

**TESTIMONY OF**

**VIRGINIA S. ALBRECHT  
HUNTON & WILLIAMS, LLP  
1900 K STREET, N.W.  
WASHINGTON, D.C. 20006  
(202) 955-1943**

**APPEARING ON BEHALF OF  
THE WATERS ADVOCACY COALITION**

**BEFORE THE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE  
U.S. HOUSE OF REPRESENTATIVES  
HEARING ON “THE CLEAN WATER RESTORATION ACT OF 2007”**

**APRIL 16, 2008**

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Thank you for the opportunity to testify before you today on the Clean Water Restoration Act of 2007 (“CWRA”). My name is Virginia S. Albrecht, and I am a partner with the law firm Hunton & Williams. For more than twenty years, my practice has focused on the Clean Water Act (referenced hereafter as “CWA” or the “Act”) and other major environmental statutes. I have represented a wide range of clients regarding CWA issues, including local governments, local water districts, developers, agricultural and mining interests, and trade associations. I have litigated CWA issues in the United States Supreme Court and the lower federal courts. I am also an Adjunct Professor at the University of Miami School of Law, where I teach a class on wetlands regulation under the Act.

I appear before you today on behalf of the Waters Advocacy Coalition (“WAC” or the “Coalition”), which is a broad-based coalition of both public and private organizations who depend on our nation’s water resources to provide vital services, such as building the homes we live in, protecting our homes from destructive floods, growing and manufacturing the food, fiber, and paper products we consume, and providing the energy we use in our homes and businesses. The Coalition’s members include: The American Council of Engineering Companies, the American Farm Bureau Federation®, the American Forest & Paper Association, the American Public Power Association, the American Road and Transportation Builders Association, the Associated General Contractors of America, CropLife America, the Edison Electric Institute, the

Fertilizer Institute, the Foundation for Environmental and Economic Progress, the Industrial Minerals Association North America, the International Council of Shopping Centers, the National Association of Counties, the National Association of Flood & Stormwater Management Agencies, the National Association of Home Builders, the National Association of Industrial Office Properties, the National Association of Manufacturers, the National Association of REALTORS®, the National Association of State Departments of Agriculture, the National Cattlemen's Beef Association, the National Corn Growers Association, the National Council of Farmer Cooperatives, the National Mining Association, the National Multi Housing Council, the National Pork Producers Council, the National Stone, Sand and Gravel Association, Responsible Industry for a Sound Environment, and the Western Business Roundtable.

The diverse set of public and private actors who comprise the Waters Advocacy Coalition share a common interest in preserving and protecting our nation's water resources. WAC members appreciate the role water plays in our nation's livelihood and depend on a healthy water supply in order to conduct their own affairs. Further, WAC members are regulated by and participate in the wetlands permitting program established by the CWA. WAC's public sector members are the state and local administrators of these same CWA permitting programs. While many WAC members are themselves dependent on sustainable water resources, all are dependent on the state and federal governments' roles in providing a sensible, predictable set of laws and regulations governing those same resources.

My testimony today concerns the unintended consequences that the CWRA could have on the CWA's successful protection and management of our nation's water resources. The substance of my testimony can be summarized by the following four basic points:

1. The successes of the last 35 years will not alone yield the solutions for the next 35 years. The significant water challenges we face today as a nation demand more cooperative federalism, not more federal regulation.
2. While proponents of the CWRA contend that the proposal seeks only to restore federal authority taken away by the Supreme Court, a fair reading of the plain text of the CWRA simply does not support that contention.
3. Altering the Act's definitional structure could have dire and unintended consequences by imposing further regulatory burdens on states and local communities, usurping state authorities to manage vital water resources, including groundwater, and imposing substantial costs and delays in the replacement of aging water infrastructure.
4. If Congress wants to fix this problem, it will direct EPA and the Corps to develop comprehensive regulations that provide greater clarity and predictability regarding the extent and limit of federal jurisdiction.

**I. The Clean Water Act's Carefully Designed Framework, Including Its Partnership Between The States And The Federal Government, Has Been Successful In Protecting Our Nation's Water Resources.**

There is no question that the CWA has been successful in improving and maintaining the quality of our nation's waters. These successes are well documented. For example, since 1972, total oxygen-demanding pollution from sewage treatment plants across the country has been cut by nearly 50 percent, despite major increases in the amount of sewage sent to those plants for treatment<sup>1</sup> and a nearly 90 million person increase in the country's population.<sup>2</sup> Further, while leading up to the CWA's passage, the nation witnessed on average the staggering loss of over 450,000 acres of wetlands per year, by 1998 our nation had reversed decades of decline with an

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<sup>1</sup> See U.S. EPA, PROGRESS IN WATER QUALITY: AN EVALUATION OF THE NATIONAL INVESTMENT IN MUNICIPAL WASTEWATER TREATMENT (EPA-832-R-00-008) (as updated in 2004); see also <http://www.epa.gov/waterscience/criteria/nutrient>.

