

**FULL COMMITTEE HEARING ON
THE NEEDS OF SMALL BUSINESSES
AND FAMILY FARMERS IN
REGULATING OUR NATION'S WATERS**

HEARING

BEFORE THE

**COMMITTEE ON SMALL BUSINESS
UNITED STATES
HOUSE OF REPRESENTATIVES**

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

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**FULL COMMITTEE HEARING ON
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Wednesday, July 22, 2009

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The Committee met, pursuant to call, at 1:00 p.m., in Room 2360 Rayburn House Office Building, Hon. Nydia Velázquez [chairwoman of the Committee] presiding.

Present: Representatives Velázquez, Dahlkemper, Schrader, Kirkpatrick, Ellsworth, Halvorson, Graves, Westmoreland, Gohmert, Luetkemeyer, Schock and Thompson.

Chairwoman VELÁZQUEZ. Good morning. I call this hearing of the House Small Business Committee to order. In our nation's recovery efforts, green policies have been a top priority and with good reason. Already, investments in sectors like efficiency and renewable energy are creating jobs and driving growth. At the forefront of this growing movement are our entrepreneurs: the innovators who are leading the way in both conservation and economic resurgence.

It is no surprise that entrepreneurs and family farmers are powering the green economy. They recognize that a clean, sustainable environment is critical to the health of both the planet and the business world. And it makes sense because small firms, like all other businesses, rely on natural resources to run their operations. Of those critical resources, water is one of the most important.

Our nation's waterways play a vital role in all acts of commerce. In one form or another, water is used for everything from paving roads to raising livestock. In recent years, however, the process for regulating our waterways has become complex. Today, we will examine the current regulatory framework and look for ways to make sure small firms can comply.

When first introduced, the Clean Water Act sought to restore and maintain the integrity of our nation's "navigable waters." Today, that term is increasingly hard to define. How exactly does one identify a navigable water? If a ditch drains into a stream that flows into a river, does the ditch then need to be regulated?

A 2006 Supreme Court ruling sought to answer that question. But rather than clearing up the ambiguity, the court only compounded it further. The resulting red tape now reaches all aspects of the CWA, including the permitting process.

Before starting projects that affect our waterways, entrepreneurs must obtain federal permits. Ninety-five percent of the time, those licenses are granted. Still, small firms say that the authorization

process is overly complicated and that a tangle of regulations has created significant backlogs. In fact, the current number of unmet requests falls somewhere between 15,000 and 20,000.

On average, a business will wait anywhere from 2 to 3 years to secure an individual license. These kinds of delays are particularly challenging today, as small contractors vie to win shovel-ready stimulus projects, the sort that have to begin right away, not two or three years down the road.

Nearly four decades ago, the Clean Water Act cemented America's commitment to conservation. We want to continue that legacy today, but in order to do so, we will need to be sure small firms understand their options and know what is at stake. When it comes to the navigable waters issue, a clarification of terms could go a long way. So could efforts to streamline the permit process.

Everyone wants a clean, safe water supply. That goes without saying. But in protecting our waterways, it is critical that entrepreneurs, particularly small businesses, not be unduly burdened. Hindering small firms will cripple efforts to create a greener, more efficient economy.

Small businesses need common sense solutions, the kinds that are both environmentally sound and economically viable. I know that, given a voice in the process, entrepreneurs can help us find a middle ground.

I would like to take this opportunity to take all the witnesses in advance for your testimony. And I am glad that they were able to make this trip to Washington to be with us today and look forward to hearing from them.

With that, I will yield to Ranking Member Graves for his opening statement.

Mr. GRAVES. Good afternoon. Thank you, Madam Chairman, for having this hearing and choosing an initiative that is so critically important to business and to agriculture. I appreciate it.

As a farmer myself, I fully appreciate the land that I farm. My brothers and I farm about 2,800 acres of corn and soybeans. In order for us to achieve the greatest yields on our property, we have to take care of that land.

So trust me when I say that farmers are the very best stewards of the land that they farm. It is absolutely in their best interest. However, I grow increasingly frustrated when the government dictates to me how I can use my property. As suggested, it knows better than those who live off of it.

In the 109th and 110th Congress, legislation was introduced that would have been an unprecedented expansion of federal government intrusion into the lives of property and business owners across the country.

The Clean Water Restoration Act would expand the scope of the Clean Water Act to essentially regulate anything that is wet: ditches, ponds, gutters, you name it. This bill would further the recent trend of more government while limiting the role of the rights of states, businesses, farmers, and property owners. Although legislation has yet to be introduced in the House this Congress, recent activity in the Senate has elevated concerns that this bill will soon be before us.

One look at the expansive list of entities opposed to the Clean Water Restoration Act and you can immediately conclude that this legislation would have broad negative impacts. Litigation from third party act in this group would dramatically increase as the government and stakeholders struggle to clarify the new meaning of the legislation.

This Committee has extensively explored the economic consequences of an out-of-control legal system. Expanded federal jurisdiction over the waters of the United States would mean a significant increase in permit applications for people with as little as a puddle on their property. These costs and delays will slow down a host of economic activity, including agriculture, real estate development, electricity transmission, transportation infrastructure development, and various energy-related tasks, such as mining and energy exploration.

There are so many things working against our economy right now. With government spending spiraling out of control, climate change legislation with the potential to drive energy costs through the roof, and a new health care bill estimated to cost over a trillion dollars, it is important to fully understand the economic consequences of our legislative actions.

Again, Madam Chairman, I appreciate that you are holding this hearing. I want to thank all of the witnesses for being here today. I know some of you have come a long ways, and we do appreciate it very much in this Committee and look forward to hearing the testimony.

Chairwoman VELÁZQUEZ. The Chair recognizes Ranking Member Graves for the purpose of introducing our first witness.

Mr. GRAVES. Thank you, Madam Chair.

I would like to introduce a friend of mine, Charlie Kruse, who is from Dexter, Missouri. He and his wife farm down in Dexter, Missouri, which is some of the best ground you can find in the State of Missouri. Charlie is President of the Missouri Farm Bureau and is testifying on behalf of the American Farm Bureau, which is the nation's largest general farm organization.

Charlie, it is always good to see you, and I thank you for making the trip out here to testify before the Small Business Committee on such an important issue.

Mr. KRUSE. Thank you very much.

STATEMENT OF CHARLIE KRUSE, PRESIDENT, MISSOURI FARM BUREAU, ON BEHALF OF AMERICAN FARM BUREAU FEDERATION

Mr. KRUSE. Madam Chairwoman and members of the Committee, thank you so much for having this hearing today and for giving us an opportunity to express our views on this very important issue. I am very pleased to have the opportunity to testify before this Committee with my good friend Ranking Member Sam Graves. We have been friends a long time. I have great respect for Sam.

My name is Charlie Kruse. I am a fourth generation farmer from Dexter, Missouri, in the Bootheel of the State of Missouri. I serve as the President of the Missouri Farm Bureau, and I am very

pleased to offer this testimony on behalf of the American Farm Bureau Federation and farmers and ranchers nationwide.

We appreciate the invitation to comment on the regulatory implications and associated costs to small business of deleting the term “navigable” from the Clean Water Act. The cases I am going to tell you about are real. And they show that small words do indeed make a big difference sometimes.

If we were to take the word “navigable” out of the Clean Water Act and let the Corps of Engineers and EPA regulate all interstate and intrastate waters, many more farmers and ranchers will be caught in regulatory quicksand that can mean years of delay and over a million dollars in costs.

A study backs up what farmers and ranchers have been telling all of us. It takes two to four years to prepare and obtain a 404 permit. The average cost can range from over \$270,000--and that figure doesn't include the cost of mitigation, design changes, and the cost of carrying capital--down to several thousand dollars, in either case a very large sum of money for someone trying to operate a small business.

The first example is about a farmer who wanted to transition his pastureland to grape production and was told that he had to obtain a 404 permit. It took two years for the agencies to issue the permit. The farmer spent over \$6,000 in consulting fees, over \$3,000 in permit and mapping fees, and over \$135,000 to mitigate 10 acres that were arguably not wetlands.

The second example is about a small farmer who wanted to improve the existing drainage on 11 acres of his land. He first went to USDA, who told him they did not consider his land a wetland.

He then went to the state agency that had jurisdiction over this issue in his state. The state agency told him the same thing. They did not consider his land a wetland. Therefore, he would not need to have a permit.

But the Corps of Engineers did tell him that he had to have a permit. They told him he needed both a permit and 17.7 acres of mitigation. The cost of compliance, \$77,000 more than the property was worth, and the farmer just simply couldn't afford to comply. So he left his land as it was.

The third example is about private ponds and lakes. I dare say that practically every, if not every, member of Congress has privately owned lakes and privately owned ponds in their state. In my State of Missouri, we have a large number. We have over 300,000 ponds, privately owned ponds, in the State of Missouri.

If the word “navigable” were to be taken out of the Clean Water Act, the federal government would then have jurisdiction over every privately owned pond and every privately owned lake, not only in the State of Missouri but in every state in the nation. That is just something that makes no sense to us in any way.

Lastly, I want to highlight the regulatory treatment of prior converted cropland. Deleting the term “navigable” opens the door for the agencies to regulate the use and value of over 55 million acres of cropland, a value conservatively estimated to be \$110 billion.

A 1993 regulation codified longstanding policy of not treating prior converted cropland as a water of the United States and recognize that prior converted cropland could be used for either agricul-

tural or nonagricultural uses. Changing this important regulatory exemption will devastate and devalue the assets of hundreds of thousands of landowners currently making plans to use their property, sell development rights, or give conservation easements.

We as farmers consider our land our 401(k). In many cases, that is all that a farmer has. And to dramatically reduce the value of this land, which if we remove the word “navigable” from the Clean Water Act is something that we think would be a very devastating process. So we would urge you to keep the word “navigable” in the Clean Water Act as it has been for years and years, since its inception.

Thank you very much, Madam Chairwoman.

[The statement of Mr. Kruse is included in the appendix.]

Chairwoman VELÁZQUEZ. Thank you, Mr. Kruse.

Our next witness is Mr. Trey Pebley. He is the Vice President of McAllen Construction in McAllen, Texas. His firm is a small, family-owned and operated business with 133 employees and annual revenues of around \$18 to \$20 million.

Mr. Pebley is testifying on behalf of the Associated General Contractors, which is the largest and oldest national construction trade association in the United States.

Sir, you will have five minutes to make your statement.

Mr. PEBLEY. Thank you.

**STATEMENT OF TREY PEBLEY, McALLEN CONSTRUCTION, INC.
ON BEHALF OF ASSOCIATED GENERAL CONTRACTORS OF
AMERICA**

Mr. PEBLEY. Good afternoon, Chairwoman Velázquez, Ranking Member Graves, and members of the Committee. Thank you for the opportunity to testify on how federal regulation of water and wetlands impacts my company and my community.

My name is Trey Pebley. I am Vice President of McAllen Construction, located in McAllen, Texas. McAllen is a small family-owned and operated business that builds bridges and installs municipal utilities, such as water lines, sanitary sewers, and storm sewers. We have 133 employees and annual revenues of around \$20 million.

I am an active member of the Associated General Contractors of America, on whose behalf I am pleased to represent today, and serve in a leadership role on AGC’s Environmental Network Steering Committee.

AGC is the largest and oldest national construction trade association in the United States, representing more than 33,000 firms. AGC members are engaged in the construction of private and public facilities and are a major contributor to employment, gross domestic product, and manufacturing.

I am also an elected trustee to the McAllen Public Utilities Board. This is an at-large position that oversees water and wastewater infrastructure and management in my community. As an elected official and a public steward, water quality is very important to me.

In my position, I am challenged to make decisions about how to best protect water quality and the health and welfare of our citizens. And because our resources are limited, I must also make sure

the projects we fund are done in a timely and cost-effective manner.

That is why I am concerned about a bill called the Clean Water Restoration Act that would fundamentally expand the federal jurisdictional scope of the Clean Water Act and displace state and local jurisdiction over land and water use.

Such efforts would cause significant disruption to the construction industry and adversely affect not only AGC's membership but also the health and welfare of the general public.

Construction projects that lie in waters of the United States within the meaning of the Clean Water Act require federal discharge permits that are both costly and time-consuming to obtain. Many of our projects require permits and have been delayed while we have waited for the Corps' district office to issue them. These delays have cost us money.

As delays and costs increase, as they will under the proposal, some construction projects will inevitably go unbuilt. In my line of work, this means impeding water supply and wastewater treatment projects that are vital to improving public health and welfare and fixing our aging infrastructure.

Other AGC members build highway and transit infrastructure, repair dams, construct flood control projects, and renovate schools, among many other things. Any delay in these types of projects deprives the general public of the benefits they would derive from them.

Today my industry faces a lot of uncertainty regarding whether any one project lies in waters of the United States and requires a permit because the exact meaning of that term continues to be in debate. It can take a lot of time and effort just for the Corps and EPA to make a jurisdictional determination to see if a permit is even needed.

Contractors and property owners alike have a right to predictability and consistency in the application of law and need fair notice of what activities are regulated. As the operators of construction sites, both property owners and their construction contractors risk civil and criminal penalties for failure to obtain a necessary permit.

AGC is committed to protecting and restoring the nation's waters, but we do not believe that it is in the nation's best interest to put everything under federal jurisdiction in the interest of clarity.

The Clean Water Restoration Act would do just that: make everything federal. As a result, any activity affecting any wet area in the United States would be subject to federal regulation. We think this goes too far. So do state and local governments that have long assumed primary responsibility for land and water use.

The proposal would give the Corps and EPA unlimited regulatory authority over all waters, period, including groundwater. This is of serious concern to us as underground contractors.

Under this expansion, contractors, especially underground contractors, like myself, would continually face the threat of legal liability for unforeseen and unpreventable encounters with groundwater. Every trenching operation, perhaps every hole dug in America, would require a permit to avoid risk of violation.

Finally I would like to add a thought on the so-called “compromise” version of the proposal that the Environment and Public Works Committee approved in June. It still results in the same outcome AGC opposes: fundamentally expanding the scope of federal jurisdiction.

I understand that Representative Jim Oberstar may reintroduce this bill shortly and include the Senate’s changes.

[The statement of Mr. Pebley is included in the appendix.]

Chairwoman VELÁZQUEZ. Time has expired. During the question and answer period, you will have an opportunity to expand on any point that you were not able to make at this point.

Mr. PEBLEY. Okay. Thank you, Madam.

Chairwoman VELÁZQUEZ. The Chair recognizes Ms. Kirkpatrick for the purpose of introducing our next witness.

Ms. KIRKPATRICK. Madam Chairwoman, thank you very much for this opportunity to introduce a fellow rancher from my great State of Arizona. My mother’s family was ranchers in Navajo County. And we grew up knowing that healthy land makes healthy cattle, which makes healthy families.

I am very pleased to introduce Mr. Jim Chilton, a fifth generation rancher in Arizona. He is here to testify on behalf of the Arizona Cattle Growers, the Public Land Council, and the National Cattlemen’s Beef Association.

Along with his brother and family, Mr. Chilton ranches on 50,000 acres near Arivaca, Arizona. Like many ranches in Arizona, the family ranch includes private property, state school trust land, and federal land, a combination that presents unique challenges and responsibilities. Though his ranch is outside my congressional district, Mr. Chilton speaks today for many of my constituents.

Thank you, Mr. Chilton. And I know the Committee is interested in hearing your thoughts today.

And thank you, Madam Chairwoman, for including ranchers as a critical part of our Small Business Committee.

STATEMENT OF JIM CHILTON ON BEHALF OF ARIZONA CATTLE GROWERS ASSOCIATION, PUBLIC LANDS COUNCIL, AND NATIONAL CATTLEMEN’S BEEF ASSOCIATION

Mr. CHILTON. Good afternoon, Madam Chairman, Ranking Member, and members of the Committee. And thank you, Congresswoman Kirkpatrick. I am testifying on behalf of the Arizona Cattle Growers Association, the Public Lands Council, and the National Cattlemen’s Beef Association, and my family.

Protecting the quality of the nation’s surface water continues to be a priority for livestock producers. As cattlemen, we have a commitment to being good stewards of the land. And that job we take very seriously.

The Clean Water Restoration Act will negatively impact small business owners, like me, by limiting my ability to improve my ranching operations. The legislation vastly expands the Corps of Engineers and the Environmental Protection Agency’s regulatory jurisdiction and will result in limitless control over all water in the nation and the dramatic expansion of bureaucracy. Ultimately bureaucrats would control not only water but citizens’ lives and land use and all watersheds.

The Chairwoman mentioned that there are 15 to 20 thousand existing 404 permits in the hopper waiting to be acted upon. Why add tens of thousands more? How many more bureaucrats will the Corps have to hire or the EPA?

As the Supreme Court has recognized and my colleague Mr. Kruse has indicated, "it takes over 788 days and \$271,596 to comply with the current process and the average applicant for a nationwide Corps of Engineers permit currently spends 313 days, the average cost of \$28,915. As Mr. Kruse pointed out, this is not counting the substantial costs for changes in design and mitigation." I am quoting the Supreme Court in the Rapanos decision.

Prior to the Supreme Court Rapanos decision, I applied for a 404 permit to construct a normal dirt ranch road across a dry wash. I had to hire an attorney, environmental consultants, which cost about \$40,000. Hearing of the costs in terms of civil penalties, et cetera, I decided to drop and abandon the project.

We later abandoned another needed improvement that would require culverts in two dry washes on existing roads that have been there for 50 years on our private land. We were again told that we would need a 404 permit, even though the total impact would be slightly more than one-tenth of an acre in a 100-acre pasture.

I asked, "How can these two dry washes impact a navigable stream since the nearest navigable stream is the Colorado River, about 275 miles away?"

The Clean Water Act of 1972 should not be expanded to include "activities affecting water." What life activity does not affect water? It would open the door to lawsuits regarding every human use. The citizen suit provision would allow radical environmentalists to stop or seriously delay any farmer's or rancher's improvement project anywhere in the nation due to the proposed expansion of jurisdiction.

Another concern I have is the bias federal officers could have towards my livelihood: Raising livestock. A rogue Corps officer could dilly-dally and delay in approving a needed permit or may demand over-the-top mitigation. The act must remain as it is and be limited to navigable waters as defined by the Supreme Court's Rapanos decision.

[The statement of Mr. Chilton is included in the appendix.]

Chairwoman VELÁZQUEZ. Time is up. Thank you, Mr. Chilton.

Our next witness is Mr. Bob Gray. He is Executive Director of the Northeast Dairy Farmers Cooperatives. In this position, Mr. Gray is engaged in a wide array of issues affecting dairy farmers in the Northeast. Mr. Gray has been a long-time advocate and representative of the dairy industry as he is based in the Washington, D.C. area.

Welcome.

**STATEMENT OF BOB GRAY, EXECUTIVE DIRECTOR,
NORTHEAST DAIRY FARMERS COOPERATIVES**

Mr. GRAY. Thank you very much, Madam Chairman, Ranking Member Graves, and members of the Committee. I am pleased to have the opportunity to testify. And I apologize for coming in with my coat off, but I came over from a meeting in the Senate. And I

was perspiring so badly I thought if I put my coat on, I might faint. So I appreciate you not requiring that I put it back on.

Chairwoman VELÁZQUEZ. The gentleman is excused.

Mr. GRAY. Thank you.

I am Bob Gray. And, as the Chairwoman mentioned, I represent five major dairy cooperatives in the Northeast, from Maryland to Maine. We have 12,000 dairy farmer, family farm members. Our farms average about 125 in size. The Northeast region is very, very important, from a dairy standpoint, as we produce 20 percent of the U.S. milk supply, 30 billion pounds of milk. It is a \$50 billion business just in the Northeast.

My mention of coming over from the Senate side, we were just in a meeting over there on--and I think this is relevant to this legislation that the Committee is having this hearing on today. The dairy industry is in the worst crisis it has faced in years and years and years.

And we were in a meeting we were having in the Senate--in fact, Congressman Thompson was at this meeting--was to try to find ways that we could resolve the crisis that dairy farmers are facing. Many of them are exiting the business. And we're going to see a lot more leaving the business in the months ahead if prices do not improve.

Now, our interest in this--I grew up on a dairy farm in upstate New York, in Cayuga County, New York. Actually, our farm was taken for a nuclear power plant siting, but the plant was never built because of Three Mile Island. But I am familiar in the farm that I grew up in with issues regarding waterways and wetland areas.

I would first like to say, though, that our dairy cooperatives starting out really oppose S. 787. Provisions in this measure will have a detrimental impact on dairy producers all across the country, not only in the Northeast.

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 geographical limit on the scope of the federal government's authority over water.

Chairwoman VELÁZQUEZ. Mr. Gray?

Mr. GRAY. Yes?

Chairwoman VELÁZQUEZ. If the gentleman will suspend for a second? I just would like to clarify for the record we are not considering any pending legislation--

Mr. GRAY. Right.

Chairwoman VELÁZQUEZ. --since there is no legislation that has been introduced.

Mr. GRAY. Okay. I just wanted to make the point, though, that the legislation that is under consideration in the Senate we have concerns with.

By deleting that, this bill would expand federal jurisdiction over certain water features that the Supreme Court decided were not subject to the Clean Water Act. And it is taking the unprecedented action in the 37-year history of the Clean Water Act to expand federal government jurisdiction beyond what many legal experts tell us is appropriate under the commerce clause of the Constitution.

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 Clean Water Act 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, the conference report thought 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 that is why the Clean Water Act and many other statutes use that term as a fundamental basis for identifying federal waters in contrast to state waters.

By deleting the term “navigable,” the bill, the Senate bill, S. 787, creates new questions and considerable confusion over the proper scope and limits of federal clean water jurisdiction under the Constitution and the commerce clause. As such, it will lead invariably to a whole new generation of litigation. That is why we have concerns for this legislation, and we wanted to pass them on to the Committee.

And, again, I appreciate the opportunity to testify. And I will be glad to answer any questions that the Committee may have. Thank you.

[The statement of Mr. Gray is included in the appendix.]

Chairwoman VELÁZQUEZ. Thank you, Mr. Gray.

And the Chair recognizes the gentleman from Oregon, Mr. Schrader, for the purpose of introducing our next witness.

Mr. SCHRADER. Thank you, Madam Chair and Ranking Member Graves, for letting me introduce the President of the National Utility Contractors Association and one of my constituents: Mr. Lyle Schellenberg.

Mr. Schellenberg was recently elected 43rd President of the National Utility Contractors Association, which represents the interests of contractors engaged in the construction of utility lines, excavation site work, and trenchless technology. It is also the oldest and largest trade association working solely for the utility construction industry.

He is also President of Armadillo Underground, as we know, which is based in Salem, Oregon. Armadillo Underground is a small family-owned business he founded in 1972--his hair is a lot lighter than mine, I can see that, aged more gracefully--offers a wide variety of services but specializes in trenchless technology.

He is well-known in my state as a leader in the utility contractor issue area, was appointed in 2001 by Governor John Kitzhaber as the contracting delegate to the Board of Directors for the Oregon Utility Notification Center. His commitment to educating and promoting the benefits of trenchless technology on a national level

earned him the prestigious National Utility Contractors Association Ditch Digger of the Year for his contributions to the industry on the national level.

Lyle lives in Salem with his wife Linda and two children: John and Angela. And I really look forward to his testimony. Thanks for making the long trek from the West Coast.

I yield back.

Mr. SCHELLENBERG. Thank you, Congressman Schrader. I appreciate it.

STATEMENT OF LYLE SCHELLENBERG, PRESIDENT, ARMADILLO UNDERGROUND ON BEHALF OF NATIONAL UTILITY CONTRACTORS ASSOCIATION

Mr. SCHELLENBERG. Madam Chair, Ranking Member Graves, and honorable members of the Committee, we have 15 employees in Armadillo. We are down because of the economy. But we work on sewer and water and other infrastructure projects throughout the state. And I appreciate the opportunity to participate in this hearing on behalf of the National Utility Contractors Association.

NUCA is a family of construction companies, manufacturers, suppliers from across the nation that build, repair, and maintain underground water, wastewater, gas, electric, and telecommunication systems.

NUCA opposes the Clean Water Restoration Act as currently written. Our fundamental concern is the potential for increased permitting requirements for wet areas with little or no impact on the nation's waters, higher compliance costs, in all likelihood significant increases in limitation. At the same time, desperately needed water and wastewater infrastructure projects could be delayed, even if they have no link to rivers, streams, or other navigable water bodies.

Under current law, if a potential job site is considered a wetland under federal jurisdiction, a contractor must obtain not only the federal wetlands permit, known as a section 404 permit, but also protection in the form of contract clauses and insurance against any potential environmental problems.

For example, we have a project in Oregon dealing with a road extension for the Port of Portland. The permit application was submitted well in advance of the project, but by the time it works its way through the bureaucracy.

As finally approved, we anticipate it will be too late for the construction season to actually begin the work in this area. Therefore, the work will be postponed until next year. And that is typical of some of the delays that are caused by the existing rules.

There is no secret the Northwest has its share of wet weather. In fact, it is notoriously wet. Think of the ramifications of new and time-consuming permit requirements of culverts, ditches, and other areas that might have standing water.

Let's now talk about the low areas of the project. Under the broad definition of all waters, it is very possible that a 404 permit could be required for the entire project. Giving the Corps and the EPA additional jurisdiction over all wet areas and activities that affect them, potentially including construction job sites themselves

will undoubtedly increase the time and the cost required to complete every construction project requiring a section 404 permit.

Many of the regulated community have indicated that the passage of the current version of the CWRA would be the largest expansion of the Clean Water Act since its enactment in 1972.

The ramifications of this bill are huge. As written, boundaries of the CWA jurisdiction would be removed. Enactment could in an instance subject ditches, water, sewer pipes, streets, gutters, man-made ponds, storm basin waters, and even puddles of rainwater to federal permitting requirements.

For the first time in the 37-year history of the CWA, activities that have no impact on legitimate American waters would be subject to full federal regulation.

This concept would introduce an overly broad definition of waters of the United States. It would eliminate the traditional basis for federal jurisdiction under the CWA by leaving the term "navigable" from the statute and expand federal jurisdiction.

In the end, the only winners will be the countless attorneys who will question the interpretation of the law through endless litigation as all stakeholders would make their case in court.

A do no harm approach to water regulation would be sound public policy. Our industry has demonstrated track record of creating jobs, increasing national output, and generating significant economic activity.

Recognizing the potential for recovery in the underground environmental infrastructure industry, Congress should be looking at expanded market opportunities, not opportunities to stifle them.

Any public works contractor will tell you that the current process in obtaining a federal section 404 permit is no cake walk. At the very least, the legislation will require considerable increases in resources needed to comply with the federal permitting process just to keep up with the increase in demand.

Guidance is needed as to what area and activities are covered, but the legislation as written seems only to complicate the issue.

I thank you for the opportunity to appear before the Committee today, and I look forward to answering any questions that you may have.

[The statement of Mr. Schellenberg is included in the appendix.]
Chairwoman VELÁZQUEZ. Thank you, Mr. Schellenberg.

Mr. Pebley, I would like to address my first question to you. The EPA and the Army Corps issued guidance, rather than regulations, on water subjects to the Clean Water Act. And this happened despite the fact that there were over 66 comments to the 2008 guidance. Do you believe that bypassing the regulatory process limited opportunities for addressing small business concerns?

Mr. PEBLEY. As AGC, we would ask that the EPA and the Corps of Engineers jointly work on rulemaking, regulatory rulemaking, and not reopen the statute. And in looking at the rulemaking, try and establish some clear and consistent definitions because that seems to be where a lot of the issue comes up is there are words that are used, but there are no definitions as to what certain words mean. And that has caused a lot of confusion.

I think if we were to throw it back into the EPA and Corps, that they could work things out and it would be better for everybody.

Chairwoman VELÁZQUEZ. Mr. Gray, many of those 66,000 comments that came from small businesses and family farmers, do you believe that the final guidance incorporated input from those comments that were submitted?

Mr. GRAY. I think from a practical standpoint; for example, in dairy farms, which I am familiar with, where we have sod waterways--and coming from the Northeast, where we have drainage ditches, we have tile, we have filter strips, I think what we're doing here is opening up a can of worms if we delete the term "navigable waters" because then we are open to almost anything.

And I think that really worries my dairy producers who have small areas on their farms that are wetlands but also in the normal practices that farmers do to conservation practice, as I mentioned, such as sod waterways, these could all fall under the Corps and EPA. And that is what really concerns us. We don't think they have been taken into account enough.

Chairwoman VELÁZQUEZ. Mr. Chilton, there are two major cases in the last decade affecting the landscape of waters subject to federal regulation. With the court split in the recent Rapanos case, it seems these matters are complicated further.

So in making investments, small farmers, do you account for the interpretations that have or may come out of the courts?

Mr. CHILTON. Absolutely. Thank you for the question. The Rapanos decision was kind of like a light from heaven, which in my opinion reined in a bureaucracy who had expanded the idea of what a navigable river is.

Let me be very clear. In our area, I mentioned dry washes. Well, all of our dry washes run into Yellow Jacket Dry Wash which runs into Arivaca Dry Wash. Arivaca Dry Wash runs into the Brawley Dry Wash. And then it goes another 20 miles, and it seeps into the sand of the desert. Water never reaches another river. It just seeps in.

So why should we in our area be subject to the Clean Water Act, period? And my view of Rapanos is that we are not. However, the Corps of Engineers in our Tucson area is determined at this very moment--I talked to people trying to get a permit--at this very moment is trying to say that "Yes, we have jurisdiction."

It's absolutely ridiculous, and it does hurt. And I will never do anything that requires a permit.

Chairwoman VELÁZQUEZ. Mr. Kruse, certain farming activities are currently exempted from regulation and permit requirements under the Clean Water Act. These exemptions were designed to cover basic farming activities and include plowing, cultivating, and harvesting.

Have these protections continued to reflect the realities of modern-day farming operations?

Mr. KRUSE. Madam Chairwoman, I think, first of all, I agree with the comments made by the other panel members about the concerns. With regard to your question, I think one of the safeguards that we have today when it comes to agriculture is how prior converted cropland is treated currently under the Clean Water Act.

One of the real concerns, whether you are a livestock producer or a row crop producer, is that removing the word "navigable" from

the Clean Water Act and changing how prior converted cropland is treated is of great concern for a couple of reasons.

The litigation aspects are just overwhelming, but also the value of one's land, which is a private property rights issue. As I stated in my testimony, many times a farmer's and rancher's land is their 401(k). So if you were to change that from the way it is treated now, it could drastically reduce the value of one's land.

And so those are some of the real concerns we have that some of the safeguards we have now, as you mentioned, might be taken away and, in fact, I think undoubtedly would be taken away if the word "navigable" is removed.

Chairwoman VELÁZQUEZ. Okay. I would like to ask my next question to either Mr. Schellenberg or Mr. Pebley. The American Recovery and Reinvestment Act's intent is to bring the money either to the states, the city, and get those shovel projects going.

We hear anecdotal stories that some projects are on hold. And it seems related to your industries that water permits may be an obstacle to getting those shovel-ready projects up and running.

I just would like to hear from any of you if you have seen any activity from either the Army Corps or EPA to expedite permit applications for Recovery Act projects. Yes?

Mr. SCHELLENBERG. Well, I have not seen anything from the EPA or from the Corps to expedite permits. And this is a major concern. Even though plans may be ready for projects and they may be ready to go, if you don't have those permits, you're not moving ahead.

That's why a lot of people see paving projects because they can do paving projects that don't require permits. But the utility work and stuff like that, a great majority of those projects, at least out in Oregon, do require those permits.

And so the shovel-ready for a lot of stuff, it just doesn't happen because of the permits. Even though the plans are sitting there, the projects are ready to go, the permits are delaying them.

Chairwoman VELÁZQUEZ. Any other witness who would like to comment?

Mr. PEBLEY. I would just like to comment on that. In the State of Texas, we have not seen that many dollars come out of the stimulus package yet. There were some highway projects that have come out that Mr. Schellenberg brought up that were basically repaving existing roadways because they were quick and easy and didn't require any permits.

In the past, we have had some bridge projects where we had contracts signed, we were told to go to work by the State of Texas, we go to mobilize out there, and then they realize, oh, we don't have a 404 permit or we have applied for it, but it hasn't come back yet. So our whole operation stops, waits for the Corps to issue the permit, which they typically aren't in a real big hurry on that because they're dealing with a state agency and sometimes there might be some turf issues. And we were left holding the bag with 15 guys standing around trying to do a project.

So it has been an issue in the past. Yes, ma'am.

Chairwoman VELÁZQUEZ. I recognize the Ranking Member. Thank you.

Mr. GRAVES. Thank you, Madam Chair.

Each of you kind of just briefly touched on the litigation aspects as a result. What I am talking about is third party litigation if some of the proposals out there for the Clean Water Act were implemented.

Could you tell me from your perspectives, each of you--and we'll start with Mr Kruse. Can you tell me how you see third party activist groups, at least the litigation from them, increasing if this were implemented and what that is going to mean to agriculture and small business in the future?

Mr. KRUSE. I think that is one of the greatest concerns we all have. And I would refer back, Congressman Graves, to a comment you made during your opening comments about farmers and ranchers striving to be good stewards of the land. And I think that, without a doubt, is something that we all strive to do is take care of the land that we are temporarily empowered to take care of.

