

**Testimony of
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**Before the
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Good morning Mr. Chairman and Members of the Committee. I am pleased to be here this morning to speak to you about the Environmental Protection Agency (EPA) and US Army Corps of Engineers (Corps) joint regulatory program under Clean Water Act (CWA) section 404. My testimony focuses on the agencies' implementation of the U.S. Supreme Court decision in the consolidated cases *Rapanos v. United States* and *Carabell v. United States* (*Rapanos*.) The Corps and EPA have worked closely together in implementing these decisions, and will continue to do so as we work to further improve the reliability, transparency, and predictability of the Section 404 regulatory program that protects the nation's vital water resources.

I. Our Commitment to Wetlands Protection and an Effective Section 404 Program

A primary goal of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," including wetlands. Wetlands help protect water quality, store flood waters, absorb coastal storm surges, support commercially valuable fisheries and migratory waterfowl,

and provide primary habitat for myriad wildlife and fish species.

Since enactment of the Clean Water Act in 1972, the annual rate of wetlands loss has been significantly reduced from an estimated 290,000 acres per year in the 1970's to a net gain of approximately 32,000 acres of wetlands per year during the period between 1998 and 2004. This has been achieved through a combination of Federal, Tribal, and State regulatory activities and environmental restoration and protection projects in partnership with many state and local agencies and conservation groups. In 1988, then President Bush adopted the National Wetlands Policy Forum recommended national goal of "no net loss" of wetlands. More recently, President George W. Bush has challenged the country to go beyond no net loss of wetlands to achieve an overall increase of this vital aquatic resource. On Earth Day 2004, President Bush established a new goal to expand the nation's wetlands by restoring, improving, and protecting 3 million wetland acres by Earth Day 2009. Last year's report on the progress of achieving the goal highlighted that 2.8 million of the 3 million acres of wetlands had been restored, improved, and protected. It also noted that the Administration and its partners are on track to exceed the 3 million acre target by Earth Day 2008.

The Clean Water Act's section 404 program has played an important role in maintaining the quality and quantity of our nation's aquatic resources. Under section 404, any person planning to discharge dredged or fill material into waters of the United States must first obtain authorization from the Corps (or a tribe or state approved to administer the section 404 program). A discharge may be

authorized only when there is no practicable alternative with less adverse effect on the aquatic ecosystem, appropriate steps have been taken to minimize potential adverse effects to the aquatic ecosystem, and unavoidable effects have been offset by appropriate compensatory mitigation. Authorization may be in the form of an individual permit or a general permit. In practice, the vast majority of projects (92+% in 2006) are authorized by general permits, which require less paperwork by the project proponent and the agencies than an individual permit application, because the activities authorized by these permits have no more than minimal effects on the aquatic environment. Individual permit applications receive a more comprehensive review because, for the most part, these projects are larger, more complex, and involve a greater potential to adversely affect aquatic resources.

EPA and the Corps have worked together to administer Clean Water Act section 404 since its enactment in 1972. The Corps has the primary day-to-day implementation responsibility for the section 404 regulatory program, including the review and authorization of activities involving the discharge of dredged or fill material in wetlands and other waters, and performs the vast majority of jurisdictional determinations associated with the program. EPA developed, in consultation with the Corps, the Section 404(b)(1) Guidelines, which are the environmental criteria that the Corps applies when deciding whether to issue a section 404 permit. In addition, EPA interprets statutory exemptions from section 404 permitting requirements, coordinates with states or tribes that choose to administer the section 404 program, and is responsible for determining the

geographic scope of Clean Water Act programs, including section 404. EPA and the Corps share section 404 enforcement responsibilities.

EPA and the Corps, in coordination and cooperation with other federal, tribal, and state agencies, continue to advance the goal of an overall net gain in wetlands, while further improving the effectiveness, predictability, and transparency of the section 404 program. These actions include such initiatives as the Compensatory Mitigation for Losses of Aquatic Resources Rule (Mitigation Rule). The Corps and EPA are promoting greater consistency, predictability and ecological success of mitigation projects under the Clean Water Act through this new rule published on April 10, 2008. This rule changes where and how mitigation is to be completed, but maintains existing requirements on when mitigation is required. The rule also preserves the requirement for applicants to avoid and minimize effects to aquatic resources before proposing compensatory mitigation projects to offset permitted effects. This rule will help establish innovative standards to promote no net loss of wetlands from permitted activities by improving wetland conservation and restoration in a watershed context. Another initiative is the Corps investing in a new database management system, ORM2, a web-based tool to improve the management of the Corps' regulatory programs, including recording effects of authorized activities and the permanence of compensatory mitigation projects. The Corps and EPA are working together on a new computer interface so that the agencies' staff can have access to relevant data both in ORM2 as well as in EPA databases. EPA also continues to collaborate with our partners, such as the Department of

Agriculture (USDA), the U.S. Fish and Wildlife Service (US FWS), and the National Oceanic and Atmospheric Administration (NOAA) to enhance our Clean Water Act regulatory and non-regulatory tools in order to further protect wetlands. For example, EPA's Wetlands Program staff has worked with USDA in the development of guidance on constructed wetlands and water quality improvements. We are continuing to collaborate closely with US FWS to update and digitize the National Wetlands Inventory and report the status and trends of the nation's wetlands. EPA also continues to support state and tribal efforts to protect wetland resources through Wetland Program Development Grants, which build capacity in areas such as monitoring, development of wetlands water quality standards, and identification of sites for restoration.

