

The Wetlands Permitting Process: Is It Working Fairly

Hearing

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Testimony of:

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Mr. Chairman and members of the Subcommittee, thank you for this opportunity to speak today on this very important topic. In January, 1989, after fourteen years with the Corps of Engineers (Corps), the last seven in the Regulatory Branch at Corps Headquarters, I and a group of other wetland resource professionals and a Department of Justice attorney left federal service and formed the Wetland Training Institute, Inc. (WTI) to provide both the public and private sector with water resource training and reference tools.

While with the Corps, I was principal technical monitor for the Wetlands Research Program and two research programs dealing with contaminated dredged material, was proponent for two wetland training courses, routinely taught in two other courses on regulatory policy, was responsible for the continued development of the Corps' wetland delineation procedure and was one of the three Corps representatives on the committee which developed the 1989 Manual for Identifying and Delineating Jurisdictional Wetlands (1989 Manual). In addition, I drafted many policy documents, provided technical and policy guidance to its districts and divisions and represented the Corps at numerous meetings within the government, professional societies and the general public.

During the last dozen years, I have taught wetland delineation and policy to thousands of individuals in both the public and private sectors from across the country. I am a Professional Wetland Scientist and Certified Wetland Delineator. I have conducted wetland work in 36 states and the Territory of Guam. In addition, as a consultant with Wetland Science Applications, I have applied the delineation and permitting process to real life projects proposed by the regulated public. I have seen the wide variety of areas that technically qualify as true wetlands as well as the types of areas which often are regulated as wetlands but that differ little functionally from uplands of similar habitat type and do not actually satisfy the 1987 Delineation Manual. Increasingly in recent years, I have been called upon to provide expert witness testimony for citizens being prosecuted under the Clean Water Act (CWA).

I have spent my entire professional career working with the federal wetland permitting program. Those that know me recognize that tact is not one of my strong points. With that in mind, I will be brief and to the point.

I have presented testimony on wetlands before congressional committees on three previous occasions: in 1988, 1990 and 1991. Since 1991, I have attended other hearings that dealt with wetland issues. In addition, I have provided substantive comments to every pertinent rule-making notice published in the Federal Register since I left the government. To date, none of my comments, nor for that matter, any of the comments made at these hearings have produced any substantive, positive contributions towards increasing the fairness of the federal wetland regulatory program. In fact, the program has become more draconian as time has matured it. Previous Congresses have been unwilling to make meaningful changes and the Executive Branch has continuously expanded its jurisdiction onto private lands and at the same time reduced the effectiveness of the permitting program by making it so convoluted and complex that it is a full-time job to try and sort it out. Until the recent Supreme Court Ruling on SWANCC and the DC Circuit Ruling on Tulloch, the Judicial Branch has most often "given deference" to the Executive Branch and furthered tightened the noose around the public's collective neck.

Colleagues of mine advised me that I would be wasting my time with yet another hearing. But hope springs eternal and I am here. As you have already seen, I believe that there is blame enough to spread around to all levels. In this brief testimony, I will try to identify as many of the short-comings of the permitting program as I can. From time to time, I will refer to projects that I have worked on as examples of the equity problems encountered by the public. In many instances, I will not identify specific parties or locations for two reasons: first, I have not sought permission from the parties to openly discuss their affairs in such a public venue; secondly, many people throughout the Nation are truly afraid of reprisals by the agencies when they try to shake-up the *status quo*.

“Fairness” comes in many sizes and faces. You will hear today from other witnesses, some of the grosser examples of how individuals have been treated in less than a fair manner under the name of “wetland protection.” Their plights are certainly the most egregious and often the most costly, both personally and to society. Most private citizens cannot afford to fight the federal government so they simply roll over and accept the grief. The federal government often spends huge sums to prosecute these cases. In addition, there are little programmatic quirks within the wetland permitting process which also result in a level of unfairness which is subtle, but more pervasive. They affect the entire regulated public. These should not be ignored in your deliberations.

Primary responsibility for the faulted nature of the wetland permitting program falls upon the past Congresses that enacted Section 404 of the Federal Water Pollution Control Act Amendments of 1972, modified the CWA in 1977 and have done nothing substantive since to correct the problems. Some suggest that Section 404 constitutes a wetland protection statute. In my opinion, that is an absurd assertion. At the time of original enactment, the word “wetland” did not even occur in Section 404. In fact the word was used only twice in the entire Act in Section 208 as part of the title National Wetland Inventory. Not until 1977 was the word “wetland” added to Section 404 and then only as a parenthetical exclusion in Section 404(g)(1). If your predecessors intended Section 404 to serve to protect wetlands, they were amazingly inept at the use of the English language.

