pollutants will then be diverted or concentrated in the area of stream itself which empties into our estuaries. The long term result may be more and larger shellfish closure areas with temporary closures resulting from storm events also increasing in frequency and duration.

(3) The problem of reduced flood storage capacity is a direct result of this permit; however implementation of the permit will further compound the problems of sediments, nutrients, and pollutants that will result from single family development in these areas. Not only will you have a new and direct source of fertilizers, phosphates, detergents, oils, pesticides and herbicides, this permit allows for "septic fields" which would be installed in what is already by definition a poorly drained soil. This will increase the potential for fecal contamination from a septic system in wetlands, not to mention what new animal operations that might be associated with the development.

(4) While working with State Environmental Health representatives in the field, I have repeatedly been told that it's against state regulations to install a septic tank in filled wetlands and that is exactly what this permit is encouraging.

(5) This general permit will allow for additional consumption and fragmentation of wildlife habitat. Wildlife is and has been gradually displaced into remaining wetland areas and this proposal will now begin interrupting these.

(6) Numerous lots have been subdivided in wetlands in the coastal area. Many lots have been subdivided and built upon with only enough highground to accommodate actual house construction. Lots of this description are common in the coastal area and they are adjacent to our estuaries and tributaries. This permit will now allow these individuals to go fill up to ½ acre of 404 wetlands, which in most cases is the transition area between the higher ground and coastal wetlands.

(7) This permit will allow for the filling of previously undevelopable hummocks surrounded by coastal wetlands. This will increase both direct and indirect pressures on our estuarine system.

(8) This permit will allow the filling of swales in our maritime forest, which in essence would defeat part of the purpose for maritime forest protection (i.e., groundwater recharge). Again, numerous lots have been platted and subdivided in these areas.

(9) To allow filling of 404 wetlands (the transition area between higher ground and coastal wetlands) will again serve to block the natural retreat of shoreline and coastal wetlands. Thus the long range result will be reduced estuary, reduced coastal wetland and reduced estuary productivity.

(10) This permit says "The Corps believes that this nationwide permit has minimal individual and cumulative adverse impacts on the aquatic environment." How can the Corps evaluate cumulative impacts when by their own admission they keep no record of the number of nationwide or general permits issued. The proposed permit itself explains there will be "little to no paperwork". Therefore I question, if you don't even know how many permits you're issuing, you have no monitoring procedures or staff to do so, how do you document minimal impact? The obvious impact is a reduction of wetlands adjacent our estuaries and reduced wildlife habitat.

(11) The Corps also explains that for the purpose of this nationwide permit "the acreage of loss of waters of the United States includes the filled area plus any other waters of the United States that are adversely affected by flooding, excavation or drainage as a result of the project." This is a ridiculous statement. There is no effort put forth or staff assigned to monitor the impacts (direct or indirect) of Corps Nationwide or General permits. This suggestion is just as big a farce as the minimal cumulative adverse impact statement.

(12) The Corps allows "stacking" of their Nationwide or General permits. Therefore, don't think the project impact would be limited to the ½ acre suggested in this permit. The applicant could stack as many permits as feasible such as Nationwide No. 18, No. 14, and possibly others. The direct impact of the fill footprint could easily end up being 1 or more acres.

I am opposed to the proposed Single Family Housing Nationwide Permit. I recommend the permit be *denied without prejudice* in the 21 coastal counties, in the 25 mountain counties, and all remaining counties in North Carolina. I recommend this permit be denied use within the State of North Carolina.

PREPARED STATEMENT OF THE PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS

The Pacific Coast Federation of Fishermen's Associations (PCFFA) is the largest organization of commercial fishermen on the west coast, with member organizations from San Diego to Alaska. *We represent thousands of working men and women in the Pacific fishing fleet who generate tens of thousands of jobs, as well as produce fresh, high-quality seafood for America's tables and for export.* The commercial fishing industry is the economic mainstay of many coastal communities throughout the Pacific coast. The commercial fishing industry whose interests we represent accounts for *several billion dollars annually in economic interests, and more than 100,000 family wage jobs along the north Pacific coast as well as far inland.*

We are also a wetlands dependent industry. An estimated seventy-one (71%) percent of this nation's entire commercial fish and shellfish resource are wetlands dependent.[1] *An even larger share of inland recreational fisheries are wetlands dependent. In fact this nation's aquatic resources generate approximately $111 billion/year to our nation's economy in both commercial and recreational fishing activities nationwide. Without protection of this nation's wetlands, however, much of this economic resource would simply disappear.*

To this nation's oldest industry—the commercial fishing industry—the protection and restoration of wetlands, therefore, is about protecting our jobs. Its about food production and food on America's tables. Its about coastal economies and coastal employment. And finally, its about commerce and exports.

WHY WETLAND PROTECTION MEANS JOBS

Fish do not arise from nowhere—they are part of and supported by a complex and fragile ecosystem. The vast majority of commercially valuable species depend for some portion of their biological lifecycle on inland, near shore or estuary wetlands—these are their nursery grounds. Let me give you some examples. Salmon, for instance, are hatched from eggs laid in inland freshwater gravel beds sometimes hundreds of miles from the ocean. The young salmon then make their long immigration downriver to the ocean where they will eventually grow to adulthood and return to spawn, but along the way they depend upon back channel wetlands as a food source, for shelter from predators and (in the case of coho salmon) they need these wetlands to provide "overwintering" habitat to nourish them for up to 18 months.[2] Even then

[1] From the EPA Office of Wetlands' estimates of value of commercial landings derived from species that during their life cycles depend directly or indirectly on coastal wetlands.

[2] Coho salmon overwinter for up to 18 months in the middle and lower inland watershed, primarily in slackwater areas which are rich feeding sources due to adjoining wetlands. One reason

they depend upon salt water wetlands to help them adapt to ocean conditions. Their adaption from fresh to salt then back to fresh-water fish is one of the most remarkable biological feats in the natural world. However, without salt-water estuaries and salt marsh wetlands within which to make the necessary biological changes, these adaptations would be impossible and they would all die.

Salmon are incredibly valuable to west coast economies. As recently as 1988, the Pacific salmon fishing industry (including both commercial and recreational portions of our industry) generated an estimated 62,750 family wage jobs, and more than $1.25 billion/year in economic income to the Pacific Northwest and Northern California.[3] This represents a national resource of roughly $39.5 billion in economic value from salmon harvests—just from northern California and the Pacific Northwest alone.[4]

Without adequate wetlands protection, however, much of the West Coast salmon fishing industry would be doomed. Wetland losses to date have already lost many west coast fishing jobs. According to official federal statistics, Washington state has lost an estimated 31% of its historic wetlands, Oregon another 38% and California a whopping 91% of all its historic wetlands base. Counting coastal wetlands only, these loss figures would be much greater. In the nine-state region of Arizona, California, Hawaii, Idaho, Nevada, New Mexico, Oregon, Utah and Washington, more than 59% of historic wetlands are now gone. *These wetland losses have already had a dramatic negative impact on salmon and many other fishery resources throughout the west coast, costing tens of thousands of jobs and hundreds of millions of dollars in productive capacity.*[5]

To give another example, nowhere in the nation is the link between wetland habitat and fish production more obvious than in the Gulf states, where National Marine Fisheries Service scientists estimate that *98% of the Gulf commercial harvest comes from inshore, wetlands dependent fish and shellfish.* Louisiana's marshes alone produce an annual commercial fish and shellfish harvest of 1.2 billion pounds worth $244 million in 1991.[6] At this rate of return the Gulf shrimp resource is worth roughly $7.7 billion dollars to the economy of those states.[7] Although by no means alone, Gulf shrimp clearly head the list of the region's wetlands dependent food species. Without strong wetlands protection this extremely valuable commercial fishery would eventually no longer exist in those states.

In the 103rd Congress there were various proposals to decrease wetlands protection in the Clean Water Act. This alarmed the commercial fishing industry a great deal. In response to that effort, PCFFA and five other major fishing industry groups published a report on the need for wetlands protection to assure our industrial job base. That report, titled Fisheries, Wetlands and Jobs (March of 1994), makes clear the value of wetlands for the production of bluefish, crab, halibut, lobster, menhaden, pollack, salmon, shrimp, striped bass, trout and many other species.[8] *Without strong wetlands protection—including both a "no-net-loss" policy and restoration—much of the commercial fishing industry will eventually be lost.* A copy of that report is attached to this testimony for the record.

---

for coho salmon now approaching extinction in many areas and being considered for listing under the ESA is the widespread loss of wetlands throughout the western U.S.

[3] Figures from an independent economic study done by the Pacific Rivers Council (January, 1992), *The Economic Imperative of Protecting Riverine Habitat in the Pacific Northwest.* This study was based on official federal salmon harvest figures for the 1988 baseline year catch figures which were already far below the productive capacity of prior years, reduced largely due to widespread habitat loss, including wetlands losses regionwide, which reduced the number of juvenile salmon able to be produced by damaged watersheds.

[4] Calculating the present value of an income stream of $1.25 billion/year based an a 3% discount rate over 100 years.

[5] Wetlands loss figures from Thomas Dahl, *Wetland Losses in the United States 1780's to 1980's,* published by the U.S. Dept. of Interior, Fish and Wildlife Service, Washington, DC. 21 pp. Wetland losses in the western U.S. by state are: Arizona (36%); California (91%); Hawaii (12%); Idaho (56%); Nevada (52%); New Mexico (33%); Oregon (38%); Utah (30%) and Washington (31%). Those states with more than 80% wetlands losses include: California, Ohio, Iowa, Indiana, Missouri, Illinois and Kentucky. No state has lost less than 20% other than Maine, Hawaii, New Hampshire and Alaska. All states, including Alaska, continue to lose their wetlands at alarming rates.

[6] From EPA Office of Wetlands publication *Economic Benefits of Wetlands* (February, 1995), taken from federal harvest figures.

[7] Again, calculating the present value of an income stream of $244 million/year at a 3% discount rate where N = 100 years.

[8] *Fisheries, Wetlands and Jobs: The Value of Wetlands to America's Fisheries.* Coauthored and presented by Pacific Coast Federation of Fishermen's Association, Atlantic States Marine Fisheries Commission, Southeastern Fisheries Association, East Coast Fisheries Foundation and Ocean Trust (March, 1994).

In a report from the U.S. Department of Commerce, Office of the Inspector General, it was noted that habitat loss (rather than overfishing) is perhaps the single greatest threat the fishing industry now faces:

> "There is growing concern about the future economic prospects of industries that depend on abundant fish and shellfish stocks. Many of the past assessments of declining stocks have cited overharvesting as the primary reason, but we found that there is a growing concern within NMFS and the fishing industry that overfishing is being overshadowed by an even more significant threat: loss of fish habitat. * * *
>
> "Since the loss of marine habitat is perhaps the greatest long-term threat to the productivity of U.S. fisheries, we believe that a strong habitat protection program—integrated with habitat restoration and fishery management—is essential for the health of our living marine resources and the economic survival of the U.S. fishing industry." [9]

The current Director of NMFS, Rollie Schmitten, has also spoken publicly on the importance of habitat protection to the commercial fishing industry, as follows:

> "My central message today is that the protection of fish and wildlife habitats is a national problem in critical need of attention. * * * The assignment of endangered and threatened status to many species is symptomatic of the cumulative, ongoing nature of broad-based habitat deterioration. * * * Habitat loss and degradation are the major factors contributing to endangerment and extinction. * * * The war to conserve fish and wildlife habitats is being lost." [10]
>
> "[O]ver the long term [nearshore ocean and estuarine fishery habitat] loss is probably the greatest threat to marine fishery productivity throughout the United States * * * Fisheries management will be moot if habitat loss and degradation destroys the productive potential and the quality of our living marine resources." [11]

In fact the war to protection fishery habitat is being lost. Even under existing law, wetlands losses have not been halted, only the *rate of loss* somewhat reduced. Habitat losses to date have already cost the commercial fishing industry more than $27 billion/year and more than 450,000 jobs.[12] On the other hand, habitat protection and restoration—and in particular wetlands protection—would restore that lost productivity and recapture those lost jobs to the economy. This is part of the "economic dividend" to the country of wetlands and other fish habitat protection.