I think the worst case scenario--and I think this would indeed happen, and some of the panel members have already maintained it--you know, if the word "navigable" is taken out of the Clean Water Act, then we're talking about every pond, every lake, every stream, every puddle, ephemeral areas, which are areas where after a rain, water may stand temporarily and then go away. And so you might have an area where water might stand after a rain for a few days a year and be dry the majority of the days of the year. But that would be under the jurisdiction of the federal government.

And, you know, I can see a scenario which we see all the time where an attorney shows up and representing a client. And thousands and thousands and thousands of dollars later and much time and agony, you could well almost be without a farm or a ranch after trying to defend yourself because of a third party lawsuit.

And, you know, I think the fear we all have is whatever the intent of Congress might be, the courts will probably end up--if the word "navigable" is taken out of this, the courts will end up deciding what is going to happen and what our fate is going to be. And that is not something we really want to think about.

Mr. GRAVES. Mr. Pebley?

Mr. PEBLEY. Thank you.

I have the same concerns that Mr. Kruse has on the word "all," instead of "navigable." In my testimony, I mentioned basically groundwater. We install water lines, sanitary sewer lines, and don't expect many of you members of Congress know this unless you are in the business where most people can--but there is typically groundwater everywhere.

And in some locations, you know, like in my home city, you can go down eight feet. And you can hit groundwater. And it is not a rushing water, but it is water that seeps in.

And in order to keep our excavation safe and keep the project moving forward, we have to pump the water out of that excavation and then put in a suitable backfill and then place the pipes in there.

Under this rule, that groundwater, whether I know it is there or not, I have to get a 404 permit. So I could be going along at the start of my project, and the ground is perfectly dry. And I come up

to an area where there is groundwater coming in because there is no amount. It just says, "all waters."

And if I have to start pumping it, then I have to shut down, get a 404 permit, and I don't know how far that groundwater is going to go. It could go for the entire length of the project or it only may go for 100 feet or so.

So this opens up a huge, huge issue, especially in our market, for this issue. And I think it is something that is completely unattended by the word of inserting "all," instead of "navigable."

And any third party who could be driving by and they see a pump running in an excavation could lead to asking where is your 404 permit. And I see that as a very, very dangerous situation for all of us.

Mr. GRAVES. Mr. Chilton?

Mr. CHILTON. I am a victim of third party lawsuits. Our ranching operations have been affected by four separate lawsuits filed by the Center for Biological Diversity. The Center for Biological Diversity, standard operating procedure sues the federal government, in three cases the Forest Service, in one case the BLM, Bureau of Land Management. They accuse the Forest Service or BLM as having not done something. In three of the cases, it was properly consult with the U.S. Fish and Wildlife on endangered species.

The problem is the Center for Biological Diversity submitted information in our case that was not even true. They were lies. They were misrepresentations.

I got so angry because of being a victim of a third party lawsuit that I sued the Center for Biological Diversity for libel, misrepresentation, and plain lying. And the jury came back and said 10 to 0 the Center for Biological Diversity was guilty, 9 to 1 that they awarded me \$100,000 in damages, 9 to 1 that they gave me \$500,000 punitive damages, punishment for the Center lying about us.

And it is just really awful as a citizen of the United States to have your ranch and farm and you are being a good steward--and I have gotten all kinds of environmental awards for being a good steward. It is really, really awful to have a radical environmental group sue the government and they are really after you. They are suing the government to get rid of me.

And as a citizen, it is just upsetting. You roll over and roll over at night. You get angry. And it is just awful. Why is a citizen of the United States put through such horrible, horrible circumstances? I really object. It is just awful, these third party lawsuits.

Mr. GRAVES. Mr. Gray?

Mr. GRAY. Yes, Congressman Graves. I certainly agree. I can't add too much to what has been stated, although I would add a point. We had a dairy producer in my home county, Cayuga County, who was sued on a nutrient management issue by a third party. This lawsuit went on for almost 10 years. And the dairy producer won it in the end. It got some of the money back that they had put in the legal fees. No question this issue will spur more lawsuits.

You can imagine having that hanging over you for that length of time. I mean, really, justice delayed is justice denied. And I can't

believe that this won't increase litigation by third party litigation much, much greater.

Mr. GRAVES. Mr. Schellenberg?

Mr. SCHELLENBERG. Yes. Mr. Graves, you know, one of the things that Armadillo does is we do a lot of culvert replacement and remediation work for both the highways as well as the railroads. And quite often we are working under the existing Clean Water Act and have all the permits.

And people come out. And they are opposed to you fixing existing culverts and infrastructure of these important railroads and highways. If we don't fix those things, what happens is you get a wash-out on the railroad or highway, you have got far greater damage downstream. So people are opposed when you are doing things right.

Now you take that further and you move it. You expand that out. You have got puddles. You have got this and that. Especially in Oregon, you know, I can see significant people coming here from groups, coming forward, just trying to stop urban growth, just trying to stop anything that "not in my backyard" type of things.

And they are going to say, "Now we have a vehicle that we can use. We are going to say this is a wetland." We can use that to prevent any kind of necessary infrastructure that we need in our communities.

Mr. GRAVES. Thank you.

Mr. CHILTON. May I add one more comment?

Mr. GRAVES. Real quick, yes.

Mr. CHILTON. The people who sue under third party lawsuits often then collect money from the U.S. Government under the Equal Access to Justice Law. So it is a cottage industry. It is an industry to sue the government and then collect money. This is wrong. This is not a democracy. The Federal Government ends up paying for their suing.

Mr. GRAVES. Chair--

Chairwoman VELÁZQUEZ. Ms. Kirkpatrick.

Ms. KIRKPATRICK. Thank you, Madam Chairman. My question is for all of the panelists. I have strong concerns about the potential reach of the Clean Water Restoration Act, and I want to know your opinions. Do you think our current practice sufficiently protects our nation's water interest, or is there a role for expanded jurisdiction if it stops short of removing navigable waters from the definition?

So I will start with Mr. Schellenberg and then just work down. I would like to know your opinions about that.

Mr. SCHELLENBERG. Well, we would like any changes that are made, if they are made, we would like them to be very clear and concise, so they are easy to understand. And that is not the case that typically happens in Government, so we--you know, we would only support something if it was very clear and concise. And without knowing what it is we are agreeing to, we really can't agree to it. But I think leaving "navigable" in there is very good.

Thank you.

Mr. GRAY. I think it probably takes more work on the part of the Corps and EPA, because the word "navigable" is in there. But I think that is good, because then you make a determination that is more comprehensive. When you take that out, then I just think you

are going to--there is nothing to really be sort of the anchor as to how you make those determinations. So I think that it is very critical that it be left in.

Mr. CHILTON. Thank you. That was a very good question. Bureaucrats over time expanded the original intent of the legislation. In the Clean Water Act, they have expanded since 1972 the concept that even my dry lands are part of the waters of the United States. So that is a real problem.

Why can't the Corps of Engineers, if they think there is a problem, identify the problem and work with the landowner about the problem, come to an agreement, for what might be done in a specific spot in a particular state, and then with the help perhaps of grant money, solve that particular problem, in contrast to throwing a net across the whole of the United States to regulate as contemplated by the expansion of the Act.

Mr. PEBLEY. As an elected official who is in charge of water and wastewater for the city of McAllen, you know, I am all for clean water. I think it is--we pump our water for the citizens of McAllen out of the Rio Grande River, which shares a border with Mexico. So, you know, I want to make sure that the water that we are pumping out of that river is as clean as possible, and not only reduces the costs of purifying the water for the citizens, but also just ensures their safety and that they are getting a good product.

So I think it is very important that the word "navigable" be left in the current role as it is, and that "all" should not be used to replace it. I think it would be very important for Congress to encourage and oversee the administrative rulemaking with the EPA and the Corps of Engineers jointly as was recommended by the Supreme Court in the Rapanos case, in order to try and get more clarity and consistency for all people.

Mr. KRUSE. I think there is logic for the Federal Government to have oversight on navigable waters. And of course, as we all know, in 1972 when the Clean Water Act was written that is what it said. The courts have taken some liberty, as we know, and they have been mentioned here today, in expanding that. I believe, and it is just an opinion, but I think the intent, if we go back to '72, was "navigable waters."

And so it is a concern to see some of the things that have occurred. But I think there is no logic in removing the word "navigable" and giving the Federal Government jurisdiction over every drop of water, theoretically, that exists, including little puddles that develop after a rain.

We all--I know you all hear all kinds of horror stories about the overreach of the Corps and the EPA, and we certainly hear them and live them every day. And I agree with Mr. Pebley, I think it is very important for you all to make sure that your intent is very present in the rulemaking. And, you know, I know that sometimes you all get frustrated by the overreach of the government bureaucracy and going beyond what your intent is. But this is a clear case where we really need to have a clear intent, and we need to keep the word "navigable."

Chairwoman VELAZQUEZ. Time has expired.

Ms. KIRKPATRICK. Thank you. Thank you, panelists.

Chairwoman VELAZQUEZ. Mr. Schock.

Mr. SCHOCK. Thank you, Madam Chairwoman. Thank you for having this hearing today to find out firsthand from those in the industry how this will affect your respective roles. I have a number of questions.

Mr. Kruse, on behalf of the Farm Bureau, as the Farm Bureau President, you talk a little bit about some instances that you are aware of folks that have applied for a 404 permit in the past. Before we get to that, I guess I want to make it clear who is charged with overseeing who has jurisdiction with all of the non-navigable waters in your state, or in all states?

Mr. KRUSE. Well, that varies from state to state. In our state, it is our Department of Natural Resources, and the NRCS within USDA have some oversight role to play in that.

Mr. SCHOCK. So each state basically is in charge of overseeing and protecting those natural waterways, be it a pond or a lake or a stream, that do not have a, let us say, natural impact.

Mr. KRUSE. Yes, sir. That is correct.

Mr. SCHOCK. Okay. So it is not as though these waterways are not being protected. It is not as though no one has jurisdiction or oversight or is looking out for the protection of these waterways.

Mr. KRUSE. Yes, sir. That is correct, and that is a very important point.

Mr. SCHOCK. That is important to point out.

Mr. KRUSE. Yes, sir.

Mr. SCHOCK. Second, you did mention those farmers who have applied for 404. Remind me again how much was spent between mitigation and the legal work, and so on, for those that have applied for a 404.

Mr. KRUSE. Well, it can vary. You know, the costs can go up into the hundreds of thousands of dollars. One instance I cited was a farmer who wanted to improve 11 acres of his land, and he did go to the NRCS and USDA.

Mr. SCHOCK. And how long did that take?

Mr. KRUSE. Well, it took almost two years, and then he finally, when he found out that the Corps was going to make him mitigate this with--mitigate the 11 acres with 17.7 acres, and all the expense that was going to be incurred, he finally just threw up his hands and said, "I can't do it. It is just--it is going to cost me more than the land is worth."

Mr. SCHOCK. So it cost him a couple hundred thousand dollars, a few years of his time, and the end result was nothing. And basically, he couldn't move forward on the project.

Mr. KRUSE. Yes, sir. And I think in this case he didn't spend--it can cost well over \$200,000, but I think he stopped the process before he spent that amount of money, because he just--when the Corps told him he had to have a permit, he had to mitigate it, he just said, "I can't justify the expense."

Mr. SCHOCK. Okay. Thank you very much.

Mr. Schellenberg on behalf of National Utility Contractors Association, you also detailed some of the problems with the permitting that would be required. I guess my question to you is, given the additional permitting that would be required, can you see instances where your utility contractors, rather than do the work, would turn

away work simply because of the number of years that would be required to get the necessary permitting to do the work?

Mr. SCHELLENBERG. I think--I am not sure we would turn away work, but we would look at it differently. It is certainly going to be--going in, if you know it is going to take--you know, you are bidding a job here, and you are not going to get to do it for a couple of years, it makes it harder to bid, because you are calculating things in the future, you are going to have to allow for that.

But those are the things that--it is going to make things--every project is going to become much more expensive. And if it gets changed, if "navigable" gets taken out, I know in Oregon it is just going to open it up that everything is--those delays are going to be just astronomical for all kinds of projects.

Mr. SCHOCK. So while you will be happy to do the work, it might take a few more years before you get to do it, and it will cost the consumer more money.

Mr. SCHELLENBERG. Right. You might have a \$10,000 project, but it might take you two years to do it, you know, so you are going to have to have a little more money for--I mean, because some projects are big, some projects are small, so--

Mr. SCHOCK. Sure.

Mr. SCHELLENBERG. --there is a lot of variation there, but--

Mr. SCHOCK. It is not exactly something we want to do while we are trying to stimulate the economy?

Mr. SCHELLENBERG. It is not what we want to do as we stimulate the economy.

Mr. SCHOCK. Thank you.

Mr. Chilton, on behalf of the Cattlemen's Association, I, too, share your frustration with frivolous lawsuits. But my question to you is really about your farmland. You said it was your greatest asset. And I guess my question is, how do you see removing "navigable waterways" from this legislation impacting the value of your farm ground?

Chairwoman VELÁZQUEZ. Mr. Schock, I am afraid the time is expired.

Mr. SCHOCK. Okay.

Chairwoman VELAZQUEZ. And we have other members, and there will be a vote on the floor today.

Mr. Ellsworth.

Mr. ELLSWORTH. Thank you, Madam Chair.

Thank you, gentlemen.

Mr. CHILTON. May I submit that answer to the record?

Chairwoman VELAZQUEZ. Sure.

Mr. CHILTON. Okay.

Chairwoman VELÁZQUEZ. Without objection.

Mr. ELLSWORTH. First, let me say, Mr. Kruse, that Don Villwock called me and said trust anything you say. So I will take that to heart. And let me say that, first, I agree that "navigable" should be left in there. And my question would be--I know this document from '77, I think the Clean Water Act was probably at least 10 or 11 pages long.

What do you think by the proposed removal of "navigable" that those rogue bureaucrats were trying to--what do you think they are trying to achieve, the folks on the other side of this, by picking that

one word out of that document that--is there this attempt to control every little pebble, every little pond, every little ditch, every little stream, that they want that jurisdiction, and that responsibility to control that?

Mr. KRUSE. Well, Congressman Ellsworth, I will certainly pass along to Don Villwock that I appreciated his comments. He is a dear friend.

Mr. ELLSWORTH. Great guy.

Mr. KRUSE. I can only believe that the intent is to dramatically expand the reach of Federal Government agencies in a way that I believe will be very harmful to farmers and ranchers and small business people, both in terms of cost, which ultimately will be passed on to the consumer, and in terms of--as we have talked here today, in terms of time that it takes to complete some of these.

It is really frightening to think that any pond in the State of Indiana or Missouri or any other state, with the word "navigable," with one word taken out, which appeared I think 80 times in the Act, but that then the Federal Government is going to have jurisdiction over a pond that some individual built, and that some individual owns on their own land.

That is a very, very frightening thought, and it is just--it can only--to your question, it seems to me it can only mean that there is a real desire to just continue the encroachment of jurisdiction by the Federal Government agencies.

Mr. ELLSWORTH. Let me ask one more thing, and this may seem a little off subject. I was a sheriff in my former life, and so I probably felt I was the victim of frivolous lawsuits from inmates as much as anybody in the room. If I can go down the line, just a yes or no, how many of you have hired an attorney, been listed as a plaintiff on a lawsuit, or hired an attorney to initiate a proceeding? You can just--have you ever--down the line, yes or no.

Mr. PEBLEY. Yes.

Mr. CHILTON. Yes.

Mr. ELLSWORTH. I see four yeses, and Mr. Kruse shakes his head no. So just curious how many--I know we talk a lot about lawsuits, and four out of the five have initiated some kind of plaintiff and hired a lawyer to initiate something.

Thank you. I would yield back.

Chairwoman VELÁZQUEZ. Time is expired.

Mr. Thompson.

Mr. THOMPSON. Thank you, Chairwoman and Ranking Member, for holding this important hearing. I want to--I have an opening statement I will go ahead and submit for the record.

Chairwoman VELÁZQUEZ. Without objection.

Mr. THOMPSON. Okay. Thank you. So we can get right to the questions here.

Mr. Kruse, in your testimony I was struck, you mentioned that expanding the scope of the CWA would sweep many forestry activities under its regulations. I have Allegheny National Forest in my district, 513,000 acres. It is an economic engine, or it has been. Could you elaborate on specifically how forestry might be affected?

Mr. KRUSE. Yes, sir. I think if we take the word "navigable" out, if the word "navigable" were taken out of the Clean Water Act, that is going to have, in my judgment, a serious impact on any type of

livestock, row crop, or forestry operation, because currently, if you take a 100-acre tract of timber, and you are going to find--after a rain, for example, you are going to find standing water in the areas of that timber, that goes away in a day or two. Currently, that is, as you know, not under the jurisdiction of the Corps of Engineers and EPA. If the word "navigable" is removed, it will become that.

And I think Mr. Pebley made a really good point a while ago, it would apply to forestry. If you are going about your business and all of a sudden you discover water in a place that you didn't realize it was going to be, you have a serious problem on your hands if the word "navigable" is not in there. And don't get me wrong, I don't think any of us would say that the Clean Water Act is perfect with the word "navigable" in. We are just saying it would be really scary if it were not in there.

Mr. THOMPSON. A whole lot worse. You know, I mean, my--the ANF, we have issues now with, as I think Mr. Chilton described, radical environmentalists who do nuisance lawsuits for different reasons. Most recently we had the Sierra Club and some others that shut down oil and natural gas drilling for--on presumed environmental issues that really weren't out there.

So what is your impression in terms of the standing water, then? It seems like the standing--that this mud puddle, then, would provide an excellent motivation for radical environmentalists to file nuisance lawsuits? It would just, you know, wreak havoc on our economy.

Mr. KRUSE. Absolutely. Without question. And a small ditch, a little stream, any water. Someone mentioned a while ago gutters. I mean, any place water exists, without the word "navigable," I mean, theoretically, and I think practically, the Corps and the EPA are going to try to regulate it.

Mr. THOMPSON. And not a question, but an observation. Mr. Chilton, you talked about the government paying these lawsuits. That is what happened in my congressional district with that forest. The Forest Service--no court handled the case, and the Forest Service voluntarily paid all of the court costs for the Sierra Club.

Mr. Gray, good to see you again. You are all over the place, and that is a good thing. Dairy farmers, as you know, in both my home State of Pennsylvania and nationally, are severely struggling. It seems to me that changing the definition will only cause additional unnecessary costs to an already struggling industry. Would you agree with that statement? And where do you see those costs--what will those costs do to our dairy farmers that, you know, on the average I think they have not large operations, about 125 heads, something like that.

Mr. GRAY. Right. Well, I agree. Absolutely. I mean, I don't know how they would pay for litigation costs today. They can't pay their feed bills. We have got farmers in the northeast that are using generators to run their farms today, because their electricity has been cut off. That is what the situation is.

I can't imagine what a dairy farmer would do if they were litigated by third party on a waterway. They wouldn't be able to deal with it, because the money just isn't there. So it would have a huge economic impact, particularly right now.

Mr. THOMPSON. How about the mitigation costs? Even if it doesn't get--you don't get a frivolous lawsuit, you have permitting costs, I heard consultant costs--

Mr. GRAY. Right.

Mr. THOMPSON. --and mitigation costs.

Mr. GRAY. It is just something that they couldn't pay for right now, and so that would just add undue economic burden.

Mr. THOMPSON. Can you just--we don't have much time. Can you give me some brief specific examples of how changing the definition would affect dairy farmers in particular.

Mr. GRAY. Well, changing it, yes. I added a couple of quick things before, and that is in ditches and in sod waterways and places where we normally do conservation practices on the land, so that we can get better drainage, and so forth, changing that definition, taking "navigable" out of there, could affect those kind of conservation practices, which are done to reduce soil erosion and nutrient runoff, and yet they could become expanded jurisdiction over those kind of practices and lands of that type.

Chairwoman VELÁZQUEZ. Time is expired.

Ms. Halvorson.

Ms. HALVORSON. Thank you, Madam Chairwoman.

Thank you all for being here. And like many of the other people that serve on this Committee, I also serve on Agriculture. So this is something I hear about quite often. And when I go back home and talk to the people on my advisory committee and many of my farmers, this is something that I hear the most is about the "navigable." And I just gave a speech just Monday to the chemical and fertilizer people in CropLife, and, again, this is something.

With all of this being talked about, I am curious, how did this happen in the Senate? Is it not talked to the Senators like it is to us? Does anybody want to answer that? I guess I am just curious--

Mr. CHILTON. I would try. I don't know, but I suspect that the environmental groups in this nation are thirsting for more power, and they have effectively lobbied the Senate to take out of Committee this S. 787. And our two Senators from Arizona were opposed.

Ms. HALVORSON. Okay. Thank you, Mr. Chilton.

A few other questions. Mr. Kruse, if you can maybe help me here, do you think the definition of "navigable," that is also something that I guess I hear from different people. Some people's definition of "navigable" is different from all of your definition of "navigable."

Now, I agree with all of you we don't want to open a Pandora's Box, and we don't want anybody encroaching on your property, which is your rights. There is already a backlog. First of all, who--if anybody wants to give me their definition of "navigable," which maybe we shouldn't, because we have already heard, that you think every pond, even if it is only there for a couple hours a year, would be part of--if we took it out.

Who would then be able to do this, if we have already got a backlog of 15- to 30,000 permits? I mean, who would enforce this? And do think that this is just a slippery slope because the EPA wants to take over more jurisdiction than you think they should have?

So if I could just start with Mr. Kruse, and if anybody else wants to answer that, it is probably about three or four questions and we don't have that much time. But basically it is about the slippery slope, EPA, and the definition of "navigable," and how do we even-

Mr. KRUSE. I think you make an excellent point, because the backlog is horrible now. And, as you say, if we remove the word "navigable," the backlog will be unconscionable. I think as we have talked here today it will open the door to third party lawsuits like we can not even believe. It encroaches on private property. It is just totally void of common sense.

And I think we would all agree that there is logic, as I said a moment ago, in the Federal Government having oversight of real navigable waters. And I think our definition of "navigable waters" would--we could all get together and come up with a pretty clear definition. As I said a moment ago, the courts have kind of stretched that out a little bit, but we are all just very frightened about what may happen and probably without a doubt will happen if the word "navigable" is removed.

Ms. HALVORSON. If anybody else wanted to speak on that.

Mr. CHILTON. I would like to. I think that "navigable," as the U.S. Supreme Court referred to it, is the best approach in the Rapanos decision.

Ms. HALVORSON. The one where it talks about even ponds and-

Mr. CHILTON. There has to be a nexus between a navigable river and the water in question.

Ms. HALVORSON. Correct. Correct.

Madam Chairwoman, I yield back.

Thank you very much, panelists.

Chairwoman VELÁZQUEZ. Mr. Gohmert.

Mr. GOHMERT. Thank you, Chair. Appreciate it.

Appreciate all your testimony. This is quite a problem, and certainly in East Texas where I am from we have experienced the problem. We have seen rivers and creeks flood, and then immediately here come all of the federal bureaucrats say, "Whoa, this is wetlands now. You can't do anything."

And have any of you guys had property that flooded, and you were told it is now wetlands and you can't use it for anything? None of you have any wetlands on your property?

Mr. GRAY. There is probably examples of that, Congressman, but I don't--you know, in the farmers that I deal with, but I would have to ask them.

Mr. GOHMERT. Well, didn't one of you say you had some wetlands on one of your property? Yes, sir. Mr. Kruse.

Mr. KRUSE. I have prior converted cropland that--in other words, as you know, land that I farm that is just great farmland, but at one time--I live in the very southeast part of Missouri, the "Bootheel" they call it, and at one time it was all swampland. And it was cleared and drained, and now it is the start of the Mississippi River delta, so it has got--it is great farmland, as Congressman Graves said.

But part of my farm in different areas of several fields is identified as prior converted. You would never know it walking over it,

but, you know, one of the concerns that not only I but so many landowners have is what may happen if we change the Clean Water Act, because, you know, it has been very clearly codified that prior converted is not under the jurisdiction of the Clean Water Act. And there is a real concern about what might happen if we change that.

Mr. GOHMERT. Right. Do none of you know people that have had water end up standing either by Beaver Dam that was--later had federal officials come in and say, "That is now something we will regulate. You can't use it"? Surely you all know of people that have had that happen, correct? I am getting some nodding heads. Yes, sir.

Mr. CHILTON. I know of a company that had a major manufacturing facility, and their cooling system, their air conditioning system, was such that it, as all systems, condenses water. Instead of putting it in the sewer, they piped the water out into adjacent property. And then, the Fish and Wildlife and I think the Corps of Engineers came along and said, after four or five years, "Oh, you have got a wetland," and then wouldn't let them build on an addition to the factory that would have created jobs and wealth.

Mr. GOHMERT. Well, thank you. And that is exactly where I am going. You know, you have talked--we have talked about shovel-ready projects. But if we eliminate the word "navigable," then some of these shovel-ready projects that were going to provide jobs, which puts food on the table and puts taxes in the coffer so we in Washington can squander it like we have been lately, all that comes to a stop because "navigable" has been put in legislation that starts creating permits that weren't previously there.

So that is something that hits me. And as an aside, you know, after Hurricane Katrina, and based on the experience we have had in East Texas with rivers flooding and all of the federal officials saying you can't use it anymore, I kept wondering when some--one of those federal officials was going to run into New Orleans and say, "Whoa, this is all wetlands. Nobody can touch it. And see these high-rise hotels? We may lease those out as multi-level duck blinds next year." But nobody ever did that, and it just seemed to be a real conflict in the way people were treated.

But, Mr. Pebley, I was curious, as I understand you were proposing the rulemaking process to clarify the federal limits of our waters, rather than legislation. When it comes to legislation, you can vote me out if you don't--I mean, constituents can, if they don't like what we put in legislation. But on the rulemaking, you can't really touch the federal rulemaking bureaucrats. Why would you prefer rulemaking over just fixing it right the first time in legislation?

Mr. PEBLEY. Where I come from on that is we know what we have right now. We know what the current law is. We know where the pitfalls are in that law. And with Congress overseeing and working with the EPA and the Corps to establish good administrative rulemaking through input by ourselves and other--

Mr. GOHMERT. Is that an oxymoron "good administrative rule-making"? It just sounds like there is a conflict there. Well, I understand your position, and my time has run out. But I have real con-

cerns when we don't make it clear in legislation and leave it to bureaucrats you can't touch when they screw up.

Thank you. I yield time.

Chairwoman VELÁZQUEZ. Time is expired.

Mr. Westmoreland.

Mr. WESTMORELAND. Thank you. I am sorry. Parliamentary inquiry, Madam Chair.

Chairwoman VELÁZQUEZ. Yes? The gentleman can state his parliamentary--

Mr. WESTMORELAND. Are we going to have several rounds of questioning?

Chairwoman VELÁZQUEZ. In consultation with the Ranking Member, we are going to have one round of questioning. But I always, always--you know, Mr. Westmoreland, I don't know where you are coming from. Here we are dealing with a very important issue, and you know that this Committee is run in a bipartisan way.

Mr. WESTMORELAND. Absolutely.

Chairwoman VELÁZQUEZ. So if you need extra time in a second round, I will grant it to you.

Mr. WESTMORELAND. So, but you said we are only going to have one round?

Chairwoman VELÁZQUEZ. If you haven't finished with your questioning, I always ask, before we conclude our proceedings, if there is any member who wishes to ask any more questions. So I am going to give you your five time period, in consultation with the Ranking Member. It has always been the tradition of this Committee, and under Rule 6 of the Small Business Committee, I have the authority, in consultation with the Ranking Member. It has always been like that. But if you--

Mr. WESTMORELAND. So are you--

Chairwoman VELÁZQUEZ. --need extra time, I will grant the extra time to you.

Mr. WESTMORELAND. Well, just another parliamentary inquiry, Madam Speaker.

Chairwoman VELÁZQUEZ. Yes.

Mr. WESTMORELAND. So are you saying Rule 6 of the Committee overrides the House rules?

Chairwoman VELÁZQUEZ. No, it is in concert with the House rules.

Mr. WESTMORELAND. Okay. So you are saying it is in conjunction with that, or you are--

Chairwoman VELÁZQUEZ. Correct.

Mr. WESTMORELAND. --acting within the House rules. So Clause 2J of 2A of Rule 11 of the House rules permits me to ask each member of the panel to have five minutes of questioning for each one of those members. Are you saying that the Committee rule will override the rules of the House?

Chairwoman VELÁZQUEZ. The Committee rules--the Committee rules give me the authority, with the Ranking Member--

Mr. WESTMORELAND. To override--

Chairwoman VELÁZQUEZ. --so that we can--

Mr. WESTMORELAND. --the House rules?

Chairwoman VELÁZQUEZ. --give an opportunity to every member. How long have you been in this Committee? And how long have you been in Congress?

Mr. WESTMORELAND. This is my third term, but I don't know that that has anything to do with the--

Chairwoman VELÁZQUEZ. You were in the majority--when you were in the majority, did you ever raise this issue?

Mr. WESTMORELAND. No, the--

Chairwoman VELÁZQUEZ. To give every member five minutes to question every--

Mr. WESTMORELAND. No, ma'am, I didn't, because I never had an opportunity. But let me explain to the Chair Lady, it doesn't matter how long you have been in Congress, if you have been here one day or 20 years, the rules are the rules. And so that does not have any effect on how the rules are applied or--

Chairwoman VELÁZQUEZ. The gentleman is being recognized for five minutes.

Mr. WESTMORELAND. Well, and I thank the gentlelady for that.

Mr. Chilton, just to give you some other things to look forward to, if you think the Clean Water Act, which I believe the gentle Chair Lady was an original co-sponsor of, that would be H.R. 2421, that was introduced last year with 166 Democratic co-sponsors and 10 Republicans. But if you think taking "navigable" out of the Clean Water--wait until you get some information on Mr. Cass Sunstein, who is the President's nominee for the Office of Information and Regulatory Affairs.

He believes that livestock, wildlife, and pets have legal rights to file lawsuits. So if you think a third party lawsuit coming for a water issue is a problem, wait until your cows start suing you.

My question to each one of you I guess is, how clean is clean? Mr. Kruse, we will start off with you.

Mr. KRUSE. Well, I think, as has been stated by many of us today, and, again, Congressman Graves mentioned this in his comments, whether you talk about clean water or clean air, or whatever, I have always believed as a fourth generation farmer--in fact, my dad will be 99 years old in September, and from the time I was a little boy he continued to lecture me, "Son, you want to leave this farm in better shape than you took it over."

And so if we are talking about water, you know, we are concerned about the overreach of the Federal Government by taking the word "navigable" out. By the same token, we in no way, none of us here, are saying that we want to disregard trying to do everything we can to make sure our water is clean, our air is good, the soil is good.

Most farmers and ranchers live on the land they care for. Their children and grandchildren run on the land and drink the water and breathe the air. So it is important to be good stewards of the land and the water and the soil. But at the same time, I think you have to strike a balance and have some common sense. And the fear that we have all expressed here today is the fear of taking the word "navigable" out of the Clean Water Act and what that could portend down the road.

Mr. WESTMORELAND. And you have made reference to some of the instances that you would have, such as a pothole or a prairie

hole, so to speak, where maybe an animal or a deer has gone and tried to dig up some salt or whatever that creates a hole. In that same piece of legislation--and I think Mr. Chilton referred to this. It mentions anything that would affect the water.

So if you were going to fertilize your land, that could require a 404 permit, could it not?

Mr. KRUSE. Yes, sir. I think you are exactly right. If you were going to spray a herbicide, that could conceivably require a permit.

Mr. WESTMORELAND. And the Corps of Engineers, you know, I wish--it would have been very appropriate today, I think, to have somebody from the Corps on a separate panel or somebody from the EPA on a separate panel, so we could have questioned them about some of these things, because I would like to hear the Corps' response to a question about, how long would it take them to review 404 permits for every farmer that wanted to fertilize his pasture, or wanted to spray some herbicide, or wanted to turn some soil over, or somebody might want to create a food plot for wildlife, or whatever.

Those things would be involved in that process, if this legislation passed where the language said anything that affect water--and because, of course, the word "navigable" out of it, it would be any water, is that not true, Mr. Kruse?

Mr. KRUSE. Yes, sir. That is exactly the way I see it.

Mr. WESTMORELAND. Thank you.

And, Mr. Chilton, I hate to keep coming back to you, but, you know, you talked about the lawsuits from the third party. Do you realize that your Federal Government funds a lot of those environmental groups that file suit against the government?

Mr. CHILTON. That is correct. The Center for Biological Diversity, in 2003, received \$900,000 from the Federal Government from suing the Federal Government. That is in their financial statements.

In terms of your question on clean water, I am very proud to say that we hired a hydrologist from the University of New Mexico to come do a hydrological study on our ranch, and he found that we have so much grass and take such good care of our ranch that the natural erosion was far below what would be expected in a normal circumstance.

We use no pesticides, we use no other products, except we have native grass. And so our water is clean, except sometimes there is a little mud in it. And it never goes anywhere. However, if I wanted to put insecticide on my farm, or if I wanted to fertilize the farm and I had to wait two years, what, 313 days for a nationwide permit, I mean, that is totally ridiculous.

Chairwoman VELÁZQUEZ. Time is expired.

Mr. CHILTON. Thank you.

Chairwoman VELÁZQUEZ. Mr. Luetkemeyer.

Mr. LUETKEMEYER. Thank you, Madam Chairman.

It is interesting, I think we probably have more common sense on this panel today than we have in all of EPA and Fish and Wildlife put together. It is interesting to listen to your comments, and I certainly appreciate all of your efforts today. It was--it is great to listen to some common sense. It is really neat.

