S. HRG. 110–1245

LEGISLATIVE HEARING ON S. 1870, THE CLEAN WATER RESTORATION ACT OF 2007

HEARING

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

APRIL 9, 2008

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COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

ONE HUNDRED TENTH CONGRESS
SECOND SESSION

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C O N T E N T S

LEGISLATIVE HEARING ON S. 1870, THE CLEAN WATER RESTORATION ACT OF 2007

WEDNESDAY, APRIL 9, 2008

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The full committee met, pursuant to notice, at 10:03 a.m. in room 406, Dirksen Senate office Building, Hon. Barbara Boxer (chairman of the full committee) presiding.

Present: Senators Boxer, Inhofe, Barrasso, Baucus, Cardin, Carper, Craig, Isakson, Vitter and Whitehouse.

OPENING STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator BOXER. The hearing will come to order.

I am really sorry to be 3 minutes behind. I had another event I had to attend.

Today, the Committee considers one of America's bedrock and most successful environmental statutes, the Clean Water Act. We will hear testimony on the Clean Water Restoration Act, a bill introduced by Senator Feingold, that would restore the protections of the Clean Water Act that have been jeopardized because of some activist members of the Supreme Court.

Enacted just over 35 years ago, the Clean Water Act has a critically important purpose, "To restore and maintain the chemical, physical and biological integrity of the Nation's waters." The protections of the Clean Water Act have helped restore thousands of lakes and rivers, streams and wetlands. It has helped protect the water supply for our families, provide essential habitat for fish and birds and other wildlife, but we have a long way to go.

While all waters were not evaluated, according to the EPA's most recent national water quality inventory, 45 percent of assessed rivers and streams were impaired; 47 percent of lakes, ponds and reservoirs were impaired; and of the assessed bays and estuaries, 32 percent were impaired.

With an ever-expanding population and the effects of global warming on our water supply, now is not the time to be weakening the Clean Water Act. But due to the intervention of some of the Justices of the Supreme Court, much of that progress is in jeopardy. In two decisions on the scope of Federal jurisdiction under the Clean Water Act, Solid Waste Agency of Northern Cook County v. Corps of Engineers in 2001, and Rapanos v. U.S. in 2006, the Supreme Court cast a shadow over nearly 30 years worth of expert agency interpretations in protecting America's waters.

In Rapanos, the Supreme Court failed to provide clear guidance for when the Clean Water Act applied, publishing five conflicting opinions with no majority ruling. This case has created massive confusion among judges, the regulated community, EPA and the Corps. But there is so much more at stake than confused lawyers, judges, agencies and stakeholders. According to EPA data, 111.6 million Americans are served by water systems that receive water from intermittent streams or headwaters, the very waters now argued to be outside the jurisdiction of the Clean Water Act. Our Nation's great recreation economy is at risk when our waters are at risk.

According to the 2006 national survey of fishing, hunting and wildlife-associated recreation released just last month by several Federal agencies, including the U.S. Fish and Wildlife Service, $122 billion was spent on fishing, hunting and wildlife activities this year, 30 million people fish, 12.5 million hunt, 71.1 million took part in wildlife-observing activities. Now, without clean, healthy waters and ecosystems, America risks losing much of its natural heritage.

The bottom line is that America's waterways and wetlands are threatened because of these Supreme Court decisions and the Bush administration's interpretations of them. Fortunately, there is a solution to this problem, and I do applaud Senator Feingold for his leadership on this issue. His bill is simple. It restores the long-established jurisdiction of the Clean Water Act to protect the waters it was intended to protect and has always protected. Colleagues, after more than 35 years of improving and protecting water quality in America, we should be celebrating the Clean Water Act, not standing by and allowing its landmark protections to slip away.

Senator INHOFE.

OPENING STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator INHOFE. Madam Chairman, our Committee has examined the issues surrounding Clean Water Act litigation and jurisdiction several times, most recently in November. Thank you to all of today's witnesses who have taken time to come to testify before this Committee this morning. It is no secret this Committee has long advocated for policies that are protective of overall environmental health. I am proud of my years of service advocating for policies that improve our Nation's drinking and wastewater facilities.

Today's legislative hearing will focus on S. 1870, the Clean Water Restoration Act. This bill as currently written will expand Federal jurisdiction authority in a way that pushes the outer limits of Congress' constitutional role. If Congress is to amend the Clean Water Act, any changes must provide clarity and reduce lawsuits. This bill does neither. It will not curtail litigation, but rather increase it as stakeholders seek legal clarity on what exactly are the limits of the constitutional authority.

Many supporters of this legislation argue that the bill simply clarifies and restores the scope of Federal jurisdiction over waters and will return the regulatory authority and certainty to the pre-Rapanos Supreme Court decision era. I believe this statement is

misleading. S. 1870 would strike the words "navigable waters" and replace the term with "waters of the United States," defined as "all InterState and IntraState waters and their tributaries."

Most egregious, though, is that the definition establishes Federal authority over not only all waters, but "to the fullest extent that these waters or activities affecting these waters are subject to the legislative power of Congress under the Constitution."

In 1972, the framers of the Clean Water Act chose to tie Federal regulatory jurisdiction to the term "navigable waters," limiting jurisdiction under the Commerce Clause. By striking any reference to "navigable" from the law, this bill will expand the Federal reach under the Act far beyond what the authors intended. In other words by striking any reference to the Commerce Clause, all waters, regardless of size or significance, and importantly, any activities affecting all waters, could be regulated by the Federal Government until the courts have determined the Federal reach was unconstitutional.

For example, individual property owners could have a small depression in their field or yard that can collect water after a good rain. If this bill passes, those waters become jurisdictional and all activities that could affect that depression would have to go under the 404 permit.

Further, homeowners could potentially need national pollutant discharge limitation system permits, the NPDES, for stormwater running off their property or from the gutters of their roofs. The effects of this legislation go far beyond the legal nuances and potential litigation. As you are well aware, Madam Chairman, many of our local governments, including cities and counties across the Country, face increasing financial burdens to improve their water and transportation infrastructure.

I have received letters and testimony from all over the Country opposing this legislation, including the testimony from regional and municipal water associations that fear legislation will constrain State and local flexibility, while greatly increasing the time and costs associated with meeting water supply and wastewater treatment obligations, as well as timely completion of necessary WRDA projects.

As a former mayor, I can tell you that local governments and landowners don't have the resources to delay the projects for years, while waiting on a permit. I have often said to others who have been mayors of cities that the major problem is not crime in the street and prostitution and all these things, but it is unfunded mandates. I think this is kind of what we are getting into here.

We also have Mr. Smith here from Montana, conveying many concerns from our agricultural community. The current cost of producing the world's safest food supply are increasing, and adding layers of regulatory hurdles makes it harder for the family farmer to survive. The narrowly written savings clause only partially protects the agricultural community and opens families to potential litigation and fines for routine work. I would like to include in the record a letter signed by 24 State agriculture associations and several State sportsmen's organizations.

Senator BOXER. Without objection, so ordered.

[The referenced document was not received at the time of print.]

Senator INHOFE. Finally, advocates of this bill assert it as a save-all for clean water, but will likely only add another cumbersome process to an already bureaucratic system, and not add to water quality.

As I have said before, the Federal Government owes it to the American people and individual property owners, including the millions of homeowners across the Country, to have clean, concise constitutional definition of waters of the United States. The Clean Water Restoration Act does not meet any of these goals and will simply result in more lawsuits and more confusion.

So obviously, I am opposed to this, and I thank you for this hearing, Madam Chairman.

[The prepared statement of Senator Inhofe follows:]

STATEMENT OF HON. JAMES INHOFE, U.S. SENATOR
FROM THE STATE OF OKLAHOMA

Madam Chairman, our Committee has examined the issues surrounding Clean Water Act litigation and jurisdiction several times, most recently in December. Thank you to all of today's witnesses who have taken time out of their busy schedules to testify before the Committee this morning. It is no secret this Committee has long advocated for policies that are protective of overall environmental health. I am proud of my years of service advocating for policies that improve our nation's drinking and waste water facilities without overburdening our communities. I have also worked tirelessly on legislation that protects and preserves wetland resources while respecting private property rights.

Today's legislative hearing will focus on S. 1870, the Clean Water Restoration Act. This bill, as currently written, will expand Federal jurisdiction authority in a way that pushes the outer limits of Congress's constitutional role. If Congress is to amend the Clean Water Act, any changes must provide clarity and reduce lawsuits. This bill does neither. It will not curtail litigation, but rather increase it, as stakeholders seek legal clarity on what exactly are the outer limits of congressional authority. We should not propose and pass legislative language that increases uncertainty and increases an already litigious environment.

Many supporters of this legislation argue that the bill simply clarifies and restores the scope of Federal jurisdictional waters and will return the regulatory authority and certainty to the pre-Rapanos-Carabell Supreme Court decision era. I believe this statement is grossly misleading.

S. 1870 would strike the words "navigable waters" and replace the term with "waters of the United States" defined as "ALL interState and intraState waters and their tributaries." Most egregious, though, is that the definition establishes Federal authority over not only all waters, but "to the fullest extent that these waters or activities affecting these waters, are subject to the legislative power of Congress under the Constitution." In 1972, the framers of the Clean Water Act chose to tie Federal regulatory jurisdiction to the term "navigable waters," limiting jurisdiction under the Commerce Clause. By striking any reference of "navigable" from the law, this bill will expand the Federal reach under the Act far beyond what the authors intended.

In other words, by striking any reference to the Commerce Cause, all waters—regardless of size or significance, and importantly, any activities affecting all waters—could be regulated by the Federal Government until the courts determine the Federal reach was unconstitutional. For example, individual property owners could have a small depression in their field or yard that can collect water after a good rain. If this bill passes, those waters become jurisdictional and all activities that could affect that depression or the waters in that depression must be permitted under section 404. Further, homeowners could potentially need national pollutant discharge elimination system permits (NPDES) for storm water running off their property or from the gutters on their roofs.