Wetlands protection should not be seen, therefore, as a cost so much as it is an investment in the future of a national commercial and recreational fishing industry that provides $111 billion dollars each year to the nation's economy and 1.5 million family wage jobs.

I won't go into the many other onshore economic benefits of wetlands protection in any detail. However, these benefits include: natural flood control, natural buffers against erosion and siltation, water purification functions, breakdown of pollutants and the support of a host of aquatic species with many other benefits. If these functions are lost through increased wetlands losses, then the costs of replacing these natural functions (e.g., increased water filtration costs) must either be paid by government *or the damages will be paid by private landowners.*

Wetlands are clearly important for natural flood control as well as nature's best water storage system. One acre of wetlands flooded to a depth of 12 inches holds 330,000 gallons of flood water that would otherwise damage human property and threaten human life. A 1965 study of the Charles River, for instance, by the U.S. Army Corps of Engineers determined that if 40% of the Charles River wetlands were lost, flood stages in the middle and upper river would increase two to four feet—increasing annual flood losses by $800,000.[13] The Minnesota Department of Natural Resources has computed a cost of $300 to replace, on average, each acre-foot of flood water storage eliminated from natural wetlands. In other words, if development eliminates a one-acre wetland that naturally holds 12 inches of water during a storm, *the replacement storage costs for flood control alone* would be $300.

---

[9] U.S. Dept of Commerce, *Program Evaluation, Mayor Initiatives Needed to Protect Marine Habitats.* Final Report, IRM–5442, January, 1994 (37 p.). Office of the Inspector General, Department of Commerce, Washington, DC.

[10] 58th North American Wildlife and Natural Resources Conference, Washington, DC 1993.

[11] National Symposium on Coastal Fish Habitat, Baltimore, MD, 1991.

[12] Job losses due to habitat degradation from *Marine Fishery Habitat Protection: A Report to the U.S. Congress and the Secretary of Commerce,* prepared by the Institute for Fisheries Resources, East Coast Fisheries Foundation and Pacific Coast Federation of Fishermen's Associations (March, 1994).

[13] From Kusler, Jon A., *Our Wetland Heritage: A Protection Guidebook* (1983), p.1.

Thus the cost to replace the storage capacity of the 5,000 acres of wetland lost annually in Minnesota would be $1.5 million (in 1991 dollars). In other studies, the economic-equivalent values of coastal wetlands ranged from about $2,200 per acre along the Pacific coast to *almost $10,000 per acre along parts of the Florida coast.*[14] In fact, wetlands are now recognized as a valuable natural resource that protects our cities from flooding, protects our beaches from erosion, provides us cleaner water and gives us a host of other valuable economic benefits. It now appears that wetlands are in many cases more economically valuable as *wetlands*—maintained simply for their biological and fisheries value than for any other purpose.

I should also note that the best way to prevent more listings under the federal Endangered Species Act CSA) is to protect wetlands. Nationwide, over 5,000 species of plants, 190 species of amphibians, and 270 species of birds depend on wetland ecosystems for their survival. In fact, nearly 50% of all the animals on the endangered species list in the U.S. rely on wetlands for their very existence. Wetlands are among the most productive natural ecosystems in the world, and therefore it pays to protect them.[15]

We are in fact losing the struggle to save the nation's wetlands. Hundreds of thousands of acres of wetlands have been drained annually, despite increased efforts to conserve wetlands through state and federal legislation. Over half (53%) of the wetlands in the coterminous United States have been lost. Only about 103 million acres of wetlands remains today, but unfortunately much of this remainder has already been biologically compromised.[16]

THE NATIONWIDE PERMIT SYSTEM'S DEFICIENCIES

Since this hearing is primarily about the nationwide permit system, it would be helpful to mention a few points about this program and its deficiencies from our industry's viewpoint. The principle problem is that these permits become a license to destroy wetlands more or less at the convenience of developers. In fact, the single biggest source of wetlands loss in America is Nationwide Permit 26. This permit singles out wetlands located in headwaters or isolated areas for different and much inferior protection under the Clean Water Act, with little scientific basis. This leads to watershed fragmentation which can have devastating cumulative impacts on the aquatic species which depend upon them.

In an influential report from 1995, the National Academy of Sciences called the scientific basis for Permit 26 "weak" and specifically recommended that the Corps reevaluate the permit for validity under the Clean Water Act.[17] The U.S. Fish and Wildlife Service has performed detailed studies of the effect of Permit 26 in California and Colorado, and these studies document that this permit is allowing significant environmental harm on the ground.[18] The Environmental Protection Agency, the National Oceanic and Atmospheric Administration, and the Interior Department have all filed formal comments critical of the permit.[19] In fact, many states have joined this chorus of criticism against Permit 26, with a number of states specifically and directly asking the Corps to abolish the permit for good.[20]

In the face of the fact that Permit 26 had become a major loophole for wetlands destruction, last December the Corps decided to phase out Nationwide Permit 26 over a two-year period. While we regret the long time the Corps is taking to implement this badly needed reform, we—as an industry organization—strongly supported the Corps' decision to abolish this destructive permit exemption. The cata-

---

[14] Economic values of wetlands from *Coastal Wetlands of the United States: An Accounting of a Valuable National Resource.* U.S. Dept. of Commerce, NOAA (1991).

[15] From *Population-Environment Balance,* April 1993; source quoted: U.S. Fish and Wildlife Service.

[16] Thomas Dahl, *Wetland Losses in the United States 1970's to 1980's, ibid.*

[17] National Research Council, Wetlands: Characteristics and Boundaries (Washington: National Academy Press, 1995), pp. 155–56 & 166–67.

[18] From Long, Michael M., et al., "Wetland Losses Within Northern California for Projects Authorized under Nationwide Permit No. 26," U.S. Fish and Wildlife Service Sacramento Field Office (October 1992), Letter from Joel A. Medlin, Field Supervisor, U.S. Fish and Wildlife Service Sacramento Field Office, to District Engineer, Corps of Engineers Sacramento District (July 15, 1996); Gladwin, Douglas N, et al., "Section 404 and Wetland Alterations in the Platte River Basin of Colorado," U.S. Fish and Wildlife Service Resource Publication 178 (1996).

[19] See their comments dated on or about September 3, 1996, and filed in response to Corps of Engineers Proposal to Issue, Reissue, and Modify Nationwide Permits, published on June 17, 1996, at 61 Fed. Reg. 30,780.

[20] See, for example, Letter from John Turner, Chief, Environmental Services Division, California Department of Fish and Game, to Corps of Engineers, April 30, 1996, at pg. 7; Letter from Jeremy Craft, Director, Division of Environmental Resource Permitting Florida Department of Environmental Protection, to Jasmin Raffington, Florida Department of Community Affairs, August 22, 1996, at pg. 15.

logue of harm caused by Permit 26 is serious: each year roughly 34,000 development activities are authorized under Nationwide Permit 26, and the annual wetlands loss *from this one permit alone* is in the many thousands of acres each year. Just as troubling, this loss is concentrated in the parts of our nation that are facing the most development pressure, a fact that magnifies and worsens the harm caused by the permit. Many of these high impact areas are in biologically important coastal areas, particularly including the Southeast part of our nation, where our industry is precisely the most wetlands dependent. As wetlands are lost at a high rate in these areas (due to Permit 26 and other permitting mechanisms), the ability of wetlands to serve as biological breeding and nursery grounds for extremely valuable fisheries is being impaired. More fishing jobs are being lost as a result. Frankly, it was past time for a change, and we are glad that the Corps is starting to move the program in the right direction and phasing it out.

As a matter of sound science and policy, Nationwide Permit 26 cannot be defended. The wetlands regulatory system needs to strike a much more responsible balance between protecting the environment and facilitating responsible economic development; for too many years, Permit 26 has thrown this balance out of kilter. Furthermore, the impact on the nation's valuable fisheries of continued wetlands loss has been systematically ignored. In many cases, *just leaving wetlands alone to serve us as wetlands* is the most biologically valuable and economically productive choice for society as a whole.

The nation's fishing industry will benefit from the end of Nationwide Permit 26, and its replacement by a set of activity-specific general permits. Those changes will do a much better job of protecting the environment, protecting our industry, and restoring the responsible balance that the Section 404 program needs—and was supposed to provide.

RECOMMENDATIONS FOR MAKING WETLANDS PROTECTION LESS BURDENSOME

There is no doubt that there is room for improvement in the Army Corps of Engineers Section 404 wetlands fill permit process, including providing for clear deadlines as well as a more open and less bureaucratic process. The system could do a much better job of protecting wetlands. The nationwide permit system and the mitigation programs are particularly in need of reform to reduce indefensible loss of valuable natural resources. However, as a regulated industry ourselves, we are also sympathetic to landowners complaints of slow processing times and costly delays. We have faced some of those problems ourselves in our salmon stream restoration programs, many of which require similar permits.

On the landowners' side the system could be improved in ways designed to give landowners more predictability and accountability in the regulatory decisions they receive from the Corps. While we do not believe legislation is necessary to effect most or all of these improvements, we could support a balanced bill focused primarily on procedural reforms designed to fix legitimate problems on both the resource protection and the landowners' sides of the program. In other words, we would support a number of reasonable administrative streamlining changes, *provided the resource protection goal of wetlands protection and the "no net loss" policy is not sacrificed along the way.*

We believe that such a balanced, centrist bill has little chance of passage, however, if land developers continue to advance extreme proposals to scale back the Clean Water Act's protections for wetlands. We have recently seen serious proposals to codify unscientific and unworkable classification schemes, to introduce special interest exemptions for favored industries, and to scale back EPA's independent review authority to prevent it from protecting wetlands at all. These are just a few examples of the unscientific, often counter-productive legislative proposals that development interests have advocated in the past, and apparently continue to advocate to this day. Bills containing provisions such as these are moderate in name only, and frankly they make any truly centrist and balanced efforts toward needed reforms impossible. As this nation's oldest and still one of its largest industries—and one which is heavily wetlands dependent—we must continue to oppose extremism of this nature.

There is also the more fundamental question as to whether the Army Corps of Engineers should even be the responsible permitting agency. Throughout the history of the Corps, that agency has been dedicated to destroying wetlands rather than protecting them. Even today it is not uncommon for the agency to be vehemently defending its own outmoded projects, some of which have caused massive wetlands loss, while simultaneously trying to shift the entire remaining burden of wetlands protection in a wetlands-depleted watershed onto the shoulders of private landowners and the taxpayer. Since the role of wetlands must be judged *on the basis*

of the whole watershed, any reductions in one place will have to be *offset elsewhere.* In many instances, modification or cancellation of a pet Corps project may be all that is required to *both* protect key wetlands *and* to reduce landowner impacts at the same time. Some of these projects are, frankly, little more than giant boondoggles designed to subsidize bloated industries at taxpayer expense. Many of them do far more harm than good.