<sup>2</sup> According to the U.S. Census Bureau, the total U.S. population was 209,896,000 in 1972 and 299,398,484 in 2006, the last year for which a population estimate is available. According to these figures, the country's population increased by 89,502,484. See U.S. Census Bureau, Annual Estimates of the Population for the United States, Regions, and States and for Puerto Rico: April 1, 2000 to July 1, 2006, at tbl. 1 (2006) (providing 2006 population estimate); U.S. Census Bureau, Statistical Abstract of the United States: 2008, at 7 (2008) (providing 1972 population estimate).

overall *increase* of 32,000 acres per year.<sup>3</sup> Further testament to the success of the CWA is the annual removal of 690 billion pounds of pollutants from industrial sources that would otherwise have been discharged to our nation's waters.<sup>4</sup> These are but a few examples of the CWA's successes. For a fuller discussion of these successes, I commend for this Committee's reading the October 17, 2007, letter from the Waters Advocacy Coalition to Chairman Oberstar and Ranking Member Mica, which is attached hereto as Exhibit A.

The CWA of 1972 was the product of extensive and thoughtful Congressional deliberations over a period of years. The Act was the culmination of 19 days of bicameral public hearings, 171 witnesses, 6,400 pages of testimony, 45 different mark-up sessions, 39 separate sessions of Senate and House conferences, and numerous days of raucous floor debate.<sup>5</sup> The process yielded a carefully crafted mix of complementary regulatory and non-regulatory programs to be carried out by the state and federal governments. To implement this system of "cooperative federalism," the CWA, among other things, has provided billions of dollars in federal grants to the states for the construction of sewage treatment plants; established broad watershed programs to identify impaired waters and address their impairments; established regulatory programs to control the discharge of pollutants to waters of the United States, including discharges of storm water associated with industrial, construction, and municipal activities and "indirect" discharges through integrated sewer drainage systems. The CWA also

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<sup>3</sup> U.S. EPA, DRAFT 2007 REPORT ON THE ENVIRONMENT: SCIENCE REPORT (May 2007), available at <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=140917>.

<sup>4</sup> T. Mehan, *The Clean Water Act: An Effective Means to Achieve a Limited End*, WATER ENVIRONMENT AND ENGINEERING MAGAZINE (Oct. 2007); see also U.S. EPA, 2000 WATER QUALITY INVENTORY, available at <http://www.epa.gov/305b/2000report>.

<sup>5</sup> See S. 2770, A Legislative History of the Water Pollution Control Act of 1972, Cong. Research Serv., vol. 1, at 189 (statement of Sen. Cooper); see also *Hearing on the Twentieth Anniversary of the Passage of the Clean Water Act Before the Senate Comm. on Environment and Public Works* (1992) (statement of Sen. Muskie), reprinted in *Clean Water Act Thirty-Year Retrospective*, Association of State and Interstate Water Pollution Control Agencies, xiii (2004).

requires many industrial facilities to take personal stock of the chemicals they use and store, and to develop plans to manage, prevent, report, and employ countermeasures to minimize the potential impacts of spills that threaten streams, rivers, lakes, and wetlands.

It is essential to recognize the critical importance of the states in this process. Much of the burden for overseeing the CWA's requirements is shouldered by the states, who are on the front line of monitoring, assessing, and protecting the health of our nation's waters. The federal government works hand-in-hand with the states through cooperative federalism—the architectural underpinning of the CWA. Cooperative federalism is a simple yet complex principle. It is simple in that it recognizes the *independent* authorities that the federal government and states can bring to bear in a coordinated fashion. It is complex in that it requires a careful balancing of interests and can be easily upset through either overreaching by the federal government or abdication of responsibility by the state.

As Congress understood full well in 1972, cooperative federalism is essential to the continued protection and well-being of our nation's water resources. While Congress's power under the CWA was founded in the Commerce Clause, the states' authorities are derived from their broader police powers, which, importantly, include the power to regulate land and water use in the interests of public health, safety, and welfare. Congress recognized this important distinction in declaring the CWA's goals and policies. Specifically, section 101(b) of the Act provides that “[i]t is the policy of the Congress 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, and to consult with the Administrator in the exercise of his authority under this chapter.” Likewise, section 101(g) of the Act enunciates “the policy of Congress that the

authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this chapter.” Pursuant to these policies, Congress charged the states—not the federal government—to adopt water quality standards, identify impaired waters, and develop programs to redress their impairment, including pollution from non-point sources not subject to federal regulation under the CWA. These policies are inextricably intertwined with local decisions involving purely local activities affecting land and water resources. Such decisions remain the exclusive and proper province of the states. Congress’s judgment in 1972 to limit its authority to “navigable waters” (defined as “the waters of the United States”) reflects the fact that Congress understood that some waters are federal and some are not, and that the nation’s water resources are best protected by building on the separate yet complementary roles of state and federal governments. The Act’s division of labor between state and federal regulation has served the nation well for more than 35 years.