The most fundamental issue of fairness, rests with the determination of what landscape features can the federal government legally regulate. On May 10, 1973, the Corps proposed two definitions of the term “navigable waters” — one for activities under Section 10 of the R&H Act of 1899 and one for those under Section 404 of the CWA. However, by the time the Corps published its final rule on April 3, 1974, it had conducted a detailed legal review and made the following statements in the Preamble:

Section 209.120(d)(1). Several comments and questions were received concerning the different definitions which were assigned to the terms “navigable waters of the United States” and “navigable waters”. In this regard, it is noted that the Corps regulatory authority under the River and Harbors Act of 1899 (33 U.S.C. 401 et seq.) speaks in terms of “navigable waters of the United States”. This term has received the benefit of over 100 years of judicial definition and interpretation which has largely been based on the constitutional extent to which the authority of the United States can extend over the nation’s waterways. Recognizing that the extent of Federal authority over the nation’s waterways has been an evolutionary one and that recent judicial decisions have provided additional guidance and direction as to the scope and extent of this jurisdiction, the Corps recently undertook an extensive review of all of the judicial decisions in this area, and substantially revised and refined its administrative definition of this term to more accurately reflect and incorporate this judicial guidance. This revised definition, which was published in the Federal Register on September 9, 1972 (37 FR 18289) and has been subsequently included in the Code of Federal Regulations (33 CFR 209.260) asserts regulatory authority over many heretofore unregulated waterways, as well as establishing the geographical limits of this jurisdiction.

Section 404 of the FWPCA uses the term “navigable waters” which is later defined in the Act as “the waters of the United States.” The Conference Report, in discussing this term, advises that this term is to be given the “broadest possible Constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.” We feel that the guidance in interpreting the meaning of this term which has been offered by this Conference Report — to give it the broadest possible Constitutional interpretation — is the same as the basic premise from which the aforementioned judicial precedents have evolved. The extent of Federal regulatory jurisdiction must be limited to that which is Constitutionally permissible, and in this regard, we feel that we must adopt an administrative definition of this term which is soundly based on this premise and the judicial precedents which have reinforced it. Accordingly, we feel that in the administration of this regulatory program both terms should be treated synonymously.

In 1974, the Corps attempted to limit the program to those waters that it believed were navigable

within the confines of the Constitution. It was sued by the NRDC and lost at the District Court level. The Corps desired to appeal the decision, but the Department of Justice at the urging of the Environmental Protection Agency (EPA) declined to do so. Thus, two definitions for navigable waters arose - the one for Section 404 becoming the term “waters of the U.S.”

In January, 2001, Supreme Court Chief Justice Rehnquist writing for the majority opined in the SWANCC decision that:

The Corps’ original interpretation of the CWA in its 1974 regulations— which emphasized that a water body’s capability of use by the public for transportation or commerce determines whether it is navigable—is inconsistent with that which it espouses here, yet respondents present no persuasive evidence that the Corps mistook Congress’ intent in 1974.

While the Supreme Court chose not to address the Constitutionality of the issue of extended jurisdiction under the CWA since it ruled that the agencies had exceeded the statutory limits in regulating non-navigable, intrastate, isolated wetlands, that question remains open. I know of several cases across the Nation which will challenge the Constitutionality of the agencies’ expansive jurisdiction as they wend their way to the high court. Congress has the opportunity to preempt such a negative ruling that would strike down the CWA and perhaps others such as the Endangered Species Act by clarifying the extent of federal jurisdiction under the CWA and reaffirming Section 101(b) which reads:

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, to plan the development and use ... of land and water resources...

There is a fundamental difference between the responsibilities under most of the CWA and those specific to Section 404 as they have evolved. While rock, sand and cellar dirt are defined as “pollutants” under the CWA, they differ considerably from such other pollutants as solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials and the like. The former generally can be considered benign, while the latter often are harmful to the human and natural environment.

Certainly, natural soil in large quantities can eliminate a waterbody or in suspended form can degrade it, yet for most activities that are regulated under section 404, the purpose is not to get rid of a waste material. Rather, soil is moved or placed with the express intention of keeping it localized and stabilized at the original discharge site, so that a structure can be built or other work can be conducted on it. The fundamental purpose is to constructively advance societal needs - be it the construction of a hospital or a single family home. All of the harmful pollutants regulated under other sections of the CWA are wastes that someone is trying to eliminate.

When I use the term “agencies,” I am generally referring to the EPA and the Corps unless I specifically state otherwise. Because of the relationship between these two agencies, it is often difficult to separate responsibility for any particular action between them. So I will place blame collectively.

Several courts have extended the title of navigable waters to ditches, because they can carry pollutants to truly navigable waters. The agencies have been quick to follow. These courts have erred. Aside from the absurd notion that a typical roadside ditch is navigable, ditches are defined in the CWA as “point sources” not as “navigable waters.” For the EPA to regulate a harmful pollutant, it does not need all ditches and intrastate waterbodies to be designated as “navigable waters” under the statute. The only requirement is that the point source eventually discharge into a truly navigable water. Once that fact is established, then EPA has the statutory authority to follow the point source to the origin of the pollution, no matter how remote that origin may be from navigable waters.

