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WETLANDS PROTECTION

The Scope of the Section 404 Program Remains Uncertain



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**The Honorable Robert A. Borski
Chairman, Subcommittee on Investigations
and Oversight
Committee on Public Works and Transportation
House of Representatives**

**The Honorable Sherrod Brown
House of Representatives**

As agreed with your offices, this report examines, among other things, the U.S. Army Corps of Engineers' administration of the Clean Water Act's Section 404 Program and the Corps' implementation of recommendations made by GAO in a 1988 report concerning the program.

Copies of this report are being sent to the Secretaries of Defense, Commerce, and the Interior; the Administrator, Environmental Protection Agency; and the appropriate congressional committees. We will also make copies available to other interested parties upon request.

This work was performed under the direction of James Duffus III, Director, Natural Resources Management Issues, who can be reached at (202) 512-7756 if you or your staff have any questions. Major contributors to this report are listed in appendix XI.

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Executive Summary

Purpose

Wetlands protection has become one of the major regulatory and environmental issues in recent years. The environmental and developmental communities are both concerned about how much land the federal government should regulate as wetlands. Wetlands—which generally include swamps, marshes, bogs, and similar areas—provide vital habitat for fish and wildlife and offer numerous other benefits. However, according to the most recent estimates of the Department of the Interior's Fish and Wildlife Service (FWS), the contiguous 48 states lost an average of 290,000 acres of wetlands per year from 1974 through 1983.

Section 404 of the Clean Water Act of 1977 (33 U.S.C. 1251, 1344) is the primary legislative authority behind federal efforts to regulate activities in wetlands and other waters of the United States. In July 1988, GAO issued a report on the U.S. Army Corps of Engineers' administration of the Section 404 Program.¹ The report contained several recommendations on how the Corps could improve its administration of the program, and the report also asked the Congress to consider establishing clearer criteria regarding the scope and direction of the program. Former Representative Don J. Pease asked GAO to (1) review the extent to which the Corps has implemented recommendations made in the 1988 report, (2) identify legislative and other developments that have occurred since the 1988 report that affect the program, and (3) identify the extent to which budgetary constraints affect the administration of the program.

Background

Under the Section 404 Program, anyone who wants to conduct dredging and filling activities in navigable waters, including wetlands, must obtain a permit issued by the Corps. In making permit decisions, the Corps must consider (1) what cumulative impacts projects would have on the environment if the permits were approved and (2) if practicable alternatives to projects that would alter wetlands are available. The Corps is also responsible for enforcing permit requirements. If no permit is issued, the Environmental Protection Agency (EPA) is responsible for enforcement of unauthorized activities. EPA, FWS, and the Department of Commerce's National Marine Fisheries Service (NMFS) may make recommendations on permit applications and may appeal permit decisions made by the Corps. These three federal agencies, which work to protect various natural resources, are known as "resource agencies." Agreements between the Department of the Army and the resource agencies govern how they all perform their roles.

¹Wetlands: The Corps of Engineers' Administration of the Section 404 Program (GAO/RCED-88-110, July 28, 1988).

Results in Brief

The Corps has undertaken several initiatives to address some of the recommendations in GAO's 1988 report—including changes in the reporting system that provides information on wetlands protection—but further action on other recommendations is needed. For example, a major issue that needs to be resolved concerns the final methodology for delineating wetlands boundaries that would establish the amount of land within the scope of the Section 404 Program. Other recommendations made by GAO that have yet to be fully implemented involve (1) developing guidance on considering the cumulative impacts of wetlands development projects and the practicable alternatives to such projects and (2) devising a feedback mechanism to inform resource agencies on how the Corps is considering their recommendations.

During the past 3 years, the Congress and the Bush Administration proposed major legislative and other revisions to section 404. If adopted, these revisions could have a major impact on the program. Any proposals to change the program, however, will have to consider the funding and staffing shortfalls that have hindered the efforts of the Corps and the resource agencies to improve the administration of the program.

Principal Findings

Status of the Corps' Implementation of GAO's 1988 Recommendations

In 1988, GAO recommended that the Corps develop a data reporting system to provide baseline information on the extent to which the process of issuing section 404 permits is controlling the development of wetlands. In 1992, the Corps announced that it would change its reporting system to collect such baseline information. If these changes are fully implemented, they will provide valuable information on the extent to which the Section 404 Program is protecting wetlands.

In addition, the Corps and EPA are developing guidance for considering practicable alternatives to projects that would alter wetlands and are studying ways to assess the cumulative impacts of section 404 permit decisions. Also, revisions to streamline the appeals process—which will be followed by the Department of Commerce and EPA in their dealings with the Department of the Army—were agreed to in August 1992. A revised agreement between Interior and the Army was still under consideration at the conclusion of GAO's review.

However, final changes to the methodology for delineating wetlands boundaries, which would establish the amount of land within the scope of the program, had not been adopted at the conclusion of GAO's current work. Toward this goal, the Congress has approved \$400,000 for the National Academy of Sciences to undertake a study of wetlands delineation. Because the scope of the Section 404 Program depends on the way in which wetlands are delineated, and because the issue has become a major controversy among the developmental and environmental communities, GAO believes that this issue must be resolved.

Although the three Corps district offices GAO reviewed—Buffalo, New York; Huntington, West Virginia; and Jacksonville, Florida—generally accepted resource agency recommendations on permit applications, the offices varied in the extent to which they advised the resource agencies of such actions. Consequently, as was the situation during GAO's previous review, the resource agencies did not always know if their recommendations on permit applications were adopted by the Corps. For example, the Department of Commerce told GAO that NMFS is finding it increasingly difficult to get specific information on how the agency's recommendations on permit applications are being handled by the Corps.

Current Proposals to Change Section 404

The 102nd Congress and the Bush Administration made proposals that would significantly change the Section 404 Program while attempting to balance the need to protect wetlands with the rights of private property owners. Included among these proposals were various bills and the Bush Administration's plans to achieve a no-net-loss goal for the remaining wetlands and to streamline the Section 404 Program. Some of these proposals would, among other things, revise the method for determining wetlands boundaries and expedite the permit application process. At least some of the legislative proposals are expected to be reintroduced in the 103rd Congress.

Funding and Staffing

Funding and staffing shortfalls have affected the administration of the Section 404 Program. They have inhibited the Corps' and EPA's enforcement activities and impeded the Corps' ability to establish wetlands boundaries for many permit applicants. Also, even though the Corps has emphasized permit processing as a priority under the program, the Corps districts that GAO visited were often unable to meet the established goals for permit processing timeliness. However, some of the permit requirements that can affect permit processing timeliness are not

within the Corps' control, such as state certifications. The Corps and EPA have experienced increases in funding and staffing that could expedite permit processing and improve enforcement, but shortfalls will probably still require the agencies' field offices to prioritize their program activities.

Budgetary constraints have also hampered the ability of resource agencies to visit proposed project sites, comment on permit applications, and follow up on the Corps' permit decisions to see if the agencies' recommendations were adopted. For example, the Department of Commerce told GAO that recent budget cuts will likely hamper the agency's ability to respond to all permit applications.

Recommendations

GAO continues to support the recommendations it made in its 1988 report and is making no new recommendations.

Agency Comments

The Departments of Commerce and the Interior generally agreed with the facts and conclusions presented in a draft of this report. The Department of Defense generally concurred with many of the findings contained in the draft report, but it did not concur with our conclusion that Corps districts should routinely advise the resource agencies about the adoption of their recommendations. Defense believes such a requirement would place further stress on its limited staffing and funding. GAO believes that providing such feedback could be accomplished at minimum cost if it were provided for only those permit applications on which the resource agencies make significant comments.

EPA believed the information presented in the draft report was evenly balanced. However, EPA expressed concern that its authority and responsibilities in administering the Section 404 Program were not adequately recognized. GAO made some revisions to the report and now believes that it has adequately recognized and described EPA's significant role in this program.

All four agencies provided additional comments that clarified certain technical information or statements made in a draft of this report. Agency comments and GAO's responses are discussed at the end of chapters 2, 3, and 4, and in appendixes VII through X.

Contents

Executive Summary		2
Chapter 1		8
Introduction	The Clean Water Act's Federal Wetlands Protection Authority	8
	Organizational Responsibilities Under the Section 404 Program	8
	The Section 404 Permitting Process	11
	Monitoring and Enforcement of Section 404 Permit Requirements	13
	Other Federal and State Programs Protect Wetlands	14
	GAO's 1988 Report Made Several Recommendations to Improve Administration of the Section 404 Program	15
	Objectives, Scope, and Methodology	16
Chapter 2		19
Progress Has Been Made Toward Implementing Some GAO Recommendations, but Further Action Is Needed	The Corps Plans to Compile Baseline Data on the Section 404 Program's Impact	19
	Development of Consistent and Workable Procedures for Implementing Basic Program Requirements Is Needed	21
	Status of Section 404 Program Enforcement	25
	Progress Has Been Made Toward Implementing a National Oversight Program	26
	The Corps Considered and Generally Accepted Resource Agencies' Recommendations	27
	The Corps Does Not Provide Feedback to All Resource Agency Field Offices	29
	Conclusions	30
	Agency Comments and Our Evaluation	31
Chapter 3		33
The Scope of the Section 404 Program Remains Uncertain	Previous Administration Proposals to Change the Section 404 Program	33
	Proposed Legislation Could Change the Scope of the Section 404 Program	38
	Conclusions	39
	Agency Comments and Our Evaluation	40

Chapter 4		41
Budgetary and Other Constraints Have Affected Administration of the Section 404 Program	Budgetary Constraints Continue to Hamper Certain Program Activities	41
	Requirements Not Within the Corps' Control Often Affect the Timeliness of Permitting Decisions	45
	Conclusions	50
	Agency Comments and Our Evaluation	51

Appendixes		
	Appendix I: Additional Details on GAO's Random Samples	52
	Appendix II: Schedule of Public Notices Where FWS Responded That It Had Insufficient Staff to Comment on Projects	56
	Appendix III: Schedule of Public Notices Where EPA Responded That It Had Insufficient Staff to Comment on Projects	57
	Appendix IV: Number and Percent of Applications Processed Within 60 Days	58
	Appendix V: Number and Percent of Permit Files GAO Reviewed, by Final Permit Decision	59
	Appendix VI: Additional Days to Process Applications Because the Corps Had to Request Further Information	60
	Appendix VII: Comments From the Department of Defense	61
	Appendix VIII: Comments From the Environmental Protection Agency	65
	Appendix IX: Comments From the Department of the Interior	78
	Appendix X: Comments From the Department of Commerce	83
	Appendix XI: Major Contributors to This Report	89

Tables		
	Table 4.1: Average Number of Days to Process Sample Permit Applications	47
	Table 4.2: Primary Reasons for Not Making Permit Decisions Within 60-Day Time Frame	50
	Table I.1: Section 404 and Section 10/404 Permit Applications Included in GAO's Sample	52

Figure	Figure 1.1: Offices of the U.S. Army Corps of Engineers	9
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Abbreviations

EPA	Environmental Protection Agency
FWS	U.S. Fish and Wildlife Service
GAO	General Accounting Office
NMFS	National Marine Fisheries Service

Introduction

Unlike in the past, when wetlands were considered unimportant areas to be filled or drained for various uses, the many important roles that wetlands play are now recognized. Wetlands—which generally include swamps, marshes, bogs, and similar areas—provide vital habitat for fish, waterfowl, and other birds and wildlife. They are also important to commercially valuable fish and shellfish enterprises. In addition, wetlands help maintain water quality and aquatic productivity, aid flood control and erosion control, and provide recreation sites and aesthetically pleasing landscapes.

However, according to estimates from the Department of the Interior's Fish and Wildlife Service (FWS), the contiguous 48 states lost approximately 53 percent of their original 221 million acres of wetlands over the 200-year period from the 1780s to the 1980s. FWS estimated that wetlands losses during the period from the mid-1950s to the mid-1970s was about 458,000 acres per year. FWS' most recent estimates covering the years 1974 through 1983 suggest that about 290,000 acres were being lost each year. The Department of Agriculture's Soil Conservation Service reported that losses of wetlands on nonfederal rural areas in the period from 1982 to 1991 totaled about 120,000 acres per year.

The Clean Water Act's Federal Wetlands Protection Authority

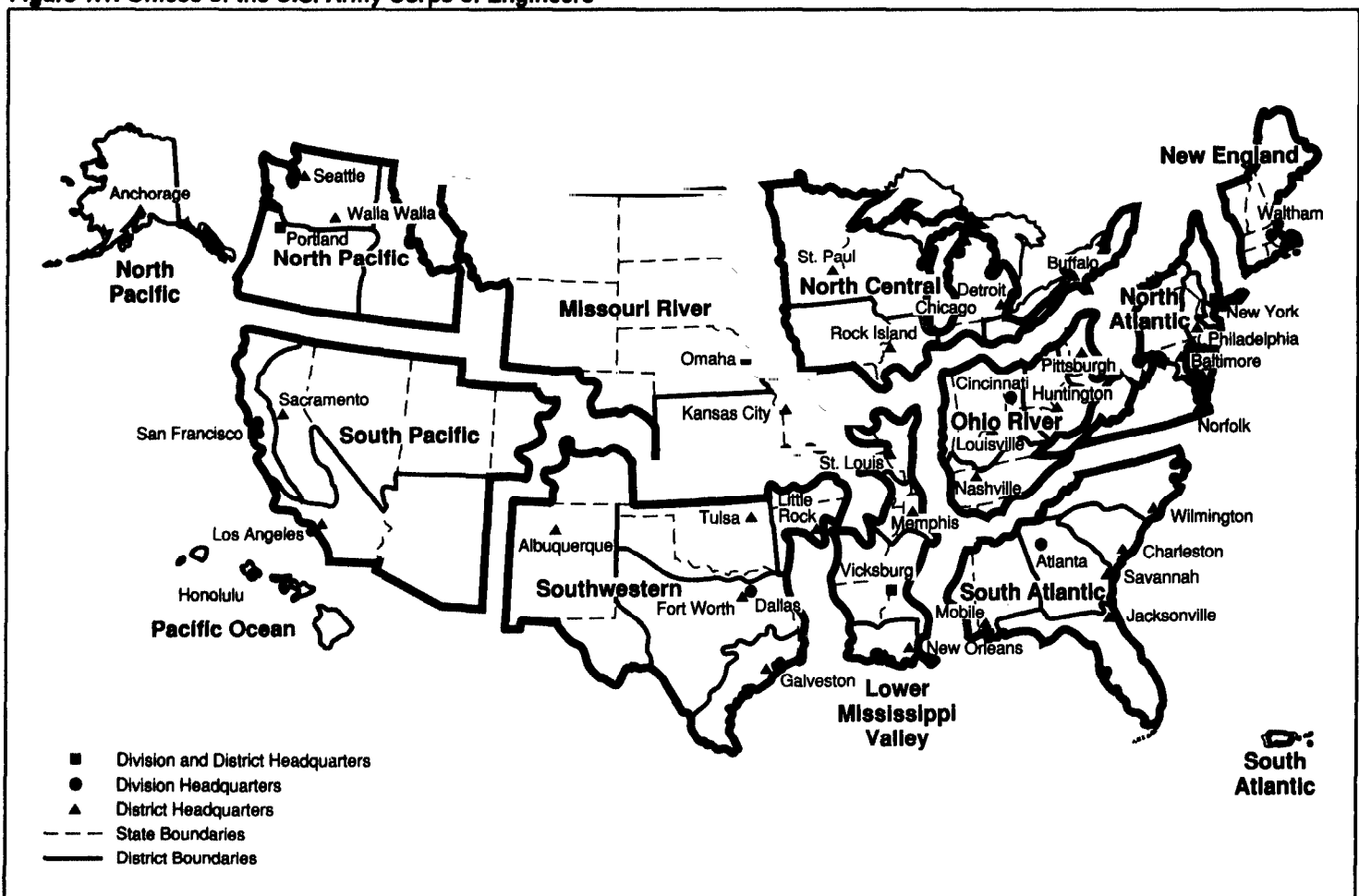
Section 404 of the Clean Water Act of 1977 (33 U.S.C. 1251, 1344) provides the primary legislative authority behind federal efforts to regulate activities in wetlands and other waters of the United States. Under the Section 404 Program, anyone wishing to carry out dredging and filling activities in navigable waters, including wetlands, must obtain a permit from the U.S. Army Corps of Engineers (Corps). Under Corps regulations, the discharge of dredged material includes (1) the addition or redeposit of material to specified discharge sites located in waters of the United States and (2) the runoff or overflow from contained land or from a water disposal area. Fill material, according to Corps regulations, includes any material used primarily for either replacing an aquatic area with dry land or changing the bottom elevation of a body of water.

Organizational Responsibilities Under the Section 404 Program

The Secretary of the Army, acting through the Corps, has responsibility for issuing permits under the Section 404 Program and for enforcing the conditions included in those permits. The Corps' organization is highly decentralized. During the period of our review, implementation of the Section 404 Program was delegated to 36 Corps district engineers who were responsible for the day-to-day management of the program. The

Corps' 11 divisions provided oversight of the operations of the district offices. The Office of the Chief of Engineers is responsible for national oversight of the program. However, in November 1992, the Corps announced a reorganization that will reconfigure the Corps' division and district offices. Figure 1.1 shows the Corps' jurisdictional areas at the time of our review.

Figure 1.1: Offices of the U.S. Army Corps of Engineers



Note: In Iowa the eastern bank of the Missouri River is regulated by the Omaha office.

Source: Corps of Engineers.

The Corps' regulatory program budget, much of which is devoted to the Section 404 Program, was a little over \$55 million for fiscal year 1988 and then steadily increased to about \$86 million in fiscal year 1992. The Corps' regulatory staff increased from 915 members at the end of fiscal year 1989 to about 1,100 members by the end of fiscal year 1992.

Other federal agencies, including the Environmental Protection Agency (EPA), the National Marine Fisheries Service (NMFS) of the Department of Commerce's National Oceanic and Atmospheric Administration, and FWS, also have roles in the section 404 permitting and/or enforcement processes. These three federal agencies, which work toward protecting various natural resources, are known as "resource agencies." The states may also have a role in implementing the Section 404 Program. The participation of the resource agencies and the states ranges from commentary on various types of permit applications to detection of unpermitted activities and permit violations.

In conjunction with the Secretary of the Army, EPA is also responsible for developing guidelines that specify disposal sites for dredged or fill material—known as the 404(b)(1) guidelines. The purpose of these guidelines is to control discharges of dredged or fill material into U.S. waters in order to restore and maintain the chemical, physical, and biological integrity of the waters. The guidelines set out the criteria against which permit applications are measured.

In addition, under Section 404(c) of the Clean Water Act, EPA has veto authority over the Corps' decisions to issue permits by prohibiting the disposal of dredged or fill material at any site if the use of the site will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas. Out of an estimated 150,000 individual permit applications received since the section 404(c) regulations went into effect in late 1979, EPA has completed 11 section 404(c) veto actions to date. Also, the Attorney General ruled in 1979 that EPA has the responsibility for construing the term "navigable waters" (waters of the U.S., including the territorial seas) and for interpretations of the scope of some activities that are exempt from the Section 404 Program's regulatory provisions. However, the Corps and EPA have agreed that the Corps will perform the majority of the geographical determinations and determinations of the applicability of the exemptions under the program.

The Fish and Wildlife Coordination Act (48 Stat. 401, as amended; 16 U.S.C. 662) requires that the Corps consult with FWS and NMFS and give full consideration to their recommendations in evaluating permit applications. Although FWS' and NMFS' recommendations are advisory, they can provide the basis for modifying, conditioning, or denying a permit. Also, although neither FWS nor NMFS has any statutory authority regarding section 404 enforcement, the Corps and EPA can seek the assistance of either agency on enforcement-related matters, when appropriate.