With regards to some of the Clean Water stuff, or some of the navigable stream stuff we are talking about, I think we are already there, gentlemen. I can give an example in my district. I have a gentleman who went out and tried to do a little something with a wet weather creek. In other words, in Missouri where I am from, you know, we have a lot of little ditches and what have you. And, you know, water is in it about, you know, 10 days out of the year, and the other 355 days a year it is dry.

And so he tried to do something with it to clean it up, and he got fined \$16,500 by the EPA. We are already there. In fact, we are already past that point, because now what is he going to do? As a result of this fine, he is not a wealthy man. How can he offset this? He has--we have got the full force of the government sitting here trying to sue him, and he has no ability to go back if he wants to fight it. And he could, because he has a legitimate suit. But he said, "I can't afford this. I am going to settle the fine, if I can negotiate it down."

The practice of intimidation by the government is out there. It is there today and it is something that we have to stop, and this is one way to do it. So I appreciate your being here today.

I think Mr. Chilton--I think Mr. Schock a while ago was trying to get to a point and trying to ask a question about the value of land. Can you give me an idea of all of the stuff that is going on with the Clean Water Act? How has that impacted the value of land in your area, or has it at all yet?

Mr. CHILTON. My land is mainly grazing, except I have a 40-acre farm. And thank you for the question. Well, the Clean Water Act, as now interpreted by the local Tucson office, would be such that, if I were to try to sell my land, that would have to be a major disclosure item to the purchaser.

And I do not know how much a purchaser would discount the fact that every bit of water, if this expansion of jurisdiction takes place, would be subject to the Clean Water Act in a 404 permit. I just can't tell you exactly.

Mr. LUETKEMEYER. Thank you.

Mr. Kruse, want to try that one?

Mr. KRUSE. Yes, sir. I think to some extent the main impact on land value so far has been, for example, where a tract of land that includes some wetlands on it has been sold, and also the whole thought of mitigation. I am aware, as I know you are, there are situations in our state where some people have been forced to mitigate five to one.

In other words, they have got to provide five acres to one acre in a mitigation process. And so that obviously indirectly impacts land value. What would really impact land value is if the word "navigable" is taken out and the way we treat prior converted cropland, which is being discussed, would be changed, because that is some 55 million acres of farmland that is prior converted. And that would dramatically have an impact on the value of the land.

There are some who are saying that that ought to be clearly defined, as prior converted can only be used for agricultural purposes, and not for anything else. You can imagine what that would do to the value of the land.

Mr. LUETKEMEYER. Thank you, Mr. Kruse.

I will yield back. Thank you, Madam Chairman.

Chairwoman VELÁZQUEZ. Mr. Graves, do you have any other questions?

Mr. GRAVES. No.

Chairwoman VELÁZQUEZ. Mr. Thompson?

Mr. THOMPSON. Thank you, Madam Chairman. Just one in terms of the complexities of this process. I would just throw this open to the whole panel. I mean, is this something--is this something you are able to--when you go through this permitting process, is this something the normal small business person or farmer is equipped to do? Or do you have to hire a consultant? Do you have to hire a lawyer? What are the complexities of this process? And what does that mean in expense?

Mr. CHILTON. Well, for me, I had to hire an attorney and two consultants. And we had to do an archaeological study. And it cost about \$40,000, and I threw up my hands and said, "I am sorry." I did get the permit, but I just gave up on the project. As it--you cannot navigate the language and legalese of the Corps of Engineers' permit process without professional help.

Mr. THOMPSON. Has anyone else experienced--

Mr. SCHELLENBERG. It has been my experience it takes engineers, it takes surveyors to survey the grounds, you have got your biologists out there and different people looking at the plants and looking at things and trying to define the area of the wetland. So you have--and then, possibly you need an attorney to help you determine whether or not what the Corps is telling you is right or not.

So it is not something a person could do on their own, in most cases. It is something that is very complex. You have to have people with knowledge in this area and people that specialize in this to get you through it.

Thank you.

Mr. PEBLEY. I would just echo Mr. Schellenberg's comments. This is something that I would not attempt to do on my own. There are too many pitfalls and minefields to try and traverse. And I am not interested in having civil or criminal penalties put upon me for misunderstanding of the law.

So no, we hire engineers and attorneys to handle this for us, and the cost is passed on to the customer. And in our case, most of the time the customer is a political subdivision. And so that cost is then passed on to the taxpayer of that political subdivision.

So, I mean, everything has its consequences, and we charge for those consequences. And I think it could be a whole lot simpler if some of the panelists who have said, Congressmen have said some common sense reigned it would make a big difference for everybody.

Mr. THOMPSON. So it is fair to say that these costs obviously are not also unnecessary, but frankly are just going to be crushing upon the businesses and the jobs that are sustained and created by those businesses.

Mr. PEBLEY. Yes.

Mr. THOMPSON. Thank you, gentlemen. Thanks for your testimony.

I yield back.

Chairwoman VELÁZQUEZ. Mr. Westmoreland.

Mr. WESTMORELAND. Thank you, Madam Chair.

Mr. Gray, I recently visited a dairy farm that--they milk cows from about 2:00 in the morning until about 10:00 in the morning, and then from about 2:00 to 10:00 at night. So it is an unbelievable thing, so the dairy farm guys have my heart in what they do.

Mr. GRAY. Thank you.

Mr. WESTMORELAND. But going there it was very interesting at the innovative things that they are doing. And right now we are in a spirit of green, I guess. And the fact that these farmers took the dairy cows, they basically wash down where they stand, this water runs into a pond, and it is stirred up. And then, this water is used to irrigate corn that is used for the silage to feed the cows. So it is kind of a cycle of life I guess that goes on.

The difference is that this--the thing is bordered by the Flint River. And having gone and witnessed how careful they are to use all of their assets I guess to make farming as cheap as they can, and to make it really as simple as it can, I am afraid that if they would have had to get a 404 permit for anything that somebody having looked at this navigable water, or anything that affects water, would come out, because, as you understand and somebody mentioned, that even though we as Congress pass laws, we do not write the rules for these laws.

These laws are written by different agencies, and they may come up with some different interpretations of what the legislative intent was. Is this normal, that dairy farmers do this type of thing? And, Mr. Chilton, I will let you answer as far as ranchers go also.

Mr. GRAY. Well, that is a good question, Congressman. As a matter of fact, I should have mentioned this in my testimony and in previous questions. And that hits on the issue, though, of handling manure from dairy cows. For example, a 1,500-cow Holstein will produce 75 pounds of manure a day. So in a sense--

Mr. WESTMORELAND. And how much water does--

Mr. GRAY. Well, that includes the water--that includes the--both the manure--the solid and the water.

Mr. WESTMORELAND. But how much water one of those cattle a day drink?

Mr. GRAY. Well, she will drink--well, she is given 100 pounds. She will drink, oh God, I don't know how many gallons, 200 or 300 gallons of water. I mean, they drink a lot. They consume a lot, they really do. But what we are lacking, and we are struggling with in the dairy business, because we have our cows confined to some degree--I mean, it depends on the herd--is the kind of manure handling, nutrient management practices that we can put on farms, as you were discussing and mentioning, that will handle manure so we have as little nutrient loss as possible. We are trying to eliminate that.

But I can tell you we don't have the range of technologies available to a dairy farmer who is 80 cows to one that is 1,000 cows that will work for everybody. Anaerobic digesters can be effective, but they are very costly. Our farmers are looking for these solutions. USDA, by the way, just did a report on animal manure and found that--I think it says between five and 10 percent of our renewable

energy could be created by using manure, so that would take that cycle, as you were discussing, one step further.

So I think we need to do that, but we need some help in doing that. We don't need more litigation. That is what we are trying to avoid. We want to do this, but we are going to need some help.

Mr. WESTMORELAND. One further question for you. Have you ever had anybody from Department of Agriculture, EPA, Corps of Engineers, come out to any of the farms that you know of and ask you how they could help you? I know that is a funny question. I apologize for that.

Mr. GRAY. Yes, I am not sure they have asked how they could help, but I know some of our farms have had Corps and EPA people come out asking questions and looking at certain parts of their farms regarding wetlands, and so forth. Yes. I mean, that has happened a lot.

Mr. WESTMORELAND. Can I continue?

Chairwoman VELÁZQUEZ. Okay. Is it your intention--do you need five more minutes, or are you going to continue questioning witnesses five minutes each?

Mr. WESTMORELAND. I probably have about five minutes more of questions.

Chairwoman VELÁZQUEZ. The gentleman can proceed.

Mr. WESTMORELAND. Thank you.

The reason I ask that is we had another hearing in this Committee, a Subcommittee hearing, that we had a lady from the EPA here that has been at the EPA for 29 years. She has been in charge of this department for 14 years that deals with the biofuels and feedstock, and so forth and so on. The reason I ask that, I had asked her in her 29 years with the EPA, because we had farmers and forestry people testify that these rules and regulations that they were coming up with was killing them, and the biofuel people.

And I asked her how many farms she had visited in 29 years to see some of these problems they had discussed, and she mentioned none. So I didn't know if any of these people writing the rules and regulations they have visited dairy farms, or if they just think milk comes from the grocery store.

Let me go--Mr. Schellenberg, it was mentioned about shovel-ready projects. I know that when the stimulus package came out my commissioner--Department of Transportation and a group of other--I think in fact all of the DOT commissioners may have gotten together and sent a letter to the EPA, because a lot of these projects were shovel-ready, except the permit--the environmental study maybe that came.

And so they asked the EPA if they would expedite the environmental studies or applications, so these shovel-ready projects could get on board. As far as the underground utility contractors, have you experienced any of that in any work that you all may see in the backlog, or in the background that is ready to come forward?

Mr. SCHELLENBERG. I haven't seen that in--coming from Oregon, I haven't seen any expedited permits that I am aware of.

Mr. WESTMORELAND. No, there is--no, trust me, there hasn't been any. But I am saying, had there been, would there not have been some more shovel-ready projects that would have been ready to go?

Mr. SCHELLENBERG. Oh, certainly. There is a lot of projects that were ready. I discussed--had a meeting a week ago with the public works director of Salem, and we discussed this very issue that they had projects. If they could have had the permits in hand, they could have done other projects. But this is hampering them getting these projects out.

Mr. WESTMORELAND. Mr. Schellenberg, I know that--and I am very familiar with underground utility contracting work coming from a building background. I know that on occasion that when you are doing tunneling and other things, if you are in the midst of doing it and a rainstorm comes up, or whatever, some of these ditches fill up with water.

And whether you are doing highway construction or boring under a road, or just putting in a water line, sewer, or whatever, that these ditches fill up with water, an incredible amount of water, at some points in time, just depending on the elevation.

If "navigable" was taken out of the Clean Water Act, would you feel, or do you think any of your members would feel, it necessary to get a permit to do something with the water that was retained in these ditches, ponds, work areas, before you could do anything to get rid of it?

Mr. PEBLEY. If "navigable" is removed, I think we are going to be told by the EPA and the Corps that we are going to need to get permits before we can proceed with this type of work. I fully expect that to happen.

Mr. WESTMORELAND. And, Mr. Pebley, let me ask you that same question coming from the Association of General Contractors, large commercial jobs where you do large excavation, such as, you know, digging down three and four stories to put in footings or foundation for some of these large structures. Would you think the same thing, that if you were in one of those situations, large rainfall, snow melt, or whatever, that you would be put into a situation of dealing with that water, because it is going to affect something if you are in a city, of having to get a 404 permit?

Mr. PEBLEY. Yes. I think if the word "navigable" is taken out and replaced with "all," yes, sir, I think it is pretty clear all waters, whether it is rainfall or drought, or that is now in a hole so it is part of groundwater, or if it seeps in while you are doing your work, yes, sir, I think you would have to get a 404, and then you are opening up to a whole host of problems, because now you have an open hole that is an attractive nuisance.

And if somebody--if a child falls in that hole because you can't fill it up because there is water in it, and you are waiting on your 404 permit, then you are open to a lawsuit from a third party, because you have an attractive nuisance and a child fell in the hole, even if you have, you know, completely fenced it off.

So it is a very tenuous slippery slope, as has been discussed earlier. And I don't see any up side to it, sir.

Mr. WESTMORELAND. Well, then you would be able to deal with OSHA for protecting the hole.

Mr. PEBLEY. Yes, sir.

Mr. WESTMORELAND. One final question, Madam Chair, if I could.

Chairwoman VELÁZQUEZ. Time is expired, and I have given you enough time out of my time, and Mr. Graves'.

Mr. WESTMORELAND. Okay. Well, you have been mighty nice, Madam Chair. I was--

Chairwoman VELÁZQUEZ. The understanding that the Ranking Member and I have is--

Mr. WESTMORELAND. I understand.

Chairwoman VELÁZQUEZ. --in consultation to provide five minutes. And I have been quite--

Mr. WESTMORELAND. Well, this is something that we will discuss at a later time. I will yield to your authority on that, and then we will take it up with the Speaker's office--

Chairwoman VELÁZQUEZ. Thank you.

Mr. WESTMORELAND. --or whoever. Thank you, ma'am.

Chairwoman VELÁZQUEZ. Thank you.

Gentlemen, thank you all for coming here today. I believe this is a very important issue, very complex, and I am happy--I will ask you, have you ever been invited to this Committee since we passed the Clean Water Act? Small Business Committee have ever conducted a hearing dealing with this issue?

Mr. SCHELLENBERG. Not that I am aware of.

Mr. GRAVES. Not that I am aware of either.

Mr. CHILTON. I have not, and I thank you very much for having the hearing.

Chairwoman VELÁZQUEZ. I am glad that it takes a Democrat to invite you to come over and discuss this issue.

Mr. CHILTON. We really appreciate it.

Chairwoman VELÁZQUEZ. Because we understand the unintended consequences that regulations and legislation will have and might have on the work that small businesses are doing in this country.

So it has been my intention to bring rural America and urban America closer, so that is why this Committee has held so many hearings with farmers, and we injected ourselves into the discussion of the farm bill. So I am very happy about that.

I ask unanimous consent that members will have five days to submit a statement and supporting materials for the record. Without objection, so ordered.

This hearing is now adjourned. Thank you.

[Whereupon, at 3:01 p.m., the Committee was adjourned.]

NYDIA M. VELAZQUEZ, NEW YORK
CHAIRWOMAN

SAM GRAVES, MISSOURI
RANKING MEMBER

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6515

STATEMENT
of the

Honorable Nydia Velazquez, Chairwoman
House Committee on Small Business

"Regulating our Nation's Waterways the Impacts on Small Businesses and Family Farmers"
Wednesday, July 22, 2009

In our nation's recovery efforts, green policies have been a top priority, and with good reason. Already, investments in sectors like efficiency and renewable energy are creating jobs and driving growth. At the forefront of this growing movement are our entrepreneurs-- the innovators who are leading the way in both conservation and economic resurgence.

It's no surprise that entrepreneurs and family farmers are powering the green economy. They recognize that a clean, sustainable environment is critical to the health of both the planet *and* the business world. And it makes sense, because small firms--like all other businesses-- rely on natural resources to run their operations. Of those critical resources, water is one of the most important.

Our nation's waterways play a vital role in all acts of commerce. In one form or another, water is used for everything from paving roads to raising livestock. In recent years, however, the process for regulating our waterways has become complex. Today, we will examine the current regulatory framework, and look for ways to make sure small firms can comply.

When first introduced, the Clean Water Act sought to restore and maintain the integrity of our nation's "navigable waters." Today, that term is increasingly hard to define. How, exactly, does one identify a "navigable water?" If a ditch drains into a stream that flows into a river, does the ditch then need to be regulated? A 2006 Supreme Court ruling sought to answer that question. But rather than clearing up ambiguity, the court only compounded it further. The resulting red tape now reaches all aspects of the CWA, including the permitting process.

Before starting projects that affect our waterways, entrepreneurs must obtain federal permits. Ninety-five percent of the time, those licenses are granted. Still, small firms say that the authorization process is overly complicated, and that a tangle of regulations has created significant backlogs. In fact, the current number of unmet requests falls somewhere between 15,000 and 20,000. On average, a business will wait anywhere from 2 to 3 years to secure an individual license. These kinds of delays are particularly challenging today, as small contractors vie to win shovel-ready stimulus projects--the sort that have to begin right away, not 2 or 3 years down the road.

---more---

Nearly four decades ago, the Clean Water Act cemented America's commitment to conservation. We want to continue that legacy today. But in order to do so, we'll need to be sure small firms understand their options, and know what's at stake. When it comes to the navigable waters issue, a clarification of terms could go a long way. So could efforts to streamline the permit process.

Everyone wants a clean, safe water supply. That goes without saying. But in protecting our waterways, it is critical that entrepreneurs not be unduly burdened. Hindering small firms would cripple efforts to create a greener, more efficient economy. Small businesses need common sense solutions, the kinds that are both environmentally sound and economically viable. I know that-- given a voice in the process-- entrepreneurs can help us find that middle ground.

---end---

U.S. HOUSE OF REPRESENTATIVES
SMALL BUSINESS COMMITTEE REPUBLICANS
REPRESENTATIVE SAM GRAVES, RANKING MEMBER

Opening Statement for Hearing on
"Meeting the Needs of Small Businesses and Family Farmers in
Regulating our Nation's Waters"
Sam Graves
Ranking Member
Committee on Small Business
United States House of Representatives
Washington, DC
July 22, 2009

Good afternoon and thank you all for participating in today's hearing. I would also like to thank Chairwoman Velázquez for choosing an issue critically important to the business and agriculture community.

As a farmer I fully appreciate the property I own. In order for me to achieve the greatest yields on my land I need to take care of my property. Trust me when I say farmers are the very best stewards of the land – it is in their best interest. However, I grow increasingly frustrated when the government dictates to me how I can use my property, as to suggest it knows better than those who live off it.

In the 109th and 110th Congress, legislation was introduced that would be an unprecedented expansion of federal government intrusion into the lives of property and business owners across the country. The Clean Water Restoration Act would expand the scope of the Clean Water Act to essentially regulate anything that is wet: ditches, ponds, gutters, etc. This bill would further the recent trend of more government while limiting the role and rights of states, businesses, farmers, and property owners. Although legislation has yet to be introduced in the House this Congress, recent activity in the Senate has elevated concerns that this bill will be before us soon.

One look at the expansive list of entities opposed to the Clean Water Restoration Act and you can immediately conclude that this legislation would have broad negative economic impacts. Litigation from third party activist groups would dramatically increase as the government and stakeholders struggle to clarify the new meaning of the legislation. This committee has extensively explored the economic consequences of an out of control legal system.

Expanded federal jurisdiction over the waters of the United States would mean a significant increase in permit applications for people with as little as a puddle on their property. These costs and delays will slow down a host of economic activity including agriculture, real estate development, electric transmission, transportation, infrastructure development, and various energy related tasks, such as mining and energy exploration.

With so many things working against our economy right now -- government spending spiraling out of control, climate change legislation with the potential to drive energy costs through the roof, and a new health care bill estimated to cost over a trillion dollars -- it is important to fully understand the economic consequences of our legislative actions.

Again, I thank the Chairwoman for holding this hearing and I look forward to our witnesses' testimony.



**Statement of the
American Farm Bureau Federation**

To: House Committee on Small Business

**Regarding: Meeting the Needs of Small Businesses and Family Farmers in
Regulating our Nation's Waters**

July 22, 2009

**Presented by: Charlie Kruse, President Missouri Farm Bureau
On Behalf of American Farm Bureau**

Madame Chairwoman and members of the Committee, my name is Charlie Kruse. I am a fourth generation farmer from Dexter, Missouri where I raise corn. I am the president of the Missouri Farm Bureau, and I am pleased to offer this testimony on behalf of the American Farm Bureau Federation and farmers and ranchers nationwide. Farm Bureau is the nation's largest general farm organization, representing producers in every part of agriculture. We appreciate the invitation to comment on the regulatory implications and associated costs to small business of deleting the term "navigable" from the Clean Water Act (CWA).

The compliance costs associated with an expanded CWA regulatory program can be summarized in the following manner: Broader scope will result in an increase in permit requests, litigation will lead to delays, higher compliance cost, lost productivity and financial burdens for small businesses.

A recent study published in the Natural Resource Journal found that it takes two years to prepare and obtain an individual 404 permit and one year to prepare and obtain a nationwide general permit.¹ It should be of no surprise that if it takes that much time the average costs are going to be significantly higher. According to the study, "*individual CWA permit application costs over \$271,596 to prepare (ignoring the cost of mitigation, design changes, cost of carrying capital and other cost), while the cost of preparing the typical nationwide general permit application averages \$28,915.*" Costs and delays of these magnitudes can cripple small businesses.

As bold and astonishing as these numbers are, they ignore other important costs. The following are three real life examples of regulatory burdens farmers and ranchers have or will likely face if the Army Corps of Engineers (Corps) and Environmental Protection Agency (EPA) are allowed to regulate all water.

Example #1 relates to a farmer living in the western U.S. who made the decision to obtain a 404 permit in order to transition his pastureland to grape production in 2004. The first question is "why would a producer need a permit to farm his land?" That is a good question and the only answer is – the agencies have not promulgated regulations to implement the law – they have only issued guidance, and under this scheme agency personnel have the capacity, if they wish, to narrow the statutory 404 (f)(1) rendering the exemptions meaningless.

The second question is "Why is this farmer growing grapes in a swamp?" The answer is – he is not. As a result of the change, the Corps and EPA now regulate isolated, intrastate, non-navigable depressions. These areas are no more than puddles that pool water on the surface for approximately 7 days a year during the growing season and can not be identified by the untrained eye.

So what did it cost for this small farm (40 acres) to obtain a 404 permit to grow grapes on land that has in the past been covered by the statutory exemption?

- 2-year wait

¹ The economics of Environmental Regulation by David Sunding, David Silberman, 2002 Natural Resource Journal. (Attached)

- Consulting fees - \$6,000
- Permit fee - \$1,500
- Mapping fee - \$1,500
- Wetlands Mitigation fee - \$35,000/acreX 10 acres = \$135,000
- Total cost - \$144,000

Let me make two important points about this:

#1 This example is not an “isolated” case. Farmers and ranchers in the West generally wait 2 to 4 years to obtain a permit, with costs ranging anywhere from \$80,000 to well over \$1 million.

#2 This money was spent by a small businessman and resulted in absolutely no environmental benefit.

If the word “navigable” is removed from the CWA, and if the Corps and EPA are allowed to use an overly-broad interpretation of the term “waters of the U.S.,” many more farmers and ranchers will be caught in exactly this kind of costly regulatory quagmire, with virtually no perceivable environmental benefit. Water will not be cleaner, more drinkable, or more fishable – which are the statutory goals of the law. Environmental activists, however, will be given an opportunity to control land use by litigating against property owners.

Example #2 highlights the costs associated with mitigation for a small farmer in the upper Midwest. This example involving the U.S. Army Corps of Engineers surfaced about the same time the Supreme Court was hearing the Rapanos case. In this case, the farmer initiated a project to improve existing drainage on 11.8 of his 130 acres. Before he conducted any work, he contacted USDA’s Natural Resources Conservation Service (NRCS) and the State of Minnesota to get approval and was told that they did not consider his land to be a wetland. Afterward, the Corps wrote him a strong letter informing him that it had reviewed his information and did consider his proposal an attempt to fill 11.8 acres of jurisdictional wetlands. The Corps said he would need a section 404 permit and would have to restore or create wetlands at a ratio of 1.5 acres of compensatory mitigation to one acre of wetland adversely impacted. The Corps instructed him that he would need approximately 17.7 acres of restored and/or created wetland, which the Corps stated would cost about \$77,000 – (this is more than the property was worth).

Additionally, the Corps sent him a copy of a Public Notice inviting a public interest review of the intended use - of his land. The Corps also claimed jurisdiction over his property was based on a hydrologic connection of his field to “navigable” water. The closest navigable water is more than 160 miles as the crow flies from this tract of land. The tenuous hydrologic connection that exists between the land and the Corps “tributary” is generated by runoff that only “occasionally” exits this property through a ditch that his center pivot irrigation system crosses when it makes a circle. The land is not navigable water; it’s nowhere near navigable water. If this farmer’s land can be regulated as navigable waters, just about any land can. His situation is not unique. There are other farmers who face the same problem but who do not feel they can criticize the Corps or other federal agencies without inviting more regulatory burdens on their farms. Unfortunately, he abandoned his improvement project and will continue to farm his 11.8 acres as his family has for

decades. If he had been allowed to complete his project he could have increased his farm's income by about \$1,500 per year.

During his exchange with the Corps, he questioned why his project would not fall under Clean Water Act section 404(f) exemptions. He, like many other farmers and ranchers, thought the law allowed farms, ranches and forestry operations to continue "normal" farming, silviculture and ranching activities. When he raised this to the Corps attention they were happy to point out that the 404 f(1) exemptions were generally "recaptured" by paragraph (2) of Section 404 (f) and his project, in its judgment, was not covered by the exemption. The bottom line is that the farmer, because of the tremendous costs, was prevented from improving the productivity of his lands. Further, his actions were initiated only after NRCS indicated the land was not a wetland. The Corps' different interpretation led the landowner from a wetland to a regulatory wasteland.

Example #3 highlights the number and acres of private ponds that could be impacted if the Corps and EPA are given the authority to regulate all water in Missouri. Aware that USDA agencies in Missouri have digitized aerial maps used in administering farm and conservation programs, we inquired about the number of private ponds and lakes in our state. Across 114 counties, we have nearly 315,000 ponds and lakes on private land. Ninety counties have more than 1,000 private ponds. Sixteen counties have more than 5,000 ponds on private lands. The three members of the Missouri congressional delegation serving on this committee collectively have more than 169,000 private ponds and lakes in their districts. Keep in mind that the Farm Service Agency's figures do not take into account other water features that could fall under federal regulation.

The regulatory reach of the federal Water Pollution Control Act, almost since the law's inception, has engendered many heated conflicts related to the federal/state relationship, the question of "navigability" and perhaps most critically the use of private property. The regulatory reach of the CWA, in particular, has kept courtrooms busy as the issue has made its way from the federal district and circuit courts to the United States Supreme Court on several occasions. Anyone who has ever had to deal with the Corps and EPA can relate horror stories about the burdensome cost, regulatory creep, narrowing exemptions and ever-broadening interpretations of what constitutes water or a wetland.

The scope of federally regulated waters is extremely important to farmers and ranchers because determinations of areas subject to or excluded from federal CWA regulation directly impact the value of agricultural land. Agricultural operations, even with the "Section 404 (f)(1) normal farming exemptions," have fallen into costly regulatory quagmires that farmers never imagined could exist. For example, in several western states the use of herbicides, which are registered and fully regulated by EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), now require a National Pollutant Discharge Elimination System (NPDES) permit. Depending on the outcome of other litigation, all farmers and ranchers may soon have to bear the cost of NPDES permit compliance. It is important to note that this legal and regulatory exercise comes with little or no real gain in water quality in rivers and streams. In fact, it significantly drains resources from the bottom line of many farmers and ranchers. If the regulatory reach of the CWA is expanded, litigation and costs of compliance both for regulators and the regulated community will increase.

Farmers and ranchers are practical small business owners. We recognize and understand that words matter. It is clear to us that Congress intended to use the term “navigable waters” when it passed the CWA in 1972 – or it would not be there. It is our view, and that of many legal experts, that deleting this term from the 1972 act would fundamentally expand, not simply restore, the scope of areas that would be subject to federal regulation. The purpose of the deletion, as we understand it, is to sever any connection of federal jurisdiction over U.S. waters from “navigable waters” and the Commerce Clause under the Constitution. Whether some intended to do that in 1972 may be open to debate; whether Congress did so is not. The history of the act amply demonstrates that the term “navigable waters” was and is at the root of the federal government’s regulatory jurisdiction and should remain a part of the statute.

Expanding the scope of the CWA would sweep many agricultural and forestry activities under CWA regulation simply because such activities are conducted near some isolated ditch, swale, wash, erosion feature or ephemeral stream that would be deemed a “water of the United States.” This would represent the most sweeping change to the law since its enactment in 1972.

Some have stated it is their intent to take CWA regulation back to a time before the Supreme Court was asked to review the actions of the federal agencies, and “*not to extend the reach, not to go beyond that purpose*” – to restore the status quo ante. Farmers and ranchers appreciate this perspective and the invitation to testify to bring some practical experience to the important goal of protecting water quality. I hope these comments will help inform members’ views of exactly what the *status quo ante* really was. Some might incorrectly infer there was a time when no controversy existed or that the law and regulations were black-and-white. That is manifestly not the case. Farmers and ranchers well understand the significant problems in interpretation of the CWA and we have first-hand knowledge of the ever-changing interpretation of federally regulated waters espoused by the Corps and EPA. We are also all too familiar with the uncertain, idiosyncratic and vague definitions of jurisdictional wetlands that helped to fuel the issues that have been before this committee for years.

During the 1980s and 1990s, the Corps and EPA had at least three delineation manuals, countless guidance documents and lists of subjective and ambiguous wetland indicators and criteria. The only parts and pieces of this broad scheme that did not evolve or were not victims of regulatory creep were those few regulations that had the benefit of full public review and comment through the rulemaking process. Whether or not the Corps or EPA had the goal of creating moving targets within their programs and policies that were, and still are, jurisdictionally vague, that was clearly the effect. The lack of definitive rulemaking has been problematic for the program, landowners and the courts. It has resulted in unclear, inconsistent and confusing jurisdictional concepts that have frustrated anyone who has had the misfortune to deal with it.

Fortunately, under current law and regulations, farmers and ranchers by and large do not have to seek 404 permits. But if the law’s jurisdictional reach is expanded, it is entirely possible that every ditch and swale on agricultural property would become a “water of the United States”, including more than 314,000 ponds in Missouri alone, based on the notion that ‘ephemeral’ features would be declared waters of the U.S. An ‘ephemeral’ feature by definition only contains water for brief periods after a precipitation event. Even though someone’s property, or a piece of their property, was dry most of the time and only held water shortly after a rain, the government

would be empowered to assert jurisdiction. And even if it did not, any activist with a lawyer would have the ability to sue to make the government assert jurisdiction. In the end, it may well be that a court, and not Congress, will decide not only the geographic scope of the CWA but to what extent the Corps and EPA can regulate the hydrologic cycle. We hope Congress will avoid that outcome.

The history of the CWA since its enactment in 1972 is replete with instances when the Corps and EPA construed binding legislative language in a manner that effectively narrowed the normal farming exemption. The current farming exemptions have been eroded over time and have not protected farming as originally envisioned. For example, regulators misconstrue what constitutes plowing and what is an ongoing farming operation. The Corps once tried to exclude temporary rice levies as not meeting the normal farming exemption. Even now, the Corps and EPA have narrowed what they consider normal farming practices in an attempt to limit crop rotational practices.

Currently, a number of Corps districts contend farmers need permits to switch the use of their land between pasture grazing and row croplands. Too often, non-farmer regulators decide for themselves what is a normal farming practice, and the result is more regulation and more costly compliance for farmers and ranchers.

Prior Converted Cropland - In addition, there appears to be considerable confusion over the regulatory treatment of prior converted cropland (PCC). We are concerned deleting the term “navigable” opens the door for EPA and the Corps to tie the hands of farmers and ranchers and directly impact the use and value of more than 55 million acres of agricultural land - a value conservatively estimated to be \$110 billion. Changing this important regulatory exemption will devastate and devalue the assets of landowners currently making plans to use their property, sell development rights or give conservation easements.

The EPA and Corps issued regulations in 1993 that formally codified the long-standing policy of not treating PCC as a “water of the United States” and specifically recognized that PCC areas could be used for either agricultural or non-agricultural uses. We are concerned that the financial well-being of farmers and ranchers could be dramatically impacted if changes to the CWA, fail to incorporate the understanding of PCC that informed the agencies’ decision to exclude PCC from the definition of ‘waters of the United States.’ By definition -

PC cropland has been significantly modified so that it no longer exhibits its natural hydrology or vegetation. Due to this manipulation, PC cropland no longer performs the functions or has values that the area did in its natural condition. PC cropland has therefore been significantly degraded through human activity and, for this reason...[and] in light of the degraded nature of these areas, *we do not believe that they should be treated as wetlands for the purposes of the CWA.*” (emphasis added) 1993 Regulation and Preamble.

The absolute exclusion of prior converted farmland from federal regulation involves two aspects of particular importance to our nation’s farmers. First, the regulation in question has been a part of the *Code of Federal Regulation* for over 14 years and it explicitly exempts prior converted farmland from the definition of “waters of the United States.” Second, once a farmer’s land is

designated as prior converted cropland and outside the jurisdiction of the CWA that designation does not change regardless of use. This is one of the very few things that the Corps and EPA have in “black and white.” The final regulation notified agricultural producers and the public of the regulatory requirements and clarified which areas would not be regulated as “waters of the United States.”

In addition to farmers and ranchers, it clarified to the entire economy, financial institutions specifically, that the market value of the land – on which financial decisions were based – would not change due to restrictions in land use from federal regulation. With approximately 55 million acres of PCC, there are significant financial risks to thousands of farmers and hundreds of banks nationwide if Congress rolls back this Clinton era regulation. Such an abrupt policy shift would immediately generate significant financial uncertainty at a time when banking and credit risk are already problematic.

Acknowledging the regulatory creep of this program, the Clinton Administration further justified this important action by stating –

except for a brief period of time after the adoption of the 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1989 Manual), the Section 404 program has generally not considered such farmed areas as meeting the regulatory definition of wetlands under the CWA. The Corps ceased using the 1989 Manual in August, 1991 at the direction of Congress (Energy and Water Development Appropriations Act of 1992, Publ L. 102-580) and began using its earlier 1987 Corps of Engineers Wetlands Delineation Manual (1987 Manual) for wetlands delineations.

