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

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

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

That is what this set of recommendations has to do with. It's a little bit broader than that. We don't want to deal with just one particular case, but it is the one that got us into this situation where we felt it was a necessity for this Commission
to make some recommendations concerning wetlands
Many of the wetlands that were influenced by, or affected by this case are in fact freshwater wetlands with not a direct connection to esturine and marine waters, but all of these wetlands are indirectly connected. And the impact could be very significant.

So we have four recommendations here to bring before us.

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

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

Third, to encourage EPA and the Army Corps
of Engineers to maintain and to attain the no net-
loss target that has been set by previous
Administrations and continued I believe in the
current Administration.
In fact, we would like to see the policy encourage the Nation to actually increase the national wetlands base. We have lost wetlands, as every one of us in the room knows, significant portions of our wetlands, and it is not just enough to try to work at no net loss. We ought to be looking at a net gain here.

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

Next, we would encourage the EPA and the Army Corps of Engineers to continue to implement the National Mitigation Action Plan. "Mitigation" may be a dirty word, but it is still the only way to go in some cases where impacts are unavoidable.
And to require--and we should underline  "effective mitigation" unavoidably lost wetlands.

There are a number of cases where mitigation resulting in so-called creation or restoration
projects have not proven to be terribly successful.

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

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

MR. EHRMANN: Commissioner Hershman?

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

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

And prior to that, 10 years ago they saw
it a different way.

So I think if we want to make a recommendation that means something that would reflect a change, then we could even be very bold and
say if we want further jurisdiction and include

isolated wetlands, we should go back to the 1986

interpretation, which was what was into law prior to

this last thing.

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

I fully agree with the ones on the state wetlands laws. I think that is really important.

And these others are all valuable, too.

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

It is a back door way of dealing with it through the Water Quality laws. It brings into bed together two animals that hate each other in most
cases, and don't get along. And I think that there's a real need for reform here.

So I guess the question that I would have is whether it is worth considering, or whether you
guys did consider a different kind of a structure all
together. There have been proposals in the
literature for decades now on some sort of different
kind of a wetlands law.

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

I think our feeling there was that under
present circumstances we probably had a 50-50 chance,
perhaps even worse, of losing ground from where we
are now as opposed to gaining ground. So that we
would simply try to assert as much jurisdiction as
possible under the existing interpretation.
I am perfectly willing to consider something else, but I believe that summarizes much of our discussion. Staff can tell me differently.

Bob, I know you had something you wanted
to add to this a minute ago. Maybe you can clarify a little bit.

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

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

So that is sort of an oblique call for Congress to address the issues more clearly in the Clean Water Act, and for the Corps of Engineers and EPA to implement the program as aggressively as they can in the meantime in light of the Swank decision.
We worked to take all of that jargon and inside-baseball talk out of the, certainly out of the slide, and to some extent out of the recommendation. But I think the belief was that these are very
important elements to the aquatic ecosystem, and to
the extent that there would be—and there is a
current pending regulatory action—some inclination
to go beyond what the Supreme Court said and further
restrict protection of wetlands, that that would not
be a good thing and we ought to be going—the
Commission would recommend that the agencies and the
Congress go as far as they can consistent with the
Constitution.

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

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

COMMISSIONER SANDIFER: I would like to hear from the other Commissioners on this point, but
your point is well taken.

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

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

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

If that situation continues, then it either ought to be--the responsibility for administering the wetlands law ought to be given to
one or the other of the agencies, or at least the
National Ocean Council should be charged with the
responsibility of straightening out that
relationship. Because that is precisely the kind of
problem that--we don't even know whether we're making
any progress on the problem because the two agencies
charged with administering it don't get along with
each other.

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

The "either" is that EPA be given the lead
role in Section 404 permitting and enforcement. And
the "or" is, if the Congress isn't willing to do
that, that the National Ocean Council figure out some
better way to manage the relationship between the two agencies currently involved.

COMMISSIONER RUCKELSHAUS: The only caveat I would have, Paul, is that I would try to make sure
that my recollection of the way in which the law was
administered, which I know is accurate, is still the
way it's being administered. Is that still the fact?

COMMISSIONER ROSENBERG: Yes.

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

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

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

BOB WAYLAND: Actually, for the last 14
years I was responsible for this program at the EPA
end of things at the sort of highest career level.
COMMISSIONER SANDIFER: You have our sympathies.

BOB WAYLAND: And I would say that the situation has significantly improved. In fact, a
A major step toward that improvement was taken in 1993 with the development of an Interagency Wetlands Plan, some 100 action items that the EPA and the Corps jointly or in some cases separately pursued.