Section 401 of the Clean Water Act requires states to issue water quality certificates, or waivers of certificates, before the Corps can issue a section 404 permit. In addition, the Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1456(c)), provides that a timely objection to a request for certification filed by an applicant for a Corps permit by a state with a federally approved Coastal Zone Management Program precludes the Corps from issuing a section 404 permit, unless the Secretary of Commerce finds that the activity is either consistent with the objectives of the act or necessary in the interest of national security.

Finally, under section 404(g) of the Clean Water Act, the states may assume responsibility for issuing permits in certain waters under their jurisdiction in accordance with criteria developed by EPA. Michigan is currently the only state with this authority.

The Section 404 Permitting Process

Upon receipt of a permit application, Corps district or division engineers determine whether an individual permit is required. If so, a public notice is prepared and sent to federal and state resource agencies, local government agencies, and other interested parties. Generally, the Corps gives between 15 and 30 days for comments on the project.

In addition to individual permits, the district or division engineer has the authority to issue alternate types of permits, such as letters of permission and general permits. Letters of permission are used when the proposed work is minor, will have no significant individual or cumulative impact on the environment, and is not expected to receive appreciable opposition. General permits cover activities that have been identified as being substantially similar in nature and that cause minimal individual or cumulative environmental impact. These can include activities such as the placement of certain navigational aids, the stabilization of banks, and the placement of fish and wildlife harvesting devices. These permits may

cover activities in a limited geographic area, in a particular region of the country, or in the entire nation.

The Corps receives about 15,000 individual permit applications annually. Of these 15,000 applications, the Corps issues approximately 10,000 individual permits (67 percent). The Corps denies approximately 500 individual permit applications, or about 3 percent of the applications it receives. The remaining 30 percent, about 4,500 applications, are either withdrawn or qualify for letters of permission or general permits. In addition, the Corps authorizes about 40,000 activities under regional or nationwide general permits each year.

At the permit application stage, the Corps often evaluates section 404 permit applications concurrently with permits under section 10 of the Rivers and Harbors Appropriation Act of 1899 (33 U.S.C. 403). Section 10 prohibits the obstruction or alteration of navigable waters of the United States without a permit from the Corps. These joint permit applications will show up in statistical reporting as sections 10/404 permits. The Corps also regulates the transportation and discharge of dredged material into ocean waters pursuant to section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413).

At the Corps district or division office level, the actual evaluation of permit applications is handled on a project manager basis, in which one staff person handles the application from the time it is received until the time that a final decision is made by the district or division engineer. The decision of whether or not to issue a permit, and under what conditions it should be issued, is determined by balancing input from many sources, such as the resource agencies, concerned individuals, and the states. This process is referred to as a public interest review and is conducted simultaneously with the 404(b)(1) guidelines evaluation.

When conducting the public interest review, the Corps must consider many factors, including wetlands values, conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood damage prevention, land use, navigation, recreation, water supply, water quality, energy needs, safety, food production, and in general, the needs and welfare of the public. Also, section 404(q) of the Clean Water Act provides for agreements that minimize interagency duplication and unnecessary delays in making permit decisions. Although not required by section 404(q), these interagency agreements entered into by the Secretary of the Army and the heads of the resource agencies also

contain the conditions under which resource agencies can request a higher level review within the Department of the Army when the agencies disagree with permit decisions made by district engineers. This appeal process is referred to as an agency's "elevation" authority.

In determining compliance with the 404(b)(1) guidelines and as part of the public interest review, the project manager must consider the availability of practicable alternatives to the proposed project and the potential beneficial effects of any proposal designed to mitigate the adverse environmental impacts of the project. If it is found that the project will not be in the public interest or will not comply with this and other components of the 404(b)(1) guidelines, the district engineer must deny the permit. This is known as a "denial with prejudice." The district engineer must also deny a permit if the applicant fails to obtain other required federal, state, or local authorizations, such as state water quality certificates or state coastal zone consistency certificates. This is referred to as an administrative denial or "denial without prejudice." If the permit is denied without prejudice, the applicant may reapply if the necessary authorizations are obtained at a later date.

The project manager must evaluate the comments submitted on the proposed project and may work with the applicant to modify the proposed project to eliminate any segments of the project that the Corps believes would not comply with the 404(b)(1) guidelines or would be contrary to the public interest. The project manager then prepares appropriate documentation to support the recommended permit decision. This statement of findings includes a discussion of the project's environmental impacts, of the findings of the public interest review, and of any special evaluations required by type of activity such as whether the project complies with the section 404(b)(1) guidelines.

Monitoring and Enforcement of Section 404 Permit Requirements

The Corps and EPA are responsible for detecting suspected unauthorized (unpermitted) activities and/or violations of the conditions in issued permits. In this regard, the Corps and EPA have entered into a section 404 enforcement memorandum of agreement. Under the agreement, the Corps has the primary responsibility for all violations of Corps-issued permits. EPA has the primary enforcement responsibility with regard to all unpermitted discharge violations that meet criteria agreed upon by the Corps and EPA. However, the Corps conducts most investigations and resolves most of the cases involving suspected unauthorized activities because of its greater field staff resources. Inspection and surveillance

activities to detect unauthorized activities are carried out by Corps employees, members of the public, and other interested federal, state, and local agencies. In some cases, formal memorandums of agreement govern how these activities will be carried out by the agencies involved.

When the Corps or EPA becomes aware of an unauthorized activity, they issue orders to stop the activity if it is still in progress, and they investigate the circumstances involved. If it is determined that legal action is not warranted and removal or restoration is not in order, the Corps can accept an “after-the-fact” permit application for the activity in question which undergoes the same public interest review process as an individual permit application. Working with the Department of Justice, the Corps or EPA can respond to unauthorized discharges by initiating criminal or civil judicial actions. In addition, both the Corps and EPA have authority under section 309 of the Clean Water Act (33 U.S.C. 1319) to impose civil administrative penalties for section 404 violations. If legal action is initiated, an after-the-fact permit cannot be considered until the legal action is completed.

Other Federal and State Programs Protect Wetlands

Section 404 of the Clean Water Act is 1 of at least 25 federal laws that can affect wetlands. The act specifically exempts certain activities—including discharges in conjunction with ongoing agriculture, silviculture (forestry), and ranching operations—but does not exempt the conversion of wetlands to those operations without a permit from the Corps. According to the Assistant Secretary of the Army (Civil Works), over the past 5 to 10 years the Corps regulatory program has expanded both the activities regulated as well as the geographic scope of the program to include virtually all wetlands. Under the Corps’ ongoing rule-making, plans are underway to expand the list of activities that are regulated to include the channelization, excavation, and drainage of wetlands.

In addition, laws such as the Swampbuster provision of the Food Security Act of 1985 (title XII, subtitle C) (16 U.S.C. 3821), as amended by the Food, Agriculture, Conservation, and Trade Act of 1990, have been enacted to strengthen wetlands protection on lands previously unprotected. Under the Swampbuster provision, federal farm program benefits are denied to producers who plant an agricultural commodity on wetlands that were converted after December 23, 1985. Several other federal statutes have been enacted that allow certain parties to (1) acquire wetlands or protect them through outright purchase (fee-title acquisition) or through protective easements that prevent certain activities such as draining,

leveling, filling, or burning; (2) restore damaged wetlands or create new wetlands; and (3) provide disincentives to altering wetlands or incentives to protect them in their natural state. These statutes are discussed in a fact sheet we issued in November 1991.¹ Five federal agencies are primarily responsible for implementing these laws: EPA, the Department of Agriculture's Soil Conservation Service and its Agricultural Stabilization and Conservation Service, FWS, and NMFS. In addition, most states also have programs for the regulation and protection of wetlands.

More recently, numerous legislative proposals were made during the 102nd Congress to revise the Section 404 Program. Also, President Bush adopted a goal of no-net-loss of remaining wetlands and proposed a three-point plan for improving the protection of the nation's wetlands. Part of this plan seeks to streamline and more clearly define the scope of the Section 404 Program.

**GAO's 1988 Report
Made Several
Recommendations to
Improve
Administration of the
Section 404 Program**

In July 1988, we issued a report on the Corps' administration of the Section 404 Program.² Specifically, our report included recommendations to the Secretary of the Army to (1) develop baseline information to determine the extent of the Section 404 Program's impact on wetlands; (2) work with the federal resource agencies to develop consistent and workable procedures for (a) considering practicable alternatives to filling wetlands, (b) considering the cumulative impacts of many individual permit decisions, (c) delineating wetlands, and (d) allowing resource agencies to appeal district engineers' permit decisions; (3) develop a feedback mechanism to provide resource agencies with documentation that shows how their recommendations were addressed during the application review process; (4) work with EPA to develop a coordinated enforcement program utilizing the resources of both agencies to provide for surveillance, inspection, and penalty assessment when violations occur; and (5) establish a national oversight program to evaluate the performance of the Corps' district offices in enforcing the Section 404 Program.

The report also contained a matter for congressional consideration to establish clearer criteria regarding the scope and direction of the program.

¹Wetlands Overview: Federal and State Policies, Legislation, and Programs (GAO/RCED-92-79FS, Nov. 22, 1991).

²Wetlands: The Corps of Engineers' Administration of the Section 404 Program (GAO/RCED-88-110, July 28, 1988).

Objectives, Scope, and Methodology

Former Representative Don J. Pease of Ohio asked us to review the extent to which the Corps had implemented the recommendations included in our 1988 report, with special emphasis to be given to any current variances in program implementation among certain Corps district offices. We were also asked to identify (1) legislative and other developments that have occurred since our previous report that would impact the administration of the program and (2) the extent to which budgetary constraints affect administration of the program. Upon the retirement of Representative Pease, we made arrangements to address the report to the Chairman of the Subcommittee on Investigations and Oversight, House Committee on Public Works and Transportation, and to Representative Sherrod Brown, Representative Pease's successor.

As agreed, we included 3 of the Corps' 36 district offices in our review—Buffalo, New York; Huntington, West Virginia; and Jacksonville, Florida. The Buffalo district is responsible for administering the Section 404 Program in parts of three states—New York, Ohio, and Pennsylvania. The Huntington district also covers part of Ohio, along with parts of West Virginia and Kentucky. The Jacksonville district office covers all of Florida plus Puerto Rico and the U.S. Virgin Islands; because Jacksonville was included in our earlier review, it provided us an opportunity to follow up on actions taken since our 1988 report.

We interviewed certain resource agency officials that interact with these three Corps districts. These offices included EPA's regional offices in Atlanta, Georgia (Region 4), and Chicago, Illinois (Region 5). We also obtained information on EPA's regional offices in New York, New York (Region 2), and Philadelphia, Pennsylvania (Region 3). These regions deal with the Buffalo and Huntington district offices of the Corps. EPA's Region 4 is responsible for eight southeastern states, including Florida, and Region 5 covers six Great Lakes area states, including Ohio. We also visited the NMFS regional office in St. Petersburg, Florida, and its field office in Panama City, Florida. We visited FWS' field offices in Jacksonville, Vero Beach, and Panama City, Florida; Elkins, West Virginia; and Reynoldsburg, Ohio. We obtained information from FWS' field office in State College, Pennsylvania. This office supervises the Elkins, West Virginia, field office that we visited.

To determine both the changes that have occurred in the Section 404 Program since we issued our 1988 report and the extent to which the Corps had implemented our recommendations, we reviewed documents and interviewed headquarters and regional officials at the Corps, EPA, FWS,

and NMFS. We relied on our recent work on wetlands-related issues, reviews of proposals made by the Congress and the Bush Administration to change or clarify federal wetlands programs, and recent publications and interviews to determine other developments that have occurred since our 1988 report that could have affected the administration of the Section 404 Program.

To determine the extent to which budgetary constraints were affecting implementation of the program, we reviewed documents and interviewed headquarters and regional officials at the Corps, EPA, FWS, and NMFS.

As part of our review at the three Corps districts, we randomly selected 50 individual section 404 permit application files received at each district office during the 3 fiscal years covered by our review (1988 through 1990). As agreed with Representative Pease's office, we did not review letters of permission or general permits. The individual permit applications were reviewed to ascertain variances among the districts in the time required to process the applications, in the procedures used to provide public comment on the applications, in the recommendations submitted by the resource agencies, and in the consideration given by the Corps to those recommendations. The 150 applications reviewed at the three districts included 88 that resulted in issued permits, 51 that were eventually withdrawn, and 11 that were denied.

At the three Corps districts, we also reviewed an additional 90 permit applications that the Corps denied. In the Buffalo, New York, and Huntington, West Virginia, district offices, we reviewed all applications that the Corps denied during the 3-year period covered by our review (31 in Buffalo and 11 in Huntington) that were over and above the denied permits in our sample of individual permits. Because of the large number of permit denials in the Jacksonville district office, we reviewed a random sample of 48 of the 186 applications that the office denied. We did not use our random samples to make estimates of how each of the three Corps district offices, or the Corps as a whole, operates. Rather, we discussed the results of our samples of application files reviewed at each district office. A more detailed discussion of our sampling methodology is included in appendix I.

We discussed variances noted in district office program administration with regional or headquarters officials of the Corps, EPA, FWS, and NMFS. We also contacted consultants who perform wetlands boundary delineations and other activities involving wetlands in the Ohio area and who work

with the Corps' Buffalo and Huntington district offices to determine if they noted any differences in the manner in which the two districts implement the program. In addition, we discussed the section 404 application approval process with state officials in Ohio.

Our review was conducted from April 1991 through December 1992 in accordance with generally accepted government auditing standards. EPA and the Departments of Defense, Commerce, and the Interior provided written comments on a draft of this report. These comments have been included in this report where appropriate, and certain comments are presented and evaluated at the end of chapters 2, 3, and 4. The text of their comments is included in appendixes VII through X.

Progress Has Been Made Toward Implementing Some GAO Recommendations, but Further Action Is Needed

In our 1988 report, we made several recommendations to the Secretary of the Army aimed at improving the Corps' administration of the Section 404 Program. The Corps and EPA have taken steps to implement some of these recommendations, but further action is needed on some of the other recommendations. For example, the Corps has implemented recommendations to develop baseline information that would enable it to determine the extent to which the Section 404 Program affects wetlands and to establish a national oversight program to evaluate the performance of the Corps' districts and divisions in administering the program. Also, revisions to the appeals process—to be used by the resource agencies when they disagree with decisions made by the Corps' district engineers—have been agreed to by the Department of the Army and two agencies—the Department of Commerce and EPA. A revised agreement between the Department of the Army and Interior was still under consideration by the two agencies.

Action has not been completed on other recommendations, including (1) revisions to the methodology for making wetlands boundary determinations and (2) development of guidance for considering both the practicable alternatives to projects that affect wetlands and the cumulative impacts of numerous individual permit decisions. Full implementation of some of our recommendations, including the development of a coordinated enforcement program, will depend on whether the Corps and EPA give sufficient emphasis to enforcement and the provision of adequate resources to carry out this function.

In contrast to the findings of our previous review, we found that the Corps districts we visited during our current review generally accepted resource agency recommendations to modify or deny permits for proposed projects. However, our recommendation to initiate a feedback mechanism to apprise resource agencies of the Corps' actions on their recommendations regarding proposed projects was not implemented by the Corps because (1) the agency does not believe it should have the responsibility for providing such feedback on a routine basis and (2) the feedback process would put further stress on the Corps' limited resources.

The Corps Plans to Compile Baseline Data on the Section 404 Program's Impact

In 1988, we noted that Corps districts generally did not collect data on wetlands that were impacted by the section 404 permitting process. Although we recognized that the Section 404 Program was protecting wetlands, we recommended that the Corps develop a data reporting system that would enable it to provide baseline information on the extent

**Chapter 2
Progress Has Been Made Toward
Implementing Some GAO
Recommendations, but Further Action Is
Needed**

to which the program is protecting and otherwise restoring and maintaining the integrity of the nation's wetlands. At the conclusion of our current review, little was still known about the effectiveness of the Section 404 Program in terms of controlling wetlands alterations. Furthermore, EPA told us that the current information on overall wetland acreage, location, and quality is inadequate.

During this review and our previous review of the Section 404 Program, we found that of the seven districts we visited during the two reviews, only the Corps' Jacksonville district had collected data on the number of acres of wetlands (1) that the applicants proposed filling, (2) that the Corps approved to be filled, (3) that were created, and (4) that were preserved or enhanced. These statistics have been kept primarily because of questions raised by a NMFS office in Florida regarding the number of acres affected by the Corps' permitting process. Neither the Buffalo nor Huntington district offices have gathered similar data.

When our previous report was issued, the Department of the Army did not concur with us—in part because of cost considerations—on the benefits to be derived from a baseline data reporting system. Since then, however, the Corps has told us that it has now decided to change its quarterly reporting system to capture data on acres impacted by the permitting process. Beginning with the first quarter of fiscal year 1993, district offices have to report to Corps headquarters the number of acres requested to be filled; the number of acres permitted to be filled; and the number of acres enhanced, restored, or constructed to mitigate damage resulting from a permitted fill.

The information to be provided to Corps headquarters by district offices will not include data on the specific function and value of the wetlands in question. However, the statistics will be broken down between tidal and nontidal wetlands¹ and between individual and general permits. Information will also be collected regarding wetland acres affected by unauthorized activities and violations of permit conditions.

¹Tidal wetlands either flood regularly, with the daily ebb and flow of tides, or flood irregularly, during spring or storm tides. They include salt marshes and mangrove swamps. Nontidal wetlands generally occur inland along streams, lakes, and ponds, and include bogs, swamps, and bottomland hardwood forests.

**Development of
Consistent and
Workable Procedures
for Implementing
Basic Program
Requirements Is
Needed**

Our 1988 report recommended that the Corps work with the resource agencies to develop consistent procedures for implementing basic program requirements such as delineating wetlands boundaries, considering practicable alternatives for projects affecting wetlands, assessing the cumulative impacts of numerous individual permit decisions, and revising the process for appealing permitting decisions.

At the conclusion of our current fieldwork, a revised methodology for making wetlands delineations was being considered by the White House Domestic Policy Council² with advice from the Corps, the resource agencies, and others. However, indications are that any changes in the delineation methodology would await consideration by the new administration. Also, the methodology for making such delineations is to undergo further study by the National Academy of Sciences. Final guidance regarding practicable alternatives for projects that affect wetlands is under consideration by the Corps and EPA, and both agencies are studying means for assessing the cumulative impacts of section 404 permit decisions. In August 1992, the Department of the Army entered into agreements with EPA and the Department of Commerce that revised the process for appealing the decisions of Corps district or division engineers. An agreement with the Department of the Interior was still under consideration as of December 1992.

**Final Delineation
Methodology Needed**

Final changes to the methodology to be used for determining wetland boundaries that would establish the areas to be regulated under the Section 404 Program had not been adopted by the end of December 1992. Revising the methodology for delineating wetlands was one of three focuses of President Bush's plan to improve the protection of wetlands. EPA, in commenting on a draft of this report, advised us that the agency's 1993 appropriations act includes \$400,000 for a National Academy of Sciences study of, among other things, wetlands delineation. Further discussion of the status of these initiatives is contained in chapter 3.

