TESTIMONY OF
ROBERT H. WAYLAND, III
DIRECTOR, OFFICE OF WETLANDS, OCEANS, AND WATERSHEDS
OFFICE OF WATER
U.S. ENVIRONMENTAL PROTECTION AGENCY
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Good morning, Mr. Chairman and members of the Committee. I am Robert H. Wayland, III, Director of the Environmental Protection Agency=s (EPA=s) Office of Wetlands, Oceans, and Watersheds. I welcome the opportunity to join my colleague Michael Davis in describing the strong commitment of EPA and our Executive Branch partners to protecting and restoring wetlands with fairness, flexibility and effectiveness. We will describe many improvements to our policies and programs that have been initiated and completed over the last several years and which are being implemented today. These actions have changed the landscape, literally and figuratively, for protecting and restoring our Nation=s aquatic resources. My testimony will describe the importance of wetlands to our nation, the history of destruction of these resources before their many values were recognized and protections enacted, and the Clean Water Act provisions pertaining to wetlands, and will elaborate on the policy initiatives developed and undertaken as a consequence of the Administration=s 1993 wetlands plan.

You have heard testimony about the enforcement action taken against John Pozsgai. A jury convicted Mr. Pozsgai on all 40 counts of violating the Clean Water Act for illegally filling wetlands and the judge sentenced him to imprisonment and a $200,000 fine. I will provide more details about the case later in my testimony.

Importance of wetlands

Wetlands are among our Nation's most critical and productive natural resources, protecting private property from flooding and providing shoreline erosion control. They help protect water quality, support commercially valuable fisheries, and provide primary habitat for wildlife, fish, and waterfowl.

Flood prone areas of the U.S. cover approximately 15,000 square miles, and at least 9.6 million households and $390 billion in property are at risk according to the Federal Emergency Management Agency. Direct flood damage in the U.S. in 1999 has been approximated at $5.4 billion dollars. Because wetlands serve as natural storage areas for flood water, they can help prevent or reduce the severity of flooding. A one acre wetland flooded to a depth of one foot of water holds 325,840 gallons of water, and the loss of upstream wetlands and their storage capacity has an escalating influence on flood peaks.

Wetlands also play a key role in protecting water quality by processing dissolved and suspended materials, accumulating nutrients, trapping sediments, and transforming a variety of pollutants. For example, one study found a riparian forest in a predominantly agricultural watershed removed approximately 80% of the phosphorus and 89% of the nitrogen from the water before it entered a tributary of the Chesapeake Bay. Excess loadings of phosphorus and nitrogen can cause dead zones and kill fish.

Wetlands also play an important role in recharging groundwater used to irrigate crops or in manufacturing. For example, playa lakes (a form of wetland) in West Texas and New Mexico are a major source of the water recharging the Ogalalla aquifer, which underlies 174,000 square miles in 8 states and is an important water resource for agriculture, industry, and human

consumption.

Wetlands are important to commercial and recreational fisheries. In 1993, commercial and recreational fishing was a $40 billion dollar industry, employing hundreds of thousands of people and contributing billions in State and federal taxes. Over 70 percent of this value is derived from fish species that during their life cycles depend directly or indirectly on wetlands. In the Southeastern United States, for example, over 90 percent of the commercial catch of fish and shellfish depend on coastal wetland systems.

Wetlands provide important habitat for migratory birds and waterfowl. Of the more than 1,900 bird species that breed in North America, about 138 are wetland dependent, and one-third of North American bird species use wetlands for food, shelter, and/or breeding. Migratory waterfowl and nearly one-half of all threatened or endangered species depend on wetlands and associated habitat for survival. In 1996, waterfowl hunters spent approximately $1.3 billion annually in pursuit of ducks, geese and other birds dependent on wetlands located throughout the United States. In addition, wetlands provide important wildlife habitat, and thus help support wildlife watching activities which accounted for another $29.2 billion dollars in expenditures in 1996. A national survey of all wildlife-related recreation prepared by the Bureau of the Census and the U.S. Fish and Wildlife Service indicates that overall in 1996, activities associated with hunting, fishing, and wildlife watching amounted to $101 *billion*.

Wetlands Losses

Wetlands destruction and degradation can lead to serious consequences, including increased flooding, declining water quality, and species decline. As previously indicated, the

Nation=s remaining wetlands provide a multitude of services to society, are the basis of many thousands of jobs, and contribute billions of dollars to the economy. On a more individual basis, the unrestricted ability of a property owner to fill or otherwise destroy wetlands on his property can adversely affect nearby landowners, for example, by increasing flooding to neighboring or downstream property, thereby reducing or even eliminating the property values of others.

