

Clean Water Act Section 404 Program

4 All right, Commissioner Sandifer, let's go
5 to Clean Water Section 404.

6 COMMISSIONER SANDIFER: Right. I want to
7 take these next four items separately. They are all
8 related, but I think it will be easier to chew these
9 one at a time.

10 This one has to do with wetlands
11 jurisdiction. There is a specific federal case
12 that's been decided at the Supreme Court level in the
13 last year or so that has limited jurisdiction of the
14 U.S. Army Corps of Engineers, limited jurisdiction of
15 other federal agencies with regard to so-called
16 "isolated wetlands."

17 That is what this set of recommendations
18 has to do with. It's a little bit broader than that.
19 We don't want to deal with just one particular case,
20 but it is the one that got us into this situation
21 where we felt it was a necessity for this Commission

22 to make some recommendations concerning wetlands

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1 protection.

2 Many of the wetlands that were influenced
3 by, or affected by this case are in fact freshwater
4 wetlands with not a direct connection to esturine and
5 marine waters, but all of these wetlands are
6 indirectly connected. And the impact could be very
7 significant.

8 So we have four recommendations here to
9 bring before us.

10 The first one is the most important. That
11 is, that the Federal Government through the Congress
12 and through the agencies that have wetlands
13 jurisdiction, should assert that jurisdiction to the
14 broadest constitutional extent.

15 Secondly, the Commission would encourage
16 states to enact state laws to protect wetlands in
17 their state.

18 Third, to encourage EPA and the Army Corps

19 of Engineers to maintain and to attain the no net-
20 loss target that has been set by previous
21 Administrations and continued I believe in the
22 current Administration.

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1 In fact, we would like to see the policy
2 encourage the Nation to actually increase the
3 national wetlands base. We have lost wetlands, as
4 every one of us in the room knows, significant
5 portions of our wetlands, and it is not just enough
6 to try to work at no net loss. We ought to be
7 looking at a net gain here.

8 So that means: Strongly encourage
9 avoidance of wetlands loss in whatever kinds of
10 activities might be undertaken, and require
11 replacement for those unavoidable losses where
12 construction activities, or whatever, results in the
13 loss has a clearly large public benefit.

14 Next, we would encourage the EPA and the
15 Army Corps of Engineers to continue to implement the
16 National Mitigation Action Plan. "Mitigation" may be
17 a dirty word, but it is still the only way to go in
18 some cases where impacts are unavoidable.

19 And to require--and we should underline
20 "effective mitigation" unavoidably lost wetlands.
21 There are a number of cases where mitigation
22 resulting in so-called creation or restoration

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1 projects have not proven to be terribly successful.

2 One really needs--this is an area where some study
3 needs to be done, and the most effective methods of
4 mitigation put at the top of the list.

5 I believe that's all we have on this
6 particular area and would be happy to entertain
7 questions.

8 MR. EHRMANN: Commissioner Hershman?

9 COMMISSIONER HERSHMAN: Well thank you for
10 even bringing this subject before us. It is a very
11 powerful one for the country as a whole.

12 The first bullet dealing with Federal
13 Government asserting jurisdiction to the broadest
14 Constitutional extent, the problem there is that the
15 courts will change their vision of the "broadest
16 Constitutional extent" as they so please, and that is
17 exactly what happened a year ago.

18 And prior to that, 10 years ago they saw

19 it a different way.

20 So I think if we want to make a

21 recommendation that means something that would

22 reflect a change, then we could even be very bold and

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1 say if we want further jurisdiction and include
2 isolated wetlands, we should go back to the 1986
3 interpretation, which was what was into law prior to
4 this last thing.

5 In other words, we disagree with the U.S.
6 Supreme Court. Now that's a bold position, but I
7 would throw that to the committee to consider.

8 I fully agree with the ones on the state
9 wetlands laws. I think that is really important.
10 And these others are all valuable, too.

11 I guess the broader question I have is
12 whether you considered the bigger issue here, which
13 is how we got ourselves into such a complicated,
14 difficult process for managing wetlands in this
15 country.