The effects of this legislation go far beyond the legal nuances and potential litigation. As you are well aware, Madam Chair, many of our local governments, including cities and counties across the country, face increasing financial burdens to improving their water and transportation infrastructure. I have received letters and testimony from all over the country opposing this legislation, including this testimony from National Water Resources Association, Western Urban Water Coalition and Western Coalition of Arid States. They say that this legislation will "unduly

constrain State and local flexibility, while greatly increasing the time and costs associated with meeting water supply and wastewater treatment obligations, [and] timely completion of necessary projects, such as those authorized in the recent WRDA legislation." In the last 5 years, construction costs have risen over 30 percent. As a former mayor, I can tell you local governments and land owners do not have the resources to delay projects for years while waiting on a permit that will unlikely lead to cleaner water. I am pleased to have Mr. Brand here to speak to the concerns of local governments.

We also have Mr. Smith here from Montana, conveying many concerns from our agricultural community. The current costs of producing the world's safest food supply are increasing, and adding layers of regulatory hurdles makes it harder for the family farmer to survive. The narrowly written savings clause only partially protects the agricultural community and opens families to potential litigation and fines for what is now considered routine work. I would like to include in the record the letter signed by 24 State agriculture associations and several State sportsman's associations.

Finally, advocates of this bill assert it as the save-all for clean water, but it will likely do nothing to improve overall water quality. Increasing Federal bureaucracy and requiring property owners to go through a lengthy permitting process for activities that may affect a puddle on their private land hardly constitutes protecting our nation's water.

As I've said before, the Federal Government owes it to the American public and individual property owners, including the millions of homeowners across the country, to have a clean, concise and constitutional definition of "waters of the United States." The Clean Water Restoration Act does not meet any of these goals and will simply result in more lawsuits and more confusion.

I look forward to all of our witnesses' testimony on S. 1870.

Senator INHOFE. And let me say, as I told Carol Browner, it is nice to have you back here. We missed you for a few years, and I always enjoyed the combat.

[Laughter.]

Senator BOXER. I remember that combat.

Senator BAUCUS.

OPENING STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR FROM THE STATE OF MONTANA

Senator BAUCUS. Thank you, Madam Chairman.

Obviously, I thank you for holding the hearing. I thank all the witnesses for coming to help us out here. I especially want to thank Randy Smith. Randy is the most distinguished-looking fellow sitting in the front row there. I look forward to Randy's testimony at a later date.

Randy and his wife Emily, for those on the Committee who probably do not know, runs a cow-calf operation near Glen, Montana. He is also Chairman of the Big Hole Watershed Committee. I mention that because the Big Hole Watershed Committee is a coalition of ranchers and conservationists working to restore our ailing fish populations there in the Big Hole, and to protect the Big Hole River, the point being that there is a lot of cooperation in that part of our State in trying to deal with lots of different dynamics.

One is running a good, profitable cow-calf operation. The second is addressing some of the concerns under the Endangered Species Act. They are all working together to try to accomplish all those objectives in a cooperative way, and I just want to thank Randy for all his efforts. He is doing a super job.

Senator Mike Mansfield, the former Majority Leader, once said, "We will have to learn to get along with one another and recognize that we don't know it all. So we should listen to the other person, and that other person sometimes is right and sometimes we are

wrong. It will be a matter of accommodation and compromise and knowledge and understanding."

I would just like to highlight that quotation from him, because I think that sense of humility served Montana's most distinguished Senator very well. His humility made him one of the most effective Majority Leaders in our Senate's history. He served for 17 years. That is a record for a Majority Leader. When he was Leader, he also worked hard to pass the Clean Water Act in 1972. It was important to him. As we take a closer look at the Clean Water Restoration Act, I hope that all this will bring the same sense of humility and willingness to consider other points of view to the debate that he epitomized, that he pursued.

The Clean Water Act has undoubtedly made this Country a better place to live, work and raise a family. That is clear. If you stop and think about it, our water was in terrible shape before the passage of the Clean Water Act and the Safe Drinking Water Act. We cleaned up our rivers and we have safe drinking water in the United States by and large because of those major bills that were passed back then. It is amazing what they have done for this Country.

I am sure some of you probably remember walking along the Potomac River. It stunk, and that is just one river. The Cuyahoga burned, it was just so polluted. We have done a super job, frankly, in this Country under the Clean Water Act. Its goals of improving water quality, ensuring fishable waters and protecting wetlands are clearly goals that we all support.

The Clean Water Act has been instrumental at protecting wetlands. Before passage of the Clean Water Act in 1972, our Country was losing about 500,000 acres of wetlands every year. By the mid–1990's because of the Act, that number had dropped to about 60,000 acres per year. Clearly, that is a major improvement, but clearly more work needs to be done. From filtering nutrients and sediments to reducing flood risks to promoting habitat for fish and game, wetlands serve invaluable public purposes. We must find ways to both protect wetlands, obviously, and respect private property rights.

In the wake of the SWANCC and Rapanos cases, it is appropriate that the panel focus on how we can best achieve the goals of the Clean Water Act for drinking, fishing and recreation. The Clean Water Restoration Act proposes one path forward. I look forward to working with my colleagues to see if it is the right path. Clearly, there are good points in it, but there are also probably parts of it we have to pay more attention to. I hope our efforts here today are ones where we can work together in a constructive and humble way.

Thank you, Madam Chairman.

Senator BOXER. Thank you, Senator Baucus. You have a very good way of finding that sweet spot where we can move legislation forward, so we will be working very closely with you.

Senator VITTER.

OPENING STATEMENT OF HON. DAVID VITTER, U.S. SENATOR FROM THE STATE OF LOUISIANA

Senator VITTER. Thank you, Madam Chairman, for calling this hearing on a very, very important topic, one that clearly dramatically affects Louisiana, in which I take great, great interest.

As does Senator Inhofe, I have some real reservations about the bill. Let me mention two related reservations in my opening statement. One is the central part of the bill which does not restore previous law in any way, but dramatically changes and expands previous law and dramatically expands Federal jurisdiction. I think we need to be very clear, because the title of this bill is very misleading, in my opinion.

This bill dramatically redefines and expands Federal authority because it takes the term "navigable waters" out of Federal law and replaces it with "waters of the United States." I think it is beyond debate that is not restoring previous law. That is changing and expanding previous law. That is not restoring what was ever intended to be the limits of Federal jurisdiction. That is dramatically expanding Federal jurisdiction.

The new definition of what is under Federal jurisdiction would be, under this bill, all interState and intraState waters and their tributaries, including lakes, rivers, streams, mudflats, sandflats, and the list goes on and on. I looked at this and did some research and thought about it, trying to figure out what instance of water was not included in that definition and I couldn't come up with anything. So this is a dramatic change.

Now, in Louisiana, we are very concerned with wetlands. We represent 40 percent of the wetlands in the United States. Unfortunately, we represent 80 percent of wetlands annual losses. It is being lost at an alarming rate. If you can picture a football field of land, just think of a football field, we lose that from Louisiana every 38 minutes. Every 38 minutes, another football field is gone, and that is 24 hours a day, 7 days a week, 52 weeks a year, with no time off for evenings or weekends or holidays. That is an alarming rate. We have already lost an area the size of several smaller States from our State of Louisiana. So wetlands are crucially important.

The other hesitation I have with all of this is that unfortunately, the Corps of Engineers wetlands regulation has done absolutely nothing to stem that problem or to solve that problem. In fact, you have this bizarre nonsensical situation which only a big Federal bureaucracy could come up with, where there is intense Corps of Engineers regulation of wetlands under present law, and that is appropriate and certainly in most instances I am not quarreling with that, and there is a necessity under that regulation for mitigation if any of that wetlands, for instance, is impacted by development. That is a good idea. I am not quarreling with that principle at all.

But you know what? None of our activity to try to stem coastal land loss, which is also under the leadership of the Corps, qualifies for that mitigation. It is two different planets, and never the twain will meet. We are actually running out of mitigation banks in Louisiana where folks who are impacting even low-value wetlands can go to mitigate, while we are initiating and moving forward with

huge ground-breaking coastal restoration efforts, and those efforts don't qualify in any way for mitigation. It is completely bizarre and nonsensical.

So under that scenario, I am very wary of dramatically increase the Corps' jurisdiction as this bill would do. I very much look forward to all the witnesses' testimony about those concerns in particular.

Thank you very much, Madam Chairman.

Senator BOXER. Thank you, Senator Vitter.

Senator BARRASSO.

OPENING STATEMENT OF HON. JOHN A. BARRASSO, U.S. SENATOR FROM THE STATE OF WYOMING

Senator BARRASSO. Thank you very much, Madam Chairman.

In Wyoming, almost nothing has been more important in our State's history than water. As we say across the West, and certainly in Wyoming, whiskey is for drinking and water is for fighting over. When someone says water in Wyoming, all ears tune in.

In Wyoming, where the frontier spirit of smaller government and individual liberty are still sacred traditions, there is overwhelming objection to this bill. The people of Wyoming do not want the Federal Government to go where this bill wants to go.

I recently heard from the Wyoming Association of Rural Water Systems. I would ask that their letter be added as part of the record.

Senator BOXER. Without objection, so ordered.

[The referenced document was not received at the time of print.]

Senator BARRASSO. Thank you very much, Madam Chairman.

They oppose any legislative efforts which would expand the Federal Clean Water Act jurisdiction over all water within the United States. The concern I hear at home is that this legislation would grant to the EPA and to the Army Corps virtually unlimited regulatory control over all wet areas within a State. So let's be clear. This bill then trumps States rights. This bill preempts States and local governments from making local land and water use decisions.