Let me digress for a moment and discuss EPA's role as overseer in the administration of the program. Its limited function was set forth by Congress in Section 404(b)(1) and (c), as coauthor of the 404(b)(1) Guidelines and with veto authority over Corps decisions, respectively. However, according to Attorney General Civiletti's Opinion in 1979, the Corps is subservient to the EPA on one of the most fundamental aspects of the permitting program — determining the extent of jurisdiction. Thus, EPA decides “where” the Corps must regulate and over the last decade much of “what” it regulates, even though the statute clearly makes permitting decisions the sole responsibility of the Corps. In my opinion, this duplication is governance at its worst, causes numerous inequities and produces no environmental benefits. To the best of my knowledge, it is the only federal program where one department-level agency is under the control of another.

While public appearances may suggest otherwise, the Corps and EPA have never really worked cooperatively on the wetland permitting program — at least at the headquarters level. The degree of discord ebbs and flows over the years and with different administrations and different personalities, nevertheless, fundamental disagreements have existed since Congress first established this duplication of responsibilities. It is simple: EPA has final authority. The Corps can argue its point, but in the end, EPA gets its way. EPA can then sit back in the shadows, while the Corps marches forth to face the wrath of the public.

Furthermore, the Corps has been hamstrung as far as providing timely and consistent guidance to its field offices, since the practice over the last decade has been that most of the guidance must be screened by EPA. The fact that the Corps cannot provide necessary, consistent guidance, often results in the public being treated inequitably. Congress would do the public a vast service and reduce greatly the unfairness of having to satisfy two different agencies for the same action by eliminating one or the other agency from the mix. Alternatively, the Corps should be given full authority over the 404 program with EPA's roles limited to those specifically defined in Sections 404(b)(1) and (c).

Returning to the topic of jurisdiction, it has been the case that almost every court ruling since enactment that would pull in the reins on expansion of the program has been dismissed or minimized by the agencies, while every other judicial decision that broadens federal regulatory authority has been immediately applied on a national basis. Even after the recent Supreme Court decision, the agencies have been sending guidance to their field offices trying to minimize the effect of the high court's ruling.

Often the administrative expansion of the program is manifest through the unfair and inappropriate practice of establishing or modifying rules without following the Administrative Procedures Act and/or not codifying such rules. As best as I can determine, the practice began in 1984 when EPA unilaterally established the “migratory bird rule” that a decade and a half later was struck down by the Supreme Court in the SWANCC decision. The “rule” originated from the EPA Office of Counsel and was “promulgated by handing a memo to Senators Chaffee and Mitchell during Senate Subcommittee hearings. No APA procedure was ever followed. Corps Counsel would later write about the event as follows:

First, when one reads the EPA memo, it appears to be internally consistent and consistent with the relevant EPA and Corps regulations until one gets to the key, operative sentence of the memo, which is the following:

In simplified terms, the answer is that if the evidence reasonably shows that the waters “are used or would be used” by migratory birds or endangered species, it is covered by EPA's regulation.

This sentence seems a bit odd, since the regulations and the rest of the memorandum speak of “are used or could be used”, while the key sentence of the EPA memo changes that to “are used or would be used” (emphasis added in both quotations). The reader is left to ponder the questions, “would be used if what, or under what unstated condition?”

Puzzled by that inconsistency and ambiguity, I telephoned the staff attorney in EPA's Office of General Counsel who reportedly wrote the EPA's memo, and I asked for an explanation. That attorney stated that the discrepancy apparently was a typographical error; i.e., that "would" was supposed to read "could". I asked that attorney to try to send a corrected copy of the memo before we transmit it to Corps FOA's; the EPA attorney agreed to do that.

Unfortunately, the EPA attorney called me back a few days later to explain that her efforts to correct the typographical error had failed, because the incorrect version had already been transmitted to the Army and to Senator Chaffee. However, the EPA attorney told me that we should read "would" as "could", and that EPA did not recognize any difference in meaning between those two words in the context under discussion. I would characterize this approach to guidance as "government by typographical error."

In 1986, the Corps published revised regulations. At that time, the Corps wanted to codify the "migratory bird rule" since EPA had directed it to use the rule. EPA rejected the idea and the "rule" was only specified in the preamble. Perhaps EPA did not want the rule codified because it recognized even then that it was not consistent with the authority under the CWA or perhaps it had doubts as to its Constitutionality. For whatever reason for a decade and a half, the public was subjected to the harassment of the permit program, fined for violations and even prosecuted and convicted of violating the CWA for activities in isolated, intrastate, nonnavigable waters based on an uncodified "rule" that exceeded the statutory authority of the agencies charged with implementing the CWA.

