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COMPLETE STATEMENT OF

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BEFORE THE
SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS OF THE
COMMITTEE ON GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES

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Good morning, Mr. Chairman and Members of the Subcommittee. We welcome the opportunity to present joint testimony to you today about the Supreme Court ruling in Solid Waste Agency of Northern Cook County v. the U.S. Army Corps of Engineers, 531 U.S. 159 (2001), more commonly referred to as the SWANCC decision. Our testimony focuses on the progress our agencies have made to develop a comprehensive response to SWANCC that will ensure that the Court's ruling is faithfully implemented. As we will discuss, we have determined that we should engage in rulemaking to define the federal role under the Clean Water Act (CWA) and collect broad public input on important jurisdictional waters.

Background

Because the SWANCC decision and our testimony today focus on federal jurisdiction under the CWA, we think it important to emphasize that the Federal government is fully

committed to preventing the unauthorized discharge of pollutants into all CWA jurisdictional waters, including adjacent wetlands, as was intended by Congress. Safeguarding these waters is a critical Federal function because it ensures that the chemical, physical, and biological integrity of these waters is maintained and preserved for future generations. We think it is appropriate to highlight the importance of our collective water resource protection responsibilities under § 404 of the CWA since EPA and the Army share responsibility for the § 404 program which protects all navigable waters, including adjacent wetlands, and SWANCC itself involves § 404 of the Clean Water Act. Indeed, we were pleased by provisions in the 2002 Farm Bill that will provide protection for millions of acres of wetlands and other water resources even if they are no longer subject to jurisdiction under the CWA.

Wetland losses have dropped substantially over the past ten years. The § 404 program has played a pivotal role in protecting thousands of acres of environmentally sensitive wetlands through highly effective procedures that are designed to avoid, minimize, and mitigate for unavoidable losses. § 404 will continue to fulfill this critical public purpose.

We also wish to emphasize that although the SWANCC decision and our testimony today focus on federal jurisdiction pursuant to the CWA, other federal or state laws and programs may still protect a water and related ecosystem even if that water is no longer jurisdictional under the CWA following SWANCC. SWANCC did not affect the Federal government's commitment to wetlands protection through the Food Security Act's Swampbuster requirements and federal agricultural program benefits and restoration through such Federal programs as the Wetlands Reserve Program

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(administered by the U.S. Department of Agriculture) grant making programs such as Partners in Wildlife (administered by the Fish and Wildlife Service), the Coastal Wetlands Restoration Program (administered by the National Marine Fisheries Service), the Five Start Restoration and National Estuary Program (administered by EPA), and the Migratory Bird Conservation Commission (composed of the Secretaries of Interior and Agriculture, the Administrator of EPA and Members of Congress).

The SWANCC decision also highlights the role of States in protecting waters not addressed by Federal law. Prior to SWANCC, fifteen States had programs that addressed isolated wetlands. Since SWANCC, additional States have considered or adopted legislation to protect isolated waters. The Federal agencies have a number of initiatives to assist States in these efforts to protect wetlands. For example, EPA's Wetland Program Development Grants are available to assist States, Tribes, and local governments build their wetland program capacities. The Department of Justice (DOJ) and other Federal agencies are co-sponsoring a national wetlands conference with the National Governor's Association, National Counsel of State Legislatures, the Association of State Wetlands Managers, and the National Association of States Attorney General. This conference is designed to promote close collaboration between Federal agencies and States in developing, implementing, and enforcing wetlands protection programs. EPA also is providing funding to the National Governors Association Center for Best Practices to assist states in developing appropriate policies and actions to protect intrastate isolated wetlands.

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Shared Responsibility for § 404 of the Clean Water Act

EPA and the Army Corps of Engineers ("Corps") share responsibility for the § 404 program under the Clean Water Act, which protects wetlands and other aquatic resources and maintains the environmental and economic benefits provided by these valuable natural resources. Under § 404 of the CWA, any person planning to discharge dredged or fill material to "navigable waters" must first obtain authorization from the Corps (or a State approved to administer the § 404 program), through issuance of an individual permit, or must be authorized to undertake that activity under a general permit.