It is important not to minimize or denigrate the nature of farmland as an asset. Land is generally the largest and most valuable asset that a farmer has and is our equivalent of a 401(k). It serves as the critical source of collateral by which farmers are able to secure loans and other debt financing vital to operating their farm businesses. It also serves as the major source for farm families as they plan for retirement. The value of land is directly based on how it can be used. Land whose potential for future use is severely restricted through regulation is worth little, striking at the very core of economic needs that farm families must sustain to keep their farms viable. The Corps and EPA took this into consideration during the rulemaking:

In response to commentators who oppose the use of PC croplands for non-agricultural uses, the agencies note that today's rule centers only on whether an area is subject to the geographic scope of CWA jurisdiction. This determination of CWA jurisdiction is made regardless of the types or impacts of the activities in those areas (emphasis added).

The owners of the more than 55 million acres of prior converted farmland, of whom I am one, are deeply troubled if Congress does not fully understand, even today, 16 years after it became effective, the proper regulatory treatment of PCC. Any change to this long-standing regulation would signal an abrupt and controversial departure from existing treatment under the law. In fact, many farmers fear this is exactly the goal of the environmental groups that are pressing to delete the term “navigable.” It is why most people feel the goal of the legislation is not, as some state, to

“restore” the act but to further broaden its regulatory reach into areas where it has never been valid.

The regulatory reach of the CWA has been one of the most contentious and controversial aspects of the law. Any change in this policy will generate tremendous financial uncertainty and rekindle long-standing controversy and opposition from the agricultural community.

Deleting the term “navigable” would not eliminate the uncertainty regarding the CWA, it would merely replace one set of questions regarding the CWA with a new set of questions. By proposing to regulate “all intrastate waters,” the regulatory focus shifts the central question from being “What water is federal?” to “What is a water?” If the statutory structure is changed, EPA, the Corps, and the general public will have to consider and determine where regulation begins. But unlike 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 how far the CWA reaches absent any specific guidance or precedence. 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 wetland? Would groundwater be a water of the United States? Ditches? Gutters? These are just a few of the questions that carry heavy regulatory cost and would have to be resolved if “navigable” is deleted from the CWA.

Contrary to the contention that deleting the word “navigable” will resolve uncertainty, the change will create more uncertainty and usher in years of 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 new definition being debated 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.

Such a change would exacerbate the already difficult and costly task of conducting business.

Prior to the Supreme Court’s ruling in *Solid Waste Agency of Northern Cook County (SWANCC)*, federal agencies attempted to assert jurisdiction over any water body that would potentially be used by migratory birds flying between or among states. The Supreme Court stated that this “bird rule” went too far and had no relation to the CWA. The Supreme Court, in *SWANCC*, recognized and relied on the CWA’s use of “navigable” in the context of the act’s description of federal jurisdiction to conclude that the scope of areas where federal agencies may regulate is limited. Legislation that asserts jurisdiction to what was in existence prior to *SWANCC* does not “restore” federal authority; it would explicitly authorize such jurisdiction for the first time. Moreover, it would authorize federal control as broad or broader than the “bird rule” struck down by the U.S. Supreme Court.

We appreciate your interest in this issue and the opportunity to submit this testimony.

Natural Resources Journal
Winter, 2002

Article

***59 THE ECONOMICS OF ENVIRONMENTAL REGULATION BY LICENSING: AN ASSESSMENT OF
RECENT CHANGES TO THE WETLAND PERMITTING PROCESS**

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ABSTRACT

Recent changes to the federal wetland permitting process increase the time and effort required of applicants to obtain needed permits. Using a combination of survey and government data, the cost of the reform is calculated at over \$300 million annually. This cost is shown to be large relative to the number of wetland acres affected. It is also argued that these changes to the wetland permitting process are inefficient in that they fail to discriminate among wetlands of different quality. Further, it is observed that other, non-regulatory federal programs protect wetlands at a fraction of the cost of the reform package, raising questions about the consistency of the licensing program with other governmental efforts. Finally, this article addresses the issues of federalism and intergovernmental relations raised by the changes.

I. INTRODUCTION

Issuing licenses to pollute is a common means of regulating environmental quality. Discharge permits authorized by the Army Corps of Engineers (the Corps) under the Clean Water Act are a prime example of this type of policy; other examples are found in the areas of air quality, pesticide use, and endangered species regulation to name just a few. [FN1] This article examines the economics of a recent federal decision to protect environmental quality by increasing the time and effort required of applicants to obtain such a license.

At a general level, licensing requirements can impose significant costs on project developers and consumers. These costs result from the need to conduct scientific investigations, negotiate with the issuing agency over the conditions of the permit, and redesign the proposed project based on *60 the agency's decision. The costs of obtaining a permit are often hidden and thus more difficult to measure than the costs of direct interventions such as environmental taxes or technology requirements (in the latter case, costs can be measured by reference to market prices).

Licensing programs also raise the question of how the investigative resources of the government should be allocated among permit applications. For example, are there easily observable aspects of proposed activities that the government can use to trigger a higher degree of scrutiny, or will all proposals receive the same degree of attention? This question is significant since the economic cost of obtaining a license is directly related to the effort the government spends reviewing the proposal. [FN2] Another important aspect of licensing is its cost-effectiveness or efficiency relative to other means of improving environmental quality.

Wetland permitting is an appropriate and timely example with which to illustrate the economics of environmental regulation by licensing. In the past several years, the federal government has undertaken important reforms of the wetland permitting process by altering the terms and conditions of many types of permits. [FN3] We consider in detail one such change to the federal permitting program: the elimination of the most frequently issued wetland permit, National Wetland Permit 26 (NWP 26)--the permit covering activities affecting "headwaters and isolated

waters"--and its replacement with other, stricter permits collectively known as the "replacement package."

This article analyzes the economic efficiency of eliminating NWP 26 and assesses whether it is an effective means of protecting wetlands. One significant change embodied in the replacement package is a reduction in the threshold triggering intensive federal review of proposed projects. Increased oversight means that the time and effort needed to obtain a wetland permit will increase. Simple calculations show that the replacement of NWP 26 with stricter wetland permits will increase the cost of permit preparation alone by more than \$100 million annually and may impose total costs well in excess of \$300 million annually. The costs of the regulation will be borne by many groups, including local governments, homebuyers, developers, and even the federal government itself.

Of course, a reform is not inefficient simply because it is expensive, and much of the remainder of this article is devoted to assessing the efficiency of eliminating NWP 26. One influential economic principle relevant to environmental policy is that governments should meet their policy objectives at the lowest possible cost to society. This minimal notion ^{*61} of efficiency suggests that governmental resources should be targeted at the most problematic areas and that policy alternatives should be examined with an eye toward selecting the minimum-cost intervention. The set of permits replacing NWP 26 does not fare well on this score. First, the reform is indiscriminate in that it abolishes use of the nationwide permit program for projects affecting more than some unknown cutoff number of acres and does not differentiate among projects based on the characteristics of the affected landscape. [FN4] Surely the government can differentiate between wetlands of different environmental productivity and more fully scrutinize projects proposed in sensitive areas. Further, other federal programs exist to protect and enhance the nation's stock of wetlands at far lower cost than the elimination of NWP 26. This observation raises questions about the consistency of the replacement package with other federal programs.

Another interesting aspect of the cost of regulation that is often overlooked in environmental economics is the resulting delay in completing the project. Relying on a detailed survey of wetlands permit applicants and a review of how the Army Corps of Engineers compiles its own statistics, this article demonstrates that Corps figures significantly underestimate the true time needed for an applicant to complete the wetlands permitting process. Indeed, requiring an individual as opposed to a nationwide permit adds nearly one and a half years to the time needed to prepare and negotiate a wetland development permit. Again, this delay is indiscriminate in that the Corps' replacement package will require an individual permit based on size alone, and without regard for the biological productivity, uniqueness, or sensitivity of the wetlands affected.

A further area of concern is how the new wetland permitting requirements will affect the relationships between levels of government. The replacement package will insert the Corps of Engineers into water quality and land use planning, an area where state and local governments have traditionally had primacy. For example, if the Corps determines that a state's water quality planning efforts are not "adequate," the Corps will step in and impose its own requirements. In this respect, the replacement package also obscures lines of responsibility among federal agencies, particularly between the Army Corps of Engineers and the Environmental Protection Agency, which has had primary federal responsibility for oversight of state water quality planning efforts.

*62 II. WETLANDS PERMITTING

Section 404(a) of the Clean Water Act authorizes the U.S. Army Corps of Engineers to issue permits for the discharge of dredged or fill material into "waters of the United States." [FN5] Section 404(b) requires the U.S. Environmental Protection Agency (EPA), "in conjunction with the Corps," to promulgate environmental guidelines that control the Corps' permitting decisions. [FN6]

The Corps and the EPA claim jurisdiction over all areas that qualify as "wetlands" as defined by the Corps' 1987 Wetlands Delineation Manual. They also claim jurisdiction over areas they deem to be "other waters," as long as the wetlands or other waters have the potential to affect interstate commerce. [FN7] Isolated bodies of water, such as dry washes in desert regions, are claimed to potentially affect commerce because a migratory bird traveling across state lines could land on them. [FN8] There are no minimum size requirements for an area to be deemed a water of the United States, and, under the Wetland Delineation Manual used by federal agencies, an area may qualify as a jurisdictional wetland even if it never has water on it. [FN9] Moreover, the Corps and the EPA claim the authority to regulate ditches, miniscule depressional areas, and other ephemeral landscape features resulting from human

activity. [FN10]

The Corps' regulatory program is administered through 38 district offices, each of which handles applications in areas assigned to each office. The districts are organized into 11 division offices that, in turn, report to Corps headquarters at the Chief of Engineers' office in Washington, D.C. In addition, for each individual permit decision and many NWPs, the Corps consults with the Fish and Wildlife Service, the EPA, the National Marine Fisheries Service (NMFS), state fish and game agencies, state water quality agencies, and state and federal cultural resource offices. [FN11]

*63 The Clean Water Act authorizes two different types of permits: general and individual permits. [FN12] General permits are streamlined permits that are issued nationwide (nationwide permits or NWPs) or regionally (regional general permits or RGPs) for activities that have only minimal individual and cumulative impacts. NWPs authorize minor activities, provided that the entity conducting the project complies with the conditions contained in the Federal Register statement. Examples of activities covered by NWPs include minor road crossings, utility line backfills, and bank stabilization projects. Before the elimination of NWP 26, more than 80 percent of Corps permitting activity under Section 404 involved activities covered by general permits. [FN13]

Prior to its elimination in 2000, NWP 26 was the most commonly used general permit and allowed discharges of dredged or fill material into "headwaters and isolated waters," provided that they affect no more than three acres of waters of the United States or 500 linear feet of streambed and meet other stringent conditions. [FN14] Headwaters are defined as "non-tidal streams, lakes, and impoundments that are a part of a surface system tributary to interstate or navigable waters of the United States with an average flow of less than five cubic feet per second." Isolated waters are "non-tidal waters of the United States that are not part of a surface tributary system to interstate or navigable waters of the United States and are not adjacent to interstate or navigable waters." [FN15] In the 14 months prior to June 30, 1998, the Corps authorized 8790 activities under NWP 26. These activities impacted 3423 acres and 377,070 linear feet of waters of the United States, for which applicants provided 13,354 acres of mitigation. [FN16]

Activities involving more than minimal impacts or not covered by a general permit are authorized by individual permits in which the Corps evaluates an applicant's specific proposal. Most individual permits are authorized through a standard process that requires public notice and a high degree of scrutiny of the proposed project. A handful of individual permits are issued as Letters of Permission, which do not require site-specific public notice. [FN17]

*64 The Corps encourages applicants contemplating large projects to meet with it and, often, other agencies for a "pre-application consultation." [FN18] The idea is that, with the benefit of the Corps' and agencies' views, the applicant will be able to prepare a permit application that addresses the agencies' concerns about the applicant's project or the specific site. After an application is submitted, the Corps determines whether it is "complete." Anecdotal evidence indicates that few applications are considered complete when filed, and thus the Corps will require further information or drawings from the applicant. Once the Corps determines that an application is complete, it starts running the clock on its "permit evaluation" time (i.e., the time from the day the application is deemed complete to the day the Corps reaches a decision). [FN19]

Under the regulations, the Corps must issue a public notice of the application within 15 days after the application is deemed complete and must reach a final decision on the application within 60 days. [FN20] In practice, these deadlines are seldom met. The public notice describes the applicant's proposal and the likely environmental consequences and requests comments from federal and state governmental agencies and members of the public. After the comment period ends, the applicant may respond to agency and public comments. Considering this information, and conducting its own analysis, the Corps issues a decision document. If the decision is to authorize a project, then the Corps issues an unsigned permit. The Corps is free to attach conditions to the permit; such conditions are often the subject of negotiation between the applicant and the Corps before the applicant accepts the permit. If the applicant accepts the permit, he or she signs it and returns it to the Corps for the Corps' official signature. The permit then becomes effective.

The main issues that must be resolved before an individual permit is issued include the following:

- Whether the applicant has a practicable alternative that would avoid impacts to waters of the United States and

whether unavoidable impacts have been minimized,

- Whether the mitigation proposal adequately compensates for any adverse impacts of the project,
- Whether the project will contribute to significant degradation of the aquatic ecosystem,
- Whether the state is satisfied that the project is consistent with state water quality standards and coastal zone management plans, and
- *65 • Whether the project is contrary to the public interest.

According to Corps and EPA policy, the first two issues must be handled according to a process called "sequencing" in which the applicant must establish that all practicable steps have been taken to avoid and minimize adverse impacts before the Corps or other agencies will consider the mitigation proposal. [FN21] Consistent with the Corps' no netloss policy, the applicant must fully compensate for unavoidable impacts to wetlands.

On March 9, 2000, the Corps issued its final notice that it was eliminating NWP 26 and creating five new NWPs, modifying six existing NWPs, modifying nine NWP general conditions, and adding two new general conditions. [FN22] New permits were issued for the following activities: Residential, Commercial, and Institutional Developments (NWP 39); Reshaping Existing Drainage Ditches (NWP 41); Recreational Facilities (NWP 42); Stormwater Management Facilities (NWP 43); and Mining Activities (NWP 44). [FN23] The new NWPs are activity-specific and apply in all non-tidal waters of the United States, with the exception of non-tidal wetlands adjacent to tidal waters. Modifications have been made to the following existing permits: Maintenance (NWP 3), Outfall Structures and Maintenance (NWP 7), Utility Line Activities (NWP 12), Linear Transportation Crossings (NWP 14), Stream and Wetland Restoration Activities (NWP 27), and Agricultural Activities (NWP 40). [FN24]

The new and modified NWPs contain stricter limits on the number of affected wetland acres than the NWPs they replace. That is, under the replacement package, more activities will fall outside the new terms and will thus require individual permits. The acreage limit for most of the new and modified NWPs is one-half of an acre. [FN25] In addition, the Corps has established a pre-construction notification threshold of one-tenth of an acre for most of the new and modified NWPs, meaning that the Corps' District Engineer must be notified if the proposed project exceeds this limit. [FN26]

In addition to the new and modified permits, the changes to the accompanying permit general conditions are also significant. The new *66 General Condition 26, Fills Within the 100-Year Floodplain, prohibits the use of certain NWPs to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain. [FN27] As a result, stormwater management ponds (authorized through NWP 43), which are intended to manage drainage and limit flooding and are normally located at low elevations in the landscape, cannot be positioned in the floodplain.

Moreover, the Corps has altered General Condition 9, Water Quality Certification. Under the new regime, the Corps will evaluate whether a state's water quality requirements are adequate, and, if they are found wanting, impose its own requirements. [FN28] Further, for any project in the vicinity of open water, the Corps will now require "vegetated buffers" with a normative width of 25 to 50 feet on each side of the water. [FN29] The new General Condition 9 also mandates that all projects include a method for stormwater management, but this does not explain how the Corps' stormwater management requirement will relate to stormwater management requirements under state and local law. [FN30]

The alterations to General Condition 21, Management of Water Flows, require that neither upstream nor downstream areas be subject to more than minimal flooding or dewatering after construction of the project and during the operation of the project. [FN31] How these conditions will relate to state and local stormwater management programs and flood control programs is not discussed. The Corps has also adopted a new General Condition 25, Designated Critical Resource Waters, prohibiting the use of certain NWPs in designated critical resource waters, defined to include areas designated as "critical habitat" for threatened or endangered species. [FN32] New General Condition 26, Impaired Waters, restricts the use of NWPs in waters of the United States designated under Section 303(d) as impaired due to nutrients, low dissolved oxygen, sedimentation, habitat alteration, suspended solids, flow alteration, turbidity, or loss of wetlands. [FN33] This new general condition prohibits the use of NWPs to authorize discharges of material resulting in the loss of more than one acre of impaired waters. [FN34]

***67 III. SECTION 404 REGULATION IN CONTEXT: WETLANDS LOSSES AND GAINS OVER THE YEARS**

Wetlands regulation is a central area of environmental policy, owing both to the environmental importance of wetlands and the controversial economic consequences of wetlands protection. Wetlands are a vital part of the nation's natural resource base as they provide fish and wildlife habitat as well as numerous other benefits, including flood control, water quality enhancement, recreation opportunities, and groundwater recharge. [FN35] Historic losses of wetland acreage have severely diminished the quantity and quality of the remaining stock of wetlands. Yet, Section 404 regulates more than just wetlands. It also reaches dry washes, ditches, and countless "other waters" deemed by the agencies to qualify as "waters of the United States." [FN36]

Economic analysis has historically supported the case for federal and state intervention to protect wetlands. There is a growing body of economic research on the role of the government and effective governance. [FN37] Economists hold to the basic premise that society seeks to attain efficient outcomes wherein resources are allocated such that individuals are collectively as satisfied as possible, subject to technological and resource availability constraints. Assessment of the benefits and costs of alternative resource allocations must take into account all activities of all sectors of society so that they include the costs and benefits of private production and consumption, government activities, and environmental amenities.

These economic principles have been used to support and rationalize environmental regulations in general, and wetland regulation in particular. To the extent that wetlands are public goods (i.e., provide benefits to the general public from which individuals cannot be excluded), standard arguments suggest that they will be inefficiently provided for in an unregulated private market equilibrium. Those who would fill wetlands for private purposes will, in the absence of any government intervention, *68 fill them until the private marginal cost of filling equals its marginal benefit. If wetlands are a public good, filling imposes marginal costs on others that are not reflected in private marginal costs, and there will be too much impact relative to what is socially desired. Economists have argued that regulation is needed to ensure that private marginal costs reflect public values (this principle is often referred to as "incentive compatibility").

For these reasons, the Clinton Administration followed the first Bush Administration in adopting a "no net loss" policy that attempts to correct, and even reverse, the longstanding downward trend in wetland acreage. This section reviews the available evidence on wetlands decline and discusses the reasons for wetlands losses. Reviewing this evidence provides a valuable context within which to evaluate the announced changes in Corps permitting policy.

A. Historical Trends in Wetland Acreage

The contiguous 48 states are currently endowed with about half of the stock of wetlands existing prior to European settlement of the United States. [FN38] Toward the end of the nineteenth century, farmers had already exploited the stock of easily accessible cropland and began cultivation of wetlands previously ignored. To encourage this activity, Congress gave 64.9 million acres of wetlands to 15 states in the Swampland Acts of 1849, 1850, and 1860. [FN39] Congress was encouraging states to reclaim wetlands by constructing levees and drains to reduce flooding and eliminate mosquito-breeding areas. States transferred nearly all of the granted lands to private owners who converted wetlands to private uses. [FN40] Since then, federal programs (some of which continue to this day) have provided incentives for wetland conversion. Such programs include those that subsidize agriculture; support reservoir construction for flood control, irrigation, and hydroelectric power; build and maintain highway projects; provide flood disaster relief and flood insurance; subsidize forestry; and establish grazing policies on federal land. [FN41]

The federal role in flood control dates mainly to the 1870s when the U.S. Army Corps of Engineers began rechanneling the Mississippi River. [FN42] Flooding in the 1940s prompted Congress to enact the Flood Control Act of *69 1944, which authorized the Corps to construct major drainage and flood control channels. [FN43] Many dormant drainage districts in the Mississippi Valley were reactivated at this time to exploit the benefits of the newly enhanced flood control infrastructure for agricultural drainage. [FN44] Prompted by floods in the early 1950s, additional drainage outlets were constructed and utilized by farmers. [FN45] Between 1929 and 1974, flood control

projects were completed that affected 4.5 million acres in the Lower Mississippi alluvial plain. [FN46]

The U.S. Department of Agriculture (USDA) has also contributed actively to the decline of the nation's stock of wetlands. Drainage inventories in 1906 and 1922 classified over 75 million acres as wetlands with potential for agricultural production. [FN47] Beginning in the Great Depression and continuing until the 1970s, the USDA provided cost-sharing assistance to farmers for draining wetlands. [FN48] In 1953, Congress linked flood control and drainage when the Federal Watershed Protection and Flood Prevention Act directed the Corps and USDA to construct drainage channels in cooperation with state and local governments. [FN49]

The Act authorized the USDA to plan and construct watershed improvements. [FN50] The Soil Conservation Service, predecessor to the Natural Resources Conservation Service (NRCS), provided technical assistance to farmers and cost sharing for ditches and subsurface drains to convey water away from fields. The Soil Conservation Service also began straightening stream channels to provide more efficient outlets for drainage. [FN51]

Federal assistance to drain wetlands for production of subsidized crops significantly expanded agricultural production. The predictable result of these (and other) federal programs was to reduce the stock of the nation's wetlands. This problem was especially severe with respect to agriculture. In the period from 1954 to 1974, 87 percent of the wetlands lost annually were converted to cropland. [FN52] As a result of these past federal policies and of changing attitudes toward the environmental services provided by wetlands, those who own or manage wetlands today face significant burdens.

*70 B. Recent Trends in Wetland Loss

Both the Department of the Interior and the Department of Agriculture maintain inventories that produce estimates of the nation's existing wetlands acreage and rates of wetland gains and losses. The National Wetlands Inventory, maintained by the Fish and Wildlife Service (FWS), generates information at 10- year intervals on the categories, extent, and status of the nation's wetlands and deepwater habitat. The National Resources Inventory (NRI), maintained by the Natural Resources Conservation Service (NRCS), is an inventory of land cover and use, soil erosion, prime farmland, wetlands, and other natural resource assets on nonfederal lands in the United States. The National Resources Inventory has been conducted at five-year intervals to determine the conditions and trends in the use of soil, water, and related resources nationwide and statewide. [FN53]

The National Wetlands Inventory and the National Resources Inventory are used to estimate the nation's wetland acreage. The most recent figure according to both inventories is over 100 million acres in the contiguous 48 states. [FN54] Each inventory uses sampling methods. Unfortunately, the two inventories use different sampling techniques and their estimates cover different time periods. The inventories have also used different land cover and land use classifications for the causes of wetland decline. [FN55]

Despite their methodological differences, both inventories support the conclusion that the nation's wetland acreage is stabilizing. The National Wetlands Inventory statistics indicate that the net loss rate from 1985 to 1995 in the contiguous 48 states was less than 0.11 percent per year. The National Resources Inventory figures indicate that the rate of net loss between 1982 and 1992 was slightly lower at 0.07 percent per year. [FN56] These net loss rate figures represent a dramatic decline compared to previous decades. For example, the U.S. Fish and Wildlife Service concluded that the rate of loss in the period from 1985 to 1995 was 60 percent lower than that *71 reported for the period between the mid-1970s and the mid-1980s. [FN57] Figure 1 shows U.S. wetland loss rates since the 1780s. [FN58]

Wetland Loss Rates in the United States: 1780 to 1992

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

The FWS and NRCS figures differ in their assessments of which types of economic activity place the most pressure on wetland acreage. For example, the FWS reported that agricultural activities were responsible for the loss of over 1.4 million acres of wetlands between 1985 and 1995, which is more than four times the gross loss attributed to agriculture by NRCS. Further, NRCS attributes 886,000 acres of gross loss to development activities between

1982 and 1992, which is more than an order of magnitude greater than the gross loss attributed to development by the FWS. [FN59]

Complicating this situation is the fact that the EPA has pointed out problems with both inventories. [FN60] EPA officials have raised concerns about the quality of the underlying data, the agencies' quality control procedures, *72 the dates of the aerial photography used, and the analytic methods utilized to develop the national estimates. The U.S. General Accounting Office has also raised questions about the consistency of the agencies' use of important terms such as "protection," "rehabilitation," "improvement," "enhancement," and "creation" in measuring the status of wetlands and in describing their various accomplishments. [FN61]

Notwithstanding these limitations, all available data and analytic methods support the conclusion that the nation's wetland acres are stabilizing. [FN62] This is direct evidence that the current regulatory system is self-correcting and working in the desired fashion. Much less is known, however, about the sources of pressure on the nation's wetlands, and hence less is known about the benefits of programs intended to curb these activities. The FWS estimates that the gross loss of wetlands to development was less than 9000 acres per year between 1985 and 1995. [FN63]

Importantly, the NWP 26 program generated net gains in wetland acreage, and the gains it achieved are higher than those achieved through the individual permit process. In 1998, the NWP 26 program impacted 2974 acres and provided 6304 acres of mitigation; the entire Section 404 general permit program impacted 15,528 acres and provided 15,531 acres of mitigation. [FN64] Thus, the NWP 26 program accounted for 19 percent of 404 impacts and 40 percent of mitigation.

IV. COST OF THE REPLACEMENT PACKAGE

The permits replacing NWP 26 have stricter acreage limitations, thus forcing more activities to be permitted under the individual permit process. The most obvious economic effect of the replacement package is to increase the time and effort required to obtain a wetland permit. Before describing these impacts, however, it is important to illustrate the performance of the pre-reform permitting program. In particular, it is vital to have an accurate measure of the relative and absolute costs of general and individual permits before assessing the incremental costs of eliminating NWP 26.

*73 A. Survey Design and Summary Statistics

In September 1999, we conducted a detailed examination of 103 individual and nationwide permit applications to understand their relative costs and to gain a better understanding of the timing of the permit process than is available from government data. A list of permitted projects was obtained from the National Association of Counties (since county governments conduct the vast majority of road maintenance, flood control, and stormwater management work) and from phone interviews with private developers and wetlands consultants. The data collection process entailed much more than just a typical survey: applicants participating in the study were asked to gather historical data on employee time spent preparing and negotiating the permit and expenditures on outside experts such as biologists and engineers (these experts are more frequently employed to help prepare individual rather than nationwide permits). Information was collected on the parameters of the project (i.e., project description, project size in acres, acres of waters of the United States in the project area, acres of waters of the United States impacted by the proposed activity, wetland acres impacted). Data were also collected on the parameters of the regulatory process (i.e., individual or nationwide permit, dates of regulatory milestones, final decision, amount and type of mitigation required). With regard to the timing of the approval process (or regulatory milestones), applicants were asked to compile information on three dates: the date at which permit preparation began, the date at which the application was submitted to the Corps, and the date a decision was received from the Corps.

Summary statistics from the resulting data set confirm that the sample was representative of the entire set of wetlands permits in many important respects. The final data come from a roughly even mix of private and public applicants (52 percent public agency applicants and 48 percent private). The projects included in the sample reflect the wide range of activities covered by NWP 26: school construction, quarry expansion, sediment containment, home building, street improvements, and flood control. The distribution of the projects according to acres impacted

and total project acreage is also representative of national totals: the mean project size in our sample was 1.95 acres and the mean wetland acres impacted was 0.23. [FN65] Projects in our sample had an approval rate of over 90 percent, consistent with national figures. [FN66]

*74 Two-thirds of the applications in our sample concerned projects in western states and were submitted to Corps district offices in Fort Worth, Texas; Los Angeles, California; Omaha, Nebraska; Portland, Oregon; Sacramento, California; and San Francisco, California. The remainder of the permits in our sample concern projects in eastern or mid-western states and were submitted to district offices in Asheville, North Carolina; Chicago, Illinois; Mobile, Alabama; Norfolk, Virginia; Raleigh, North Carolina; Rock Island, Illinois; and Wilmington, Delaware. This western focus is also representative of the NWP 26 program.

B. Cost of Permit Preparation

With regard to the cost of preparing a wetlands permit, individual permit applications are much costlier to prepare than nationwide applications both in terms of internal staff time and outside experts. The mean individual permit application in our sample costs over \$271,596 to prepare (ignoring the cost of mitigation, design changes, costs of carrying capital, and other costs), while the cost of preparing a nationwide permit application averages \$28,915. [FN67] Of course, these figures are not directly comparable since the typical individual permit is needed for a larger project than the typical nationwide permit. Fortunately, it is possible to correct for this phenomenon.

The acreage of waters of the United States impacted by a project has a statistically significant effect on the cost of both nationwide and individual permit preparation costs. Utilizing the survey data, we determined a statistical relationship between these factors for both types of permits. For individual permits, application costs were measured as \$43,687 plus \$11,797 for each acre of impact. For nationwide permits, costs were measured as \$16,869 plus \$9285 for each acre of waters of the United States impacted. [FN68] Thus, permitting costs have statistically significant fixed and variable components and permits are more expensive to obtain for larger projects.

Considering these relationships, it is possible to determine the marginal impact of the Corps' replacement package on the cost of obtaining a permit. In particular, we wish to determine the increase in permit preparation costs resulting from the Corps' proposal to switch some applications from nationwide to individual permits. The survey asked respondents to report the overall size of their projects, a criterion the Corps' uses to evaluate eligibility for nationwide permits. Using the general rule *75 that an applicant can only use a nationwide permit if the project affects less than one-half of an acre of waters of the United States, we find that 58 percent of the NWP-authorized projects in our sample would have required individual permits under the Corps' proposal. Utilizing the estimated relationship between acres impacted and individual permit preparation costs discussed above, we find that preparation costs for these projects that would switch from NWP to IP would roughly double (from \$28,915 to \$59,719, a difference of \$30,804). Note again that this figure does not include the cost of mitigation (or in lieu of fees), design changes, or the costs of carrying capital for several extra months, but is simply the additional cost of preparing an individual permit application.

C. Time Needed to Obtain a Permit

Another important dimension of the wetlands permitting program is the time involved to prepare a permit and receive a decision from the Corps. According to the Corps of Engineers, it takes far longer for an applicant to receive a decision on an individual permit than on a nationwide permit. In particular, the Corps asserts that it takes 127 days for a decision on individual permits and 16 days to receive a decision on a nationwide permit. [FN69] These statistics demonstrate that a shift from the nationwide to the individual permit process will have serious consequences for the applicant, but this is only part of the story. With regard to the length of the permitting process, we queried applicants about three dates: the date the applicant began compiling information needed to submit an application, the date on which the application was submitted to the Corps, and the date on which a final decision was received. These time periods were then broken down between individual and nationwide permits. The results are displayed in Table 1.

Table 1: Time to Prepare and Obtain a 404 Permit

	Days to Prepare Application (1)	Days from Submission of Application to Decision (2)	Days from Completed Application to Decision (3)	Total Calendar Days (1+2)

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Survey				

Individual	383	405		788

Nationwide	184	129		313

Difference	199	276		475

Corps Statistics				

Individual			127	

Nationwide			16	

Difference			111	

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*76 Nationwide permits in our sample took an average of 313 days to obtain--far longer than the few weeks implied by the Corps' public accounting. [FN70] The main reason for the discrepancy is that the Corps only counts

the time from the date that it deems an application to be complete until it reaches a decision. This accounting ignores the time needed to prepare the application, which comprises the majority of the total permitting time required for both nationwide and individual permits. The applicants in our sample also indicated that it took an average of 788 days (or two years, two months) from the time they began preparing the application to the time they received an individual permit, of which 405 days elapsed after the application was submitted to the Corps' office. [FN71] One implication of this finding is that it actually takes an applicant 475 extra days to obtain an individual as opposed to a nationwide permit. Thus, eliminating NWP 26 will result in a longer approval process for many projects and will likely delay the completion of many more projects. These delay costs are in addition to the extra permit preparation costs described earlier.

D. Cost to the Federal Government

To measure the cost to the federal government of eliminating NWP 26, it is necessary to first develop a baseline with which to compare the two programs. In fiscal year 1994, there were more than 48,000 Section 404 applications (including general permit verification requests and pre-construction notifications) sent to the Corps for authorization. [FN72] Eighty-two percent of these applications were authorized through general permits. [FN73] During a 14-month period ending on September 30, 1998, the Corps authorized 8790 activities through NWP 26. [FN74] Thus, this single permit accounts for around 15 percent of all activities permitted by the Corps under Section 404.

Because it reduces permit evaluation time relative to individual permits, the NWP program conserves resources at the Corps of Engineers and quickens the permitting process for minimal impact projects. The budgetary and time costs flowing from the elimination of NWP 26 are substantial. Shifting large numbers of permit applications from the "general" to the "individual" category will increase Corps workloads. There are two outcomes of this change. Corps budgetary requirements will increase if permit evaluation times are to be kept at current levels; however, *77 if the Corps' regulatory budget is not increased, permit evaluation time will increase.