For Wyoming, there is even a larger concern because this bill undoes the legacy of one of Wyoming's great statesmen, Senator Malcolm Wallop. Senator Wallop is still recognized as an authority on Western water law. He authored and passed an amendment to the Clean Water Act. That amendment blocks Washington from overriding State control of water.

This bill wipes that out and leads to an even more expensive, cumbersome bureaucracy. The bureaucracy will increase delays in securing permits and that will slow or stop vital economic activities all across the Country. That is going to include agriculture, electric transmission, transportation, mining, real eState development—all will be affected. These are not activities that we want to hurt deliberately, especially while the housing market is in decline, while people are paying higher electric bills, while family farms are in decline, while our Nation's infrastructure may be crumbling, and while the mining industry is facing new regulations. These are the industries that create economic growth and we need them to be strong and viable.

I have serious concerns on how this bill will affect my home State. There are significant unintended consequences of this legislation that will lead to absurd results in Wyoming. It is now springtime in the Rockies. As the snow melts, large temporary water holes are formed on ranches and farms all across the State. Under this bill, any activity on that land that touches these water holes would require a Federal permit. Ranchers who use stock water ponds for watering livestock would be required—required—to obtain a Federal permit before any upgrades or modifications to the pond occur.

Let's talk about the larger issue for Westerners across the spectrum, and that is the water shortage in the West. The West is growing, but the Rocky Mountain West never has all the water that it needs. This bill will needlessly delay construction or repair of pipelines, ditches, canals, diversion structures, and wells with more permitting requirements.

Water is vital to the sustainability of Wyoming and so many other States. We should not delay such pipelines, canals, diversion structures and wells from being built. Delays in providing for water delivery not only hurts our citizens, it also hurts endangered species who need that water as part of habitat conservation plans and recovery plans across the West.

Given the reasons that I have mentioned, I have come to the conclusion that on behalf of the citizens of Wyoming, I want to say thanks, but no thanks.

Thank you, Madam Chairman.

Senator BOXER. Thank you so much. We don't have applause at these, but we do appreciate it.

Senator ISAKSON.

OPENING STATEMENT OF HON. JOHNNY ISAKSON, U.S. SENATOR FROM THE STATE OF GEORGIA

Senator ISAKSON. Thank you, Madam Chairman.

I want to begin by thanking Administrator Browner. I don't know whether she will remember this event or not, but in 1999 she issued a waiver to the State of Georgia and the city of Atlanta for the construction of the 17th Street Bridge. We were in violation of the Clean Air Act and clean air standards. I am pleased to tell you, because of her wisdom in granting that waiver, that connector has now been built and 20 percent of the traffic on the downtown connector is gone, and the air quality has gone up, which also demonstrates a point that I would like for her to address sometime during the hearing.

When you run into the labyrinth of regulatory authority over air and water, sometimes there are unintended consequences just like there was on the 17th Street bridge. For example, we are now in Georgia in a severe level IV, category IV drought. Our main drinking water resource, the Lake Lanier, is being managed not by water consumption for humans, but by an environmental species suit. Because of wetlands restrictions, building of reservoirs in North Georgia has been difficult and problematic because of those regulations.

So in our attempt to build reservoirs to get more retainage to help manage ourselves during the most difficult of times of

drought, and our inability to get those reservoirs built because of the wetlands application, we end up having the Corps of Engineers releasing water because of an environmental species suit. The unintended consequence of both those excellent pieces of legislation is we are running out of water to drink. In the absence of the drought going away, we are going to have a big problem.

So my comment is this, and I think Senator Baucus made an excellent observation. I think he referred to as a sweet spot. The waiver for us on the 17th Street Bridge was a sweet spot. If there is not a clear way in which you can work your way through regulations to see to it that in the end the people we serve are benefited, not actually punished, then this is going to have a real problem.

So it is very important for me to understand that whatever the regulatory mechanism is, it does not become a labyrinth that inhibits us doing the right thing. I again thank you for that bridge. It has made my commute in Atlanta a lot easier.

Senator BOXER. Thank you very much, Senator.

And now we turn to Hon. Carol Browner, Principal, The Albright Group, former Administrator, U.S. Environmental Protection Agency. We really are very pleased to see you, Carol. If you can sum up in five or 6 minutes, and then we will have questions.

STATEMENT OF CAROL BROWNER, PRINCIPAL, THE ALBRIGHT GROUP, FORMER ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY

Ms. BROWNER. Thank you very much, and good morning, Madam Chairman, Senator Inhofe and members of the Committee. I appreciate the opportunity to return to this Committee room and to testify before you today about the urgent need for legislation to protect our Nation's waters in light of recent challenges to the Clean Water Act.

I want to speak to you today as the former Administrator of the Environmental Protection Agency. I also want to note that I have continued my work in the environmental arena as Chair of the National Audubon Society.

During my tenure at EPA, I gave high priority to safeguarding our Nation's waters. I recognized, as did the Administrators who preceded me, that Congress intended for the Clean Water Act to cover all of our Nation's interconnected water resources, including watersheds, tributaries and wetlands. These waters are essential not only for safeguarding water quality, but also for the health of our people, our economy, and to ecosystems. These waters protect and purify water. They shield our homes and businesses from flooding, and they provide valuable habitat for a wide range of wildlife.

However, I believe this congressional intent has been challenged in recent years by Supreme Court decisions such as SWANCC and Rapanos. In the Rapanos case, I joined with three of my fellow former EPA Administrators, Democrats and Republicans, in filing a brief in the Supreme Court supporting the Government's interpretation of which waters should be protected under the Clean Water Act. In enacting that law, Congress acknowledged that all of our Nation's waters are connected through hydrologic cycles and therefore must be given equal protection. Agencies and courts, in

keeping with that legislative intent, must interpret the term navigable waters broadly as waters of the United States in order for our waters to be adequately protected from pollution.

My fellow former Administrators and I, two Democrats and two Republicans, argued that misinterpretation of navigable waters, which was suggested by the petitioners in the Rapanos case, would if accepted by the court do serious damage to our ability to protect our Nation's waters.

In light of the Supreme Court's contentious split decision in Rapanos, I am now concerned that wetlands and tributary protections that have been in place for more than 30 years are jeopardized. The Federal agencies responsible for implementing the Clean Water Act—EPA and the Army Corps of Engineers—worked for months on policy guidance in light of the Rapanos decision. Last June after substantial review and revision by the White House and other agencies, in addition to concerted lobbying efforts, EPA and the Corps finally issued this guidance. I believe this guidance fails to clarify the Clean Water Act's protections for a large portion of the Nation's wetlands and streams, and that it takes a very narrow and unnecessary interpretation of the Rapanos decision.

Under this guidance, as many as 20 million acres of wetlands and thousands of miles of seasonal streams will be vulnerable to pollution, filling and destruction. This will inevitably affect many more water resources. The most effective solution to this problem would be legislation to restore how we have always interpreted the Clean Water Act. I support passage of the Clean Water Restoration Act of 2007 because it leaves no doubt as to the scope of the Clean Water Act. Specifically removing the phrase navigable waters from the Clean Water Act and giving definition to the phrase "waters of the United States" will restore the original intent of Congress and allow the agencies to continue to act as they have acted for 30-some years.

I want to be very clear about this. This legislation is not an expansion of the Clean Water Act's jurisdiction. It is merely an essential clarification of Congress' original intent for this landmark law, which we have relied upon. As Senator Baucus noted, it has allowed us to achieve so much in terms of protecting our Country's water resources.

Again, it is a pleasure to be back before this Committee, and I look forward to answering any questions.

[The prepared statement of Ms. Browner follows:]

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TESTIMONY OF CAROL M. BROWNER
BEFORE A HEARING OF THE UNITED STATES SENATE
ENVIRONMENT AND PUBLIC WORKS COMMITTEE

"LEGISLATIVE HEARING ON S. 1870, THE CLEAN WATER RESTORATION ACT OF 2007"

April 9, 2008

Good morning, Madam Chairman, Senator Inhofe, and members of the Committee. I appreciate the opportunity to testify before you today about the urgent need for legislation to protect our nation's waters in light of recent challenges to the Clean Water Act.

I speak to you as a former Administrator of the Environmental Protection Agency. During my time at EPA, I gave high priority to safeguarding our nation's waters. I recognized, as did the administrators who preceded me, that Congress intended for the Clean Water Act to cover all of our nation's interconnected water resources, including watersheds, tributaries, and wetlands. These waters are essential not only for safeguarding water quality, but also for our nation's public health, economy, and ecosystems: they protect and purify water, shield our homes and businesses from flooding, and provide valuable habitat for a wide range of wildlife.

However, this congressional intent has been challenged in recent years by Supreme Court decisions such as *SWANCC v. United States,* and *Rapanos* and *Carabell v. United States.*

In the *Rapanos* case, I joined three of my fellow former EPA Administrators in supporting the government's interpretation of which waters should be protected under the Clean Water Act. In enacting that law, Congress acknowledged that ALL of our nation's waters are connected through hydrologic cycles and therefore must be given equal protection. Agencies and courts, in keeping with that legislative intent, must interpret the term "navigable waters" broadly as "waters of the United States," in order for our waters to be adequately protected from pollution.

My fellow former Administrators and I – two of us Democrats, and two Republicans – argued that the misinterpretation of "navigable waters" suggested by the petitioners in the *Rapanos* case would, if accepted, do serious damage to enforcement of the Clean Water Act and protection of not just tributaries and wetlands, but all of the United States' waters.

In light of the Supreme Court's contentious split decision in *Rapanos,* I am now concerned that wetlands and tributary protection may be in serious jeopardy.