Although the Corps is responsible for the day-to-day administration of the program, including reviewing permit applications and deciding whether to issue or deny permits, EPA has a number of important § 404 responsibilities. In consultation with the Corps, the EPA develops the § 404(b)(1) Guidelines, which are the environmental criteria that the Corps must apply when deciding whether to issue permits. Under the Guidelines, a discharge is not allowed if there are practicable alternatives with fewer adverse effects on the aquatic ecosystem, and appropriate steps must be taken to minimize potential adverse effects to the aquatic ecosystem and mitigate for unavoidable impacts.

EPA and the Corps have a long history of working together closely and cooperatively in order to fulfill our important statutory duties on behalf of the public. For example, the Army and the EPA we have concluded a number of written agreements

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which are intended to further these cooperative efforts in a manner that promotes efficiency, consistency, and environmental protection.

The SWANCC Decision

SWANCC involved a challenge to CWA jurisdiction over certain isolated, intrastate, non-navigable ponds in Illinois that formerly had been gravel mine pits, but which, over time, attracted migratory birds. Although these ponds served as migratory bird habitat, they were non-navigable and isolated from the tributary system of other waters regulated under the CWA. In SWANCC, the Supreme Court held that the Army Corps of Engineers had exceeded its authority in asserting CWA jurisdiction pursuant to § 404(a) over the waters at issue based on their use as habitat for migratory birds, pursuant to preamble language, commonly referred to as the Migratory Bird Rule. 51 Fed. Reg. 41217 (1986).

"Navigable waters" are defined in the CWA to mean "waters of the United States, including the territorial seas." 33 U.S.C § 1362. In SWANCC, the Court determined that the term *navigable* had significance in indicating the authority that Congress' intended to exercise in asserting CWA jurisdiction. After reviewing the jurisdictional scope of the statutory definition of navigable waters, the Court concluded that neither the text of the statute nor its legislative history supported the Corps' assertion of jurisdiction over the waters involved in SWANCC.

In SWANCC, the Supreme Court voiced "serious constitutional and federalism questions" raised by the Corps' interpretation of the CWA. The Court recognized that

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"Congress passed the CWA for the stated purpose of 'restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters'" and also noted that "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.'" SWANCC at 166-67. Given the Court's determination that the term navigable waters as used in § 404(a) of the CWA must be given some meaning, the Court determined that the Migratory Bird Rule was an invalid extension of the agency's authority under § 404(a) the CWA.

Scope of Jurisdiction Generally, After SWANCC

Because SWANCC limited use of the Migratory Bird Rule as a basis of jurisdiction over certain isolated waters, it has focused greater attention on CWA jurisdiction generally, and specifically over tributaries to jurisdictional waters and over wetlands that are "adjacent wetlands" for CWA purposes.

As indicated, the CWA defines the term navigable waters to mean "waters of the United States, including the territorial seas." The Supreme Court has recognized that this definition clearly includes those waters that are considered traditional navigable waters. In SWANCC, the Court noted that while "the word 'navigable' in the statute was of 'limited import'" (quoting Riverside Bayview Homes, 474 U.S. 121 (1985)),“ the term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." 531 U.S. at 172. In

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addition, the Court reiterated in SWANCC that "Congress evidenced its intent to 'regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." SWANCC (quoting United States v. Riverside Bayview Homes Inc., 474 U.S. 121, 133 (1985)). The Supreme Court has recognized in SWANCC and Riverside Bayview that the Corps has jurisdiction pursuant to § 404(a) of the CWA over wetlands that actually "abutted on a navigable waterway." SWANCC at 167; see generally Riverside Bayview. In rendering both decisions, the Court declined to address the exact limits of how far Congress extended federal jurisdiction beyond traditional navigable waters.

Army and EPA Response

The case law on the precise scope of federal CWA jurisdiction since SWANCC is still developing. The Corps, EPA, and DOJ have been monitoring these newly decided cases and have been working closely together in an effort to develop guidance concerning CWA jurisdiction following SWANCC. As you know, the EPA has final authority over CWA jurisdictional matters according to a prior Attorney General Opinion.