We will now assess the size of the budget increase necessary to keep permit evaluation times at their current levels. Two components of the replacement permit package are key with respect to budgetary impacts. First, the new General Condition 26 eliminates the use of most general permits in the 100-year floodplain. Second, the replacement permits have lower acreage ceilings above which applicants are required to obtain an individual permit. An April 1999 survey of public agencies and private companies indicated that 60 percent of all Section 404 applications were in the 100-year floodplain. [FN75] The survey concluded that 58 percent of applications would trigger the acreage limitations imposed on the use of NWPs. Assuming that 60 percent of NWP 26 applications are in the 100-year floodplain or are covered by the sliding-scale acreage limitations, then 4500 activities annually will be switched from NWP to individual permits. [FN76]

Assume that the Corps takes roughly 110 extra days to evaluate and process each individual permit as opposed to a general permit, and assume that each Corps worker handles six individual permit applications at a time. [FN77] Under these conditions, the replacement package will require that the Corps hire roughly 450 workers just to keep evaluation times at current levels. Suppose that average employee compensation (including benefits) and other related expenses (e.g., office space, furniture, phone, and fax expenses, etc.) are \$75,000 per year. Then the total budgetary impact of eliminating NWP 26 is \$34 million every year. This figure represents nearly a 30 percent increase in the Corps' proposed FY 2003 regulatory budget of \$151 million. [FN78]

*78 E. Cost to Applicants

I. State and Local Governments

It is important to bear in mind that public agencies, particularly at the state and local level, also apply for wetland permits to carry out vital services such as road construction and maintenance; managing stormwater; and building schools, hospitals, and prisons. The changes to NWP 26 will require an adjustment period for local public agencies and will result in a new equilibrium that is much more costly to them. Project costs will increase as agencies rely

more on outside experts (consultants, engineers, etc.) to obtain needed permits, increase their planning horizon to anticipate delays, and have less flexibility to devise and implement creative and timely solutions to public works problems. The replacement package will also delay construction, maintenance, and development activities affecting waters of the United States.

Public agencies have fixed budgets, and increasing the cost of construction and maintenance activity draws resources away from other competing uses. In this sense, the Corps' replacement of NWP 26 can be viewed as an unfunded federal mandate. Local governments can respond to the increase in costs by increasing taxes, which is unlikely, or by reducing the number or quality of projects undertaken by state and local public agencies.

Also troubling are the implications of the elimination of NWP 26 for public safety. By raising the cost of doing business, the replacement permit package will mean that some public sector projects will not be completed. Increases in permit processing time will also have an effect. Particularly in the northern part of the country, the window of opportunity to perform maintenance is limited by weather conditions, and processing delays may prevent agencies from conducting maintenance work in a timely manner. This conflict leads to further deterioration of important infrastructure and exposes the public to additional risks. For example, road and highway maintenance agencies may delay performing needed road repairs by a year or more, which increases risks to travelers. Flood control agencies may delay performing maintenance work, which increases the risk of flooding. Thus, the elimination of NWP 26, which is intended to benefit the environment, may considerably increase risks to humans and the environment.

Increasing the cost of wetland regulation by replacing NWP 26 will reduce the flexibility of local agencies to design new projects as they strive to avoid wetland impacts altogether. The Corps is thereby creating incentives that lead to more congestion and a sub-optimal configuration of infrastructure as agencies attempt to keep permitting costs under control. For example, higher regulation costs result in reduced road capacity and poor placement of roads, both of which inflate the private cost of travel.⁷⁹ These impacts can be serious, as the following example illustrates. Suppose that a local agency cannot use the most direct route for a road and instead builds a longer road to skirt a wetland. This response imposes potentially large private costs. Suppose that the more circuitous route raises average commute time by just six minutes per day and 100,000 people use the affected road. This single change implies that the environmental regulation increases travel time by 10,000 hours per day. At an average opportunity cost of \$10/hour, which is quite conservative, changing road placement costs commuters \$100,000 per day.

2. Private Sector

There are several aspects of the replacement permit package that will increase the costs of private sector activities. The cost of obtaining a permit will compound as more activities will require an individual permit and more activities require pre-construction notification. Even with major additions to the Corps' regulatory staff, the time needed to obtain a Section 404 permit will be prolonged as a result of eliminating NWP 26. Further, the costs of compliance will increase as a result of lengthened processing time and new permit requirements (e.g., for upland buffers).

Individual permits cost far more than general permits, both in money and time. Individual permits often require an applicant to hire outside experts, such as biological consultants and specialized engineers to perform environmental and engineering analyses, and require much more extensive negotiations with the Corps than general permits require.

Another important component of cost is the impact of the permitting changes on the timing of the development process. Even with substantial growth in funding for Corps regulatory activities, switching applications from general to individual permits will delay the development process and increase the capital outlays of applicants. The Corps admits that the time needed to process an individual application will increase, but it has declined to quantify this impact, saying only that the increase in permit processing time "will be substantial." [FN79]

The actual delay is more than just the time needed for the Corps to respond to the application. In many cases, developers can only operate in good weather and need to subcontract portions of the overall project. Prolonging the Corps' evaluation time may make a current construction season a total loss. Delay and mounting uncertainty will increase the cost of capital to developers and, by extension, the price of housing.

Other aspects of the Corps' proposal will increase the cost of obtaining a Section 404 permit and may make some projects technically or *80 economically infeasible. Consider, for example, General Condition 9, Water Quality, which requires that, to the maximum extent practicable, vegetated buffers planted with native species be established adjacent to "open waters" in the "vicinity" of the "project." [FN80] The buffer requirement is not based on any showing that the project affects the open waters or that buffers are the most effective way to redress any adverse impacts to open waters. Rather, they are an unvarying obligation of the permittee, limited only by the "maximum extent practicable" requirements. [FN81] The normative size of the buffer is from 25 to 50 feet on each side of the open water. [FN82] This requirement sets aside significant amounts of land, which provide little or no financial return, and may make some proposed activities infeasible.

The changes to the wetland permitting process will increase the marginal cost of private development by raising the cost of preparing and negotiating the permit, by delaying the development process, and by upping the amount of resources that must be set aside for wetlands protection. The incidence of such an increase in cost is well understood by economists. Raising the cost of permitting imposes costs on developers, which are passed through to homebuyers and other customers in the form of higher housing prices. Higher costs also reduce the amount of housing and other structures produced by developers in an economic equilibrium.

3. Measuring the Incremental Cost of Obtaining a Wetland Permit

Consider first the increased cost of preparing a Section 404 permit to the entity preparing the permit (developer, local government, etc). [FN83] Our survey indicates that the average NWP-authorized activity would cost roughly \$31,000 more to permit if authorized by the Corps on a project-specific basis. If 60 percent of activities previously authorized under NWP 26 require individual permits under the replacement package, then just the additional costs of preparing wetlands permits amounts to over \$140 million annually. Note that this figure does not include the cost of proposed design features such as vegetated buffers, the cost of the new water quality planning requirements, or the delay costs.

This survey-based evidence is consistent with more aggregate calculations. The total value of private and public construction and development activity is \$760 billion annually. [FN84] Recent survey evidence suggests that wetlands permitting averages 0.15 percent of this amount. [FN85] *81 If residential and public sector construction activity is two-thirds of the value of all activity permitted under Section 404, then over \$1.7 billion is spent each year by the private and public sectors obtaining wetlands permits for residential and public sector activities. If 80 percent of all 404 applications are authorized through general permits and individual permits are twice as expensive to obtain as general permits, then an average individual permit costs roughly \$30,000 more to prepare than a nationwide permit. Note that this calculation is quite close to the results of our survey. If 60 percent of all former NWP 26-authorized projects require individual permits under the Corps' proposal, then the additional permit preparation cost is over \$130 million annually.

Since these are rough calculations and consider only one aspect of the actual cost of the Corps' proposal, it is helpful to compare the results of a different approach. A National Association of Home Builders survey reveals that all aspects of the Section 404 permitting process taken together add \$400 to the price of an average new home. [FN86] Viewed another way, the survey concludes that costs imposed by Section 404 requirements are 0.16 percent of total homebuilding costs and 0.4 percent of total development costs. If 15 percent of new homes must obtain 404 permits, then the average cost of obtaining a 404 permit is \$2667 per home requiring a permit. [FN87] If an individual permit is twice as expensive to obtain as a nationwide permit and 80 percent of new home 404 permits are nationwide, then an NWP adds \$2223 to the price of a new home and an IP adds \$4446.

Suppose that there are 1.5 million new homes constructed per year, that 20 percent of the new homes needing 404 permits receive NWP 26 permits, and that 60 percent of these switch from general to individual permits. [FN88] Then the Corps' proposal adds \$60 million per year to the price of new housing. If 20 percent of NWP 26 permits issued each year are for residential projects, and if these projects are representative of overall costs, then, by this method, the total cost impact of the Corps' proposal is over \$300 million annually. [FN89] Clearly, the Corps must do more work to assess the costs of its replacement package. At this point, however, it is evident that the elimination of NWP 26 will significantly increase the cost of obtaining a wetland permit.

Of course, these calculations do not factor in the cost of delay, defined as the increase in total project costs resulting from the longer time ⁸² it takes an applicant to receive an individual versus a nationwide permit. The survey data discussed above indicate that the magnitude of the delay is large. In particular, an individual permit takes 475 days more to prepare and receive than does an NWP (199 extra days to prepare the application and 276 extra days to receive approval once the application is submitted). ^[FN90] If 60 percent of former NWP 26 applications are shifted to individual permits and the rest remain as nationwide permits, then the average permit application will be delayed by 285 days, or well over 9 months, from the time permit preparation begins, and by 175 days, or nearly 6 months, once the application is submitted.

Delay costs have numerous sources. Developers must carry capital and bear labor and other operating expenses for longer periods of time. Carrying capital for longer periods of time increases interest expenses and results in lost alternative investments. Moreover, the increased regulatory uncertainty associated with the replacement package will increase the cost of borrowing to developers. These higher interest rates further increase capital outlays and raise the price of housing.

V. PERMITTING IN RELATION TO OTHER WETLAND PROTECTION POLICIES

In a complete cost-benefit analysis of a regulation, the analyst compares the cost of the intervention with the monetary value of its benefits. Measuring the benefits of environmental regulations is notoriously difficult (and controversial, even among economists), and we will avoid it in this study. Instead, we will consider a simple notion of efficiency: whether the Corps' replacement package is the lowest-cost way to achieve a desired level of health of the nation's wetlands.

A. Benchmark for Cost-Efficiency Analysis

We first develop a benchmark for cost-efficiency by calculating the cost of the replacement package per wetland acre affected. Recall that NWP 26 was designed to authorize activities with minimal individual and cumulative impacts on wetlands. Not surprisingly, the likely effect of eliminating NWP 26 on wetland acres appears to be modest, particularly in relation to the large costs imposed on the regulated community. In 1998, the NWP 26 program authorized activities impacting roughly 3,000 wetland acres. ^[FN91] Assuming that the replacement package alters the design of projects affecting all of this acreage and assuming that the economic cost of ⁸³ eliminating NWP 26, including the increased cost of federal regulation, is \$300 million annually, then it follows that the total cost amounts to over \$100,000 per acre affected.

In reality, the implicit cost of wetland conservation embodied in the permitting reform is much higher than \$100,000 per acre. Eliminating NWP 26 and forcing projects to be approved via the more arduous individual permit process only protects wetlands to the extent that the new program catches "mistakes" allowed under the old program, namely projects that were permitted and should not have been. Most of the criteria by which the Corps is planning to approve or disapprove projects remain unchanged, with the exceptions detailed earlier. Thus, most submitted projects were approved under the old program, and most will be approved under the new program. Suppose that five percent of the projects permitted under the old rules were approved in error. Then the permitting changes impose a cost of over \$100,000 on all acres affected by the program but amount to a cost of over \$2 million per acre conserved that would have been altered under the old permitting program. ^[FN92] It is obviously worth ascertaining if this is the most efficient way to protect the nation's wetlands.

B. Cost of Non-Regulatory Programs

Governments are constantly challenged to meet their objectives at minimum cost. Thus, it is important to consider whether there are other programs that can protect wetlands at less than the implicit cost of conserving them by tightening the requirements for obtaining a discharge permit.

There are a number of active programs by which the federal government is acquiring land to add to the stock of the nation's wetlands. The North American Wetlands Conservation Act established a Wetlands Trust Fund in 1989 and

established the North American Wetlands Conservation Council to approve wetland restoration activities. [FN93] The Act has stimulated more than 960 projects in 49 states, which collectively have restored more than 8.5 million acres of wetlands. [FN94]

The Wetlands Reserve Program (WRP) is a voluntary program directed at wetlands on private property. Congress created the WRP with the Food, Agriculture, Conservation and Trade Act of 1990, as amended by the 1996 Farm Bill. [FN95] The NRCS administers the program in consultation *84 with the Farm Service Agency and funding for the WRP comes from the Commodity Credit Corporation. Landowners choosing to participate in the WRP may sell a conservation easement or enter into a cost-share restoration agreement with the USDA to restore and protect wetlands. The landowner voluntarily limits future use of the land, yet retains ownership. The landowner and NRCS jointly develop a plan for the restoration and maintenance of the land. The program offers landowners three options: permanent easements, 30-year easements, and restoration cost-share agreements of a minimum 10-year duration. Nationwide, over 990,000 wetland acres have been enrolled in the program since 1990. [FN96]

The federal government is not the only entity attempting to preserve and restore wetlands: private conservation organizations such as The Nature Conservancy, the Trust for Public Lands, the Isaac Walton League, and Ducks Unlimited have also contributed significantly to wetland conservation. For example, since its founding in 1937, Ducks Unlimited has conserved more than 10 million acres. [FN97]

With regard to the cost of these various measures, economists have noted a basic dichotomy between programs intended to conserve existing wetlands and those attempting to restore lands that were previously wetlands. In particular, economists have found that restoration of wetlands is usually much less expensive than conservation. [FN98] Protection of existing wetlands is more expensive than restoration because there is a large supply of former wetlands that are only marginally suited to economic uses. Wetlands that are profitable to develop or have a high level of agricultural productivity, by contrast, can be quite expensive to conserve.

One illustration of this principle is the relatively high cost of the Swampbuster program; the mean cost of conservation under this program is \$2215 per acre, with a range of \$519 to \$4316 per acre. [FN99] Even the conservation efforts of private groups are generally more expensive than restoration efforts. For example, The Nature Conservancy's costs of wetland conservation averages \$1306 per acre. [FN100] A recent study by the Economic Research Service calculated the costs of conserving wetlands through programs that acquire partial interests in land and restore wetlands. [FN101] The mean costs of conservation under these programs range from \$250 to \$1300 *85 per acre. The study also concludes that the WRP achieves restoration at around \$600 per acre. [FN102]

The per acre costs of wetlands enhancement by any of these measures is low relative to the cost of conserving wetlands by modifying the federal permitting system. Further, programs that acquire full or partial interests in land, or result in cooperative agreements with landowners, directly protect and enhance wetlands. The changes to the wetlands permitting system merely alter the process by which applications are reviewed. Most permit applications will still be approved, and wetlands filled, now that NWP 26 is eliminated.

C. Agency Flexibility and Fine Tuning of Regulation

Economists have argued that the efficiency of environmental regulation depends on agencies' flexibility and their capacity to adjust to varying circumstances. There is immense variability of weather conditions, economic performance, and ecosystem characteristics across locations. Therefore, if government regulation is to reflect differences in benefits and costs, it should be adjusted to specific conditions. Efficient regulation will achieve the same environmental quality improvement at the same cost across locations. One form of regulation that may be especially inefficient is a complete ban on certain activities. For example, proposed complete bans of pesticides have been shown to be very inefficient, and the use of differentiated pesticide regulation has been shown to achieve similar environmental improvements at a much lower cost. [FN103]

A quantitative assessment of environmental amenities, such as wetlands, requires that a distinction be made among wetlands of different quality. A recent study by Babcock and others assesses the Conservation Reserve Program (CRP) and suggests that conservation policies that do not discriminate between lands that vary in their

environmental amenities are likely to be highly inefficient. [FN104] The study used the National Resources Inventory to weigh the contribution of various lands to conservation objectives (e.g., reduced soil erosion, conservation of native plants, creation of wildlife habitat). Babcock and his coauthors found that the initial design of the CRP, which aimed to maximize enrolled acreage with a given budget without discrimination among lands of different characteristics, attained less environmental quality improvement than an approach targeting lands *86 with the highest ratios of environmental amenities per dollar spent. Policy simulations conducted as part of the study show aggregate quality losses of more than 20 percent when the uniform targeting approach is used instead of the optimal approach. [FN105]

Interviews with public agencies and private developers conducted during this study suggest that one of the major flaws of the current permitting process is the lack of discrimination between wetlands of varying qualities. [FN106] The lack of discrimination by regulators among wetlands of different qualities might have been justified in the past by technological constraints and cost considerations. The disregard of functional differences in the proposed permitting process is less understandable given the recent advances in remote sensing, geographic information systems, and spatial statistical inference.

The effectiveness of the regulatory process has improved as it has become quantitative, with well-defined and measured data. Cost-benefit analysis can provide sound assessment of whether or not to execute a project. If agencies lack the capacity to obtain direct market evaluation of environmental amenities (which is usually the case), then the criteria of consistency should be applied in evaluating projects. Namely, the value of environmental amenities implied by existing activities and regulations can be used as a benchmark in new project evaluation. Values of wetland preservation, as implied by existing regulations and market activities, can be used as a benchmark for evaluation in new proposed projects. Protecting wetlands by reforming the permitting process appears to be an expensive way to achieve given improvements in environmental quality as compared to other policies.

VI. FEDERALISM AND EFFICIENT GOVERNANCE

The elimination of a streamlined permit like NWP 26 also raises economic questions about the division of government responsibilities. First, the replacement permit package raises issues of the efficient allocation of responsibility among levels of government. Second, aspects of the change raise questions about the appropriate level of detail to include in federal regulations.

Even in those situations where federal agencies have proper oversight responsibility, it is desirable that they not be engaged in minute details of execution. Federal agencies should focus their attention on major water quality problems that are of national concern, coordinate state *87 regulations when there are spillovers, and oversee environmental regulations at the state and local level, but let local agencies deal with the day-to-day details of implementation. [FN107] This is not often the case. Frequently, the Corps has hands-on regulatory control of local projects that have only minimal (or no) national impact, and the distance between the decision makers and the operators in the field leads to delayed, and sometimes erroneous, decisions. It seems that even the current system may benefit from devolution and increased autonomy for local agencies.

The replacement permit package will increase the Corps' power over water quality and even land use decisions. Some aspects of the replacement package demonstrate that it seeks to alter the balance between federal and state governments and insert direct federal control into areas where it has not been exercised previously. For example, the existing General Condition 9, Water Quality Certification, simply ensures that the Corps has determined that the state has issued (or waived) water quality certification for the proposed project. [FN108] The new General Condition 9, Water Quality, alters the focus of the condition from ensuring that the state has certified that the project meets water quality requirements to establish new conditions that may or may not be consistent with state regulations. [FN109] The Corps states that the purpose of the modified General Condition is to ensure that the project will have "minimal adverse effects on the aquatic environment, especially by preventing or reducing adverse effects to downstream water quality and aquatic habitat." [FN110] The Corps thus appears to be second-guessing the state by asserting authority to impose its own water quality conditions.

These observations are related to another economic concern: the regulations are too detailed and impose specific performance requirements regardless of the circumstances in which a permittee operates. Again, the new General Condition 9 is a good illustration of the problem. The vegetated buffer requirement that is central to the Corps' new

water quality focus is an example of micro-management and will impose significant costs *88 on local public agencies and private developers. [FN111] Further, the Corps now requires that the buffer should be planted with native species, and if exotic species are present, they must be removed. Consider the potential impact on a flood control agency with responsibility to construct and maintain a flood control system in natural and artificial water bodies. These agencies do not usually own the upland areas immediately adjacent to the streams in which they work. But the new general condition requires them to control and enhance these areas nonetheless.

Beyond the obvious question of how these requirements redress impacts attributed to the activities for which the Corps is issuing permits, it is important to ask whether they should be spelled out in a national regulation at all. Or, should these types of requirements be left to state water quality control boards and local land use planning agencies?

Another aspect of effective governance is striking a balance between agencies' specific concerns and the overall coherence of regulation from the perspective of the public. State and local agencies as well as developers undertaking a project with wetland impacts are often required to interact with a multitude of regulatory agencies to obtain approval for even minor activities. Government statistics bear out this assertion. In 1997, at least 36 federal agencies conducted wetlands-related activities; funding for these activities totaled \$787 million and involved 4308 full-time employees. [FN112] There is already substantial regulatory and programmatic clutter in the area of wetlands.

Effective governance aims to streamline regulation and set coordinated policies that reduce the burden of regulation and minimize the number of points of interaction between government and the regulated community. Replacing NWP 26 makes the regulatory process more complex and fragmented by broadening the Corps' role in the area of water quality regulation, an area in which the EPA has traditionally been the lead federal agency.

VII. CONCLUSIONS

Issuing licenses to pollute or degrade environmental quality is an important tool of environmental regulation. In general, licensing programs may impose significant costs on the regulated community; however, these costs are less obvious and can be more difficult to measure than the costs *89 imposed by direct interventions such as environmental taxes or technology requirements. There is also the question of how the investigative resources of the government are allocated, and whether there exist obvious aspects of proposed activities that the government can use to trigger a higher degree of scrutiny. Another interesting aspect of licensing is its cost-effectiveness or efficiency relative to other environmental policies.

The case considered in this article is the set of recent changes to the federal wetlands permitting program known collectively as the "NWP 26 replacement package." This case is significant since wetlands policy is a key component of the nation's environmental protection and enhancement strategy, and it is important that wetlands regulation, including permitting requirements, be as effective as possible. Public intervention has already helped stabilize and even reverse the downward trend of the loss of the nation's stock of wetlands. When contemplating the replacement package, it is important to consider its cost, its environmental benefits, and whether it squares with commonly-accepted principles of good governance, including cost-effectiveness, consistency among government programs, and allocation of responsibility among levels of government.

Our study shows that the proposed permitting changes are a major federal action. The elimination of NWP 26 could impose costs well in excess of \$300 million per year, or over \$100,000 per acre affected, and much more for each acre actually conserved. The costs of the regulation will be borne by many groups, including homebuyers, developers, local governments, and even the federal government itself. Because developers and governments pass on cost increases to consumers and taxpayers, average citizens will end up paying most of the bill for this change in policy. Further, it is likely that the changes to the wetland permitting program will end up degrading the quality of local government service by making it more difficult to perform maintenance and construction activities.

Environmental economists frequently advocate that governments should meet their environmental objectives at minimum cost. The elimination of NWP 26 fails this test. First, the policy is indiscriminate in that it prohibits use of streamlined nationwide permits for headwaters and isolated waters based solely on the size of the project and the number of affected wetland acres, and not on the characteristics of the affected area. It may be wise for Congress to

appropriate additional funds to invest in technology to enable the Corps to discriminate among wetlands of varying quality. In this way, the Corps can more effectively target its human resources toward the most vulnerable and biologically important areas. Further, there are other, non-regulatory programs that protect and enhance the nation's stock of wetlands at far lower cost than the elimination of NWP 26. This observation raises questions about the consistency of the replacement package with other federal initiatives.

*90 Another aspect of licensing cost that is often overlooked in assessments of environmental policies is the delay caused by regulation. Relying on a review of how the Corps compiles its own statistics and a detailed survey of wetlands permit applicants, we argue that published Corps figures vastly understate the true time needed for an applicant to complete the wetlands permitting process. Indeed, we find that shifting a project from a nationwide to an individual permit adds nearly one and a half years to the time needed to prepare and negotiate a wetland development permit. Again, this delay is indiscriminate in that the Corps' replacement package will require an individual permit based on the size of the project alone, and not on the biological productivity, uniqueness, or sensitivity of the affected wetlands.

A further area of concern is how eliminating NWP 26 will affect the relationships between levels of government. The replacement package will insert the Corps of Engineers into water quality and land use planning, an area where state and local governments have traditionally had primacy. Further, the replacement package, particularly language in the new general conditions, obscures lines of responsibility among federal agencies, particularly between the Corps of Engineers and the Environmental Protection Agency, which has had primary federal responsibility for oversight of state water quality planning efforts. The replacement package will result in more complex and fragmented regulation, where just the opposite is desired.

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[FN1]. For a comprehensive survey of environmental licensing programs, see generally Terry Davies, *Reforming Permitting, Resources for the Future*, (2001), available at http://www.rff.org/reports/PDF_files/reformingpermitting.pdf.

[FN2]. An important, and under-researched, aspect of the cost of a licensing program is the degree to which it delays the activity in question.

[FN3]. See *Issuance of Nationwide Permits; Notice*, 67 Fed. Reg. 2,020. (Jan. 15, 2002).

[FN4]. See *Final Notice of Issuance of Modification of Nationwide Permits*, 65 Fed. Reg. 12,818 (Mar. 9, 2000). The acreage limit applies to all new NWPs except NWP 41, Reshaping Existing Drainage Ditches, which is intended to authorize projects benefiting the aquatic environment. See *id.* at 12,825.

[FN5]. 33 U.S.C. § 1344(a) (1994). See also *Permits for Discharges of Dredged or Fill Material into Waters of the United States*, 33 C.F.R. § 323.1 (2001).

[FN6]. 33 U.S.C. § 1344(b) (1994).

[FN7]. *Definition of Waters of the United States*, 33 C.F.R. § 328 (2001).

[FN8]. See *Final Rule for Regulatory Programs of the Corps of Engineers*, 51 Fed. Reg. 41,206, 41,217 (Nov. 13,

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1986).

[FN9]. See U.S. ARMY ENGINEERS WATERWAY EXPERIMENT STATION, U.S. ARMY CORPS OF ENGINEERS, TECHNICAL REP. NO. Y-87-1, USACE WETLANDS DELINEATION MANUAL (1987), available at <http://www.saj.usace.army.mil/permit/87manual/pdf>.

[FN10]. See Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

[FN11]. See Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12,818 (Mar. 9, 2000).

[FN12]. See 33 U.S.C. § 1344 (1994).

[FN13]. See REGULATORY BRANCH, U.S. ARMY CORPS OF ENGINEERS, SECTION 404 OF THE CLEAN WATER ACT AND WETLANDS: SPECIAL STATISTICAL REPORT 5 (1995). [hereinafter SPECIAL STATISTICAL REPORT].

[FN14]. See Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. at 12,818.

[FN15]. Id.

[FN16]. See U.S. Army Corps of Engineers, Nationwide Permit 26 Mitigation Report, May 1, 1997-June 30, 1998 (on file with author).

[FN17]. See id.

[FN18]. 33 C.F.R. § 325.1(b) (2001).

[FN19]. SPECIAL STATISTICAL REPORT, *supra* note 13, at 4.

[FN20]. See 33 C.F.R. § § 325.2(a)(2), 325.2(d)(3) (2001).

[FN21]. 33 C.F.R. § 325.2(d)(3).

[FN22]. See Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12,819, 12,819-99 (Mar. 9, 2000). The proposed change was described in detail in July 1999. See Proposal to Issue and Modify Nationwide Permits; Notice, 64 Fed. Reg. 39,252 (July 21, 1999). This proposal followed two earlier versions of the replacement permit package. See Proposal to Issue and Modify Nationwide Permits, 63 Fed. Reg. 36,040 (July 1, 1998); Proposal to Issue and Modify Nationwide Permits, 63 Fed. Reg. 55,095 (Oct. 14, 1998). General conditions are permit conditions that apply to all NWPs.

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[FN23]. See Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. at 12,885-86.

[FN24]. See id. at 12,885.

[FN25]. See id. at 12,818.

[FN26]. See id. at 12,819.

[FN27]. NWP's not allowed in the 100-year floodplain include NWP's 29, 39, 40, 42, 43, and 44. See id. at 12,879.

[FN28]. See id. at 12,862.

[FN29]. See id. at 12,896.

[FN30]. See id. at 12,894.

[FN31]. See id. at 12,897.

[FN32]. See id. at 12,898.

[FN33]. See id. at 12,875.

[FN34]. See id.

[FN35]. See Virginia Carter, Wetland Hydrology, Water Quality and Associated Functions, in NATIONAL WATER SUMMARY ON WETLAND RESOURCES 2425 (Judy D. Fretwell et al. eds., 1996); Ted Williams, What Good Is a Wetland?, AUDUBON Nov.-Dec. 1996, at 42-53; WILLIAM J. MITSCH & JAMES G. GOSSELINK, WETLANDS (1993); Donald E. Kroodsma, Habitat Values for Nongame Wetland Birds, in WETLAND FUNCTIONS AND VALUES: THE STATE OF OUR UNDERSTANDING 320 (Philip Greeson et al. eds., 1978).

[FN36]. Definition of Waters of the United States, 33 C.F.R. § 328 (2001).

[FN37]. This research is being conducted in the fields of public finance, see JEAN-JACQUES LAFFONT, FUNDAMENTALS OF PUBLIC ECONOMICS (John P. Bonin & Helene Bonin trans., 1988), and recently relies on modern techniques of game theory. See JEAN-JACQUES LAFFONT & JEAN TIROLE, A THEORY OF INCENTIVES IN PROCUREMENT AND REGULATION (1993).

[FN38]. Press Release, U.S. Fish & Wildlife Serv., Wetlands Loss Slows, Fish and Wildlife Service Study Shows (Sept. 17, 1997) (on file with author).

[FN39]. RALPH E. HEIMLICH ET AL., DEPT. OF AGRIC. & ECON. RES. SERV., WETLANDS AND AGRICULTURE: PRIVATE INTERESTS AND PUBLIC BENEFITS (1998) [hereinafter HEIMLICH].

[FN40]. See *id.* A direct consequence of this policy is that over 80 percent of all wetlands are today in private ownership.

[FN41]. See *id.*

[FN42]. See *id.* at 24.

[FN43]. See Pub. L. No. 78-534, 58 Stat. 445 (1944) (current version at 16 U.S.C. § 460d (1994)).

[FN44]. See HEIMLICH, *supra* note 39, at 24.

[FN45]. See *id.*

[FN46]. See *id.*

[FN47]. See HEIMLICH, *supra* note 39, at 25.

[FN48]. See *id.*

[FN49]. See 16 U.S.C. § § 1001-1008 (1994 & Supp. V 1999).

[FN50]. See HEIMLICH, *supra* note 39, at 25.

[FN51]. See *id.*

[FN52]. See Econ. Research Serv., U.S. Dept of Agric., Conservation and Environmental Policy: Questions and Answers, at [http:// www.ers.usda.gov/briefing/conservationandenvironment/questions/consenvwet1.htm](http://www.ers.usda.gov/briefing/conservationandenvironment/questions/consenvwet1.htm) (last updated Dec. 19, 2000).

[FN53]. See U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/RCED-98-150, WETLANDS OVERVIEW: PROBLEMS WITH ACREAGE DATA PERSIST (1998). [hereinafter WETLANDS OVERVIEW].

[FN54]. See *id.* at 10.

[FN55]. See *id.* at 9.

[FN56]. See *id.* at 10. The NWI reports a base acreage of 100.9 million acres, a gross loss of 3.357 million acres, a gross gain of 2.146 million acres, and a net loss of 1.211 million acres between 1985 and 1995. The NRI reports a base acreage of 112 million acres, a gross loss of 1.561 million acres, a gross gain of 0.769 million acres, and a net loss of 792,600 acres between 1982 and 1992.

[FN57]. See THOMAS E. DAHL & CRAIG E. JOHNSON, DEPT OF INTERIOR, STATUS AND TRENDS OF WETLANDS IN THE COTERMINOUS UNITED STATES: MID-1970S TO MID-1980S (1991).

[FN58]. See HEIMLICH, *supra* note 39, at 81-84.

[FN59]. See WETLANDS OVERVIEW, *supra* note 53, at 10.

[FN60]. See *id.* at 11.

[FN61]. See *id.*

[FN62]. See *id.*

[FN63]. See *id.*

[FN64]. See U.S. Army Corps of Engineers, General Permit Verifications-- 1998 (on file with author).

[FN65]. These figures are close to the national averages reported in U.S. ARMY CORPS OF ENGINEERS, COST ANALYSIS FOR THE 1999 PROPOSAL TO ISSUE AND MODIFY NATIONWIDE PERMITS (2000) [hereinafter COST ANALYSIS].

[FN66]. See SPECIAL STATISTICAL REPORT, *supra* note 13, at 5.

[FN67]. The range of NWP costs was between \$2000 and \$140,076; the median cost was \$11,800. The range of IP costs was between \$7000 and \$1,530,000; the median was \$155,000.

[FN68]. Interestingly, we did not discover a statistically significant relationship between the size of the project, measured various ways, and the length of time it takes an applicant to prepare an application and receive a decision from the Corps.

[FN69]. See SPECIAL STATISTICAL REPORT, *supra* note 13, at 5.

[FN70]. The range was from 11 to 1867 calendar days from initiation of the paperwork to obtaining a final Corps decision. The median was 196 calendar days.

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[FN71]. The range was from 209 to 1884 calendar days. The median was 726 days.

[FN72]. See SPECIAL STATISTICAL REPORT, *supra* note 13, at 5.

[FN73]. See *id.*

[FN74]. See Nationwide Permit 26 Mitigation Report, *supra* note 16.

[FN75]. Coalition on Permitting Efficiency, Discussion Draft, Survey Methodology and Results: Section 404 Permit Applications in the 100-year Floodplain, Apr. 16, 1999 (unpublished paper, on file with author).