II. The Supreme Court Decisions in *SWANCC* and *Rapanos*

In 2001, the Supreme Court held in *SWANCC* that Clean Water Act jurisdiction could not be asserted over non-navigable, intrastate, isolated waters based solely on the presence of migratory birds. EPA and the Corps issued joint guidance regarding the decision in January 2003, clarifying that the "migratory bird rule" may not be used as the sole basis for jurisdiction over such waters. 68 FedReg. 1991. In 2006, the Supreme Court issued three substantive opinions in *Rapanos* focusing on the current jurisdictional reach of the Clean Water Act, with none of the opinions having majority support. 126 S.Ct. 2208.

In an opinion written by Justice Scalia, a plurality of the Court concluded that "waters of the United States" protected by the Clean Water Act should

extend only to “relatively permanent, standing or continuously flowing bodies of water” connected to traditional navigable waters, and to “wetlands with a continuous surface connection to” such relatively permanent waters. 126 S.Ct. 2208, 2225-27.

Justice Kennedy concurred with the plurality that the cases should be remanded, but disagreed with the plurality's analysis. He concluded that a wetland is a “water of the United States” under the Act “if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” When the wetland's effect on the navigable water is “speculative or insubstantial”, Justice Kennedy would consider the wetland non-jurisdictional. 126 S.Ct. 2208, 2248. Justice Stevens wrote a dissenting opinion, joined by three other justices, which concluded that the Corps of Engineers' decision to treat the wetlands at issue as jurisdictional was a reasonable interpretation in light of the ambiguity of that statutory term and the important water quality role of wetlands.

III. The Interagency *Rapanos* Guidance

Following the Supreme Court's ruling in *Rapanos*, EPA and the Corps issued guidance to their section 404 field staff on June 5, 2007. The *Rapanos* Guidance implements the Supreme Court ruling by clarifying that traditionally navigable waters and their adjacent wetlands plus relatively permanent waters and wetlands with a continuous surface connection to such relatively permanent

waters are subject to jurisdiction under the Act. In addition, the guidance states that jurisdictional determinations for non-navigable, non-relatively permanent waters and their adjacent wetlands, as well as for wetlands adjacent to but not directly abutting relatively permanent waters, are to be based on reliable data which demonstrate that they significantly affect the chemical, physical, or biological integrity of the Nation's waters. Over the past 10 months, EPA and the Corps have been working together to apply the Guidance in a fair, consistent, and effective manner. The *Rapanos* Guidance itself clarifies how section 404 field staff should apply the *Rapanos* decision to assess the scope of waters covered by the Act. The *Rapanos* Guidance focuses on those provisions of the Corps and EPA regulations at issue in *Rapanos* – 33 CFR §328.3(a)(1), (a)(5) and (a)(7) and 40 CFR §230.3(s)(1), (s)(5), and (s)(7), which govern the jurisdictional status of traditional navigable waters, tributaries, and adjacent wetlands. Based on existing case law governing split decisions, the Guidance clarifies that the agencies will assert jurisdiction over waters that satisfy either the plurality standard or the standard articulated by Justice Kennedy. Specifically, the Guidance states that the following categories of waters are jurisdictional: all traditional navigable waters and their adjacent wetlands, all relatively permanent waters and any abutting wetlands, and non-relatively permanent waters, their adjacent wetlands and wetlands adjacent to but not abutting relatively permanent waters if a science-based, fact-specific analysis indicates that they have a significant nexus to a downstream traditional navigable water. Consistent with Justice Kennedy's direction that wetlands should be considered together with

similarly situated lands, the Guidance further clarifies that significant nexus determinations should evaluate the tributary at issue and all of its adjacent wetlands holistically, and determine that there is a significant nexus if the tributary and wetlands collectively have a significant impact on the chemical, physical, and biological integrity of a downstream navigable water.

The *Rapanos* Guidance did not discuss “isolated” waters that might be jurisdictional under 33 CFR 328.3(a)(3) or 40 CFR 230.3(s)(1). The circumstances under which such waters might be found jurisdictional consistent with the *SWANCC* decision have been described in interagency guidance issued by EPA and the Corps in January 2003.