As the federal agencies responsible for implementing the Clean Water Act, EPA and the Army Corps of Engineers worked for months on policy guidance in light of the *Rapanos* decision. Last June, after substantial review and revision by the White House and other agencies, in addition to concerted lobbying efforts on the part of developers and polluters, EPA and the Corps finally issued this guidance. Sadly, the guidance fails to clarify the Clean Water Act's protections for a large proportion of the nation's wetlands and streams, as it takes a very narrow interpretation of the *Rapanos* decision. Under the new guidance, as many as 20 million acres of wetlands and thousands of miles of seasonal streams will be vulnerable to pollution, filling, and destruction. And this will, of course, affect all of America's water resources.

The most effective solution to this problem would be legislation to restore protection to these waters. I wholly support passage of the Clean Water Restoration Act of 2007 because it leaves no doubt as to the scope of the Clean Water Act. Specifically, removing the phrase "navigable waters" from the Clean Water Act and giving broader definition to the phrase "waters of the United States" will restore the original intent of Congress, and ensure protection for ALL of our nation's waters from pollution.

Let me be clear: this legislation is not an expansion of the Clean Water Act's jurisdiction. It is merely an essential clarification of Congress's original intent for this landmark law, which we have relied upon to protect our waters for over thirty years.

Thank you for the opportunity to speak to you today. I would be pleased to answer any questions you may have.

Senator BOXER. Thank you so much, Ms. Browner. You said that there were three of you that joined together in effect to say you didn't agree with Rapanos. Who were those three?

Ms. BROWNER. There were four. There was myself. I was joined by the only other Democrat to ever run EPA, Doug Costle, and then two Republicans, Mr. Train and Mr. Reilly.

Senator BOXER. Thank you.

Now, Senator Vitter says that the Clean Water Restoration Act, which I support and you support, expands the scope of the Clean Water Act. He says it is disingenuous to say it just restores it. Do you see this bill expands the Clean Water Act beyond the scope of what it was before these Supreme Court decisions? Any significant changes?

Ms. BROWNER. There is absolutely no expansion of the Clean Water Act's jurisdiction. The waters that have historically been protected would continue to be protected. I might also note, Madam Chair, that the exemptions embodied in the Clean Water Act are also preserved. So some of the examples that appear and people have been talking about are actually activities that are exempt, have been exempt under the law, and would continue to be exempt under the law.

The final point I would make is just because a water is covered doesn't mean nothing can happen. There is a permitting process that unfolds. I think a number of the members spoke to the issue of mitigation. So this is not a hard stop. It merely guarantees that the Federal Government will take a look in particular situations and determine whether or not the activity will have irreversible impacts on the quality of our water.

Senator BOXER. OK. I just want to say for the record, as we all sit here, I would say in general members who are here today, water is a huge issue. Anyone who saw the movie Chinatown understands, or read the book Cadillac Desert about my State, knows about the water fights. I agree with you, Senator Barrasso, it is a cause of great angst and continues to be.

I found what is very interesting, the American Association of State Highway and Transportation Officials put together a document. They said since Rapanos, and I think this would interest my colleagues, because the Federal Government has had to issue guidance and it is so confusing. They have issued guidance under the Bush administration and one State reports that prior to Rapanos, section 404 permitting typically took no more than 120 days. It is now taking eight to 9 months to get a project done. So to my colleagues complaining about this bill, it would at least improve the current situation.

So I would ask have you heard similar stories, that this is so confusing it is taking longer to get these projects done?

Ms. BROWNER. I have. I think there is a lot of confusion out there. There is a case out of Alabama recently where there was a criminal conviction and fines because of activities that took place. The case on appeal was remanded to the trial judge, who essentially threw up his hands and said, I don't understand what I am supposed to do here; this is not clear at all, and I don't want to be involved going forward.

So if you have judges feeling that they cannot even begin to interpret the law, you can only imagine what the person sitting in a government office trying to process a permit on a day to day basis must be experiencing.

Senator BOXER. So you have judges throwing up their hands. You have officials here in the Bush administration so confused that the guidelines are taking—that the guidelines are so confusing that it is taking way longer to get a permit than it did under the former bill.

So under Rapanos, if a factory is located next to an isolated wetland or a stream that flows only some months of the year, are you concerned that the owner of the factory could dump toxic pollution into those waters and argue that they are not within the scope of the Clean Water Act.

Ms. BROWNER. I am concerned. I think that is an important point. We think about the bill before you as protecting wetlands from being dredged and some way destroyed or paved over, but the Clean Water Act is also about what we discharge, what pollutants we dump into our rivers, lakes and streams, and that may start with a wetland or some sort of stream that only runs occasionally. If we lose the authority to prohibit or to regulate those kinds of activities, or to be even be aware that those kind of activities are taking place, we will set ourselves back in terms of our goal toward fishable and swimmable waters for the people of this Country.

Senator BOXER. Thank you.

My time has almost expired, so we will turn to Senator Vitter.

Senator VITTER. Thank you, Madam Chair.

Madam Administrator, obviously we disagree. Under your tenure, EPA and the Corps didn't assert jurisdiction over every intra-State body of water, did it?

Ms. BROWNER. The definition that is laid out in this piece of legislation is what we followed. This was how we did the job on a day to day basis. You are right. We didn't assert jurisdiction over every single puddle, nor would this legislation cause the government to be able to assert jurisdiction over every puddle.

Senator VITTER. Let me rephrase the question. What type of body of water does the new language in this bill not cover?

Ms. BROWNER. Oh, all sorts of bodies of water.

Senator VITTER. Give me some examples if there are all sorts.

Ms. BROWNER. A puddle. I think someone mentioned that puddles are covered. Puddles would not be covered. There are eight different exemptions.

Senator VITTER. Are you sure the puddle wouldn't be a mud flat?

Senator BOXER. Would you allow the witness to answer before you interrupt her please?

Senator VITTER. A slough for a prairie pothole or a wet meadow?

Ms. BROWNER. All of the things listed in here have widely accepted scientific definitions. Just because you or I might look at something and say it is this or that, the agencies who implement these laws are not free to do that. They follow the accepted definitions and there are lots of things that would not be covered. I come from Florida where wetlands is a huge issue. I can tell you all sorts of places in Florida that would not be covered under this law. This is not changing what the agency has been doing, the EPA, the

Army Corps of Engineers, and the States that were subject to that jurisdiction. This is not changing what they have been doing.

In a better world, to your point about protecting wetlands and protecting our waters, maybe we should be thinking about expanding what is covered. This does not do that in any way, shape or form.

Senator VITTER. I am a layman, so explain to me some of these accepted definitions. What is the difference between a puddle, as you describe it, and a natural pond or a wet meadow?

Ms. BROWNER. If the Chair doesn't mind if I can just back up for 1 second, the best definition of a wetland is not whether or not water is always there. The best way to determine it, the scientific way to determine what is a wetland is to look at what is the vegetation, what is the habitat that is provided.

Simply because water stands someplace at some period of time doesn't make it a wetland, doesn't make it something that is subject to permitting under the Clean Water Act. So there are widely accepted ways to determine what is and what isn't. The Army Corps, EPA and many of the States have actually mapped their States. You can look at these maps. If you are a developer—we did a lot of this work when I was at EPA—you can look at a map and understand where there are requirements that you have to meet and where there are no requirements for you to meet.

Senator VITTER. Again, let me re-State the question, because I don't understand the answer. For a layperson, what is the difference what you are calling a puddle and a mudflat, a sandflat, a slough, a prairie pothole, a wet meadow, a natural pond—all impoundments of the foregoing.

Ms. BROWNER. I would say it this way. A puddle does not have the kind of vegetation, does not provide habitat, does not contribute to aquifer re-charge. Therefore, it is not covered under the bill.

Senator VITTER. I would just make the point, Madam Chair, that a lot of things I consider a puddle and my constituents consider a puddle are undoubtedly these things. I think as a matter of practice, this would be a dramatic expansion and invitation of the Federal bureaucracy to get involved in all sorts of things that they haven't traditionally been involved in.

I assume, Madam Administrator, you agree that under the new language, there is no type of property, like for instance a backyard, that is off limits by definition.

Ms. BROWNER. Under the historic interpretation of the Clean Water Act, there are lots of things like backyards—and you and I may not be meaning the same thing—that are excluded. There is a whole 30-year history of interpreting this language that doesn't go away. It is preserved.

Can I try and say this another way? If you don't do something like this bill, if you don't reassert the historic jurisdiction of the Clean Water Act, you could end up in a situation where an overly aggressive Administrator started expanding the Federal Government's activities. This actually takes what has been done for 30 years and says that is all you can do going forward.

Senator VITTER. I thought——

Senator BOXER. Your time has expired. We will now move to Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Madam Administrator, for being here. I appreciate it very much.

Having run regulatory agencies myself, and having served as a lawyers and attorney general, I am keenly aware of the value of the precedent that has been built up around a particular statute over very many years.

It is somewhat unrelated, but when I was attorney general, one of the battles I fought was to get rid of our State definition of grand jury secrecy rules so we could model the Federal grand jury secrecy rules. I did so not because the Federal grand jury secrecy rules were word-by-word better than the State rules, but rather because they came with a body of precedent that spanned the Country, that had innumerable glosses on them and further definitions and analysis and discussion.

That body of precedent provided guidance to lawyers, provided stability to the process, and prevented my successors in this office from doing extraordinarily difficult, stupid or whatever things that they might have been able to slip through a State definition. That great body of precedent attached to the Federal definition was enormously both restricting and provided practical guidance in a way that a new bill never could.

So I just want to emphasize what you said. I think that the most important thing that you said in your testimony was exactly that, that there is this precedent developed under both Republican and Democratic Administrations. Correct?

Ms. BROWNER. Yes.

Senator WHITEHOUSE. Under Republican and Democratic Administrators?

Ms. BROWNER. Yes.