**The Corps Has Recently
Emphasized Consideration
of Practicable Alternatives**

Regulations implementing the Section 404 Program require that permit applicants consider practicable alternatives to filling wetlands. This may include locating projects on other sites that do not include wetlands. Since our 1988 report, the Corps has issued four guidance letters to individual field offices emphasizing the need to consider practicable alternatives in

²The Domestic Policy Council, under the Office of Policy Development in the Executive Office of the President, advises the President in the formulation, evaluation, and coordination of long-range domestic and economic policy.

**Chapter 2
Progress Has Been Made Toward
Implementing Some GAO
Recommendations, but Further Action Is
Needed**

their permit application deliberations. Although these guidance letters are case specific, the Corps advised district offices to use them in handling similar situations they encounter. Corps and EPA headquarters officials told us that they are jointly drafting guidance for use by all Corps district offices in dealing with the subject of practicable alternatives. Corps officials told us that their input to the guidance will be based on the information contained in the four individual letters. However, in commenting on a draft of this report, the Department of Defense told us that, when concurrence by two agencies is required before guidance can be issued, delays are often the result.

EPA, in its comments on a draft of this report, pointed out that practicable alternatives must be considered as the initial step under a February 1990 section 404 mitigation memorandum of agreement between the Department of the Army and EPA. The agreement also clarifies the procedures to be used to determine the type and level of mitigation necessary to demonstrate compliance with the section 404(b)(1) guidelines. For adverse impacts that are unavoidable despite all the appropriate and practicable steps that are taken to minimize them, the agreement stipulates that permit applicants undertake compensatory measures such as restoring existing degraded wetlands or creating man-made wetlands.

The three district offices included in our current review actively considered practicable alternatives during the permit application review process. For example, we found that the Huntington district (1) recommended to two potential applicants that alternative analyses be conducted before they submitted formal applications, (2) withdrew four applications pending the submission of alternative analyses as part of additional information requested, and (3) denied six permits because less damaging alternatives were available. For five other applications, the applicants analyzed alternatives at some point during permit application processing. In the Buffalo district, the existence of practicable alternatives was often a reason cited for denying permits. For the 50 files we reviewed in the Jacksonville district that had permits that were denied with prejudice, we found that the district considered practicable alternatives. For 25 of these permit applications, the district's letters to the applicants notifying them of the outcome of their applications specifically stated that the permit was denied because less damaging alternatives were available.

**Cumulative Impacts Need
to Be Assessed**

According to Corps and resource agency officials, one of the most troublesome requirements for Corps districts to adhere to under the

Chapter 2
Progress Has Been Made Toward
Implementing Some GAO
Recommendations, but Further Action Is
Needed

404(b)(1) guidelines and the section 404 public interest review process is considering the cumulative impacts that many individual permit decisions will have on the ecosystem.³ Officials at Corps headquarters agreed that the issue of cumulative impacts has presented problems for its districts. Several resource agency field office officials we contacted believe that the Corps districts they interact with do not consistently address cumulative impacts.

Case files we reviewed indicated that Corps districts generally considered the impacts of projects on a case-by-case basis and that cumulative impacts were sporadically addressed by the Buffalo and Huntington districts. Although the Jacksonville district appeared to be making a more concerted effort to consider the cumulative impacts of its permit decisions, none of the permit denials we reviewed appeared to be based on adverse cumulative impacts on the ecosystems in the project areas.

A Buffalo district official agreed with our previous finding concerning the difficulty of assessing cumulative impacts. Our review of permit files in Buffalo showed only minimal documentation of cumulative impacts being considered. Only four permit application files mentioned cumulative impacts as a factor in the Corps' decisions to deny the permits.

The Chief of Huntington's Regulatory Branch told us that the cumulative impacts of projects or of several subprojects are generally not considered because it is difficult to determine what they are. For the sample files we reviewed, the Huntington district denied one permit in part because of the cumulative impacts that continued surface mining of a natural stream corridor would have on environmental values. However, another Huntington district file that involved construction of a boat dock and other activities was one of 12 similar projects in the same area of the Ohio River. The Corps permit documentation made no mention of the cumulative impacts of these 12 docks nor their related facilities. In this regard, the district's statement of findings mentioned only that the rapid growth in residential and commercial development within the area would affect the aquatic environment.

In contrast, a Jacksonville district official told us that the district gives great weight to the consideration of cumulative impacts as part of the public interest review. However, for the 50 permits we reviewed that were denied with prejudice, case file documentation contained discussions of

³An ecosystem is a system formed by the interaction of a community of organisms with their environment.

**Chapter 2
Progress Has Been Made Toward
Implementing Some GAO
Recommendations, but Further Action Is
Needed**

the adverse cumulative impacts of permitting actions in the project area, but none of the Corps' letters to applicants advised that the permit denial was based on adverse cumulative impacts. Corps headquarters officials told us that permit denial letters to applicants often do not include all of the reasons for the denial.

The Corps and EPA have independently studied means to address cumulative impacts. EPA's methodology was due to be published sometime in fiscal year 1993, while the Corps expects to field test revised procedures later in 1993.

**Status of Revisions to
Appeals Process**

The Corps and the resource agencies negotiated memoranda of agreement in 1985 and 1986 that included procedural guidelines under which resource agencies could refer disagreements with Corps districts or divisions to higher review levels within the Department of the Army. Our previous report noted that this appeals process, more commonly referred to as the "elevation" process, was used infrequently. The process was resource intensive and the resource agencies believed that there was little likelihood that their appeals would result in alternative permit decisions. We recommended that the Corps develop, with the participation of the resource agencies, a mutually acceptable and simplified process under which the permitting decisions of district or division engineers could be appealed.

In the 3 fiscal years that our current review covered, the elevation process remained basically the same as it had been at the time of our previous review. However, as we discuss later in this chapter, the three Corps districts we visited during this review generally accepted resource agency recommendations to modify or deny permits for proposed projects. This stands in contrast to the past, when many resource agency recommendations were not accepted by the Corps. Thus, the resource agencies now have less incentive to appeal Corps permit decisions.

In August 1992, the Department of the Army entered into agreements with EPA and the Department of Commerce to revise the method for appealing district engineer decisions in an attempt to streamline permit processing. Corps officials told us that revisions to the agreement with the Department of the Interior were still under consideration as of December 1992.

Status of Section 404 Program Enforcement

We found during our previous review that the Corps and EPA had not emphasized enforcement in their efforts to detect unpermitted activities and to ensure compliance with permit conditions. Rather, Corps district officials told us that their personnel are primarily involved in permit processing. In our 1988 report, we recommended that both the Corps and EPA develop a coordinated enforcement program that would utilize the combined resources of both agencies and other resources in dealing with violations of section 404 permit requirements.

On January 19, 1989, the Department of the Army and EPA entered into a memorandum of agreement that designates which agency will act as the lead agency in specific enforcement activities. However, we have found that permit processing continues to be the primary emphasis of Corps district officials. This is borne out by funding statistics which show that, while the overall appropriations for the Corps' regulatory program—including the Section 404 Program—increased during the period of our review, the percentage of funding devoted to enforcement remained static. The Chief of Buffalo's Enforcement Section told us that staffing shortfalls continued to hamper enforcement of the requirements of the Section 404 Program. He said that the district needed to augment its 11-member enforcement staff with 4 additional staff members to keep up with the enforcement case load.

The Chief of Jacksonville's Enforcement Branch told us that the district engineer considered permit application processing the priority in the district, and that enforcement/compliance has therefore taken a backseat to permit processing. However, staffing in the enforcement branch nearly doubled from 6 to 11 in fiscal year 1992, and this should strengthen the district's enforcement program.

The Huntington district does not have a separate enforcement branch. The district's project managers must handle enforcement in addition to their permit application processing duties. Permit processing has been designated a priority in the district, according to the Chief, Regulatory Branch.

Although the Corps has assumed the majority of the enforcement activities under the Section 404 Program, EPA still has an enforcement role. However, according to its Office of Inspector General, EPA has also not given priority to its enforcement responsibilities because its limited staff resources must be concerned with their other duties, such as making recommendations on permit applications. In this regard, EPA's Office of

**Chapter 2
Progress Has Been Made Toward
Implementing Some GAO
Recommendations, but Further Action Is
Needed**

Inspector General reported in 1991 on implementation of the Section 404 Program in three regions—including the Atlanta region, which works with the Corps' Jacksonville district office.⁴ The audit report, which covered the same 3 fiscal years as our current review, stated that although enforcement was a key objective of EPA's wetlands program, the three regions included in the review had not developed effective, consistent enforcement programs and had not, along with the Corps, adequately coordinated and monitored enforcement against unpermitted discharges of dredged and fill material into regulated wetlands.

EPA, in commenting on a draft of this report, informed us that its Office of Water disagreed with many of the findings and recommendations in the Office of Inspector General audit report and that the Office of Water is working to resolve these differences. However, an official from the Office of Inspector General who is familiar with the negotiations told us that his office has no plans to change its position regarding EPA's enforcement activities under the Section 404 Program as stated in the audit report.

**Progress Has Been
Made Toward
Implementing a
National Oversight
Program**

As part of a strengthened enforcement program, we recommended in our 1988 report that a national oversight program for evaluating the performance of Corps districts in their enforcement of the Section 404 Program be established. The Corps has established such a program, which includes performance standards to measure the regulatory performance of district and division offices.

The performance standards are related to the percent of (1) individual applications that are processed within 120 days; (2) all applications, including general permits, that are processed within 60 days; (3) unauthorized activities that are resolved; and (4) permits that are inspected for compliance with the terms and conditions of the permits. The goal for this last performance standard is that 25 percent of individual permits issued the previous year be inspected for compliance with permit terms and conditions. In establishing the performance standards, the Corps expected to (1) get a more realistic estimate of available resources to match the existing work load, (2) gain a better understanding of the problems the districts face as a result of regulation and policy changes by Corps headquarters, and (3) obtain a realistic estimate of the work required to implement the regulatory program.

⁴Wetlands: EPA's Implementation and Management of the Section 404 Wetlands Program, EPA's Office of Inspector General, Sept. 1991.

The focus of the oversight program will be the monitoring of division offices by Corps headquarters staff and the monitoring of district offices by Corps divisions—each on a no-less-than-annual basis. Initial field visits have been conducted at each of the 11 Corps divisions to determine their compliance with the performance standards.

Although the national oversight program established by the Corps fulfills our previous recommendation in this regard, the Department of Commerce, in commenting on a draft of this report, expressed concern that the Corps' performance standards seem to stress the processing of permits rather than the implementation of environmental considerations such as achieving the goal of no-net-loss of remaining wetlands.

The Corps Considered and Generally Accepted Resource Agencies' Recommendations

In contrast to the findings in our 1988 review, the Corps district offices we visited generally accepted resource agency recommendations to modify or deny permits for proposed projects. For example, the Buffalo district did not reject any of the 34 permit modification recommendations or the 18 permit denial recommendations made by resource agencies. The Huntington district rejected 4 of the 18 recommended permit modifications and only 1 of 21 recommended permit denials. The Jacksonville district rejected 2 of 24 recommended permit modifications and 9 of 114 recommended permit denials. The permit modification and denial recommendations discussed above include recommendations made by the resource agencies on applications that were ultimately (1) denied by the Corps with or without prejudice, (2) withdrawn by the Corps or by the applicants, or (3) approved by the resource agencies when the applicants submitted alternative project plans. For example, of the 22 recommended permit modifications that we categorized as accepted by the Jacksonville district, 3 were denied with prejudice, 1 was denied without prejudice, 1 was withdrawn by the applicant, and 1 was withdrawn by the Corps when the applicant failed to provide additional information requested by the district.

In the few instances where the Corps rejected resource agencies' recommendations to modify or deny projects, it gave various reasons. Some recommended modifications were rejected because the Corps did not believe that EPA and FWS provided adequate support for their positions. For others, the Corps believed that the comments were outside the resource agencies' jurisdiction. The Corps rejected 10 denial recommendations made by resource agencies on 7 projects. For these seven projects, three involved situations where the Corps decided that the

**Chapter 2
Progress Has Been Made Toward
Implementing Some GAO
Recommendations, but Further Action Is
Needed**

applicants had no practicable alternative to altering wetlands. Three others involved projects that would cause insignificant damage to wetlands or other minor impacts, according to the Corps. One project involved a previously issued permit that was being renewed by the applicant and the Corps concluded that no new information was discovered that would make them overturn the decision to reissue the permit.

Most of the resource agency officials we contacted would like more information on the consideration given to their recommendations on permit applications. However, with a few exceptions, these officials were pleased with their overall working relationship with the Corps. For example, officials in FWS' field office in Reynoldsburg, Ohio, told us that their working relations with the Corps have improved since we issued our 1988 report. FWS officials dealing with the Jacksonville district office told us that although they had some problems with the district office, the relationship was generally a good one. An FWS official in the Jacksonville, Florida, field office said they have been able to negotiate with the Corps to modify projects until all parties are satisfied.

EPA Region 5 officials in Chicago, who work with the Corps' Buffalo and Huntington district offices, told us that their association was working well. The officials told us that the Corps has never issued a permit over the region's objections and that there has never been an elevation of a permit decision in the region. EPA Region 4 officials in Atlanta told us that their working relations with the Corps' Jacksonville district office had improved considerably over the last several years. However, these officials told us that, nevertheless, they had been involved in several projects during the last 3 years in which they had been dissatisfied with the Jacksonville district office's handling of their recommendations and had initiated the elevation process within the Corps.

In one of these cases, EPA vetoed the Corps permit, as allowed under Section 404(c) of the Clean Water Act. In another case, after EPA initiated 404(c) procedures, the applicant modified the permit application to address EPA's concerns. Although the Corps then approved the permit application, the Department of Defense, in commenting on a draft of this report, told us that the applicant did not complete construction of the project because the additional modifications required by EPA made it impractical to proceed with the project. For two additional cases, EPA declined to pursue elevation and the permits were issued.

**Chapter 2
Progress Has Been Made Toward
Implementing Some GAO
Recommendations, but Further Action Is
Needed**

The Department of Commerce, in commenting on a draft of this report, provided the results of two separate NMFS analyses of Jacksonville district permit actions. The first analysis covered 501 permit actions during the years 1981 to 1989, and the second covered 37 permit actions in 1990. The analyses showed a general trend toward greater acceptance of NMFS' recommendations by the district. Commerce told us that the analysis for 1991 had not been completed to see whether the trend in accepting a greater percentage of NMFS comments was continuing.

**The Corps Does Not
Provide Feedback to
All Resource Agency
Field Offices**

Although the Corps is not required by statute or regulation to work with the resource agencies to develop a feedback mechanism to advise the agencies on how their recommendations were addressed and, when applicable, on the reasons why the recommendations were not accepted, we recommended in 1988 that the Corps develop such a mechanism. We stated that such a system would facilitate coordination between the Corps and the resource agencies. The Department of Defense's response to our 1988 recommendation was that data are available at the district offices for the resource agencies to review and that providing detailed explanations to the resource agencies of the actions taken would add to the already difficult job of the project manager, who must deal with permit processing and, in some districts, an enforcement case load. Corps headquarters officials told us that a formal feedback mechanism would be too time-consuming and costly. The position of the Corps was that it is the resource agencies' responsibility to request such information on a case-by-case basis.

The three Corps district offices we visited during this review varied in the extent to which they advised resource agency field offices about actions to adopt their recommendations to modify permits or to deny them. All three districts provide a monthly list to resource agency field locations showing the permits that were approved or denied, including the applicants' name and when the final actions were taken. The Huntington district also sends a copy of the issued permit, and a copy of the letter transmitting the permit to the applicant, to the resource agencies. If the permit is denied, the district sends a copy of the letter that includes the reason(s) for denial to the resource agencies.

Although the Jacksonville district does not routinely send copies of issued permits and denial letters to the resource agencies, some of this information is provided to certain resource agency field offices. For example, an official in NMFS' Panama City field office told us that he gets

**Chapter 2
Progress Has Been Made Toward
Implementing Some GAO
Recommendations, but Further Action Is
Needed**

copies of issued permits from two of the three permit processing branches in the Jacksonville district, but nothing from the third branch. FWS officials in Panama City and Vero Beach, Florida, told us that they get copies of some issued permits. Our review of issued permit files in FWS' Jacksonville field office showed that two of the seven files reviewed for that office contained copies of Corps permits. All nine permit denial files contained a copy of the Corps' denial notification.

Before October 1988, the Buffalo district routinely sent copies of completed permit actions to the resource agencies. However, beginning in October 1988, this practice was discontinued because of the cost involved. The resource agencies were told that they could request documentation on individual permit actions.

Some resource agencies who deal with each of the three districts we visited told us that their staffs give priority to providing comments on the numerous new permit applications they receive from the Corps. This precludes them from following up on the consideration given to the recommendations in response to previous public notices. In its 1991 report on the implementation of the Section 404 Program in three EPA regions that we referred to earlier, EPA's Office of Inspector General reported that EPA's regions had no formal requirement to follow up on either public notice comments or recommendations in order to determine the Corps' final decisions on the permit applications.

Although an official in NMFS' Panama City field office told us that he gets copies of issued permits from two of the three permit processing branches in the Jacksonville district, the Department of Commerce, in commenting on a draft of this report, told us that lack of follow-up continues to be a significant weakness in the Corps' regulatory process and that NMFS is finding it increasingly difficult to get specific information on permits that have been issued. The agency must generally make specific requests that require additional work by its staff, which is problematic because the agency is understaffed.

Conclusions

During this review, we found that the Corps and/or EPA have taken actions to implement some of our previous recommendations. In regard to the recommendations on which the Corps has not completed action, we continue to believe that our 1988 recommendations are valid and should be implemented. For example, final changes to the methodology to be used for determining wetlands boundaries for purposes of establishing the

**Chapter 2
Progress Has Been Made Toward
Implementing Some GAO
Recommendations, but Further Action Is
Needed**

amount of land within the scope of the program had not been adopted as of December 1992. The study of wetlands delineation and other matters to be undertaken by the National Academy of Sciences could help to resolve this controversial issue.

Also, the three Corps districts that we visited varied in the extent to which they advise the resource agencies concerning adoption of their recommendations. The Department of Defense, in commenting on a draft of this report, stated that it did not want to provide such feedback because of the costs involved. However, we do not believe that it would be cost prohibitive to provide the resource agencies with copies of issued permits and/or the districts' statements of findings that discuss the Corps' rationale for issuing or denying permits. This could be done on a selective basis involving only those permit applications on which the resource agencies made significant comments. This would likely substantially reduce the number of applications involved in any feedback system initiated.

Other actions that we believe the Corps and EPA should complete include developing guidance on considering practicable alternatives to altering wetlands and assessing the means for considering the cumulative impacts of section 404 permit decisions. Both of these actions, if completed, could result in greater consistency in the permitting process in Corps districts.

Agency Comments and Our Evaluation

With regard to the Corps providing feedback to resource agencies concerning the adoption of their recommendations on permit applications, the Department of Defense continues to believe that the cost and time required to routinely provide such information would further impact available Corps regulatory program resources. Defense said that since our 1988 report, professional relations between the Corps and the resource agencies have improved and that the Corps' administration of its regulatory program already provides numerous opportunities to exchange this information and that federal resource agencies should not be surprised by the permit application evaluation outcome. However, we continue to believe that providing such feedback would facilitate coordination between the Corps and the resource agencies and that it could be accomplished at minimum cost. For example, if it is determined that providing feedback to resource agencies on all permit applications processed (as is already done by the Huntington district) is cost prohibitive, the Corps could opt to provide such feedback only in those instances where the resource agencies made significant comments, thus substantially reducing the number of permit applications involved.

