

Testimony before the House Small Business Committee
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Regarding S. 787, the Clean Water Restoration Act of 2009

Chairwoman Velasquez, member of the committee, I am Bob Gray, Executive Director of Northeast Dairy Farmers Cooperatives, an association representing Agri-Mark, Dairylea Cooperative, Inc, Dairy Farmers of America, Inc, St. Albans Cooperative Creamery, and Upstate Niagara Cooperative, Inc. I appreciate the opportunity to testify before the committee today on pending legislation that would have a dramatic and detrimental effect on the dairy sector.

Dairy farmers are the original stewards of the land – using it as a home and for their livelihood for generations. They work tirelessly to protect and improve the land. In the case of milk production, dairy producers understand that satisfying the local demands of a growing world population must not come at the expense of ecological health, human safety or economic viability. Accordingly, for decades dairy producers have adhered to a principle of continuous improvement and an incessant pursuit of greater efficiency. As a result, significant benefits to society have been achieved by modern agriculture and improvements in production efficiency will continue to lessen the environmental impacts of food production.

The dairy cooperatives I represent are opposed to S.787. Provisions in this measure will have a detrimental impact on dairy producers across the country. This legislation would delete the term “navigable” from the underlying act, a term that appears in current law more than 80 times and is a key concept in the act to establish a practical geographic limit on the scope of the federal government’s authority over water. By deleting it, this bill would expand federal jurisdiction over certain water features that the Supreme Court decided were not subject to the CWA, and is taking the unprecedented action in the 37-year history of the CWA to expand federal government jurisdiction beyond what many legal experts tell us is appropriate under the Commerce Clause of the Constitution.

The Federal Water Pollution Control Act of 1972, referred to as the Clean Water Act (CWA), has gone a long way towards restoring the integrity our nation’s waters. However, the regulatory landscape has been very confusing despite what we believe to be Congress’ clear intent in its use of the term “navigable” in the statute. Jurisdiction as defined through the regulatory program has been a moving target over the life of the CWA, leading to and sparked by litigation and ever-broadening implementation by federal agencies.

The term “navigable waters”, for decades has described those waters that are clearly subject to federal control. It has been well-settled in law that the federal regulatory authority over “navigable waters” is based on Congress’ power to regulate navigation under the Commerce Clause. It is clear that Congress intended to use the term “navigable waters” when it passed the CWA in 1972. The conference report specifically states that “Congress intends the term ‘navigable waters’ be given its broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.” In

making the statement in the conference report about regulating navigable waters, Congress was exercising its authority under the Commerce Clause. Maintaining the term “navigable waters” makes it clear that, while Congress has asserted its broad authority under the Commerce Clause, this jurisdiction is not limitless. Moreover, there are decades of cases that define the term which is why the CWA and many other statutes use that term as a fundamental basis for identifying federal waters in contrast to state waters.

The courts have long grappled with the intent of Congress and have made way in the last few years to provide a definition to the term that addresses the unique role dairymen play. Prior to the 2001 Supreme Court decision in *Solid Waste Agency of Northern Cook County v. the United States Army Corps of Engineers (SWANCC)*, nothing covered all intrastate waters. The new definition could allow regulators and third- parties to assert jurisdiction over all roadside ditches, municipal storm drains used for flood control and other purposes, groundwater, small desert washes that carry water only a few hours a year and other features on the landscape that may carry water.

By overturning SWANCC and reinstating the so-called Migratory Bird Rule, S. 787 would establish federal CWA jurisdiction over any water body that “could be used” by a migratory bird, reaching well beyond the isolated waters S.787 supporters say they are targeting. Language in the bill upsets the balance between state and federal authority that is expressly states in the CWA. The CWA recognizes that states should retain the authority to make decisions about their land and resources, water allocation, and police powers - -but that right is stripped with this legislation.

In 2006, the Supreme Court decided *Rapanos v. United States*. The decision addressed the asserted jurisdiction of the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) over wetlands adjacent to “waters of the United States,” the problematic phrase used by the CWA to define the geographic scope of the act’s wetlands permitting program.

Dairy farmers share the goal of restoring and protecting water quality but at this time we cannot support S. 787 in its current form. Our core concern lies at the heart of the bill, which removes the term “navigable,” which has been part of the Act since its inception in 1972, and its use in predecessor water legislation stretches back well over 100 years. By doing so, the bill does not reduce confusion about the scope and limits of federal CWA jurisdiction. Rather, it simply introduces a new line of confusion over how to interpret the Commerce Clause in this context, and will invariably lead to a whole new generation of litigation.

Dairy farmers do not see any value in taking such legislative action. It expands federal water jurisdiction to highly marginal water features across and next to our farms, things like drainage ditches, storm water management structures and highly ephemeral and intermittent streams that have water in them only when it rains or for a few weeks a year. This expansion in federal authority is not needed for EPA and the state agencies to work effectively with us to protect the water leaving our farms so that waters of the United States further down the watershed are protected and the goals of the CWA met.

Thank you for the opportunity to provide you with these comments.