Senator WHITEHOUSE. Primarily driven by technical professional people who are not partisans within the Environmental Protection Agency?

Ms. BROWNER. And the Army Corps of Engineers, yes.

Senator WHITEHOUSE. And the Army Corps of Engineers—hardly a hotbed of liberal environmentalism through a great deal of this period, correct?

Ms. BROWNER. Correct.

Senator WHITEHOUSE. So you would agree, there is real value to trying to revive that body of precedent in this case. Could you comment on how a developer might find value in having this body of precedent reactivated by this statute?

Ms. BROWNER. Well, two points. You are exactly right. Precedent is very important and agencies are not free to do whatever they want. They have to follow the law and they have to follow the historical interpretations of the law by the agency and by the courts. A developer should take a lot of comfort in knowing that the agency is not free to do anything. This clarifies that in light of the Supreme Court decision.

I might also note that in the Rapanos case, 34 States submitted amicus briefs saying we can't do this without the assistance of the Federal Government. So there is this recognition that the precedent, Senator, as you speak, that has built up in the Federal program is extremely important.

Senator WHITEHOUSE. Yes, including my State of Rhode Island. I am very proud to be a part of it, but also including Kentucky, Louisiana—Senator Vitter's State signed on—Montana, and New Mexico. It is a very broad coalition.

One other quick question or observation, I guess, the Clean Water Act was passed back in 1972, and the Rapanos decision was in 2006.

Ms. BROWNER. Correct.

Senator WHITEHOUSE. So for 34 years—we are trying to get back to whether the law of the land was developed over that great time period in which there were Republican Presidents and Republican Congresses and Democratic Presidents and Democratic Congresses. That is a pretty substantial track record for lawyers, developers, people trying to figure out whether to finance a project, to look at. Correct?

Ms. BROWNER. Absolutely. To put two finer points on it, most of the people interpreting the Clean Water Act over its history were Republican administrators, not Democratic administrators; and No. 2, I think I am widely known for having had a very aggressive enforcement program at EPA going after the polluters. We read this the way it had been read historically.

At the same time, the economy grew in this Country. Lots of areas got developed. Things as we know it didn't grind to a halt. So you can interpret this law and still have a lot of the activities that people think are important to their communities, to their economy, to their agricultural production. It has been done before. It can be done again.

Senator WHITEHOUSE. My time has expired. I thank the Chair.

Senator BOXER. Thank you very much, Senator.

Senator BARRASSO.

Senator BARRASSO. Thank you very much, Madam Chairman.

When the Clean Water Act passed initially, there were some assurances made unanimously to Western Senators regarding allocation of water. I think that helped ensure passage of the bill at that time. Certainly, the amendment from Senator Wallop was part of that essentially barred Washington from overriding State control of water.

The National Water Resources Association states that this bill dramatically undermines the assurances made by Congress to the States, which was part of the Wallop amendment. Does this bill, in your opinion, erode or undermine the language in the statute included by Senator Wallop?

Ms. BROWNER. No, I do not believe it does. I am sure you know this, but it is always just worth reminding ourselves, the Clean Water Act is about water quality. It is not about water quantity. I think what Senator Wallop was attempting to do was to make that distinction very clear.

Now, obviously there are times when water quantity affects water quality, but the heart of the Clean Water Act is water quality.

Senator BARRASSO. But you continue to maintain this is not an expansion, but a clarification, although everyone I talk to at home views this as an expansion, not as you claim, a clarification. You

talked about your opinion on these. That is just your opinion. It is not what a judge may rule if a suit is filed.

Ms. BROWNER. Let me say, if I were at EPA and this bill were to pass, nothing would change in terms of what EPA would be doing. EPA would continue to do the same thing it had done prior to the Rapanos decision. I wouldn't send out some guidance. I take your point that I am not a judge. I do have 20 years of experience in the regulatory arena and I continue to follow these issues, but I am not a judge.

But I can tell you, as someone who has written regulations, as someone who has written legislation, who has read a lot of these, this in my considered opinion does not in any way change the jurisdiction of EPA and the Army Corps of Engineers when it comes to protection our Nation's water quality.

Senator BARRASSO. It would just seem that removing the word navigable does expand, does not just clarify, and if it didn't, this piece of legislation wouldn't be necessary.

In your opinion, how is this bill going to benefit ranchers and farmers all across Wyoming and the Rocky Mountain West?

Ms. BROWNER. Well, I think it benefits them in the same way it benefits all of us, which is we are facing increasing dilemmas when it comes to water in this Country, making sure that we are able to protect areas that act as re-charge, protect areas that contribute to a water body that becomes our drinking water.

Our water resources are interconnected, and protecting them in a coherent way makes sense for everybody, whether you are a farmer or a mother turning on the tap water to fix their baby's bottle.

Senator BARRASSO. Thank you very much, Madam Chairman. I think we just have a fundamental difference of opinion on this as a clarification or expansion. Thank you.

Senator BOXER. Thank you, Senator Barrasso.

Senator CARPER.

Senator CARPER. Ms. Browner, welcome. It is great to see you. Thank you for your service to our Country and your stewardship, and for joining us today.

One of the things I was reminded of almost every day in my 8 years as Governor was that businesses like certainty. They like to know what the rules of engagement are going to be. We have been wrestling here with what to do about climate change and global warming. My colleagues have all met with folks from the utility industry.

I remember this one meeting about 2 years ago with folks from utility industries around the Country. We were talking about reducing carbon dioxide emissions and trying to set up a cap and trade system. This one crusty old fellow from a utility company somewhere down south, maybe Georgia, he said to me, just tell us what the rules are going to be; make them reasonable; give us a chance to comment on them; and just give us a little flexibility and get out of the way. That is really what he said. But he said, in our business we are going to be investing hundreds of millions of dollars, maybe billions of dollars, and we just need to know what the rules are going to be.

I think the same probably applies here. You started to make a point, and I just want you to go back and make it again for us. The point I think you were making is you could have an Administration given broad flexibility to come in and take the law, if you will, through regulation, in directions that would be far different from where this Administration would go. I think what you are trying to say is by virtue of passing the legislation that has introduced, and that some of us have cosponsored, we do provide a fair amount of predictability for folks who need it. Would you just expand on that for us again?

Ms. BROWNER. You are exactly right. I heard it over and over again during my tenure at EPA. People just want to know what the rules are. They want to know what the end game is. They want some flexibility in how they get there, but tell them the rules.

This tells people the rules. Essentially what it says is the rules are as they have been. Again, I think it is really important to remember, this doesn't say you can't get a wetlands permit. It simply says when you must seek the authority of the government. It also includes a whole set of exemptions, a whole type of activity, and these types of waters are not covered with this proposed legislation.

So I actually think that if I were a developer, if I were a farmer, I would take a lot of comfort in the clarity that this brings to the situation.

Senator CARPER. All right. Thank you.

A second question, if I could. I understand that under EPA and Corps of Engineers new guidance rules that as many as 20 million wetland acres could lose Clean Water Act protection. I don't know if that is the right number. That is what I have heard. Delaware, as you know, is a coastal State. You know because you have been there along with your son, as I recall, many years ago on a day that it rained all day. But I understand the importance of preserving wetlands to clean our surface water and to protect our coast in Delaware against storm surges and provide some habitat for plant and animal species.

The question is this, and it really relates to cost. Could you talk with us a little bit about the costs of not protecting these so-called wetlands to public health and the environment? Is it more effective, in your judgment, to take preventive measures or to really be reactionary?

Ms. BROWNER. If 35 years of environmental efforts in this Country on the pollution side have taught us anything, it is precisely that preventing the pollution, rather than waiting to clean it up, will always be more cost-effective. We are talking about water quality broadly, but when we talk about wetlands, that is nature's kidneys. It is the way nature has of purifying the runoff, the pollution. And if we go around draining our wetlands and paving our wetlands over, we are not going to have that function in nature and we are going to end up having to do it ourselves, and it will be very, very expensive.

Senator CARPER. One last question, if I may, Madam Chair.

One of the objections to the Clean Water Restoration Act that has been introduced is that it is an expansion of Federal authority over protecting our Nation's waters. Could you just respond to that? Do you think it is?

Ms. BROWNER. No.

Senator CARPER. I think you said no.

Ms. BROWNER. It is not an expansion. There is nothing that the Army Corps or EPA would do differently with the passage of this law than they did 10, 15, 20, 30 years ago. It would be different maybe than what they are doing today because today I do not believe they are enforcing the Clean Water Act in the way they should. But in terms of the historical interpretation, this simply clarifies, restates, and we continue to do what we did and were able to do to good end in terms of cleaning up our rivers, lakes and streams, protecting our waters.

Senator CARPER. All right. Thanks very much. Thanks for joining us today.

Senator BOXER. Thanks, Senator Carper.

Senator ISAKSON.

Senator ISAKSON. Thank you, Madam Chairman.

Following up on Senator Carper's question about 230,000 acres of wetlands that would not be covered, was that because the definition of navigable water always exempted the wetland?

Ms. BROWNER. The issue is that the current Administration has chosen to read a 414 decision, the Rapanos decision, as excluding from the purview of the Clean Water Act things that have historically been within the Clean Water Act. That number is derived by a number of people who have looked at if you apply this new interpretation of the Administration, what falls out of the jurisdiction of the Clean Water Act that had previously been in its jurisdiction.

Senator ISAKSON. Prior to the Rapanos decision, the court decision, if the State of Georgia was cited for a violation of the Clean Water Act, but it determined the point source of the pollution was in the State of Tennessee, prior to Rapanos could it seek a remedy against the State of Tennessee as a State?

Ms. BROWNER. There would be a couple of options open to the State of Georgia. One would be to contact the EPA and ask them to take action against the State of Tennessee. The second would be litigation between the State of Georgia and the State of Tennessee, as there has been litigation between Florida and Georgia.