**Chapter 2
Progress Has Been Made Toward
Implementing Some GAO
Recommendations, but Further Action Is
Needed**

In regard to the cumulative impacts of the Corps' permit decisions, Defense told us that before the Corps makes a decision to deny a permit, it should consider the site-specific and cumulative impacts that such a decision will have, instead of considering only the cumulative impacts of the decision. Defense agreed that a methodology for predicting cumulative impacts is lacking. Further, Defense told us that the Corps considers cumulative impacts when (1) information on such impacts is available, (2) federal or state endangered species or waterfowl whose populations are under stress are at issue, and (3) the general knowledge of regulatory program professionals indicates that cumulative impacts are already being realized.

The Department of Commerce agreed with our overall findings and the idea that the Corps should develop guidance for considering cumulative impacts of permit decisions and for considering practicable alternatives to development projects in wetlands. Commerce also supported our position regarding the benefits that would accrue if Corps districts advised resource agencies of the acceptance or rejection of their recommendations. Commerce said that this is one of the few ways available to measure program effectiveness and decide where changes are needed. Commerce also believes that the Corps should establish a performance standard requiring follow-up on at least a percentage of the activities authorized under section 404 permits. However, as we recognized in the report, the Corps requires that permits be inspected for compliance with the permit's terms and conditions and established a goal that 25 percent of the individual permits issued the previous year be inspected.

The Department of the Interior agreed with our findings and conclusions and said that the report presents an overall accurate characterization of the Section 404 Program and correctly represents FWS' role in the program. Interior also told us that since our 1988 report, improvements have been made in the administration of the program. Interior said that interagency coordination has improved and that the Corps districts are considering and generally accepting recommendations made by the resource agencies. When disagreements occur, FWS and the Corps have been able to work together to resolve the differences.

The Scope of the Section 404 Program Remains Uncertain

Section 404 of the Clean Water Act is considered the major federal provision regulating activities in wetlands and other U.S. waters. However, section 404 makes no specific reference to wetlands. Since our 1988 report, the Section 404 Program has become a major regulatory and environmental issue. Farmers, developers, oil companies, and other private landowners have targeted the program and have organized in opposition to it. These interests believe that the program has become too intrusive on their land-use decisions and that the permitting process is time-consuming, costly, and administered in an inconsistent manner by Corps districts.

Environmentalists and some state officials, on the other hand, are concerned that proposals for delineating the boundaries of wetlands that have recently been under consideration are too restrictive and will result in the loss of millions of acres of what has previously been regulated as wetlands. Numerous legislative proposals and other initiatives, such as plans to streamline the section 404 permitting process and President Bush's goal of no-net-loss of remaining wetlands, seek to find a balance between these developmental and environmental interests. However, until a definitive methodology for delineating wetlands is established, the scope of the Section 404 Program—i.e., how much land will be considered protected wetlands—will remain uncertain.

Previous Administration Proposals to Change the Section 404 Program

Proposals to change the Section 404 Program center on the need to stem the loss of remaining wetlands without creating severe economic hardship on private developers and property owners. Although there is general agreement among the developmental and environmental communities that valuable wetlands must be protected, section 404 of the Clean Water Act does not contain specific goals to accomplish such wetlands protection objectives.

In this regard, in 1987, the National Wetlands Policy Forum,¹ convened by the Conservation Foundation² at the request of EPA, found that the nation's wetlands programs contained many of the elements needed for a comprehensive protection system, but that there was no clear and coherent goal. The Forum recommended that a national wetland

¹The 20 members of the Forum included 3 governors, a state legislator, and heads of state agencies; a town supervisor; chief executive officers of environmental groups and businesses; farmers and ranchers; and academic experts. In addition, senior officials from five principal federal agencies involved in wetlands protection and management participated as ex-officio members.

²The Conservation Foundation is a nonprofit research and communications organization dedicated to encouraging human conduct to sustain and enrich life on earth.

protection policy be established to prevent an overall net loss of the nation's remaining wetlands base, as defined by acreage and function, and to restore and create wetlands, where feasible, to increase the quality and quantity of the nation's wetlands resource base.

In 1989, President Bush adopted a goal of no-net-loss of remaining wetlands; on August 9, 1991, he announced a three-point plan for improving the protection of the nation's wetlands. The plan seeks to balance the protection, restoration, and creation of wetlands with the need for sustained economic growth and development by

- strengthening wetland acquisition programs and other efforts to protect wetlands,
- revising the 1989 federal manual's methodology that is used for delineating wetlands to ensure that it is workable, and
- improving and streamlining the current wetlands regulatory system.

Among the steps outlined in the plan were (1) streamlining the permitting process under the Section 404 Program to ensure more timely decisions and effective coordination among agencies and (2) modifying the kinds of activities occurring in wetlands that are covered by the current regulatory program. However, certain key elements of this plan remained unresolved as of December 1992. For example, a primary concern that still must be addressed is how to delineate wetlands for the purpose of determining the amount of land coming within the scope of the program.

Around the time of our previous fieldwork in 1987, the Corps' Waterways Experiment Station in Vicksburg, Mississippi, which is one of the Corps' laboratories that conduct studies on how to carry out Corps policy directives, finalized a technical manual for identifying wetlands and defining their boundaries after 7 years of research and testing. However, use of the manual was optional for district offices. Of the three districts included in this review, the Jacksonville district adopted the 1987 manual, the Buffalo district chose to use a modified version of the 1987 manual, and the Huntington district made the manual available for staff to use as a resource document, but did not formally adopt it for making delineations. The Huntington staff relied on regulations and Regulatory Guidance Letters³ to perform wetlands delineations. These variances could explain part of the reason for the public's perception that Corps districts were treating them inconsistently and unfairly. In commenting on a draft of this

³Regulatory Guidance Letters are issued by Corps headquarters to transmit guidance on the permit program to its division and district engineers.

report, for example, the Department of the Interior told us that it was the experience of rws that the Buffalo district's modifications to the 1987 manual resulted in very restrictive wetlands determinations.

Subsequent to our 1988 report, the Corps worked with EPA, FWS, and the Soil Conservation Service to develop a uniform manual for delineating wetlands. When this manual—entitled Federal Manual for Identifying and Delineating Jurisdictional Wetlands—became effective in March 1989, it was required for use by all Corps district offices.

According to information reported to Corps headquarters by its district offices, the number of acres that are considered wetlands generally increased with the adoption of the 1989 manual. According to EPA, a major reason for this increase was that croplands that had been converted to another use before 1989 came within the manual's definition of wetlands. However, in September 1990, the Corps issued a regulatory guidance letter that stated that prior converted croplands were not regulated under the program. EPA estimated that this change resulted in the exclusion of up to 60 million acres of agricultural lands from regulation.

For the three districts included in our review, Buffalo reported the most dramatic increase in its jurisdictional wetlands, as its number of wetlands acres went from 500,000 under the 1987 criteria that Buffalo used to about 958,000 acres under the 1989 manual criteria. The Huntington district reported that accurate acreage data was not available for any of the states covered by the district. The Jacksonville district reported no change in its estimated 12 million acres of wetlands as a result of the change from the 1987 delineation manual to the 1989 delineation manual.

Because of the large increase in its jurisdictional wetlands, the Buffalo district experienced a significant increase in the number of permit applications submitted to it. For the 18-month period before the 1989 manual became mandatory, the district received 731 applications for section 404 or section 10/404 permits; during the 18-month period following the effective date of the manual, the district received 1,323 applications, an increase of over 80 percent. The number of applications received by the Huntington district increased from 128 to 150, or about 17 percent, whereas the number of applications received by the Jacksonville district decreased from 1,747 to 1,242, or about 29 percent. A Jacksonville official attributed the decline in applications to decreases in planned development as a result of poor economic conditions in the state

rather than as a result of the adoption of the 1989 wetlands delineation manual.

Implementation of the 1989 manual in states such as Ohio, which experienced a large increase in jurisdictional wetlands, created public concern that the Section 404 Program had become too intrusive and was no longer meeting congressional expectations. Also, a backlog in processing permit applications ensued in the Buffalo district that raised the ire of landowners, who complained that the delays were costing them time and money.

In response to queries by members of the Congress, the Office of the Assistant Secretary of the Army (Civil Works) asked the Corps' Waterways Experiment Station in Vicksburg to ascertain if the Buffalo district was properly applying the 1989 manual. A research team member from the station reviewed wetlands delineations made by district office staff and reported that they were properly applying the 1989 manual criteria. The research team member pointed out that 95 percent of the delineations in the Buffalo district were prepared by consultants and later verified by the Corps. According to the researcher, the Corps and the consultants would establish the same wetlands boundaries.

Several consultants we contacted in Ohio who were experienced in dealing with the Buffalo district and state officials concurred that the district conscientiously applied appropriate criteria in making permit decisions. The Huntington and Jacksonville districts did not undergo reviews of their application of the new manual.

When use of the 1989 manual for delineating wetlands boundaries became a major concern to private landowners, resolution of the issue was elevated to the Executive Office of the President. An Inter-Agency Task Force on Wetlands,⁴ under the White House Domestic Policy Council's Working Group on Environment, Energy, and Natural Resources, worked with the four agencies who developed the 1989 manual to revise the wetland delineation criteria included in that manual. On August 14, 1991, the proposed revisions were published for public comment in the Federal Register, a procedure that had not been followed for the 1989 federal manual. Under the proposed revisions, the criteria for delineating

⁴The Task Force was comprised of representatives from the Departments of the Interior, Agriculture, Commerce, Defense, Housing and Urban Development, and Transportation; EPA; the Office of the Vice President; the Office of Management and Budget; the Council on Environmental Quality in the Executive Office of the President; and the Office of the Assistant to the President for Economic and Domestic Policy.

wetlands for federal program purposes would again significantly change. For example, the 1989 manual's hydrology criterion for saturated wetlands required a water table within 6, 12, or 18 inches of the surface (depending on soil drainage class, permeability, and texture) to be sustained for usually 7 days or more during the growing season to delineate wetlands boundaries.⁵ Under the proposed revisions, wetlands would be limited to areas having standing water for 15 consecutive days or having a water table at the surface for 21 consecutive days during the growing season. Environmental groups and state officials are concerned that the proposed revisions lack any scientific merit and that they could result in the loss of millions of acres that they consider wetlands. According to some estimates, wetlands under the jurisdiction of the Section 404 Program would decrease by up to 50 percent under the proposed criteria.

The extended public comment period on the proposed changes to the manual, which resulted in the receipt of over 70,000 sets of comments, expired January 21, 1992. However, as of December 1992, consideration of these comments had not been completed.

Meanwhile, the Energy and Water Development Appropriations Act of 1992, which provides funding for the Corps, prohibited the use of such appropriations for making wetland delineations using the 1989 manual or any subsequent manual not adopted in accord with the notice and public comment requirements of the Administrative Procedure Act's (5 U.S.C. 553) rule-making process. Accordingly, effective August 17, 1991, the Corps reverted to requiring all of its district offices to use the previously mentioned 1987 manual for delineating wetlands. Preliminary indications were that this step quieted much of the public outcry over this issue.

An official from the Office of the Assistant Secretary of the Army (Civil Works) told us in August 1992 that the administration was considering the adoption of the 1987 manual, along with supplemental guidance on wetland indicators such as prevalent plant species, as the final wetland delineation criteria. The Corps believes that the 1987 manual supplemented by other guidance provides a technically sound and legally defensible basis for wetlands delineations that is not overly resource intensive. Nonetheless, the controversy surrounding the methodology to be used to delineate wetlands prompted the Congress to include \$400,000 in EPA's 1993 appropriations act for a National Academy of Sciences study of wetland delineation, among other things. Until the wetland delineation

⁵Hydrology involves the distribution of water on the earth's surface and underground and the cycle involving evaporation, precipitation, etc.

issue is resolved, the amount of land within the scope of the Section 404 Program will remain uncertain.

Proposed Legislation Could Change the Scope of the Section 404 Program

Although the Section 404 Program is just 1 of at least 25 laws that can regulate or otherwise impact wetlands, it has emerged as a key regulatory and environmental issue and was specifically targeted by several legislative proposals introduced in the 102nd Congress that would have changed federal wetland protection policies. At least some of these bills are expected to be reintroduced in the 103rd Congress. These bills—which included the (1) Comprehensive Wetlands Conservation and Management Act of 1991 (H.R. 1330), (2) Wetlands Protection and Regulatory Reform Act of 1991 (H.R. 404), (3) Wetlands No-Net-Loss Act of 1991 (H.R. 251), (4) Wetlands Reform Act of 1992 (H.R. 4255), and (5) Wetlands Stewardship Act of 1991 (H.R. 2400)—would, if passed by the 103rd Congress, directly affect the Section 404 Program.

Among the provisions that some of these bills contain are a no-net-loss of wetlands goal; a system for classifying wetlands by their size and value that has the potential for treating wetlands differently, depending on their relative prevalence and functions; compensation for certain wetlands property owners; a narrower definition of wetlands that would decrease the acreage under the jurisdiction of the program; and goals for expanding the role and responsibilities of the states in the program.

One of the most hotly debated bills attempting to revise the Section 404 Program was H.R. 1330, which includes provisions for (1) defining and classifying wetlands according to their size and value to the environment, (2) compensating certain wetlands property owners, (3) broadening section 404 permit exemptions and general permits, and (4) eliminating EPA's authority to veto section 404 permits. The bill also sets deadlines and administrative appeal procedures for the permitting process. However, the bill would also expand regulated activities in wetlands, which currently only include the discharge of dredged and fill materials in waters of the United States, to include drainage, channelization, and excavation activities. However, concern was voiced over the potential cost of implementing this proposed legislation, which some estimates said would exceed \$10 billion.

H.R. 404 would broaden section 404 permit exemptions and repeal EPA's authority to veto 404 permits. H.R. 251 would impose permit fees to reflect actual administrative costs of permit processing, including subsequent

monitoring of measures to mitigate unavoidable impacts to wetlands and of other permit conditions.

H.R. 4255 would, among other things, require the Secretary of the Army to initiate a pilot program of wetlands restoration. The bill also would have provided funding for training and certification of individuals who conduct wetland delineations and would have established an expedited permit review process.

H.R. 2400 outlines a schedule to review and revise, as necessary, the existing method for the delineation of wetlands. As mentioned, the Congress has provided \$400,000 for a National Academy of Sciences study to include consideration of a revised method for the delineation of wetlands. However, it is not clear which of the other provisions of these proposed bills, if any, might be adopted.

Conclusions

The loss of more than half of the original wetlands in the contiguous United States has become a major regulatory and environmental issue. Under almost any scenario, the Section 404 Program will play an important role in any future federal wetlands protection effort. Since we issued our 1988 report, various provisions of the program have come under attack by farmers, developers, and other private landowners; environmentalists; and state agencies.

Numerous proposals by both the Congress and the Bush Administration have been advanced, which would result in major changes to the Section 404 Program. These proposals, which attempt to balance the need to protect our nation's wetlands with the rights of private property owners, include various bills introduced before the 102nd Congress, Bush Administration plans to achieve a no-net-loss goal for remaining wetlands and streamline the Section 404 Program, and revisions to the federal manual for delineating wetlands. Because the manner in which wetlands boundaries are determined is critical to the scope of the Section 404 Program, and the procedures to be used to make wetlands determinations have become a major controversy among the developmental and environmental communities, we believe that these issues must be resolved. Resolution of these issues, however, must now await completion of the National Academy of Sciences' study of wetlands delineation and other matters. Completing this study, and adopting some of the other proposals from the Congress and the previous administration, would

hopefully clarify the scope of the program and would be consistent with the suggestion contained in our 1988 report.

Agency Comments and Our Evaluation

The Department of Defense concurred that the loss of wetlands is a key regulatory and environmental issue, and told us that President Bush's wetlands plan incorporates many of the concepts contained in the proposed legislation cited in our report. In addition, Defense believes that the Corps' currently proposed rule-making that would expand activities regulated under the Section 404 Program to include excavation, channelization, and drainage is consistent with the Bush administration plan and with H.R. 1330, which we described as one of the most hotly debated proposed bills before the 102nd Congress.

In response to our statement that the Section 404 Program has never had clearly stated wetlands protection goals, Defense asserted that the no-net-loss of wetlands goal is a significant step toward establishing a Section 404 Program goal. However, we note that nowhere in the Clean Water Act—and more specifically, nowhere in section 404—is the goal of no-net-loss of remaining wetlands specified.

Defense further stated that the goal of no-net-loss is further clarified in the revised memorandum of agreement between the Corps and EPA concerning mitigation, in which the Department said the Corps regulatory program is required to meet the no-net-loss of remaining wetlands goal to the extent practicable. However, in the "Questions and Answers" section of the memorandum of agreement mentioned above, it is stated that

"The MOA [memorandum of agreement] is not, in itself, a no net loss policy and neither the Section 404 program in general, nor the MOA in particular, is designed to achieve the national goal of no overall net loss of wetlands. EPA and the Corps will strive to achieve the President's goal of no net loss; however, the MOA clearly recognizes that mitigation which is not appropriate or practicable will not be required, nor will each permit be required to achieve no net loss of wetlands."

We believe that the goal of no-net-loss of remaining wetlands will be vague and subject to change until the establishment of a final methodology for delineating wetlands for the purpose of determining the amount of land to be regulated under the Section 404 Program.

Budgetary and Other Constraints Have Affected Administration of the Section 404 Program

Budgetary and other constraints have affected the extent to which the Corps and the resource agencies have been able to carry out the activities they are responsible for under the Section 404 Program. For example, the Corps has been unable to perform wetlands delineations for all permit applicants who request them, thus requiring the permit applicants to hire consultants to perform this function. Resource agencies are unable to visit many proposed project sites as part of their evaluations of proposed projects.

Budgetary shortfalls have required the Corps to assign priorities to the various activities it is required to perform under the program. However, even though the Corps has assigned its highest priority to timely permit processing, Corps districts we visited were often unable to meet the Corps' standards regarding such processing. Much of this delay can be attributed to requirements that are outside the control of the Corps—such as the failure of applicants to obtain required state certifications. This has contributed to private landowners' criticism of the process as lengthy, inconsistent, unpredictable, and the cause of costly and untimely disruptions to the planning and implementation of projects.

Budgetary Constraints Continue to Hamper Certain Program Activities

Although several of our 1988 recommendations have been acted on by the Corps and/or EPA, budgetary constraints hamper certain aspects of program implementation by the Corps, EPA, and the other resource agencies. For example, as was discussed earlier, the Corps' Buffalo district was still experiencing funding and staffing shortfalls within its enforcement branch. Similarly, the Corps has been unable to perform timely wetlands delineations for all applicants who request them. If permit applicants want to obtain timely delineation of wetland boundaries, they often are forced to hire consultants to do so. Lack of sufficient funding and staffing have also hampered resource agencies' abilities to comment on permit applications, visit proposed project sites, follow up on Corps permit decisions to see if their recommendations were adopted during the public interest review, and/or conduct effective enforcement efforts.

The Corps and EPA expect that planned increases in the Corps' regulatory program staff and in EPA's wetland program staff will result in improved permit processing and enforcement by these agencies, but some agency field offices continue to face shortfalls that require the agencies to set priorities for their section 404 activities.

**Corps Districts Cannot
Perform Timely Wetlands
Delineations**

Limited resources have prevented some Corps district offices from performing wetland delineations when requested by permit applicants. When the Corps is unable to immediately perform wetland delineations, applicants can hire consultants to perform the delineations that must subsequently be approved by the Corps, or wait until the Corps can provide staff to undertake the delineations—a potentially costly and/or time-consuming proposition for the applicants.