The next flagrant example of this unfair practice was the issuance in 1989 of a MOA on mitigation which established new policy (as evidenced by numerous statements in the future tense indicating what the agencies "will" start doing) without the benefit of the APA process. Immediately upon issuance, the City of Anchorage sued over the lack of APA procedures. The agencies retracted the MOA and reissued it in 1990 with all the future tense verbs changed to present tense, suggesting that the practices were ongoing. In that document, the agencies established a new sequencing protocol which they claimed was a requirement of the 404(b)(1) Guidelines. It was and is not. Nowhere in the Guidelines does it state "appropriate and practicable compensatory mitigation will be required for unavoidable adverse impacts which remain after all appropriate and practicable minimization has been required." Yet as the years have progressed, the agencies have entrenched this doctrine in subsequent Federal Register publications until now it is used as if it were the eleventh commandment handed down on Mt. Sinai. Sequencing and the requirement for compensatory mitigation even have wormed their way into the nationwide permit program, contrary to the original MOA itself.

The events surrounding the "Tulloch Rule" are a perfect example of the agencies expanding the program as a result of a court case. In 1981, the Corps had issued Regulatory Guidance Letter (RGL) 81-4 which in summary said that *de minimis* discharges during dredging operations were not 404 discharges. It extended RGL 81-4 in 1984. The concept that *de minimis* discharges associated with land clearing were not regulated activities was reiterated in RGL 85-4. In 1986, the Corps issued a regulation that specifically excluded *de minimis* discharges from the definition of "discharge of dredged material." However, in 1990, by RGL 90-5 and without benefit of APA review, the Corps summarily changed its long-standing policy on *de minimis* discharges associated with land-clearing and started regulating excavation activities with only *de minimus* discharges.

It was not until 1993, after a court settlement entered into by Colonel Tulloch of the Wilmington District, that the agencies decided to observe the requirements of the APA and enter into rulemaking for this new policy. The only *de minimis* activity which remained exempt from regulation under the CWA was navigational dredging. Thus, the resuspension of sediments during the dredging from commercial harbors in truly navigable waters of millions of cubic yards of dredged material that is polluted with many of the most toxic substances introduced by humans into the environment was exempted from regulation under the CWA because it is *de minimis*, while the material that incidentally fell off a backhoe while

digging a ditch in a temporarily wet depression hundreds of miles from a navigable waterway required a permit.

Immediately upon issuance of the revised regulation, the American Mining Congress sued the agencies. The District Court held that the regulation was outside the statutory authority and contrary to the intent of Congress to the extent that it asserted jurisdiction under the CWA where the only discharge associated with an activity is incidental fallback. The agencies appealed the decision and the Circuit Court upheld the lower court's ruling in 1998.

As an indication of the lack of respect for the Constitutional roles of the Legislative and Executive branches, the Circuit Court related the following at the end of its opinion:

In a press release accompanying the adoption of the Tulloch Rule, the White House announced: "Congress should amend the Clean Water Act to make it consistent with the agencies' rulemaking." White House Office on Environmental Policy, *Protecting America's Wetlands: A Fair, Flexible, and Effective Approach* 23 (Aug. 24, 1993). While remarkable in its candor, the announcement contained a kernel of truth. If the agencies and NWF believe that the Clean Water Act inadequately protects wetlands and other natural resources by insisting upon the presence of an "addition" to trigger permit requirements, the appropriate body to turn to is Congress. Without such an amendment, the Act simply will not accommodate the Tulloch Rule. The judgment of the district court is *Affirmed*.

The agencies did not appeal the decision to the Supreme Court nor did it effect modifications of the law through legislative channels. Instead, in May 1999, the agencies published a modification of the definition of dredged material which exempted incidental fallback. At about the same time EPA began prosecuting individuals that undertook what became know as "Tulloch-ditching" under the NPDES program. In August 2000, the agencies proposed and in January, 2001, finalized a further modification of the definition of the "discharge of dredged material" which required that anyone excavating from waters of the U.S. prove that there would be no more than incidental fallback to the satisfaction of the agencies — a subjective decision by agency staff using unspecified criteria. Thus, when this second rule-change took effect in April 2001, the agencies had effectively rendered the Court's decision on Tulloch, meaningless.

Most recently, the agencies have taken to establishing programmatic definitions, not through APA process and subsequent codification but through the issuance of nationwide permits (NWP). Numerous, jurisdictional definitions such a ephemeral, intermittent and perennial streams, open waters, non-tidal wetlands, stream bed and waterbody first surfaced and exist only in the permit program documentation in the 2000 NWP Federal Register notice. Definitions on jurisdiction must stand independent of what specific permitting instrument may be used.