EPA and the Corps have organized a staff-level interagency workgroup that includes EPA, Corps, and DOJ participants and meets bi-weekly to exchange information, identify SWANCC-related issues arising in the field, and to keep staff informed of litigation developments on an ongoing basis. The interagency group has been very helpful in ensuring that all the issues are being considered, that the legal, policy, and practical implications of various approaches are fully analyzed, and that post-SWANCC case law is given due attention. We believe that this process is the best

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way to ensure a consistent approach on litigation and procedures for disseminating information through our agencies.

We recognize that field staff and the public could benefit from additional guidance on how to apply the applicable legal principles in individual cases. Moreover, the Corps of Engineers and EPA have not updated their regulations in many years generally concerning CWA jurisdiction. Accordingly, our efforts have focused on determining what categories of water are jurisdictional or not jurisdictional, and where rulemaking might be advisable and necessary to reinforce the appropriate scope of CWA jurisdiction. We have determined that we should engage in such a rulemaking. A rulemaking also will allow us to garner public input on the important jurisdictional issues arising from SWANCC. What follows is a brief discussion of the issues that this may address.

SWANCC squarely eliminates CWA jurisdiction over isolated waters that are intrastate and non-navigable, where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross state lines in their migrations. Accordingly, both agencies are now precluded from asserting CWA jurisdiction in such situations.

In light of SWANCC, questions have also been raised about whether there remains any basis for jurisdiction under the other rationales of 33 C.F.R. § 328.3(a)(3)(i)-(iii) over isolated, non-navigable, intrastate waters (i.e., use of the water by interstate or foreign travelers for recreational or other purposes; the presence of fish or shellfish that could be taken and sold in interstate commerce; use of the water for

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industrial purposes by industries in interstate commerce). The Corps and EPA plan to address this issue.

The Court in SWANCC determined that the term *navigable* had at least the significance of showing "what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." 531 U.S. at 172. Accordingly, traditional navigable waters remain jurisdictional following SWANCC. Traditional navigable waters are defined in case law and Army regulations to mean waters that are subject to the ebb and flow of the tide, or waters that are presently used, or have been used in the past, or may be susceptible for use, to transport interstate or foreign commerce. See 33 C.F.R. 328.3(a)(1).

CWA jurisdiction extends to waters, including wetlands, that are adjacent to navigable waters pursuant to the Supreme Court holding in Riverside Bayview Homes, which was endorsed in SWANCC as controlling law. Riverside Bayview found that a wetland adjacent to a traditional navigable water was jurisdictional and that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with' jurisdictional waters" 474 U.S. at 134. While wetlands adjacent to traditional navigable waters remain jurisdictional after SWANCC, the Supreme Court in Riverside Bayview Homes and SWANCC expressly declined to elaborate on the precise meaning of "adjacent." Corps of Engineers and EPA regulations currently define the term adjacent as "bordering, contiguous, or neighboring." 33 C.F.R. § 328.3(b). The Army and EPA are examining the issue of whether this definition should be the subject of future rulemaking.

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For many years, EPA and the Corps have interpreted their regulations to assert jurisdiction over non-navigable tributaries of traditional navigable waters. Following SWANCC, Federal courts have raised questions concerning the extent of CWA jurisdiction over non-navigable tributaries. These questions include the jurisdictional status of intermittent and ephemeral streams and waters that pass through man-made conveyances, and wetlands adjacent to these waters. The Army and EPA are examining whether a rulemaking should be pursued to address these questions.

Conclusion

The case law on CWA jurisdiction is still developing. The agencies will continue to monitor the emerging case law. The resolution of issues on appeal and the issuance of guidance should help to define and reinforce the appropriate scope of CWA jurisdiction. The agencies will continue to work closely together to issue appropriate guidance, in the form of internal policy statements and/or proposed revised regulations as soon as possible. We look forward to receiving stakeholder input on these important issues and are hopeful that this dialogue and ensuing rulemaking will minimize the potential for litigation and disputes generally over CWA jurisdiction. In the meantime, we encourage the public to confer with agency personnel about whether permits are required in circumstances where unresolved jurisdictional issues exist. Agency personnel will answer these questions on a case by case basis.

Thank you for providing us with this opportunity to present this testimony to you. We appreciate your interest in these important national issues that are of mutual concern.

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