## **II. The CWRA Would Fundamentally Change The Clean Water Act By Adopting An Expansive Definition Of The Term “Waters of the United States.”**

The CWRA, as drafted, would effectively destroy the CWA’s careful calibration of federal and state authority and would replace it with overriding federal regulation over virtually every water body in the nation. The CWRA would delete the term “navigable waters” and replace it with the term “waters of the United States.” The legislation defines “waters of the United States” to mean:

all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.

The bill appears to abandon the cooperative federalism policies of sections 101(b) and 101(g). And instead of preserving the states' independent authorities to plan the development and use of land and water resources and to allocate water within each state's jurisdiction, the CWRA relegates the states to the role of handmaiden of the federal government. Its only recognition of the states is in section 3, where it "*preserv[es] for States the ability to manage permitting, grant, and research programs to prevent, reduce, and eliminate pollution . . . .*" In other words, the states are allowed to administer programs designed and dictated by the federal government. This is a far cry from the independent and primary authorities recognized in the CWA. The authority to regulate local matters would tip dangerously in favor of the federal government, thereby defeating the careful calibration that Congress achieved in 1972 through the text and structure of the CWA.

Three elements of the CWRA's proposed new definition of "waters of the United States" deserve special attention. First, the bill defines "waters of the United States" as including "all intrastate waters," which finds no definition in the legislation. Applying basic dictionary definitions to the term, "all intrastate waters" could be interpreted reasonably to mean any or all waters found within a state, no matter how small or seemingly unconnected to a federal interest. Under this apparently boundless concept, the federal government could rightly regulate storm sewers, drainages, and roadside ditches and activities related thereto. To date, the federal government has generally refrained from exercising such expansive jurisdiction under the CWA, reasonably interpreting such geographic features and waters as the dominion of state and local officials. Construction and maintenance of ditches in the United States historically have been a basic function of local and state governments—to control drainage, irrigate crops, and provide flood control, among other things. Take roadside ditches as an example. State and local

governments construct and maintain ditches along roadways for the purpose of keeping our roadways safe and free from standing water. In many cases, these ditches also serve as corridors for essential water infrastructure pipes. Unfortunately, the CWRA would transform ditches into federally-regulated conveyances of “intrastate waters.” And the function of a ditch would no longer be simply to provide for safe roads and other health and safety functions critical to local communities. Ditches would also have to meet the panoply of the CWA’s federally-mandated water quality standards and permitting requirements. A local government would have to obtain a permit under the CWA every time it engaged in ditch maintenance. The overall burden on state and local governments would be substantial, as there are more than 4 million miles of roads in this country.<sup>6</sup>

The phrase “all intrastate waters” could also be used as a basis to exert federal jurisdiction over groundwater. Groundwater—that is, water which is stored underground in aquifers or is otherwise not exposed on the surface of land—traditionally has been governed by the states. Many states have developed complex and comprehensive regulatory schemes for protecting the groundwater within their borders. The CWRA could usurp important state and local controls over groundwater resources, as the term “all intrastate waters” could be reasonably interpreted as including groundwater. States, local communities, and private property owners would no longer be free to manage these aquifers and other groundwater sources. Instead, states and local interests would be subjugated to federal permits and other forms of federal approvals for activities affecting groundwater.

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<sup>6</sup> See U.S. DEP’T OF TRANSP., FEDERAL HIGHWAY ADMIN., HIGHWAY STATISTICS 2006 § V, Roadway Extent, Characteristics and Performance, Table HM-10, *available at* <http://www.fhwa.dot.gov/policy/ohim/hs06/htm/hm10.htm> (estimating federal, state, and local roadways in the United States as covering 4,016,734 miles).