At the Buffalo district, over 95 percent of all delineations are performed by consultants. In the Jacksonville district, between 75 and 80 percent of the delineations are performed by consultants. In contrast, the Huntington district, which has significantly fewer applications, performed wetlands delineations for almost all applicants who requested them. However, on a few large complex projects, even the Huntington district suggested that applicants hire an outside consultant to perform the delineation. This creates a potential cost inequity in the treatment of applicants by the various Corps districts. However, applicants who must use consultants to perform delineations generally do not object because the consultants are employed by the applicants and can often make the delineations quicker than the Corps. This helps them avoid economic losses and other problems caused by delays.

**Resource Agencies Cannot
Respond to All Public
Notices, Visit All Proposed
Projects, or Follow Up on
All Recommendations**

Resource agencies have experienced funding and staffing shortfalls that have affected their ability to respond to the large number of public notices that are received from the Corps. In addition, limited funds and staff have precluded the resource agencies from following up on applications to see if the Corps has adopted their recommendations on public notices.

Several resource agency officials told us that although all incoming public notices are screened to make sure that significant projects are reviewed, budgetary constraints have limited the overall number of projects that they can comment on. For example, for our random sample of 150 permit applications for which the Corps districts issued 107 public notices, FWS said that it did not have sufficient staff to comment on 17, or 16 percent, of the 107 public notices. The range of files not reviewed by FWS in the three Corps districts because of staff shortages was 0 percent in Buffalo during the premanual and postmanual periods to 41 percent in Huntington during the premanual period.

For the additional 87 public notices issued on 90 permit applications that resulted in a Corps denial, FWS said that it did not have sufficient staff to

comment on 6, or 7 percent, of the public notices. The range of these public notices not reviewed by FWS because of staff shortages was 0 percent in Buffalo in the postmanual period and in Huntington in the premanual period to 29 percent in Huntington in the postmanual period. (See app. II for the number and percent of public notices, by Corps district office, not commented on by FWS because of staff shortages.)

In addition, officials at FWS' Reynoldsburg, Ohio, field office told us that they were not as diligent as they should be in following up on actions the Corps has taken on their recommendations. They told us that they do not have the resources to review all new public notices as well as follow up on all recommendations made on past public notices.

In its comments on a draft of this report, the Department of Commerce told us that the task of commenting on all public notices is becoming more onerous because the Corps is insisting more strongly that site-specific information be provided when making such comments. This is made more difficult by funding and staffing shortfalls at NMFS, and the limited time allowed for the resource agencies to review proposed projects.

Although EPA has experienced overall increases in its wetland program staff during the last 4 years, the EPA regional offices included in our review did not comment on 52, or 49 percent, of the 106 public notices sent to them by the Corps on the 150 permit applications in our random sample that were received during the 3 fiscal years covered by our review. For the 87 additional public notices on permit applications we reviewed that were denied, EPA did not comment on 22, or 25 percent of the public notices.

Further, these regional offices notified the Corps that they were unable to review the projects on 14 of the 106 public notices received during the period reviewed because of resource and/or staff shortages. For these 14 public notices, the range of files not reviewed by EPA was 0 percent for applications received from the Jacksonville district during the premanual and postmanual periods to 46 percent of the applications received from the Buffalo district during the premanual period.

For 13 of the 87 public notices on permit applications we reviewed that the Corps denied, EPA notified the Corps that it was unable to review the projects because of resource and/or staff shortages. The range of public notices not reviewed by EPA because of staff shortages was 0 percent in Jacksonville in the premanual and postmanual periods to 42 percent in Buffalo in the postmanual period. (See app. III for the number and percent

of public notices, by district office, not commented on by EPA because of staff shortages.)

However, in commenting on a draft of this report, EPA said that a decision by an EPA regional office to not comment on a particular Corps public notice may not necessarily be the result of a lack of staff resources. In particular circumstances, such actions would be appropriate given the range of projects that EPA is called upon to review, according to EPA.

EPA officials in Atlanta, which is responsible for coverage in eight southeastern states, told us that staffing constraints along with the 30-day time limitation for commenting on public notices preclude it from reviewing permit applications other than those where the impact is potentially significant. These officials also told us that even though they may provide comments on public notices, the number of sites that can be inspected is limited. For example, for each of the last several years, regional staff visited less than 5 percent of the sites described in public notices that they commented on. One reason cited for this was the limited regional office travel budget, which for several fiscal years was only \$2,000 per full-time staff member. EPA's Office of Inspector General reported in 1990 that the Region 4 travel budget of \$2,000 per staff member was "woefully inadequate" on the basis of the region's work load.¹ Because EPA regional staff cannot visit many project sites, they must rely heavily on contacts with FWS; state, county, and local governments; the Corps; and others for information on the specifics of a particular project.

The 1990 Inspector General report estimated that, based on a Region 4 work load analysis conducted in 1987, 37 full-time equivalent staff members were needed to effectively implement and manage the Section 404 Program in that region. The Chief of EPA's Region 5 Wetlands Office told us that the 1987 needs assessment indicated that his region needed 29 staff members to effectively carry out the program. The EPA regions we visited in Atlanta and Chicago had 22 and 17 staff members, respectively. Thus, in fiscal year 1992, Region 4 in Atlanta and Region 5 in Chicago had achieved staffing levels of only about 59 percent of their estimated staffing needs 5 years earlier.

The 1991 report by EPA's Office of Inspector General, which we referred to earlier, also stated that limited program resources restricted the effectiveness of the agency's regulatory actions under the Section 404

¹Wetlands: Region 4 Implementation and Management of the Section 404 Wetlands Program, EPA's Office of Inspector General, Mar. 23, 1990.

Program. The report noted that EPA's Region 4 provided written comments on only 15 percent of the public notices received.

In commenting on a draft of this report, EPA agreed that budget constraints have adversely impacted the ability of both the Corps and EPA to implement the Section 404 Program, particularly in requiring the agency to choose between permit processing and enforcement, with the former receiving priority.

NMFS officials also told us that budgetary constraints have impacted their involvement in the Section 404 Program. The officials told us that they historically used contractor staff to perform about 90 percent of their site inspections, but the agency's funding for contractors has been reduced over the past 12 fiscal years from \$500,000 to nothing. The Department of Commerce attributed the decrease in money available for contracting such services to budget reduction exercises or shortfalls caused by increases in labor costs. NMFS officials can only conduct a limited number of site visits themselves because of insufficient travel funds.

In addition, the Department of Commerce told us that funding and staffing shortfalls have severely hampered NMFS' ability to respond to all proposed section 10 and section 404 permit applications. The Department said that the funding for NMFS' Habitat Program, the organizational unit responsible for making such comments, has stayed constant for many years while inflation and workload has increased. Furthermore, the Department said that, because of recent budget cuts, NMFS' capability to review permit applications in the Jacksonville district office's area of jurisdiction and elsewhere across the country will be significantly reduced (perhaps as much as 50 percent in the Southeast).

Requirements Not Within the Corps' Control Often Affect the Timeliness of Permitting Decisions

Despite assigning a priority to permit processing and experiencing funding and staffing increases in recent years, Corps districts we visited often had difficulty meeting the Corps' permit processing timeliness goals. Some of the reasons for not meeting these goals are outside of the Corps' control, such as the need for applicants to obtain water quality certifications from the state. At the time of our current review, the Corps had a goal to complete its permit decisions, including general and individual permits, not later than 60 days, on average, after receipt of a complete application unless precluded by law. For all permit actions with an evaluation time of greater than 60 days, district offices were required to report to Corps headquarters on the primary reason for the delays.

However, starting with the third quarter of 1991, the goal for processing individual permits was raised to an average of 120 days, while the goal for processing all permits remained at 60 days. Corps officials told us that they made this change because individual permits are becoming more complex and take longer to review than do general permits. Under the revised procedures, districts must report the percentage of individual applications processed within 120 days and the percentage of all applications processed within 60 days. Corps headquarters considers its district offices in compliance with these performance standards if they are able to process between 70 and 80 percent of individual applications within 120 days and between 85 and 95 percent of all applications within 60 days.

The three districts we visited varied in the extent to which they were able to meet the 60-day performance standard in effect at the time of our review. For example, the percentage of applications in our sample taking longer than 60 days to process in the three district offices was as follows: Buffalo, 56 percent; Huntington, 78 percent; and Jacksonville, 98 percent. Thirty-four of the 150 applications included in our initial sample were processed within 60 days. Six of the 34 resulted in issued permits and the remaining 28 applications were withdrawn from further processing—22 of which were withdrawn because the applicant failed to provide additional information requested by the Corps. For the 90 denial applications (for which 87 public notices were issued) that we reviewed, only 3 were processed within 60 days and all 3 were in the Buffalo district. (See app. IV for the number and percent of applications processed within 60 days.)

Part of the variance in the average time that districts took to process permits can be attributed to the different time frames the districts allow for steps involved in the permitting process. For example, the Huntington district generally allowed 20 days for resource agencies and others to comment on public notices, whereas the Buffalo and Jacksonville districts generally allowed 30 days. Furthermore, the comment period can be extended upon request of the resource agencies. We found that as a result of extension requests on some applications, Huntington allowed an average of 24 days to comment on public notices, whereas Buffalo allowed an average of 30 days and Jacksonville allowed an average of 32 days. For the denied permits we reviewed, the public notice comment period was 43, 25, and 31 days for the Buffalo, Huntington, and Jacksonville districts, respectively.

**Chapter 4
Budgetary and Other Constraints Have
Affected Administration of the Section 404
Program**

Although the Buffalo district's public notice comment period was longer, on average, than the two other districts, the Jacksonville district had the longest average overall processing time because of the time it took to complete the steps subsequent to the comment period. Table 4.1 shows the average number of days to process the 240 individual permit applications (150 in our initial sample and 90 in our subsequent sample of Corps denials) we reviewed in the three Corps districts. Times shown are for applications received in the period prior to the effective date of the 1989 wetlands delineation manual (premanual period) and applications received after the effective date of the manual (postmanual period).

Table 4.1: Average Number of Days to Process Sample Permit Applications

Application type	District office		
	Buffalo	Huntington	Jacksonville
Pre-1989 manual period (Oct. 1, 1987 to Mar. 31, 1989)			
All permits	112	108 ^a	229
Issued permits	140	98	263
Denied permits	0	304 ^a	164
Withdrawn applications	76	45	134
Post-1989 manual period (Apr. 1, 1989 to Sept. 30, 1990)			
All permits	76	132	185
Issued permits	163	158	211
Denied permits	0	156	143
Withdrawn applications	49	84	122
Denials			
Premanual period	191	132 ^a	316
Postmanual period	161	127	227

Note: The Corps calculates processing time from the date the application is considered complete rather than the date received. Corps regulations state that it must make a decision on the completeness of the application within 15 days. We only recorded the date on which applications were received so we deducted 15 days from our calculations to show processing times approximately equivalent to those of the Corps.

^aDoes not include the days for one application that was suspended pending appeal of a water quality certificate that had been denied by the state.

As can be seen in table 4.1, the Buffalo district was able to meet the Corps' revised 120-day processing goal in both the premanual and postmanual periods if all permits (issued, denied, and withdrawn) in our initial sample of 50 applications are considered. Two factors explain why the Buffalo district was able to meet the 120-day goal for the applications included in

our random sample. First, 30 of the 50 applications (60 percent) in our random sample for the Buffalo district were withdrawn applications. Second, no denied permits, which generally have a longer processing time, were included as part of our random sample.

The Huntington district met the 120-day goal in the premanual period but not the postmanual period for our initial sample of 50 applications. The Jacksonville district did not meet the goal in the premanual or postmanual periods for our initial sample of issued, denied, or withdrawn applications. In contrast to the Buffalo district, withdrawn applications in the Huntington and Jacksonville districts represented only 26 and 16 percent, respectively, of the applications selected for our sample. In addition, our random sample at both of these districts included some denied applications.

According to a Jacksonville district official, the longer processing times in that district were primarily due to (1) sensitive environmental concerns found in the district, (2) the need to wait for Florida water quality certifications, (3) the practice of keeping applications open when additional information is needed from applicants, and (4) the inordinate number of individual permits that take longer to process. Corps headquarters officials also told us that especially in the Jacksonville district, many individual permit applications are for complex projects that take longer to complete, and that our calculations should consider time lost when the district must request additional information. (See app. V for further details on the number of applications in our random sample by final permit decision.)

Although the Corps questioned our methodology for calculating average application processing times because it believes that many applications may remain incomplete for periods longer than 15 days while the Corps secures the necessary information to process the applications, our random sample of 240 applications (150 for our initial sample and 90 denied applications) showed that the Corps requested additional information for only 26 of the 150 initial applications and received additional data for 21 of them. For 1 of the 21, the request for additional information was made after the public notice was issued. Four additional applications were withdrawn prior to issuance of the public notice and one was denied for lack of a water quality certification.

None of the application files we reviewed in the Buffalo district contained requests for additional information made prior to issuance of the public

notice. The average number of days it took for the other two districts to receive additional information was 34 days for Huntington's 3 applications and 22 days for Jacksonville's 17 applications. As a result of these additional days, the Huntington district's overall average processing time was extended by 6 days and Jacksonville's by 9 days. For the 90 applications we reviewed where the Corps denied a permit, the average processing time for the three applications where additional information was requested was less than the overall processing time and the processing time where additional information was not requested. Data was requested for two other applications, but the request was made after issuance of the public notice. (See app. VI for further details on additional processing days that resulted when the Corps requested additional information from applicants.)

Table 4.2 shows the primary reasons that the three Corps districts provided headquarters for not meeting the 60-day goal for permit decisions in effect at the time of our review.

**Chapter 4
Budgetary and Other Constraints Have
Affected Administration of the Section 404
Program**

Table 4.2: Primary Reasons for Not Making Permit Decisions Within 60-Day Time Frame

Reasons for delays	District office		
	Buffalo	Huntington	Jacksonville
Environmental impact statement needed	0	0	2
Public hearing scheduled	2	3	3
Elevation under agreements entered into under section 404(q) of Clean Water Act ^a	7	25	45
Applicant delay ^b	124	15	136
Awaiting Coastal Zone Management Act certification	74	0	24
Awaiting water quality certification	189	64	571
Awaiting Historic Preservation Act compliance review	0	21	19
Awaiting certification of compliance with other laws	2	0	241
Administrative delays ^c			
Internal	381	18	640
External	8	2	667
Total number of permits	787	148	2,348

^aThese are situations where the Corps took the first step in a potential elevation case by advising resource agencies that the Corps planned to issue a permit without the resource agencies' recommended conditions. Prior to September 1992, the resource agencies had the prerogative of either pursuing the elevation informally to the division office level or pursuing it formally from this level to the Assistant Secretary of the Army (Civil Works). Subsequently, the division engineer level was removed from the elevation process when disputes between the Corps and the resource agencies involved individual permits.

^bThese are cases where the applicant has requested a delay in permit processing or the applicant has not provided the Corps with timely responses to requests for additional information.

^cThese are delays caused by the Corps, but which are not otherwise categorized, and/or caused by others where the Corps had no control, such as a local government agency.

As can be seen from table 4.2, several reasons for delaying final permit decisions are not within the control of the Corps. For example, applicant delays in submitting needed information to the Corps, time awaiting required state certifications, and requirements imposed by other laws are matters that are often outside the Corps' control.

Conclusions

Budgetary and other constraints have hampered the abilities of the Corps and the resource agencies to carry out the responsibilities each has under the Section 404 Program. Because of funding and staffing shortfalls, a number of tasks and functions that each of the various agencies is responsible for have either gone undone or have not been done in a timely

manner. Other constraints outside the control of the Corps have affected its ability to complete tasks even when assigned as priorities—such as permit processing.

The inability of the agencies to do all that is required and expected of them under the Section 404 Program in an effective and efficient manner has undoubtedly contributed to public outcries over various impositions and inadequacies of the program. Recent increases in Corps and EPA funding and staffing for their wetlands programs should result in more timely permit processing and greater enforcement of permit requirements and against unpermitted discharges. However, the funding and staffing increases that have occurred may not be sufficient to prevent the continued need for the agencies to set priorities for their section 404 activities.

Agency Comments and Our Evaluation

The four agencies that commented on a draft of this report—Defense, Interior, Commerce, and EPA—all agreed that budgetary constraints continue to hamper certain program activities. The Department of Commerce is also concerned that the current trend in reducing processing time will also reduce the ability of the Corps and the resource agencies to perform adequate environmental assessments and that, within the current budget and staffing climate, this will ultimately reduce their effectiveness in implementing the Clean Water Act.

While we agree that budget and staffing constraints can hamper certain program activities, a review of the impact that reducing permit processing time would have on the ability of the Corps and the resource agencies to perform environmental assessments was not within the scope of our review.

Additional Details on GAO's Random Samples

At three U.S. Army Corps of Engineers' district offices—Buffalo, New York; Huntington, West Virginia; and Jacksonville, Florida—we reviewed 50 randomly selected individual permit application files for section 404 or section 10/404 permits that were received at each district office during the 3 fiscal years covered by our review (1988-1990). We did this to determine the extent of any variances in program implementation at the three district offices. Because the Federal Manual for Identifying and Delineating Jurisdictional Wetlands became effective in March 1989, halfway through the 3-year period covered by our review, we divided the 3-year period into two 18-month periods to determine if the manual had any effect on the processing of applications. Twenty-five of the applications reviewed at each district office were received in the premanual period between October 1, 1987, and March 31, 1989, and the other 25 were received in the postmanual period between April 1, 1989, to September 30, 1990. Table I.1 shows the universe and GAO sampling of case files in the three districts included in our review, followed by a description of how we selected the files reviewed in each district.

Table I.1: Section 404 and Section 10/404 Permit Applications Included in GAO's Sample

Corps districts	Premanual period		Postmanual period	
	Total applications	Applications reviewed by GAO ^a	Total applications	Applications reviewed by GAO ^a
Buffalo	731	44	1,323	61
Huntington	128	38	150	39
Jacksonville	1,747	43	1,242	28

^aThis column shows the number of files GAO reviewed to arrive at its sample of 25 files from each of the two (premanual and postmanual) periods.

We also reviewed permit files for cases where the Corps denied permits to determine if variances existed among the three districts in the processing of such applications. Following is a discussion of how we selected our initial sample of 50 application files at each of the three district offices included in our review as well as a discussion of the additional application files reviewed where the Corps denied the permit.

Buffalo District

The Buffalo district provided computer printouts identifying all applications received in the district for (1) the 18-month period preceding the effective date of the 1989 delineation manual and (2) the 18-month period following implementation of the manual. To select our sample of applications for individual permits for the premanual period for the

Buffalo district, we numbered the section 404 and section 10/404 applications received by the district in this period. This produced a universe of 731 applications.

To obtain our sample of 25 applications for individual permits for this period, we randomly selected and reviewed 44 applications from the numbered computer listing. However, the Buffalo district, unlike the other two districts visited, withdraws applications when their initial review indicates an application is incomplete. As a result, approximately 76 percent of all applications received by Buffalo are withdrawn. Because we were interested in the variances in the way the districts processed applications, we did not include in our sample those applications that were withdrawn because they were incomplete. Seventeen of the applications we reviewed in selecting our sample in this period were excluded for this reason. Two other applications were excluded from our sample because the staff in Buffalo could not locate the files when requested.

To select our sample for the postmanual period, we identified and numbered the applications identified on the computer printout as section 404 and section 10/404 permit applications received between April 1, 1989, and September 30, 1990. This produced a universe of 1,323 applications. We randomly selected and reviewed 61 application files to obtain our sample of 25 individual permit applications. Twenty-four applications were rejected because the Buffalo staff had found the applications to be incomplete and returned them to the applicants. Six other applications were excluded because the files could not be located. Another five applications were excluded because nationwide general permits were issued for the work to be performed. Another permit was excluded because a review of the file revealed that no permit was required.