At the time of European settlement, what is now the lower 48 states contained about 220 million acres of wetlands, or about 9 percent of the landscape. Between then and the 1980's, more than one-half of those wetlands (or 117 million acres) were converted to other uses according to the National Research Council. The Fish and Wildlife Service states that during the 1950's to the 1970's approximately 460,000 acres of wetlands were lost annually. From the 70's to the mid 80's, that figure dropped to 290,000 acres of wetlands lost per year, and more recently, from the mid 80's to the mid 90's, the rate of loss dropped to approximately 100,000 acres of wetlands per year. Over the past 28 years since its enactment, the Section 404 program, along with U.S.D.A.=s Swampbuster, on going public and private wetlands restoration programs, and active State, local and private wetlands protection efforts, has prevented the destruction of hundreds of thousands of acres of wetlands and the degradation of thousands of miles of rivers and streams. This has reduced property damage and loss of lives from flooding and protected fish and wildlife habitat and water quality - - all vital to the Nation's economy and overall health.

Overview of Clean Water Act Section 404

Because they are waters of the United States, all of the protections applicable to rivers, lakes and estuaries established in the Clean Water Act apply to wetlands. And the Act's provisions to regulate conversion of wetlands to uplands, primarily found in Section 404, also

apply to conversion of rivers, lakes, or coastal waters.

Under Section 404, any person planning to discharge dredged or fill material to wetlands or other waters of the United States must first obtain authorization from the U.S. Army Corps of Engineers (or a 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. General permits can be issued on a nationwide, Regional, or State level, and generally provide authorization with fewer procedural requirements. In addition, certain activities as specified in Section 404(f) of the statute are exempted from the requirement to obtain a permit. The vast majority of authorizations (90 percent) for discharges of dredged or fill material take the form of general permits. For those discharges not authorized by a general permit, the discharger must apply to the Corps for an individual Section 404 permit.

Although the U.S. Army Corps of Engineers (Corps) is responsible for the day-to-day administration of the program, including reviewing permit applications and deciding whether to issue or deny permits, EPA has a number of Section 404 responsibilities. In consultation with the Corps, we develop the Section 404(b)(1) Guidelines, which are the environmental criteria that the Corps must apply when deciding whether to issue permits. Under the Guidelines, a discharge is not allowed if there are practicable alternatives with less adverse effects on the aquatic ecosystem, and appropriate steps must be taken to minimize potential adverse effects to the aquatic ecosystem and mitigate for unavoidable impacts. Under Section 404(c), EPA is authorized to veto or otherwise restrict a Corps decision to issue a permit if EPA finds there would be unacceptable adverse impacts to specified environmental resources. EPA and the Corps share Section 404 enforcement authority. Other EPA Section 404 responsibilities include

determining the geographic scope of the program, determining the applicability of the exemptions for certain agricultural and forestry activities, and approving and overseeing State assumption of the program.

Property Rights and Takings Issues

By protecting wetlands, the Section 404 program maintains the environmental and economic benefits provided by these valuable natural resources. The program also helps ensure that private landowners do not use their property in a manner that will damage or destroy the value of neighboring and downstream property. Section 404 permits contain appropriate and necessary terms and conditions to limit potential impacts and to ensure losses of wetlands functions and values, such as floodwater storage and habitat, are adequately mitigated.

Many activities undertaken on wetlands either are not regulated at all, are explicitly exempted from regulation, or are authorized by general permits, eliminating or reducing the regulatory burden for tens of thousands of landowners each year. In situations where individual permits are required, the Federal agencies are prepared to work with permit applicants to design projects that meet the requirements of the law and protect the environment and public safety. However, in some instances the law restricts the actions of the property owners in order to protect the property rights, safety, environmental or economic interests of other individuals and landowners or the community at large.

In those rare situations where the necessary restrictions on use amount to a Fifth Amendment taking of the property, the owner will, of course, be entitled to compensation. Moreover, where a property owner believes that government action amounts to a taking, the

courts are available to review such claims and to determine whether compensation is due. Due to the unique nature of each situation, these issues must be considered on a case-by-case basis.

Ultimately, the courts decide whether a compensable taking of private property has occurred by applying a longstanding test which is intended to balance the competing interests of the property owner with those of society as a whole. In deciding if a taking has occurred, courts often use a multi-factor test, considering such things as the character of the government activity, the economic impact of the government action on the landowner, and the extent to which the government action interferes with reasonable investment-backed expectations.

