DEPARTMENT OF THE ARMY

COMPLETE STATEMENT
OF

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ASSISTANT SECRETARY OF THE ARMY
(CIVIL WORKS)

BEFORE THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
UNITED STATES HOUSE OF REPRESENTATIVES

and

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ON

Impacts of the Proposed Waters of the United States Rule on State and Local Governments

February 4, 2015

Chairman Inhofe, Ranking Member Boxer, Chairman Shuster and Ranking Member DeFazio, I am Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works). Thank you for the opportunity to discuss the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency's (EPA) proposed Clean Water rule to clarify the jurisdictional scope of the Clean Water Act (CWA) and thereby improve the efficiency of the process by which the Corps determines which waters are and are not covered by the Act. I am pleased to be here today testifying alongside the Honorable Gina McCarthy, Administrator of the EPA.

Our overarching policy objective is to enable the agencies to balance the protection of our Nation's aquatic resources as required by the CWA with the need for utilization of important resources. Both the Corps and EPA continually strive to be more efficient and to streamline required environmental reviews. A corollary objective is to make improvements in our regulations fully responsive to, and consistent with, the three Supreme Court decisions that I will highlight for you today. Our goal in this rulemaking is to provide the clarity, consistency, and predictability that members of Congress and the regulated public have requested, while remaining faithful to the requirements of Federal law.

The jurisdictional scope of the CWA is "navigable waters," defined in the statute as "the waters of the United States, including the territorial seas." The statutory text, legislative history and the case law confirm that "the waters of the United States" in the CWA are not limited to the traditional navigable waters. It is this Clean Water Act definition that is the subject of this proposed rule. The CWA leaves it to EPA and the Corps to define the term "waters of the United States." Existing regulations define "waters of the United States" as the traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands.

Under Section 404 of the CWA, the Corps regulates discharges of dredged or fill material into waters of the United States, including wetlands. The Corps Regulatory Program is implemented day-by-day at the district level by 38 district commanders and their staffs, who know their regions and resources, and the public they serve. Nationwide, the Corps makes final decisions on over 81,000 permit-related activities and approximately 56,000 jurisdictional determinations, annually. Therefore, maintaining and improving regulatory efficiency for the members of the public who submit to the Corps for decision applications for permits and requests for jurisdictional determinations under Section 404 of the Act is a critical goal of this rulemaking. Since the enactment of the CWA, there have been three significant Supreme Court decisions that have addressed the scope of waters that are regulated under Section 404 of the Act. As already noted by Administrator McCarthy, two of those cases followed the publication of our 1986 regulations, which are still on the books. The outcome of these court decisions illustrate why there is a pressing need for the Corps and EPA to clarify and update their CWA regulations. Allow me to briefly explain further.

In 1985, the Supreme Court in *United States* v. *Riverside Bayview Homes* deferred to the Corps' judgment that adjacent wetlands are "inseparably bound up" with the waters to which they are adjacent, and upheld the inclusion of adjacent wetlands in the regulatory definition of "waters of the United States." The Court found that interpretation reasonable in light of Congress' broad objectives of protecting water quality and aquatic ecosystems. Thus, the 1986 regulations reflect the inclusion of the term "adjacent" in the regulatory definition of "waters of the United States." The 1986 regulations include a definition of adjacent, which clarifies that the term refers to wetlands that are "bordering, contiguous, or neighboring" jurisdictional waters of the United States. The definition of "adjacent" also states that "Wetlands separated from other Waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

In 2001, the Supreme Court held in *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers* (*SWANCC),* that the use of "isolated" non-navigable intrastate ponds as habitat by migratory birds was not, by itself, a sufficient basis for the exercise of Federal regulatory authority under the CWA over those ponds, and that the significant nexus between the adjacent wetlands and `navigable waters' had informed the Court's reading of the CWA in *Riverside Bayview*.

In 2006, *Rapanos v. United States* involved two consolidated Supreme Court cases in which the CWA had been applied to wetlands adjacent to non-navigable tributaries of traditional navigable waters. All members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. A four-Justice plurality interpreted the term "waters of the United States" as covering relatively permanent, standing or continuously flowing bodies of water that are connected to traditional navigable waters, as well as wetlands with a continuous surface connection to such water bodies.

Justice Kennedy in *Rapanos* concluded that the term "waters of the United States" encompasses wetlands that "possess a *significant nexus* to waters that are or were navigable in fact or that could reasonably be so made." He further stated that wetlands possess the requisite significant nexus if the wetlands, "either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable." The four dissenting Justices in Rapanos would have affirmed the court of appeals' application of the existing Corps regulation and also concluded that the term ''waters of the United States'' includes all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy.