In addition to our sample of 50 application files, we reviewed all 37 application files where the Buffalo district denied the permit. No denials were selected as a part of our random sample. However, we only included 31 of the denials in our analysis of Buffalo's permitting process. We eliminated three applications, one in the premanual period and two in the postmanual period, because they were applications for section 10 work only. Another two applications were excluded, one in each period, because the Buffalo staff could not locate the files. One other postmanual period application was rejected because a permit was subsequently issued following the applicant's appeal of the state's denial of a water quality certification.

Huntington District

The Huntington district provided computer printouts identifying all the section 404 and section 10/404 applications received by the district for (1) the 18-month period preceding the effective date of the 1989 delineation manual and (2) the 18-month period following the manual's effective date. To select our sample of applications for individual permits for the premanual period for the Huntington district, we identified 128 applications the district received as section 404 and section 10/404 applications.

To obtain our sample of 25 files for this period, we randomly selected and reviewed 38 application files. Three applications were eliminated because they were applications for section 10 permits only. Another application was excluded because a nationwide general permit was issued for the work to be performed. Nine other applications were excluded because they were for separate portions of projects we had already selected. The Huntington district assigns different application numbers to separate portions of projects for identification purposes.

To obtain our sample for the postmanual period, we randomly selected and reviewed 39 files to obtain our sample of 25 application files. Six application files were excluded because they were separate portions of projects we had already selected. Four other application files were excluded because they were applications for section 10 work only. Another four application files were excluded because general permits had been issued for the work to be performed.

As in the Buffalo district, we reviewed all applications that were denied during the 3 years covered by our review in addition to the 50 application files included in our random sample. Two denials in each period had been selected as part of our random sample. Two applications that were denied, one in each period, were excluded because the applications had actually been withdrawn, not denied as indicated by Huntington's computer-generated listing. Consequently, we were able to review 11 applications received during this time that were denied—4 applications in the premanual period and 7 in the postmanual period.

Jacksonville District

The Jacksonville district also provided computer printouts identifying all applications received for premanual and postmanual periods. To arrive at a universe of 1,747 applications in the pre-manual period, we numbered those applications identified by the Jacksonville staff as section 404 and section 10/404 permit applications. We then randomly selected and

reviewed 43 application files to obtain our random sample of 25 application files. Of the 43 selected, we rejected 10 applications because the application had been withdrawn and the file destroyed. Three additional files could not be located and were excluded from our sample. Of the remaining five files, two files were excluded because they were for section 10 work only; one was excluded because it was a nationwide permit; another because a permit was not required; and one because it was outside of our review period.

To select our sample for the postmanual period, we identified 1,242 applications categorized as section 404 and section 10/404 permit applications. From this universe, we selected and reviewed 28 of the applications. Three of these were subsequently excluded because they were requests for a jurisdictional determination rather than an application for a permit.

The Jacksonville district denied 186 permit applications during the 3-year period covered by our review, of which 8 were selected as part of our random sample. Because of the large number of denials, we drew a random sample of 48 applications that were denied with prejudice. We reviewed 116 files to obtain our sample. Forty-six of the files, 43 in the premanual period and 3 in the postmanual period, were excluded because they were denied "without prejudice." Three files were excluded because they were selected and reviewed as part of our premanual period sample of individual permits and another was excluded because the application was received prior to the period covered in our review. We excluded an additional 14 files, 13 in the premanual period and 1 in the postmanual period, because the files could not be located. Four other files, three in the premanual period and one in the postmanual period, were excluded because they were for section 10 work only.

Schedule of Public Notices Where FWS Responded That It Had Insufficient Staff to Comment on Projects

Applications reviewed	District office			Total
	Buffalo	Huntington	Jacksonville	
Sample (preperiod)				
Public notices	14	22	22	58
Number unable to review	0	9	2	11
Percent unable to review	0	41	9	19
Sample (postperiod)				
Public notices	10	19	20	49
Number unable to review	0	2	4	6
Percent unable to review	0	11	20	12
Sample (total)				
Public notices	24	41	42	107
Number unable to review	0	11	6	17
Percent unable to review	0	27	17	16
Denials (preperiod)				
Public notices	17	4	24	45
Number unable to review	1	0	1	2
Percent unable to review	6	0	4	4
Denials (postperiod)				
Public notices	12	7	23	42
Number unable to review	0	2	2	4
Percent unable to review	0	29	9	10
Denials (total)				
Public notices	29	11	47	87
Number unable to review	1	2	3	6
Percent unable to review	3	18	6	7

Schedule of Public Notices Where EPA Responded That It Had Insufficient Staff to Comment on Projects

Applications reviewed	District office			Total
	Buffalo	Huntington	Jacksonville	
Sample (preperiod)				
Public notices	13	22	22	57
Number unable to review	6	5	0	11
Percent unable to review	46	23	0	19
Sample (postperiod)				
Public notices	10	19	20	49
Number unable to review	0	3	0	3
Percent unable to review	0	16	0	6
Sample (total)				
Public notices	23	41	42	106
Number unable to review	6	8	0	14
Percent unable to review	26	20	0	13
Denials (preperiod)				
Public notices	17	4	24	45
Number unable to review	7	1	0	8
Percent unable to review	41	25	0	18
Denials (postperiod)				
Public notices	12	7	23	42
Number unable to review	5	0	0	5
Percent unable to review	42	0	0	12
Denials (total)				
Public notices	29	11	47	87
Number unable to review	12	1	0	13
Percent unable to review	41	9	0	15

Number and Percent of Applications Processed Within 60 Days

District	Processing time				Total
	0-60 days		Over 60 days		
	Number	Percent	Number	Percent	
Initial sample of 150 applications					
Buffalo	22	44	28	56	50
Huntington	11	22	39	78	50
Jacksonville	1	2	49	98	50
Total	34	23	116	77	150
Denied applications					
Buffalo	3	10	28	90	31
Huntington	0	0	11	100	11
Jacksonville	0	0	48	100	48
Total	3	3	87	97	90

Number and Percent of Permit Files GAO Reviewed, by Final Permit Decision

Applications	District office						Total number reviewed
	Buffalo		Huntington		Jacksonville		
	Number	Percent	Number	Percent	Number	Percent	
Initial sample of 150 applications							
Preperiod							
Issued permits	14	56	19	76	17	68	50
Denied permits	0	0	2	8	6	24	8
Withdrawn applications	11	44	4	16	2	8	17
Preperiod total	25		25		25		75
Postperiod							
Issued permits	6	24	15	60	17	68	38
Denied permits	0	0	1	4	2	8	3
Withdrawn applications	19	76	9	36	6	24	34
Postperiod total	25		25		25		75
Initial sample total							
Issued permits	20	40	34	68	34	68	88
Denied permits	0	0	3	6	8	16	11
Withdrawn applications	30	60	13	26	8	16	51
Total	50		50		50		150
Denied applications							
Preperiod	18		4		25		47
Postperiod	13		7		23		43
Denied sample total	31		11		48		90

Additional Days to Process Applications Because the Corps Had to Request Further Information

District office	Applications where additional data was requested and received	Days to receive data	
		Total	Average
Initial sample of 150:			
Preperiod:			
Buffalo	0	0	0
Huntington	0	0	0
Jacksonville	8	98	12
Postperiod:			
Buffalo	0	0	0
Huntington	3	103	34
Jacksonville	9	281	31
Total:			
Buffalo	0	0	0
Huntington	3	103	34
Jacksonville	17	379	22
Denied applications:			
Preperiod:			
Buffalo	0	0	0
Huntington	0	0	0
Jacksonville	0	0	0
Postperiod:			
Buffalo	0	0	0
Huntington	2	42	21
Jacksonville	1	30	30
Total:			
Buffalo	0	0	0
Huntington	2	42	21
Jacksonville	1	30	30

Comments From the Department of Defense

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0103



REPLY TO
ATTENTION OF

10 NOV 1992

Mr. James Duffus III, Director
Natural Resources Management Issues
Resources, Community, and Economic
Development Division
U.S. General Accounting Office
Washington, D. C. 20548

Dear Mr. Duffus:

This is the Department of Defense (DOD) response to the General Accounting Office (GAO) draft report entitled--"Wetlands Protection: The Section 404 Program Needs Clear Direction," (GAO Code 140647/OSD Case 9224). The Department generally concurs with many of the findings of the report, especially those regarding improved professional relations between the Army Corps of Engineers (Corps) and the Federal resource agencies. However, as discussed below, there are aspects of the report that continue to be of concern.

As a general concern, the title of the report casts an unnecessarily negative light on the regulatory program. Many significant positive steps have been taken by the administration to improve the protection of wetlands through the Section 404 program. Within the past 6 months, the Army has clarified the roles of the key Federal agencies and improved the interagency appeals process. Those changes will reduce unnecessary delays and duplication--allowing all agencies to better prioritize work in more sensitive environmental areas. In addition, the Army proposed a regulation change on ditching, excavation, and channelization that will significantly improve wetlands protection. Since the 1988 GAO report on the regulatory program, the Army issued interagency guidance on mitigation, geographic jurisdiction, and enforcement. During the same period, the regulatory staff has been increased by 21 percent and the budget by 35 percent. To imply that the program lacks "clear direction" is inaccurate and simply not supported by the facts. The regulatory program is an important mission of the Corps and receives its full support. In light of such significant concerns, the DOD suggests the GAO retitling the report.

The Department agrees with the GAO finding that requirements not within the control of the Corps affect the timeliness of permit application decisions. It is the Department's position, however, that the method used

See comment 1.

**Appendix VII
Comments From the Department of Defense**

-2-

See comment 2.

to compute the permit application evaluation times in report table 4.1 is not accurate. The GAO subtracted 15 days from review times (time between application receipt date and the date of final action by the Corps,) based on the presumption that the Corps is required to decide if a permit application is complete within the 15-day time frame. In fact, the Corps is required to issue a public notice within 15 days of receipt of a complete application. Since some applications may remain incomplete for extended periods (while the Corps continues to pursue the necessary information), the GAO accounting method results in the erroneous interpretation of longer permit application evaluation times.

See comment 3.

The Department also does not agree with the GAO finding with regard to providing extensive written feedback to all Federal resource agency field elements. It is the Department's position that the costs and time required to reproduce and transmit copies of approximately 10,000 permits and statements of findings annually would further impact available Corps Regulatory Program resources. In addition, the Corps administration of the permit application evaluation process provides substantial verbal, as well as written, feedback to the Federal resource agencies concerning Corps implementation of their recommendations.

See comment 4.

Regarding the findings on the status of Section 404 Program enforcement, the GAO commented on presumed shortcomings of the Huntington District enforcement efforts. The GAO comments were based on complaints from the Fish and Wildlife Service concerning three reported, but not investigated, violations and an instance where the GAO considered the Corps use of an after-the-fact permit application for a dock (constructed after it was eliminated from a previous permit application) to be inappropriate. The Huntington District should have been provided an opportunity to respond. The district subsequently informed Corps headquarters that, although they had not responded to the letter from the Fish and Wildlife Service, inspections of the three sites revealed no Section 404 violations. With regard to the dock, the district advised the dock was removed from the previous application in accordance with a condition of the State water quality certification. Since the State water quality certification explicitly disallowed the dock, the Corps was precluded from including the dock in the Corps permit. The Huntington District does not, however, agree with the State rationale for not approving the dock. It

-3-

is the Department's position that the acceptance of an after-the-fact permit application is within the District Engineer's discretion and is appropriate under the circumstances. The State will have an opportunity to provide its position to the Corps on the after-the-fact application.

See comment 5.

The Department does agree with the GAO finding that the Corps considered and generally accepted Federal resource agencies' recommendations. Regarding the Section 404(c) case in the Jacksonville District, however, it should be noted that with the project modifications required by the Environmental Protection Agency, the project was not constructed. The applicant indicated that the project was not practicable with the additional requirements.

See comment 6.

The detailed DOD comments on the report findings are provided in the enclosure. The Department appreciates the opportunity to comment on the draft report.

Sincerely,



Nancy P. Dorn
Assistant Secretary of the Army
(Civil Works)

Enclosure

The following are GAO's comments on the Department of Defense's letter dated November 10, 1992.

GAO Comments

1. We believe that the report gives considerable recognition to the accomplishments of the Corps that were achieved after we issued our previous report in 1988. However, we have revised the report title, which the Corps found unnecessarily negative, to one that shows that the scope of the Section 404 Program will remain uncertain until a final wetlands delineation methodology is established that will establish the amount of land that is subject to the program's regulations. The National Academy of Sciences will consider the wetlands delineation issue in 1993.
2. We recalculated permit processing times to consider the time that applications were considered incomplete while the Corps continued to pursue needed information. On the basis of these recalculations, the overall average processing times for the three districts changed very little—Buffalo showed no change, Huntington increased 6 days, and Jacksonville increased 9 days.
3. As stated in the agency comments section at the end of chapter 2, we recognized the Department's concern about the cost and time required to routinely provide feedback to resource agencies on all permit applications they commented on. However, we believe that the time and cost involved in providing such feedback can be minimized if such feedback is provided in those instances where the resource agencies made significant comments. This would likely substantially decrease the number of permit applications involved.
4. Subsequent to Defense's letter, GAO contacted Huntington district officials and deleted the sections of the report that discussed specific enforcement cases handled by the district.
5. This comment is included in the final report on page 28.
6. The detailed Defense comments have not been included as part of this appendix because they contain voluminous excerpts from the body of our draft report, which have remained in this report. However, each of the Defense comments is recognized in this report.

Comments From the Environmental Protection Agency

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 10 1992

OFFICE OF
POLICY, PLANNING AND EVALUATION

Mr. James Duffus III
Director
Natural Resources Management Issue
Resources, Community, and Economic Development Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Duffus:

The Environmental Protection Agency (EPA) appreciates the opportunity to review and provide comments on the draft GAO report entitled "Wetlands Protection: The Section 404 Program Needs Clear Direction" (GAO/RCED-93-026). The report examines the extent to which the Army Corps of Engineers (Corps) has implemented GAO's 1988 recommendations regarding administration of the Clean Water Act Section 404 program.

As the Agency stated in its comments on the draft version of the earlier 1988 GAO report, "Wetlands: The Corps of Engineers' Administration of the Section 404 Program," the Section 404 program is very complex, making any attempt to evaluate its implementation and effectiveness a challenging task. At that time, EPA also indicated that objective examination of Section 404 program implementation can serve as a vehicle to initiate needed and significant program improvements. That continues to be the case and the Agency is pleased that GAO has undertaken this follow-up report. In particular, the draft points out that inadequate program funding and permit processing delays outside the control of the Corps affect program implementation, factors that are rarely acknowledged by critics of the Section 404 program.

Nevertheless, EPA has some concerns about the draft report. In particular, both the Executive Summary and the introductory chapter fail to explain the scope of EPA's authorities and responsibilities regarding implementation of the Section 404 program. Also, several parts of the draft report may need clarification regarding the scope of Section 404 jurisdiction and application of the Section 404(b)(1) guidelines.

See comment 1.

Appendix VIII
Comments From the Environmental
Protection Agency

2

See comment 2.

Another general concern is that only individual permit applications were examined; neither letters of permission nor general permits were evaluated. Useful discussions of enforcement and the cumulative effects of individual permits, as well as the development of baseline information on the 404 program's impact on wetlands, need to include consideration of all these application types.

See comment 3.

Since little information is provided as to statistical methodology or format of interview questionnaires, it is not possible to comment on the reliability and validity of the reported results. Even though other information EPA has on hand indicates that the results reported here are consistent with the experiences of Corps district offices across the country, the data could be more accurately evaluated if it noted that only three of the 36 district offices are represented in this report.

Again, thank you for the opportunity to review the draft GAO report on the Section 404 program. The report is evenly balanced between addressing the implementation of the 1988 report's recommendations, the scope and direction of the 404 program, and budgetary constraints. While the Agency generally believes that the draft report is accurate and contains useful findings, we have indicated in the enclosed attachment specific points that need clarification.

Sincerely,



Richard D. Morgenstern
Acting Assistant Administrator

Enclosure

**Appendix VIII
Comments From the Environmental
Protection Agency**

**"Wetlands Protection:
The Section 404 Program Needs Clear Direction"
(GAO/RCED-93-026)**

Specific Comments from the Environmental Protection Agency (EPA)

Executive Summary

Now on page 2,
paragraph 3.
See comment 1.

o Page 2, Paragraph 3 - The paragraph entitled "Background" may be misleading and should be qualified as follows. First, the Section 404 program is jointly implemented by the Army Corps of Engineers (Corps) and EPA. Second, the applicability of Section 404 is not limited to "landowners and developers." Anyone proposing to discharge dredged or fill material to wetlands and other waters of the U.S. must first obtain authorization from the Corps. Third, the determination of whether to grant or deny a Section 404 permit application includes a consideration of cumulative impacts and practicable alternatives, but also goes further to consider other factors needed to make a determination of compliance with the Section 404(b)(1) Guidelines and evaluated as part of the public interest review. The discussion of Section 404 enforcement at the top of page 3 also needs clarification. EPA and the Corps share Section 404 enforcement responsibility with regard to both unauthorized discharges and permit violations.

See comment 4.

Now on page 2.

o Page 3, Paragraph 1 - In the first paragraph under "Results in Brief," the reference in the last sentence to "adopting" wetlands delineation methodologies is misleading since the Corps has adopted and is implementing its 1987 wetlands delineation manual. It may be more accurate to refer to "improving" such methodologies.

Now on page 3,
paragraph 1.
See comment 5.

o Page 3, Paragraph 2 - Since resource constraints plague all agencies involved in the Section 404 program, in the last sentence in this paragraph, it would be more accurate to refer to the Corps "and the resource agencies."

Now on page 3,
paragraph 2.
See comment 6.

o Page 4, Paragraph 1 - The first sentence should be changed to indicate that guidance on practicable alternatives is being developed jointly by the Corps and EPA. Since the Corps is using the 1987 manual, the statement in the third sentence that the delineation methodology is "unsettled" may be somewhat misleading and should be clarified to indicate that, at the conclusion of the GAO study, changes to the 1989 wetlands delineation manual had been proposed, but final changes had not been adopted.

Now on page 3,
paragraph 4.
See comment 6.

Now on page 4,
paragraph 1.
See comment 6.

Chapter 1 - Introduction

Now on page 8,
paragraph 3.
See comments 4
and 6.

o Page 9, Paragraph 3 - In the first sentence, it would be more appropriate to describe Section 404 as "the primary federal program that regulates activities in wetlands and other waters of the United States." Also, as indicated above, the program's applicability is not necessarily limited to "property owners or developers." It would be useful to point out that a "discharge" includes either the addition or redeposit of dredged or fill material to regulated waters.

Now on page 8,
paragraph 4.
See comment 1.

o Page 10, Paragraph 1 - The first sentence needs to be clarified to state that both the Secretary of the Army, acting through the Corps, and EPA jointly implement the Section 404 program. The Corps is responsible for the day-to-day administration of the Section 404 permit program and makes the decision whether to issue or deny a permit. As explained in more detail below, EPA also has various Section 404 responsibilities.

Now on page 10,
paragraph 2.
See comment 7.

o Page 12, top of page - The roles of the Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration (NOAA) should be clarified. Both agencies review and provide comments to the Corps on public notices of permit applications. However, neither agency has any statutory authority regarding Section 404 enforcement.