Senator ISAKSON. In that case, when you were the Administrator, had such a circumstance come up and if they had come to you as EPA Administrator to intercede, do you remember cases where you did?

Ms. BROWNER. Oh, sure. There were cases. What you would do initially is sort of the common sense thing, which is you would reach out to the State of Tennessee and say we think you have a facility within your jurisdiction that is out of compliance. Can you take a look?

But there is an authority that EPA has which is if a State has received day to day operation authority for the Clean Water Act, but EPA determines that State is not managing that day to day operation within the confines of the Federal Clean Water Act, EPA can step in and do what is called an over-file, which is sort of reclaim the jurisdiction on a case-specific basis.

Senator ISAKSON. So would it be true then that after the decision, the EPA is now saying, in that example I gave where Georgia goes and says, look, the point of this pollution of the water is not

us, you can't cite us, it is Tennessee, in your Administration and others they would have gone and tried to mitigate and work that out with the State of Tennessee. But now because of the definitional interpretation, that would not have taken place?

Ms. BROWNER. In some situations. I think there is still agreement between everybody that certain things are covered by the Clean Water Act. Then there is this dispute that some people have interpreted Rapanos to say things that were historically covered are not covered. An example would be, if that discharge in Tennessee from that polluting plant went into an intermittent stream, a stream that only occasionally had water in it, and that stream then fed into Lake Lanier, there are people who would say that discharge is no longer covered under the Clean Water Act. It is no longer subject to regulation by the EPA because that stream is no longer covered. You have to kind of work upstream to sort these things out.

It is a complicated example you have given. Depending on what the discharge is into, you may have people arguing today it is not a covered discharge.

Senator ISAKSON. Well, it may be complicated, but as I read the amicus written by the Attorneys General for those 34 States, that is precisely what they were trying to get from the court, was a clarity that they could call on the EPA when they were a victim and not an accomplice to the pollution.

One other point I will make, and I know my time is running out, going back to clean air that it is somewhat analogous to. In Northwest Georgia, we have Dade and Walker Counties. They are noncompliant in clean air standards, but don't generate any pollution, but are south of a major city in another State that does. Because of wind patterns and the Bermuda high, they end up being penalized. They have no remedy under the Clean Air Act, or at least we have never been able to find one to get some waiver or some wiggle room in terms of the penalties under the Clean Air standards. It would be interesting to take this application and look to the Clean Air Act and see if you could find a way.

Ms. BROWNER. There actually are some mechanisms within the Clean Air Act that can provide some relief to them. For example, there are States in the Northeast who have actually sued States in the Midwest over their failure to regulate pollution that is impacting the Northeast. So there is some precedent there.

If I might just thank you for recognizing the work we were able to do in Atlanta. It is something I continue to be very proud of. As EPA Administrator, when we could hold a press conference where I determined that a bridge is an air pollution reduction strategy, it was a nice day.

Senator ISAKSON. At the risk of going too long, and there probably were others, that was the singular best example I have ever seen of making an intelligent decision that benefited both the environment and the development community, which does demonstrate you cannot always be adversaries. You can, in fact, be friends.

Ms. BROWNER. But the laws all provide flexibility for common sense interpretations. Thank you for recognizing that.

Senator BOXER. Thank you, Senator.

Senator CARDIN.

Senator CARDIN. Thank you very much, Madam Chair.

Let me first ask consent that my entire opening statement be placed in the record.

Senator BOXER. Without objection, so ordered.

OPENING STATEMENT OF HON. BENJAMIN L. CARDIN, U.S. SENATOR FROM THE STATE OF MARYLAND

Senator CARDIN. Ms. Browner, welcome. It is a pleasure to have you back. You bring back good times when EPA was out there fighting on behalf of our environment. I can tell you, we are going to restore those days. I think it is critically important for our Country and I just applaud you for your leadership and I thank you very much for your testimony.

I just really want to make a comment about how important this issue is to maintain, as you point out, the jurisdiction of the EPA as it relates to our waters. As you know, Maryland is very much impacted by the Chesapeake Bay. It is the largest estuary in the Country. It depends upon the concerns of many different jurisdictions. It is 64,000 square miles and 110,000 streams flow into the Chesapeake Bay, with 1.7 million acres of wetlands alone.

I mention that because wetlands are vital, absolutely vital to the health of the Chesapeake Bay. I visited Blackwater over the weekend and saw what is happening to the marshlands there, and knowing how sensitive that area is to the whole ecology of the region. It is important for species diversification. It is important for drinking water. We could just go down the list. So it is vitally important that we have a Federal partner. The Clean Water Act is critically important, and the enforcement of the Clean Water Act, as historically understood, needs to be maintained. So I thank you for making that point.

The people of Maryland have been on this issue now for several decades. Although it is frustrating because the quality is not what we want it to be, we recognize what would have happened if we didn't make the type of commitments that we did in the past, where we would be today. When you were the Administrator, you aggressively worked with us—aggressively as a partner, not to dictate policy, but to complement the work that was done by the Maryland government, the Virginia government, and Pennsylvania with the Susquehanna, and dealing with so many other issues. You used the jurisdiction of EPA so that we could get the type of cooperation from the private sector, as well as from the governmental partners.

And that what this is I think all about. I think this bill is extremely important. I am a co-sponsor of the bill. I think it is extremely important that we maintain that partnership. That is what I look at this as, as a partnership. It has never been used in a way to try to dictate a particular policy. We have strong support from the private sector, strong support. They are rooting us on on this. They understand the importance of clean water to their families and to their businesses.

I just really want to applaud you for being here and for what you have done, and thank you for continuing to wage the good fight.

Thank you, Madam Chairman.

[The prepared statement of Senator Cardin follows:]

STATEMENT OF HON. BENJAMIN L. CARDIN, U.S.SENATOR
FROM THE STATE OF MARYLAND

Madame Chairman, thank you. For 36 years the Federal Water Pollution Control Act, known as the Clean Water Act, has provided protection to our Nation's waters. The goal of the Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Protection of our Nation's waters has been vital for contributing to the well-being of our Nation's environment, economy, and health. These protections are now at risk.

The Supreme Court's SWANCC ruling in 2001 and its more recent rulings in June 2006—Rapanos v. United States and Carabell v. Army Corps of Engineers, have threatened to leave nearly 60 percent of our nation's waters without Federal protection.

At issue in these cases was whether the application of the Clean Water Act to some non-navigable wetlands, based on interState commerce and de-linked from the traditional connection to "navigable waters," exceeded Congress' constitutional authority. The uncertainty left as a result of these rulings over Federal jurisdiction of our Nation's waters threatens many streams, small rivers, and wetlands that are important for:

- water quality,
- fish and wildlife habitat,
- drinking water quality and protection, and
- for providing protection from flooding and storm surges.

Wetlands play a vital role in the Chesapeake watershed—the largest and most productive estuary in the United States.

One hundred and 11 thousand miles of creeks, streams and rivers throughout the Bay watershed converge into fifty major tributaries that send water to the Chesapeake Bay. The Bay's nine largest tributaries contribute 93 percent of the total fresh water to Chesapeake Bay, about half of the Bay's total water volume.

Headwater streams comprise the majority of streams and waters in a watershed, and they play the most important role within the watershed in improving water quality by filtering runoff, sediment, nutrients, and contaminants before they move further downstream.

The Bay's productivity has declined sharply in recent years—as the human population has increased beyond 16 million—and land use practices, which include the destruction of wetlands, are a major cause of this decline.

The Chesapeake Bay watershed has an incredibly complex network of 110,000 streams and 1.7 million acres of wetlands, most of which are non-navigable tributaries and non-tidal wetlands. The headwater streams and wetlands of the 64,000 square mile Chesapeake Bay watershed, however, are inseparably bound to the Susquehanna, the Potomac, the James, and the other large navigable rivers that flow to the Bay.

Over 500 surface drinking water intakes, serving up to 3 million people, are located in non-navigable headwaters in Chesapeake Bay states. The headwaters of the Chesapeake Bay tributaries serve as a natural filter for drinking water.

Additionally, headwater streams and wetlands of the Chesapeake watershed protect downstream areas from flooding as these streams and wetlands temporarily store water thereby slowing flood flows.

The Chesapeake Bay and its 3,700 different species rely upon the network of streams and wetlands to provide vital water quality and a healthy habitat.

Because of wetlands' vital role to the health of the Chesapeake, I am proud to be a co-sponsor of S. 1870, the Clean Water Restoration Act of 2007 introduced by our colleague Senator Feingold.

S. 1870 would clarify the jurisdiction of Federal authority over the waters of the United States in the Clean Water Act by deleting the word "navigable" from the Act and replacing it with the term "waters of the United States." This change makes it clear that the Clean Water Act is principally intended to protect the nation's waters from pollution, and not just maintain navigability. This legislation would reaffirm the regulatory status quo prior to the Rapanos and Carabell rulings while not creating "new" Clean Water Act requirements.

We should let science determine the relationship between wetlands and downstream navigable waters and further let legislation we craft to deal with uncertainties in defining this Nation's waters. Because there are few wetlands and streams that are truly isolated hydrologically, there is scientific justification for their receiving the broadest possible protection under Federal law.

I look forward to the testimony from today's witness in helping to clarify why we need to restore the wetland protections that existed prior to the SWANCC, Rapanos, and Carabell decisions.

Thank you Madame Chairman.

Ms. BROWNER. Thank you.

Senator BOXER. Thank you, Senator.

Senator CRAIG.

OPENING STATEMENT OF HON. LARRY E. CRAIG, U.S. SENATOR FROM THE STATE OF IDAHO

Senator CRAIG. Madam Chair, thank you very much.

Carol, it is great to have you back before the Committee. I appreciated the relationship we had over the years when you were Administrator.