16 It is a back door way of dealing with it
17 through the Water Quality laws. It brings into bed
18 together two animals that hate each other in most

19 cases, and don't get along. And I think that there's
20 a real need for reform here.

21 So I guess the question that I would have
22 is whether it is worth considering, or whether you

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1 guys did consider a different kind of a structure all
2 together. There have been proposals in the
3 literature for decades now on some sort of different
4 kind of a wetlands law.

5 COMMISSIONER SANDIFER: I don't recall any
6 detailed discussions on alternative permitting
7 approaches. We did discuss the jurisdictional issue
8 and the question of whether or not we would recommend
9 that the Congress overturn the Supreme Court which is
10 what you're really saying. You have to pass a new
11 law that you hope then would stand a Constitutional
12 challenge.

13 I think our feeling there was that under
14 present circumstances we probably had a 50-50 chance,
15 perhaps even worse, of losing ground from where we
16 are now as opposed to gaining ground. So that we
17 would simply try to assert as much jurisdiction as
18 possible under the existing interpretation.

19 I am perfectly willing to consider
20 something else, but I believe that summarizes much of
21 our discussion. Staff can tell me differently.
22 Bob, I know you had something you wanted

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1 to add to this a minute ago. Maybe you can clarify a
2 little bit.

3 BOB WAYLAND: I'm Bob Wayland and I'm a
4 consultant to the Commission. I would just say that
5 actually what the Supreme Court did in the Swank
6 decision was to conclude that the agencies had over-
7 read the reach of the Clean Water Act.

8 They didn't conclude that there was a
9 Constitutional defect. So this in effect does say
10 that Congress should, or that the Executive Branch
11 Agencies in implementing the Clean Water Act,
12 take the broadest interpretation they can consistent
13 with the Constitution.

14 So that is sort of an oblique call for
15 Congress to address the issues more clearly in the
16 Clean Water Act, and for the Corps of Engineers and
17 EPA to implement the program as aggressively as they
18 can in the meantime in light of the Swank decision.

19 We worked to take all of that jargon and
20 inside-baseball talk out of the, certainly out of the
21 slide, and to some extent out of the recommendation.
22 But I think the belief was that these are very

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1 important elements to the aquatic ecosystem, and to
2 the extent that there would be--and there is a
3 current pending regulatory action--some inclination
4 to go beyond what the Supreme Court said and further
5 restrict protection of wetlands, that that would not
6 be a good thing and we ought to be going--the
7 Commission would recommend that the agencies and the
8 Congress go as far as they can consistent with the
9 Constitution.

10 The Supreme Court has not opined on the
11 Constitutionality of wetlands' protection, but rather
12 the interpretation of the Agencies of the Clean Water
13 Act.

14 COMMISSIONER HERSHMAN: Well I guess
15 what's not coming across, then, is the policy
16 direction in which we would like to move, through at
17 least what's written here. So I would just recommend
18 that it be described in a different way so we know

19 clearly what direction we think the policy ought to

20 go.

21 COMMISSIONER SANDIFER: I would like to

22 hear from the other Commissioners on this point, but

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1 your point is well taken.

2 MR. EHRMANN: Do you want to comment on
3 this?

4 COMMISSIONER RUCKELSHAUS: Having had some
5 experience in trying to administer Section 404 of the
6 Clean Water Act, I wonder if your Working Group,
7 Paul, looked at the way in which the current
8 Administration shared between the Corps of Engineers
9 and the EPA works?

10 It did not work before. There was no
11 inclination on the part of Congress to clarify who
12 had the responsibility, and so the two agencies
13 fought over it. It created a terrible relationship
14 within the two agencies. There were all kinds of
15 claims and counterclaims with the public witnessing
16 this and being terribly confused, I'm sure, as to
17 whether the wetlands were being properly protected,

18 whether they were being exploited, whose fault it

19 was.

20 If that situation continues, then it

21 either ought to be--the responsibility for

22 administering the wetlands law ought to be given to

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1 one or the other of the agencies, or at least the
2 National Ocean Council should be charged with the
3 responsibility of straightening out that
4 relationship. Because that is precisely the kind of
5 problem that--we don't even know whether we're making
6 any progress on the problem because the two agencies
7 charged with administering it don't get along with
8 each other.