More egregiously, the agencies have used the NWP notices as a mechanism to expand further federal 404 jurisdiction into virtually every acre of property in the Nation through the change in policy which brought both ephemeral channels and drainage and irrigation ditches under the umbrella of "navigable waters." Until this recent change, Corps districts were not regulating ephemeral waters or constructed ditches. On October 17, 1994, for example, the Baltimore District of the Corps issued Baltimore Guidance Letter 95-01, which stated in part:

Project Managers are frequently required to determine the upstream limits of regulatory jurisdiction, including differentiating between intermittent streams, which are regulated [33 CFR 328.3(a)(3)], and ephemeral streams, which are not regulated. ... Since ephemeral streams, by definition, are always above the water table and receive no groundwater contribution, they act as rain gutters, conveying water for brief periods of time during and immediately following precipitation events.

Six years later in 2000 and even before the definition of ephemeral streams was finalized in the

Federal Register NWP notice, a Baltimore regulator inspecting a wetland delineation that I had completed in Potomac, Maryland, apologetically told me that I had to extend the jurisdiction upslope beyond the limits of the small bed and bank channel that I had flagged. The inspector explained that until the previous week he would never have regulated the upslope area, but that in training that the entire regulatory branch had just received, they were told that if there was any evidence that water collected and ran along the surface of the ground, that area was jurisdictional. In the instant case, water had pushed aside the leaves on the forest floor [“the presence of litter and debris” per the Corps definition of the ordinary high water mark (OHWM) at 33 CFR 328.3(e)] and this constituted an OHWM.

Pollution of the nations navigable waters cannot be stopped by regulating every little channel throughout country. The fact is that what happens on the entire landscape, not just in the channels or wetlands, ultimately influences the quality of the nation’s surface waters. That influence occurs either directly through the quality and quantity of overland flow or by the quality of the ground water which eventually discharges into the surface waters. What happens immediately next to the channel and upslope of 404 jurisdiction (at least for today) has as much probability of adversely effecting water quality as that which occurs in the channel. It is the right and responsibility of the states to manage the entire landscape and to determine which water quality measures are appropriate. In my opinion, the continued and increasing intrusion of the federal government into land management issues that rightly belong to the states is too great of an assault on federalism to withstand the Constitutional challenge that will eventually occur.

Today, over many thousands of miles of roadside ditches, landowners now need 404 permits to access their properties with culverted-crossings and state highway departments need 404 permits to relocate the ditches when roads are widened (the same ditches that were dug out of uplands when the roads were first constructed) all because the ditches might run through an otherwise isolated patch of wetland to a stream which is many miles away or bridge the upland gap between two streams. Worse yet, is the fact that federal protection is being provided to small channels that have no real ecological significance and may only be present because of erosion induced by poor land management practices in the past. The Corps gives as example in its August 9, 2001, NWP Federal Register notice the following:

To understand why, it is important to realize that the CWA’s geographic jurisdiction extends to the uppermost portions of tributary systems. Some streams extend for thousands of feet, but are extremely small. For example, a stream may consist of a drainage-way (which may have been straightened in the past by human activity) that is a six-inch wide by one-inch deep area running for several thousand feet throughout a grassy upland field. Such a stream may only have water flowing for a few days after a rain event. In some cases, this type of stream provides few, if any, aquatic functions and loss of more than 300 linear-feet of such a stream would not constitute more than minimal impacts.

In fact, in many instances, the presence of such channels actually damage valuable natural systems because of the sediment loads they carry and because they allow water to travel across the landscape at faster than natural rates and, thereby, increase the potential for flooding downstream. Oftentimes, these ephemeral drains should be eliminated (i.e., filled in and planted) so that more water will infiltrate into the soil and percolate down to the ground-water aquifer – not afforded protection as “navigable waters.”

While many regulators are just trying to do their jobs in a responsible fashion, there are those who abuse their authority and impose their personal agendas. It has been my experience that property owners and other alleged violators of Section 404 of the CWA are guilty until proven innocent in the eyes of the agencies. Because the courts generally give deference to the agencies, an allegation of violation is extremely difficult to successfully combat. Since there is essentially no accountability over the actions of the agency staff, they have almost unlimited authority to harass the public if they so choose. Many in the regulated community including local developers and consultants are reticent to complain about the abuses

of authority that they are subjected to for fear of future reprisals.

I firmly believe that reprisal was the name of the action taken against Louise Mango by the Department of Justice on the Iroquois Pipeline Project. Louise was president of a small environmental consulting company that was hired to work on the project. The Corps issued a permit for over 500 crossings of “navigable waters” along the length of the pipeline from the Canadian border through upstate New York to Connecticut. For some reason, Justice decided to go after the conglomerate that owned the pipeline. Justice offered Louise and her husband (who was vice-president of their company) immunity from criminal prosecution if they would testify against the officers of the conglomerate. Louise’s husband accepted but Louise, knowing that she had done nothing wrong and believing that the conglomerate had done nothing wrong, declined.