Again, we would support improvements to the process which would benefit both the wetlands resource and landowners. Some of our recommendations for how the process can be improved are as follows:

(1) *Minimizing conflicts with private landowners.*—Most of the conflicts between private landowners and the government with respect to wetlands protection are more perceived than real. Nevertheless, there is a need to minimize those conflicts to the extent possible as well as providing for conservation measures which achieve the goal as cost effectively as possible. Some of the measures that should be incorporated into the law to achieve these goals include the following:

The law should direct the Secretary to emphasize the role of federal actions and public lands in achieving recovery. The law should be clearer in specifying that *all* federal agencies have a responsibility *to use their existing programs to foster the implementation of wetlands protection to the degree they can.* All agency actions should be based on a coordinated basinwide wetlands protection plan. Otherwise there will be fragmentation and waste as frequently occurs today. Thus we frequently see federal projects to both destroy wetlands and save wetlands in the same basin—clearly working at cross purposes.

If wetlands occur on privately held lands, the law should direct the Secretary to identify land for acquisition (including any land interests less than fee title, such as conservation easements), from willing sellers, and should to set priorities for acquisition. This process should be *well funded* and the administrative procedures for financing these acquisitions should be simplified. Many landowners would be more than willing to help with wetlands protection efforts if such financial incentives were more readily available.

An expedited review of proposed wetland modification actions by private landowners should be provided so that no more than 90 days elapses between application for review and final decision. A "tiering" process would be useful so that processing for projects likely to have only minimal impacts would be expedited, thus freeing up staff time for more speedy review of projects with major significance.

There should also be permit review and decision deadlines as a matter of statute so that the permit process is more predictable and there is more agency accountability.

Landowners should be encouraged to provide wetlands protection through a variety of incentive and financing programs, including the following:

(a) Establish a revolving loan fund for state and local government entities to encourage such entities to develop regional wetlands conservation plans similar to the Habitat Conservation Plan (HCP) process under the ESA. In fact, these processes may be one and the same, as an HCP should also address wetlands protection.

(b) Enable landowners with proposed activities consistent with an approved regional HCP to obtain expedited approvals of those activities which may affect wetlands.

(c) Authorize the Secretary to enter into cooperative management agreements with private landowners, providing financial incentives for conservation measures above and beyond those required by law.

A Wetlands Conservation Plan process similar to (and perhaps part of) the Habitat Conservation Plan (HCP) procedure is a good tool for landowners to restore some certainty into the process as well as to provide for long-term protection measures. However, the current HCP process is deeply flawed and includes too little public notice and comment. Furthermore, HCP's can be inconsistent with approved HCP's elsewhere, even in the same watershed. However, some similar planning process is required to get an "overview" as well as to create a realistic, long-term plan for wetlands protection and conservation on a landscape basis.

(2) *Wetlands identification should be based on the best available science.*—Wetlands should be identified in accordance with the recommendations of the National Research Council's recent report Wetlands: Characteristics and Boundaries. This report represents the best available science on this process.

(3) *Funding for scientific surveys and wetlands restoration efforts should be greatly improved.*—The total funding for all wetlands survey, permit review and remedi-

ation programs is nowhere near adequate. Without better funding, the agency simply cannot do the required job without major project delays. The most common complaint from landowners, in our experience, are agency delays. These delays are caused primarily by lack of adequate funding to complete the process within reasonable time lines.

(4) *Alternanve Dispute Resolution for property owners.*—There are rare instances in which property owners were unfairly treated or in which government agencies made inappropriate decisions. This is inevitable in any large administrative process. However, there should be a speedy and effective way to put these problems to rights. Some internal dispute resolution mechanism would be very helpful for landowners to minimize unnecessary conflicts and resolve disputes. There is an existing Alternative Dispute Resolution process within the U.S. Court of Claims which allows aggrieved landowners to present their case to a Claims Court judge without needing a lawyer and without a lot of paperwork. This process does not even require a trip to Washington, DC—it can be done by fax and phone. At a minimum, any new legislation ought to specifically include this sort of fast and inexpensive alternative dispute resolution mechanism as a "safety value" to prevent problems from escalating out of control.

(5) *All known information about the existence and extent of known wetlands should be available to prospective purchasers or developers of property from a centralized data source.*—Information depositories should be created (perhaps administered through the National Biological Service and made available through state and local land planning agencies) so that *prospective* purchasers or developers of property would be able to ascertain quickly and inexpensively whether or not wetlands are known to exist on the property they are considering purchasing. Similar state-based information services are already available in states like California, through the local permit process. In theory, it would be possible to have all this information in readily searchable form, available with a quick computer inquiry for a very minimal fee from any county planning agency. This information may also be made available for "on-line" access via computer modem.

Most land use conflicts result when landowners have invested substantial money and resources in a development project and feel that they have no choice except to proceed in order to recoup their investment. If a prospective landowner or developer knows *before close of escrow* whether or not there might be conflicts between development plans and wetlands protection obligations, he or she could plan accordingly, propose mitigation measures with acceptance a condition of close of escrow, and in general take a number of proactive steps to minimize or eliminate any potential future conflicts. Biological impact review of development plans by state fish and wildlife or local agencies is routinely done in many states as part of the building permit process, and this additional data base would fit neatly into those programs.

(6) *Abolish the Nationwide Permit 26*—In particular, the Nationwide Permit 26 exemption should be abolished as quickly as possible, so that the unreasonable tide of wetland loss this permit causes can finally be stemmed and these kinds of blanket exemptions replaced with a balanced, scientifically valid approach to wetlands protection that take *all* values—in particular commercial and recreational fisheries values—into account.

CONCLUSION

In conclusion, I want to leave this Subcommittee with two critical messages. The first is that wetlands are critical to fish production, which means they are essential to create and maintain jobs, food, commerce and exports. In fact, almost $79 billion dollars per year are even now generated from wetlands dependent species, or about 71% of the nation's entire $111 billion dollar commercial and recreational fishing industry.

The second message is that *we cannot afford to lose any more wetlands.* We have already lost *more than half,* and are still only slowing the rate of loss down rather than reversing it. Our focus today should therefore be on protecting what is left, restoring what has been degraded and looking for opportunities to establish new wetlands, since this will mean more abundant fisheries and additional economic opportunities in the future. Wetlands protection is, in fact, one of the wisest long-term investments this nation can make in its economic future. It is also a very good investment in flood control and clean water for our children and their futures. Wetlands, in short, is one of this nation's most valuable economic resources, and it pays to protect it.

Fisheries, Wetlands and Jobs

The Value of Wetlands to America's Fisheries

Prepared for the
Campaign to Save California Wetlands

by
William M. Kier Associates
Consulting Fisheries Scientists
Sausalito, California

Assisted by
Clean Water Action
Clean Water Network
National Audubon Society
Natural Resources Defense Council
National Wildlife Federation
Sierra Club
Trout Unlimited

Campaign to Save California Wetlands and this report
are funded by
David and Lucille Packard Foundation
Columbia Foundation
The San Francisco Foundation
Compton Foundation, Inc

March, 1994

EXECUTIVE SUMMARY

The nation is engaged in a continuing debate over the future of America's wetlands - salt marshes, the brackish shallows of bays and estuaries, freshwater swamps, seasonal pools, even Alaska's frozen tundra. The discussion should address the role that wetlands play in groundwater replenishment, flood control, the protection of water quality, the conservation of nature and wildlife - and the production of fish.

Fishing contributes $111 billion to the nation's economy and one and a half million jobs.

The relationships between wetlands and fish production are essential. They are well understood by fisheries experts and most fishermen. This report, prepared from scientific publications and government reports, describes the links between wetlands function and the health of some of the nation's most valuable fish resources.

The values discussed here are substantial. Three quarters of the nation's fish production depends on marshes and other wetland environments. Fishing contributes *$111 billion* to the country's economy and provides jobs for *one and a half million Americans*.

Three quarters of the nation's fish production depends on marshes and other wetland environments.

The U.S. Fish and Wildlife Service estimates that at the birth of our nation wetlands covered 104 million acres of the contiguous states -- an area roughly the size of California. Half of those wetlands are gone. Although our country is largely developed we are still destroying wetlands at a rate of 300,000 acres year. We must face the question of how we will feed and sustain ourselves in the years ahead. **This report makes clear the essential role wetlands must play in a sustainable American future.**

CONTENTS

INTRODUCTION

This report explains the relationship that fish have with their wetland habitats and the relationship that we have with the fish. Both relationships are important to survival - theirs and ours.

Fish, like many humans, may change the location and nature of their habitat as they go through stages of development. The availability of a particular habitat is much more important to the survival of fish, however, than it is to us. For example, many ocean fish spend their youth in shallow-water wetland habitats and can venture into the open sea only when they have become strong swimmers. Scientists believe, and have clearly demonstrated in many cases, that the availability of habitat and the survival of fish are absolutely linked. The disappearance of wetlands, therefore, leads to the decline of the fish which depend upon them.

Wetlands are an essential habitat for both salt- and freshwater fish. While we may struggle for a politically acceptable definition of wetlands, their nature and function are very clear where fish are concerned. Wetlands cycle nutrients out of mud, sand and water back into bays, lakes and streams, promoting the growth of the smallest organisms in the aquatic food chain. These small creatures are eaten by larger ones and then by fish. Such "primary production" and predation work especially well where the water is sheltered, shallow and rich with nutrients. Therefore, no matter how we may define them, wetlands are vital to fish for food and shelter.

The term "fishery" puts *us* in the picture. It refers to *our* harvest of fish resources, for food or sport, the place of the harvest and even the harvesting method. We talk of an "oyster fishery", a "catch-and-release trout fishery", the "Columbia River salmon gillnet fishery".

Fishing is big business in this country. Our commerical fishermen harvested more than *ten billion pounds of fish last year.* National Marine Fisheries Service scientists estimate that nearly seven billion pounds of these fish depend upon inshore-wetland habitats.

Sports fishermen's $24 billion in spending means $69.4 billion in economic output, 924,600 jobs and $3.3 billion in state and federal taxes.

Seventy thousand U.S. fishing boats are the workplace for a quarter million fishermen and fisherwomen. Most of these boats are family businesses, similar to family farms or other small businesses ashore. Each of the onboard jobs supports several workers on land, including those who unload, process and truck fish, and those who fuel, provision and repair the boats.

We sold $7 billion of our fish products to foreign trading partners, $5 billion of it produced in the wetlands.

The U.S. Department of Commerce reports that American consumers spent $35 billion on seafood products last year. We sold $7 billion of our fish products to foreign trading partners, $5 billion of it produced in the wetlands.

And that is just the commercial fishing side of the story. According to the most recent report by Commerce and the Department of the Interior, 36 million anglers spent $24 billion on sports fishing in 1991. The Washington, D.C.-based Sports Fishing Institute reports that anglers' $24 billion in direct purchases means $69.4 billion in economic output, 924,600 jobs and $3.3 billion in state and federal taxes.

As we will see, most of the $111 billion in economic activity and most of this country's *one and a half million fishing-based jobs* rely on fish that depend upon wetlands.

LAND OF POLLOCK AND THE 1% RULE

Alaska, the nation's leader in so many ways, tops the states with the extent of its wetlands - and the rate at which it is destroying them. Development has destroyed more than 50 percent of the historic wetlands surrounding Juneau and Anchorage. Alaska's disregard for wetlands places the state's *three billion dollar a year* fishing industry at risk.

Alaska's disinterest in wetlands protection may seem reasonable considering that half the state, at least 170 million acres, is covered with them. Nearly all these acres are inland wetlands, bogs, muskegs, tundra, swamp and forests essential for wildlife and fish such as salmon. The state has only 345,000 acres of *salt marsh* wetlands. This is where Alaska politics and ocean fish production come into conflict.

Alaska's disregard for wetlands places the state's three billion dollar a year seafood industry and 55,000 jobs at risk.

Alaska's political leadership advocates a "one percent rule". The rule asks that Alaska not be held to the same wetlands protection standard as the Lower 48 states, until the state has eliminated one percent of its historic wetlands. Alaska's one percent wetlands exemption was adopted by the Bush Administration in November, 1992.