The agencies issued a number of related documents concurrently with the Guidance in June 2007 to aid in implementation of the *Rapanos* decision. For example, we issued an Instructional Manual and Jurisdiction Form as technical assistance to field staff to assist in making jurisdictional determinations (JDs) consistent with the *Rapanos* Guidance. We established a temporary, enhanced interagency coordination process to ensure that JDs involving either significant nexus determinations or “isolated” (a)(3) waters were reviewed by staff from both agencies, with an opportunity to elevate complicated determinations or policy questions to agencies’ headquarters. This coordination process also revised a provision in the January 2003 guidance by requiring that all “isolated” (a)(3) JDs be sent to headquarters for review, not just those asserting jurisdiction. The enhanced coordination procedure expired on [date], having served its purpose, except for the provision dealing with (a)(3) waters, which remains in effect.

Through the close cooperation of EPA and Corps field staff, and evaluation of the relatively small number of cases elevated to headquarters for further review, we identified a number of implementation issues that would benefit from additional clarification, and we are currently working expeditiously to address these issues. We also developed a number of “Q&As” discussing issues associated with the *Rapanos* decision, the Guidance, and the agencies’ implementation of section 404 in light of those developments. In addition, we have been providing joint web-assisted training for our field staff on how to implement the *Rapanos* decision, are planning field-based joint training, and have given numerous presentations at public conferences.

Our primary purpose in issuing the Guidance and associated technical documents, coupled with training, was to ensure a clear understanding of jurisdictional determination documentation requirements and foster a high level of national consistency in jurisdictional determination documentation and decisions in the section 404 program.

To help ensure the public keeps informed as we implement *Rapanos* in the section 404 context, EPA and the Corps have established websites devoted to all Guidance-related materials [<http://www.epa.gov/owow/wetlands> and http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/cwa_guide.htm] . This allows the public (as well as agency staff) to have one place to check for the latest updates, clarifications, and revisions. Corps Districts are also now posting all jurisdictional determinations on their public websites.

IV. *Rapanos* Guidance Implementation

The Corps has the primary responsibility under the Clean Water Act (CWA) for work related to the issuance of Section 404 permits. Under the coordination agreement, EPA staff is working closely with them on some of those determinations, particularly those few with unusual or ambiguous circumstances which require more careful judgment in application of the Guidance. Based on data Corps headquarters has gathered from its 38 District offices, 18,619 JDs have been finalized for those waters addressed by the Guidance (e.g., traditional navigable waters and their adjacent wetlands, relatively permanent waters with abutting wetlands, other waters requiring application of the significant nexus standard) since release of the *Rapanos* Guidance in June 2007. Further details regarding these finalized JDs have been provided by EPA to the Committee. In addition to these statistics on waters directly addressed by the *Rapanos* decision, approximately 1,050 JDs involving (a)(3) waters have been completed.

As part of coordination, Corps District and EPA Regional field staff discussed draft JDs involving significant nexus analyses, resolving data and other concerns at the staff level wherever possible. It is important to note that only a small percentage of draft JDs have required additional coordination between the Corps and EPA, and discussions regarding the vast majority of those are concluded at the staff level. Where issues have arisen that require additional clarification, the draft JDs are raised to the agencies' headquarters for resolution. As of March 14, ninety five significant nexus-related draft JDs have

been elevated to headquarters, representing about one half of one percent of the JDs conducted during this time frame, and less than ten percent of the total under interagency coordination, further indicating the success of discussions at the field level.

The interagency coordination procedures currently call for EPA and Corps headquarters to receive all draft (a)(3) waters-related jurisdictional determinations. Between June, 2007, and March 14, 2008, a total of 1,048 draft jurisdictional determinations involving (a)(3) waters have been submitted to EPA headquarters. Of those, over 150 have been reviewed by EPA and Corps headquarters staff and sent back to the Districts for reconsideration as potentially jurisdictional under provisions of the regulatory definition of “waters of the US” other than (a)(3) for additional information-gathering regarding potential jurisdictional bases.

V. Public Comments and Next Steps Regarding the *Rapanos* Guidance

When EPA and the Corps issued the interagency *Rapanos* Guidance in June 2007, we sought public comments on the guidance and committed to reissue, revise, or suspend the guidance in light of those comments and the agencies’ implementation experience. We received over 62,000 public comments (including about 1500 substantive comments and over 60,000 form letters and e-mails) during a seven-month comment period which ended on January 21, 2008.

Commenters identified a number of areas where greater clarity would

promote more timely and consistent JDs. EPA and the Corps are working as expeditiously as possible to evaluate the comments and the issues that have arisen during the first nine months of implementation, and will announce the results of this review shortly. In the meantime, Corps Districts and EPA Regions will continue to use the guidance on an interim basis to make JDs until such time as it is reissued, revised, or suspended. Lessons learned through implementation of the Guidance and information provided in the public comments will be used to inform the agencies' determination whether to reissue, revise, or suspend the Guidance.