As time progressed, Justice extracted a large settlement fine out of the conglomerate and then offered immunity to all of its officers if they would testify against Louise. All but one vice-president of the conglomerate accepted. Over 40 criminal counts were brought against Louise and the conglomerate vice-president: the two people that declined the offer of immunity. Their alleged criminal activity was based on the government’s claim that less than 30 of the more than 500 crossings were not restored properly. I inspected all of the alleged violations and with the exception of 2 or 3 sites which could have been restored somewhat better, one could barely discern that a pipeline had been constructed through them. For this, Louise spent eight years of her life with criminal prosecution hanging over her head.

Setting and publicizing examples of violators was the theme of the agencies’ 1990 enforcement initiative. Through that initiative, high-profile alleged violators were prosecuted to put the public on notice of the ramifications of operating without a 404 permit. Because of the threat of litigation, many lending institutions started requiring a letter confirming that no navigable waters existed on a piece of property before they would finalize a loan. In New York District, the Corps could not keep up with all the requests.

Very recently, the concept of setting examples appears to be the motive for the legal action threatened against Donna Lovell, a wetland consultant from Montana. The Corps recommended to the EPA that she be prosecuted as a flagrant violator because three of her clients allegedly violated Section 404. Nothing in the Memorandum of Agreement on Enforcement between the Corps and EPA covers such a referral. Ms. Lovell is neither an owner nor an operator of any of the properties. Furthermore, with no vested interest in the properties, Ms. Lovell is completely powerless to prevent the owners from conducting any action, either legal or otherwise, on their properties that they so choose. While her clients allegedly violated the CWA - there has, as yet been no final decision that they actually did — they, and therefore she, apparently are guilty until proven innocent. The action by the agencies is clearly aimed at intimidating a regulatory consultant to set an example to others that might challenge the actions of the agencies.

In another case, the owners were accused of violating the CWA by clearing a tract of land to put it into agricultural production. The property had been completely surrounded by ditches and levees for years prior to the clearing, but the agencies disregarded the effect of these hydrologic alterations on the hydrology of the site.

First a large team of agency staff conducted a comprehensive wetland delineation over the course of several days. They later disregarded their own data because it indicated that the site was drained and not a wetland. Next the agencies’ expert hydrologist claimed that only the areas above a certain elevation were not wetlands. When we proved that the entire site, except for the ditch-bottoms, was higher than the specified elevation, they scrapped that approach. Finally, the agencies based their delineation claims on one aerial photograph that their aerial photo-interpreter claimed showed water on the site. Rather than continue to fight and suffer financial ruin, the farmer finally capitulated and settled the legal action by

deeding 170 of the 240 acres of the property to the government. Justice was not served - extortion prevailed.

It seems to be an unwritten rule that if you don't work for the agencies, you are morally corrupt and technically inferior. In another case, a Corps regulator with six months of regulatory experience claimed that more than 6 acres of a 7-acre parcel were jurisdictional wetlands before the client cleared the land to construct low-income housing units. I assembled a team that consisted of a Ph.D. hydrogeologist, the country's foremost hydric soils expert and myself with a Ph.D. in ecology. In addition, we had data from a Ph.D. geotechnical engineer and a licensed surveyor, both of whom had been on the property prior to clearing. The property undisputedly had been ditched decades before the alleged violation and the cross-sections of the ditches indicated that they were functioning although the agencies chose to disregard the survey data. While my technical team unanimously agreed that only a small amount of wetlands had been present on the site prior to clearing, the government persisted with the novice Corps delineator's assessment and delayed the project for more than a year, not willing to accept either our post clearing findings nor those of the geotechnical engineer and the surveyor who had been on site prior to clearing.

The case was finally settled through negotiations and some much needed low-income housing is now available in a very depressed area. My client ended up paying large consulting and legal fees, a stiff fine and a substantial mitigation requirement all on a piece of property that they were told by their original engineering firm and the City Director of Planning before they purchased it, that it contained no wetlands. It is virtually impossible for the average property owner to understand the regulatory program. I have spent the last 26 years working on it and it is a struggle for me to keep current with the constant changes and the expansions of jurisdiction. It often amazes me that anyone would be a land-developer (another apparently immoral occupation in the minds of some) in this day and age.

The assumption that the agencies are omniscient and above reproach carries into the deference that the courts show to agency testimony. In one case, the government hired a high profile academician from a well-known university as its lead, wetland expert. During sworn deposition the government's expert claimed that he had never conducted a wetland delineation that was submitted to the Corps. During testimony in court, however, he testified that he had prepared a delineation jointly with a private consulting firm that had been submitted to the Corps. After contacting the consulting firm, we learned and the government's expert ultimately admitted under oath, that his delineation and that of the consulting firm's were submitted independently to the Corps and that the Corps rejected his and accepted the consulting firm's. Despite the obvious perjury (not to mention the lack of expert-level experience), the court ruled that the government's expert was "a highly credible witness" and decided the case in the government's favor.