Alaska's population has tripled since 1950. Most of this growth adjoins coastal waters. Most of the development pressure on Alaska's wetlands is, therefore, on its coastal wetlands.

Simple arithmetic clearly demonstrates the problem. Alaska's 345,000 acres of coastal wetlands represent only *two-tenths of one percent* of the state's total. The "one percent rule" would allow the destruction of *five times* the total area of Alaska's coastal wetlands.

Fishing is serious business in Alaska. The state's Department of Commerce and Economic Development reports that more than one in ten Alaskans makes his living from the fisheries. Included in this work force are the crews of nearly 18,000 vessels which land *six billion pounds of seafood* a year, 60 percent of the nation's total, plus workers at more than 400 fish handling and processing plants.

While Alaskans debate the future of their coastal ecosystems, evidence linking wetlands to the production of the state's most valuable fish grows. The results of research by state and federal fisheries agencies shows that Alaska's salmon, steelhead, herring, sole, and flounder are all strongly dependent on wetland habitats.

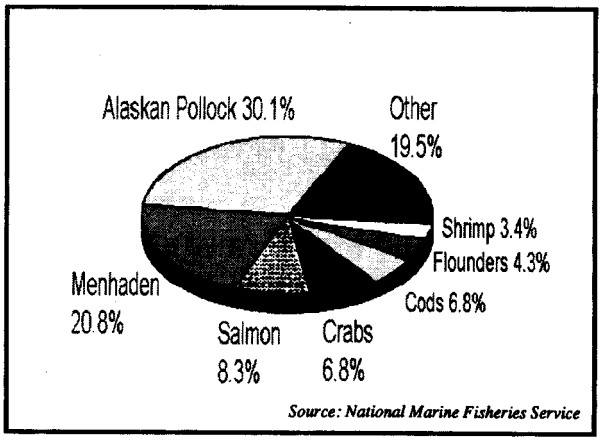
According to the National Marine Fisheries Service, 76 percent of Alaska's 1991 seafood harvest came from inshore and wetlands dependent species.

Alaska's fastest growing ocean fishery is for walleye pollock, a member of the cod family. According to the National Marine Fisheries Service (NMFS) nearly three *billion* pounds of Alaska pollock was landed in 1992, a catch worth a third of a billion dollars.

Scientists from the government's Auke Bay Laboratory near Juneau regularly survey the region's shallow waters. Young pollock and ocean perch, another economically vital species, are consistently found in the shallow waters around Juneau and other coastal population centers. These shallow water habitats will be degraded unless their value to Alaska's fisheries is recognized in the wetlands regulatory process.

The Clinton Administration announced its policy on wetlands in August, 1993. In *Protecting America's Wetlands: A Fair, Flexible, and Effective Approach*, the White House declared, "Because of the significant adverse environmental consequences that it would allow, the Alaska 1% rule will be withdrawn."

The Administration has not yet withdrawn the one percent rule, which leaves Alaska's wetlands fish habitat, her three billion dollar a year fisheries and the 55,000 person fisheries work force at risk.



Estuary and wetlands-dependent species yield three-quarters of the nation's ten billion pound annual seafood harvest.

RESTORING THE KING

Redwood Creek nestles in the coastal rain forest of northwestern California half-way between Humboldt Bay and the Oregon border. The stream was once famous for its fishing. Redwood Creek yielded chinook salmon - also known as *kings* because of their great size - weighing up to 65 pounds, in addition to coho salmon and steelhead.

All three salmon runs have now declined dramatically. The chinooks - the kings - have been hit the hardest. Their numbers have plummeted 80 percent since the late 1960s.

The land around Redwood Creek has been acquired by the government for the Redwood National Park. National Park Service scientists began to study Redwood Creek 20 years ago to learn what could be done to return the kings to the stream. These studies soon determined that the disappearance of salmon from Redwood Creek was linked to the loss of wetlands from the stream's lower reaches.

Studies link the salmon decline to the loss of wetlands.

Floods swept through lower Redwood Creek in the winter of 1965, closing the Redwood Highway and damaging the streamside village of Orick. Congress reacted swiftly by authorizing the Corps of Engineers to straighten and levee Redwood Creek in order to speed its flow directly into the Pacific Ocean.

Before the Corps' 1968 channelization project, lower Redwood Creek spread into side channels and backwaters. It was in these wetland areas, Park Service biologists concluded, that young chinook salmon lingered on their migration to the sea. This was where the fish had fed and gained the strength to survive in the open ocean.

The Park Service settled on a plan nearly ten years ago to improve Redwood Creek's fish habitat. The Service estimates it will take at least $2 million to modify the 25-year-old flood control project to restore some of the lost wetlands. Fishery experts have agreed this is the only way to return the kings to the stream.

In stark contrast to the speed with which the Corps of Engineers' levee project was funded, the Park Service's request for funds to restore Redwood Creek's wetlands is moving, if at all, at a snail's pace. In terms of the National Park system's nationwide priorities, it seems the return of the king to Redwood Creek must wait.

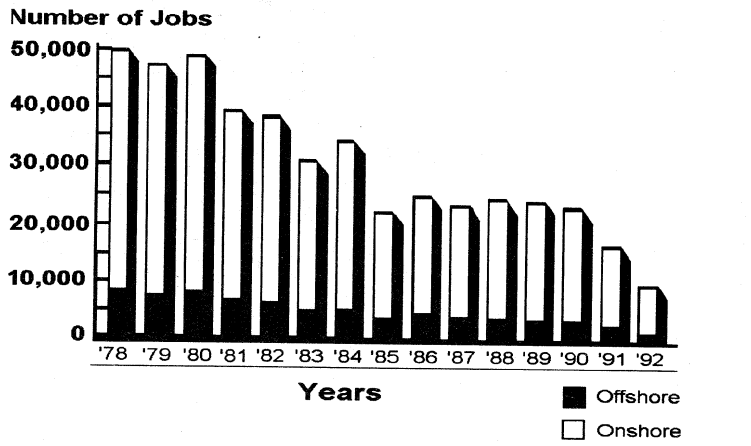
There are hundreds of streams like Redwood Creek up and down the Pacific Coast where habitat for young salmon must be pieced back together if salmon are to continue to contribute to the nation's economy. Nearly $50 million has been spent to repair these battered streams in California alone in the past 15 years. Most of this money has been raised by the state's commercial salmon fishermen through a tax on their own landings, even though both fish and work have declined steadily along the coast since 1978.

The fishermen are fighting for their lives. The industry did gain a major victory in 1992 when it persuaded Congress to restore a significant amount of water from the vast federal Central Valley Project back into key California rivers for salmon restoration. In 1993 Congress appropriated $70 million for the repair of Northwest salmon watersheds as an element of President Clinton's Forest Plan.

Following a three-year analysis of the salmon decline, the California Legislature recently concluded that rebuilding salmon runs to twice their depressed 1980s levels would provide economic benefits to the state of $150 million a year. Full implementation of the doubling effort over several years would yield *$6 billion* in net profits to the state, $1 billion in profits to small businesses. The Legislature further calculated that the salmon restoration objective, which Congress incorporated into the 1992 Central Valley Project reform, will create 8,000 new California jobs.

Restoration must not, however, become the excuse for destroying wetlands further. In its recent report to Congress, the National Research Council's Committee on Restoration of Aquatic Ecosystems cautions, "The result is that many [restoration] projects fall short of the goal of returning ecosystems to the predisturbance condition, and there is indeed considerable controversy over whether or not wetlands can actually be restored." As Redwood Creek demonstrates so poignantly, it is a whole lot easier to protect a wetland than it is to put one back together.

Salmon Fishing Industry Job Losses In California



Source: Pacific Coast Federation of Fishermen's Associations

DUNGENESS CRAB

Dungeness crab are near the top of life's blessings. Sweet and succulent, Dungeness crab meat, like fresh ocean-caught king salmon, is one of the nation's finest seafoods.

When northern California's rivers swell with late rains and snow-melt, the strength of their outflow forces incoming tides to the bottom of bays and estuaries. These bottom tides, or gravitational currents, carry the crab larvae from the ocean through the Golden Gate and deposit them among the wetlands of the upper San Francisco Bay system.

These springtime travelers look more like tiny shrimp at this *megalops* stage. The wetlands nourish the young crabs which grow, molt (shed their shells) and grow some more until they reach adulthood in the Bay a year or so later. To be precise, not all Dungeness crabs rear in the Bay. Some appear never to leave their nearshore ocean spawning grounds. Those that do rear along the edges of San Francisco Bay's sheltering wetlands grow more quickly, doubtless survive at a higher rate and contribute more to the fishery.

Young Dungeness crabs do not appear to use areas of the estuary where salinities are less than about one-third that of seawater. To the extent young crabs depend on wetlands, and they certainly appear to, they require areas bordering salty, rather than fresh or brackish, water. You cannot, therefore, mitigate the destruction of Dungeness crab-sustaining wetlands at sites that are less than one-third seawater.

Dungeness crab landings brought California fishermen $16 million dollars in 1991. The availability of Dungeness crab provides some relief to those fishermen who traditionally depend on salmon for a living.

California Halibut

Westerners have a hearty appreciation for their fresh local seafood, including halibut. While Pacific halibut from Alaska is excellent, fresh California halibut is especially prized. These flavorful fish, which grow to more than 50 pounds, range from northern Washington to Baja California. Much of the California halibut catch now occurs, however, inside the Southern California Bight, the nearshore waters between Point Arguello and Mexico.

Like many of California's fisheries the halibut industry was launched from San Francisco. Italian-born fishermen began towing a bottom net for halibut, a *paranzella*, between two lanteen-rigged sail boats during the 1880s. The fishery soon grew north to Bodega Bay and Eureka and south to the ports of Santa Barbara, Los Angeles and San Diego. By 1920 California halibut landings had swelled to nearly five million pounds a year.

Commercial catches of California halibut have declined in recent decades to just over a million pounds a year. Despite its decline this fish continues to be a popular target for sports fishermen. The loss of wetlands to development along California's coast has contributed significantly to the decline in halibut.

Commercial catches of halibut have declined from nearly 5 million pounds to just over one million pounds a year since 1920.

Like many ocean fish, mature halibut broadcast their eggs in shallow waters where they become part of the planktonic mix, to be tossed about by winds and currents. Researchers have begun to pinpoint when and where larval halibut settle out along the coast to begin their great potential growth. The new information makes clear the importance of wetlands to this fishery.

California Halibut

Researchers from the State University system's Southern California Ocean Studies Consortium have captured young halibut in a variety of open water and protected areas along the Bight during the 1980s. The samples from these surveys makes clear the high preference of young halibut for protected shallow water areas such as those provided by salt marshes. The loss of these wetlands - 90 percent of the bays and estuaries in southern California have been severely altered or destroyed by human activities - is clearly implicated in the decline of California halibut in recent decades.

The small fraction of historic wetlands that remains along the southern California coast will have to be protected vigorously if California halibut is to continue to grace the tables of our nation.

GULF SHRIMP

Shrimpers from the Northwest to New England land about a third of a billion pounds of shrimp a year. At $1.50 to two dollars a pound dockside, the nation's annual shrimp harvest puts a half billion dollars in the pockets of U.S. fishermen. The nation's most productive shrimp fishery is the Gulf of Mexico where fishermen from Texas, Louisiana, Mississippi, Alabama and Florida harvested a quarter billion pounds of brown, white and pink shrimp in 1991 and 1992.

Nowhere in the nation is the link between wetland habitat and fish production more obvious than in the Gulf, where National Marine Fisheries Service scientists estimate that *98 percent of the harvest* comes from inshore, wetlands dependent fish and shellfish. Gulf shrimp clearly head the list of the region's wetland dependent species.

