COMPLETE STATEMENT OF

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OF THE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

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Good morning, Mr. Chairman and Members of the Subcommittee. We welcome the opportunity to present joint testimony to you today on issues concerning Clean Water Act (CWA) jurisdiction over navigable waters. In keeping with your May 29, 2003, letter of invitation, our testimony will address the current regulatory and legal status of federal jurisdiction in light of the issues raised by 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) ("SWANCC"). In particular, our testimony will provide background information on our agencies' roles and responsibilities under the CWA, summarize the SWANCC decision, discuss our recently issued joint guidance in response to the SWANCC decision as well as our Advance Notice of Proposed Rulemaking (ANPRM),

and then address some of the jurisdictional issues relating to the § 404 regulatory program.

Overview of EPA and Corps of Engineers Clean Water Act Responsibilities

The Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers ("Corps") share responsibility for the § 404 program under the CWA, which regulates discharges of dredged or fill material, helping to protect wetlands and other aquatic resources and maintain the environmental and economic benefits provided by these valuable natural resources. In addition, EPA administers or oversees implementation of numerous other provisions of the CWA. For example, EPA and approved Tribes or States issue permits under § 402 for discharges of pollutants other than dredged and fill material, and EPA reviews and approves water quality standards developed by approved Tribes or States under § 303.

The § 404 responsibilities are extensive. Fulfillment of the Corps day to day responsibilities in its regulatory program requires a staff of greater than 1200 and a budget in FY 2003 of $137 million. These resources are required each year to process more than 80,000 individual and general permit authorizations, including any associated jurisdictional determinations.

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 Tribe or 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 § 404

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, EPA develops the § 404(b)(1) Guidelines, which are the environmental criteria that the Corps must apply when deciding whether to issue permits. Under those Guidelines, a discharge is allowable only when there is no practicable alternative with less adverse effect 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. In this regard, the Army and EPA have concluded a number of written agreements to further these cooperative efforts in a manner that promotes efficiency, consistency, and environmental protection. For example, in 1989 the agencies entered into a Memorandum of Agreement (MOA) setting forth an appropriate allocation of responsibilities between the EPA and the Corps for determining the geographic jurisdiction of the § 404 program. That MOA was entered into in light of a 1979 U.S. Attorney General opinion (43 Op. Att'y Gen. 197) determining that EPA has the ultimate authority under the CWA to determine the geographic jurisdictional scope of the Act. The MOA provides that the Corps will perform the majority of the geographic jurisdictional determinations in the § 404 program using guidance developed by EPA with input from the Corps. Typically such guidance at the national level has been jointly issued by our agencies.

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 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 isolated, intrastate, non-navigable waters under 33 C.F.R. § 328.3(a)(3), 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). At the same time, the Court in SWANCC did not disturb its earlier holding in United States v. Riverside Bayview Homes, 474 U.S. 121 (1985) which found 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.

"Navigable waters" are defined in § 502 of the CWA to mean "waters of the United States, including the territorial seas." In SWANCC, the Court determined that the term "navigable" had significance in indicating the authority Congress intended to exercise in asserting CWA jurisdiction. After reviewing the jurisdictional scope of the statutory definition of "navigable waters" in § 502, 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 recognized that "Congress passed the CWA for the stated purpose of 'restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters' " and 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.' " Expressing "serious constitutional and federalism questions" raised by the Corps' interpretation of the CWA, the Court stated that "where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." Finding "nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit," the Court held that the "Migratory Bird Rule", as applied to petitioners' property, exceeded the agencies' authority under § 404(a).