[FN76]. 8790 authorizations in 14 months implies roughly 7,500 authorizations in a representative 12 month period. 60 percent of this number is 4500. This estimate corresponds closely with the Corps' assertion that the replacement package will result in an additional 4429 individual permit applications per year. See Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12,818, 12,820 (Mar. 9, 2000).

[FN77]. The 110-day assumption is consistent with the Corps' own assertion that it takes 111 extra days to process an individual application (127 - 16 W 111). If there are 1300 members of the Corps regulatory staff and they process 12,000 individual permit applications per year, then the average worker processes over 11 IP applications per year. Assuming that each takes 127 work days to process and there are 210 work days in a year, then it follows that the typical worker handles seven applications at a time.

[FN78]. Complete Statement of The Honorable Mike Parker, Assistant Secretary of the Army (Civil Works) Before the Subcomm. on Energy and Water Dev., Comm. on Appropriations, at 9 (Feb. 22, 2002) (on file with author).

[FN79]. Notice of Proposal to Issue and Modify Nationwide Permits, 64 Fed. Reg. 39,369 (July 21, 1999).

[FN80]. See Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12,819, 12,893 (Mar. 9, 2000).

[FN81]. See *id.* at 12,894 (Mar. 9, 2000).

[FN82]. See *id.*

[FN83]. Note that these costs may be passed on to some degree to final consumers.

[FN84]. See COUNCIL OF ECONOMIC ADVISERS, 1999 ECONOMIC REPORT OF THE PRESIDENT (1999).

[FN85]. See Interview with Susan Asmus, National Association of Home Builders (Nov. 1999).

[FN86]. See *id.* (The survey also shows that wetland permitting costs are 0.4 percent of development costs, which

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are 43 percent of the total cost of a new home).

[FN87]. See id.

[FN88]. Press release, U.S. Bureau of the Census, Bureau of the Census Announced that Privately Owned Housing Starts Were at a Seasonally Adjusted, Annualized Rate of 1.6 Million Units in November, 1999 (Dec. 17, 1999) (on file with author).

[FN89]. See Nationwide Permit 26 Mitigation Report, supra note 16.

[FN90]. See supra Table 1.

[FN91]. See Nationwide Permit 26 Mitigation Report, supra note 16.

[FN92]. \$100,000 per acre affected divided by a .05 error rate equals 2 million.

[FN93]. North American Wetlands Conservation Act, 16 U.S.C. § § 4401- 4412 (1994).

[FN94]. See Ducks Unlimited, NAWCA, at [http:// www.ducks.org/conservation/nawca.asp](http://www.ducks.org/conservation/nawca.asp) (last visited Apr. 29, 2002).

[FN95]. See 16 U.S.C. § 3837 (1994 & Supp. V 1999).

[FN96]. See Testimony of Dr. Katherine R. Smith before the Comm. on Agriculture, Nutrition & Forestry (Feb. 28, 2001) (on file with author).

[FN97]. Statement of Dr. L.J. Mayeus, President of Ducks Unlimited, at www.ducks.org/about/index.asp (last visited Apr. 29, 2002).

[FN98]. See HEIMLICH, supra note 39, at 55.

[FN99]. See id.

[FN100]. See id.

[FN101]. See id.

[FN102]. See id.

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[FN103]. See David Zilberman, et. al., The Economics of Pesticide Use and Regulation, 253 SCIENCE 518, 518 (1991); David L. Sunding. Measuring the Marginal Cost of Nonuniform Environmental Regulations, AM. J. AGRIC. ECON. 1098, 1098-107 (1996).

[FN104]. Bruce Babcock et al., Targeting Tools for the Purchase of Environmental Amenities, 73 LAND ECON. 325, 336-37 (1997).

[FN105]. See id.

[FN106]. Informal telephone interviews with 14 city and county engineers, private developers, and Hood control officials (Aug.-Sept. 1999).

[FN107]. For the principle that governments should have responsibilities over public goods whose geographic scope is the same as their jurisdiction, see, e.g., ROBERT COOTER, THE STRATEGIC CONSTITUTION (2000).

[FN108]. See Final Notice of Issuance, Reissuance, and Modification of Nationwide Permits, 61 Fed. Reg. 65,874, 65,907(Dec. 13, 1996).

[FN109]. See Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12,818, 12,893 (Mar. 9, 2000).

[FN110]. Notice of Proposal to Issue and Modify Nationwide Permits; Notice, 64 Fed. Reg. 39,369 (July 21, 1999); Notice of Proposal to Issue and Modify Nationwide Permits; Notice, 64 Fed. Reg. 39,252, 39,338 (July 21, 1999).

[FN111]. See Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. at 12,818, 12,890.

[FN112]. See WETLANDS OVERVIEW, supra note 53, at 2-8. In the same report, the GAO also noted that six agencies (the Corps, USDA's Farm Service Agency and NRCS, Interior's Fish and Wildlife Service, Commerce's NMFS and the USEPA) accounted for 70 percent of the funding and 65 percent of the staff.

END OF DOCUMENT

Statement of

Trey Pebley
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on behalf of

The Associated General Contractors of America

presented to the

Committee on Small Business
U.S. House of Representatives

on the topic of

Meeting the Needs of Small Businesses and Family Farmers in
Regulating our Nation's Waters

July 22, 2009



The Associated General Contractors of America (AGC) is the largest and oldest national construction trade association in the United States. AGC represents more than 33,000 firms, including 7,500 of America's leading general contractors, and over 12,500 specialty-contracting firms. More than 13,000 service providers and suppliers are associated with AGC through a nationwide network of chapters. Visit the AGC Web site at www.agc.org.

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Thank you, Chairwoman Velazquez, Ranking Member Graves, and members of the Committee for the opportunity on behalf of the Associated General Contractors of America (AGC) to participate at today's hearing entitled "Meeting the Needs of Small Businesses and Family Farmers in Regulating our Nation's Waters."

My name is Trey Pebley. I am Vice President of McAllen Construction located in McAllen, Texas. McAllen Construction is a small family owned and operated business that installs municipal utilities such as waterlines, sanitary sewers, and storm sewers for the Texas Department of Transportation, counties, and municipalities. We are also engaged in concrete bridge construction. McAllen Construction currently employs 133 employees and has annual revenues of around \$18-20 million. My primary role at the company is to oversee our environmental, health and safety activities, our concrete plant operations, risk management, and the financial side of the business.

I am also an elected Trustee of the McAllen Public Utilities Board. This is an at-large position that oversees the water and wastewater infrastructure and management for the citizens of McAllen, Texas. As an elected official, working on behalf of my town, water quality is an extremely important issue to me. Not just as a builder, but also as a public steward, I am challenged to make decisions about how to best protect water quality and the health and welfare of the citizens of McAllen. Resources are limited, so the projects we are able to fund must be done in a timely and cost-effective manner.

That is why I am concerned about legislative efforts to fundamentally expand the scope of federal Clean Water Act (CWA) jurisdiction. As a contractor, many of our projects require a federal CWA permit. We have seen projects delayed in Texas while we waited on the Corps district—for lack of staff—to issue a permit. These delays have cost us money we did not recoup. Another AGC member in Texas had a \$34 million project shut down for 4 years over a wetland that was approximately 80 feet by 200 feet in size. In that example, Texas DOT did issue a materials escalation change order in the amount of \$7 million (of taxpayer money) to cover the contractor's increased costs.

I am pleased to testify on behalf of the Associated General Contractors of America (AGC). AGC is the oldest and largest of the national trade associations in the construction industry. It is a non-profit corporation founded in 1918 at the express request of President Woodrow Wilson. AGC now represents more than 33,000 firms in nearly 100 chapters throughout the United States. Among the association's members are nearly 7,500 of the nation's leading general contractors, more than 12,500 specialty contractors, and more than 13,000 material suppliers and service providers to the construction industry. I am currently an active member of AGC of Texas and AGC of America, and currently serve in a leadership role on AGC of America's Environmental Network Steering Committee.

I. Introduction

The Associated General Contractors of America (AGC) is pleased to submit these comments on the issue of protecting small business in regulating the nation's waters. Specifically, AGC would like to offer its comments on the "Clean Water Restoration Act" (CWRA), which was introduced in the U.S. House of Representatives as H.R. 2421 in the 110th Congress, and in the U.S. Senate as S. 787 in the 111th Congress. AGC strongly opposes the CWRA which would delete the term "navigable waters" from the Clean Water Act (CWA) and subject all "waters of the United States," including all "intrastate waters," and all activities affecting such waters, to federal jurisdiction. AGC encourages the

Administration to undertake and Congress to oversee a common sense rulemaking that would establish readily identifiable limits to federal jurisdiction over waters and wetlands.

Without clear definitions to guide field staff in the regulatory agencies, permitting decisions will continue to be arbitrary and inconsistent. Vague and ambiguous regulatory provisions will continue to cause confusion, deny the regulated community fair notice of what is required, and waste time and money; all with little benefit to the environment. This lack of clarity is unduly burdensome for critical public infrastructure and private projects.

To clarify the scope of CWA jurisdiction, in light of *SWANCC* and *Rapanos*, this Administration should move forward with a rulemaking, and Congress should encourage (and not pre-empt) this effort. The commonalities between Justice Scalia's plurality opinion and Justice Kennedy's concurrence in *Rapanos* not only provide a starting point to fashion a rational policy; they also provide the Administration with an opportunity to implement balanced, effective regulations in an area that has generated endless litigation for decades. The Administration has taken a necessary first step towards a rulemaking through the issuance of joint guidance to aid regulatory agencies in making jurisdictional determinations. However, AGC believes that the guidance on its own is insufficient to provide clarity to this issue.

II. Statement of Interest

AGC members engage in the construction of commercial buildings and public works facilities, and they prepare the sites and install the utilities necessary for residential and commercial development. Many of their construction projects lie in "waters of the United States," within the meaning of the CWA, and therefore require federal permits. Whether any one project lies in such "waters" depends on the precise contours of that term.

Today, the contours are far from certain, and the uncertainty has become a great burden for AGC members to bear. The federal permits required for construction activity in "waters of the United States" are both costly and time-consuming to obtain. While their environmental purposes are laudable, they do add to the cost and delay of the completion of the private and public infrastructure that literally forms the foundation of our nation's economy.

At the same time, the penalties for failing to obtain a necessary permit can be severe. The civil fines can reach \$37,500 per day per violation, and the criminal penalties for "negligent" violations can include fines of \$50,000 per day per violation, three years' imprisonment, or both. As the "operators" of construction sites, both property owners and their construction contractors risk such fines and penalties for any failure to obtain a necessary permit. Courts have found both the owner and the constructor of a project to be responsible for compliance, at least where the contractor has control over the discharge activity, and whether or not the contractor reasonably relied on the owner to obtain a necessary permit.

AGC is committed to protecting and restoring the nation's water resources, but it does not believe that it is in the nation's best interest to expand the Clean Water Act beyond its original scope.

III. AGC Opposes the Clean Water Restoration Act

AGC strongly opposes the "Clean Water Restoration Act" (CWRA), which would delete the term "navigable" from the CWA and replace it with a new legislative definition of "waters of the United States" that includes all "intrastate waters" and all "activities affecting these waters." AGC believes that CWRA neither "restores" the original intent of the CWA nor "clarifies" CWA jurisdiction; rather, CWRA would create the greatest expansion of the CWA since it was signed into law in 1972.

CWRA would grant the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) *for the first time ever* jurisdiction over all "intrastate waters"—essentially all wet areas within a state, including groundwater, ditches, pipes, streets, municipal storm drains, gutters, and desert features, as well as authority over all "activities affecting these waters" (public or private, including construction), regardless of whether the activity is occurring in water or whether the activity actually adds a pollutant to the water.

CWRA changes the original intent of Congress in enacting the CWA from the Commerce Clause to the full "legislative power of Congress under the Constitution" and conflicts with CWA Sections 101(b) and 101(g), which state Congressional intent to "recognize, preserve, and protect the primary responsibilities and rights of the States" to control the development and use of local land and water resources and to "allocate quantities of water within [state] jurisdiction."

The practical impacts of CWRA are many and significant. The Corps and EPA would have unlimited regulatory authority over all intrastate waters, including, for example, waters now considered entirely under state jurisdiction, such as isolated wetlands and groundwater. Such a broad expansion would require enormous resources not provided by the legislation, exacerbate an existing funding gap in the CWA regulatory program, and lead to longer permitting delays. In short, CWRA's grab of state and local authority over water and land use would increase the cost of and delay or stop construction projects nationwide and slow economic growth.

In fact, a study of the CWA Section 404 permitting process found that obtaining a nationwide general permit took on average 313 days at a cost of \$28,915. Moreover, obtaining an individual permit took on average 788 days at a cost of \$271,000. See David Sunding and David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetlands Permitting Process*, 42 Nat. Resources J. 59 (Winter 2002).

IV. CWRA Could Provide the Federal Government New Authority to Regulate Groundwater

In 1972, Congress enacted the CWA to restore the chemical, physical, and biological integrity of our nation's lakes, streams, and rivers. Based on the CWA's plain language and its legislative history, Congress did not intend to directly regulate groundwater—water underground. CWRA creates sweeping new federal authority which could extend to groundwater and potentially all activities affecting groundwater.

By deleting the term "navigable" from the CWA and replacing it with the term "waters of the United States" defined to include "all...intrastate waters," the ordinary meaning of the word "all" is "every," "as much as possible," or "every member or individual component," the bill, by its plain language,

suggests the inclusion of groundwater. In addition, the term "intrastate waters" includes waters under state jurisdiction, and most states specifically list groundwater in the definition of "waters of the State." Further, CWRA uses the phrase "to the fullest extent that these waters...are subject to the legislative power of the Congress under the Constitution" to describe the extensive authority over "waters of the United States." Congress' constitutional authority to regulate groundwater is beyond dispute, as groundwater is already regulated under the Safe Drinking Water Act and the Resource Conservation and Recovery Act. Courts relying on the plain language of CWRA may likely conclude that "all means all and nothing less" and EPA and the Corps will find they have no choice but to regulate groundwater.

Under this expansion of federal authority, contractors, especially underground contractors, would continually face the threat of legal liability for unforeseen (and unpreventable) encounters with groundwater. As a result, CWRA would put underground contractors in a situation where their due process rights are being violated. Specifically, there would be no feasible way for the federal government to give contractors the sort of notice they would require to comply with the law. As the law is currently written, it is no defense that you could not anticipate groundwater or delineate the pool of groundwater. As such, every trenching operation (potentially including nearly every hole dug in America) would require a CWA Section 404 permit to avoid risk of violation.

V. AGC Opposes S. 787, the Clean Water Restoration Act of 2009

AGC opposes S. 787, the Clean Water Restoration Act of 2009, as reported by the Senate Environment and Public Works Committee on June 18, 2009. This so-called "compromise" version of CWRA would result in the same outcome—fundamentally expanding the scope of federal CWA jurisdiction—by deleting the term "navigable" from the CWA. Simply stated, the bill is expansion, not restoration of CWA jurisdiction.

The definition in S. 787 includes all "intrastate waters" including "intermittent streams" and "tributaries". However, nothing in the law or regulations in place prior to the Supreme Court decision in *SWANCC* covered all interstate waters. The new definition could allow regulators and third-parties to assert jurisdiction over 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 Migratory Bird Rule, S. 787 would establish federal CWA jurisdiction over any waterbody that "could be used" by a migratory bird (i.e., virtually any water), reaching well beyond the isolated waters S. 787 supporters say they are targeting.

In addition, the "Findings" in Section 3 are incorrectly claimed to demonstrate that S. 787 simply reinstates jurisdiction as defined in the regulations that existed before the *SWANCC* and *Rapanos* decisions. S. 787 addresses fundamental topics in CWA protection through legislative findings that would be better addressed instead through clear statutory language. Further, findings cannot overrule plain statutory language. Thus, a finding that groundwater is not included within "waters of the United States" will not negate legislative language that "all" waters are "waters of the United States," nor will a finding retaining the states' authority to allocate their own water preserve the states' authorities over land and water use.

VI. Supreme Court Provides Starting Point for Administrative Rulemaking

AGC seeks to ensure that the construction industry can continue to contribute to the nation's quality of life. In light of the U.S. Supreme Court's decisions in *Rapanos*, and for the reasons outlined below, AGC supports a rulemaking by the Administration to clarify federal limits over waters and wetlands and opposes legislation, such as CWRA, which would overly extend the jurisdictional reach of the CWA.

In the *Rapanos* decision, the Court vacated prior rulings by the U.S. Court of Appeals for the Sixth Circuit that the federal government has jurisdiction over wetlands connected in any way to actually navigable waters. These cases themselves involved wetlands adjacent to a series of drainage ditches, non-navigable creeks and culverts, and wetlands separated from a drainage ditch by a berm. In both cases, the Sixth Circuit held that the wetlands are "waters of the United States" because they are hydrologically connected to navigable waters.

The Supreme Court vacated these decisions—with a majority of the Court agreeing that the Corps had overstepped its bounds—and remanded the cases to the lower court for further inquiry into the facts. Four Justices (Justices Scalia, Thomas, Alito, and Chief Justice Roberts) reasoned that the CWA authorizes federal jurisdiction over "only those relatively permanent, standing, or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams [,] ... oceans, rivers, [and] lakes,'" and that the statute excludes from federal jurisdiction "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."¹ These four Justices also interpreted the CWA to cover "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right" such that it is "difficult to determine where the 'water' ends and the 'wetland' begins."²

Justice Kennedy concurred in the judgment but for different reasons. He reasoned that the "significant nexus" standard is the operative standard for determining whether a non-navigable water should be regulated under the CWA. In his concurring opinion, he repeatedly emphasized the importance of the relationship to traditional navigable waters, stating that to be a "water of the United States," a non-navigable water must "perform important functions for an aquatic system incorporating navigable water,"³ or "play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood."⁴

The remaining four Justices (Justices Stevens, Souter, Ginsburg, and Breyer) expansively interpreted the CWA to grant the Corps and the EPA jurisdiction over waters and wetlands only remotely connected to traditional navigable waters. While some have made much of the dissenting opinion, these four Justices did not concur in the judgment.

Chief Justice Roberts, lamenting this fractured result, pointed to *Grutter v. Bollinger*⁵ and *Marks v. United States*⁶ as a guide for lower courts in interpreting *Rapanos*. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the

¹ Scalia, slip op. at 20-21.

² Scalia, slip op. at 23-24.

³ Kennedy, slip op. at 24.

⁴ Kennedy, slip op. at 25.

⁵ 539 U.S. 306, 325 (2003).

⁶ 430 U.S. 188, 193 (1977).

Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.”⁷ AGC believes it clear that it was Justice Kennedy who “concurred in the judgment on the narrowest grounds.” AGC believes it equally clear that his opinion identifies important limitations on federal jurisdiction under the CWA and specific principles that the federal government must consider in making any jurisdictional determinations.

a. AGC Deems a ‘Case-by-Case’ Standard Unworkable

Following *Rapanos*, to establish that non-navigable water (including a non-navigable wetland) is a “water of the United States,” AGC believes that the agencies must measure and establish the nature of the non-navigable water’s connection to, and relationship with, traditional navigable waters. The agencies have not undertaken such a review in the past, and Chief Justice Robert lamented the “unfortunate” fact that, in the absence of any further guidance, “lower courts and regulated entities will now have to feel their way on a case-by-case basis.”⁸

Proceeding on a case-by-case basis is unacceptable to AGC. It would greatly increase the costs associated with processing permits and the days spent waiting for their issuance. As noted by Justice Scalia in the plurality opinion, the regulated community is already spending about \$1.7 billion annually to obtain CWA Section 404 discharge permits.⁹ (What is more, the study he cites in support of this figure does not appear to include either the costs or time associated with ascertaining whether the property in question is appropriately subject to federal jurisdiction under the CWA.¹⁰) Given the issues that *Rapanos* has raised, applicants are likely to suffer even longer delays and incur additional costs while trying to determine whether or not their property is subject to federal jurisdiction.

b. AGC Calls for Administrative Proceedings

AGC believes that the *Rapanos* decision seriously conflicts with EPA’s and the Corps’ current regulations on “waters of the United States”¹¹ and that the two agencies need to launch an immediate

⁷ *Id.* at 193.

⁸ Roberts, slip op. at 2.

⁹ Scalia, slip op. at 2.

¹⁰ Sunding & Zilberman, “The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process,” 42 *Natural Resources J.* 59, 74-76, 81 (2002).

¹¹ The existing CWA regulations define “waters of the United States” as follows:

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including such waters:
 - (i) which are or could be used by interstate or foreign travelers for recreational or other purposes;
 - (ii) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - (iii) which are used or could be used for industrial purposes by industries in interstate commerce;
- (4) All impoundment of waters otherwise defined as waters of the United States under the definition;
- (5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
- (6) The territorial seas;
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA are not waters of the United States.

effort to update those regulations. We agree with four of the Justices who specifically suggested a clarifying rule.¹² The Court's plurality noted "the immense expansion of federal regulation of land use that has occurred under the CWA—without any change in the governing statute—during the past five Presidential administrations."¹³ AGC urges Congress to instruct the Corps and EPA to issue new rules that adhere to the commonalities between Justice Scalia's plurality opinion and Justice Kennedy's concurrence.

AGC believes it is clear that Justice Kennedy's opinion establishes important limitations on the Corps and EPA's authority to regulate work in water and wetlands and identifies certain principles that the Corps must consider in determining whether non-navigable waters have the requisite nexus with traditional navigable waters, as follows—

- The federal government may no longer regulate non-navigable waters or wetlands based solely on their mere hydrological connection to a navigable waterbody.
- The federal government may not rigidly insist that an "ordinary high water mark" is the appropriate measure for identifying jurisdictional tributaries.
- The federal government may no longer consider all "connected" waters to be tributaries and may not automatically assert jurisdiction over any wetland "adjacent" to such connected waters.
- The federal government may no longer regulate "isolated" waters and wetlands.

In *Rapanos*, Justice Kennedy rejected the Corps' practice of asserting jurisdiction over any non-navigable water that has any hydrological connection to any navigable water. Justice Kennedy holds that to be jurisdictional, a non-navigable waterbody's relationship with traditional navigable waters must be "substantial."

[M]ere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood.¹⁴

Inappropriately, the government's principle test for jurisdiction has been any hydrological connection to traditional navigable waters. Based on the assumption that water flows downhill, the Corps has asserted jurisdiction over non-navigable waters without even considering how far they lie from navigable water, how frequently they carry water, or how much water they carry.

Now, to establish that a non-navigable water (including a non-navigable wetland) is a "water of the United States," it is apparent that the agencies must measure and establish the nature of the non-navigable water's connection to, and relationship with, traditional navigable waters. To illustrate this point, Justice Kennedy requires, for non-navigable wetlands, a showing that:

(8) Waters of the United States do not include prior converted cropland...

Different CWA regulations contain slightly different formulations of the definition. For simplicity's sake, these comments refer to the Corps' version at 33 CFR § 328.3(a). Other versions appear at, e.g., 40 CFR §§ 110.1, 112.2, 116.3, 117.1, 122.2, 230.3(s), and 232.2.

¹² *Rapanos v. United States*, 547 U.S. ___, slip op. at 25 (Kennedy, J. concurring); *Id.*, slip op. at 2 (Roberts, C.J. concurring); *Id.*, slip op. at 14 (Stevens, J. dissenting); and *Id.*, slip op. at 2 (Breyer, J. dissenting).

¹³ Scalia, slip op. at 3.

¹⁴ Kennedy, slip op. at 28.

[T]he wetlands, either alone, or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term, 'navigable waters.'¹⁵

Justice Kennedy also rejects the Corps' current approach to identifying "tributaries." Specifically, Justice Kennedy calls into question the Corps' use of "ordinary high water mark" (OHWM) as a measure for identifying tributaries. He starts by noting that the "Corps views tributaries as within its jurisdiction if they carry a perceptible 'ordinary high water mark.'¹⁶ Ultimately, he concludes that the current regulations, as applied by Corps, stray too far from traditional navigable waters:

[T]he breadth of this standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carry only minor water-volumes towards it—precludes its adoption as a determinative measure ... Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*.¹⁷

Justice Scalia was likewise unpersuaded by the Corps' treatment of "tributaries" and use of OHWM.¹⁸ Inappropriately, the Corps has been using the presence of an OHWM (which it defines in terms of physical characteristics, not ordinary flow) to claim federal jurisdiction over many ditches, dry desert drainages, swales, and gullies.

In addition, Justice Kennedy rejects the government's notion that the Corps may regulate all wetlands that are adjacent to all tributaries. Justice Kennedy's rejection of the Corps' tributary standard leads him also to reject the Corps' practice of regulating all wetlands that are adjacent to all tributaries. He finds that "[a]bsent more specific regulations, ... the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries."¹⁹ Justice Kennedy adds that the Corps "[t]hrough regulations or adjudication may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely..." to have a significant nexus to navigable waters.²⁰ He repeatedly cautions that "insubstantial," "speculative," or "minor flows" are insufficient to establish a "significant nexus."²¹

Inappropriately, the Corps' current definition of "adjacent" purports to allow the federal government to control all wetlands that are "bordering, neighboring, or contiguous" to any of the waters covered in

¹⁵ Kennedy, slip op. at 23.

¹⁶ 33 CFR 328.4(c); 65 Fed. Reg. 12,823 (2000).

¹⁷ Kennedy, slip op. at 24-25.

¹⁸ Scalia, slip op. at 6-9.

¹⁹ Kennedy, slip op. at 25.

²⁰ Kennedy, slip op. at 24.

²¹ Kennedy, slip op. at 22-24.

the regulation at Section 328.3(a)(1)-(7) (the seven categories of waters of the United States), including all tributaries, however defined.

Finally, Justice Kennedy confirms that nonnavigable, isolated, intrastate waters are not jurisdictional.²² This was the opinion of the Court in its 2001 decision in *SWANCC*.²³ Some interests have disputed this interpretation, claiming that such waters are beyond the scope of the CWA only where the only basis for asserting federal CWA jurisdiction is the use of such waters by migratory birds. But the Court in *Rapanos* clarified its previous decision. Under the plurality opinion in *Rapanos*, all isolated water and wetlands are clearly outside the authority of the federal agencies under the CWA. Justice Kennedy in his concurring opinion cites *SWANCC*'s "holding" that "nonnavigable, isolated, intrastate waters" are not "navigable waters . . ."²⁴

Following *SWANCC*, the Corps has continued to inappropriately regulate any water/wetland that is not isolated by claiming that all connected waters are tributaries.

In sum, Justice Kennedy's analysis in *Rapanos* calls into question the Corps' current regulations at 33 CFR Section 328.3(a)(5) (tributaries) and (a)(7) (adjacent wetlands). The definitions of "adjacent" at Section 328.3(c) and "ordinary high water mark" at 33 CFR Section 328.3(e) are similarly suspect. Further, Justice Kennedy is writing against the backdrop of *SWANCC*, in which the Supreme Court had previously rejected the "other waters" regulation at 33 CFR Section 328.3(a)(3).

VII. Corps/EPA Joint Guidance Not Enough

In 2008, the Corps and EPA jointly issued guidance on the extent of federal control over water and wetlands. The new interagency guidance, commonly called the "2008 *Rapanos* guidance," explains how regulators plan to exercise control over construction activities impacting wetlands, tributaries, and other waters, based on the Supreme Court's decision. The 2008 *Rapanos* guidance is intended to ensure that jurisdictional determinations and other relevant agency actions being conducted under the Section 404 program are consistent with the *Rapanos* decision. AGC joined with organizations representing the housing, mining, agriculture, and energy sectors to submit detailed comments on the 2007 draft version.

The 2008 *Rapanos* guidance generally builds upon the 2007 version, without substantial modifications. The revised 2008 guidance makes only three (3) noteworthy changes to the 2007 version (despite the fact that the agencies received 66,047 public comments on the draft). First, wetlands and waterways are subject to the CWA regime only if they have a relationship, or, in Judge Kennedy's words, a "significant nexus," to what the agencies call "traditional navigable waters" or TNW. The revised guidance clarifies that TNWs are broader than Rivers and Harbors Act Section 10 waters (33 U.S.C. 403), and also include (1) waters deemed to be navigable-in-fact by the courts, (2) waters currently being used for – or that have historically been used for – commercial navigation or recreation, (3) waters that are "susceptible to being used in the future for commercial navigation... [or] recreation"

²² Current regulations define "isolated waters" as those non-tidal waters of the United States that are (1) not part of a surface tributary system to interstate or navigable waters; and (2) not adjacent to such tributary waterbodies. 33 CFR § 330.2(e)(2005).

²³ *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

²⁴ Kennedy, slip. op. at 17.

when evidence of such use is more than "insubstantial or speculative." See 2008 *Rapanos* guidance page 5, footnote 20. AGC's comments on the 2007 guidance urged EPA and the Corps to better explain the concept of TNW. However, the agencies ultimately took a very expansive view of TNW (finding that commercial recreation is good enough), and the 2008 guidance directly conflicts with AGC's position that TNWs should be limited to the Rivers and Harbors Act waters.

Second, the revised guidance attempts to clarify what the Supreme Court meant when it required wetlands and waterways to be "adjacent" to federally-controlled waters to receive their own federal protection. Adjacent is defined in the Corps regulations at 33 C.F.R. § 328.3(c) and means "neighboring, bordering, or contiguous." The 2008 guidance interprets this to mean that wetlands are adjacent to traditionally navigable waters when there is a hydrologic connection, even if the connection is intermittent (a continuous surface connection is not required!); when the wetlands are separated from jurisdictional waters by formations such as man-made dikes or natural river berms; or when the wetlands' proximity to jurisdictional waters is reasonably close, based on an ecological interconnection. AGC is concerned that this new language will, in effect, unlawfully expand the regulatory definition of adjacent as it is applied in the field.

And finally, the 2008 guidance attempts to clarify the term "tributary flow," another issue the Supreme Court introduced in the *Rapanos* decision. The revised guidance modifies the process for assessing flow in tributaries (for purposes of determining whether a tributary is relatively permanent), indicating that where the downstream limit is not representative of the stream reach as a whole, "the flow regime that best characterizes the entire tributary" should be used. The 2007 version of the interagency guidance stated that the flow characteristics of a particular stream reach should be evaluated at the farthest downstream limit of the reach (i.e., the point the tributary enters a higher order stream). AGC commented that assessing flow at the downstream point is not the most appropriate approach to characterizing the entire stream.

The 2008 guidance is consistent with the 2007 version in specifying that a "significant nexus" analysis will assess the flow characteristics and functions of the tributaries and the functions of the wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters. A significant nexus determination includes consideration of hydrologic and ecologic factors. AGC argued that there needs to be actual data showing impacts to integrity of traditional navigable waters to establish a significant nexus, but the agencies chose not to modify the earlier guidance.

In addition, the 2008 guidance maintains the interagency procedure for reviewing and approving significant nexus-related jurisdictional determinations (JDs). A memorandum dated January 28, 2008, provides for a shorter, more efficient coordination process (than what was established by the 2007 *Rapanos* guidance) wherein the Corps districts act without EPA oversight. Specifically, when the Corps asserts CWA jurisdiction following a significant nexus finding, it notifies the appropriate EPA regional office. The EPA region then has 15 days to decide whether to make the final jurisdictional determination as a "special case," using a separate process in place since 1989. If EPA does not respond, the Corps will finalize the JD. AGC had expressed concern that the interagency coordination process outlined in the 2007 guidance was causing delays and recommended that coordination with EPA be ended altogether.

In its comments on the 2007 version of the interagency guidance, AGC expressed concern regarding delays in finalizing official JDs (i.e., "approved JDs") and implications of those delays for permitting decisions and timing of associated construction projects. AGC pointed out the processing delays caused by data-intensive approved jurisdictional determinations called for by Regulatory Guidance Letter (RGL) 07-01, which was issued as part of the 2007 *Rapanos* guidance. (RGL 07-01 required all CWA Section 404 applicants to obtain an "approved JD" for each water body impacted by a project, regardless of whether jurisdiction was contested.) In response, the Corps issued RGL 08-02, clarifying that project proponents may request a preliminary JD based on an "effective presumption of jurisdiction over all of the wetlands and other water bodies at the site," essentially allowing a project proponent to concede jurisdiction. RGL 08-02 is currently in effect and replaces RGL 07-01.

VIII. McWane Case

On December 1, 2008, the United States Supreme Court denied certiorari in an Eleventh Circuit case, *McWane Inc. v. United States*, 505 F.3d 1208 (11th Cir. 2007), the grant of which would have presented the Court an opportunity to reconsider jurisdictional determinations of "waters of the United States" under the Clean Water Act. AGC submitted a brief in support of the government's petition for writ of certiorari, asking the Supreme Court to clarify its decision on federal regulation of wetlands in *McWane*, and arguing that "the Corps and EPA need clear and administrable rules defining the scope of the CWA's coverage." The Supreme Court denied certiorari without comment. Notably, in the 2008 *Rapanos* guidance, the agencies continue to maintain their position that regulatory jurisdiction exists over a water body under the Clean Water Act, if either the plurality test or the Kennedy "significant nexus" test is met. The agencies recognize, however, that in the 11th Circuit (jurisdiction over federal cases originating in the states of Alabama, Florida and Georgia), the Kennedy standard is the controlling test and the sole method of determining CWA jurisdiction in that Circuit.

