

REGULATOR'S PERSPECTIVE — U.S. ARMY CORPS OF ENGINEERS

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I want to first say that we appreciate hearing the ports views. We appreciate hearing them in this context and when they give them to us in private meetings and we take the ports comments very seriously. There were a few comments that I disagree with, but the vast majority of what the Ports have presented to you, I generally agree with. There are problems which the Corps is trying to address, because we do think there are things that need to be fixed within the program.

Let me briefly discuss the history of the Corps Regulatory program. The Corps has been regulating since the early 1900s, so we have been doing this a long time. The Program has gotten very environmental since the 1960s. The Corps issues about 100,000 permits a year. Of those 100,000 permits, just to give you an idea of the wetland impacts, we have estimated that about 11,600 acres of wetlands were impacted by those permits in 1993. So, even though we issue a lot of permits, there are not a lot of wetland impacts. 11,000 acres is not much impact. In 1993, we required mitigation that resulted in 15,200 acres of restoration, creation, or enhancement. Based on these statistics, we believe that we are operating at or about, or better than, no net loss, as far as wetlands go. We intend to try to keep that record going.

Let me now talk about some of the things we want to do to try to manage the program better and try to make some other improvements. First of all, we do believe our evaluation process is slower than we would like. Certainly, some cases take a long time. Many of the cases you have heard about this morning, virtually all of them, should not have taken as long as they did. Since 1991, we have increased the staff in the regulatory program by 20%. We are still maintaining a solid training program. We have increased budget by 20%. The President's Wetland Plan identifies the Corps as needing to have further increases in both staff and budget. We will be working within the administration and with the Congress to try to get some reasonable increases in staff. So we are very serious about trying to put more people in the Corps of Engineers focused on this important program. As I mentioned, we have thousands of applications and we do need to have a solid work force. We also agree with a point that was made by Charlie Roberts, that we have got to attract and retain good people. We are just about finished with an initiative

that will increase our ability to compensate our regulators to the level we think they should be compensated. In many offices we are going to provide a better compensation package and we hope that will help retain good people.

The Corps is also concerned about problems with dredge material management. In the Corps Civil Work Program and the Regulatory Program, we are very interested in looking at ports dredging in a total view and try to manage the dredged material. It is going to take some time to get there. We are working with other agencies, EPA, Fish and Wildlife Service and NOAA at the federal level and state agencies, but we are very interested in better managing the dredge material in the ports.

Finally, let me make a comment that relates to the concern about science and testing. We would agree that some of the methods that we currently use have been passed by. We are working very actively with EPA on a new revised testing material that we hope will correct some of those problems. We would expect and hope to get that out later this calendar year. That is the current desire. We wish that we would solve them quicker than we have and hope that we can move ahead on them. We take these comments very seriously, and want to try to improve the program.

Let me address some of the issues which are more inland, and speak to those of you in the transportation community other than ports operators; DOTs and other members of the transportation community. We have issued, as part of the President's plan, in August of 1993, guidance with EPA on flexibility in our program and on mitigation banking (Regulatory Guidance Letter 93-2). The guidance is intended to make sure that all of our field offices are aware of the flexibility that does exist in the program. We can, and do, consider cost as we evaluate any permit application. The cost is involved in a determination under the 404(b)(1) Guidelines that we call the practicability test. Under practicability, the bottom line is that in order to issue a permit the Corps has to determine that a project is the alternative that is the least environmentally damaging practicable alternative. The least environmentally determination includes consideration of all of the environment. So if an alternative damages uplands that are important and the wetlands are low value, then the upland alternative

would not be less environmentally damaging. It also takes into consideration the concept of cost in terms of practicability. The test is, and I would argue should remain, a somewhat subjective test. The reason for that is if we put specific numerical tests in something like practicability, we run into more problems than we have now. Basically, the test is that if an alternative is unreasonably expensive to an applicant, or the type of project, then the alternative is not practicable. You have to keep in mind that most of the folks in this room are involved with rather large developments, whether it is Ports, or DOT initiatives, or other types of infrastructure developments. For this type of applicant, a higher cost for mitigation or avoidance is going to be practicable than the level of cost for private owner of a home who has a house and wants to build a small addition on some wetlands. Practicability to an individual who wants to build a house is different than it is to a major industry. Again, that is why we believe that test has to remain subjective. This Guidance does lay out the flexibility that is in the Guidelines and a lot of the flexibility is involved in the practicability determination. I encourage any of you who have not seen it to read it.

The second thing I will mention is mitigation banking. Of course, the Ports have led mitigation banking for the last five, or so, years. Mitigation banking is very important to our overall program. Mitigation banking which I will not be able to explain in detail due to time constraints, is basically a method of compensatory mitigation where you develop some mitigation and you use it for several different projects. Simply put, you develop the mitigation, at least to the extent that construction is completed to establish wetland hydrology, before you start drawing credits from it. Mitigation banking is very important to our program and I would encourage the ports to continue using that concept for their wetland type fills.

There are several other elements of the President's Plan that we believe are going to help the process. One is an appeal process. We are finalizing a proposed rule right now. It should be published in a couple of months. Regarding the appeal process, in the event someone is denied a permit, or gets a permit that they simply cannot accept because of the restriction placed on the permit, there will be an administrative appeal. In other words, that is the least the applicant can go through the Corps of Engineers and appeal it to a higher level.