Madam Chair, let me first ask unanimous consent that my full statement be a part of the record.

Senator BOXER. Without objection, so ordered.

Senator CRAIG. I have been listening very closely as to what you are saying and what others are asking, so I am not going to repeat nor follow that line of questioning. I will make a brief comment because there are other witnesses to be before us.

We know the distinctions and the differences that the great Mississippi River makes, not as a body of water, but as a legal boundary line between different water laws, eastern water, western water. In fact, the Senator from Georgia while talking about it, now his State and others are embroiled in the absence of good State relationships and water laws that the West has and has had now for a century.

And the reason was always quite simple: in the West, water was scarce. It was an arid place. In the East, water was almost always a problem more than it was an asset. We worried more about managing it for human safety than we did about managing it for human survival.

The Chairman's State and mine and others are perfect examples of phenomenal systems built over the years. Whether you criticize it or praise it with Cadillac Desert, Idaho and California bloom and are phenomenal places to live today because of man's ability to manage and shape water resources, some not so good, most very good.

And as a result of that, when the law changes, Western States especially become very frustrated as to what it means. You are telling us that it really means nothing. It clarifies. So the ultimate question is, who clarifies it in the end? I do believe that we will go through a period of time in the courts and with fights all over again as to what it really means, because we know what it means today and what it doesn't mean. We fought that battle out. You were right out there on the front, no dispute about that, doing your job as Administrator as you saw the law and interpreted the law at the time.

Push-back? You bet. There was a lot of push-back as it related to who had the authority, whether the Army Corps of Engineers was appropriately defining what a wetland was, blah, blah, blah, blah. None of us dispute the value of water. The great debate in the West today is what are we going to do? We are populating at a higher rate than we ever have before. We are going to have to reallocate water. I want that allocation and that relationship primarily to reside in Laramie or Boise or Sacramento, and not Wash-

ington, DC, and not with the Administrator of the EPA. Period. End of statement.

But having said that, none of us dispute water quality. And as we fight over water quantity, we know that water quality is very, very important, more so than ever before. We understand the intermittent relationships of wetlands and aquifers and filtering systems and riparian zones and all of that much more so than we ever did before. And probably the Clean Water Act has helped us do that. I don't dispute that.

Here is my greater frustration with this reauthorization. I think the Senator from Wyoming used the old adage that is very typically Western about water and whiskey in his opening comments. I will take it a step further. I really do believe that this change from navigable to waters of the U.S. will put us in a situation where any puddle—and I will use that word—that can float a legal brief is now in question.

And don't think it won't be tried in the courts. Environmental groups, groups of good cause, will determine they can shape and control water more than ever before, and the clarification will not come from the Administrator of EPA. It will come from a judge. Where the Chair and I disagree on occasion about the Ninth Circuit, it is an activist court and we know it to be that, and it will make these determinations, and judges will become water masters in the West instead of the States.

Therein lies my greatest frustration. Let me close—my time is up—by suggesting this. Water quantity that you say is Western water law, that Malcolm Wallop talked about who determines, will become a factor of water quality under this definition more than ever before, in my humble lay opinion.

Thank you very much.

[The prepared statement of Senator Craig follows:]

STATEMENT OF HON. LARRY E. CRAIG, U.S. SENATOR
FROM THE STATE OF IDAHO

The Clean Water Restoration Act, S. 1870, deletes the term "navigable" from the Clean Water Act (CWA) and replaces it with a new legislative definition of "waters of the United States" that includes all "intraState waters" and all "activities affecting these waters." These are far-reaching changes to the CWA.

This is the age old issue of State versus Federal water rights. In Idaho, we believe in State preemption, where the State has the right to manage the local water bodies.

The legislation that we are reviewing today, if enacted, would change the definition of navigable water to anything that will float a legal brief. The title sounds harmless, but if S. 1870 is enacted and its supporters have their way, Federal bureaucrats will have the authority to visit farms, ranches, and even suburban lawns to gauge how your normal activities are affecting every drop of water that falls on your land. This bill will expand the reach of the Federal Government and its potential impact on individuals, businesses, and local government.

While S. 1870 intends to clarify the jurisdiction of the United States over 'waters of the United States,' it broadens the bodies of waters that could be subject to the legislative powers of Congress. Examples of where S. 1870 could negatively impact private land owners include: Intermittent streams as well as grass waterways that farmers typically access with heavy equipment and maintain could be impacted. A farmer might possibly need to obtain a permit to perform maintenance under the new definition of "navigable waters". In addition, farmers might also be required to obtain a permit before using chemicals to control weeds and insects in fields, due to possible runoff impacts into "intermittent streams."

Should it be every drop of water or should there be some limit to the power of the Federal Government to reach into: lakes, rivers, streams (including intermittent

streams), mudflats, sand flats, wetlands, prairie potholes, wet meadows, playa lakes, natural ponds, groundwater, and all impoundments of the foregoing. The language "all impoundments of the foregoing" would include roadside ditches. Since many of these ditches exist by the road for drainage purposes, the business practices of road builders and road maintenance could be impacted.

The provisions would also add an untenable workload on reviewing agencies who must apply the additional changes to other regulatory decisions regarding point discharges, storm water management, and TMDL compliance. It would essentially grant the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers veto power over local land use policies (regulating all activities that "affect" water). Additionally, thirty years of experience since the passage of the Federal Water Pollution Control Act indicates that states most efficiently protect the water quality of smaller and intermittent bodies of water and wetlands. S. 1870 would endanger this local protection.

The bill makes no attempt to legislate within the bounds of Congress' Constitutional authority, instead it redefines the jurisdictional limits of the Federal Government to include all waters, regardless of their impact on interState commerce, and defers to Federal courts to come up with a jurisdictional limit that Congress did not. Good rulemaking will solve this issue—defining, with adequate public comment, what is "isolated"; what constitutes a "tributary.

Senator BOXER. Thank you.

Let me say this, given the time we are under, the constraints because we have a very good panel to hear from, what I am going to do now is, before Carol Browner leaves, some of us have some documents to place into the record. This would be the moment to explain those documents.

Senator Craig, do you want to say what your document is?

Senator CRAIG. I just would ask unanimous consent. It is a letter from a county commissioner and a board of county commissioners in the State of Idaho, Lemhi County. I would ask unanimous consent that it be part of the record.

Senator BOXER. Absolutely.

[The referenced document follows:]

OFFICE OF THE COUNTY COMMISSIONERS
206 COURTHOUSE DRIVE
SALMON, IDAHO 83467

R. E. Cope, Chairman
Brett Barsalou
Rick Snyder

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COMMENTS FROM LEMHI COUNTY
REGARDING THE CLEAN WATER RESTORATION ACT

The Lemhi County Board of Commissioners is grateful for the opportunity to comment on the Clean Water Restoration Act, S. 1870. Water is one of the truly key issues for counties of the Intermountain West, and this legislation has, in our opinion, a high probability of producing pronounced negative effects on our citizenry and their environment.

It is important to remember that Westerners have a rich heritage of interdependence with the land and each other. Given the frequent harshness of the climate and terrain, these types of relationships are often vital for not only prosperity, but for survival. This spirit of cooperative efforts to achieve a common goal dominates the history of central Idaho. It also applies to intergovernmental cooperation, especially regarding issues of environment and natural resource usage. We believe that the Clean Water Restoration Act would be highly detrimental to the relationships we have built among federal, state, and local governments.

For government to function at its best, it must be close to its citizens. The more local knowledge that is utilized in a decision-making process, the better any decisions reached will be. This is especially true as it applies to issues with unique geographical characteristics. In the western United States, no such characteristic can be more important than water.

For over a century, the state and local governments of Idaho have worked cooperatively with the federal government to ensure the proper and judicial use of our most important resource – water. The quantity and quality of this water are equally important. For this reason, Idaho's Department of Water Resources and Department of Environmental Quality both work diligently to protect our water. Both state agencies work closely with local governments, particularly those of counties and cities. In this manner, local expertise can be utilized to the fullest possible extent. We firmly believe that this type of intergovernmental cooperation is essential to protect our water and other aspects of our environment.

This does not in any way exclude cooperative interaction between local government and federal agencies. In fact, Lemhi County works very closely with the U. S. Forest Service and the Bureau of Land Management. This intergovernmental cooperation has been highly beneficial for

both our public lands and our citizens. Such relationships with other federal agencies have been much more difficult to achieve, because their presence in our area is, unfortunately, at best intermittent. With the current trends in decreasing federal agency budgets, it is virtually impossible to foresee a change in this presence.

In our efforts to improve aquatic habitat in our rivers and streams, the Upper Salmon Basin Model Watershed Project has been able to accomplish a great many projects in central Idaho. These projects have included, among others, construction of fences to exclude livestock from riparian areas, culvert replacement, and stream reconnection. These efforts have been made jointly with federal agencies and local citizens, and serve as a model for other areas throughout the West. However, we believe that the Clean Water Restoration Act could prevent these types of projects from ever happening.

The vast majority of funding for our restoration projects comes from Bonneville Power Administration, which commits its funds for a limited time in advance. Because the streams where we do our work come under the jurisdiction of Section 404, permitting from the Army Corps of Engineers is routinely required. If this permitting process is delayed to any significant degree, Bonneville Power may well be unable to commit its funding. This certainly is not helpful to our efforts to improve our environment.

The Clean Water Restoration Act, as we read it, essentially makes every body of water, no matter how large or small, come under the jurisdiction of the federal government. However, it includes no provisions of any sort to supplement staff or funding for the Corps of Engineers or any other agency that could be affected by the legislation. We believe that delays in any and all permitting processes are inevitable.