IX. Conclusion

AGC strongly opposes CWRA or similar legislation that would significantly expand federal jurisdiction under the CWA and pre-empt the administrative rulemaking the Supreme Court recommended and provided important direction for in *Rapanos*. The Administration has taken a first and necessary step by issuing joint Corps/EPA guidance. Rather than obstruct this effort, Congress should encourage and oversee a subsequent rulemaking to provide further and long overdue clarity to CWA jurisdictional issues involving waters and wetlands. Doing so will allow the regulated community to continue to deliver critical infrastructure projects in a timely and cost-effective manner, while protecting and enhancing the environment.

Thank you.

Statement by the

**NATIONAL CATTLEMEN'S BEEF ASSOCIATION,
PUBLIC LANDS COUNCIL and
ARIZONA CATTLE GROWERS' ASSOCIATION**

With regard to

The Clean Water Restoration Act

Submitted to the

United States House of Representatives - Committee on Small Business

The Honorable Nydia M. Velázquez, Chairwoman

The Honorable Sam Graves, Ranking Member

By

**Jim Chilton
Box 423, 17691 W. Chilton Ranch Road,
Arivaca, Arizona 85601**

July 22, 2009

**Testimony before the Committee on Small Business, U.S. House of Representatives
James K. Chilton, Jr.
July 22, 2009**

I am testifying on behalf of the Arizona Cattle Growers' Association, the Public Lands Council, the National Cattlemen's Beef Association and my family.

My name is Jim Chilton and I am a 5th generation Arizona rancher. My address is Box 423, 17691 W. Chilton Ranch Road, Arivaca, Arizona 85601. Arivaca is approximately 55 miles southwest of Tucson, Arizona in native mesquite and oak grassland grazed for over 300 years since the explorer priest Fr. Kino brought cattle ranching to the area. The north end of our 50,000-acre ranch is adjacent to the town of Arivaca and continues south to the international border with Mexico. The ranch includes private property, state school trust land leased for grazing since statehood, three federal grazing permits within the Coronado National Forest and a private land farm. I am very proud of my wife Sue Chilton, my two sons, my partner who is my brother, my father and mother and my ancestors and their contribution to the culture, economy, and strength of the State of Arizona.

We have been in the cattle business in Arizona for over 120 years preserving our western ranching customs, culture and heritage dating back to our pioneering ancestors who settled in Arizona Territory in the 1800's. Our multi-generational responsibility has given us a long-term view of the necessity to be excellent stewards of the grasslands and water resources we respectfully manage in Arizona.

National Cattlemen's Beef Association, Public Lands Council and Arizona Cattle Growers' Association Object to Immeasurable Expansion of the 1972 Clean Water Act

Arizona Cattle Growers' Association

The Arizona Cattle Growers' Association (ACGA) is the only professional organization solely dedicated to representing, educating, communicating and providing service to Arizona's beef producing families. ACGA represents over 950 members that raise over 970, 000 head of cattle on private, federal, and state trust land. Each year the Arizona cattlemen provide over 400 million pounds of beef and generate 3.2 billion dollars for Arizona's economy.

Public Lands Council

The Public Lands Council (PLC) has represented livestock ranchers who use public lands since 1968, preserving the natural resources and unique heritage of the West. Public land ranchers own nearly 120 million acres of the most productive private land and manage vast areas of public land, accounting for critical wildlife habitat and the nation's natural resources. PLC works to maintain a stable business environment in which livestock producers can conserve the West and feed the nation and world.

National Cattlemen's Beef Association

The National Cattlemen's Beef Association (NCBA) has represented America's cattle producers since 1898, preserving the heritage and strength of the industry through education and public policy. As the largest association of cattle producers, NCBA works to create new markets and

increase demand for beef. Efforts are made possible through membership contributions. To join, contact NCBA at 1-866-BEEF-USA or membership@beef.org.

The Proposed Clean Water Restoration Act (CWRA) gives the Army Corps of Engineers (“Corps”) and the Environmental Protection Agency (“EPA”) control over all watersheds in the nation. Since all land in the nation is within a watershed it means that the Corps and EPA would have land use control over farmers’ and ranchers’ property and other businesses not currently under the jurisdiction of the 1972 Clean Water Act. Water for grazing, farming, cattle and wildlife is absolutely essential to life, to economic production, and to the conservation of our ranching heritage. Consequently, bureaucrats would control the lives and land use of farmers’ and ranchers’ private land and grazing permits on State, Indian and Federal lands and therefore control peoples’ lives.

Not only does the expansion of the Clean Water Act threaten farmers and ranchers across the nation, but it affects small businesses, small communities, forestry, mining, manufacturing and all productive uses on private, State School Trust, Native American, and federally-managed lands. In fact, the proposed expansion of Federal jurisdiction would include hundreds of millions of isolated, intrastate pools, stock water ponds, springs, small lakes, depressions filled with water on an intermittent basis, drainage and irrigation ditches, irrigated areas that would otherwise be dry, sloughs, and damp places located on farms and ranches that have NO nexus with any navigable waters.

CWRA expands the current Corps and EPA jurisdiction to all waters within the United States and importantly to “activities affecting these waters.” What life activity does NOT affect at least your own water in some way? Therefore, the proposed Act is essentially a limitless national land and water use control effort that will regulate every activity in a wet area in the nation without requirement that it be connected in any way to a navigable water. Bureaucrats driven by private agendas will be empowered to impose their views and appealing their decisions will be costly and usually prohibitive in time, money, and national productivity. Bureaucrats will control citizens rather than citizens controlling government. Unfortunately, activists employed by federal agencies are already aware that they can freely interpret federal regulations to favor their personal philosophy. This *de facto* license results in a form of tyranny that supplants the rule of law. Every State will essentially have a federal land and water use Czar operating with dozens of powerful bureaucrats who control the very water we need to survive.

We believe the Clean Water Restoration Act is a “nice-sounding” name which masks an economically and culturally devastating power grab. It flagrantly violates both the spirit and the words of the U.S. Constitution. In fact, the Bill would effectively devalue private property without just compensation. Even worse, it will make law abiding citizens feel victimized and robbed without realistic remedy because appeal of arbitrary and vindictive rulings will be beyond the means of most citizens.

The Cost in Time and Money to Obtain a Permit

It makes no sense to require a family rancher or farmer to get a permit from the EPA or Corps before they can utilize their property or continue to water their cattle and farm their land. This is especially true given the fact that the federal government is already struggling to handle a backlog of 15,000 to 20,000 existing permit requests. As the United States Supreme Court has recognized, "The average applicant for an individual Clean Water Act permit spends 788 days and \$271,596 in complying with the current process and the average applicant for a nationwide permit currently spends 313 days and \$28,915 - not counting the substantial costs of mitigation or design changes." Rapanos, 447 U.S. at 719 (plurality opinion). The culturally unique ranchers of the United States own and manage approximately 666.4 million acres of the 1.938 billion acres of the contiguous U.S. land mass. They rely on considerably more land than any other segment of agriculture and any other industry. In addition to raising livestock, they and American farmers grow hay, feed grains, food grains, fiber, fruits and vegetables. Passing this Act will be another serious wound to American family agricultural productivity.

The proposed language change, removing the word "navigable" from the present Constitutional limitation upon control of the "Waters of the United States," would also constitute a direct attack on the heritage of the western pioneer ranching culture and ranching in every part of the United States. Congress must be aware that just deleting one small word is such a clever weapon of mass destruction. I'm sure the proponents of that change hoped it would escape unnoticed: so minor, so camouflaged in a nice-sounding name. But we do take notice and are entirely aware of the potential of that weapon to increase costs and delay production. Those delays and those costs may drive more farmers and ranchers over the financial edge and further arm those activists who seek to destroy the ranching and farming culture.

Personal Experience with Obtaining a 404 Permit from the Corps

Prior to the Supreme Court's Rapanos decision, our family ranch had to apply for a 404 permit to construct a road across a wash that is dry almost 100% of the time. The regulatory approval process, which necessitated hiring attorneys and environmental consultants, cost about \$40,000. All we wanted to do was cross a dry wash on our legal right of way so that we could have legal access to 240 acres of our private property. The process took over a year. We then abandoned another project that would have required culverts in two other dry washes on an existing ranch road after concluding from our prior experience that seeking a 404 Corps permit was too expensive in time and money. Keep in mind that this is private property I am talking about in an area in which dry washes are often no more than a few hundred feet apart. It is impossible to traverse your own land without crossing a low place in our hilly terrain. Furthermore, no water on our ranch drains into a navigable river since it all disappears into the desert sand.

The requirement to obtain a 404 permit (prior to the U.S. Supreme Court Rapanos decision) in a dry desert grassland seemed totally irrational. It was the grotesque expansion of regulatory jurisdiction and bureaucracy beyond rational comprehension. Specifically, our attorney and environmental consultants informed us that our request for two culverts in two dry washes (that only have water briefly two or three times a year for less than 12 hours) would trigger the need

for a 404 permit based on the fact that both washes had sand in the bottom greater than one foot and that the cumulative impact would be slightly more than 1/10th of an acre in a 100-acre pasture. Therefore, the dry washes (each with sand about two feet from one side of the dry wash to the other side) activated what our consultants believed to be Navigable Stream provisions of the 1972 Clean Water Act. It is laughable or enough to provoke anger, to think of these desert washes as “navigable” waters of the United States.

I asked, how can these two dry washes impact in any way a navigable stream since the nearest navigable stream is the Colorado River about 275 miles away? The two small dry washes unite with another small dry wash that joins another dry wash that is a tributary to the last connected dry wash that disappears in the desert approximately 40 miles from where I wanted to install two culverts. The Brawley never reaches even a dry river bed. In a rare big storm the wash has water for less than a day before it spreads out in the desert and all of its water evaporates or sinks into the sand.

Observations on the Difficulty of Obtaining a 404 Permit

In addition to my own frustrating and costly experience with obtaining permits on my private land, I have reviewed the onerous, expensive and time consuming process home builders have to navigate to obtain a 404 permit from the Corps. The Corps rules and regulations are nearly impossible to understand by an ordinary citizen or small business entrepreneur. As a consequence, due to the complex bureaucratic legalese, homebuilders need to hire specialist attorneys and/or environmental consultants to plot a course through the complicated paper work. It is simply not acceptable to require family ranchers, farmers and other small businesses to hire expensive legal and environmental experts to conform to the requirements of a dramatically expanded Clean Water Act. Furthermore, few small private businesses can hold out on needed improvements for years while the wheels of agency compliance slowly review and then turn out the required documents.

The average private citizen has no timely recourse against the well-placed activists inside the Federal agencies. Regulators have real power over the lives of citizens. Most officers of the United States do their best to be objective, to fulfill their duties and not to be arbitrary or capricious. However, I have personally experienced assaults from environmental activists within federal agencies. It is nearly impossible for a citizen to fight a powerful bureaucrat who has a private anti-agriculture or anti-land use agenda. The more complex and far reaching the law is with complicated, rules, regulations and policies, the greater the opportunity for abusive bureaucratic behavior.

Hypothetically, a federal officer might not like a rancher, farmer or other business person and/or personally object to the nature of the business. A rogue Corps officer may dilly, dally and delay forever. Worse, a Corps employee may arbitrarily demand environmental mitigation in exchange for a permit. Since mitigation is often in the form of money or land, who gets the money or who gets the land? Is it fair or equitable for a small business person to be required to finance environmental organizations in exchange for a permit? Clearly, the power to deny

permits can provide nearly unchecked independence to a federal officer who chooses to exercise a form of tyranny over fellow citizens.

Should Congress Expand Burdensome Regulation During a Recession?

We ask, how, during a severe recession when the economy is struggling to recover, Congress can justify adding an enormous burden to American agricultural production by adopting the CWRA in the absence of tangible benefit? What will be the cost of the Act to the American economy? What will be the impact of an additional attack on the American ranching culture? How can the family rancher, farmer and small businessman survive this extra regulatory cost in time and money? How will the additional regulatory burden impact food prices, the consumer and the standard of living for Americans? How will this nation be able to meet the growing demand for locally-produced food that doesn't require transportation from distant regions and other continents? How will American livestock producers compete with other livestock producing countries? How much more of our food will have to come from imports? What will the impact be on exports of our products and the U.S. balance of payments? How many bureaucrats will need to be hired and what will it cost to pile these additional regulatory burdens on American citizens? Isn't it both wise and fair to have answers to these important questions prior to putting more chains and shackles on American livestock producers?

Enacting a new Standard for Federal Jurisdiction will Increase Litigation

It will take years to litigate the constitutionality of CWRA. Furthermore, 40 years of settled law will be trashed. Vast amounts of time and money will be diverted from production to a brand new legal treasure trove of litigation while citizens wait years to determine what the courts will conclude about what they can or can not do on their own land.

Importantly, the shift of both land use control and water regulation and water rights to the federal government from the States is a long-term change in the nature of the United States government. The legal and policy issues raised by this systemic departure from our nation's founding principles affect the basic concept of Federalism and settled law. Why would a State want to transfer its jurisdiction over local water and land use and cede *de facto* local zoning authority to the Federal Government? Citizens of small towns in rural agricultural areas far from navigable waterways will no longer be free to shape their future through their local land use. Their choices will be effectively subject to the veto of an unelected federal permitting officer.

All small businesses, farmers and ranchers will face the possibility of citizen suits by radical activists whose obstructionist philosophies will be financed by productive taxpayers under the Equal Access to Justice law. Those who make their living from the cottage industry of filing suits against the government will be delighted with the proposed changes to the Clean Water Act. These changes constitute an effective transfer of public money to activists who oppose American production. How can small businesses, farmers and ranchers defend themselves when a radical activist group cleverly files suit against the Federal Government's issuance of a permit while actually targeting the small business, the farmer or rancher?

It is difficult and costly even to gain intervenor status. The activists submit arguments to the court advocating denial of your right to even make your case. I have spent hundreds of thousands of dollars from my retirement savings intervening in lawsuits filed by radical activist environmental groups against the Forest Service in which I was actually the target. They tried time and again to eliminate grazing on my federal grazing allotments by requesting injunctions or denial of historic permit renewals. I am not alone. Other western ranchers have either had to fight this costly battle or sell out their heritage and cease production.

The remedy the activists usually request is an injunction against grazing or other productive activity essential to the livelihood and economic health of the individual and the community during the years it takes to resolve the suit. The activists chalk up a home run from the start by imposing costs and delays. These costs and delays are paid for directly by the producer and the taxpayers and later by the American consumer.

Producers usually have to try to intervene to help the Federal Government defend itself because the government interest may not be exactly the same as the producer's interest. Often someone in Washington DC charged with handling the case may decide not to defend the agency and the urban lawyers defending the government may not clearly understand the implication of serious issues affecting agriculture. The government has a record of advancing its own political agenda, settling these lawsuits, giving the activists what they want, and then using taxpayer dollars to pay the activists for their obstructionism under the Equal Access to Justice Act. This is already the situation. How much more will the proposed virtually limitless expansion of the jurisdiction of the Corps and EPA cost farmers, ranchers and other individuals and business to defend themselves over time?

Respect for Private Property

The proposed expansion of regulatory jurisdiction is a covert attack on private property rights fundamental to this nation. Private property is the bedrock of American productivity and the best hope for conservation of natural values. The right to hold and use private property is the most powerful tool for motivating human ingenuity to improve landscapes. Free people, vested with the security of private property and the rule of moral law, have natural incentives to enhance the value of land that belongs to them. An improving natural world order occurs because of freedom, not in the absence of freedom. And as George Washington said, "private property and freedom are inseparable."

Conclusion

Current law gives federal bureaucrats the authority to regulate wetlands associated with "navigable waters." If any non-navigable water needs to be protected by federal law, the specific water that needs protection should be identified and a rational solution should be found for the specific problem.

Farmers and ranchers believe that our nation's water is precious. The cost and scarcity of water inherently lead us to use it conservatively and scientifically for productive purposes. Livestock producers agree that we need to continue to protect the quality of our Nation's surface and ground water, but no expansion of federal jurisdiction is necessary to accomplish this goal. Federal agencies have ample authority under existing law to protect water quality. It is essential that the partnership between the federal and state levels of government be maintained so that States can continue to have the essential flexibility to do their own land and water use planning. Chairman Oberstar's attempt at usurping authority over these issues by vastly expanding federal jurisdiction must be halted by responsible congressional action.

Testimony before the House Small Business Committee
Bob Gray
Executive Director
Northeast Dairy Farmers Cooperatives
July 22, 2009
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 statues 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.



Advancing the water, sewer, gas and telecommunications construction industries

Written Testimony
by

Lyle Schellenberg
President, Armadillo Underground, Inc.
&
President,
National Utility Contractors Association

before the

House Committee on Small Business

addressing

**“Meeting the Needs of Small Business and Family Farmers in
Regulating our Nation’s Waters”**

July 22, 2009

NATIONAL UTILITY CONTRACTORS ASSOCIATION

4301 North Fairfax Drive • Suite 360 • Arlington, Virginia 22203-1627 • Phone: 703-358-9300 • Fax: 703-358-9307 • www.nuca.com

Madam Chair, Ranking Member Graves and honorable members of the Committee, my name is Lyle Schellenberg. I am the president of Armadillo Underground, Inc. in Salem, Oregon. We have 15 employees who engage in trenchless excavation, auger boring and tunneling activities on water, sewer and other infrastructure projects throughout the state.

I appreciate the opportunity to participate in this hearing on behalf of the National Utility Contractors Association (NUCA), which is a family of construction companies, manufacturers and suppliers from across the nation that builds, repairs and maintains underground water, wastewater, gas, electric and telecommunications systems.

NUCA is pleased to be able to offer the perspective of small construction companies, a large number of which would be harmed if the Clean Water Restoration Act (CWRA) in its present form were to pass into law and be implemented.

VAST EXPANSION OF CLEAN WATER ACT JURISDICTION

As currently written, the CWRA (S. 787) would remove the term “navigable” from the Clean Water Act and allow the Army Corps of Engineers (Corps) and Environmental Protection Agency (EPA) to regulate all “waters of the United States.” NUCA’s fundamental concern with this legislation is that instead of providing greater clarity, it will lead to: bigger government, increased permitting requirements for wet areas with little or no impact on the nation’s waters, higher compliance costs, and inevitably, significant increases in litigation. At the same time, desperately needed water and wastewater infrastructure projects could be delayed by increased permitting requirements, even if they had no link to rivers, streams or other “navigable” water bodies.

Under current law, if a potential jobsite is considered a wetland under federal jurisdiction, a contractor must obtain not only a federal wetlands permit (also known as a Section 404 permit), but also protection—in the form of contract clauses and insurance—against any potential environmental problems. Giving the Corps and the EPA additional jurisdiction over all wet areas and activities affecting those waters—potentially including construction jobsites themselves—will undoubtedly increase the time and cost required to complete every construction project requiring a Section 404 permit. Many in the regulated community have indicated that passage of the CWRA would be the largest expansion of the CWA since it was enacted in 1972.

Frankly, the potential ramifications of this bill are alarming. As written, boundaries of CWA jurisdiction would be removed. Enactment would immediately subject to federal CWA permitting requirements ditches, water and sewer pipes, streets, gutters, man-made ponds, storm water basins, streets and gutters, even puddles of rainwater. For the first time in the 37-year history of the CWA, activities that have no impact on legitimate American waters would be subject to full federal regulation. Indeed, by applying the Act to “all interstate and intrastate waters,” S. 787 leaves no water unregulated, not even dry land with standing water following a wet weather event. Consequently, the bill would greatly complicate the range and number of activities that require permits – affecting a broad range of small businesses, farmers and ranchers, builders of homes, roads, highways, and our environmental infrastructure. Commercial development, energy

development, and a broad range of those who engage in manufacturing would also be subject to these unnecessary and harmful new requirements.

Indeed, expanding CWA authority in this manner would delay and increase the cost of the projects needed to improve the nation's public and private infrastructure and by extension the American economy. Improvements to drinking water and wastewater infrastructure, highways, bridges, mass transit facilities, airports, schools, and other imperative infrastructure would be delayed or possibly eliminated at a time when we simply can't afford it.

BOTH "WATERS" AND "ACTIVITIES" UNDER THE MICROSCOPE

The crux of our opposition to the CWRA is that it would provide for a vast expansion, not "restoration," of the jurisdiction provided in Clean Water Act. The legislation would grant sweeping new authority to the federal government with little deference to state and/or local governments. While some are touting the current legislation as a "compromise," it in fact falls far short of an acceptable solution.

In its current form, S 787 would not just adopt the current definition of "waters of the United States" in existing regulations. The bill would expand the scope of federal jurisdiction under the Clean Water Act to *all* waters, and *all* activities affecting those waters. Neither current law nor existing EPA and/or Army Corps regulations provide for this.

In brief, the legislation seeks to eliminate the traditional basis for federal jurisdiction under the CWA by deleting the term "navigable" from the statute. Because the limits of federal jurisdiction have not been defined by Congress, exactly what the limits in authority might be under the legislation is unknown. Inevitably, the only winners in this scenario would be the countless attorneys who would inevitably engage in endless litigation as all stakeholders seek to make their case in court.

The Senate legislation provides that all interstate and intrastate waters, including "intermittent streams" and "tributaries," would be covered. Because nothing in current law or regulations (before landmark legal challenges) provides for "all waters" to be subject to CWA requirements, these terms allow regulators and third parties to declare jurisdiction over ditches, municipal storm drains, groundwater and desert washes that carry water only a few hours a year. Let me say that again, but with a slightly different twist. Since the term "waters" itself remains undefined and without limitation, virtually *any* wet area could be found to meet the definition of a jurisdictional water. A court case involving jurisdiction over a puddle sounds ridiculous, but is theoretically possible under the proposed legislation. The point I'm making is that if the legislation does not define its terms with precision and clarity, the courts will be forced to at the taxpayer's expense.

Additionally, the so-called "compromise" would most certainly disrupt the balance between federal and state authority that is expressly provided for in the CWA. The CWA's recognition that states should retain the authority to make decisions about their own water resources would be completely upended by the current legislation.

And finally, the so-called “compromise” would grant EPA and the Corps authority over all “activities affecting these waters,” without any reference to whether the activities were public or private and whether or not they actually add pollutants to the water.

ECONOMIC BENEFITS COME WITH UNDERGROUND UTILITY CONSTRUCTION

Since the economic downturn, the water infrastructure market has gone from bad to worse. In addition to cuts in federal funding to refurbish America’s water and wastewater infrastructure, state budgets have been hit hard because of the downturn in the housing market, which in turn has lowered revenues from property taxes. The most recent job-loss numbers released by the U.S. Department of Labor’s Bureau of Labor Statistics (BLS) in June indicated that 1.6 million construction workers are out of work and that the current unemployment rate for the construction industry is more than 17 percent. In June alone, 79,000 construction jobs were lost, marking the 24th consecutive month with significant job loss in the construction industry. In all, 1.3 million construction jobs have been lost since the start of the recession. In light of those statistics, a “do no harm” approach to water regulation would be sound public policy.

NUCA serves as managing member of the Clean Water Council (CWC), a coalition of 35 national and international construction organizations that work collectively to expand the water, wastewater and storm water infrastructure markets. The CWC recently released the findings of a study on the economic impacts that accompany funding for water and wastewater infrastructure projects. The study, *Sudden Impact: Assessment of Short-Term Economic Impacts of Water and Wastewater Projects in the United States*, conclusively demonstrates that the construction of these projects creates significant, immediate economic benefits, including considerable job creation, increased demand for goods and services, rise in personal income and the generation of state and local tax revenue.

Specifically, the study shows that a \$1 billion investment in water and wastewater infrastructure results in the creation of up to some 27,000 new jobs (with average annual earnings for the construction portion of the jobs at more than \$50,000), total national output (i.e., demand for products and services in all industries) of between \$2.87 and \$3.46 billion, and generation of personal or household income of between \$1.01 and \$1.06 billion. Each \$1 billion invested also generates approximately \$82.4 million in state and local tax revenue.

The study also underscores the “ripple effect”—that is, how this investment impacts industry sectors outside of construction. Each \$1 billion invested in water and sewer projects generates measurable national employment in 325 other standard industry classifications. In fact, a \$1 billion investment results in the hiring of at least 100 workers in 25 industry segments outside of construction, including retail markets, wholesale trade, real estate, insurance carriers, health care, food services, and accounting, just to name a few.

Recognizing the potential for recovery in the underground environmental infrastructure industry, Congress should be looking to expand market opportunities, not stifle them.

Impacts on State / Local Governments

The harmful impacts on passage of the current CWRA do not end with the construction industry. In fact, they extend from the private to the public sector. The expansion of the CWA's jurisdiction would unnecessarily burden local, state and even the federal government. For example, it is clear that the legislation would impose new and burdensome administrative responsibilities. As always, new federal requirements without the necessary resources to implement and comply with them constitute little more than additional unfunded mandates on states and localities at a time when revenues are scarce and infrastructure needs are skyrocketing.

As an example, states would be required to adopt water quality standards, monitor and report on the quality of those waters and ensure compliance with those standards, including compliance with new requirements for "activities affecting these waters." While all the specific consequences might be difficult to determine, there is no doubt that they would be dramatic in the negative sense. At the very least, a large number of public infrastructure projects would suddenly be at risk of delay. Nothing in the bill suggests that this or any of the other factors I've enumerated have been adequately considered.

CONCLUSION

Any public works contractor will tell you that the current process for obtaining a federal Sec. 404 permit is no cake walk. A significant backlog of permit requests already exists—15,000 to 20,000 such requests, each with an expected wait time of two- to three-years to obtain one. At the very least, the proposed legislation would require big increases in the resources needed to comply with the federal permitting process just to keep up with the increase in demand, much less get rid of the backlog. No such resources are provided for in the legislation. Again, this will only serve to delay critical infrastructure projects, increase costs and stifle economic growth. Local government officials are in fact already saying that there simply are no funds available to comply with another complex, ambiguous and invasive regulation.

NUCA looks forward to continuing its long tradition of working with Congress to find ways to protect waters and wetlands for the benefit of the environment and future generations and, at the same time, not unduly hinder the utility construction industry from providing the essential infrastructure that helps sustain our quality of life. A better definition of "waters" is needed, along with a more thorough evaluation of what activities should be regulated. Without such definition and evaluation, the consequences of the CWRA as currently written will be disastrous, even if unintended.

I thank you for the opportunity to appear before the Committee today, and I look forward to answering any questions you may have.

Rep. Kathy Dahlkemper Statement on Clean Water Act

The Clean Water Act was a landmark piece of legislation that aimed to preserve and protect the health of our nation's waterways. More than 30 years after the enactment of the 1977 Amendments to the Clean Water Act, it stands out as one of the best examples of environmental stewardship of this country.

Clean water is essential for the health of both animals and humans. Clean streams and wetlands preserve wildlife habitats, absorb flood waters and replenish our drinking supplies in times of drought. Healthy streams and wetlands are also a boon to certain industries as they support recreational activities such as hunting, fishing, birdwatching and boating.

Unfortunately, the *SWANCC* and *Rapanos* Supreme Court decisions turned back the clock on this important law. Both decisions significantly limited the scope of the Clean Water Act by focusing on a very narrow interpretation of the term "navigable waters." Prior to these rulings, the term "navigable waterway" was broadly interpreted by the Environmental Protection Agency to include areas connected to or linked to water via tributaries or other similar areas. Congress's intent in passing the Clean Water Act was "to restore and maintain the chemical, physical and

biological integrity of the Nation's waters," not to enhance the floatation of boats moving cargo in commerce.

Commonsense legislation like S. 787 restores the Clean Water Act protections prior to the *SWANCC* and *Rapanos* Supreme Court decisions. By deleting the term "navigable" from the legislation, Congress restores our decades old effort to protect the nation's waterways from pollution, rather than just sustaining the navigability of waterways.

**UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON SMALL BUSINESS
“MEETING THE NEEDS OF SMALL BUSINESSES
AND FAMILY FARMERS IN REGULATING OUR
NATION’S WATERS”
HEARING HELD JULY 22, 2009**

**TESTIMONY FOR THE RECORD
SUBMITTED ON BEHALF OF
NATURAL RESOURCES DEFENSE COUNCIL
IZAAK WALTON LEAGUE OF AMERICA
SIERRA CLUB
NATIONAL WILDLIFE FEDERATION
TROUT UNLIMITED
EARTHJUSTICE**

Chairwoman Velazquez and Ranking Member Graves:

Our organizations respectfully submit this testimony and attached materials for the record of your recent hearing titled “Meeting the Needs of Small Businesses and Family Farmers in Regulating our Nation’s Waters.” We share the Committee’s desire to avoid undue burden on small businesses, but our perspective on the importance of restoring Clean Water Act protections to water bodies around the country is significantly different than the assortment of opponents of restoration from whom the Committee heard testimony on July 22. We strongly believe that clean water benefits small business, and that the legal uncertainty surrounding the nation’s waters threatens clean water. That is why we, unlike the several hearing witnesses last week, agree with numerous other organizations and the Obama administration that Congress must act to fix the Clean Water Act.

There is one thing on which many people on all sides of this issue can likely agree – because of the Supreme Court’s *SWANCC* and *Rapanos* decisions, the current Clean Water Act program is in disarray, and the lack of clarity hurts small business. For example, testifying on behalf of the Associated General Contractors of America, Mr. Pebley said that the law’s “contours are far from certain, and the uncertainty has become a great burden for AGC members to bear.”¹ Similarly, in asking the Supreme Court to review an Eleventh Circuit decision holding that only the “significant nexus” standard from *Rapanos* can be used, the United States observed, “within the Eleventh Circuit alone, approximately 28,215 additional hours of agency time would have been expended if the Corps had been required (as it now is under the court of appeals’ decision in this case) to make all formal jurisdictional determinations under the ‘significant nexus’ standard. That, in turn, will burden the regulated community by increasing the time and costs associated with obtaining a Section 404 permit.”²

The real question therefore is not whether the law should be clarified – it must be – but rather what kinds of water bodies the law should clearly protect. Unfortunately, while the Committee heard testimony suggesting it would be proper to restrict coverage for various water bodies, it did not hear from any witness that indicated support for reinstating the same protections that existed prior to the Supreme Court’s recent opinions. Mr. Pebley, for instance, contended that the law today could not protect so-called “isolated” waters and wetlands, and indicated support for an administrative rulemaking that would codify that restriction.³ Mr. Chilton likewise suggested that it was “laughable” to cover certain tributaries that lack regular flow, given the current law’s use of the word “navigable.”⁴

Our organizations strongly believe that the law must broadly protect water bodies. Feeder streams, inland lakes and wetlands, and seasonal waters help maintain the integrity of other waters, and also have significant value in their own right; they can filter pollution, store

¹ Statement of Trey Pebley, Vice President, McAllen Construction, Inc., on behalf of the Associated General Contractors of America, at 3 (July 22, 2009).

² Petition for a Writ of Certiorari, *U.S. v. McWane, Inc.*, at 30 (Aug. 2008).

³ Statement of Trey Pebley at 7-8.

⁴ Statement of Jim Chilton, on behalf of the National Cattlemen’s Beef Assoc., Public Lands Council & Ariz. Cattle Growers Assoc., at 5 (July 22, 2009).

flood waters, provide habitat for fish and other wildlife, and replenish drinking water supplies. Accordingly, when the Senate considered significantly rolling back the scope of the Act's restrictions on the discharge of dredged or fill material in 1977, that effort was rejected, and members of both parties spoke in support of an inclusive scope for the law:

- Senator Baker: "Continuation of the comprehensive coverage of this program is essential for the protection of the aquatic environment. The once seemingly separable types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource."⁵
- Senator Chafee: "I think it is important to bear in mind that marshes and wetlands are not a parochial responsibility or an asset; they are not a local asset; they are a national asset. They are not just confined within boundaries which happen to exist for any one of our States. *** The wetlands perform a vital part of the food chain for our wildlife. *** I should like to stress that these wetlands are not something that belong to Louisiana or Rhode Island or Michigan or Minnesota. They belong to all the citizens. They are much too valuable to be abandoned to some unstable, fragmentary kind of protection. We must bear in mind that these wetlands are part of this larger system. They are not independent. They do not belong only to Minnesota, so that if Minnesota wants to fill them in, it is too bad for the Nation. We have to remember that it affects everything else downstream. There is a linkage between wetlands and streams and estuaries and rivers, and they all must live in harmony, through wise management."⁶
- Sen. Hart: "The Congress can capitulate. The Congress can abandon the national interest. The Congress can permit activities of a dredge-and-fill nature to go forward on those small streams, marshes, wetlands, and swamps which will make their way into the bigger waterways of this country and have a tremendous adverse effect on the people of this country and on their welfare, on their crops, on many of their activities. Or we can establish a program of the sort the committee has established, which will protect all of those water systems; which will protect all of the elements of those systems, which will not permit dredge and fill activities to deposit very toxic materials into those waterways."⁷

Support for a comprehensive approach is strong today as well. Recently, the heads of the White House Council on Environmental Quality, the Environmental Protection Agency, the Army Corps of Engineers, the Department of Agriculture, and the Department of the Interior wrote that "a clear statement of Congressional intent is needed" with regard to the scope of the law, and laid out a set of principles for legislation (attached).⁸ The administration stressed that "[i]t is essential that the Clean Water Act provide broad protection of the Nation's waters,

⁵ Senate Committee on Environment & Public Works, A Legislative History of the Clean Water Act of 1977, Committee Print No. 95-14, 95th Cong., 2d Sess., at 922 (October 1978)

⁶ *Id.* at 917 & 919.

⁷ *Id.* at 908.

