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Testimony

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Administration and Enforcement
of the Section 404 Program

Statement of
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Before the
Subcommittee on Oversight and
Investigations
Committee on Public Works and
Transportation
House of Representatives



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Dear Mr. Chairman and Members of the Subcommittee:

We are pleased to be here today to discuss our recently issued report on the extent to which the program authorized under Section 404 of the Clean Water Act is protecting the nation's wetlands.¹ This work, done at your request, examined the following issues:

- the overall impact of the Section 404 program in controlling wetlands losses,
- the extent to which the Corps of Engineers considers federal resource agencies' comments during the Section 404 permitting process, and
- how the Corps and the Environmental Protection Agency (EPA) enforce program requirements.

We performed our review work at 5 of the 36 Corps district offices. In addition to our work at the Corps, we contacted officials from other federal agencies involved in the program. They are commonly referred to as "resource agencies" and include the EPA, Fish and Wildlife Service, and National Marine Fisheries Service. To assess the Corps' performance in issuing and enforcing permits, we selected and evaluated random samples from three universes--individual permits, suspected unpermitted discharges, and general permits.

In summary, the Section 404 program, as currently authorized, does not provide the Corps with the authority to regulate activities that result in the majority of wetlands losses each year. However, the Corps and the resource agencies disagree concerning whether the Corps is doing all it can to protect

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

wetlands under existing program authority. Although the Corps districts generally consider resource agencies' comments on permit applications, they often do not adopt recommendations that would lead to project modifications or denial. Resource agencies are concerned over the Corps' nonacceptance of some recommendations, but they infrequently use their authority to appeal Corps permit decisions to higher levels within the Corps. Finally, monitoring and enforcement of Section 404 program requirements is not a high priority in the districts we visited, and EPA has used its significant authority to enforce the program sparingly.

I would like to discuss each of these findings in greater detail and then present our related observations and recommendations.

SECTION 404 PROGRAM NOT CONTROLLING MOST WETLANDS LOSSES

Wetlands, which provide many important ecological benefits, have been disappearing at the rate of 300,000 to 500,000 acres a year nationwide, according to some estimates. Section 404 is the primary legislative authority behind federal efforts to control wetlands use. However, because of the many statutory exemptions and other jurisdictional limits to Section 404 regulatory requirements, permitting and related enforcement action under Section 404 do not provide the basis for a comprehensive wetlands protection program.

As the program is currently structured, the Corps does not have the authority to regulate activities such as normal farming and draining that occur in wetlands. These activities cause most wetlands losses. Notwithstanding the limitations in the regulatory authority provided by Section 404, the Corps and the resource agencies agree that some wetlands are being protected as a result of Section 404 program requirements. However, neither the Corps

nor any of the resource agencies maintain comprehensive, nationwide information on the acreage of wetlands that the Section 404 program protects.

While recognizing the limits to the Section 404 program's jurisdiction, the resource agencies disagree over whether the Corps is administering the program in a manner that protects as much wetlands acreage as it could. The resource agencies believe that the Corps is interpreting certain key provisions of program regulations and guidance too narrowly. Included among the areas of disagreement are determinations on how to (1) delineate wetlands boundaries, (2) assess the cumulative impacts of individual permit decisions, and (3) consider practicable alternatives to development in wetlands. In some cases these differences can result in substantially different determinations over the extent to which a proposed permit site would be classified as a wetland and subject to the act's regulatory requirements. For example, in one Corps district's area of coverage, we were advised that it is not uncommon that the district would determine that about 20 to 25 percent of a site is regulated wetlands, whereas a resource agency would determine that 80 percent of the site is wetlands.

CORPS DISTRICTS CONSIDER BUT OFTEN
DO NOT IMPLEMENT RESOURCE AGENCY
RECOMMENDATIONS

Although the Corps districts and the resource agencies we visited disagree about several key provisions affecting the program's administration, they engaged in frequent negotiations over the scope of some Section 404 permit applications. The policies for involving the resource agencies varied by Corps district, and the resource agencies differed in their assessments of how well the Corps has involved them in the early stages of permit consideration. Overall, however, we found that the Corps is generally soliciting and considering resource agency views during

the Section 404 permitting process. Furthermore, in most cases for which they receive applications on which to comment, the resource agencies do not express major concerns with proposed projects and do not object to permit issuance.

There are cases, however, where these agencies object to issuing permits and other cases where they make suggestions for major modifications to proposed projects. On the basis of our sample results at 5 Corps districts, we estimate that in fiscal year 1986, the resource agencies recommended denying permits for 111 of the estimated 1,419 applications on which they commented. We estimate that the Corps districts issued permits over these denial recommendations in 37 percent of these cases.