VI. Implications of *Rapanos* Decision on Other CWA Programs

The government's long-standing position is that there is only one definition of "waters of the US" and it is the same for all CWA programs, including section 404, section 402 (National Pollutant Discharge Elimination System, or NPDES), section 311 (oil spills) and section 303 (water quality standards). While the definition of "waters of the US" is the same, the CWA provides these programs with different authorities and responsibilities for protecting those waters. As a result, the joint EPA-Corps *Rapanos* Guidance does not discuss implementation of the *Rapanos* decision outside the section 404 context.

For example, "waters of the U.S." is an important, but not the only factor in determining whether an NPDES permit is needed for a particular discharge. Justice Scalia noted in the plurality decision that "...there is no reason to suppose that our construction today significantly affects the enforcement of §

[402]. The Act does not forbid the ‘addition of any pollutant *directly* to navigable waters from any point source,’ but rather the ‘addition of any pollutant *to* navigable waters.’” (emphasis in original). 128 S.Ct. 2208, 2227. This acknowledges that discharges that may reach “waters of the U.S.” through a “conveyance” before reaching the “waters of the U.S.” will continue to need a permit under the NPDES program.

Similarly, the Clean Water Act section 311 oil spill response program responds to discharges or substantial threats of discharges of oil into waters of the U.S. and adjoining shorelines. Jurisdictional issues often arise in connection with EPA’s deployment of staff upon receipt of a notice of a spill or threat of a spill to inland waters. In those situations where an on-scene response is deemed appropriate, EPA coordinates closely with the U.S. Coast Guard’s National Pollution Fund Center (NPFC). The NPFC will reimburse EPA’s removal costs incurred in response to a discharge or substantial threat of a discharge of oil into waters of the U.S. or adjoining shorelines. To date, the NPFC has not found any EPA oil spill response actions to be ineligible for reimbursement after *Rapanos*.

The case-by-case analysis called for under *Rapanos* and reflected in the Guidance has generated the important benefit of greater coordination among the Clean Water Act section 404 program and other CWA programs within EPA, and has also led to the much greater coordination between EPA program offices and the Corps. For example, when assessing a potential significant nexus between a waterbody and downstream traditional navigable water, the Corps and EPA 404 programs have been working with EPA’s Water Quality Standards program to

understand the relevance of the water quality standards set for those waters and the impairments and causes of impairment found in those downstream waters. Similarly, section 404 staff have been coordinating closely with section 402 NPDES staff on jurisdictional decisions having direct or indirect implications for waters on which discharges are currently authorized under section 402. Coordination with the Office of Enforcement and Compliance Assurance also has been important to ensure that the jurisdictional determinations associated with any ongoing and future enforcement cases are consistent with the *Rapanos* decision and the Guidance.

VII. H.R. 2421

We understand that H.R. 2421, the “Clean Water Restoration Act of 2007,” would remove the word “navigable” from the description of covered waters, and that its stated purpose is to protect the waters of the United States to the fullest extent of the legislative authority of Congress under the Constitution.

As described in detail above, we are strongly committed to protection of wetlands and believe we are doing a good job under the current statutory framework. However, we have serious concerns about the potential effects of HR 2421. These are discussed in more detail in Secretary Woodley’s testimony. However, I will briefly mention a few here. We are concerned that application of the legislation may raise potential constitutional and programmatic issues associated with removal of the term “navigable waters” from the Act. Similarly, we are concerned about the effect of the bill on existing CWA programs, including the use of the term “activities” rather than “discharge” in describing the

scope of regulation. Both these changes might be construed to expand the scope of CWA authorities in unintended ways and lead to protracted litigation. Another concern is that the bill fails to include the long-standing regulatory exemptions from jurisdiction for “prior converted cropland” and waste treatment systems. We’d like to better understand the reasons behind and potential implications of this omission. Finally, the bill also seems likely to have implications for states and tribes, who work collaboratively with EPA and the Corps to achieve the Act’s water quality goals. It appears to alter the Federal-State balance of authorities and responsibilities crafted in the original Clean Water Act and may have different effects in different regions of the country, which will need to be carefully considered.

VIII. Conclusion

Mr. Chairman, EPA and the Corps remain committed to using the full range of our regulatory and non-regulatory tools to protect America’s wetlands and waters. The agencies will continue to work collaboratively to implement our responsibilities in a manner consistent with the Clean Water Act and its implementing regulations, as these have been interpreted by the courts. I look forward to the opportunity to coordinate with the Chairman and this Committee as we work to achieve these important goals. I appreciate your interest and would be pleased to answer any questions you or the Members of the Committee might have.