A second element of the CWRA's definition of "waters of the United States" that warrants special attention is its defining of "waters of the United States" as including "activities affecting" waters. The CWRA does not say what "activities affecting" means, thus, we are left to reasonably conclude that the CWRA intends quite literally to give federal authorities jurisdiction to control any activity that has any impact on any water in the United States. This focus on activities related to water would represent a new frontier for the CWA. In its current form, the CWA regulates only "discharges of pollutants," a term defined under the Act as meaning "any addition of any pollutant to navigable waters."<sup>7</sup> The proposed legislation would significantly expand the regulatory reach of the CWA, as the Act would no longer be focused simply on "additions" to navigable waters, but instead could also reach any "activities affecting" any intrastate water. Authorizing federal regulation of "activities affecting" any water would obliterate the point source/non-point source distinction that is the foundation for the current statute's allocation of authority between the federal and state governments and section 101's commitment to state primacy in land use and water allocation decision-making.

Third, the CWRA defines "waters of the United States" based on the fullest extent of Congress's legislative powers, whereas the current statute exercises only Congress's Commerce Clause powers. Specifically, the legislation identifies a seemingly boundless universe of waters (among others, "all intrastate waters") and claims authority to regulate these waters as "waters of the United States . . . to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution." By invoking the Treaty

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<sup>7</sup> The CWA defines the term "discharge of a pollutant" as meaning "(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1361(12). "Discharges" are prohibited under section 301 of the Act unless authorized by a permit under section 402 or 404 of the Act.

Power, the Property Clause, the Necessary and Proper Clause, and any other part of the Constitution “to the fullest extent,” the legislation opens a Pandora’s box of endless federal power which will likely preempt state and local authority and will certainly undermine the “cooperative federalism” policy that has served us so well since 1972.

These three components of the legislation’s definition of “waters of the United States” would stretch the CWA beyond its original design. Although the legislation includes a so-called “savings clause,” the provisions therein do not exempt any waters or areas from the broad definition of “waters of the United States.” The savings clause merely exempts certain *activities* from being considered “discharges.” Moreover, since CWRA no longer premises jurisdiction on the presence of a “discharge” but rather appears to regulate *all* “activities affecting” waters, the impact of the “savings clause” is hard to predict. Although certain activities would not be regulated as discharges (as under section 404(f) of the current CWA), presumably they would still be regulable as “activities affecting” waters. Moreover, even if this language is ultimately determined to exempt certain activities from regulation, that does not mean that the place where the activity takes place is not a water of the United States. Thus, although, for example, maintenance of an irrigation ditch would not be a regulated activity (under one reading of the savings clause), the ditch itself would remain a water of the United States and all other activities in or affecting the ditch would be subject to CWA regulation. Finally, the savings clause does not mention existing regulatory exemptions that have been in place for several Administrations, thus calling into question the continued viability of those exemptions.

In sum, the CWRA proposes expanding the CWA in an unprecedented manner. Never before has Congress so broadly defined federal jurisdiction as extending to “all intrastate waters.” Rather, Congress saw fit to link federal CWA jurisdiction to “navigable waters.” Never

in the history of the CWA has the federal government been granted authority to regulate “activities affecting” water bodies; rather, its regulation has always been directly related to water itself. Never in the history of the CWA has the federal government been granted sweeping authority to regulate to the fullest extent of Congress’s legislative power; on the contrary, Congress’s authority has always been based on the Commerce Clause. Thus, rather than “restoring” the CWA, the CWRA’s new definition of “waters of the United States” would fundamentally alter the CWA’s regulatory framework.

### **III. The CWRA’s Definition Of “Waters of the United States” Would Have Unintended Consequences For The Clean Water Act’s Regulatory Programs, And Would Not Provide Clarity Regarding The Scope Of Clean Water Act Regulation.**

The CWA is a complex statute consisting of interrelated regulatory programs premised on the states and the federal government having independent authority over our nation’s water resources. Much like tugging on a loose thread can unravel a whole sweater, changing the Act’s key jurisdictional terms (*i.e.*, “navigable waters” and “waters of the United States”) will likely unravel the Act’s intricate system of regulations, funding, and incentives aimed at improving our nation’s waters. The CWRA would substantially alter the scope and design of a series of regulatory programs under the CWA. Second, and consequently, the CWRA will neither bring clarity to the CWA nor “restore” it to its original design. I will discuss each category of these unintended consequences in turn.

#### **A. The CWRA’s Unintended Consequences For Clean Water Act Regulatory Programs**

The CWA is a complex statute consisting of multiple regulatory and non-regulatory programs. Its most well known component is perhaps the section 402 permitting regime that regulates discharges of “pollutants” from “point sources” into “waters of the United States.” The CWA, however, is much more than a permit regime. It also includes a water quality program

established under section 303 that could be negatively impacted by the CWRA's new definition of "waters of the United States."

States establish water quality programs, monitor progress toward meeting standards, identify "impaired waters," and establish pollution budgets for impaired waters. In addition, 45 states operate the NPDES permitting program under authority delegated to them by EPA. By treating ditches, drainages, and storm sewer conveyances as waters of the United States, the CWRA will extend all of the CWA regulations to these "waters."