The mature shrimp spawn in the Gulf's offshore waters. Fertile eggs soon hatch into free-swimming larvae, and the larvae quickly pass through a series of molts. During the postlarvae stage the shrimp enter the estuaries along the coast to become bottom feeders.

In the estuaries the juvenile shrimp feed at the marsh-water or mangrove-water interface or in submerged seagrass beds. These areas offer a concentrated food supply of detritus, algae and microfauna and some protection from predators. Both the growth and survival of the young shrimp are largely dependent on local salinity and temperature regimes.

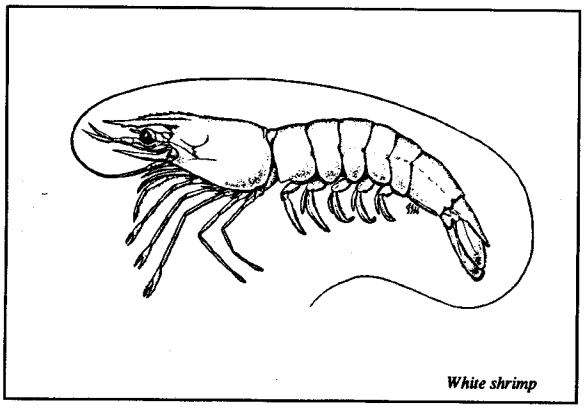
In its shrimp management plan the federal Gulf of Mexico Fishery Management Council notes that, "The weakest link in the life cycle chain is the estuarine phase of growth." Man-caused factors implicated by the Council in the decline of Gulf shrimp habitat were "bulkheading that removes critical marsh-water and mangrove-water interfaces" together with "alterations in freshwater discharge that create unfavorable salinity regimes."

Wetlands are the mainstay of the Gulf Coast's $4.4 billion sportsfishing economy.

The Everglades of south Florida, Marjory Stoneman Douglas' *River of Grass*, have for centuries fed freshwater through the mangroves into the warm tides of the Gulf and Florida Bay. The seagrass beds of this region are critical habitat for pink shrimp. The diversion of Everglades freshwater to urban development and as a result of drainage programs has driven up salinities in the receiving bays, destroying the seagrass shrimp nurseries. By 1990, 10,000 acres of Florida Bay seagrass beds had been lost completely while another 50,000 acres was in serious decline.

Because the wetlands-shrimp production relationship is so strong it illustrates an important matter in the debate over wetlands: the boundaries of wetlands are not always simple to define. Freshwater from the heart of the Everglades' huge wetlands system moderates the salinity of Florida Bay more than 50 miles downstream. Moderate salinities are needed for healthy seagrass beds. Florida Bay's seagrass beds are prime pink shrimp habitat. The Everglades, the Florida Bay seagrasses and the Gulf's offshore shrimping grounds are, in this way, an interdependent ecosystem.

Many of the 14,000 jobs in more than a thousand Gulf Coast fish processing plants are sustained by the shrimp fishery. And commercial fishing represents only a part of the economic engine fueled by these tasty invertebrates. Shrimp are prime prey for the area's gamefish and, therefore, popular as bait with the region's anglers. According to the Washington D.C.-based Sports Fishing Institute, Gulf state anglers brought $4.4 billion to the region's economy.



White shrimp

MENHADEN: A LITTLE POGY IN ALL OF US

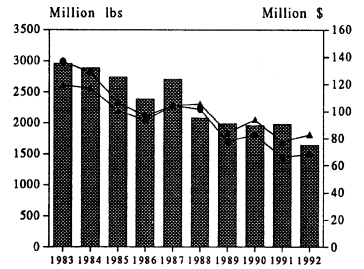
Until the recent boom in Alaska pollock, menhaden - "pogy" to fishermen - made up an impressive one-third of our nation's industrial catch. Because we don't eat menhaden, or we don't *know* that we do, the fish attracts little interest outside a few southern coastal towns where malodorous menhaden plants exude the "smell of money".

The menhaden fishery began in New England. Colonists used the fish for fertilizer and bait for other fish. Rhode Islanders began pressing oil from menhaden about 1800. The bulk of the fishery shifted to the South during the 1930s and 40s, where it now involves two species, Atlantic and Gulf menhaden.

Menhaden are cooked and pressed into meal, oil and "solubles". It is mixed into poultry feeds where it is vital for improving growth rates and food efficiency. Menhaden solubles are blended with soybean meal for cattle and swine feed. The oil is mixed with other fats in cooking oil, shortening and margarine. It is used in marine lubricants, plasticizers, alkyd resins, oil for paint and even lipstick. As author Earl Conrad wryly notes in *Gulf Stream North*, pogy "reaches everybody's plate by the back door."

Menhaden absolutely need wetlands to exist. Tragically, their coastal nurseries are under siege. Researchers estimate that Louisiana's coastal marshes, critical habitat for menhaden, are being lost to a combination of natural and development forces at an average rate of *more than 30,000 acres a year*. The government's Gulf menhaden management plan cites the loss of wetlands as the principal threat to the menhaden fishery.

Trend in Commercial Landings, 1983-1992
Atlantic and Gulf Menhaden



Source: National Marine Fisheries Service

Atlantic and Gulf menhaden landings varied between two and three billion pounds during the 1980s. Increasingly mechanized, the fishery employs over 100 boats, 1,400 fishermen and a like number of plant workers. The 1.6 billion pound 1992 menhaden harvest brought fishermen $83 million and guaranteed products essential to the South's poultry producers and many other industries.

TROUT FISHING MICHIGAN'S WETLANDS

Fishing is big business in Michigan. Angling contributed $2 billion to the state's economy in 1991, supported over 31,000 jobs and generated $132 million in taxes. Michigan owes some of its best fishing to wetlands which would have been stripped of federal protection under policy changes announced in 1991. The changes were, fortunately, withdrawn. A look at Michigan's Pere Marquette River will explain how wetlands serve freshwater ecosystems, and how the hasty 1991 policies threatened some of the best fishing Michigan has to offer.

The Pere Marquette River rises from two large wetland complexes, the Oxford swamp and the Widewaters. Along its 80 mile trip to Lake Michigan, the river takes on water from a number of smaller wetlands. At some points the entire river must work its way through a mixture of swamps, floating bogs and marshes. The water chemistry of the Pere Marquette rarely varies. The river never freezes and it rarely gets above 60 degrees in the summer. The wetlands release the water they store up in winter and spring gently throughout the year. In short, the Pere Marquette is prime trout water and it attracts fishermen by the thousands from all over the country.

Government's 1991 proposals for changing the way wetlands are defined turned a blind eye to what makes the Pere Marquette, and hundreds of other wetland-origin trout streams in the Midwest and Rocky Mountain regions of the nation, so valuable. Although the Pere Marquette's wetlands have saturated soils - one proposed criterion - the water seldom is at or above the surface, a second 1991 draft criterion. Over-the-bank flooding has never exceeded three days - another criterion - and never during the 1991 manual's proposed "growing season". In sum, one of the finest trout rivers in Michigan failed to meet the tests for public wetlands protection under the 1991 federal policy proposals.

In hundreds of streams in the Midwest and Rocky Mountain regions, wetlands support the trout that are so valuable for sports fishing.

As the nation considers how to prevent a repeat of the Midwest's devastating 1993 floods, we should keep in mind an essential function of wetlands. They soak up water like giant sponges when it might otherwise race away in a flood, and they release that water slowly, when it can benefit man and beast. That is the way the Pere Marquette works, and that is the way some of the land which the Missouri River and other Midwest streams took back in the 1993 floods could be made to work once more.

Wetlands Sustain Sport Fishing Industries In the Midwest and Rocky Mountain States

	Economic Contribution of Sports Fishing in 1991			
State	Angler Expenditures	Economic Output	Jobs	State & Federal Taxes
Colorado	$332,105,000	$687,052,000	10,511	$38,200,000
Idaho	163,251,000	294,951,000	5,655	20,125,000
Illinois	606,630,000	1,417,777,000	18,839	94,282,000
Minnesota	803,746,000	1,643,782,000	26,466	120,982,000
Montana	157,469,000	300,432,000	5,818	8,956,000
Ohio	722,166,000	1,530,084,000	24,236	87,480,000
Wisconsin	852,282,000	1,757,480,000	30,351	110,975,000
U.S. Total	$24 billion	$69.4 billion	924,600	$3.42 billion

Source: Sports Fishing Institute

LEAPIN' BLUEFISH

The scientific name for bluefish, *Pomatomus saltatrix*, salutes the fish's impressive energy. While the first name attempts to describe the dark, scar-like line on the gill cover ("cover-cut"), *saltatrix* exclaims "somersaulter" - leaper. The ubiquitous blue bites hard and fights valiantly, making him a favorite of saltwater anglers from the South Atlantic coast to New England. Unfortunately, blues are in decline and deteriorating shoreline conditions may be the reason.

Bluefish (Pomatomus saltatrix)

Adult bluefish move around the ocean a lot. They winter off the coast of Florida and head north in the spring. A major bluefish spawn occurs in early spring just landward of the Gulf Stream between Florida and southern North Carolina. A second, summer spawn takes place off the mid-Atlantic. Larvae from the spring spawn head north with the currents, around Cape Hatteras to the offshore waters of the mid-Atlantic Bight. As the waters nearer the shore warm in late spring, juvenile blues move into bays and estuaries to feed on wetlands invertebrates such as opossum shrimp, amphipods and small wetlands fish like silversides and killifish.

Bluefish are famous for feeding frenzies in which they attack schools of bait fish and tear their prey savagely to bits. The scraps attract gulls. Fishermen hunting for blues keep an eye out for the gulls and a chance to join the fray.

Anglers caught *140 million pounds* of bluefish in 1983. The catch plummeted to 38 million pounds last year. "We have strong reason to believe the population is declining" State of Connecticut fisheries research supervisor Victor Crecco told the press last fall. Some researchers believe that, in addition to heavy fishing pressure, the destruction of inshore habitat, including the pollution of bays and estuaries, is implicated in the blues' decline.

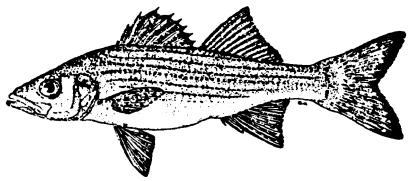
STRIPERS

There are three primary striped bass populations along the Atlantic coast: Hudson River, Chesapeake Bay and the Roanoke River. For generations these bass sustained major commercial and recreational fisheries. The popularity of stripers with anglers often drove sport annual catches beyond those of the commercial fishermen. The commercial striped bass harvest peaked in 1973 at about 14 million pounds, then began a precipitous decline.

Following years of particularly poor survival of striped bass, the result of poor water quality and severe fishing pressure, Congress passed the Striped Bass Conservation Law in 1984 and directed the Departments of Commerce and Interior to assist the interstate Atlantic States Marine Fisheries Commission to moderate fishing pressure in order to restore striper populations to healthy levels.

The State of Maryland places a value of $678 billion on Chesapeake Bay's resources. Much of this is dependent upon wetlands.

A strong recruitment of young striped bass in Chesapeake Bay in 1989 permitted a modest relaxation of the fishing restrictions in 1990. The fishery is being monitored closely to assure that the harvest is kept to less than one quarter of the adult fish population.



Striped bass

Water pollution has been especially hard on the Chesapeake Bay stripers. During July of the years 1984 through 1987 there was simply *no* suitable habitat remaining for striped bass in the north central part of the bay. The bay receives about 19 million pounds of phosphorus and 188 million pounds of nitrogen a year from urban and agricultural wastes according to U.S. Environmental Protection Agency estimates. These nutrients stimulate

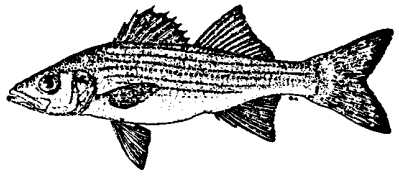
STRIPERS

There are three primary striped bass populations along the Atlantic coast: Hudson River, Chesapeake Bay and the Roanoke River. For generations these bass sustained major commercial and recreational fisheries. The popularity of stripers with anglers often drove sport annual catches beyond those of the commercial fishermen. The commercial striped bass harvest peaked in 1973 at about 14 million pounds, then began a precipitous decline.

