DEPARTMENT OF THE ARMY

COMPLETE STATEMENT
OF

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(CIVIL WORKS)

BEFORE THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

UNITED STATES HOUSE OF REPRESENTATIVES

ON

Potential Impacts of Proposed Changes to the Clean Water Act Jurisdiction Rule

June 11, 2014

Chairman Gibbs, Ranking Member Bishop, and Members of the Subcommittee, I am Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works). Thank you for the opportunity to discuss the Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency's (EPA) proposed rule defining "waters of the U.S." under the Clean Water Act (CWA). I would like to specifically discuss why our agencies are pursuing rulemaking on this subject and the policy objectives of this rulemaking effort. I will also discuss the key beneficial changes and clarifications of the proposed rule, and outline what we propose to change and what we are not changing through this rulemaking effort. This rulemaking effort will enable our agency to protect aquatic resources and provide clarity and predictability for the regulated public in a manner that is consistent with the statute and Supreme Court decisions. Finally, I will discuss the rulemaking process going forward and describe our efforts to obtain valuable public input to inform the final rule.

Under Section 404 of the CWA, the Corps regulates discharges of dredged or fill material into waters of the United States, including wetlands. The regulatory program is implemented day-by-day at the district level by staff that knows their regions and resources, and the public they serve. Nationwide, the Corps makes decisions on over 88,000 applications as well as approximately 58,000 jurisdictional determinations annually.

The jurisdictional scope of the CWA is "navigable waters," defined in the statute as "waters of the United States, including the territorial seas." The statutory text, legislative history and the case law confirm that "waters of the United States" in the CWA are not limited to the traditional navigable waters. It is this CWA 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 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.

Since the enactment of the CWA and publication of our 1986 regulations defining waters of the U.S. for purposes of CWA Section 404, there have been three significant Supreme Court decisions that have addressed the scope of waters that are regulated under Section 404 of the Act. I will briefly describe the outcome of these cases and my intent is to illustrate that there is a real need for the Corps, working closely with EPA, to clarify and update our regulations defining the geographic scope of CWA jurisdiction, which were last published in 1986.

In *United States* v. *Riverside Bayview Homes*, the U.S. Supreme Court 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. 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 and that the significant nexus between the adjacent wetlands and `navigable waters' had informed the Court's reading of the CWA in *Riverside Bayview. 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 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." Justice Kennedy 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." Kennedy's opinion notes that such a relationship with navigable waters must be more than "speculative or insubstantial." The four dissenting Justices concluded that waters that satisfy either the plurality's or Justice Kennedy's standard are "waters of the United States" within the meaning of the CWA. The United States' view is that CWA jurisdiction can be established under either standard. Because Justice Kennedy identified "significant nexus" as the touchstone for 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.

Why the agencies chose to do a rule, its policy objectives, and its benefits.

As a result of these complex court decisions, there exists a need for a rule that provides clarity, efficiency, and certainty for the regulated public and agency staff regarding CWA jurisdiction. Following the *SWANCC* and *Rapanos* decisions, the agencies developed policy guidance that 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 coordination between the Corps and EPA, all of which require significant resources and time. The confusion and lack of clarity contributes to uncertainty for the regulated public. In addition, when the agencies began developing draft guidance on this subject in 2011, we received many comments from various entities, including Congress, stakeholders, and the public, urging the agencies to pursue a notice and comment

rulemaking effort instead of non-binding less formal agency policy guidance. Furthermore, Chief Justice Roberts recommended in his concurring opinion in *Rapanos* that the agencies conduct a notice and comment rulemaking and promulgate a new final rule regarding CWA jurisdiction. We listened to these requests.

The agencies are proposing this rule to provide much-needed clarity regarding which waters are, and which waters are not, jurisdictional under all sections and programs of the CWA. Our proposal is consistent with the best available science and the agencies' interpretation of the Supreme Court decisions. The proposed rule will help improve efficiency in making jurisdictional determinations. The proposed rule will ensure protection of our Nation's aquatic resources and make the process of identifying "waters of the United States" less complicated and more efficient. The rule achieves these goals by increasing CWA program transparency, predictability, and consistency. This rule will result in more effective and efficient CWA jurisdictional determinations with increased certainty and less litigation.