For example, section 303 requires states to establish ambient water quality standards for the "navigable waters" covered under the Act. The Act requires these standards to be set at levels to "protect the public health or welfare, enhance the quality of water" and serve the purposes of the Act. By replacing the term "navigable waters" with the term "waters of the United States" (defined to include "all intrastate waters"), the CWRA would substantially expand the number of water bodies for which states would have to establish water quality standards and monitor progress. Water quality standards would have to be established for ditches, drains, and pipes.

Section 303 also requires states to establish additional requirements for waters when the Act's normal permit controls are insufficient to ensure that the water quality standards will be satisfied. These additional requirements or pollution budgets are known as "total maximum daily loads" or "TMDLs." *See* 33 U.S.C. § 1313(d). As with all CWA water quality standards, these TMDL requirements are only applicable to "navigable waters." Thus, if the term "navigable waters" is replaced with the CWRA's broad definition of "waters of the United States," TMDL requirements will have to be established for many new water bodies. Many states are concerned, and rightly so, that the CWRA could significantly expand the costs and

requirements to monitor and assess all waters, such as storm sewers and ditches, not currently subject to these requirements, thereby diverting scarce and important state and federal resources away from more ecologically and environmentally sensitive water bodies. Expanding the reach of the 303 program would also cause further economic hardship to communities already coping with impacts of the 303 program affecting growth.

CWRA threatens yet more unintended consequences of placing substantial new burdens on state and local governments. Under the current CWA, state and local governments are both regulators and regulated. They have autonomy to manage some water without interference from the federal government, and are simultaneously regulated by the federal government with respect to other waters. By expanding the scope of federal jurisdiction, the CWRA would expand the federal government's regulation of state and local governments.

The CWRA would also allow the federal government to exert greater authority over communities and storm sewer systems by subjecting those systems to more NPDES permitting requirements. While many medium and large size communities are already subject to NPDES requirements for their municipal separate storm sewer systems ("MS4s"), all communities, regardless of size and whether they are currently subject to EPA's MS4 requirements, would be subject to the NPDES permitting program. Moreover, communities could be required to obtain hundreds of NPDES permits to cover each and every point source discharge at which a pollutant enters a storm sewer or drainage ditch, based on the legislation's sweeping expansion of federal authority over "all intrastate waters."<sup>8</sup> Local officials would bear the responsibility of securing

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<sup>8</sup> The CWA's permit regime prohibits discharges of pollutants into "navigable waters" unless the discharge is authorized by a permit. *See* 33 U.S.C. § 1311(a). Permits may be issued under section 402 of the Act for the discharge of pollutants into "navigable waters" from "point sources" a defined term that encompasses most industrial actors who convey wastewater into our nation's waterways. *See* 33 U.S.C. § 1342 (section 402 permit program); *see also* 33 U.S.C.

permits and the burden and expense of achieving the limits established for the permit. It is important to bear in mind that failure to obtain permits can result in civil or possibly even criminal penalties.

**B. The CWRA's Unintended Creation Of Ambiguity Regarding The Scope Of Clean Water Act Regulation**

The WAC members appreciate that this legislation is designed in part to bring clarity to the CWA in the aftermath of the U.S. Supreme Court's 2006 decision in *Rapanos v. United States*, 126 S. Ct. 2208 (2006), and its 2001 decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). There is no question that these recent decisions have highlighted questions regarding the scope of the CWA—albeit ones that existed before, and were not created by, those decisions. The CWRA, however, would not eliminate the uncertainty regarding the CWA. The CWRA merely replaces one set of questions regarding the CWA with a new set of questions.

Specifically, by regulating “all intrastate waters,” the CWRA shifts the central question from being “What water is federal?” to “What is a water?” If this legislation is passed, EPA, the Corps, and the general public will have to consider and determine where regulation begins. But unlike with the current version of the CWA, they will not have decades of case law, regulations, and guidance to consult for reference. Instead, EPA, the Corps, and the general public will have to determine from scratch how far the CWA reaches. EPA and the Corps will be required to promulgate regulations defining “waters of the United States” under the new statute. It will be no easy task. At what point does rainfall running across the landscape become a “water”? At what point does a puddle become a vernal pool? Would groundwater be a water of the United

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§ 1362(14) (defining “point source”). Permits may also be issued under section 404 for the discharge of dredged and fill material into “navigable waters.” *See* 33 U.S.C. § 1344.

States? Ditches? Gutters? These are just a few of the questions that would have to be resolved if the CWRA is enacted.

