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Good afternoon, Mr. Chairman and Members of the Committee. We welcome the opportunity to present joint testimony to you today on issues concerning Clean Water Act (CWA) jurisdiction over waters of the United States. Our testimony will address the status of federal jurisdiction in light of the Supreme Court ruling in Rapanos v. United States and Carabell v. United States. In particular, our testimony will provide background information on our agencies' roles and responsibilities under the CWA, summarize the Rapanos and Carabell decision, and discuss the steps our two agencies are undertaking to ensure all CWA programs, including section 404, are implemented in a manner consistent with the CWA.

Overview of Administration Wetlands Policy

From “No-Net-Loss” to Net Gain of Wetlands

President Bush established, on Earth Day 2004, a national goal to move beyond “no net loss” of wetlands and to attain an overall increase in the quantity and quality of wetlands in America. Specifically, the President established a goal to increase, improve, and protect three million acres of wetlands by 2009. Since the President announced this objective, EPA, the Corps, the U.S. Department of Agriculture (USDA), and the Department of Interior (DOI) have restored, created, protected or improved 1,797,000 acres of wetlands. We now have 588,000 acres of wetlands that did not exist in 2004, we have improved the quality of 563,000 wetland acres that already existed, and we have protected the high quality of 646,000 acres of existing wetlands.

These accomplishments were achieved by assuring no net loss of wetlands through the regulatory requirements of the 404 program, and also through federal agency conservation programs, including those administered by EPA, the Corps, USDA, DOI, and the Department of Commerce.

To sustain this commitment to wetlands conservation, the President’s 2007 budget proposes $403 million, an increase of $153 million over the 2006 level, to enroll 250,000 acres into the USDA’s Wetlands Reserve Program

(WRP). This program is crucial to the President's national wetlands initiative and, if enacted, the budget request would enable an annual enrollment of 250,000 acres, an increase of 100,000 acres over FY 2006, and would bring total cumulative enrollment to more than 2.2 million acres. In addition, restored wetlands enrolled in the USDA's Conservation Reserve Program reached 2 million acres as of June, 2006. These restored wetlands are the result of several initiatives, including the 500,000 acre Bottomland Hardwood Timber Initiative and the new 250,000 acres Non-Floodplain Wetland Restoration Initiative.

Congress is an essential partner in the President's conservation agenda, and we look forward to continuing our collaboration with you towards reaching our wetlands goals.

Equally necessary to our continued commitment to wetlands conservation is the 404 regulatory program. Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the nation's waters", including wetlands, through programs such as section 404. Wetlands are among the Nation's most valuable and productive natural resources, providing a wide variety of functions. They help protect water quality, reduce downstream flooding by storing flood waters, maintain flows and water levels in traditional navigable waters during dry periods, support commercially valuable fisheries, and provide primary habitat for wildlife, fish,

and waterfowl. Wetlands are at the core of this country's rich natural heritage and are central to its healthy, prosperous future.

Since 1990, it has been the goal of the Environmental Protection Agency (EPA) and the U. S Army Corps of Engineers (Corps) to achieve no net loss of wetlands in the section 404 program. Under section 404, any person planning to discharge dredged or fill material to waters of the U.S. must first obtain authorization from the Corps (or a Tribe or State approved to administer the section 404 program), through issuance of an individual permit, or must be authorized to undertake that activity under a general permit. In practice, the vast majority of projects (95% in 2003) are authorized under general permits, which require less paperwork by the project proponent than an individual permit application. In terms of the section 404 program, the no-net-loss goal is being accomplished through avoidance, minimization, and compensation for unavoidable impacts to aquatic resources. Corps' data show that we continue to achieve no net loss of wetlands in the 404 regulatory program. However, it is only one of the tools in the Administration's efforts to achieve an overall increase in wetlands nationwide.

In the 34 years since its enactment, the CWA section 404 program – together with Swampbuster, ongoing public and private wetlands restoration programs, and active State, Tribal, local, and private protection efforts – has helped to prevent the destruction of hundreds of thousands of acres of

wetlands and the degradation of thousands of miles of rivers and streams. The annual rate of wetland loss, from development as well as subsidence and other natural causes, is estimated to have been reduced from 460,000 acres per year in the 1950's to 60,000 acres annually between 1986 and 1997, and recent data indicates that we are achieving an annual net gain in certain types of wetland acreage and continuing to reduce the net loss of other types.

EPA and Corps Responsibilities Under Section 404

The EPA and the Corps coordinate to implement the section 404 program under the CWA, which regulates discharges of dredged or fill material, helping to protect wetlands and the aquatic environments of which they are an integral part, and maintain the environmental and economic benefits provided by these valuable natural resources.

The Corps is responsible for the day-to-day administration of the section 404 program, including reviewing permit applications and deciding whether to issue or deny permits. Annually, the Corps staff makes approximately 100,000 jurisdictional determinations, and reviews more than 80,000 individual permits and general permit authorizations. EPA comments on these permits as part of the public interest review process. EPA's role under CWA section 404 includes coordinating with States or Tribes that choose to administer the section 404 program, interpreting statutory exemptions from the permitting requirement, and sharing enforcement responsibilities with the

Corps. EPA also develops and implements, 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 section 404 permits.