One of the most fundamental aspects of the program is the determination of 404 jurisdiction in wetlands. In 1989, the agencies agreed to use a new manual which in part specified that many areas which had a water table within 18 inches of the surface for only one week, have wetland hydrology. Within a year the farm community besieged Congress with the zealous actions of many agency regulators who claimed that vast areas of farm land that had been drained since European settlement was now considered wetland. The Johnston rider to the Corps 1992 Water Resources Appropriation Bill provided that none of the Corps regulatory budget could be used in reliance on the 1989 Manual until it had been processed under the APA.

Instead of going through APA, the Corps immediately switched back to the 1987 Manual and has purportedly relied upon it as supplemented by two sets of questions and answers issued in 1991, and 1992, ever since. Vestiges of the old 1989 Manual philosophy, however, are still practiced in the field and even taught by the Corps. For example, the 1987 Manual and 1991 and 1992-guidance all state that wetland hydrology is present when the ground is saturated to the surface or inundated for more than 12.5 percent

of the growing season. Between 5 and 12.5 percent, many areas are not wetlands and specifically if the dominants are Facultative they are not. The 1987 Manual on the web site, Corps training classes and many Corps regulators profess, however, the requirement is “at least 5 % of the growing season.” Furthermore, the definition of wetlands requires “saturated soil conditions.” The 1987 manual defines saturated soil conditions as soils with all pores filled with water to the soil surface at pressures greater than atmospheric (i.e., the water table must be at the soil surface). However, standard practice is that if the water table is within 12 inches of the surface, the agencies consider it “to the surface”. If time permitted, I would relate to you the story of the Justice attorney who while deposing me, tried to squeeze one more day of the water table at 12 inches to meet the 5 % “standard.”

Problems also attend the use of plants in the delineation process. The basic list of indicators for the plants was published in 1988 after groups of federal employees (myself included) subjectively assigned plants to categories. A decade later, FWS proposed modifications to the list that again were based upon subjective assignments. Thousands of data sheets had been collected after 1988, but the agencies never attempted to quantify the indicator ratings. We have, however, and found that the original ratings in many cases are erroneous. In addition, there is mounting evidence that a FAC-neutral analysis is more valid than the 50% rule advocated in the 1987 Manual.

A question for you. Why, if it is true (as the FWS claims) that over half the wetlands in the U.S have been lost (presumably all of them originally had hydric soils), and thus, over half of the hydric soils no longer support wetlands, is it so difficult to convince the agencies that an area with hydric soils is not a wetland?

Inequities abound in the permitting arena. For example, there are no time limits on processing individual permits. This fact was recognized and discussed in hearings before the House Subcommittee on Water Resources in 1990. While a permittee has presumptive authorization if the Corps does not respond within a 45-day time period in the NWP program, there is no such time limit on individual permits. Even the statutorily-mandated 15-day period to publish a public notice after receipt of a complete application is routinely ignored. The consequence is that many permits take very long periods for final resolution.

The Corps recently implemented an Administrative Appeals Process that lacks real substance. The Appeal Review Officer (RO), when all is said and done, has no authority to alter a permit decision. In the one instance that I know of, the RO found that the district had not followed proper procedures. The permit was remanded, the district corrected the procedural errors and the denial stood. In order for an appeal process to be meaningful, the RO must be given permit decision authority - otherwise the process unfairly protracts the inevitable.

There are MOAs between the Corps and EPA, FWS and NMFS based upon Section 404(q) that provide for elevation of individual permit applications. While the agencies seldom actually seek elevation, they often use the threat of it to extort concessions from permit applicants who often cannot afford the delays that the elevation process entails.

Finally, as I run up against my page-limit, I would like to identify inequities that exist in the NWP program. “Nationwide permits are a type of general permit issue by the Chief of Engineers and are designed to regulate with little, if any delay or paperwork certain activities having minimal impacts” – or so says 33 CFR 330.1(b). In 1977, the Corps first issued nine NWPS with seven applicable conditions. Four of those were for classes of waters and five were for specific activities. The “classes of waters” permits authorized all discharges that met the conditions into all headwaters, tributary and isolated lakes less than 10 acres in size and all isolated, non-lake waters with no notification.

Later that same year, Congress first enacted a provision allowing NWPs. Section 404(e)(1) states

that:

...the Secretary may, ... issue general permits on a State, regional or nationwide basis for any category of activities involving discharges of dredged or fill material if the secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.

While four of the NWP's that were in effect at the time that Congress wrote Section 404(e)(1) dealt with "classes of waters" and not specific activities Congress did not include that phrase in the CWA. Thus started one of the most contentious arguments in the permit program which ultimately led to the demise of NWP 26 which covered headwaters and isolated waters.