The Corps districts accepted a greater number of the resource agency recommendations to modify proposed projects. Of the estimated 2,277 modifications recommended by the resource agencies, the districts accepted 1,822, or about 80 percent. Individual Corps districts varied significantly in their willingness to adopt recommended modifications, however. One district accepted all modification recommendations, while another accepted only 58 percent of them.

Not all Corps districts provided the resource agencies with feedback on the reasons for rejecting their recommendations. During our work, Corps officials identified a variety of reasons for not adopting resource agency recommendations. These reasons included their belief that (1) recommendations were already included in state permits, (2) the recommended alternatives were not feasible, and (3) the suggestions were based on resource agency policies that differed with the Corps'.

Infrequent Use Of Elevation
and "Veto" Authority

Although the federal resource agencies did not always agree with final Corps permitting decisions, the agencies elevated few of these disagreements to higher levels within the Corps in accordance with procedures specified in memorandums of agreement with the Corps. Three of the districts we visited had no elevations during the past 3 fiscal years. According to resource agency officials, the agencies rarely elevate disagreements because elevation procedures are very cumbersome and time-consuming, elevations rarely result in changes to district engineer decisions, their own agencies discourage use of the elevation authority, and most disagreements involve wetlands fills of comparatively small size.

In addition to being able to elevate district engineer permitting decisions, EPA can "veto" permit decisions. However, since passage of the Clean Water Act of 1977, EPA had completed such action only five times nationally.

THE CORPS AND EPA DO NOT EMPHASIZE
MONITORING AND ENFORCEMENT ACTIVITIES

The Corps and EPA share enforcement responsibility under Section 404. Neither agency has emphasized surveillance to detect unauthorized activities, and the Corps does not inspect all sites to ensure that permittees adhere to permit conditions. In many cases, surveillance and monitoring takes place only when it can be combined with some high-priority district activity, such as site investigations during permit processing.

The Corps, which has assumed the bulk of the enforcement effort under the program, has delayed some investigations of reported unauthorized activities for months after they were reported, or it did not investigate them at all. As a result, some

unauthorized activities may have gone undetected, and wetlands may have been filled unnecessarily. According to district officials, Corps personnel are primarily involved in permit processing, whereas monitoring has received a low priority.

In pursuing identified violators of permit requirements, the Corps rarely used available civil or criminal remedies, preferring instead to rely on administrative procedures to attempt problem resolution. This was true even in some cases that involved repeat offenders or those who failed to comply with Corps cease-and-desist orders. When the Corps did take action on unauthorized activity cases, it usually either required violators to restore affected areas to their original condition or accepted applications for permits that would then undergo a public interest review.

In the five districts, only six civil actions and no criminal actions were documented as having been pursued by the Corps districts during fiscal years 1984 to 1986. Two monetary fines imposed as a result of Corps-initiated action were documented. The Corps districts also suspended or revoked few permits when permittees did not comply with permit conditions. No permit revocations occurred during fiscal years 1984 to 1986, and we documented a total of 16 suspensions that occurred during varying time periods in the 5 districts.

EPA, which has independent enforcement authority for unpermitted activities, has used its authority sparingly, even though most of the suspected violations reported each year involve unpermitted discharges of materials. EPA indicated that staff and funding levels for the Section 404 program limit the extent to which it can participate in enforcement activities.

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In conclusion, Mr. Chairman, we found significant differences in how the Corps and the resource agencies believe the Section 404 program should be implemented. These differences appear to be affecting the degree to which the nation's wetlands are protected, and they are unlikely to be fully resolved without further legislative guidance. Therefore, in our report, we suggested that the Congress may wish to consider establishing clearer criteria regarding certain key provisions affecting the administration of the Section 404 program, such as how to delineate wetlands and the extent to which practicable alternatives to filling wetlands must be considered.

Regarding its implementation of the Section 404 program, the Corps points to staff and budget constraints as the primary reasons for not taking a more active role in enforcing the program and making other program improvements. However, we believe that some improvements can be made without major expense, and that other actions would actually make existing program expenditures by the Corps and resource agencies go further. Accordingly, we recommend that the Corps:

- develop baseline information that will enable it to determine the extent of the Section 404 program's impact on wetlands;
- work with the federal resource agencies to develop consistent and workable procedures for (1) considering practicable alternatives to filling wetlands, (2) delineating wetlands coming under the program's jurisdiction, and (3) allowing resource agencies to appeal district engineers' permit decisions; and
- work with EPA to develop a coordinated enforcement program utilizing the resources of both agencies to provide for

surveillance, inspection, and penalty assessment when appropriate.

Mr. Chairman, this concludes my prepared remarks. I would be happy to respond to questions at this time.