9 COMMISSIONER SANDIFER: Bill, I don't
10 believe we had a lot of discussion on that, but I
11 certainly would bow to your great experience in this
12 and agree with you. I guess, depending on how the
13 rest of the Commission feels, I would suggest we have
14 an either/or kind of recommendation here.

15 The "either" is that EPA be given the lead
16 role in Section 404 permitting and enforcement. And
17 the "or" is, if the Congress isn't willing to do
18 that, that the National Ocean Council figure out some

19 better way to manage the relationship between the two
20 agencies currently involved.

21 COMMISSIONER RUCKELSHAUS: The only caveat
22 I would have, Paul, is that I would try to make sure

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1 that my recollection of the way in which the law was
2 administered, which I know is accurate, is still the
3 way it's being administered. Is that still the fact?

4 COMMISSIONER ROSENBERG: Yes.

5 COMMISSIONER SANDIFER: I think two of the
6 other Commissioners over there, I believe the
7 reference that Marc had to the two animals fighting
8 was the EPA animal and the Army Corps of Engineers
9 animal. That is what I got out of it.

10 COMMISSIONER RUCKELSHAUS: That is
11 terrible for the public interest, is the main thing.
12 Who cares which agency wins? The public is confused.

13 COMMISSIONER SANDIFER: Bob Wayland has
14 some more recent relevant experience, so maybe he can
15 bring us up to date.

16 BOB WAYLAND: Actually, for the last 14
17 years I was responsible for this program at the EPA
18 end of things at the sort of highest career level.

19 COMMISSIONER SANDIFER: You have our

20 sympathies.

21 BOB WAYLAND: And I would say that the

22 situation has significantly improved. In fact, a

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1 major step toward that improvement was taken in 1993
2 with the development of an Interagency Wetlands Plan,
3 some 100 action items that the EPA and the Corps
4 jointly or in some cases separately pursued.

5 Virtually all of the rulemaking that has
6 been undertaken in this program area over the past
7 dozen years has been a joint rulemaking by EPA and
8 the Corps of Engineers.

9 There hasn't been a 404(c) veto in 12
10 years. The number of permit actions elevated from
11 the field to headquarters for review by the Assistant
12 Secretary of the Army is a relative handful. And I
13 think that colleagues from the Corps of Engineers
14 with whom I testified on more than a dozen occasions
15 on the Hill about a controversial program would
16 probably agree.

17 Now having said all that, there are still
18 frictions and there are somewhat different

19 perspectives and points of view. And I can't say
20 that in the last 12 months or so of my tenure at EPA
21 that I would have characterized our relationships as
22 productive, and strong, and positive as they had been

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1 for many of the preceding years.

2 But I think that the severity of this sort
3 of agency disconnect that was a major problem in the
4 '80s into the early '90s is something that our people
5 worked very hard in both agencies to get beyond, and
6 I think we were largely successful in doing that.

7 MR. EHRMANN: Commissioner Rosenberg on
8 this point.

9 COMMISSIONER ROSENBERG: On this point, it
10 is not so much related to the war between EPA and the
11 Army Corps, or the two animals fighting, but in this
12 concentrated animal feeding operation it seems to me
13 the result is about the same as in the ones we
14 discussed earlier.

15 There are two other agencies that are
16 involved in the 404 program, NOAA and Interior. I
17 had experience with it from the NOAA side. It's not
18 so much the battling that concerned me, although

19 obviously that is a problem; it is the result.

20 That is why I refer to CAFOs again. I

21 think the result is kind of like what we get out of

22 CAFOs. We end up doing a huge number of permit

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1 reviews. We don't connect them. There isn't a very
2 good evaluation of cumulative impact.

3 We do elevate, but even when you elevate
4 you don't get much of a result. This seems to be
5 exactly the kind of program that all of the
6 discussion about fragmentation, conflicting mandates,
7 and so on, was describing.

8 EPA and the Corps have very different
9 mandates. NOAA, Fish and Wildlife Service certainly.
10 They do work together, and there is a lot of effort
11 put in I think by the staffs in all of the agencies
12 to try to make this work, but I know that it is a
13 program that is incredibly difficult to make work
14 under the existing structure and under the existing
15 statute.