The federal agencies strive to minimize the imposition of Section 404 program burdens on landowners and other dischargers, consistent with our statutory mandate to protect, restore, and maintain the physical, chemical, and biological integrity of the Nation=s waters. During FY 1999, the Corps regulatory program provided written authorization for over 74,000 activities, and over 90 percent of all those actions were authorized through a general permit in an average of 18 days. The Corps received an average of 74,500 Section 404 permit requests per year from FY 1996 to FY 1999. Of those requests, 90 percent were authorized through a general permit. Only 6.7 percent of all permit applications were subject to the more detailed individual permit evaluation, through which impacts are avoided and compensated. Less than 1 percent of all Section 404 requests were denied.

Program Improvements Over the Past Decade

Administering the Section 404 program in a fair, flexible and effective manner has been a major priority of this Administration. In this regard, EPA was centrally involved in developing

the 1993 Wetlands Plan and in implementing many of the actions it laid out. The Plan reflects a federal commitment to be responsive to landowners= concerns with the Section 404 Program, without compromising protection of wetlands and other waters. It reflects five principles that serve as the framework for the Administration's comprehensive wetlands policy. First, the Administration supports the interim goal of no overall net loss of the Nation's remaining wetlands, and the long-term goal of increasing the quality and quantity of the Nation's wetlands resource base. Second, the Administration continues to emphasize the importance of non-regulatory programs, such as advance watershed-based planning, voluntary participation in the Wetlands Reserve, Partners for Wildlife, and 5 Star Restoration programs, and other public/private cooperation to protect and restore wetlands. Third, expanding and improving Federal partnerships with State, Tribal, and local governments is essential to protecting and restoring wetlands in an ecosystem/watershed context. Fourth, wetlands regulatory programs must be efficient, fair, flexible and predictable, and avoid duplication among regulatory agencies, while providing effective resource protection. Finally, wetland policy must be based on the best scientific information available.

The Administration=s Wetlands Plan includes over 40 specific initiatives, and their implementation by EPA, the Corps, and other agencies has resulted in many improvements for those we regulate:

- In 1993, and also in 1995, the Corps and EPA issued guidance (Regulatory Guidance Letters (RGL) 93-2 and 95-1) clarifying the need for flexibility in processing permit requests, emphasizing that small projects with minor impacts do not need the same detailed review as large projects. This guidance directs

field staff to use the flexibility that exists in the Section 404 program to ensure that the level of permit review reflects variations in the wetlands functions and the nature of the project's impacts.

- In June 1993, EPA and the Corps amended their jurisdictional regulations to make clear that Aprior converted croplands,@ as defined by the Food Security Act, are excluded from CWA jurisdiction. An estimated 53,000,000 acres of prior converted croplands exist, and are areas that, prior to December 23, 1985, were hydrologically manipulated and cropped to the extent that they no longer perform the wetlands functions they did in their natural condition. Prior converted cropland is exempt from Swampbuster and this change ensured a similar exemption from the CWA, simplifying farmers= regulatory burdens.

- In January 1994, we entered into a Memorandum of Agreement with the Corps and Departments of Agriculture and Interior regarding the delineation of wetlands on agricultural lands. In order to increase certainty for farmers by providing for single reliable wetlands determinations on agricultural lands, the agreement clarified the agencies= roles and responsibilities for such delineations and provided for acceptance for Clean Water Act purposes of wetlands delineations made by the Natural Resources Conservation Service. This agreement also includes provisions to ensure that Federal agency personnel conducting wetlands delineations are properly trained and that standard, agreed-upon methods will be used in making such determinations.

- In June of 1995, in order to reduce regulatory burdens on persons wishing to build a home for their family, the Corps issued Nationwide Permit 29 for single family homes impacting less than 1/4 acre of non-tidal wetlands.

- In November of 1995, recognizing that use of mitigation banks may reduce permit processing times for projects that qualify and provide more cost-effective and flexible compensatory mitigation opportunities, EPA, along with four other agencies, issued joint Federal guidance concerning the establishment of wetland mitigation banks. The guidance encourages the use of mitigation banks where appropriate and sets national policy for establishment and management of these banks for the purpose of providing compensatory mitigation for adverse impacts to wetlands and other aquatic resources.

- In March 1999, the Corps published a final rule establishing an administrative appeal process for permit denials. That rule became effective on August 6, 1999. The administrative appeals process was subsequently revised on March 28, 2000 to also allow for appeals from Corps jurisdictional determinations.

Since the Plan, we also have increased funding to States, Tribes and local governments for wetlands programs. EPA recognizes the advantages of implementing environmental programs at a level close to the affected public and has long encouraged states and tribes to become more active partners in wetlands regulation, management and restoration. EPA has provided grants to many states to develop permitting programs that eliminate or reduce the federal role in Section 404 decisions, and some of them are now administering their own

permitting programs, primarily through State Programmatic General Permits.