Apart from § 404, the jurisdiction of many other CWA programs also is dependent upon the meaning of "navigable waters" as defined in CWA § 502. Thus, although the SWANCC case itself specifically involves § 404 of the CWA, the Court's decision may also affect the scope of regulatory jurisdiction under other provisions of the CWA, including programs under §§ 303 (water quality standards program), 311 (spill program, as well as the Oil Pollution Act), 401 (State water-quality certification program), and 402 (National Pollutant Discharge Elimination System (NPDES) permitting program). For example, two significant U.S. Circuit Court of Appeals opinions interpreting SWANCC involved such other programs. Headwaters v. Talent

Irrigation Dist., 243 F.3d 526, 534 (9th Cir. 2001) (§ 402); Rice v. Harken, 250 F.3d 264 (5th Cir. 2001) (rehearing denied) (Oil Pollution Act).

Joint Guidance and Advance Notice of Proposed Rulemaking

On January 10, 2003, following coordination with the Department of Justice, General Counsel from EPA and Army jointly signed clarifying guidance regarding the Supreme Court's decision in SWANCC. The guidance states that jurisdictional decisions will be based on Supreme Court cases, including Riverside Bayview Homes and SWANCC, relevant regulations, and applicable case law in each jurisdiction. Because it is guidance, it does not impose legally binding requirements on EPA, the Corps, or the regulated community, and its applicability depends on the circumstances. The guidance was provided to our field offices and also published as Appendix A to the Agencies' ANPRM in order to ensure its availability to interested persons and to help better inform public comment on the ANPRM.

The guidance makes a number of key points with regard to assertion of CWA jurisdiction, providing that:

- Field staff should not assert jurisdiction over isolated wetlands and other isolated waters that are both intrastate and non-navigable where the sole basis for asserting jurisdiction is based on the factors in the preamble language known as the "Migratory Bird Rule":
  - Use as habitat by birds subject to Migratory Bird Treaties or which cross State lines;
  - Use as habitat for endangered species; or
  - Use to irrigate crops sold in commerce.

- Field staff should seek formal project-specific headquarters approval prior to asserting jurisdiction over isolated non-navigable intrastate waters based on factors listed in 33 C.F.R. § 328.3(a)(3):

- Use by interstate or foreign travelers for recreational or other purposes;
- Production of fish or shellfish sold in interstate or foreign commerce; or
- Use for industrial purposes by industries in interstate commerce.

○ Field staff should continue to assert jurisdiction over traditional navigable waters (and adjacent wetlands) and, generally speaking, their tributary systems (and adjacent wetlands).

- The guidance describes traditional navigable waters as 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.

Finally, because case law interpreting SWANCC is still developing, the guidance supersedes the previous EPA/Corps (January 19, 2001) legal memorandum concerning SWANCC.

In addition to the guidance, we published a joint ANPRM soliciting public comment, information and data on issues associated with the definition of "waters of the U.S." in light of SWANCC. 68 Fed. Reg. 1991 (January 15, 2003). Issuance of the ANRPM was an extra measure, not required by the Administrative Procedure Act, to provide an early opportunity for public comment on this important issue before the agencies decide how to proceed. It does not pre-suppose any particular substantive or procedural outcome.

The ANPRM comment period ran for 90 days, closing on April 16th. It sought public input on the following regulatory issues:

○ Whether factors listed in § 328.3(a)(3)(i)-(iii) of the regulations (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, the use of the water for industrial purposes by industries in interstate commerce) or any other factors, provide a basis for CWA jurisdiction over isolated, non-navigable, intrastate waters;

- Whether the agencies should define "isolated waters," and if so, what factors should be taken into account in the definition.

The ANPRM also sought information on the effectiveness of other Federal or non-Federal programs for the protection of aquatic resources, as well as on the functions and values of wetlands and other waters that may be affected by SWANCC. In addition, it sought data and comments on the effect of no longer asserting jurisdiction over some of the waters (and discharges to those waters) in a watershed on the implementation of Total Maximum Daily Loads (TMDLs) and attainment of water quality standards. Finally, as is often the case with ANPRMs, we did not seek to limit comment only to the specific questions raised, but also solicited views as to whether any other revisions are needed to the existing regulations regarding which waters are jurisdictional under the CWA.