16 In the southeast region for NOAA we would
17 review 12,000 to 14,000 permits a year with a staff
18 of, you know, 10 people. Which meant that each

19 permit would go to

20 a staffer, and there really wasn't any way that that

21 staffer could do other than give their individual

22 opinion. You don't have time to have a broader

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1 overview. There's no programmatic overview, or
2 you're struggling to have any programmatic overview,
3 and there is no real way to see how the permits
4 relate to one another except in the mind of the
5 individual staffer in the other 1000 permits they
6 looked at that year.

7 That just doesn't make any sense to me,
8 and I think you get the result of no net loss hasn't
9 resulted in no net loss, and we have lost wetlands.
10 So I think that this is an area where we need some
11 major changes.

12 I think it is in the permitting program of
13 trying to look at cumulative impacts. And I think it
14 relates to watershed management. There needs to be
15 something clearer in watershed management that this
16 permitting activity relates to so that you can look
17 at cumulative impacts, and you can have some sense of

18 how everything fits together.

19 It is not a swipe at EPA, or the Corps, or

20 NOAA, or the Fish & Wildlife Service, because I have

21 dealt with people in all of those agencies trying to

22 manage this program.

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1 I just think it is not well structured,
2 not because of lack of will, but because of the
3 conflicting mandates and the fragmentation across the
4 agencies.

5 So I think that this is something that the
6 National Ocean Council should immediately take up.
7 It probably is a task force kind of activity that
8 goes along with things like nonpoint source
9 pollution, to actually get implementation
10 of a wetlands policy that can work and that can
11 address what it's supposed to address, which is
12 cumulative impacts.

13 COMMISSIONER SANDIFER: And you got to
14 what I was going to ask you. You got a specific
15 recommendation, and that will be helpful I think.
16 That is what we really need to include in here.
17 Thanks.

18 MR. EHRMANN: Commissioner Hershman, and

19 then back to Commissioner Gaffney.

20 COMMISSIONER HERSHMAN: What Andy said I
21 agree with completely. I would just add one thing to
22 it. The program is set up to be project by project

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1 review, and by law that is the only way it can work.

2 So one thing that could be recommended,
3 even if we don't go along with a major overhaul of
4 the agencies and all that, is to be able to introduce
5 a planning function of some sort into wetlands.

6 I remember an attempt to do some
7 characterization of wetlands, and some signaling in
8 advance that these wetlands are ones you can't touch,
9 but these we can try to mitigate, and these are less
10 important, and that was thrown out as being unlawful.

11 Well that's something there that can be a
12 fix. If we could somehow look ahead so that we can
13 characterize the resource, identify areas where it is
14 particularly critical and in areas where we can still
15 find development within it so long as it there is
16 mitigation, I think we will have taken a big step
17 forward. So that's an idea to throw into the hopper.

18 MR. EHRMANN: Let me go to Commissioner

19 Gaffney and then back to Mr. Ruckelshaus.

20 COMMISSIONER GAFFNEY: To defend the

21 recommendation just a little bit, reading back on our

22 longer paper, I guess I came away with the

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1 impression, which I now think is not exactly correct,
2 that it was very clear that EPA was in charge of
3 this. It says "EPA and Corps of Engineers" up here,
4 and there's also Fish & Wildlife, and NIMPS involved
5 in this process.

6 But when it comes right down to it, EPA is
7 in charge, even though it might have to go directly
8 to the Administrator himself to break the tie. But
9 EPA is in charge. So that's why we didn't pursue it.
10 I think that's why we didn't pursue it any further.

11 On the permitting thing, if you'll allow
12 me to leap forward, we had this discussion and the
13 discussion that's about to come up on dredge spoil
14 for ports. We were so frustrated by the permitting
15 process and the many steps it goes through and the
16 length of time and the economic impact, and the
17 negative environmental impact by these
18 long processes that tend to irritate people, that we

19 are about to recommend that this whole kill chain
20 from start to finish be looked at in that particular
21 case by the National Academy of Public
22 Administration, someone that is used to looking at

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1 processes. And maybe these could be lumped together.

