

DEPARTMENT OF THE ARMY

COMPLETE STATEMENT

OF

THE HONORABLE JO-ELLEN DARCY
ASSISTANT SECRETARY OF THE ARMY
(CIVIL WORKS)

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
SUBCOMMITTEE ON FISHERIES, WATER, AND WILDLIFE
UNITED STATES SENATE

ON

*The Army Corps of Engineers' Participation in the Development of the Final Rule,
entitled "Clean Water Rule: Definition of Waters of the United States"*

September 30, 2015

Chairman Inhofe, Ranking Member Boxer, Chairman Sullivan, Ranking Member Whitehouse, I am Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works. Thank you for the opportunity to come before the Subcommittee on Fisheries, Water, and Wildlife to discuss with you the Army's participation in developing the final rule, entitled, "Clean Water Rule: Definition of 'Waters of the United States.'"

As you know, the final Clean Water Rule was published in the Federal Register on June 29, 2015 and became effective in all but 13 states on the 28th of August. In those 13 states, which are subject to a preliminary injunction issued by the North Dakota District Court, the U.S. Army Corps of Engineers continues to implement its Clean Water Act section 404 responsibilities under the prior regulation when making jurisdictional determinations and issuing permits under the Clean Water Act.

The Clean Water Rule is being challenged by certain trade associations, States, and environmental groups. Currently, there are more than 12 pending matters in district courts throughout the nation. In addition, 15 petitions for review challenging the rule have been consolidated in the Sixth Circuit Court of Appeals.

The process leading to the June 2015 publication of the final rule started years ago when members of Congress, key local and national stakeholders, and the American public spoke loudly and clearly demanding that the Environmental Protection Agency (EPA) and the Department of the Army deliver a new common-sense set of rules that would add clarity and predictability to the implementation of the Clean Water Act following the United States Supreme Court's 2001 and 2006 decisions, specifically SWANCC and Rapanos, which called into question the agencies' decisions over which waters were "waters of the United States." President Obama therefore called upon the Administrator of the EPA and the Secretary of the Army to clear up the confusion by issuing a rule that would not only protect our Nation's waters, as contemplated by the Clean Water Act, but also improve regulatory predictability, certainty, and transparency. That was our charge and that is what the new rule accomplishes.

Alongside EPA Administrator Gina McCarthy and her predecessor, the Army was an active partner in developing the rule. As you know, the rule is definitional in nature and clarifies the scope of the term “waters of the United States” as used in the Clean Water Act. The rule affects all programs established by the Clean Water Act, one aspect of which is the U.S. Army Corps of Engineers’ permit program for the discharge of dredged or fill material, commonly referred to as the “404 Program.”

As Assistant Secretary of the Army for Civil Works, I am responsible for setting the overall strategic direction for the Army’s Civil Works Program. I am therefore responsible for developing policy and guidance for administering the 404 Program. When undertaking these responsibilities, just as with my other Assistant Secretary of the Army for Civil Works responsibilities, I coordinate with senior leadership at the U.S. Army Corps of Engineers. The exercise of my discretionary authority is always informed by, among other valuable inputs, the technical expertise offered by the experienced regulators and program officials at the Corps and on my staff. This is precisely the process I established and used in formulating the Army’s position on many of the policy decisions that arose during the drafting and vetting of the proposed and final rule. The inevitable internal differences of opinions encountered along the way to this final rule were not unusual in the course of a rulemaking process.

The final rule was not only the product of EPA and Army collaboration but was improved by a lively and productive interagency process. Numerous agencies actively engaged in the formulation and development of the final rule. The choices and decisions I made on behalf of the Army were reached after receiving the Corps’ input and always in close consultation with EPA. I am proud of the Army’s role in developing the rule. We stand shoulder to shoulder with our colleagues at EPA in support of the merits of the final rule and the process used to develop it. Both EPA and the Army will rely heavily on the expertise and judgment of our senior leadership teams as we move forward in implementing the new rule. I have personally spoken with the Chief of Engineers, LTG Thomas Bostick, and he has confirmed that the Corps is unequivocally committed to implementing the new rule as effectively and efficiently as possible. The Army and

EPA are continuing to closely monitor implementation of the new rule. Furthermore, to ensure openness and transparency, we are establishing a publicly-available automated tracking system for all determinations made under the new rule.

With respect to matters associated with the single administrative record supporting the final Clean Water Rule, I would note that the rule was issued under the Administrator's general administrative authority (33 U.S.C. §1251), as well as her authority to prescribe regulations (33 U.S.C. §1361(a)) under the Clean Water Act. As such, the Army is following EPA's Administrative Records Guidance manual. In accordance with this guidance, an administrative record has been assembled for judicial review purposes that contains all relevant non-deliberative information the agencies considered, including information that supports or is contrary to the action taken. Because the administrative record does not include deliberative documents, the record for this rule does not include materials such as internal e-mails, staff attorney opinions or work product, or documents exchanging preliminary opinions or recommendations. These materials are excluded regardless of whether they include supporting or conflicting opinions on the merits of scientific, technical, or policy issues, or contain recommendations for options not ultimately adopted by the agencies. The administrative record for this rule was recently filed in the Sixth Circuit Court of Appeals.

The final rule reflects many changes as a result of listening to the public and carefully considering the interests of all Americans, including America's farmers and ranchers. As stated by the National Farmers Union, "[w]hile the rule is not perfect from our perspective, the final rule is an improvement over the proposed rule. The final rule puts bright-line limits on jurisdiction over neighboring waters, offering farmers increased regulatory certainty and mitigating the risk of enforcement or litigation. The final rule also provides clarity on which ditches fall under the Clean Water Act jurisdiction, removing a gray area that has caused farmers and ranchers an incredible amount of concern." Again, the public demand for a common-sense rule was heard. The Clean Water Rule is a major and positive step forward. It represents years of scientific study and public outreach.

The Clean Water Rule addresses the tens of millions of miles of the Nation's streams and millions of acres of wetlands whose status under the Clean Water Act requires further clarification following the 2001 and 2006 Supreme Court decisions in SWANCC and Rapanos. The Clean Water Rule will protect those streams and wetlands that have been scientifically shown to have the greatest impact on the water quality of downstream traditional navigable waters and that form the foundation of our Nation's water resources. The rule ensures that waters protected under the Clean Water Act are more precisely defined, more predictable, easier for landowners and businesses to understand, and consistent with the law and latest science.

Clean water is vital to our health, communities, and economy. We need clean water upstream to have healthy and vibrant communities downstream. Almost 117 million Americans, that's one in three people in this country, get their drinking water from streams impacted by the types of waters whose jurisdictional status has been clarified by the Clean Water Rule. Our cherished way of life and our economy are dependent upon having access to an abundance of clean water.

Now that the Clean Water Rule has gone into effect, the Army's focus has turned towards ensuring that implementation of the rule will achieve the goal of providing greater predictability, certainty, and transparency in identifying which waters are jurisdictional under the Clean Water Act.

Thank you again for the opportunity to be here today. I will be happy to answer any questions you may have that do not involve matters in litigation. This concludes my statement.