In addition to its activities under section 404, EPA coordinates implementation of numerous other CWA provisions that involve "waters of the United States." For example, EPA and approved States and Tribes issue permits under section 402 for discharges of pollutants other than dredged and fill material, and EPA reviews and approves water quality standards developed by approved States and Tribes under CWA Section 303.

Cooperative Implementation of Section 404 and Wetlands Protection

EPA and the Corps have a long history of working together closely and cooperatively in order to fulfill our important statutory duties on behalf of the public. In this regard, the Corps and EPA have concluded a number of written agreements to further these cooperative efforts in a manner that promotes predictability, consistency, and effective environmental protection. For example, on March 28, 2006, the U.S. Army Corps of Engineers and EPA published a proposed set of new standards to promote "no net loss" of wetlands and streams. This proposed "mitigation rule" represents a collaborative effort between the Corps and EPA to develop a consistent set of science-based standards to compensate for unavoidable impacts to wetlands, streams, and other aquatic resources. The rule establishes a single set of standards that all

forms of compensation must satisfy, and that is based on better science, increased public participation, and innovative market-based tools.

Implementation of the comprehensive, multi-agency Mitigation Action Plan (MAP) [December, 2004] and the Mitigation Regulations will improve the ecological performance and results of compensatory mitigation, and we are committed to ensuring that these two complementary efforts work together. To that end, we are making adjustments to some of the timelines for release of remaining MAP guidance documents to ensure that they are in harmony with the mitigation rule. The public comment period closed on the proposed mitigation rule on June 30, 2006, and the agencies are in the process of reviewing comments.

Intergovernmental cooperation extends well beyond EPA and the Corps. An important component of successful implementation of the CWA section 404 program is a close working relationship with States and Tribes. States and Tribes may assume operation of the section 404 program, and to date two have done so (Michigan and New Jersey). Many States and Tribes have chosen to protect wetlands under State/Tribal law, while working cooperatively with the federal agencies without formally assuming the 404 program.

The Administration remains committed to a strong Federal-State partnership to protect the Nation's waters. Annually, EPA has awarded an

average of $15 million to help enhance existing or develop new wetlands protection programs at the State, Tribal, and local levels. The Bush Administration has asked Congress to appropriate an additional $1 million for these important programs as part of its FY 2007 budget request.

In addition to the grants mentioned above, EPA provides funding assistance for a variety of CWA programs involving wetlands and other waters. For example, EPA awards grants to States and Tribes to implement projects and programs to reduce "nonpoint" sources of pollution, to support approaches of controlling stormwater and other "wet weather flows," and to reduce and prevent pollution of specific waters such as the Great Lakes and the Chesapeake Bay. The Agency also advances the President's Cooperative Conservation agenda through collaborative efforts such as the 5 Star Grants Program and the National Estuaries Program.

Supreme Court Decision in Rapanos and Carabell

The judgment of the Supreme Court was to vacate and remand both cases for further proceedings. In summary, four Justices, in a plurality opinion authored by Justice Scalia, concluded that "the lower courts should determine ... whether the ditches or drains near each wetland are 'waters' in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the wetlands in question are 'adjacent' to these 'waters' in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we

addressed in *Riverside Bayview*." 126 S.Ct. at 2235. Justice Kennedy, who concurred in the judgment of the Court, established a different test, concluding that the cases should be vacated and remanded to determine "whether the specific wetlands at issue possess a significant nexus with navigable waters." Id. at 2252. Chief Justice Roberts joined in the plurality opinion and also wrote a concurring opinion. Justice Stevens, in a dissenting opinion in which Justices Souter, Ginsburg, and Breyer joined, would have affirmed the decisions by the lower courts. Justice Breyer also wrote a separate dissenting opinion.

The plurality opinion, authored by Justice Scalia, first concluded that the petitioner's argument that the terms "navigable waters" and "waters of the United States" are limited to waters that are navigable in fact "cannot be applied wholesale to the CWA." Id. at 2220. Citing CWA Section 502(7) and 404(g)(1), Justice Scalia opined that "the Act's term 'navigable waters' includes something more than traditional navigable waters." Id. Then, after reviewing the statutory language, the plurality concluded that "waters of the United States," includes "relatively permanent, standing or flowing bodies of water. The definition refers to water as found in 'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies' of water 'forming geographical features.'" Id. at 2221 (citation omitted). The phrase does not include "ordinarily dry channels through which water occasionally or intermittently flows." Id. The Corps' interpretation of the term "the waters of the United States," the plurality concluded, was not based on a permissible construction of the statute.

Justice Scalia elaborated on this test in footnotes. He stated:

> By describing "waters" as "relatively permanent," we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months-such as the 290-day, continuously flowing stream postulated by Justice Stevens' dissent. . . .
>
> It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that the dissent's "intermittent" and "ephemeral" streams . . . that is, streams whose flow is "[c]oming and going at intervals...[b]roken, fitful," . . . or "existing only, or no longer than, a day; diurnal . . . short lived" . . . are not. Id. at 2221 n.5 (citations omitted).