⁸ Letter from CEQ Chair Nancy Sutley, EPA Administrator Lisa Jackson, Acting Assistant Secretary of the Army (Civil Works) Terrence Salt, USDA Secretary Tom Vilsack & DOI Secretary Ken Salazar to Barbara Boxer, Senate Environment & Public Works Committee Chairman, at 3.

consistent with full Congressional authority under the Constitution. All of the environmental and economic benefits that these aquatic ecosystems provide are at risk if some elements are protected and others are not.”⁹

The Senate Environment and Public Works (EPW) Committee recently considered S. 787, the Clean Water Restoration Act, a bill clarifying and re-establishing historic protections under the law. The Committee strongly endorsed a substitute amendment that specifies that the definition of “waters of the United States” must be read consistently with interpretations prior to *SWANCC*, and that codifies two administrative exemptions from the law. A number of organizations wrote to indicate their support. Attached are that amendment and several letters of support.

The attached materials reveal that representatives of public works, farming, recreation, and state interests believe that the Clean Water Act should be restored and will not place undue burdens on their work, contrary to what one might believe after reading the testimony from last week’s hearing. For instance:

- Whereas Mr. Schellenberg’s testimony for the National Utility Contractors Association to your Committee suggested fixing the law could delay important infrastructure improvements,¹⁰ the American Public Works Association contends that the EPW compromise “will return much needed clarity, consistency, predictability and a sense of fairness to implementation of the CWA and allow essential local government infrastructure projects to move forward without additional delay and uncertainty.”¹¹
- Whereas Mr. Kruse’s testimony for the American Farm Bureau Federation and Mr. Chilton’s testimony for the Arizona Cattle Growers’ Association, the Public Lands Council, and the National Cattlemen’s Beef Association both suggested that fixing the law could intrude on farmers’ and ranchers’ land use,¹² the National Farmers Union says that “[a] clear and concise method of determining jurisdiction would allow farmers and ranchers to continue to be proactive stewards of all environmental resources,” and urged the adoption of the EPW compromise “in order to restore the original intent of the CWA, minimize costly litigation, and expedite the permitting process for agricultural producers.”¹³ In addition, farmer Ray McCormick writes that “[w]e need to step up and be the best land and water stewards in the country. The CWA and the CWRA already has an exemption for normal agricultural practices and operations, including on

⁹ *Id.* at 2.

¹⁰ Statement of Lyle Schellenberg, President, Armadillo Underground, Inc. & President, National Utility Contractors Assoc., at 4 (July 22, 2009) (“a large number of public infrastructure projects would suddenly be at risk of delay”).

¹¹ Letter from Noel Thompson, President, American Public Works Assoc., to Senator Max Baucus, at 1 (June 15, 2009).

¹² Statement of Charlie Kruse, President, Missouri Farm Bureau, on behalf of American Farm Bureau Federation, at 5 (July 22, 2009) (“If the word ‘navigable’ is removed from the CWA, and if the Corps and EPA are allowed to use an overly-broad interpretation of the term ‘waters of the U.S.,’ many more farmers and ranchers will be caught in [a] . . . regulatory quagmire, with virtually no perceivable environmental benefit.”); Statement of Jim Chilton at 3 (“bureaucrats would control the lives and land use of farmers’ and ranchers’ private land and grazing permits on State, Indian, and Federal lands and therefore control peoples’ lives”).

¹³ Letter from the Nat’l Farmers Union Board of Directors to Senator Max Baucus, at 1 (June 17, 2009).

prior converted cropland, so it won't impact us anymore than prior to the Supreme Court decisions."¹⁴

- Whereas Mr. Gray's testimony for the Northeast Dairy Farmers Cooperatives alleged that fixing the law could "upset[] the balance between state and federal authority that is expressly states [sic] in the CWA,"¹⁵ the Association of Fish & Wildlife Agencies, the Association of State and Interstate Water Pollution Control Administrators, the Association of State Floodplain Managers, the Association of State Wetland Managers, the Coastal States Organization, and the Environmental Council of the States say "we believe that the [EPW] compromise language's reliance on the previous regulatory definition and interpretations of it neither broadens or lessens federal authority, nor causes a loss of states' rights."¹⁶
- Whereas Mr. Pebley argues that fixing the law could lead to new regulation of groundwater,¹⁷ the National Ground Water Association believes that the EPW compromise "is a major step forward in adding clarity to the topic, including the continued treatment of ground water separately for purposes of the Clean Water Act; as neither 'Navigable Water' nor 'Waters of the United States.'" The Association goes on to say that the compromise "spell[s] out clearly for all that the Congressional intent is to apply the same comprehensive approach to protection of 'Waters of the United States' as was provided prior to the *SWANCC* and *Rapanos* court decisions."¹⁸

Restoring historic protections will help safeguard the economic value that water bodies provide. For example, Ducks Unlimited reports that "[o]ver 12.5 million Americans hunt every year and waterfowlers in particular have a significant annual economic impact of \$2.3 billion on the nation's economy."¹⁹ Eric Hirzel of Hirzel Canning Company and Farms in Ohio says that, "[a]s a farmer and processor, clean water is vital to my livelihood, so protecting clean water is protecting my income and that of the thousands of other farmers who put food on Americans' tables."²⁰ Furthermore, over 110 million Americans receive drinking water from suppliers that draw from source water protection areas containing headwater or non-perennial streams,²¹ many of which are at risk of losing protections because of the Supreme Court's decisions. New York

¹⁴ Letter from Ray McCormick, McCormick Farms, Inc., to Senator Barbara Boxer, at 1.

¹⁵ Statement of Bob Gray, Executive Director, Northeast Dairy Farmers Cooperatives, at 2 (July 22, 2009).

¹⁶ Letter from R. Steven Brown, Executive Director, Environmental Council of the States; Ellen Gilinsky, President, Association of State & Interstate Water Pollution Control Administrators; Matt Hogan, Executive Director, The Association of Fish & Wildlife Agencies; Kristen Fletcher, Executive Director, Coastal States Organization; Jeanne Christie, Executive Director, Association of State Wetland Managers; and Larry Larson, Executive Director, Association of State Floodplain Managers, to Senator Barbara Boxer, at 1 (June 10, 2009).

¹⁷ Statement of Trey Pebley at 4-5.

¹⁸ Letter from Kevin B. McCray, Executive Director, National Ground Water Association, to Senator Barbara Boxer, at 2 (June 10, 2009).

¹⁹ Letter from Stephen E. Adair, Director of Operation – Great Plains Region, Ducks Unlimited, to Senator Max Baucus, at 1.

²⁰ Letter from Eric Hirzel, Hirzel Canning Co. & Farms, to Senator George Voinovich, at 1.

²¹ Letter from Benjamin Grumbles, EPA Assistant Administrator for Water, to Jeanne Christie, Executive Director, Assoc. of State Wetland Managers, at 2 (Jan. 9, 2006) (mis-dated as Jan. 9, 2005).

City's drinking water supply does not need mechanical treatment because it is naturally purified, including by many wetlands in the watershed,²² saving enormous treatment costs.

Individual businesses benefit from clean water. For example, the American Fisheries Society supported the Clean Water Restoration Act in the 110th Congress and said, "not protecting these waters under the Clean Water Act is detrimental to interstate commerce and public interests that depend on water quality and water flows."²³ Likewise, in supporting that same bill, the National Marine Manufacturers Association (NMMA) said, "[t]he recreational boating industry is a major consumer goods industry and substantial contributor to the nation's economy with expenditures on recreational marine products and services of nearly \$40 billion in 2006 alone."²⁴ Finally, attached is a recent report by several conservation organizations providing numerous examples of the problems caused by the current legal confusion; one example involves a scuba diving instruction and equipment business that claimed the lake it neighbored had been polluted, but the alleged polluter claimed that the lake was not covered by the Clean Water Act.

Even the report cited by some of the witnesses estimating the cost of getting a permit from the Army Corps does not warrant abandoning historic protections. As Justice Stevens observed in *Rapanos*, "these costs amount to only a small fraction of 1% of the \$760 billion spent each year on private and public construction and development activity."²⁵ Additionally, "for 80% of permits the mean cost is about \$29,000 (with a median cost of about \$12,000)," and this does not account for the myriad activities that take place without requiring a permit at all.²⁶

We appreciate the opportunity to submit these views for the record of the Committee's hearing. Please feel free to contact any of our organizations if you have questions or would like further information about the critical need to restore longstanding Clean Water Act protections to the nation's waters.

²² Brief of the City of New York, *Rapanos v. U.S.*, 547 U.S. 715 (2006), at 2 (Jan. 13, 2006), available at <http://www.eswr.com/1105/rapanos/rapamicnyc.pdf>.

²³ Letter from Ghassan N. Rassam, Executive Director, American Fisheries Society, to Chairman James L. Oberstar, House Committee on Transportation & Infrastructure, at 2 (July 18, 2007).

²⁴ Letter from Thomas J. Dammrich, President, National Marine Manufacturers Assoc., to Chairman James L. Oberstar, House Committee on Transportation & Infrastructure, at 1 (Sept. 14, 2007).

²⁵ *Rapanos*, 547 U.S. at 798 (Stevens, J., dissenting).

²⁶ *Id.* at 798 n. 7.



NATIONAL COUNCIL OF FARMER COOPERATIVES

July 22, 2009

The Honorable Nydia Velazquez
 Chairwoman
 Committee on Small Business
 U.S. House of Representatives
 2361 Rayburn H.O.B.
 Washington, DC 20515

The Honorable Sam Graves
 Ranking Member
 Committee on Small Business
 U.S. House of Representatives
 B363 Rayburn H.O.B.
 Washington, DC 20515

Dear Chairwoman Velazquez and Ranking Member Graves:

On behalf of the more than two million farmers and ranchers who belong to one or more farmer cooperative(s), the National Council of Farmer Cooperatives (NCFC) applauds your thoughtful leadership in examining the needs of farmers, ranchers and small businesses when it comes to regulating our nation's waters. We ask that this letter be included in the hearing record.

Since 1929, NCFC has been the voice of America's farmer cooperatives. Our members are regional and national farmer cooperatives, which are in turn composed of nearly 3,000 local farmer cooperatives across the country. NCFC memberships also includes 26 state and regional councils of cooperatives.

NCFC values farmer ownership and control in the production and distribution chain; the economic viability of farmers and the businesses they own; stewardship of natural resources; and vibrant rural communities. We have an extremely diverse membership, which we view as one of our sources of strength – our members span the country, supply nearly any agricultural input imaginable, provide credit and related financial services (including export financing), and market a wide range of commodities and value-added products. Earnings from these activities are returned to their farmer members on a patronage basis, which helps them improve their income from the marketplace, capitalize on new value-added market opportunities, and compete more effectively in a global marketplace.

Farmer cooperatives also contribute significantly to the well-being of rural America and the overall economy, while helping meet the food, fiber, feed and fuel needs of consumers at home and abroad. Farmer cooperatives provide jobs for nearly 250,000 Americans with a combined payroll over \$8 billion, further contributing to our nation's economy.

Farmer cooperatives have been at the forefront of improving the environment in the communities they serve. From pest management to nutrient management, from development of cutting-edge technologies to implementation of area-wide conservation practices, farmer cooperatives have the expertise and the trust of their farmer members as the best place to seek information on production practices.

Water quality issues, as well as other resource issues, are vitally important to our industry as we all work to ensure our lands are healthy. Our goal is to support science-based, achievable, affordable and sustainable conservation and environmental policies and initiatives in order to continue to produce the quality food our customers have come to expect.

For several years, a number of outside groups have exerted, and continue to exert, enormous pressure in an effort to enact a fundamental change in the Clean Water Act (CWA). While we **disagree with these groups' characterizations of the law prior to recent U.S. Supreme Court rulings**, we recognize that tremendous political pressure that is being brought to bear on members of Congress, and we are grateful for your willingness to listen to our concerns.

To date, legislation has not been re-introduced in the U.S. House of Representatives but we are anticipating its introduction in the near future. We can provide the Committee with our views on House legislation once it has been introduced. Meanwhile, the Senate has commenced consideration of S. 787, the Clean Water Restoration Act. For purposes of this letter, we will focus our comments S. 787, anticipating that as in years past, legislation introduced in the House will closely track the legislation that has been introduced in the Senate.

Our core concern lies at the heart of the bill. The Clean Water Restoration Act fundamentally alters the longstanding, appropriate and beneficial use of the term **"navigable"** to define the scope and reach of the CWA. This term has been part of the Act since its inception in 1972, and its use in water legislation stretches back well over 100 years. It is a term that attempts to delineate the appropriate scope of federal jurisdiction, including where such jurisdiction ends and where state and local jurisdiction begins. There is an extensive legal record since 1972, most recently in the context of two Supreme Court decisions that attempted, in our view, simply to give "navigable" fitting meaning.

This bill, by removing the term "navigable", does not in our view reduce confusion about the scope and limits of federal jurisdiction. Rather, it simply introduces a new line of confusion over how to interpret the Commerce Clause of the U.S. Constitution in this context, and will invariably lead to more litigation. We see no value in such an effort, particularly when S. 787 expands federal water jurisdiction to essentially include all wet areas within a state, such as impoundments, groundwater, ditches, pipes, streets, gutters, and so on. Such an expansion is not needed to ensure that the water leaving our farms meets federal clean water standards.

Proponents of S. 787 contend that the legislation excludes normal farming activities and farmland. This is simply not true, and the inclusion of the Savings Clause provides very limited **benefits to agriculture relative to the bill's broad and aggressive expansion of federal jurisdiction.**

The Savings Clause contained in S. 787 does not prevent the U.S. Environmental Protection Agency (EPA), the U.S. Army Corps of Engineers (the Corps) and the courts from excluding, by **interpretation, farming activities from these Savings Clause "exemptions," or prevent** them from changing policies about their application – all of which have occurred, particularly through the **application of the CWA's statutory "recapture" provision. Furthermore, the Savings Clause does not prevent EPA and the Corps from their ongoing effort to reverse past policy and require a**

Section 404 permit for non-agricultural uses of prior converted cropland. The Savings Clause does not address the court decisions that are blurring the distinction between what is an **agricultural operation's point source** discharge subject to mandatory CWA water quality permits and what is agricultural storm water covered by the CWA agricultural storm water exemption. And finally, but most importantly, the Savings Clause does not exempt anything from the broad definition of "**waters of the United States.**"

Furthermore, not all agricultural activities enjoy the benefit of an explicit statutory exemption. Pesticide use, for example, is not covered by an explicit statutory exemption. This extremely important agricultural production activity can result in the deposit or drift of pesticide into areas **deemed "waters of the United States."** EPA already properly and fully addressed such pesticide movements that may result from farmer use in the requirements and limitations imposed on the **pesticide's use through the mandatory pesticide labeling process.** Similarly, the application of fertilizer, and other vital farming activities that may incidentally or inadvertently add material to "**waters of the United States**" are not exempted by statute or addressed in the "**Savings Clause**" of S. 787.

We value clean water and support the goal of restoring and protecting the waters of the United States. However, we believe Congress must explore which specific bodies of water and aquatic systems cannot meet this goal under the Act, absent the changes sought in S. 787. These discussions should involve specific bodies of water that either are not or cannot be protected today, where they are and how the current Act fails to protect them. Such a factual context will lead to solid and grounded policymaking that can be linked directly back to the federal water goals that our farmers and ranchers support.

Rather than enact S. 787, with its restatement of the Savings Clause measures that fail to protect agriculture, we encourage Congress to work with farmers and ranchers on concrete ways to protect these specific waterways.

Thank you for this opportunity to provide our views on the Clean Water Restoration Act. Please do not hesitate to contact us if we can provide additional information.

Sincerely,



Charles F. Conner
President and CEO



"Representing the state's largest ag industry"

July 21, 2009

The Honorable Nydia M Velázquez,
Chairwoman
House Committee on Small Business

The Honorable Sam Graves,
Ranking Member
House Committee on Small Business

Dear Madam Chairwoman and the Ranking Member,

Nebraska Cattlemen appreciates the opportunity to provide a written statement to the House Committee on Small Business regarding the Clean Water Restoration Act (CWRA). My letter to the Committee is intended to provide perspective on the fiscal impact to farmers and ranchers of the CWRA.

Nebraska Cattlemen is an association representing more than 3,000 members comprised of ranchers, farmers and feeders who work every day to provide food to our nation and the world. Nebraska is home to more than 1.9 million mother cows and a feeding sector that markets in excess of 5 million head per year. Twenty percent of all beef produced in the United States comes from Nebraska. Needless to say, with the 12 billion dollars of economic activity, the beef industry is the largest economic engine in a state of only 1.7 million people.

The proposed CWRA is the single largest federal land grab in history. The Senate version of the bill, S. 787 would delete the term "navigable" from the Act, a term that appears in the current law more than 80 times and is the sole limit on the federal government's authority. It also would expand federal jurisdiction by 1) including certain water features that the Supreme Court decided were in the purview of the states and 2) taking the unprecedented action in the 37-year history of the CWA to expand federal government jurisdiction beyond the Commerce Clause of the Constitution.

The current law gives the federal government authority under the Commerce Clause of the Constitution to regulate navigable waters, limited non-navigable waters, and wetlands associated with "navigable waters."

The definition in S. 787 includes all "intrastate waters" including "intermittent streams" and "tributaries." However, nothing in the law or regulations in place prior to the Supreme Court decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)* covered all intrastate waters. The new definition could allow regulators and third-parties to assert jurisdiction over 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.

The proposed CWRA gives the Army Corps of Engineers ("Corps") and the Environmental Protection Agency ("EPA") control over all watersheds in the nation. Since all land in the nation is within a watershed it means that the Corps and EPA would have land use control over farmers' and ranchers' property and other businesses not currently under the jurisdiction of the 1972 Clean Water Act. Water for grazing, farming, cattle and wildlife is absolutely essential to life, to economic production, and to the conservation of our ranching heritage. Consequently, bureaucrats would control the lives and land use of farmers' and ranchers' private land and grazing permits on State, Indian and Federal lands and therefore control peoples' lives.

Not only does the expansion of the Clean Water Act threaten farmers and ranchers across the nation, but it affects small businesses, small communities, forestry, mining, manufacturing and all productive uses on private, State School Trust, Native American, and federally-managed lands. In fact, the proposed expansion of Federal jurisdiction would include hundreds of millions of isolated, intrastate pools, stock water ponds, springs, small lakes, depressions filled with water on an intermittent basis, drainage and irrigation ditches, irrigated areas that would otherwise be dry, sloughs, and damp places located on farms and ranches that have NO nexus with any navigable waters.

CWRA expands the current Corps and EPA jurisdiction to all waters within the United States and importantly to "activities affecting these waters." What life activity does NOT affect at least your own water in some way? Therefore, the proposed Act is essentially a limitless national land and water use control effort that will regulate every activity in a wet area in the nation without requirement that it be connected in any way to a navigable water. Bureaucrats driven by private agendas will be empowered to impose their views and appealing their decisions will be costly and usually prohibitive in time, money, and national productivity. Bureaucrats will control citizens rather than citizens controlling government. Unfortunately, activists employed by federal agencies are already aware that they can freely interpret federal regulations to favor their personal philosophy. This *de facto* license results in a form of tyranny that supplants the rule of law. Every State will essentially have a federal land and water use Czar operating with dozens of powerful bureaucrats who control the very water we need to survive.

The Nebraska Sandhills are a unique landscape in America. They comprise 23 million acres of sand covered with a very thin layer of topsoil (a few inches) held in place by native grasses. This unique geologic formation and biological ecosystem is a highly valuable resource for our ranching community. It's undulating topography, delicate ecosystem and rich grasses make grazing cattle the highest and best use on this natural resource. The Sandhills are not only the headwaters of thirteen named rivers and streams, countless marshes, wetlands, creeks and thousands of wet meadows and lakes but also the primary fill point (a 23 million acre sponge) of the High Plains and Ogallala aquifers.

The impact of bringing these water bodies, all of which reside on or flow through private lands, under the jurisdiction of the Corps and EPA would be economically devastating. This action would require ranchers to engage engineers and attorneys to evaluate and litigate each and every action, as it pertains to water, on their private lands. The imposition of 404 Permits

and/or NPDES permits which can take years to perfect and more than \$20,000 would bring little or no benefit to the pristine waters of the Sandhills.

With no improvement in water quality the passage of the CWRA would impose significant economic hardship to a region of the nation and a sector of Nebraska's economy that has no ability to pass costs on down the chain.

Beyond the costs however we have significant concerns over the provisions for citizen suits to virtually impale our industry. In a land where producers have learned to care for a delicate landscape and where cattle have supported a state and much of the nation for over a century this act would allow anyone to willy nilly bring action against a secluded rancher for activities that outsiders have no knowledge or perspective. The average private citizen has no timely recourse against the well-placed activists inside the Federal agencies. Regulators have real power over the lives of citizens. Most officers of the United States do their best to be objective, to fulfill their duties and not to be arbitrary or capricious. It is nearly impossible for a citizen to fight a powerful bureaucrat who has a private anti-agriculture or anti-land use agenda. The more complex and far reaching the law is with complicated, rules, regulations and policies, the greater the opportunity for abusive bureaucratic behavior.

We the landowners, who live and raise our families on the land we are entrusted with, recognize more than anyone the valuable resource we have. We work every day to preserve the land and the water for generations to come just as our forefathers did before us.

Thank you for listening to our concerns,

Sincerely,

A handwritten signature in black ink, appearing to read "Todd Schroeder". The signature is fluid and cursive, with the first name "Todd" written in a larger, more prominent script than the last name "Schroeder".

Todd Schroeder, President
Nebraska Cattlemen



**National Rural Electric
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The National Rural Electric Cooperative Association

TESTIMONY SUBMITTED FOR THE RECORD

**Meeting the Needs of Small Businesses and Family
Farmers in Regulating our Nation's Waters**

BEFORE THE

U.S. House of Representatives Committee on Small Business

July 29, 2009

House Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515

Introduction

Thank you for the opportunity to submit written testimony and to provide you with the views of the electric cooperatives regarding pending water legislation in the Senate. The National Rural Electric Cooperative Association (NRECA) is the national trade association for more than 900 not-for-profit, member-owned rural electric cooperative power systems that supply central station electricity to 42 million consumers in 47 states. All or portions of 2,500 of the nation's 3,141 counties are served by rural electric cooperatives. The cooperatives' combined service areas cover 75 percent of the U.S. landmass.

NRECA's members have a critical interest in how our nation's waters are regulated, as Clean Water Act (CWA) permits are needed for a wide range of generation and transmission activities located on or near "waters of the United States." We sincerely appreciate the Committee taking time to gain a broader understanding of the issues and concerns encompassing the Senate water bill.

In May 2007, House Transportation and Infrastructure Committee Chairman Oberstar (D-MN) introduced H.R. 2421, the Clean Water Restoration Act of 2007. In April 2009, Senator Feingold (D-WI) introduced S. 787, a slightly modified version of Chairman Oberstar's 2007 bill. Sen. Feingold's bill was approved by the Senate Environmental and Public Works Committee on June 18, 2009, on a party line vote.

NRECA is strongly committed to the protection and restoration of America's water and wetlands resources. However, S. 787 would expand the scope and reach of federal jurisdiction well beyond anything that ever existed under the Clean Water Act, and create dramatic consequences for stakeholders, including electric cooperatives, that operate in or near hundreds, if not thousands of bodies of water of varying sizes.

Background

All "navigable waters" are "waters of the United States," but not all waters of the United States are navigable waters. Since 1972, the CWA has regulated the subset "navigable waters." Regulatory programs, like the CWA Section 404 Wetlands Program, that focus on protection of navigable waters are generally read as not applying to all waters of the United States – only those that are navigable. The Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) have provided varying regulatory definitions of "the waters of the United States" over the past 30 years.

The United States Supreme Court has examined the scope of the CWA three times. In 1985, the Court unanimously upheld in the *Riverside Bayview* case the agencies' authority to regulate wetlands adjacent to navigable waters. In 2001, the Court rejected the agencies' authority in the *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)* to regulate isolated waters based upon the potential presence of migratory birds. The Court said that asserting jurisdiction over such waters raised "significant constitutional concerns." In the 2006 *Rapanos v. United States*

decision, the Court affirmed that CWA jurisdiction extends beyond strictly navigable waters, but does not extend to all areas with merely a “hydrological connection” to navigable waters. All Justices agreed in principle that the CWA should stand as it is, but that the Corps and EPA should issue new regulations. As Justice Breyer, who sided with the dissent, observed, the agencies should “write new regulations, and speedily so.”

NRECA agrees with the limits on CWA jurisdiction established by the Court’s decisions in these cases.

Industry Impacts and Exposure

NRECA believes the legislation reported by the Senate Environment and Public Works Committee creates a new set of broad federal authorities and explicitly erases the distinction between federal waters, state waters and waters on private lands. The result could be the largest expansion of federal regulation of water in 37 years.

S. 787 would delete the term “navigable” from the statute and replace it with a new legislative definition of “waters of the United States” that includes all “intrastate waters” and all “activities affecting these waters.” For example, under S. 787, all intrastate waters, including desert washes, roadside ditches, farm ponds and waste treatment systems, would fall under federal regulatory control.

Under the current regulatory interpretation, waste treatment systems—including some cooling ponds constructed and used by electric utilities to achieve CWA requirements—are largely excluded from the definition of waters of the United States. In contrast, S. 787 as proposed, would not allow the use of cooling ponds if those ponds possess some characteristic of waters of the United States. This means countless waste treatment ponds (used for all types of construction by industry, municipalities, and farmers) that have been permitted and used for years to remove pollutants may no longer be allowed.

Proponents of the legislation assert that S. 787 “restores” the original intent of the CWA and “clarifies” CWA jurisdiction. It does neither. Instead, S. 787 grants EPA and the Corps jurisdiction over all “intrastate waters,” and all “activities affecting these waters” (private or public), regardless of whether the activity is occurring in water or whether the activity actually adds a pollutant to the water.

Because they serve a large part of America’s heartland where many regions are sparsely populated, cooperatives have the fewest number of customers per mile of electricity distribution line. Cooperatives must cover large distances to serve their customers and consequently own roughly 43 percent of all the nation’s distribution lines. To maintain reliable, secure service, cooperatives must maintain and repair existing lines and build new ones. NRECA is concerned that expansion of federal authority as envisioned in S. 787 to cover all intrastate waters and “activities affecting these waters” would add a layer of federal regulation covering even the most minor activities. New federal regulations would increase costs, delay projects during permit processing and intrude on activities already regulated under state programs.

For example, S. 787 would expand the number of permits required and jeopardize the use of current technologies, such as cooling ponds, for management and treatment of waste. This potential reclassification would virtually eliminate the treatment function for which the impoundments were designed, requiring utilities to comply with CWA discharge limitations prior to discharging into impoundments, rather than at the point where the impoundments discharge to waters traditionally considered subject to the Act.

Where cooling ponds have been used to meet technology or water quality-based requirements for removing heat at a site, S. 787 would require facility owners to find a different solution. This might include cooling towers, even though at many sites there is not enough room to build cooling towers. Once built, towers require a significant amount of electricity and additional concerns, including noise, appearance, fogging that may impair visibility, and air pollution in the form of salt or other particulates that can harm crops and create Clean Air Act permitting problems.

Additionally, increased delays in securing permits will raise costs of and impede many economic activities affecting electric transmission and generation, agriculture, transportation, and mining. Based on Chairwoman Velázquez's testimony, it takes on average between two-three years to obtain an individual CWA permit, and the current backlog for individual permits is estimated between 15,000 and 30,000. These types of delays are already challenging for industry and will be further compounded should federal jurisdiction over our nation's waters be expanded.

Conclusion

Thank you for the opportunity to present NRECA's testimony before the Committee. In its current form, NRECA opposes S. 787 as we, in our members' best interest, cannot support legislation that would place all water under federal regulatory authority. We support the *SWANCC* decision and agree with the Supreme Court's interpretation of Congress's intent that the CWA focus on navigable waters and not intrude on state programs that protect isolated intrastate waters. NRECA looks forward to working with this Committee, as well as other committees with jurisdiction over various aspects of this issue, to develop a workable and sustainable piece of legislation. Thank you again for your time and commitment.



Testimony
Of
The
Independent Petroleum Association of America
Before
Committee on Small Business
U.S. House of Representatives
July 29, 2009

**Statement of The
Independent Petroleum Association of America**

This testimony is submitted by the Independent Petroleum Association of America (IPAA). IPAA represents the thousands of independent natural gas and oil explorers and producers, as well as the service and supply industries that support their efforts, that will be significantly affected by proposed changes to the Clean Water Act definition of navigable waters. Independent producers drill about 90 percent of American oil and natural gas wells, produce over 65 percent of American oil, and more than 80 percent of American natural gas.

This hearing examines a critical issue confronting American natural gas and petroleum production – proposals that could legislatively restructure the scope of the Clean Water Act (CWA). These changes would result from altering the definition of “navigable waters”, the fundamental threshold defining the federal jurisdiction of the CWA. IPAA opposes changing the definition and believes that such a change runs counter to Congress’ original intent in passing the CWA. The definitional question of “navigable waters” presents a long and tortured series of issues. Yet, it is fundamental because it provides the Constitutional link through the Commerce Clause to create federal authority for CWA regulation

The origin of the issue comes from the debate over the landmark amendments to federal water pollution legislation – the Federal Water Pollution Control Act (FWPCA) Amendments of 1972. FWPCA create broad new legislative and subsequent regulatory authority including its new definition of “navigable waters”. When the House considered its version of the FWPCA, the definition read: *The term ‘navigable waters’ means the navigable waters of the United States, including the territorial seas.* Similarly, the Senate version of the bill included the

following definition: *The term 'navigable waters' means the navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes.* At the time of this debate, the context of navigable waters was a narrow one, extending back to court decisions as early as 1870 with some gradual broadening – essentially water bodies that were either involved as “highways of commerce” or could be. Clearly, the Senate’s version of the definition recognized the need to include tributaries of navigable waters in order to expand the definition’s scope. There was no debate over these terms in the House or the Senate.

However, when the House-Senate conference reported its agreement, the conferees modified the definition to state: *The term 'navigable waters' means the waters of the United States, including the territorial seas.* This was a term without a legislative or legal history. The conferees tried to create a framework. Senator Edmund Muskie (D-ME), as the lead Senate conferee, included an exhibit in the record that addressed the scope of the definition. It stated:

One matter of importance throughout the legislation is the meaning of the term “navigable waters of the United States.”

The conference agreement does not define the term. The Conferees fully intend that the term “navigable waters” be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.

Based on the history of consideration of this legislation, it is obvious that its provisions and the extent of application should be construed broadly. It is intended that the term “navigable waters” include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be

considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases the commerce on such waters would have a substantial economic effect on interstate commerce.

There are two key points to this explanation. First, the characterization of “waters” is related to water bodies – lakes, streams and rivers – that are navigable in fact or associated with navigation. Second, these water bodies are involved in some form of commerce. While similar statements were made in the House manager’s statement, there was no further debate and no clearer legislative history.

Starting from this paucity of information, federal agencies initiated interpretations of the new language as they implemented the FWPCA Amendments. The efforts were challenged, most notably in the *NRDC v. Callaway* case – a 1975 District of Columbia Circuit Court decision that overturned the initial federal interpretation of the law by the Corps of Engineers. The federal government never appealed this decision to the U.S. Supreme Court. Instead, it began restructuring its interpretation of the “navigable waters” definition creating a broad application of its meaning.

Among the most egregious extensions of the scope of the CWA was the interpretation that it applied to isolated water bodies – e.g., prairie potholes, playa lakes – because of a tenuous link to migratory waterfowl as a test of interstate commerce. Ultimately, this regulatory overreach led to a U.S. Supreme Court appeal. In *Solid Waste Agency of Northern Cook County*

V. United States Army Corps of Engineers (SWANCC), the Court decision rejected overly broad interpretations of the “navigable waters” definition and forced regulatory agencies to bring regulations back toward the intended scope of FWPCA.

Subsequently, in *Rapanos Et Ux., Et Al. V. United States (Rapanos)*, the Supreme Court further directed the regulatory agencies to hone their regulations to finer reading of the “navigable waters” definition. It stated, in part:

The phrase “the waters of the United States” includes only those relatively permanent, standing or continuously flowing bodies of water “forming geographic features” that are described in ordinary parlance as “streams,” “oceans, rivers, [and] lakes,” Webster’s New International Dictionary 2882 (2d ed.), and does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps’ expansive interpretation of that phrase is thus not “based on a permissible construction of the statute.”

Following these decisions, their opponents have coalesced around a theme that the Court is judicially reconstructing the CWA and unraveling decades of interpretations of the law. Clearly, the Court is changing decades of interpretation of the CWA – because it has been wrong, because it has exceeded the intent of the statute. While these allegations hope to capture the emotions of the time to shift the scope of the law, they should be rejected. The CWA should not apply to playa lakes and dry arroyos simply because water is there sometimes.

These proposed changes have consequences. For American natural gas and oil producers the expanded scope of the CWA sought by the sponsors of S. 787 and similar bills would burden thousands – if not tens of thousands – of wells that are located in isolated and arid areas to

regulatory burdens that are neither necessary nor appropriate. For example, Spill Prevention, Control and Countermeasure planning regulations designed to protect against water contamination would be applied to such sites where no linkage to water under the CWA jurisdiction exists. These wells are frequently marginal wells and additional regulatory burdens result not in enhanced environmental performance but in shut down of the operation.

IPAA recommends that Congress recognize that the scope of the CWA has not been impaired or restricted by the *SWANCC* and *Rapanos* cases. Rather, those cases have served to bring the CWA regulatory structure back toward the Congressional intent when FWPCA was enacted.