Now on page 10,
paragraph 3.
See comment 1.

o Page 12, Paragraph 1 - The discussion of EPA's statutory authorities needs to be clarified and expanded as follows. As stated above, EPA has numerous Section 404 responsibilities. EPA, in conjunction with the Corps, develops and interprets the Section 404(b)(1) Guidelines, which are the environmental criteria that must be satisfied before a Section 404 permit can be issued. Under Section 404(c), EPA has the authority to veto a Corps decision to issue a permit, or to otherwise prohibit or restrict the discharge of dredged or fill material to waters of the U.S. EPA uses this authority only for the most significant permit applications involving critical resource issues. Since EPA is responsible for overall implementation of the Clean Water Act, it also has the ultimate authority for determining the geographic scope of Section 404, i.e., whether an area is a wetland or other water of the U.S. Similarly, EPA has the final word on the applicability of Section 404(f), which exempts certain discharges from the permit requirement. EPA and the Corps share authority for enforcing the requirements of Section 404. Finally, EPA approves and oversees state assumption of the Section 404 program.

Now on page 12,
paragraph 3.
See comment 8.

o Page 14, paragraph 3 - As part of the discussion of the permit review process, it may be useful to clarify several points. First, a section 404 permit cannot be issued unless it is determined that the discharge complies with the Section 404(b)(1) guidelines.

Appendix VIII
Comments From the Environmental
Protection Agency

3

Now on page 12,
paragraph 4.
See comment 6.

o Page 15, Paragraph 1 - Also, the second sentence is misleading. Resource agency review of Corps public notices is not tied to the public interest review per se, but is part of the overall permit review process, including application of the Guidelines. The sentence appears to reference "interagency agreements" other than the Section 404(q) memoranda of agreement (MOA); we are unfamiliar with any such agreements.

Now on page 13,
paragraph 1.
See comment 6.

o Page 15, Paragraph 2 - The first sentence should be revised to clarify that consideration of the availability of practicable alternatives is undertaken as part of determining compliance with the Guidelines, as well as under the public interest review. That same sentence is misleading when it says that "the project manager may also look at the availability of practicable alternatives"; rather, he/she is required to look at alternatives. To clarify that the practicable alternatives analysis is one of various components of the Guidelines, the second sentence could be changed to refer to "this and other components" of the Guidelines.

Now on page 13,
paragraph 2.
See comment 6.

o Page 16, Paragraph 1 - The first sentence sets forth an incorrect standard for Corps review of permit applications. Therefore, the phrase "cause unacceptable effects or that others object to" should be deleted and replaced with "not comply with the Guidelines or be contrary to the public interest."

Now on page 13,
paragraph 3.
See comment 9.

o Page 16, Paragraph 2 - The discussion of enforcement misconstrues the agencies' joint enforcement authorities. Both EPA and the Corps have the authority to enforce against unauthorized discharges, be they unpermitted discharges or discharges in violation of permit conditions. To ensure efficient and effective implementation of this shared enforcement authority, EPA and the Corps have entered into a Section 404 enforcement memorandum of agreement. Under this MOA, the Corps, as the Federal permitting authority, has the enforcement lead in circumstances involving Corps-issued permit violations and EPA has the enforcement lead on many unpermitted discharge cases. Consistent with the Enforcement MOA (and because of its greater field staff resources), the Corps does investigate and resolve many unpermitted discharge violations. In fact, the courts have recognized the Corps' authority under the statutes to enforce against parties who discharge without a permit. (See, e.g., Parkview Corps v. Department of the Army, 490, F. Supp. 1278, F.D. Wisconsin, 1980.) However, with explicit statutory authority under Section 301 (a) of the Clean Water Act, the EPA Regions also do inspect, investigate, and as appropriate, enforce against unpermitted discharge violations.

Now on page 14,
paragraph 1.
See comment 6.

o Page 17, Top of page - To clarify the discussion of Clean Water Act enforcement mechanisms, both EPA and the Corps have administrative and judicial enforcement tools. Administratively, they can issue orders seeking cessation of illegal discharges and, where appropriate, removal and restoration. Section 309(g) gives the agencies the authority to assess civil administrative penalties

Appendix VIII
Comments From the Environmental
Protection Agency

4

for Section 404 violations. Also, working with the Department of Justice, EPA and the Corps can respond to unauthorized discharges by initiating civil or criminal judicial actions.

o Page 17, Paragraph 1 - The third sentence in this paragraph is confusing since it does not appear to directly relate to the sentence that precedes it. That second sentence addresses the exemptions from the permit requirement found in Section 404(f)(1), which relate to discharges associated with the activities specified in the statute itself. The reference to an expansion of "regulated activities to isolated wetlands and headwaters" is not related to the statutory exemptions at all and also appears to misconstrue the scope of geographic jurisdiction. Therefore, the third sentence should be deleted.

Chapter 2 - Progress Has Been Made Toward Implementing Some GAO Recommendations

o Pages 23 - 25 As part of the discussion on compilation of baseline data, two points should be added. First, the inadequacy of our current information base on wetland acreage, location, and quality should be emphasized. Second, recent efforts among federal agencies, coordinated by the Domestic Policy Council, to establish a wetlands categorization system should be mentioned.

o Page 26, Top of page - Although the Office of the Vice President, and more recently, the Executive Office of the President, have been coordinating the consideration of revisions to the 1989 wetlands delineation manual, any decision regarding a revised manual will be made by officials of the four agencies that issued the 1989 version - EPA, Army, Department of Agriculture, and FWS. Also, the reference to practicable alternatives guidance in the first full sentence on this page should indicate that both the Corps and EPA are considering such guidance. Since EPA has the ultimate word regarding interpretation of the Guidelines, any guidance on practicable alternatives would need to be jointly developed by the Corps and EPA.

o Page 26, Paragraph 1 - As stated above, EPA does not believe that it is entirely accurate to refer to the status of the wetlands delineation manual as "unsettled," since the Corps is using its 1987 Manual and thus continuing to make jurisdictional determinations as needed in the field.

o Page 26, Paragraph 3 - To our surprise, the draft report's discussions of the practicable alternatives issue fail to mention the Mitigation MOA entered into by EPA and Army in February 1990. The MOA clarifies the Guidelines' requirement that the Corps evaluate permit applications to ensure that mitigation occur in the

Now on page 14,
paragraph 2.
See comment 10.

Now on pages 19
and 20.
See comment 6.
See comment 11.

Now on page 21.
See comment 12.

Now on page 21,
paragraph 2.
See comment 5.

Now on page 22,
paragraph 1.
See comment 6.

**Appendix VIII
Comments From the Environmental
Protection Agency**

5

following sequence: avoidance of impacts where practicable through the evaluation of alternative sites, followed by minimization of impacts, and finally, appropriate and practicable compensation of unavoidable impacts.

o Page 27, Top of page - Given EPA's role in interpretation of the Guidelines, any reference to development of guidance on practicable alternatives should indicate that such guidance will be jointly developed by the Corps and EPA.

o Page 27, Paragraph 2 - Since the Guidelines also require consideration of cumulative impacts, it may be appropriate to refer to them, as well as to the public interest review, in the first sentence at the bottom of the page.

o Page 32, Paragraph 3 - The draft report references an audit report of the EPA wetlands program undertaken by the Agency's Office of Inspector General (OIG). It is important to recognize that, to date, the Office of Water has not agreed with many of the audit report's findings and recommendations and has met with OIG staff on October 14, 1992, to try to resolve remaining disagreements. Based on the progress made at this meeting toward reaching agreement on findings and recommendations for EPA's wetlands program, the description of the OIG report contained in this paragraph should be revised.

o Pages 36 and 37 - In the discussions of cases elevated for Corps permit decisions, one of the referenced cases is outside the Section 404 Permit Program jurisdiction. Also, the case was in the Mobile District of the Corps, not the Jacksonville District.

o Page 39 - There is an incorrect reference to a 1990 EPA report on both line 1 of this page and again in the footnote at the bottom of the page. The information discussed regarding public notice comments and final decisions on permit applications is actually contained on page 83 of the 1991 EPA OIG report footnoted on page 33.

o Page 39, Paragraph 1 - As already indicated above, the statement in the second sentence that the issue of delineating wetlands jurisdiction remains "unsettled" may be misleading and it would be more accurate to state that the relevant agencies continue to work to "improve" the wetlands delineation methodology.

Now on page 22,
top of page.
See comment 6.

Now on page 22,
paragraph 3.
See comment 6.

Now on page 25,
paragraph 5.
See comment 13.

Now on page 28,
paragraph 3.
See comment 14.

Now on page 30.
See comment 15.

Now on page 26.

Now on page 30,
paragraph 4.
See comment 5.

**Chapter 3 - The Scope and Direction of the Section 404 Program
Remains Unsettled**

Now on page 33,
paragraph 1.
See comment 16.

o Page 40, Paragraph 1 - The first two sentences may need clarification. Whether or not Section 404 contains "clearly stated wetlands protection goals," it does regulate certain activities that destroy or degrade wetlands and other waters of the U.S. and, therefore, certainly serves to protect the nation's wetlands. Moreover, while there may be numerous federal laws that affect wetlands, Section 404 is the major federal program regulating activities in wetlands and other waters of the U.S.

Now on page 33,
paragraph 3.
See comment 17.

o Page 40, Paragraph 3 - The Agency disagrees with the statement in the last sentence that the Section 404 program "lacks a clear focus." The statute itself, coupled with the implementing regulations, set forth goals for the program. For example, the Guidelines, at 40 CFR Section 23.1(c), state a fundamental principle of the program, which is that dredged or fill material should not be discharged to wetlands or other waters of the U.S. unless it is shown that such discharges will not have an adverse impact. Certainly, EPA agrees that the Section 404 program can be improved in various ways; however, EPA believes it is inaccurate to characterize the program as lacking a clear focus.

Now on page 34,
paragraph 2.
See comment 18.

o Page 42, Paragraph 1 - Contrary to the first sentence, the President's wetlands plan does not explicitly seek to modify the amount of wetlands covered by the Section 404 program. One of the goals of the President's plan is to produce a workable methodology for delineating wetlands.

Now on pages 35
and 36.
See comment 6.

o Pages 43 and 44 - The discussion of the effect of the 1989 manual on the scope of Section 404 wetlands jurisdiction needs to clarify that a major reason for the increase in Section 404 jurisdictional scope was that prior converted croplands, as defined by the Swampbuster program, came within the manual's definition of wetlands. The Corps subsequently addressed this issue by issuing Regulatory Guidance Letter (RGL) 90-7 which states that prior converted croplands are not waters of the United States and, therefore, not regulated under Section 404 of the Clean Water Act. It is estimated that upwards of 60 million acres of agricultural lands were so excluded from Section 404 regulation. Thus, subsequent to the issuance of RGL 90-7, the wetlands acreage covered by the 1989 manual was reduced significantly, and the discussion on these two pages should reflect that result.

Now on page 36.
See comment 6.

o Page 45, Top of page - Consistent with our earlier comments, the 1989 manual and the proposed 1991 revisions to the manual were developed and published in the Federal Register by the four relevant Federal agencies and not by the Domestic Policy Council. Also, the fourth sentence on this page inaccurately describes the wetlands criteria in the 1989 manual. EPA recommends revising this sentence to read, "For example, the 1989 manual's hydrology

Appendix VIII
Comments From the Environmental
Protection Agency

7

criterion for saturated wetlands required a water table within six, 12, or 18 inches of the surface (depending on soil drainage class, permeability, and texture) for usually one week or more during the growing season." The fifth sentence incorrectly characterizes the proposed 1991 revisions to the 1989 manual and should be revised to read, "Under the proposed revisions, wetlands would be limited to areas having standing water for 15 consecutive days or having a water table at the surface for 21 consecutive days during the growing season."

o Page 46, Top of page - The report should be updated to reflect the fact that EPA's FY 1993 appropriations, as passed by Congress and signed by the President, include \$400,000 for a National Academy of Sciences study of wetland delineation and wetland functional assessment techniques.

o Page 47, Paragraph 2 - The last sentence should be clarified to state that the Section 404 program currently regulates discharges of dredged or fill material in waters of the United States. Also, the discussion of wetlands legislation should mention the Congressional Research Service's calculation that H.R. 1330 will cost no less than \$10.7 billion.

o Pages 50 - 54 - The report makes a good point in emphasizing that budget constraints have adversely impacted the ability of both the Corps and EPA to implement the 404 program, particularly in requiring it to choose between permit processing and enforcement (with the former achieving priority).

o Page 51, Paragraph 1 - It is more accurate to refer to EPA wetlands staff, instead of the Office of Wetlands, Oceans, and Watersheds.

o Page 51, Paragraph 2 - This discussion should acknowledge that, even when applicants hire outside consultants to perform wetlands delineations, the Corps must still approve the consultant's jurisdictional determination.

o Page 53, Paragraph 1 - As already indicated above, the statement regarding staff increases should refer to "wetlands program staff," instead of the Office of Wetlands, Oceans, and Watersheds. It is worth noting that a decision by an EPA Regional office to provide "no comment" on a particular Corps public notice may not necessarily be driven by lack of staff resources, but in particular circumstances would be appropriate given the range of projects reviewed.

Now on page 37.
See comment 19.

Now on page 38,
paragraph 3.
See comment 6.

See comment 20.

Now on pages 41
to 45.
See comment 6.

Now on page 41,
paragraph 4.
See comment 6.
Now on page 42,
paragraph 1.
See comment 6.

Now on page 43,
paragraph 3.
See comment 6.

Appendix VIII
Comments From the Environmental
Protection Agency

8

Now on page 44,
paragraph 2.
See comment 21.

o Page 53, Paragraph 2 - EPA applauds the acknowledgement in the fourth sentence that the EPA Regional wetlands programs have very limited travel budgets, which significantly affect EPA's ability to visit wetlands sites either planned for development or potentially subject to enforcement action.

Now on page 44,
paragraph 3.
See comment 22.

o Page 54, Paragraphs 1 and 2 - As with the OIG national wetlands audit report referred to earlier, the Office of Water also disagreed with some of the findings and recommendations contained in the OIG audit of the Region IV wetlands program. For example, with regard to OIG recommendations on staff and monetary resource levels for Region IV, the Office of Water responded in part that, without an examination of resource needs and availability across all Regions and program areas, OIG is not in a position to determine that a particular Region's needs are more compelling than the needs of other Regions or that resources should increase for the wetlands program relative to other EPA programs.

Moreover, the "work load analyses" mentioned in the second sentence do not represent official Agency estimates of resource needs, but instead, were informal analyses proposed as part of a process to develop an acceptable workload model for wetlands. Given that, Agencywide, workload exceeds available resources, it is misleading to imply that any one Region has any greater gap between resource need and availability than any other Region without an exhaustive analysis of all 10 Regions. Since such an analysis has not been done, the information on workload in these two paragraphs is not pertinent and the Agency recommends that both paragraphs be deleted.

Now on page 51,
paragraph 1.
See comment 6.

o Page 60, Paragraph 1 - In the case of EPA, the reference in the second sentence to the potential impact of funding and staffing increases on enforcement should include enforcement against unpermitted discharges, as well as permit condition violations.

The following are GAO's comments on the Environmental Protection Agency's letter dated November 10, 1992.

GAO Comments

1. We made certain revisions to the executive summary and the body of the report to more clearly recognize EPA's enforcement role and responsibility for determining the geographic jurisdiction of the Section 404 Program. We now believe the report more adequately recognizes and describes EPA's role in the program.
2. As noted in the objectives, scope, and methodology section at the end of chapter 1, it was agreed with the requester that we would not include general permits or letters of permission in our review. Therefore, we did not compile information on the cumulative effects of such permits on wetlands.
3. The objectives, scope, and methodology section on pages 16 to 18 of this report notes that we included 3 of the Corps' 36 districts in our review and describes the methodology we used.
4. The report has been revised to recognize that anyone proposing to discharge dredged or fill material into wetlands and other waters of the United States must obtain a Corps permit.
5. Although the Corps is implementing its 1987 wetlands delineation manual as a result of a provision in the Energy and Water Development Appropriations Act of 1992— which prohibited using the 1989 manual jointly developed by the Corps, EPA, FWS, and the Soil Conservation Service or any subsequent manual not adopted in accord with the notice and public comment requirements of the Administrative Procedure Act's rule-making process—use of the 1987 manual could be an interim step that is subject to further change. For example, EPA's 1993 appropriations bill includes \$400,000 for the National Academy of Sciences to study wetlands delineation, among other things.
6. The report has been revised to incorporate this comment.
7. In the draft and final versions of the report, we stated that the U.S. Fish and Wildlife Service and the National Marine Fisheries Service can provide advisory recommendations to the Corps on permit applications. We agree that neither of these agencies have a statutory role in Section 404 Program enforcement, and we have added a description of the conditions under

which they may become involved in enforcement as contained in the enforcement memorandum of agreement entered into by the Department of the Army and EPA.

8. We recognized the need to comply with the section 404(b)(1) guidelines on page 15 of the draft report (now on page 12). Therefore, no further changes were made in this regard.

9. The referenced paragraph was revised to recognize the enforcement roles of the Corps and EPA as described in the enforcement memorandum of agreement entered into by the Department of the Army and EPA.

10. We have deleted the referenced sentence from this final report.

11. Subsequent to receiving EPA's November 10, 1992, letter, we contacted officials from EPA and the Office of the Assistant Secretary of the Army (Civil Works) who told us that efforts to establish a wetlands categorization system have been suspended for the present.

12. The report was updated to recognize that the National Academy of Sciences will conduct a study, funded under EPA's fiscal year 1993 appropriations, of wetlands delineation and wetlands functional assessment techniques. Any further changes to the wetlands delineation methodology will likely have to wait for the results of this study. We have also recognized that both EPA and the Corps are considering guidance on practicable alternatives.

13. We revised the report to recognize that EPA's Office of Water disagreed with many of the findings in the referenced Office of Inspector General audit report and that Inspector General and EPA Office of Water officials were trying to reach agreement on some of the findings and recommendations. However, based on a follow-up conversation with an Office of Inspector General official familiar with the negotiations, there is no plan for that office to change its position on EPA's Section 404 enforcement program as stated in the audit report.

14. We attempted to obtain clarification from EPA regarding the cases elevated under its section 404(c) authority; however, EPA had not responded in time to include their comments in the final report. Our work papers indicate that each of the cases discussed in the draft report were section 404 related projects in the Jacksonville district.

15. We revised the report to cite the 1991, not 1990, audit report.
16. We have revised the report to affirm that the Section 404 Program is protecting wetlands, and reiterated that it is the major federal program that regulates activities in wetlands and other waters of the United States.
17. We deleted references to the Section 404 Program lacking a clear focus. However, although the Clean Water Act contains overall goals for the Section 404 Program, neither the act nor other program guidance contains specific goals for the amount of lands subject to the program's regulatory jurisdiction.
18. We revised the final report to state that President Bush's August 1991 plan contained references to modifying the kinds of activities occurring in wetlands that are covered by the regulatory program.
19. The report was updated to reflect the actual authorization of funding for the National Academy of Sciences' study of wetlands delineation, among other things.
20. We added a reference to the estimated cost to implement the proposed legislation.
21. No change needed.
22. An analysis of resource needs across EPA regional offices and program areas was beyond the scope of our review, and our report is not intended to depict any one EPA region as having greater staffing needs than any other region. Because of EPA's concerns about how agencywide resource needs were depicted in our draft report, we deleted references to agencywide workload analyses. However, we retained the workload estimates contained in the Office of Inspector General report for EPA region 4. This was the only information on the extent of the estimated shortfall in staffing for the wetlands program in the region that was available to us, and EPA region 4 officials were given an opportunity to review the Inspector General report. The region officials did not take exception to the estimates.