Contrary to those who contend that CWRA will resolve uncertainty, the CWRA would create uncertainty by inviting litigation over the scope of the CWA. In particular, EPA and the Corps would be subject to lawsuits if they did not regulate “all” intrastate waters. The absolute language of the CWRA would leave the agencies very little room or discretion to limit their jurisdiction. Courts could interpret the word “all” to mean “all” and therefore compel the agencies to regulate every “intrastate water”—no matter how small, how infrequent, or how local in nature. If it is a “water,” it would be a “water of the United States” within the meaning of CWA.

The CWRA would also create uncertainty for local governments in that it places local governments at risk of losing their autonomy over land use decisions. As I discussed earlier, the proposed legislation’s new definition of “waters of the United States” includes not only almost all “waters” in the United States, but also “activities affecting” such waters. The legislation does not limit “activities affecting” “waters of the United States.” Consequently, because local land use plans, building codes, and floodplain regulations may all “affect” water, they could become subject to federal regulation.

Importantly, the CWRA will also exacerbate the already difficult and costly task of updating our nation’s aging water infrastructure. As this Committee is fully aware, our nation faces an estimated shortfall of between \$300 and \$500 billion over the next 20 years to maintain and upgrade community water systems that profoundly impact the quality of our nation’s waters. Expanding the federal government’s regulation to all waters, including storm sewers, drainages, and roadside ditches, will invariably increase the costs to local communities seeking to replace

leaking sewers and wastewater pipes and delay replacement as local agencies seek permits (and negotiate mitigation requirements) associated with necessary improvements to public infrastructure.

The future of our nation's waters and the intractable problems we collectively face depend upon our ability to respond innovatively, flexibly, and through adaptive management. Many of our nation's waters are impacted by excess nutrients, sediments, pathogens, oil and grease, and other pollution that emanates from non-point sources and urban storm water runoff. Communities, however, are rising to meet the challenge through the adoption of more cost-effective and environmentally sensitive green infrastructure solutions, such as constructed wetlands, infiltration trenches, detention ponds, and rain gardens, as well as restoring riparian streams and buffers. These management practices work by filtering polluted water and removing pollutants before they enter our streams, rivers, and lakes. Under the CWRA, these activities would be subject to NPDES permits. By expanding federal jurisdiction, we risk stifling these innovative solutions at a point and time we need them most.

#### **IV. The Nation's Waters Would Be Better Served By An Administrative Rulemaking That Could Resolve Uncertainties About The Scope Of Federal Jurisdiction Under The Clean Water.**

The members of WAC believe that the overall intent behind the CWRA is an admirable one, *i.e.*, protection of our nation's aquatic resources. Unfortunately, however, the CWRA seeks to fix something that is not broken. The CWA is not the problem. Rather, it is the agencies' administration of the CWA that is the problem.

For years, the agencies have openly admitted that they needed to enact regulations that better define the scope of "waters of the United States" under the CWA.<sup>9</sup> For years, the general

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<sup>9</sup> On April 23, 1990, EPA included on its semiannual regulatory agenda its intent to promulgate a rulemaking to revise the definition of "waters of the United States" by October

public has eagerly awaited the agencies' action. After years of temporizing, EPA and the Corps took a preliminary step in January 2003 toward promulgating regulations defining "waters of the United States" by issuing an Advance Notice of Proposed Rulemaking. Unfortunately, they never carried through with this effort. As was the case before the Supreme Court's 2001 *SWANCC* decision, federal regulators continue to apply the CWA without the benefit of a comprehensive set of regulations. Since *Rapanos* was decided in 2006, the agencies continue to avoid their duty to promulgate regulations—despite the fact that Justice Breyer in *Rapanos* characterized the Court's opinion as "call[ing] for the Army Corps of Engineers to write new regulations, and speedily so." *Rapanos*, 126 S. Ct. at 2266 (Breyer, J., dissenting).

The WAC members believe that the solution to resolving uncertainties regarding the CWA is not to substantially revise the Act as this legislation proposes. There is no need to reinvent the wheel. Rather, Congress should make the agencies do their job. Congress has already created a brilliant, complex, and largely effective statutory framework—that is the CWA that is on the books today. Congress should not have to substantially recreate that law simply because the agencies have failed to clarify the precise scope of the Act.