Following years of particularly poor survival of striped bass, the result of poor water quality and severe fishing pressure, Congress passed the Striped Bass Conservation Law in 1984 and directed the Departments of Commerce and Interior to assist the interstate Atlantic States Marine Fisheries Commission to moderate fishing pressure in order to restore striper populations to healthy levels.

The State of Maryland places a value of $678 billion on Chesapeake Bay's resources. Much of this is dependent upon wetlands.

A strong recruitment of young striped bass in Chesapeake Bay in 1989 permitted a modest relaxation of the fishing restrictions in 1990. The fishery is being monitored closely to assure that the harvest is kept to less than one quarter of the adult fish population.



Striped bass

Water pollution has been especially hard on the Chesapeake Bay stripers. During July of the years 1984 through 1987 there was simply *no* suitable habitat remaining for striped bass in the north central part of the bay. The bay receives about 19 million pounds of phosphorus and 188 million pounds of nitrogen a year from urban and agricultural wastes according to U.S. Environmental Protection Agency estimates. These nutrients stimulate

LOBSTERS: HOME FOR HOMARUS

The American lobster, *Homarus americanus*, is not usually thought of as a wetlands-dependent animal. And that, according to New England researchers, is an oversight that could undermine the region's $165 million lobster fishery.

Inshore areas that have shallow water, lowered salinities, varying temperatures and increased turbidity may be precisely what is needed to speed young lobsters on their way to becoming "keepers".

Recent research shows that juvenile lobsters in relatively high densities inhabit inshore areas including cobble, eelgrass and salt marsh peat reefs. There is strong evidence that years of abundant freshwater flow from wetland areas into these inshore habitats are followed nine years later - the period it takes juvenile lobsters to grow to legal size - by good lobster harvests.

Better survival of juveniles to harvestable size, "recruitment" to fisheries managers, is essential if lobster fishing is to be sustained. The fishery is currently taking a relatively high percentage of the adult lobsters.

The connection between wetland functions and lobster production is coming under closer scrutiny. Pending the scientists' final verdict, lobstermen and their friends will do well to continue their support for wetland conservation efforts.

CONCLUSIONS

From hundreds of fishing communities across the land and thousands of coastal and river fish habitats, the evidence mounts steadily that most of this country's $111 billion dollar fisheries economy - and the one and a half million jobs that go with it - depend on wetlands.

Where wetlands have been destroyed, fisheries have declined. Some heroic efforts, like those of California's salmon fishermen, are being made to restore wetland and fish resources. In relatively undisturbed areas like Alaska the wetlands-fisheries connection appears to be inadequately appreciated. In the New England lobster fishery the importance of wetlands, always a fact, is only now becoming clear.

The fishermen of this country are literally fighting for their lives. Those with organizing skills and some remaining resources are leading - even winning - conservation battles, as in the case of the recent reform of California's federal Central Valley Project. In too many cases, however, fishermen's pleas for wetlands protection have been lost in the nation's race to develop coasts, estuaries and rivers for agricultural, energy, recreational and urban projects.

America's fisheries are sustainable, but only if the habitat they need is identified and protected. It accomplishes little to shut down threatened fisheries, like those for Atlantic coast striped bass, unless the rebuilding process tackles habitat problems as well.

Absolutely essential to three-quarters of America's fishery production, wetlands are complex and often - as in the case of the Everglades - extensive ecosystems. Wetlands are complex systems which cycle water, air, soil, nutrients and energy into the waters and life which surround them. It is not surprising that the National Research Council questions whether we can create or restore wetlands ecosystems. The prudent course, clearly, is to protect our remaining wetlands.

The current Congressional deliberations concerning the wetland protection provisions of the Clean Water Act, coming just as we must determine the future of flood control in the nation's heartland, provide an important opportunity to weigh the values that wetlands bestow on this country and to consider how to sustain those values for the generations to come.

About This Report

This report was prepared by William M. Kier. Mr. Kier is a certified fisheries scientist with more than 35 years of professional experience in the protection and management of freshwater, estuarine and marine sport and food-fish resources. His early work in the field included life history studies of the fishes of the San Francisco Bay-Delta Estuary. He became assistant chief of the California Department of Fish and Game's environmental protection branch, the state's assistant Resources Secretary and the principal fisheries advisor and director of research for California's State Senate. The consulting firm he leads specializes in fisheries management analysis and restoration planning.

The copyrighted art on the cover was created by Sandra Noel of Vashon Island, Washington.

Copies of this report are available for $5.00 each, which includes tax and postage, from:

Campaign to Save California Wetlands
P.O. Box 20651, Oakland, CA 94620-0651
Phone 510/654-7847 • Fax 510/654-4936

References

Able, K.W., K.L. Heck, Jr., M.P. Fahay, and C.T. Roman. 1988. Use of salt-marsh peat reefs by small juvenile lobsters on Cape Cod, Massachusetts. Estuaries 11(2):83-86.

Allen, L.G. 1988. Recruitment, distribution, and feeding habits of young-of-the-year California halibut (*Paralichthys californicus*) in the vicinity of Alamitos Bay-Long Beach Harbor, California, 1983-1985. Bull. So. Calif. Acad. Sci. 87(1), 1988, pp. 19-3

————, **R.E. Jensen and J.R. Sears.** Open coast settlement and distribution of young-of-the-year California halibut (*Paralichthys californicus*) along the southern California coast between Point Conception and San Mateo Point, June-October, 1988. Pages 145-152 *In* C.W. Haugen (ed.) The California halibut, *Paralichthys californicus*, resource and fisheries. Calif. Dept. Fish and Game, Fish Bull. 174.

Allen M.J. and K.T. Herbinson. 1990. Settlement of juvenile California halibut, *Paralichthys californicus*, along the coasts of Los Angeles, Orange, and San Diego Counties in 1989. Calif. Coop. Ocean. Fish. Invest. Rep. 31: 84-96.

Barrett, B.B., and M.C. Gillespie. 1973. Primary factors which influence commercial shrimp production in coastal Louisiana. La. Dept. Wildl. Fish. Tech. 9. 28 pp.

Barshaw, D.E., and D.R. Bryant-Rich. 1988. A long-term study on the behavior and survival of early juvenile American lobster, *Homarus americanus* in three naturalistic substrates: eelgrass, mud and rocks. Fish. Bull. 86(4):789-796.

Boreman, J. 1983. Status of bluefish along the Atlantic coast, 1982. U.S. Nat. Mar. Fish. Serv., Woods Hole lab. Ref. Doc. No. 83-28. 36 pp.

Bulger, A.J., B.P. Hayden, M.E. Monaco, D.M. Nelson, M.G. McCormick-Ray. 1993. Biologically-based estuarine salinity zones derived from a multivariate analysis. Estuaries, vol. 16, no. 2, pp. 311-322. Estuarine Research Federation.

California Legislature. 1988. Restoring the balance. Rpt. of the Adv. Cmte. on Salmon and Steelhead to the Joint Legislative Cmte. on Fisheries and Aquaculture, Sacramento. 84 pp.

Carlson, H.R., R.E. Haight and K.J. Krieger. 1982. Species composition and relative abundance of demersal marine life in the waters of southeastern Alaska. 1969-1981. NWAFC Processed Rpt. 82-16. Nat. Mar. Fish. Serv., NOAA, Dept. of Commerce. 106 pp.

Cato, J.C. and H.E. Kumpf. The economic influence of population growth, fisheries, coastal and marine industries, and tourism derived from use of the Gulf of Mexico. pp. 153-160, Proc. of the Conference on the Environmental and Economic Status of the Gulf of Mexico, Gulf of Mexico Program, New Orleans, LA.

Cavit, N.H. 1981. Dependence of menhaden catch on wetlands habitats, a statistical analysis. U.S. Fish Wildl. Serv. National Geosystems Team. Unpublished report.

Chambers, J.R. 1991. Coastal degradation and fish population losses. *In* R.H. Stroud (ed.) Proc. of a Symposium on Coastal Fish Habitat Conservation, Baltimore, MD. Published by the National Coalition for Marine Conservation, Savannah, GA.

Christmas, J.Y., and R.S. Waller. 1975. Location and time of menhaden spawning in the Gulf of Mexico. Gulf Coast Research Laboratory. 20 pp.

Conrad, Earl. 1980. Gulf Stream North. Second Chance Press, Sag Harbor, N.Y.

Dobkin, S. 1961. Early developmental stages of pink shrimp, *Penaeus duorarum* from Florida waters. U.S. Fish Wildl. Serv. Fish Bull. 61:321-349.

Douglas, Marjory Stoneman. 1947. The Everglades: River of Grass.

Environmental Defense Fund and World Wildlife Fund. 1992. How wet is a wetland? The impacts of the proposed revisions to the federal wetlands delineation manual. 175 p. New York, N.Y. and Washington, D.C.

Fedler, A.J. and D.M. Nickum. The 1991 economic impact of sport fishing in the United States. Sports Fishing Institute, Washington, D.C. 2

Field, D.W., A.J. Reyer, P.V. Genovese and B.D. Shearer. 1991. Coastal wetlands of the United States, an accounting of a valuable national resource. Dept. of Commerce, NOAA, and Dept. of the Interior, Fish and Wildlife Serv., Washington, D.C.

Friedland, K.D., G.C. Garman, A.J. Bejda, A.L. Studholme, and B. Olla. 1988. Interannual variation in diet and condition in juvenile bluefish during estuarine residency. Trans. Am. Fish. Soc. 117:474-479.

Frey, H.W., ed. 1971. California's living marine resources and their utilization. Calif. Dept. Fish and Game. 148 pp.

Giles, J.H., and G. Zamora. 1973. Cover as a factor in habitat selection by juvenile brown (*Penaeus aztecus*) and white shrimp (*P. setiferus*). Trans. Am. Fish. Soc. 102(1):144-145.

Guillory, V., J. Geaghan and J. Roussel. 1983. Influence of environmental factors on Gulf menhaden recruitment. Louisiana Dept. Wildlife and Fish., Tech. Bull. No. 37, 32 pp.

Gulf of Mexico Fishery Management Council. 1981. Fishery management plan for the shrimp fishery of the Gulf of Mexico, United States waters. Tampa, FL.

Gunter, G., and J.C. Edwards. 1969. The relation of rainfall and freshwater drainage to the production of the penaeid shrimps (*Penaeus fluviatilis* Say and *Penaeus aztecus* Ives) in Texas and Louisiana waters. FAO Fish. Rep. 57(3):875-892.

Haaker, P.L. 1975. The biology of the California halibut, *Paralichthys californicus* (Ayers), in Anaheim Bay, California. pp. 137-151 In E.D. Lane and C.W. Hill, eds. The marine resources of Anaheim Bay. California Dept. Fish and Game, Fish Bull. 165.

Hersey, John. 1988. Blues. Random House, Inc. New York. 205 pp.

Hofstra, Terrence D. 1983. Management alternatives for the Redwood Creek estuary. Redwood National Park, Arcata, Calif. 50 pp.

Hoss, Donald E. and Gordon W. Thayer. 1993. The importance of habitat to the early life history of estuarine dependent fishes. Pages 147-158, Proc. American Fisheries Society Symposium 14.