Since 2007, the United States' view is that CWA jurisdiction can be established under either the plurality standard or Justice Kennedy's standard, and the proposed Clean Water Rule addresses this. Because Justice Kennedy identified a "significant nexus"

threshold for establishing CWA jurisdiction, and the four dissenting Justices agreed that this was an appropriate basis for establishing jurisdiction, the Corps and EPA have determined that it is reasonable and appropriate to apply the "significant nexus" standard to both open waters and wetlands to determine whether they are subject to CWA jurisdiction. Federal courts have generally upheld this interpretation of Rapanos.

Following the *SWANCC* and *Rapanos* decisions, the Corps and EPA developed policy guidance in 2003 and in 2008. The latter calls for case-specific significant nexus analysis for many categories of non-navigable streams, other water bodies, and wetlands. These jurisdictional determinations require extensive documentation, field work, and in specific circumstances involve coordination between the Corps and EPA, all of which require significant resources and time. Applicants seeking a Department of the Army CWA Section 404 authorization have, on a regular basis, expressed concern and frustration over the lack of clarity regarding how significant nexus determinations are being made by the Corps.

In addition, when the agencies began developing draft guidance on this subject in 2011, we received many comments from various entities, including Congress, business and industry, agricultural interests, scientists, other stakeholders, and the public, urging the agencies to pursue a notice and comment rulemaking effort instead of relying on guidance. Chief Justice Roberts himself in the *Rapanos* decision stated that the agencies would be in a better position if they had conducted a notice and comment rulemaking and promulgated a new final rule regarding CWA jurisdiction. We chose to pursue rulemaking with a wide range of support for a new rule to clarify jurisdiction under the CWA.

The proposed rule retains much of the structure of the agencies' longstanding definition of "waters of the United States," including many of the existing provisions not directly impacted by the *SWANCC* and *Rapanos* decisions. The agencies did not propose to

substantively change the following terms and provisions: traditional navigable waters, interstate waters, and the territorial seas.

For the first time, the agencies proposed a regulatory definition for the term “tributary” and proposed that only those waters that meet that definition and that flow directly or indirectly into a traditional navigable water, an interstate water, or the territorial seas are jurisdictional as tributaries.

The agencies have significantly clarified the definition of “adjacency.” The agencies proposed to change the definition of “adjacent” to cover both adjacent wetlands and other adjacent water bodies. Furthermore, our proposed rule clarifies the meaning of the term “neighboring” as used in the definition of “adjacent” and defines the terms “riparian area” and “floodplain.” These new definitions afford greater clarity to the identification of waters that would be jurisdictional by rule under this category using well understood ecological concepts. As a result, no additional site-specific analysis would be required for the adjacent waters category. Our decision to propose to regulate “by rule” all tributaries and adjacent waters and wetlands is based on our understanding that these waters, alone or in combination with similarly-situated waters in a watershed, have a significant nexus to a traditional navigable water, interstate water, or the territorial seas based on the best currently available science.

The proposal also reduces jurisdictional uncertainty because it defines certain categories of waters that currently require case-specific analyses to instead be “jurisdictional by rule.” By decreasing the number of jurisdictional determinations that require a case-specific significant nexus analysis evaluation, the proposed rule is expected to reduce documentation requirements and processing times for those determinations.

One of the most substantial changes in the proposed rule is to delete the existing regulatory provision that refers to “other waters.” Under the proposed rule, an “other

water" could be determined to be jurisdictional only upon a case-specific determination that it has a significant nexus with traditional navigable waters, interstate waters, or the territorial seas. The rule offers a definition of "significant nexus" and explains how similarly situated "other waters" in the region could be identified.

The agencies proposed, for the first time, to exclude by rule certain waters and features over which the agencies have as a policy matter generally not asserted jurisdiction, such as certain ditches, artificial reflecting pools and swimming pools, groundwater, and specific erosional landscape features. Waters and features that are determined to be excluded from CWA jurisdiction will not be jurisdictional under any of the categories of "waters of the U.S." in the proposed rule, even if they would otherwise satisfy the regulatory definition of a jurisdictional water body.

Finally, the agencies do not propose any changes to the existing regulatory exclusions, including those for waste treatment systems or prior converted cropland.

What is the process going forward?

The proposed rule was published in the Federal Register (FR) on April 21, 2014, and comments were accepted through November 14, 2014. The FR notice solicited comment and public input on all aspects of the proposed rule and specifically requested comment on certain options and approaches. The public provided robust input; over a million comments were received, over 20,000 of which are unique and present individual ideas, opinions, and suggestions for the agencies to consider as they craft a proposed final rule. The agencies are in the process of fully evaluating the body of public comment and considering that input as a final rule is being developed. In publishing the final rule, the agencies will also carefully consider the Science Advisory Board's findings and recommendations contained in its final report, which was recently published in the Federal Register.

In summary, like Administrator McCarthy, I am focused on ensuring that the final rule will achieve the goal of providing greater predictability, consistency and effectiveness in the process of identifying those waters that are and are not jurisdictional under the CWA.

This concludes my statement. Thank you again for the opportunity to be here today and I will be happy to answer any questions you may have.