2 MR. EHRMANN: Good thought. Mr.
3 Ruckelshaus?

4 COMMISSIONER RUCKELSHAUS: There are in
5 fact three studies that have come out from the
6 National Academy of Public Administration in the last
7 five years that look at a lot of EPA programs,
8 including this one. I was on two of those studies.

9 I would echo what Mark has said and think
10 we should include in a recommendation. This is a
11 pretty good example of why you need a National Ocean
12 Council. And if we are in fact encouraging people to
13 go to ecosystem-based management, the fact that you
14 have a number of these wetlands in a given watershed
15 and, because they're treated individually, in some
16 respects they're all treated the same, and they're
17 not all the same. Some of them are important, and
18 some of them aren't--I think you used the word

19 critical.

20 And if we had an ecosystem-based
21 management process in these regional ocean councils,
22 it would be possible to begin to designate which of

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1 the wetlands we really ought to be concerned about
2 and which of those are not so important.

3 But again, the National Council I think
4 could both understand better the way in which this
5 program currently works within all those government
6 agencies and who if any agency ought to be declared
7 the lead agency. And then try to fit it into an
8 ecosystem based management approach that makes sense.

9 I think that kind of recommendation passed
10 for implementation to the National Ocean Council
11 where they could use regional councils and pilot
12 studies to try to figure out how to do this would be
13 a very good use of these new mechanisms we're
14 suggesting be set up to test whether in fact they
15 work in a specific case like this.

16 MR. EHRMANN: There are a couple of more
17 Commissioners who want to comment. Bob Wayland, did

18 you have another comment?

19 BOB WAYLAND: Just a point of information.

20 The reference to the National Mitigation Action Plan

21 that's included on the slide that is in front of you

22 does refer to an effort on the part of EPA and Army

18 and you probably were, too, Bob, in the Special Area
19 Management Plan sort of exercises in places like
20 Hackensack Meadowlands, and I don't think that it
21 worked quite right. But at least the idea of looking
22 at all of the wetlands and all of the projects and

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1 thinking about mitigation broadly clearly was a much
2 more sensible way to go than permit-by-permit. Even
3 though I'm not sure that it fully worked. We ended
4 up being in a lot more sensible place at the end of
5 that process than we were at the beginning, because
6 there was a proposal to build the world's largest
7 shopping mall in the middle of the wetlands,
8 Hackensack Meadowlands.

9 The original proposal was something like
10 800 acres of fill, and it ended up being 80 acres
11 that they asked for with a lot of mitigation. So
12 there are some mechanisms around that can work, but
13 they really need to be pushed very hard.

14 MR. EHRMANN: Commissioner Coleman and
15 then Commission Borrone.

16 COMMISSIONER COLEMAN: Paul, I realize
17 that you're dealing with the Section 404 Program and
18 dealing with isolated wetlands, but I would urge the

19 Working Group to take one step beyond that.

20 I am from a state where in two years we

21 lose more coastal wetlands than all the isolated

22 wetlands that exist in the U.S.

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1 Between Alaska and Louisiana, and a few of
2 the other states in the Gulf Coast, we have 80
3 percent of the total wetlands. We are losing those
4 at a rate of 25 to 30 square kilometers per year. A
5 recent study by the Corps of Engineers, and one by a
6 private firm that Louisiana hired to just simply
7 attain a no-net-loss would take between, in one
8 report, \$12 billion over the next 20 years; the other
9 was \$15 billion over the next 20 years.

10 This is a major problem. So I would urge
11 you to--and I did send you a paper on that--to add
12 another page here with some bullets that bring to the
13 public--because these aren't "Louisiana" wetlands,
14 they're American wetlands. If we lose, and the rates
15 are correct, we're losing ecosystems at a rate
16 unheard of on this planet.

17 So I would urge you to add another page to

18 this. You can still incorporate Section 404 under

19 it. But I would strongly urge you to do that.

20 MR. EHRMANN: Paul, did you want to

21 comment on that?