Hull, David. 1986. Restoring and protecting Humboldt Bay's aquatic resources. Pages 120-123 *In* Proc. of a Symposium on Managing Inflows to California's Bays and Estuaries, The Bay Institute, Sausalito, Calif.

June, F.C., and L.L. Chamberlin. 1959. The role of the estuary in the life history of the Atlantic menhaden. Proc. Gulf and Carib. Fish. Inst. 41-45.

Kier, William M. 1992. The relationship between streamflow, opossum shrimp habitat and coho salmon growth and survival in the Lagunitas Creek estuary. Expert testimony presented to the California State Water Resources Control Board, hearing of May 12, 1992 concerning water use in Lagunitas Creek, Marin County, CA.

Knapp, G. and T. Smith. 1991. Seafood industry sector report to the Alaska Dept. of Commerce and Economic Development. Institute of Social and Economic Research, Univ. of Alaska, Anchorage. 162 pp.

Kramer, S.H. 1990. Distribution and abundance of juvenile California halibut, *Paralichthys californicus*, in shallow waters of San Diego County. Pages 99-126 In C.W. Haugen (ed.) The California halibut, *Paralichthys californicus*, resources and fisheries. Calif. Dept. Fish and Game, Fish Bull. 174.

——— **and J.R. Hunter.** 1987. Southern California wetland and shallow water habitat investigation, annual report for the fiscal year 1987. U.S. Dept. Commerce, NOAA, NMFS, SWFC, La Jolla, Calif., 12 pp.

Kutkuhn, J.H. 1966. The role of estuaries in the development and perpetuation of commercial shrimp resources. Pages 16-36 *In* R.F. Smith, A.H. Swartz, and W.H. Massman, eds. A symposium on estuarine fisheries. Am. Fish. Soc. Spec. Publ. 3.

McKeon, Joseph F. 1985. Downstream migration, growth, and condition of juvenile fall chinook salmon in Redwood Creek, Humboldt County, California. M.S. thesis, Humboldt State University, Arcata, Calif. 90 pp.

Merrell, Theodore R. and K.V. Koski. Habitat values of coastal wetlands for Pacific coast salmonids. Pages 256-266 *In* P.H. Greeson et al. (eds.) Wetland functions and values: the state of our understanding. Proc. National Symposium on Wetlands, American Water Resources Association, Minneapolis, MN.

Monaco, M.E., T.A. Lowery and R.L. Emmett. 1992. Assemblages of U.S. west coast estuaries based on the distribution of fishes. Jour. of Biogeography, vol. 19, pp. 251-267.

Muncy, R.J. 1984. Species profiles: life histories and environmental requirements of coastal fishes and invertebrates (Gulf of Mexico)—white shrimp. U.S. Fish Wildl. Serv. FWS/OBS-82/11.20 U.S. Army Corps of Engineers, TR EL-82-4. 19 pp.

National Research Council. 1992. Restoration of Aquatic Ecosystems. National Academy Press. Washington, D.C. 552 pp.

Norcross, J.J., S.L. Richardson, W.H. Massman, and E.B. Joseph. 1974. Development of young bluefish (*Pomatomus saltatrix*) and distribution of eggs and young in Virginia coastal waters. Trans. Am. Fish. Soc. 103:477-497.

Odum, W.E. 1971. Pathways of energy flow in a south Florida estuary. Ph.D. Dissertation. University of Miami, Fla. Diss. Abstr. Univ. Mich. 70-18, 156:1898B.

Perret, W.S. 1968. Menhaden or pogies: Louisiana's most valuable commercial fish. Louisiana Conserv. 20(1 and 2):14-15.

Peters, David S. and Ford A. Cross. 1992. What is coastal fish habitat? Pages 17-22 *In* Richard H. Stroud (ed.), Stemming the tide of coastal fish habitat loss. Proc. of a Symposium on Conservation of Coastal Fish Habitat, Baltimore, MD. Published by the National Coalition for Marine Conservation, Inc., Savannah, GA.

———— and W.E. Schaaf. Empirical model of the trophic basis for fishery yield in coastal waters of the eastern USA. Trans. American Fish. Soc., 120:459-473, 1991.

———— and W.E. Schaaf. Atlantic marsh-estuarine nearshore detrital system (amends) model. *In* K.W. Turgeon (ed.) Proc. of a workshop on marine ecosystem modeling. Dept. of Commerce, NOAA. Frederick, MD. April 6-8, 1992.

Piummer, K.E., E.E. DeMartini, and D.A. Roberts. 1983. The feeding habits and distribution of juvenile-small adult California halibut (*Paralichthys californicus*) in coastal waters off northern San Diego County, CalCOFI Rep., 24:194-201.

Powell, A.B., D.E. Hoss, W.F. Hettler, D.S. Peters, and S. Wagner. 1989. Abundance and distribution of ichthyoplankton in Florida Bay and adjacent waters. Bull. of Marine Sci., 44(1), p. 35-48. 1989.

Reid, G.K. 1957. Biologic and hydrologic adjustment in a disturbed gulf coast estuary. Limnol. and Oceanogr. 2:198-212.

Reimers, P.E. 1973. The length of residence of juvenile fall chinook salmon in Sixes River, Oregon. Research Reports of the Fish Commission of Oregon. (4)2.

Robison, Clayton D., Jr. 1993. Alaska wetlands are not different. National Wetlands Newsletter, Enviro. Law. Instit., Vol. 15, No. 5.

Rozengurt, M.A. and I. Haydock. 1992. Effects of fresh water development and water pollution policies on the world's river, delta, estuary, coastal zone ecosystems. *In* H. S. Bolton, ed. Coastlines of the World, Amer. Soc. of Civil Eng., New York.

Simenstad, C.A., K.L. Fresh and E.O. Salo. 1982. The role of Puget Sound and Washington coastal estuaries in the life history of Pacific salmon: an unappreciated function. Pages 343-364, *In* Victor S. Kennedy ed. Estuarine Comparisons, Academic Press, New York, New York. 704 pp.

Skinner, John E. 1962. An historical review of the fish and wildlife resources of the San Francisco Bay area. Wat. Proj. Branch Rpt. 1, Calif Dept of Fish and Game, Sacramento. 225 pp.

Smith, Jerry J. 1990. The effects of sandbar formation and inflows on aquatic habitat and fish utilization on Pescadero, San Gregorio, Waddell and Pomponio Creek estuary/lagoon systems, 1985-1989. San Jose State Univ., Dept. of Biol. Sci. Interagency Agreement Rpt. 84-04-324.

Spratt, Jerome D. 1981. Status of the Pacific herring, *Clupea harengus pallasii*, resource in California 1972 to 1980. Fish Bull. 171, Calif. Dept. of Fish and Game, Sacramento. 107 pp.

Trent, L., E.J. Pullen, and R. Proctor. 1976. Abundance of macro-crustaceans in a natural marsh and marsh altered by dredging, bulkheading, and filling. U.S. Natl. Mar. Fish. Serv. Fish Bull. 74(1):195-200.

Turner, R.E. 1977. Intertidal vegetation and commercial yields of penaeid shrimp. Trans. Am. Fish. Soc. 106(5):411-416.

U.S. Dept. of Commerce. 1992. Our living oceans, report on the status of U.S. living marine resources, 1992. NOAA Tech. Memo. NMFS-F/SPO-2. Washington, D.C. 148 pp.

————. 1993. Fisheries of the United States, current fisheries statistics no. 9200. Washington, D.C. 115 pp.

————. 1994. National Oceanic and Atmospheric Administration, Estuarine living marine resources program (ELMR), draft species life history notes for the North Atlantic Region. NOS/ORCA/SEA Biogeographic Characterization Branch, Silver Spring, MD.

U.S. Dept. of Interior and U.S. Dept. of Commerce. 1993. 1991 national survey of fishing, hunting and wildlife-associated recreation. U.S. Govt. Printing Office, Washington, D.C.

U.S. Environmental Protection Agency (EPA). 1992. Status and trends report on aquatic resources in the San Francisco Estuary. San Francisco Estuary Project. Oakland, CA. 257 pp. plus app's.

U.S. Environmental Protection Agency (EPA). 1990. Progress report for the baywide nutrient reduction strategy. Region III, Chesapeake Bay Program Office, Annapolis, Md.

Wild, Paul W. and Robert N. Tasto, eds. 1983. Life history, environment, and mariculture studies of the Dungeness crab, *Cancer magister*, with emphasis on the central California fishery resource. Fish Bull. 172, Calif. Dept. of Fish and Game, Sacramento. 352 pp.

Wilk, S.J. 1977. Biological and fisheries data on bluefish, *Pomatomus saltatrix*. U.S. Nat. Mar. Fish. Serv., Sandy Hook Lab., Highlands, N.J. Tech. Serv. Rep. 11.

Williams, A.B. 1958. Substrates as a factor in shrimp distribution. Limnol. Oceanogr. 3(3):283-290.

PREPARED STATEMENT OF WISE USE MOVEMENT

Mr. Chairman. Please include this testimony in the Hearing Record on Nationwide Permits under Section 404 of the Federal Clean Water Act held 26 June 1997 and send us a copy of the Hearing Record when available.

The purpose of the Wise Use Movement:

- To preserve and protect wise, environmentally sound use of public lands, including lands owned by the various states and the Federal government.
- To encourage wise, environmentally protective regulation of private lands by local, state and Federal agencies, including use of land use planning, zoning, and regulation of extractive industries such as mining, grazing and logging on private lands.
- To educate the public as to wise use of public lands and resources and wise and environmentally sound regulation of private property, including wetlands.
- To encourage public participation in the political process at the local, state, and national level.
- To combat distorted and erroneous materials circulated by individuals and organizations promoting environmentally destructive use of public lands and resources, and restricting environmentally sound regulation of private lands and activities.

The WISE USE MOVEMENT supports the following private property responsibilities:

- To share our temporary land ownership with our fellow creatures, wildlife and fish, big and small.
- To seek to restore biological integrity.
- To assist in the recovery of endangered plants and animals.
- To keep hazardous waste from contaminating the land, air and water.
- To protect surface water, groundwater and aquifers.
- To refrain from activities that damage or pollute adjacent temporary owners.
- To protect and preserve sensitive areas, especially wetlands.
- To refrain from activities which damage or degrade natural resources important to the quality of life of our fellow citizens and the sustainability of our communities.
- To leave the land to the next temporary owner in better ecological shape than it was received.

The Wise Use Movement is concerned that our Nation's wetlands will again be threatened by excavation undertaken without permit due to the recent Tulloch Court decision, which struck down an EPA/Corps rule designed to regulate under Sec. 404 of the Federal Clean Water Act the destruction of wetlands through ditching and draining. We request that Congress restore the intent of the Tulloch rule in order to protect the quality of our nation's waters, including wetlands.

We also remain opposed to the Corps of Engineers use of nationwide permits to circumvent the goals and policies of the Federal Clean Water Act. How many wetlands were filled in the State of Washington last year? We would know if the Corps wasn't breaking the law.

Under the Federal Clean Water Act, the Corps is authorized to issue permits (under Sec. 404) for the discharge of dredged or fill material into wetlands. They also issue permits (under Sec. 10 of the Rivers and Harbors Act) for structures in navigable waters such as piers and docks, that do not impact wetlands. Applications for individual permits under Sec. 404 and/or Sec. 10 are sent out for public notice and review. They must undergo an alternatives analysis (i.e. are there upland sites for the proposed activity) and mitigation is required.

However, the Corps is also allowed to issue "general" permits on a state, regional or nationwide basis for activities that are "similar in nature" and have a minimum adverse impact, including cumulatively, on the environment. The Bush Administration issued 36 different nationwide permits in 1991 for a five-year period, many of which impact wetlands. The Clinton Administration embraced all of these NWPs, issued a new NWP last year, and proposed to issue three new ones. In addition, the Corps refuses to prepare an environmental impact statement to document the wetland losses from NWPs over the past five years. [Worse, the Clinton Administration and the Corps have indicated that they intend to continue issuing regional general permits for geographic areas smaller than a state, again contrary to the Federal Clean Water Act.]