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

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

Now having said all that, there are still 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
for many of the preceding years.

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

MR. EHRMANN: Commissioner Rosenberg on this point.

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

There are two other agencies that are involved in the 404 program, NOAA and Interior. I had experience with it from the NOAA side. It's not so much the battling that concerned me, although
obviously that is a problem; it is the result.

That is why I refer to CAFOs again. I think the result is kind of like what we get out of CAFOs. We end up doing a huge number of permit
reviews. We don't connect them. There isn't a very
good evaluation of cumulative impact.

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

EPA and the Corps have very different
mandates. NOAA, Fish and Wildlife Service certainly.

They do work together, and there is a lot of effort
put in I think by the staffs in all of the agencies
to try to make this work, but I know that it is a
program that is incredibly difficult to make work
under the existing structure and under the existing
statute.

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

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

staffer could do other than give their individual

opinion. You don't have time to have a broader
overview. There's no programmatic overview, or

you're struggling to have any programmatic overview,

and there is no real way to see how the permits

relate to one another except in the mind of the

individual staffer in the other 1000 permits they

looked at that year.

That just doesn't make any sense to me,

and I think you get the result of no net loss hasn't

resulted in no net loss, and we have lost wetlands.

So I think that this is an area where we need some

major changes.

I think it is in the permitting program of

trying to look at cumulative impacts. And I think it

relates to watershed management. There needs to be

something clearer in watershed management that this

permitting activity relates to so that you can look

at cumulative impacts, and you can have some sense of
how everything fits together.

It is not a swipe at EPA, or the Corps, or NOAA, or the Fish & Wildlife Service, because I have dealt with people in all of those agencies trying to manage this program.
I just think it is not well structured,
not because of lack of will, but because of the
conflicting mandates and the fragmentation across the
agencies.

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

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

MR. EHRMANN: Commissioner Hershman, and
then back to Commissioner Gaffney.

COMMISSIONER HERSHMAN: What Andy said I agree with completely. I would just add one thing to it. The program is set up to be project by project
review, and by law that is the only way it can work.

So one thing that could be recommended,

even if we don't go along with a major overhaul of

the agencies and all that, is to be able to introduce

a planning function of some sort into wetlands.

I remember an attempt to do some

characterization of wetlands, and some signaling in

advance that these wetlands are ones you can't touch,

but these we can try to mitigate, and these are less

important, and that was thrown out as being unlawful.

Well that's something there that can be a

fix. If we could somehow look ahead so that we can

characterize the resource, identify areas where it is

particularly critical and in areas where we can still

find development within it so long as it there is

mitigation, I think we will have taken a big step

forward. So that's an idea to throw into the hopper.

MR. EHRMANN: Let me go to Commissioner
Gaffney and then back to Mr. Ruckelshaus.

COMMISSIONER GAFFNEY: To defend the recommendation just a little bit, reading back on our longer paper, I guess I came away with the
impression, which I now think is not exactly correct, that it was very clear that EPA was in charge of this. It says "EPA and Corps of Engineers" up here, and there's also Fish & Wildlife, and NIMPS involved in this process.

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

On the permitting thing, if you'll allow me to leap forward, we had this discussion and the discussion that's about to come up on dredge spoil for ports. We were so frustrated by the permitting process and the many steps it goes through and the length of time and the economic impact, and the negative environmental impact by these long processes that tend to irritate people, that we
are about to recommend that this whole kill chain from start to finish be looked at in that particular case by the National Academy of Public Administration, someone that is used to looking at
processes. And maybe these could be lumped together.

MR. EHRMANN: Good thought. Mr. Ruckelshaus?

COMMISSIONER RUCKELSHAUS: There are in fact three studies that have come out from the National Academy of Public Administration in the last five years that look at a lot of EPA programs, including this one. I was on two of those studies. I would echo what Mark has said and think we should include in a recommendation. This is a pretty good example of why you need a National Ocean Council. And if we are in fact encouraging people to go to ecosystem-based management, the fact that you have a number of these wetlands in a given watershed and, because they're treated individually, in some respects they're all treated the same, and they're not all the same. Some of them are important, and some of them aren't--I think you used the word
critical.

And if we had an ecosystem-based management process in these regional ocean councils, it would be possible to begin to designate which of
the wetlands we really ought to be concerned about

and which of those are not so important.

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

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

MR. EHRMANN: There are a couple of more Commissioners who want to comment. Bob Wayland, did
you have another comment?

BOB WAYLAND: Just a point of information.

