



May 1, 2008

The Honorable James Oberstar
Chairman
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

On behalf of members of the Waters Advocacy Coalition (WAC), I would like to thank you for the opportunity to present testimony before the Committee on H.R. 2421, the *Clean Water Restoration Act of 2007*. We believe the hearing held April 16 provided for a constructive exchange regarding the implications of the changes that H.R. 2421 would make to the Clean Water Act.

While there was diversity of opinion among the witnesses on some issues, we do believe that during the presentation of oral statements and under close questioning by members of the Committee, some points of general agreement began to emerge. Certainly there was broad agreement that the Clean Water Act has been instrumental in helping this nation dramatically improve the quality of the nation's waters. Fundamental to that progress has been the federal-state partnership on which the Clean Water Act is premised, which includes a recognition that not all waters are or necessarily should be subject to federal jurisdiction.

The Committee's dialogue with the witnesses from the Department of Justice, the EPA, and the Corps of Engineers points to a conclusion that retaining a division between federal and state jurisdiction over waters is important to preserving the constitutionality of the Clean Water Act and to maintaining the cooperative federalism structure that has been the foundation of the Act's successes. Further, having the dividing line tethered to the term "navigable waters" is key to avoiding "unnecessary litigation or potential constitutional litigation."

Similarly, the hearing firmly established that authorizing federal jurisdiction to be asserted when an activity affects a water of the United States would expand federal permitting requirements to activities not presently regulated under the Clean Water Act and actually lead to greater confusion and uncertainty in the Act's implementation. This aspect of H.R. 2421 was recognized by federal and non-federal witnesses as a highly controversial expansion of existing Clean Water Act jurisdiction.

We also believe a clear consensus emerged that the current exemptions for prior converted cropland and waste treatment systems must be preserved and that failure to do so would be



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highly problematic for implementation of the Act. While the witnesses, particularly the federal witnesses, did not attempt to describe all their questions or concerns related to H.R. 2421, we think one concern raised by Mr. Lancaster, Chief of the Natural Resources Conservation Service (NRCS), is particularly illustrative of the potential for unintended consequences from enactment of H.R. 2421. Mr. Lancaster pointed out that, while the changes proposed by H.R. 2421 do not seek to amend the operation of the NRCS programs, they would very likely alter the bargain struck by a landowner upon enrollment of his lands in an NRCS program, potentially reducing the available uses remaining to the landowner and increasing liability exposure under the Clean Water Act. Surely, H.R. 2421 does not intend such a result, yet its enactment would prove a rude awakening to the many landowners throughout the country who have entered into voluntary agreements under an NRCS program or other similar programs.

Finally, WAC believes that the Committee discussion continues to show that, while under the Clean Water Act there is a distinction between federal waters (tethered to the concept of navigable waters (broadly construed)) and state waters, the actual line of demarcation prior to *SWANCC* and *Rapanos* was not static. Rather, that line was subject to continuous redefinition based on the combination of guidance, regulation, and litigation interpreting the Clean Water Act since it was passed in 1972. That process is still continuing with the issuance of the agencies' recent interim guidance applying *Rapanos*. We believe the result of that process will assure that federal jurisdiction continues for the vast majority of waters, and reaffirm state responsibility for the remainder.

We believe any Congressional action must be careful to respect a federal-state balance and constitutional boundaries and to avoid unnecessary litigation and unintended consequences. Towards that end and in response to your letter seeking suggestions by May 1, WAC believes that any viable legislative proposal, at a minimum, must

- Maintain the term "navigable waters" in the CWA;
- Maintain all regulatory exemptions such as prior converted cropland and waste treatment systems;
- Eliminate the reference to "activities" affecting waters;
- Eliminate the overbroad reference to "all intrastate waters" as waters of the United States; and
- Eliminate any and all references asserting jurisdiction to the fullest extent of the legislative authority of Congress under the Constitution, retaining reliance on the authority of Congress under the Commerce Clause.

We believe that bringing into federal jurisdiction "isolated, intrastate waters" and "all ephemeral waters" raises constitutional concerns and the likelihood of more litigation and uncertainty in the future, and would undermine the Act's very effective federal-state partnership. As Mr. DeFazio



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(D-OR) observed during the hearing, the reference to all intrastate waters shifts the focus of the debate from “what water is federal?” to “what is water? . . . At what point does rain running off . . . any slope in the western side of Oregon . . . constitute water that would be regulated by the federal government . . .?” See Hearing Transcript. To avoid these complications, we recommend that such features be addressed at the state level and through incentive programs.

WAC also recommends that, as an alternative, the Committee consider directing the agencies to initiate a rulemaking, as urged by the Supreme Court justices, to define key terms and provide certainty to the public and the states about which waters are federally jurisdictional and which waters are jurisdictional to the states. Such a rulemaking will allow for broad public participation and assist the states in assuring that state programs are adequate to address waters that are not under federal jurisdiction.

In conclusion, WAC would like to thank you for the opportunity to participate in the recent legislative hearing. The dialogue was helpful and constructive. Whether there is sufficient convergence to lead the way to agreement on legislative language remains to be seen, but the Waters Advocacy Coalition welcomes the opportunity to be part of that discussion inasmuch as our membership would be deeply affected by the proposed changes.

Sincerely,

A handwritten signature in black ink that reads "Virginia S. Albrecht". The signature is written in a cursive style with a large, sweeping flourish at the end of the name.

Virginia S. Albrecht
(202) 955-1943

About the Waters Advocacy Coalition

The Waters Advocacy Coalition is active in working to protect our nation’s wetlands and water resources as members of the regulated community and/or co-regulators and is comprised of both public and private organizations.

Members include: American Council of Engineering Companies; American Farm Bureau Federation®; American Forest and Paper Association; American Iron and Steel Institute; American Road and Transportation Builders Association; Associated General Contractors of America; CropLife America; Edison Electric Institute; The Fertilizer Institute; Foundation for Environmental and Economic Progress; Industrial Minerals Association – North America; International Council of Shopping Centers; National Association of Counties; National Association of Flood and Stormwater Management Agencies; National Association of Home Builders; National Association of Industrial and Office Properties; National Association of Manufacturers; National Association of REALTORS®; National Association of State Departments of Agriculture; National Cattlemen’s Beef Association; National Corn Growers Association; National Council of Farmer Cooperatives; National Mining Association; National Multi Housing Council; National Pork Producers Council; National Stone, Sand and Gravel Association; Public Lands Council; RISE – Responsible Industry for a Sound Environment; United Egg Producers; and Western Business Roundtable.