The plurality then examined the factor of the adjacency of the wetlands under review to "waters of United States." Justice Scalia concluded that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a 'significant nexus' in SWANCC." Id. at 2226 (citation omitted and emphasis in original).

In response to arguments that this opinion would "frustrate enforcement against traditional water polluters [under CWA sections 301 and 402] . . ., " the plurality concluded: "That is not so." Id. at 2227. The plurality went on to say that "from the time of the CWA's enactment, lower courts have held that the

discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates [section 301], even if the pollutants discharged from a point source do not emit ‘directly into’ covered waters, but pass ‘through conveyances’ in between.” Id. (citation omitted).

Justice Kennedy did not join the plurality's opinion, but instead authored an opinion concurring in the judgment. He agreed with the plurality that the statutory term "waters of the United States" extended beyond water bodies that are navigable-in-fact. Justice Kennedy, however, concluded that wetlands are "waters of the United States" where “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.’" Id. at 2248. The concurrence by Justice Kennedy stated, in relevant part, that "[a]s applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone." Id. With respect to wetlands adjacent to nonnavigable tributaries, Justice Kennedy explained that: "[a]bsent more specific regulations, . . . the Corps must establish a significant nexus on a case-by-case basis[.]" Id. at 2249.

Justice Kennedy did not agree with the plurality’s interpretation of "waters of the United States" and agreed with the dissent “that an intermittent flow can

constitute a stream. . . . It follows that the Corps can reasonably interpret the Act to cover the paths of such impermanent streams." Id. at 2243 (citation omitted).

In his concurring opinion, Chief Justice Roberts wrote that "[i]t is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis. This situation is certainly not unprecedented. See *Grutter v. Bollinger*, 539 U.S. 306, 325 . . . (2003) (discussing *Marks v United States*, 430 U.S. 188. . . (1977))." 126 S.Ct. at 2236.

The four dissenting Justices would have affirmed the lower courts' opinions and upheld the Corps' exercise of jurisdiction in these cases as reasonable. Justice Stevens also concluded: "In these cases, however, while both the plurality and Justice Kennedy agree that there must be a remand for further proceedings, their respective opinions define different tests to be applied on remand. Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases - and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied - on remand each of the judgments should be reinstated if *either* of those tests is met." Id. at 2265.

The Department of Justice testimony will elaborate further on the effect of the Supreme Court Decision.

Steps to Clarify CWA Jurisdiction after the Rapanos and Carabell Decision

The Rapanos and Carabell decision has important implications for administration of the CWA.

The United States will fully implement the CWA consistent with the Rapanos and Carabell decision. The Agencies are working closely with the U.S. Department of Justice to interpret the decision and its impacts on the scope of "waters of the United States" protected under the CWA. In particular, we are working on joint EPA/Corps guidance clarifying CWA jurisdiction in light of the Rapanos and Carabell decision. It is our hope that the guidance moves us beyond disagreement over how widely we assert jurisdiction, and toward an agreement on how effective we are in protecting wetlands that provide ecological and social benefits. The development of guidance should not be about bigger or smaller jurisdiction but about better results.

In the meantime, our field staff continues to administer CWA programs. To ensure consistent interpretation of the scope of "waters of the U.S." in light of Rapanos and Carabell, EPA and the Corps issued immediate guidance to field staff shortly after the decision, indicating that: the field staff should continue to process permit authorizations; to the extent circumstances permit, the field staff should temporarily delay making jurisdictional calls beyond the limits of the traditional section 10 navigable waters; and where delays are not possible and

permit actions require taking a position on CWA jurisdictional scope, such determinations should be deferred, where possible, until further guidance is provided by Headquarters of both agencies.

In summary, EPA and the Corps are working quickly to develop interim guidance regarding the tests defined by the Supreme Court in the Rapanos/Carabell decision, in order to provide clarity for the public and to ensure consistency among CWA jurisdictional determinations nationwide.

Conclusion

The agencies remain fully committed to protecting all CWA jurisdictional waters as was intended by Congress. Safeguarding these waters is a critical federal function because it ensures that the chemical, physical, and biological integrity of these waters is maintained and preserved for future generations. Our goal in moving forward is to clarify what waters are properly subject to CWA jurisdiction in light of the Rapanos/Carabell decision and afford them full protection through an appropriate focus of Federal and State resources in a manner consistent with the Act. Working collaboratively and in cooperation with the Department of Justice, EPA and the Corps will continue to assess CWA jurisdiction in light of Rapanos/Carabell issuing additional guidance and refinements as appropriate. We also wish to emphasize that although the Rapanos /Carabell decision and our testimony today focus on federal jurisdiction pursuant to the

CWA, other federal or State laws and programs continue to protect waters and wetlands that may no longer be jurisdictional under the CWA following these decisions.

Thank you for providing us with this opportunity to present this testimony to you. We appreciate your interest in these important national issues that are of mutual concern.

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