22 COMMISSIONER SANDIFER: Yes. I had

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1 already mentioned this to staff. As I was rushing
2 from my office the other day, I neglected to pick up
3 that particular paper but I've got it, and I had
4 already mentioned to staff that this was something
5 that would be included in the next draft here.

6 Not only did I already commit to that and
7 believe it is important, I think it really should be
8 the lead for this whole section on wetlands,
9 particularly in this area where we're talking about
10 maintain and actually attain the no net loss and then
11 try to get net gains.

12 That is where it ought to be emphasized.
13 And then we go into this other one. I flatly just
14 did not have the paperwork with me, and it is just a
15 matter of not having the information to sit and work
16 with staff and I promise to get it to them. So we
17 will move ahead with that.

18 COMMISSIONER COLEMAN: Thank you for that.

19 And if the staff needs any help, I have probably more
20 material that I can send them than they'll ever want
21 to see.

22 MR. EHRMANN: Great. Commissioner

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1 Borrone?

2 COMMISSIONER BORRONE: Thank you. Still
3 on the 404 program. I appreciated the focus on
4 watershed planning. I think it emphasizes, though,
5 the need for the comprehensive, systematic planning
6 effort looking at the watershed as well as the
7 coastal zone and the interactions, just as Jim has
8 pointed out by his comments about the wetland loss in
9 Louisiana.

10 Coupled with that, though, this morning
11 before the lunch break we talked about one of the
12 Governance recommendations being a financial
13 commitment to a land acquisition program.

14 And while in our discussions we were
15 talking broadly about coastal areas, I don't think we
16 should limit that recommendation on one hand.

17 On the other, given the size of the
18 numbers Jim has just talked about, I think we have to

19 be thoughtful in the way we frame that

20 recommendation.

21 If we are going to talk at all about a new

22 financial plan or program that the Congress might be

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1 expected to authorize for land acquisition for
2 presentation, for restoration, for protection and
3 enhancement, then I think we need to think about it
4 in a multi-tiered broad scope.

5 I think it has to be looked at. Right now
6 these permits really rely on developer negotiations
7 where you're getting the private sector or the public
8 sector entity who is going to be building whatever
9 the facility or use is to agree to make certain
10 commitments.

11 But there are other methods that we might
12 explore in the financial dialogue that we're going to
13 have during the next few months that might look at
14 other public/private program opportunities that could
15 be coupled with any new federal funds that might be
16 able to be generated by a Congressional
17 authorization.

18 So I just ask us to think about the

19 linkages as we are making these recommendations and
20 try to make sure that we are looking in the broadest
21 fashion as well as in the specifics.

22 MR. EHRMANN: Commissioner Sandifer, do

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1 you want to make any kind of summary comments based
2 on what you've heard on this section before we move
3 on?

4 COMMISSIONER SANDIFER: Obviously we were
5 too timid in our approach to Section 404 and too
6 limited--by limiting Section 404 here. Wetlands
7 loss, or perhaps I should put it another way.

8 Maintenance or gain of wetlands should be
9 the overall theme of the Commission's recommendation,
10 and cleaning up the permitting process through the
11 action of the National Ocean Council should be the
12 second part of that.

13 Take a very clear statement of the current
14 loss not due to development pressures but to other
15 pressures, climatic and others, in the Gulf of Mexico
16 and Alaska of wetlands, and to look at land and
17 wetland protection programs, including the new
18 recommendation currently in the Congress in the

19 broader view ways to encourage, to also encourage
20 gains of wetland areas.

21 Finally, I would tend to agree with
22 Lillian that we need to broaden it beyond just the

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1 estuary. Despite the fact that we're in very
2 difficult economic times, I am not so afraid of the
3 big numbers. Look at what is being done in the
4 Florida Everglades at least in terms of expenditures.
5 Whether or not you agree with everything that's being
6 done, that program was sold to the Congress as a
7 restoration program and huge sums of money were made
8 available based on the critical nature of that
9 ecosystem.

10 I think it is incumbent upon us to make
11 that kind of big statement here. So that is what
12 I've gotten out of it thus far, and I think staff
13 will have plenty of work to do to bring it up to
14 date.