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1990. EPA did not meet that deadline. Since that time, EPA has repeatedly included its intent to revise the definition of "waters of the United States" in semiannual regulatory agendas, and has repeatedly failed to act on that intent. *See* 55 Fed. Reg. 45,134, 45,162 (Oct. 29, 1990); 56 Fed. Reg. 17,980, 18,008 (April 22, 1991); 56 Fed. Reg. 54,012, 54,042 (Oct. 21, 1991); 57 Fed. Reg. 17,378, 17,407 (April 27, 1992); 57 Fed. Reg. 52,024, 52,055 (Nov. 3, 1992); 58 Fed. Reg. 24,996, 25,028 (April 26, 1993); 58 Fed. Reg. 56,998, 57,030 (Oct. 25, 1993); 59 Fed. Reg. 21,042, 21,079 (April 25, 1994); 59 Fed. Reg. 58,200, 58,237 (Nov. 14, 1994); 60 Fed. Reg. 23,928, 23,965 (May 8, 1995); 60 Fed. Reg. 60,604, 60,645 (Nov. 28, 1995); 61 Fed. Reg. 23,610, 23,651 (May 13, 1996); 61 Fed. Reg. 63,122, 63,168 (Nov. 29, 1996); 62 Fed. Reg. 22,296, 22,345 (April 25, 1997); 62 Fed. Reg. 58,080, 58,126 (Oct. 29, 1997); 63 Fed. Reg. 22,602, 22,734 (April 27, 1998); 63 Fed. Reg. 62,348, 62,463 (Nov. 9, 1998); 64 Fed. Reg. 21,898, 22,037 (April 26, 1999); 64 Fed. Reg. 65,010, 65,141 (Nov. 22, 1999); 65 Fed. Reg. 23,430, 23,574 (April 24, 2000); 65 Fed. Reg. 74,478, 74,612 (Nov. 30, 2000); 66 Fed. Reg. 26,120, 26,258 (May 14, 2001); 66 Fed. Reg. 62,240, 62,384 (Dec. 3, 2001); 67 Fed. Reg. 33,724, 33,864 (May 13, 2002); 67 Fed. Reg. 74,051, 74,215 (Dec. 9, 2002); 67 Fed. Reg. 75,168, 75,299 (Dec. 9, 2002).

Importantly, even if Congress were to pass this legislation, it would not be a quick fix. Rather, we would still find ourselves in the position that we are in today—*i.e.*, waiting on the agencies to promulgate rules to implement Congress’s directive. Indeed, given the substantial reworking of the Act that the CWRA proposes, the agencies would likely have to promulgate an entire new body of regulations covering many more issues than simply the scope of the term “waters of the United States.” The public has been waiting for years for the agencies to promulgate regulations on this relatively discrete issue, and there is no telling how many more years they would take to promulgate regulations on the many new uncertainties that this legislation would create.

In conclusion, I would again like to emphasize on behalf of the members of the Waters Advocacy Coalition that we support and appreciate Congress’s ultimate goal of protecting our nation’s water resources. The CWRA, however, is not the vehicle for achieving these goals and, in fact, would have many unintended consequences that undermine the CWA’s successful framework for protecting our nation’s waters. The CWRA would also not resolve any questions that the Supreme Court may have raised regarding federal agencies’ application of CWA programs. Those questions can be and should be resolved by Congress requiring the agencies themselves to conduct a rulemaking, with vigorous Congressional oversight to ensure that the rule furthers the “cooperative federalism” policy.

**Exhibit A**



October 17, 2007

Dear Chairman Oberstar and Ranking Member Mica:

On behalf of the members of the Waters Advocacy Coalition, we commend you for holding this hearing on the 35<sup>th</sup> Anniversary of the Clean Water Act (CWA) to highlight the successes and future challenges of the CWA. Over the last 35 years, the progress our nation has made in restoring the chemical, physical and biological integrity of our nation's waters is truly extraordinary. Not only have we reversed the historic trend of wetlands losses, but we have restored streams and rivers degraded by pollution. After many years, these waters are thriving again with life (see Attachment). We recognize that but for the collaborative efforts of the U.S. EPA, States, Tribes and industry, such progress would not have been possible.

While we have made significant strides to improve water quality, the next 35 years will focus on updating antiquated infrastructure and addressing sources of pollution inextricably intertwined with land use activities. Solutions will be more complex and costly, and will invariably require a greater commitment to fostering the federal-state framework critical to the CWA's success.

Toward this end, in 1972, Congress affirmed its long-standing deference to State water law in Section 510 of the CWA, which states "[e]xcept as expressly provided in this chapter, nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370. Congress also reaffirmed its constitutional obligation 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. . ." 33 U.S.C. § 1251(b). Congress understood that water and land use are inextricably linked and that the primary authority over such matters should continue to reside with the States. In that vein, we would encourage Congress to support the continued efforts of States and communities to protect local water resources through incentives, grants, and technical assistance.

In our attachment, we have summarized a few examples of the dramatic successes achieved by the Federal government, the States, and the regulated community working together to carry out the goals of this landmark legislation. While we acknowledge the additional work ahead, we take great joy in reflecting upon the 35th Anniversary of this remarkable law and how far we have come.