Public Response to Advance Notice of Proposed Rulemaking

We received over 133,000 comments on the ANPRM by the close of the April 16th comment period. As we are still early in the process of reviewing and analyzing the comments received, the information that follows is at this point of a preliminary nature. Approximately 128,000 of the comments appear to be the result of e-mail or write-in campaigns producing identical or substantially similar letters. Of the apparent 5,000 unique or individual letters received, approximately 500 letters raise or discuss specific issues in some detail. The commenters included a number of different types of stakeholder groupings, including Tribes/States and related associations, local

governments, academic, research and scientific associations, industry and the regulated public, non-profit organizations, and private citizens.

The comments reflect a wide breadth of opinion, ranging from assertions that SWANCC affects only jurisdiction based solely on use by migratory birds that cross State lines to assertions that SWANCC limits CWA jurisdiction to navigable-in-fact waters and those tributaries and wetlands shown to have an actual effect on navigable capacity. Some commenters supported further rulemaking to clarify CWA jurisdiction, some favored clarification through use of guidance instead, while others supported no action at all or withdrawal of the current guidance. Some commenters expressed the view that the nature and extent of aquatic resource impacts was irrelevant to determining CWA jurisdiction, while others expressed concern for such impacts and the need to consider this when determining how to proceed. We also received comments from 4 Tribes and 42 different States on the ANPRM. A large number of these commenters provided information and data regarding the ecological value of various aquatic resources, including wetlands and ephemeral and intermittent streams.

Regulatory Status of Federal Jurisdiction Under § 404 of the CWA

Although the SWANCC decision did not invalidate any part of the CWA or of the regulations (the so-called "Migratory Bird Rule" as previously indicated is actually an excerpt from the preamble to the Corps 1986 regulations), it did have important implications for the Corps administration of the § 404 CWA regulatory program, as well as implications for other CWA programs whose jurisdiction depends upon the meaning of "navigable waters." This is because the Agencies have applied the "Migratory Bird Rule" criteria since 1986 as a basis of jurisdiction over aquatic area that were not readily identifiable as jurisdictional on some other basis.

The Supreme Court's invalidation of the use of the Migratory Bird Rule as a basis for CWA jurisdiction over certain isolated waters 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 we explained in testimony before the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs of the United States House Committee on Government Reform on September 19, 2002. The ANPRM , which solicited input from the public on the nature of, and necessity for, any change in the existing regulations, is the first step in the process of addressing the jurisdictional issues arising from the SWANCC decision.

The Joint Guidance that was published as Appendix A of the ANPRM provided useful information on CWA jurisdiction to the public and regulatory staff, but further information is needed to provide the degree of certainty that agency personnel and the regulated public deserve, and to ensure the fair and effective administration of the CWA. Any inconsistencies in § 404 jurisdictional determinations highlight our Executive

Branch responsibility to provide this clarity. Responsible stewardship requires that we ensure that Federal resources are applied effectively and consistently to maximize environmental protection in a manner consistent with the CWA.

As was previously indicated, the ultimate direction of any proposed rulemaking has not been predetermined, and will be influenced significantly by the public comment on the ANPRM. Our general goals will be to provide clarity for the public and to ensure consistency among CWA jurisdictional determinations nationwide.

Conclusion

We wish to emphasize that the agencies remain fully committed to protecting 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 will carefully consider all the comments and information received in response to the ANPRM. Our goal in moving forward is to clarify what waters are properly subject to CWA jurisdiction in light of SWANCC and afford them full protection through an appropriate focus of Federal and State resources in a manner consistent with the Act.

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 (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 Star 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). In addition, some States have authority under State law to regulate activities in waters that are beyond the jurisdiction of the CWA. About fifteen States have had for a number of years programs to protect at least some of these waters, and Wisconsin and Ohio have expanded their programs since the SWANCC decision. The President has requested an increase in funding for Wetlands Programs Grants in the Fiscal Year 2004 budget, which will provide a financial incentive for other Tribes and States to provide broader and more effective protection for their waters.

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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