In 1982, the Corps issued/reissued 26 NWP's with nine conditions. One NWP still covered all headwaters and all isolated waters. None of the NWP's required any advance notification to the Corps. In 1986 the Corps reissued the 26 NWP's, placed a maximum 10 acre limit on the "classes of waters" (thereafter identified as NWP 26) and required advanced notice to the Corps for use of four NWP's. Fourteen conditions were established. By 1992, there were 36 NWP's with 22 conditions. Advance notification was required on 14 NWP's including NWP 26 which remained with a maximum impact of 10 acres and a notification threshold of 1 acre. In 1996 there were 39 NWP's with 24 conditions. The limit on NWP 26 had been reduced to 3 acres with a -acre notification threshold. Fourteen NWP's required notification and Condition 15 required that in many cases of multiple use of NWP's that notification would be required.

In 2000, the Corps revoked NWP 26 (purportedly because it did not satisfy the "activities ... similar in nature" requirement of Section 404(e)). In its stead, it issued 5 new NWP's none of which allowed more than ½ acre impact or 300 feet of linear stream impact and had -acre notification thresholds. It also modified 6 NWP's, added new conditions for a total of 26, one of which has 19 subparts, added compensatory mitigation and lengthened the review time from 30 to 45 days.

The NWP program has become so complex and in many respects so constrained that it is almost not worth having anymore. If you don't believe me, read NWP 44, Mining Activities, and see if you as individuals with above average intelligence and education can understand it. I need to draw a road map just to get through that one permit every time I teach it. Think of the aggregate mining equipment operator trying to figure out whether or not he is in violation of the CWA. Congress at a minimum should add "classes of waters" to Section 404(e)(1).

There was a real ecological value when developers would take extra time and even reasonable added expense to qualify for the NWP's. Now, it is impossible for many projects to qualify under the ½ acre maximum limit. As example, consider a destination resort in Idaho that I have been working on. The property is approximately 3,500 acres. The plan is to construct ski and golf facilities, hotels, commercial shopping, condominiums and single-family homes on the site. When the project was first proposed, the design called for about 35 acres of wetland impacts. When I became involved there were still 10 acres of impacts proposed. Because of the benefit of operating under the NWP program, I convinced the owners to modify the project so that transportation and utility line crossings accounted for almost all of the impacts, with minor stream diversions, stormwater management and only one building impacting any wetlands. Total impacts were reduced to under 2.7 acres. As mitigation, we will restore ½-mile of severely eroding stream and construct high quality wetlands.

Why did I push the owners to keep the project under the NWP program? The primary reason was to avoid the offsite, alternatives' analysis that is mandatory for individual permits. How far afield must you consider alternatives for a world-class, destination resort? The entire watershed? All of Idaho? All of the western U.S.? Or beyond?

I still remember the proposed Hampton Roads Oil Refinery that never was constructed. Ultimately the alternatives' analysis included the entire coast from Canada to Mexico. The time and cost of an alternatives' analysis can be exorbitant and will kill many projects. Furthermore, proving that there is no other alternative with less impact to the aquatic environment for such a project can be nearly impossible. The Idaho resort could not be constructed under today's NWPs. Many large projects cannot help but impact more than ½ acre of waters, irrespective of how well they are planned. It is physically impossible or the necessary construction modifications drive the cost to astronomical proportions.

Much of the NWP program has evolved to the complex mess that now exists because EPA in trying to appease environmental organizations has pushed it there. The public and the economy have suffered and there have not been any real gains to the environment. Delays simply cost money - they don't save the environment. Furthermore, once developers find that they can not get their project permitted under a NWP, they tend to increase the overall wetland impacts because the impact-intensive alternatives (e.g., culvert and fill instead of bridging) are less costly and they have to undergo the offsite alternatives review and delays anyway.

Finally, and perhaps the most absurd aspect of the NWP program is the fact that when the agencies lowered the advanced notification threshold from 1/3 to 1/10 acre they vastly increased the workload of the Corps regulators who have to review far more "applications", not to mention increased the delays to the regulated public. At the same time, they lowered the maximum allowable acreage that could be permitted under NWPs thus, increasing the number of individual permits for activities that would have been covered under the old NWPs, and, therefore, further increasing the Corps workload (as well as further delaying the public). The fact is that the same regulators evaluate both NWP advanced notifications and individual permit applications. They have always had the authority to revoke the NWPs on a case-by-case basis and require an individual permit. Thus, the logical thing to have done if the advanced notification threshold was lowered, was to increase the maximum acreage limit or at least not decrease it. The fact that both the advanced notification threshold and the maximum NWP acreage limit were decreased, showed a lack of confidence in the judgement of Corps regulators to decide when an activity is more than minimal, and a total disregard for the cost of operating the regulatory program, the cost in time and money for the regulated public to move through it and the environmental harm that is likely to ensue since the incentive to reduce project impacts no longer exists.

Thank you for this opportunity to express my views. I hope that these hearings will produce positive and meaningful changes in the program. It has consumed so much of my life and affects the lives of so many of the Nation's citizens. I will be happy to try to answer any questions that you might have.