The reference to the National Mitigation Action Plan that's included on the slide that is in front of you does refer to an effort on the part of EPA and Army
jointly to try to move mitigation from a permit-by-permit and reactive approach to one that is watershed based and does include a stronger planning element.

There are some serious impediments to trying to do that in the permitting process, per se, but know that we're going to need mitigation and trying to look at that other than on a permit-by-permit basis is something that has been recognized. It was included as a recommendation of the National Academy report, and actually builds on an element of that '93 Wetlands Plan that called for trying to move this program. And frankly beyond the Clean Water Act 404 program, but including the efforts of other federal agencies and the private sector away from project-by-project permit-by-permit approaches and toward a watershed approach.

COMMISSIONER ROSENBERG: I was involved,
and you probably were, too, Bob, in the Special Area Management Plan sort of exercises in places like Hackensack Meadowlands, and I don't think that it worked quite right. But at least the idea of looking at all of the wetlands and all of the projects and
thinking about mitigation broadly clearly was a much more sensible way to go than permit-by-permit. Even though I’m not sure that it fully worked. We ended up being in a lot more sensible place at the end of that process than we were at the beginning, because there was a proposal to build the world's largest shopping mall in the middle of the wetlands, Hackensack Meadowlands.

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

MR. EHRMANN: Commissioner Coleman and then Commission Borrone.

COMMISSIONER COLEMAN: Paul, I realize that you're dealing with the Section 404 Program and dealing with isolated wetlands, but I would urge the
Working Group to take one step beyond that.

I am from a state where in two years we lose more coastal wetlands than all the isolated wetlands that exist in the U.S.
Between Alaska and Louisiana, and a few of
the other states in the Gulf Coast, we have 80
percent of the total wetlands. We are losing those
at a rate of 25 to 30 square kilometers per year. A
recent study by the Corps of Engineers, and one by a
private firm that Louisiana hired to just simply
attain a no-net-loss would take between, in one
report, $12 billion over the next 20 years; the other
was $15 billion over the next 20 years.

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

So I would urge you to add another page to
this. You can still incorporate Section 404 under it. But I would strongly urge you to do that.

MR. EHRMANN: Paul, did you want to comment on that?

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

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

That is where it ought to be emphasized.

And then we go into this other one. I flatly just
did not have the paperwork with me, and it is just a
matter of not having the information to sit and work
with staff and I promise to get it to them. So we
will move ahead with that.

COMMISSIONER COLEMAN: Thank you for that.
And if the staff needs any help, I have probably more material that I can send them than they'll ever want to see.

MR. EHRMANN: Great. Commissioner
COMMISSIONER BORRONE: Thank you. Still on the 404 program. I appreciated the focus on watershed planning. I think it emphasizes, though, the need for the comprehensive, systematic planning effort looking at the watershed as well as the coastal zone and the interactions, just as Jim has pointed out by his comments about the wetland loss in Louisiana.

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

And while in our discussions we were talking broadly about coastal areas, I don't think we should limit that recommendation on one hand. On the other, given the size of the numbers Jim has just talked about, I think we have to
be thoughtful in the way we frame that recommendation.

If we are going to talk at all about a new financial plan or program that the Congress might be
expected to authorize for land acquisition for

presentation, for restoration, for protection and

enhancement, then I think we need to think about it

in a multi-tiered broad scope.

I think it has to be looked at. Right now

tese permits really rely on developer negotiations

where you're getting the private sector or the public

sector entity who is going to be building whatever

the facility or use is to agree to make certain

commitments.

But there are other methods that we might

explore in the financial dialogue that we're going to

have during the next few months that might look at

other public/private program opportunities that could

be coupled with any new federal funds that might be

able to be generated by a Congressional

authorization.

So I just ask us to think about the
linkages as we are making these recommendations and try to make sure that we are looking in the broadest fashion as well as in the specifics.

MR. EHRMANN: Commissioner Sandifer, do
you want to make any kind of summary comments based
on what you've heard on this section before we move
on?

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

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

Take a very clear statement of the current
loss not due to development pressures but to other
pressures, climatic and others, in the Gulf of Mexico
and Alaska of wetlands, and to look at land and
wetland protection programs, including the new
recommendation currently in the Congress in the
broader view ways to encourage, to also encourage gains of wetland areas.

Finally, I would tend to agree with Lillian that we need to broaden it beyond just the
estuary. Despite the fact that we're in very
difficult economic times, I am not so afraid of the
big numbers. Look at what is being done in the
Florida Everglades at least in terms of expenditures.

Whether or not you agree with everything that's being
done, that program was sold to the Congress as a
restoration program and huge sums of money were made
available based on the critical nature of that
ecosystem.

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