Thank you for your consideration.

American Farm Bureau Federation  
American Forest & Paper Association  
American Public Power Association  
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 & Stormwater Management Agencies  
National Association of Home Builders  
National Association of Industrial Office Properties  
National Association of Manufactures  
National Association of Realtors  
National Association of State Departments of Agriculture  
National Cattlemen Beef Association  
National Corn Growers Association  
National Mining Association  
National Multi Housing Council  
National Pork Producers Council  
National Stone, Sand and Gravel Association  
Responsible Industry for a Sound Environment  
Western Business Roundtable

## **Clean Water: 35 Years of Progress**

The Clean Water Act of 1972, as it stands today, has been responsible for astounding success in improving the health of surface water everywhere in the United States. For example,

1. In the mid-1970's, 30-40% of surface waters monitored met water quality goals. By 2000, 60 – 70 % of waters met their goals.
2. In 1972, only 141.7 million people were served by wastewater treatment facilities, and only 60% of those people were served by secondary treatment or better. Today, 222.8 million people (over 1.5 times as many as 35 years ago) are served by wastewater treatment facilities; nearly 99% of those people are served by secondary treatment or better.
3. Since 1972, total oxygen-demanding pollution from sewage treatment plants across the country has been cut by nearly 50%, despite a major increase in the amount of sewage sent to these plants for treatment.
4. Water quality standards have now been set for every river, stream, lake, and bay in the country. These standards protect aquatic life and human health, and reflect numeric criteria published by EPA for about 190 pollutants.
5. By the end of 2006, monitoring has shown that about 39,000 waterbodies still do not meet their water quality standards. However, States have now developed (and EPA has approved) over 25,000 individual clean-up plans for cutting pollution and for meeting standards. EPA estimates that all remaining plans will be completed within 10 years.
6. Since 1972, EPA has regulated pollution discharges from 56 major categories of industry, and updates its regulations regularly. EPA's regulations specify limits for industrial discharges which reflect the application of the best available control technology for existing sources and the best demonstrated control technology for new sources.
7. Since 1972, EPA and States have issued over 60,000 individual discharge permits to limit pollution with best available technologies and in many cases, to require even more stringent limits to solve local water quality problems. About 15,000 concentrated animal feeding operations are also covered, plus more than 500,000 stormwater sources.
8. From the 1950s to the 1970s, an average of 458,000 acres of wetlands were being lost each year. By the 1986-1997 time period, the loss rate had declined to 58,600 acres per year. In the most recent study period, 1998-2004, wetland area increased at a rate of 32,000 acres per year.

9. There are many regional and local examples of clean water progress over the last 35 years:
  - a. In 2006, whitefish returned to the Detroit River for the first time since 1976.
  - b. The extent of submerged aquatic vegetation (which is important to healthy ecosystems) nearly doubled in the Chesapeake Bay from 1978 to 2005.
  - c. Atlantic salmon disappeared from the Connecticut River in the late eighteenth century as a result of overfishing and massive pollution. Salmon were first seen again in the late 1970s and were first observed to spawn and reproduce in 1991 – for the first time in about two hundred years.

## Sources

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2. Communication from Bob Bastian, Senior Environmental Scientist, USEPA Municipal Support Division. Based on Progress in Water Quality: An Evaluation of the National Investment in Municipal Wastewater Treatment, EPA832-R-00-008, June 2000, updated 2004.
3. *ibid.*
4. Communications with EPA water quality standards staff. Also, EPA Current Water Quality Criteria, <http://www.epa.gov/waterscience/criteria/wqcriteria.html> (September 28, 2007)
5. EPA National TMDL Report, [http://iaspub.epa.gov/waters/national\\_rept.control](http://iaspub.epa.gov/waters/national_rept.control) (September 28, 2007)
6. EPA 2006 Section 304(m) Plan, 76648 Federal Register, Vol. 71, No. 245 (December 21, 2006), p. 76648
7. “Growth of the NPDES Permits Program,” charts prepared by USEPA Permits Division, October 2007.
8. Draft 2007 Report on the Environment: Science, USEPA, May 2007 <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=140917>
9. a. “The Clean Water Act: An Effective Means to Achieve a Limited End,” article by Tracy Mehan scheduled for publication in *Water Environment and Engineering Magazine*, October 2007. Also, 2000 Water Quality Inventory, USEPA, <http://www.epa.gov/305b/2000report/>  
b. Draft 2007 Report on the Environment: Science, USEPA, May 2007 <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=140917>  
c. “Salmon Return to Old Spawning Spot, Two Centuries Later,” *New York Times*, December 4, 1991.