The proposed rule will improve clarity for regulators, stakeholders, and the regulated public. The proposal accomplishes this by defining certain categories of waters that currently require case-specific analyses as jurisdictional by rule. By decreasing the number of jurisdictional determinations that require this case-specific significant nexus analysis evaluation, the proposed rule is expected to reduce documentation requirements and processing times for jurisdictional determinations.

What has NOT changed, and what is NOT jurisdictional?

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* Supreme Court decisions. The agencies propose to define "waters of the United States" in section (a) of the proposed rule for all sections of the CWA as follows:

- All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- All interstate waters, including interstate wetlands;
- The territorial seas;
- All impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary;
- All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment;

- All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary; and

- On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas.

The agencies do not propose to substantively change the following provisions: traditional navigable waters interstate waters, the territorial seas.

For the first time, the agencies propose a regulatory definition for the term "tributary" and propose 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 propose 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. In addition, the agencies propose that waters outside of the riparian and floodplain areas would be jurisdictional only if they have confined surface or shallow subsurface connection to a traditional navigable water, an interstate water, the territorial seas, or an impoundment or tributary of such waters. 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.

One of the most substantial changes in the proposed rule is to delete the existing regulatory provision that defines "waters of the United States" to include as jurisdictional all other waters the use, degradation or destruction of which could affect interstate or foreign commerce. These are generally referred to as "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 proposed rule also presents several alternative options for determining the jurisdictional status of certain "other waters;" those other options would rely less, or not at all, on case-specific significant nexus evaluations. The agencies may adopt one or a combination of these options for the final rule after considering public comment and the evolving scientific literature on connectivity of waters.

The agencies propose for the first time to exclude by rule in section (b) certain waters and features over which the agencies have as a policy matter generally not asserted jurisdiction. The proposed section (b) would exclude specified waters and features from the definition of "waters of the United States." Waters and features that are determined to be excluded under section (b) of the proposed rule will not be jurisdictional under any of the categories in the proposed rule under section (a), even if they would otherwise satisfy the regulatory definition of a jurisdictional water body. Those waters excluded under section (b) of the proposed rule that would not be "waters of the United States" are: ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow; ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or an impoundment of a jurisdictional water; artificial reflecting pools or swimming pools created by excavating and/or diking dry land; groundwater, including groundwater drained through subsurface drainage systems; and, gullies, rills, and non-wetland swales.

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 on April 21, 2014, for a 91-day public comment period. The FR notice solicits comment and public input on all aspects of the proposed rule and specifically requests comment on certain options and approaches; we look forward to robust public comment to inform the final rule. After the completion of the comment period, the agencies will fully evaluate and consider the comments received in the development of the final rule. In addition, the agencies have committed that the rule will not be finalized until the connectivity science synthesis report is finalized, which will reflect feedback provided by EPA's Science Advisory Board and the public. The agencies will determine at that time whether the entire administrative record supports the conclusions of the proposed rule, and make any adjustments to the final rule deemed to be appropriate at that time.

Outreach and public input.

The agencies recognize the importance and value of receiving public input on this proposed rule. The public may submit comments within the 91-day public comment period. In addition, the agencies have developed a rigorous schedule of outreach and stakeholder calls to present the proposed rule to the public and interested parties and to solicit further comments. There are various joint stakeholder meetings held each week between the agencies and various groups, such as: state governments and agencies, businesses, the agricultural industry, the natural resources industry, and environmental

organizations. The agencies also plan to participate when invited to speak at various meetings and conferences, when within budget constraints. In addition, the agencies are hosting webinars and have developed informative websites to further disseminate information on the proposed rule. Also, the roll-out effort for the proposed rule included significant outreach and other media events. The agencies have tried to reach out to as many different interested parties as possible to ensure that the proposed rule receives valuable public input in order to best develop the final rule.

Mr. Chairman, 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.