Comments From the Department of the Interior

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240



NOV 02 1992

Mr. James Duffus III
Resources, Community, and Economic
Development Division
U.S. General Accounting Office
Washington, D.C. 20548


Dear Mr. Duffus:

This responds to your request of October 6, 1992 addressed to Secretary Lujan in which you asked the Department of the Interior (Department) to review the draft report titled WETLANDS PROTECTION: The Section 404 Program Needs Clear Direction (GAO/RCED-93-026).

Overall, the Department agrees that the draft report is a generally accurate assessment of the Section 404 Program and we concur with your conclusions. Our enclosed comments mainly address clarification of technical information or statements made in the report.

Thank you for the opportunity to provide comments.

Sincerely,


Assistant Secretary for Fish
and Wildlife and Parks

Enclosure

**Appendix IX
Comments From the Department of the
Interior**

**GENERAL COMMENTS ON THE DRAFT GAO REPORT
"WETLANDS PROTECTION: The Section 404 Program Needs Clear Direction"
(GAO/RCED-93-026)**

In general, the Department agrees with the findings and conclusions presented in the draft General Accounting Office (GAO) report. The report presents an overall accurate characterization of the section 404 permit program and correctly represents the role of the Department and the Fish and Wildlife Service in that program. Since GAO's last report in 1988, improvements have been made in the administration of the permit program. Interagency coordination has improved and, as a result, the agencies are generally working in a more cooperative fashion at the field level. While differences remain between Districts, the Department agrees with GAO's findings that the Corps of Engineers considers and generally accepts recommendations made by the resource agencies. However, there are still individual cases where there are agency disagreements involving substantial adverse impacts to significant fish and wildlife resources. In these situations, the Fish and Wildlife Service works with the Corps to resolve these differences of opinion in a timely fashion. While we may disagree with the Corps on certain specific projects, we recognize that the authority for permit decisions rests with the Corps of Engineers.

See comment 1.

SPECIFIC COMMENTS ON SECTIONS OF THE DRAFT REPORT

Page 2 of Executive Summary and Page 9 of the Introduction

Both of these sections identify section 404 of the Clean Water Act as the primary legislative authority behind federal efforts to "control the use of wetlands". We suggest that this description needs to be rephrased to reflect the goals of the Clean Water Act and include specific language from the Act or implementing regulations. Appropriate language might state, "Section 404 of the Clean Water Act provides the primary legislative authority for the Federal government to regulate the discharge of dredged or fill material into waters of the U.S., including wetlands. The regulation of the discharge of dredged or fill material is an important part of the government's efforts to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." We also suggest revising the last sentence and adding the following sentence to the end of the first paragraph of the Executive Summary, "FWS' most recent estimates covering the years 1974-1983 suggest.... each year. The Department of Agriculture's Soil and Conservation Service reported in 1991 that 120,000 acres of wetlands were lost on non-federal rural lands." We further suggest adding the following sentence to the second paragraph of the introduction, "The Department of Agriculture's Soil and Conservation Service reports that wetlands loss estimates for non-federal rural areas in the 1982-1991 period were 120,000 acres per year."

Now on pages 2 and 8.

See comment 2.

**Appendix IX
Comments From the Department of the
Interior**

Now on page 10.

Introduction, page 12

See comment 2.

The second paragraph on this page discusses the numbers of permit applications received by the Corps after EPA's section 404(c) regulations went into effect in late 1979. We believe that the number cited represents individual permit applications. We suggest that this be clarified in the final report.

Now on pages 11 through 13.

Introduction, pages 14-16

See comment 2.

During the discussion of the permit review process, the report does not clearly distinguish between the public interest review and the review conducted under the section 404(b)(1) guidelines. Since these reviews have different requirements, we suggest that this section of the report be revised to more accurately reflect these differences.

Now on page 14.

Introduction, page 17

See comment 3.

The report references studies that have indicated that the section 404 program regulates only about 20 percent of the activities that result in wetland losses. The Department is only aware of one such study that was conducted by the Office of Technology Assessment (OTA) in 1984 (Wetlands: Their Use and Regulation). OTA extrapolated this information from several different data sources, none of which were originally developed for assessing the overall effectiveness of section 404. Although this figure has subsequently been cited in other reports, it does not reflect the established jurisdictional scope of section 404 and is not, in our opinion, an accurate characterization of the effectiveness of the present section 404 program.

Now on page 35.

Chapter 3, page 43

See comment 4.

The draft report does not give sufficient weight to the fact that, prior to adoption of the 1989 manual, the Buffalo District used a modified version of the 1987 Corps of Engineers manual. In the experience of the Fish and Wildlife Service, the Buffalo District's modifications to the 1987 manual resulted in very restrictive wetland determinations. For example, the Buffalo District did not consider forested wetlands to be in jurisdiction unless obligate wetland plants occurred in the understory vegetation. Additionally, since the 1987 manual did not cover croppped wetlands it is important to know whether or not the Buffalo District included these in their estimate of wetland acreage using the 1989 manual. Following the adoption of the 1989 manual, the Corps issued a regulatory guidance letter in September 1990 that removed "prior converted" croppped wetlands from section 404 jurisdiction.

See comment 5.

When the Corps was subsequently directed to return to using the 1987 manual, guidance was issued to all Districts that made use of the 1987 manual mandatory and provided technical guidance on how the manual should be interpreted. To permit comparison between the Buffalo and Jacksonville Districts on the jurisdictional acreage differences between the 1987 and 1989 manuals, we suggest that GAO ascertain the jurisdictional acreage within the Buffalo District under mandatory use of the 1987 manual,

Appendix IX
Comments From the Department of the
Interior

excluding prior converted cropland (i.e., present day jurisdiction).

The following are GAO's comments on the Department of the Interior's letter dated November 2, 1992.

GAO Comments

1. These comments have been recognized at the end of chapter 2 of the report.
2. The report has been revised to incorporate these comments.
3. The reference to the Section 404 Program regulating only about 20 percent of the activities that result in wetlands losses was deleted from the report.
4. The draft and final version of this report state that the Buffalo district used a modified version of the Corps' 1987 wetlands delineation manual. The Department's statement that the Buffalo district's modifications to the 1987 manual resulted in restrictive wetlands determinations have been included in the final report. Also, additional information on prior converted croplands was included in the final report based on comments made by EPA on a draft of this report.
5. Based on information provided by the Corps' Buffalo district, we have updated the jurisdictional acreage figures to the extent possible.

Comments From the Department of Commerce

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



UNITED STATES DEPARTMENT OF COMMERCE
The Deputy Under Secretary for
Oceans and Atmosphere
Washington, D.C. 20230

NOV 6 1992

Mr. James Duffus III
Director, Natural Resources
Management Issues
Resources, Community, and Economic
Development Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Duffus:

Thank you for your letter requesting the Department Commerce's comments on the draft General Accounting Office (GAO) report entitled "Wetlands Protection: The Section 404 Program Needs Clear Direction".

Wetlands, in particular coastal and estuarine wetlands, provide habitat essential to the maintenance and productivity of the nation's living marine and anadromous resources. Under the Fish and Wildlife Coordination Act and the Clean Water Act, the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) routinely evaluates, comments and provides recommendations on proposed Section 404 wetland dredge and fill projects. The proper administration and enforcement of this program to combat wetland loss is of critical concern to us.

In general, we support the findings and recommendations identified in the report. We strongly agree with the report's recommendations that the Corps of Engineers (COE) must develop defensible guidance on the cumulative impacts of permit decisions and the consideration of alternatives to development projects. Please see the enclosure for more specific comments.

Funding and staffing have severely hampered NMFS' ability to respond to all 10/404 permits. It should be noted in the report that the National Marine Fisheries Service Habitat Program has been level funded for many years, while inflation and workload have increased.

It is difficult to analyze some of the information on the performance of the Jacksonville District. NMFS reviews focus on coastal areas and not inland. Therefore, if the permits sampled were disproportionately inland, then it is possible that the analysis did not reflect our experiences. For example, Mager (1990) did an analysis of permit actions between 1981 and 1989. This survey of 501 permit actions revealed that the Jacksonville District accepted, partially accepted, and rejected NMFS comments

See comment 1.

See comment 2.

See comment 3.



**Appendix X
Comments From the Department of
Commerce**

2

See comment 3.

on 23 percent, 25 percent, and 52 percent, respectively, of the permits sampled. An analysis of 37 permits issued by the District during 1990 (Mager and Rackley, 1991) indicated that NMFS comments on 30 percent, 38 percent, and 32 percent of projects authorized were accepted, partially accepted, and rejected, respectively.

See comment 3.

The analysis for 1991 has not yet been completed to see whether the trend in improvement by the Jacksonville District is real. Because of the difficulty involved in getting issued permits from the COE, it is becoming more difficult to do this analysis. We therefore, support the GAO's arguments that such information should be routinely provided. This is one of the few ways available to measure program effectiveness and decide where changes are needed.

See comment 1.

See comment 2.

It is clear that the current trend in reducing processing time will also reduce the ability to the COE and resources agencies to perform adequate environmental assessments. There is concern that, within the current budget and staffing climate, this will only reduce the effectiveness of the Clean Water Act.

We appreciate your continuing efforts to assess the effectiveness of Section 404 of the Clean Water Act. We appreciate the opportunity to comment on the draft report.

Sincerely,


Ray Kammer

Enclosure

Enclosure

SPECIFIC COMMENTS

Now on page 2,
paragraph 1.
See comment 4.
Now on page 8,
paragraph 2.
See comment 1.

Page 2, para. 1 - The term "estuary" is not framed in the proper context. As used, it is implied that an estuary is a wetland. An estuary actually contains many different kinds of wetlands. This should also be corrected on page 9, para. 1.

Now on page 4,
paragraph 4.
See comment 2.

Page 4, para. 4 - We are finding it increasingly difficult to get specific information on permits that have been issued. We must generally make specific requests that require additional work by our staffs. This is problematic because we are even more understaffed than the (COE).

Now on page 11,
paragraph 2.
See comment 5.

Page 5, para. 2 - This focuses on the funding and staffing problems of the COE and Environmental Protection Agency (EPA). However, while these agencies have experienced increases, the National Marine Fisheries Service (NMFS) has actually lost purchasing power.

Now on page 11,
paragraph 5.
See comment 6.

Page 13, para. 1 - It would be useful for GAO to mention that a problem with the CZMA is the apparent confusion in dealing with inter-state issues.

Now on page 12,
paragraph 3.
See comment 7.
Now on page 14,
paragraph 2.
See comment 8.

Page 14, para. 1 - Some Nationwide permits (e.g., NWP-26) allow placement of fill in up to 10 acres of wetlands. This is a significant area. To this day, the cumulative effect of this program remains unknown.

Page 14, para. 4 - The new Clean Water Act (CWA) Memorandum of Agreement between Commerce and the Army excludes a role by the COE Division unless an issue involves policy.

Page 17, para. 2 - It may be true that Section 404 regulates only 20 percent of the activities that result in wetlands losses. However, the proportion would be much higher in the coastal zone where NMFS has a primary interest. This program is additionally more critical in the coastal zone because of past abuses resulting in disproportionately high habitat losses.

Now on page 20,
paragraph 1.
See comment 9.

Page 24, para. 3 - An earlier problem with the way habitat was tracked resulted from the way data was kept regarding open water. The Jacksonville District logged in only "open water" without reference to substrate. Accordingly, the data could not disclose whether important benthic habitats such as seagrasses were involved. We do not know if this has been resolved.

Now on page 26,
paragraph 3.
See comment 1.

Page 33, para. 2 - It is unfortunate that the performance standards relate mainly to processing and not implementing environmental considerations (e.g., no-net-loss). This is, after all, the main purpose behind the CWA.

Appendix X
Comments From the Department of
Commerce

2

Now on page 27,
paragraph 3.
See comment 3.
Now on page 31,
paragraph 1.
See comment 1.

Now on page 36,
paragraph 2.
See comment 10.

Now on page 42,
paragraph 3.
See comments 2
and 6.

Now on page 45,
paragraph 2.
See comment 2.

Now on page 50,
paragraph 1.
See comment 11.

Now on page 51,
paragraph 1.
See comment 2.

Page 35, para. 1 - See typo on line 6. Corps should be Corps. Also see our General comments.

Page 39, para. 1 - Lack of follow-up continues to be a significant weakness in the COE's regulatory process. We believe a performance standard should be implemented calling for follow-up on at least a percentage of the activities authorized. Perhaps a test for significance could be established to reduce the number that would require review.

Page 44, para. 2 - It would be of value for the GAO to provide an assessment of whether their analysis finds the complaints of landowners and developers to be valid. We have heard that in the review of the Wetlands Delineation Manual, when complaints were investigated, they were mostly found to be without merit.

Page 52, para. 2 - This problem has been made more onerous because the COE is insisting ever more strongly on site specific information. The time allowed for the resource agencies to review pre-discharge notifications (general and nationwide permits) is generally only 5 days.

Page 54, para. 3 - NMFS, because of recent budget cuts, expects its capability to review permit applications in the Jacksonville District and elsewhere across the country will be significantly reduced (perhaps as much as 50 percent in the Southeast). The money available for contracting was either lost during budget reduction exercises or needed to meet shortfall arising from increased labor costs.

Page 59, Table 4.2 - It should be noted in Footnote "a" that the Division Engineer has been removed from the elevation process.

Page 60, para. 2 - It is unfortunate that, in all likelihood, the requirement for swift processing without the ability to conduct a sound environmental assessment will undermine the purposes of the CWA.

Literature Citations

Mager, A., Jr. 1990. National Fisheries Service habitat conservation efforts related to federal regulatory programs in the Southeastern United States. NOAA Technical Memorandum NMFS-SEFC-260. 12 pp.

Mager, A., Jr., and D.H. Rackley. 1991. National Marine Fisheries Service habitat conservation efforts in the Southeastern United States for 1990. NOAA Technical Memorandum NMFS-SEFC-293. 15 pp.

The following are GAO's comments on the Department of Commerce's letter dated November 12, 1992.

GAO Comments

1. This comment has been recognized at the end of chapter 2 of the report.
2. These comments have been recognized at the end of chapter 4 of the report.
3. These comments have been recognized in various sections of chapter 2 of the report.
4. The term "estuary" was deleted from the executive summary and introductory paragraph of the report.
5. Although we recognized that the Coastal Zone Management Act has implications for the issuance of section 404 permits, consideration of any confusion resulting from the act's implementation was beyond the scope of our review.
6. As agreed with the requester and as noted in the objectives, scope, and methodology section of the report, we did not include nationwide permits in our review. Therefore, we did not compile information on the cumulative effects of such permits on wetlands.
7. While we agree that the new memorandum of agreement between the Departments of the Army and Commerce excludes the Corps' division-office level from a role in the elevation process when disputes between the Corps and resource agencies involve individual permits, the referenced section of our draft report referred to the role of two Corps divisions in the permit review process. The revised memorandum of agreement made no change in this arrangement; therefore, we did not change the report.
8. The reference to the Section 404 Program regulating only about 20 percent of the activities that result in wetland losses was deleted from the report.
9. The Corps planned to begin requiring the reporting of baseline information on the Section 404 Program's impact on wetlands during the first quarter of fiscal year 1993. Although we believe that the Corps' actions are a step in the right direction, no reports had been received from

the district office at the conclusion of our fieldwork. We made no change to the report.

10. We did not evaluate landowner and developer complaints about the scope of the Section 404 Program during the course of our review but recognized their concerns in our report. In a similar vein, although we did not analyze the validity of environmental organization complaints regarding proposed changes to the 1989 wetland delineation manual, we included their concerns in the report.

11. We have revised the referenced footnote (now on page 50) to reflect that since September 1992, the division engineer level was removed from the elevation process when disputes between the Corps and the resource agencies involved individual permits.

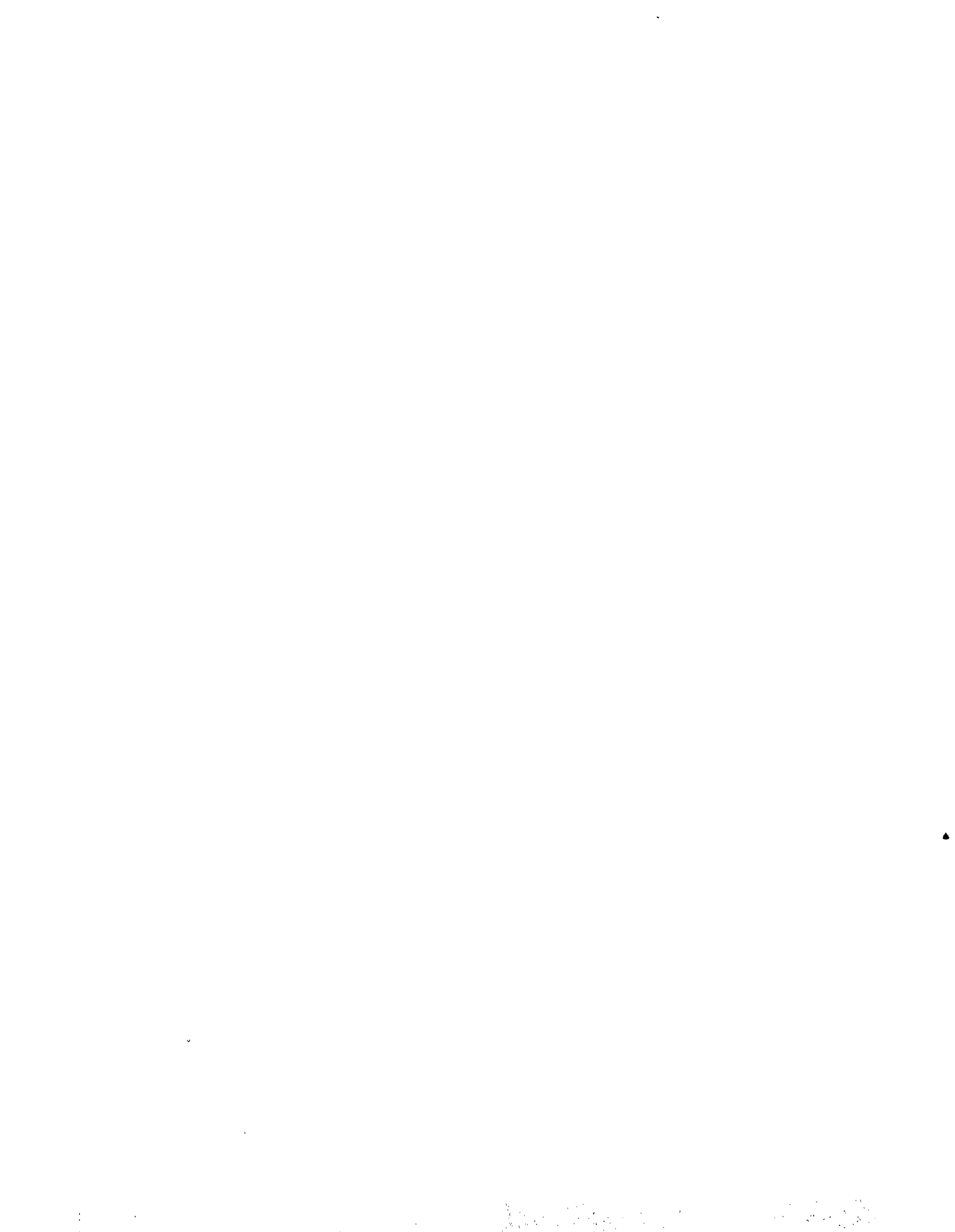
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