Many of these nationwide permits (NWPs) involve wetland filling. They do not go out for public review. They do not require an alternatives analysis, and in too many cases, they do not require any mitigation. At least 77.7 acres of wetlands were filled in the State of Washington in 1995 under all nationwide permits. The reason we don't know the real figure is that the Corps has issued nationwide permits (NWPs) for wetland filling activities that are not similar in nature and there was no requirement that the Corps be notified when wetlands in isolated areas under an acre are

filled. The new Corps rules have required notification when filling more than ½ acre, but we will still will have no Corps record of fills under ½ acre.

The two most environmentally damaging NWPs are NWP–26 and NWP–29. NWP–26 covers wetland filling in isolated areas. It does not cover activities similar in nature. For areas under an acre no notification to the Corps was required in the past. Rather than admit that NWP–26 is a violation of the Federal Clean Water Act, the Corps chose to reduce the scale of MAIP–26 and provide a phaseout within two year. An illegal NWP is still illegal whether phased out or not. The National Homebuilders have filed a frivolous lawsuit in an attempt to reestablish the full extent of the environmentally damaging NWP–26. This is unwarranted. Many states have denied water quality certification for NWP–26 because of their local concern for wetlands. Individual permit applications are available from the Corps and no member of the National Homebuilders can show harm just because they no longer will be able to fill a wetland and avoid public notice and review.

NWP–29 is another bad example of Corps permitting. It involves filling for single family residences and attendant features. Again, since "attendant features" is not well defined, it does not cover activities similar in nature and should be rejected as well.

In order to determine how the Nation-Wide Permit program works, a review was made in July/August 1996 of Seattle District Army Corps of Engineers files on individual permits and Nationwide permit–26's issued in the State of Washington from 1994–1995. The Seattle Corps District currently issues Section 404 permits for the entire state of Washington.

Information on permits issued by the Seattle District were taken from the monthly list of permit decisions (i.e. issued, cancel led or denied). Each Corps District is required to issue a such a list monthly, however many Corps Districts fail to issue this list monthly. In addition, the quality of the monthly list various enormously from Corps District to Corps District. The Corps prides itself on being a "decentralized" agency with much discretionary authority given to the District Engineer, hence the lack of standardization across Corps Districts.

Because Section 404 covers the disposal of dredged or fill material, not all activities involving a Section 404 permit involve wetland filling (e.g., the disposal of dredged material in open water). The monthly list does not provide adequate information to determine whether a permit is being issued for wetland filling. Therefore, each individual Corps permit file must be examined individually.

In addition, under the NWP–26 in effect for the state of Washington there was no notification to the Corps required for wetland filling of less than one acre in isolated waters or above the headwaters. Thus, the Corps does not track, nor can the extent of wetland filling in Washington State be quantified from Corps files.

RESULTS: INDIVIDUAL PERMITS

In 1995, based on the file search, approximately fifty individual Section 404 permits were issued by the Seattle District Corps. Information collected for each permit included: permit number, applicant, permit date, kind of project (when listed), location of project, acreage of wetland impacted (when listed), and any mitigation and monitoring requirements, It was determined that half of these (27) involved no wetland filling. An additional nine files could not be located by the Corps. Fourteen individual permit files involving wetland filling were reviewed.

Nine permits involving 8.963 acres of filling were given to public agencies. Five permits involving 19.4 acres of filling were given to private parties. (However, a single permit given for 17.4 acres of wetland filling for a non-water dependent horse racing tracking).

1995 INDIVIDUAL PERMITS

Sec. 404 Permits Issued: Approximately 50
Sec. 404 Permits that did not involve wetland filling: 27
Sec. 404 Permits that did involve wetland filling or impacts: 14
—Nine permits involving 8.963 acres of filling given to public agencies
—Five permits involving 19.4 acres of filling were given to private parties
- Two projects were for roads
- Two projects were for storm water detention ponds
- One project for an airport
- One project for a house
- One project for a horse racing track (biggest single wetland fill)
- One project for ferry terminal
- One project for road/parking lot/shop
- One project for commercial development

- Four projects for misc. filling

Sec. 404 Permit files that could not be located: 9
—Based on the monthly lists
- three permits issued to public agencies for wetland filling
- three permits issued to private parties for wetland filling
- three permits did not appear to involve wetland filling

1994 INDIVIDUAL PERMITS

Sec. 404 Permits Issued: Approximately 63
Sec. 404 Permits that did not involve wetland filling: 42
Sec. 404 Permits that did involve wetland filling or impacts: 18
—Fourteen permits given to public agencies involving 25.39 acres of filling
—Three permits given to private parties involving 9.19 acres of filling
- Nine projects for roads/parking lots
- Three projects for restoration
- One project for commercial development
- One project for dike
- One project for Port development
- One project for draining/clearing
- One project for railroad
- One project for misc.

Sec. 404 Permit files that could not be located: 6
—Based on the monthly lists
- two permits issued to public agencies for wetland filling
- four permits did not appear to involve wetland filling

NATIONWIDE-26 PERMITS

1995 NWP–26S APPROXIMATELY 190 ISSUED

112 NWP–26s issued to private parties for 63.3 acres of wetland filling/impacts
41 NWP–26s issued to public agencies for 14.43 acres of wetland filling/impacts
- thirty eight permits for roads
- thirty one projects for misc.
- twenty projects for ditching/excavation
- seventeen permits for housing projects
- fourteen permits for commercial development
- nine permits for houses
- eight permits for restoration
- seven projects for land clearing
- six project purposes could not be determined
- three permits for sewers

21 NWP–26 files could not be located
14 NWP–26s did not appear to involve wetland filling (e.g., after-the-fact permits were it was difficult to determine prior conditions, wetland jurisdiction calls)
2 NWP–26s were cancelled.

1994 NATIONWIDE PERMIT-265 APPROXIMATELY 153 ISSUED

107 NWP–26s issued to private parties for 60.86 acres of wetland filling/impacts
31 NWP–26s issued to public agencies for 13.16 acres of wetland filling/impact
- Thirty-seven residential housing projects
- Twenty-eight road/parking lot projects
- Nineteen commercial/industrial projects
- Nine unspecified building projects
- Eight land clearing/draining projects
- Eight misc. projects
- Nine projects where no purpose was provided
- Six individual housing projects
- Five restoration/enhancement projects
- Four school projects
- Two pipeline projects

7 NWP–26 files could not be located
8 NWP–26s did not appear to involve wetland filling (e.g., after-the-fact permits were it was difficult to determine prior conditions, wetland jurisdiction calls)

Under the Clean Water Act, the Corps can only issue general permits when the activities "are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse ef-

fect on the environment" (Sec. 404(e)(1). NWP–26 for fills in headwaters and isolated waters do not constitute a category of activities similar in nature.

For example, the Seattle District Corps issued NWP–26s for

—wetland fill for golf course roads, bridges (94–4–00453) Vanport Manufact.
—wetland fill for housing development (95–4–00727) Falcon 2000, Inc.
—wetland fill for school playground (95–4–00427) Mt. Vernon School District
—wetland fill for hospital expansion (95–4–00380) Providence Hospital
—wetland fill for sewer line (95–4–01532) Northshore PUD
—wetland fill for culvert replacement (94–4–02176) WA DOT
—wetland fill for church parking lot (94–4–00130) Emmanual Baptist Church
—wetland fill to store old cars (95–4–00745) To Leatham

These are clearly not a category of activities similar in nature.

OTHER WETLAND IMPACT REVIEWS

(1) The Corps maintains a computer database (called RAMS) which generates Quarterly Reports. The system is used to track each Section 404 permit, mainly for permit issuance time. This is a major focus of the Corps, to cut down on the time it takes them to issue Section 404 permits. Same additional acreage and mitigation information is also included. However, the type of mitigation is not broken out, nor is there any verification that the mitigation has actually taken place or been successful.

The Quarterly Reports lump all NWPs together. According to the Quarterly Reports for 1995 prepared by the Seattle Corps District, 155.1 acres of wetlands were approved for filling under all Nationwide permits. Half of all NWP fills reported (77.73 acres) occurred under NWP–26. This is a large cumulative loss of wetlands which does not include the wetland losses under NWP–26 that are not reported. For example, the same Quarterly Reports document 54.69 acres of wetland filling under the standard (individual) permit process.

(2) The Washington State Department of Ecology (DOE) issued an annual report in May 1996 covering the time period of September 1994–August 1995. During this time period, DOE made 626 decisions on Federal Section 10, Section 404 and nationwide permits. [Note: Under Section 10 of the Rivers and Harbors Act, the Corps issues permits for piers and other potential obstructions to navigation.]

Under their Water Quality Certification and/or Coastal Zone Certification authority, DOE made 41 Section 404 decision, and 130 NWP–26 decisions. However, since NWP–26 fills less than an acre do not need to be reported to the Corps, this level of wetland filling is not reflected in DOE's report.

According to DOE, 152.58 acres of wetland filling/impacts were recorded of which 139.10 acres were in Western Washington, (with the majority in King (39.10 acres) and Pacific Counties (23. 19 acres) followed by Whatcom (15.02 acres), Snohomish (12.98 acres), Skagit (10.99 acres) and Clark (10.60 acres). According to DOE, the majority of wetlands impacted reflect the urban, and even rural growth that is occurring in those counties. The six counties identified above total 111.8 acres of 80.4% of the total wetland acreage reported impacted in Western Washington.

The DOE report lists 221.39 acres of mitigation received, but there is no information on whether this mitigation was preservation, enhancement, restoration or creation. Nor is there any verification that the mitigation proposed was actually carried out or was carried out successfully. In addition, DOE notes 9 acres of "Pipeline Restoration" and 21.94 acres of "Wetland Conversion".

CONCLUSIONS

• Public agencies are responsible for approximately 25% of wetland filling under NWP–26 during 1994–95 and well over half the wetland filling under standard (individual) permit applications. This raises significant questions concerning the wisdom of allowing state and local governments to run wetland permitting programs when they are such a significant source of wetland filling themselves.

• Quality of file information varied greatly. Some files contained standard permit applications that the Corps determined could be processed under NWP–26. Other files were merely "enforcement files" where a determination was made that the alleged violation did not exceed an acre and therefore was automatically covered by NWP–26.

• Approximately 17 files were missing or could not be located while at the Corps. Better tracking of files is needed.

• Approximately 14 files did not appear to involve wetland filling (e.g., 95–4–00501 to create a pond), but were processed as NWP–26 anyway.

• Some local government sensitive area ordinances require mitigation for even small wetland fills. However, since mitigation is not a condition of Seattle Corps

District NWP–26s for wetland fills less than an acre it is impossible to determine what mitigation has been carried out from examining the Corps files. In any event, the public can not sue to enforce conditions issued by the Corps.

• The Corps uses NWP's to resolve alleged unauthorized filling. However, in several cases, no purpose was attached to the filling (e.g., land clearing). As a result, the Corps can not carry out general policies for evaluating permit applications found at 33 CFR Sec. 320.4(a)(2) concerning need for the proposed project.

What is surprising is the high Percentage of wetland filling permits being given to state and local agencies. This is strong evidence that allowing state or local governments to assume sole responsibility for wetland permit decisions when they themselves are also the seekers of wetland filling permits would be a grave mistake.

The Wise Use Movement supports strengthening the Clear Water Act, particularly Section 404 and we oppose weakening efforts such as that proposed by Senator Bond and Senator Breaux. Thank you for the opportunity to submit these comments. Please send us a copy of the hearing record then it becomes available.

○