To help landowners understand and comply with the requirements of the Clean Water Act, EPA has a contractor-operated toll-free Wetlands Information Helpline that has assisted tens of thousands of callers. Extensive information on wetlands programs, policies, and regulations has been made available on the World Wide Web. EPA also engages in dialogues with those regulated, such as the forestry industry, the golf industry, and corporate interests, to better understand their concerns and to develop mutually-supported, voluntary or incentive based programs to protect and restore wetlands. We keep many active lines of communication with organizations representing landowners= interests. We have made substantial progress towards achieving the Administration=s goal of providing for a fair, flexible and effective wetlands protection program. We will continue in our efforts to make further improvements.

Compliance and Enforcement

Section 301 of the Clean Water Act prohibits the discharge of pollutants into waters of the United States except in compliance with permit and regulatory requirements. As previously noted, Clean Water Act Section 404 creates a regulatory and permit program for the discharge of dredged or fill material. Both the Corps and EPA may bring enforcement actions for violations of Section 404, and may bring criminal violations to the attention of the Department of Justice. The Water Quality Act of 1987 amended Section 309(c) of the Clean Water Act to make it a felony crime, punishable by three years imprisonment and fines, to knowingly violate the Clean Water Act.

In the last six years, EPA has pursued 31 civil judicial referrals and entered into 51

judicial settlements involving wetlands. Since 1995, EPA has pursued 49 criminal actions involving wetlands.

A vital part of effective wetlands protection is the enforcement of those cases that involve serious harm to the environment and/or adjacent property as a result of unauthorized dredging or filling, or involve flagrant or knowing violations of the law. Enforcement actions are brought against violators for many reasons, including: 1) to protect water quality, including maintaining water quality for commercial, recreational, and subsistence fishing; 2) to protect private property since wetlands act as natural equalization basins that reduce the effects of flooding; and 3) to protect environmental values such as wildlife habitat.

The government brings enforcement actions to require alleged violators to promptly correct their violations and to remedy any harm caused by those violations. As part of an enforcement action, we sometimes also seek monetary penalties that promote environmental compliance by deterring future violations by the same violator and by other members of the regulated community. Penalties help to ensure a level playing field within the regulated community by ensuring that violators do not obtain an unfair economic advantage over competitors who have complied with the Act. At the same time, our policies always take into account the violator=s good faith efforts and other reasonable issues such as financial conditions.

In light of the interest your letter of invitation expressed in the John Pozsgai case, I would like to set out a brief history and its current status for your information. The wetlands in question provide storage capacity for flood waters produced as a result of runoff from extensive paved areas north of this site. The record of the case established that Mr. Pozsgai purchased the property at a reduced price because of his knowledge of the presence of regulated wetlands. In

addition, he was specifically warned by the Corps not to deposit fill material at the site. He deposited over four hundred truckloads of rocks and concrete, filling in at least four acres of the wetland, which resulted in flooding of neighbors= property.

During the course of the court proceedings, Mr. Pozsgai violated a temporary restraining order issued by the court, for which the court ordered Mr. Pozsgai in contempt. In December 1988 a jury found Mr. Pozsgai guilty of 40 counts of violating the Clean Water Act for illegally filling wetlands. In July 1989, the district court sentenced Mr. Pozsgai to 27 months imprisonment without parole for those violations occurring after the effective date of the U.S. Sentencing Guidelines (11/1/87), three years imprisonment for those violations occurring when parole was still possible, five years probation, and a $200,000 fine. He was also ordered to restore the wetlands in accordance with specifications in a plan submitted by the Army Corps of Engineers. After Mr. Pozgai=s two appeals to the Third Circuit, his conviction and sentence still stand, although the court reduced the $200,000 fine to $5,000 based upon inability to pay. Mr. Davis can provide information on the status of Mr. Pozsgai=s more recent interactions with the Corps District.

Conclusion

In carrying out the Section 404 program, both the Corps and EPA are sensitive to the interests and concerns of landowners. The equitable administration of any Federal regulatory program involves more than strict technical considerations and must include sensitivity to the rights and expectations of all of our citizens. Implementation of the Section 404 program often requires a balancing of environmental protection, public interests, and individual interests. We have made much progress, but continue to strive towards the fair, flexible, and effective

implementation of the Section 404 program. That concludes my testimony, and I hope that the information I have provided has been useful to you. I would be pleased to answer any questions you might have.