Also, we fervently believe that a "bottom up", common sense approach to environmental issues, properly implemented, will always have the most beneficial results. The more decisions that can be made at the local level, the more site-specific knowledge can be utilized, and more benefits will be realized by our environment and our citizens. The Clean Water Restoration Act is a polar opposite of this belief. It essentially says that the federal government believes its expertise is always superior to state and local governments, and all water should therefore become the exclusive purview of federal agencies. We respectfully but strongly disagree.

Lastly, we feel that this legislation will be applied in a broad manner, as the clause that refers to "activities that affect these waters" may well be interpreted to apply to groundwater and potential non-point source contaminants. We consider this to be a far-reaching implication that goes far beyond the parameters of the 1972 legislation.

In summary, Lemhi County strongly supports efforts to improve the quality of our local waters, as evidenced by the recent accomplishments in our area. However, we do not believe that the Clean Water Restoration Act is in harmony with our goals. As such, we strongly oppose this legislation.

Senator BOXER. Senator Cardin.

Senator CARDIN. The statement from the Chesapeake Bay Foundation in support of the Clean Water Restoration Act.

Senator BOXER. Very good.

[The referenced documentwas not received at the time of print.]

Senator BOXER. Any colleagues on this side? Yes, Senator?

Senator BARRASSO. Thank you very much, Madam Chairman.

Yes, in addition to the one I previously put in the record from the Wyoming Rural Water group, I also have a letter from the Wyoming Stock Growers Association that I would like to have included in the record.

Senator BOXER. Without objection, so ordered.

[The referenced document was not received at the time of print.]

Senator BOXER. Senator Whitehouse, do you want to explain what you have here?

Senator WHITEHOUSE. Yes, I would like to, if I may, Madam Chair, with unanimous consent put into the record a table showing a State-by-State analysis of the overlay between the stream categories at issue here in the Rapanos decision, and the drinking water populations of the State which would indicate, relevant for instance to my colleague from Wyoming's question, that there are 177,871 Wyomians whose drinking water risks being affected by waste or sewage or chemicals dumped into start-reaches or intermittent ephemeral streams presently regulated, but at risk of losing regulation as a result of the Rapanos case.

Senator Carper was here. He is fortunate. He has none. Georgia, it is 3.6 million people, and Idaho, 242,589; in Louisiana, Senator Vitter's State, 1,071,000; in Maryland, 3.7 million water drinkers; and the last, our Chairman's State, the great State of California, 14.2 million people's drinking water could be affected by this decision. I would ask that to be made a matter of record.

Senator BOXER. Well, without objection, we will put that in.

[The referenced document follows:]

Table 1: State-by-State NHD Analyses of Stream Categories and Drinking Water Data

	Streams[1]			Drinking Water[2,*]	
State	% Start Reach	% Intermittent/Ephemeral	% Perennial	Population Served by SWPAs Receiving Water from Start Reaches or Intermittent/Ephemeral Streams	# of Systems with SWPAs Receiving Water from Start Reaches or Intermittent/Ephemeral Streams
AL	61	40	60	2,581,768	76
AR	52	63	29	911,466	104
AZ	56	94	3	818,881	45
CA	46	66	23	14,272,000	667
CO	52	68	24	3,583,330	230
CT	52	8	91	2,223,112	35
DC	59	28	71	0	0
DE	55	11	85	0	0
FL	29	12	46	916,454	9
GA	57	33	66	3,810,208	111
HI	55	46	36	40,084	4
IA	59	62	36	620,639	29
ID	51	47	47	242,589	58
IL	56	55	41	1,623,780	91
IN	54	34	54	1,668,898	36
KS	57	81	18	1,372,206	65
KY	55	29	64	3,097,903	164
LA	38	36	46	1,071,156	39
MA	52	10	89	4,733,465	98
MD	59	19	80	3,690,933	39
ME	55	13	87	389,174	58
MI	48	36	56	298,007	7
MN	45	51	40	959,301	14
MO	58	66	29	2,549,622	86
MS	55	58	37	289,740	3
MT	54	63	33	341,821	60
NC	56	23	71	4,297,102	142
ND	50	84	14	290,800	27
NE	52	77	19	525,566	5
NH	55	15	85	474,976	40
NJ	48	6	87	2,882,025	27
NM	53	88	8	211,146	37
NV	51	89	9	0	0
NY	55	11	87	10,220,056	275
OH	60	45	51	3,471,892	124
OK	58	74	26	2,420,695	216
OR	53	51	44	1,581,537	203
PA	59	25	75	7,979,560	362
PR				3,997,772	133
RI	54	11	89	551,162	10
SC	53	23	73	1,470,158	52
SD	55	86	10	341,211	34
TN	60	18	80	2,963,333	154
TX	53	75	21	7,284,836	328
UT	55	79	16	2,003,441	36
VA	57	30	67	3,317,038	133
VT	56	10	90	253,213	60
WA	54	41	54	1,701,824	145
WI	53	45	53	199,457	5
WV	60	36	64	881,596	133
WY	53	66	28	177,861	51
National	53	59	36	111,604,794	4,860

[1] Data Source: National Hydrography Dataset (NHD) from Reach Address Database (RAD) v2.0 at 1:100,000 scale. Percentages are calculated relative to total stream length using total kilometers of linear streams in watersheds that are totally or partially contained within each state boundary. Watersheds are at the 8-digit Hydrologic Unit Code (HUC) level.

[2] Data Sources: NHD (1:100,000 scale), Safe Drinking Water Information System (SDWIS); Preliminary Analysis. Source water protection areas (SWPAs) (based on SDWIS 4th Quarter 2003 data) for this estimate encompass the drainage area of up to 15 miles upstream from a drinking water intake, and any SWPA that contains at least one start reach or intermittent/ephemeral stream is included in the count. Only SWPAs of intakes located on the NHD are included in this analysis (EPA has located over 85% of intakes on the NHD).

* Does not include data on tribal lands

General caveats: NHD data generally do not capture streams under one mile in length. Intermittent and ephemeral streams are grouped together in the NHD. Washes in the arid western U.S. are not consistently demarcated. A start reach is a stream segment in the NHD that has no other streams flowing into it.

Senator BOXER. I have several things: the statement of Russ Feingold, who wrote this important bill, the Clean Water Restoration Act of 2007; the Office of the Governor of the State of Vermont supporting the legislation—a Republican Governor; the Office of the Governor of the State of Montana supporting this legislation; and a communication from 15 Attorneys General from our States supporting this legislation.

Also, I find this really intriguing. There is a document here, and I am going to put this one page in, where we have a quote by a member of the public during a workshop on the guidance held in Scottsdale, Arizona after Rapanos. This is what this gentleman says. I think you will all appreciate this, the frustration that is out there:

"We are I think as a community very frustrated with the guidance"—this is the guidance they got after Rapanos, and by the way, the guidance that now is causing big delays, much worse delays than before Rapanos—"We don't know what a significant nexus is. We don't know what a navigable water is. We don't know what a relatively permanent water is. We don't know how long a delineation will take. There has been a suspension of normal processing of delineation since 2006. One of the interesting things that is happening is this, you can go under the old rules and people are just saying please, let me go under the old rules, like they loved the old rules. We hated the old rules, but now we would just love to go under the old rules."

It is very interesting. You talk about an activist court. The Supreme Court is an activist court on this one, several members, not all.

And the last thing I want to put in the record, I think this is also intriguing and I hope my Republican friends hear this. This is part of the legislative history of the Clean Water Act. This is a quote from the then-Senator Majority Leader Howard Baker, who was the former Chief of Staff to President Reagan later. This is what he said: "A fundamental element of the Water Act is broad jurisdiction over water for pollution control purposes. Comprehensive jurisdiction is necessary not only to protect the natural environment, but to avoid creating unfair competition. Unless Federal jurisdiction is uniformly implemented for all waters, discharges located on non-navigable tributaries upstream from the larger rivers and estuaries would not be required to comply with the same procedural and substantive standards imposed on their downstream competitors."

Then he said, "We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource." And he says finally here, Let me emphasize that the protection of water quality must encompass the protection of the interior wetlands and small streams."

So I think if you look at, first of all, this is such a bipartisan issue, which really pleases me. When Ms. Browner, former Administrator of the EPA, she said two Republicans and two Democrats came together with the same stand. We have Republican Governors writing to us, Republican Attorneys General. I think this is not a partisan matter.

I just want to say, Carol Browner, thank you. Every time you come here, this is what I love about you. You are clear. You are straight from the shoulder. It is just unadorned testimony, and we learn a lot whether we agree with you as our side does in most cases, or disagree as some of our friends do. You are clear and you are knowledgeable. Thank you very much. We so appreciate your being here.

Ms. BROWNER. Thank you.

Senator BOXER. And now we will call up our second panel. It is my intention to go straight to this panel. So we welcome you: The Honorable Alexander Grannis, Commissioner, New York Department of Environmental Conservation; Joan Card, Water Quality Division Director, Arizona Department of Environmental Quality; The Honorable David Brand, Sanitary Engineer, Madison County, State of Ohio; and Randall P. Smith, who we have all been introduced to I think before, Smith 6-S Livestock.

We welcome you. We are going to start off. We will go back and forth from majority witness to minority witness so we get on the one hand and on the other hand testimony. So we will start with Hon. Alexander Grannis, Commissioner, New York Department of Environmental Conservation.

Welcome, sir.

STATEMENT OF ALEXANDER GRANNIS, COMMISSIONER, NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Mr. GRANNIS. Good morning, Madam Chair.

I am very pleased to be here on behalf of the department that I head and also the State of New York. As you stated, I am the Commissioner of the State Department of Environmental Conservation. Obviously, this matter is of great importance to the people of New York.

The Clean Water Act has been integral to the protection of our Nation's water for more than 30 years, as you acknowledged in your opening statement. Unfortunately, rulings by the U.S. Supreme Court in the SWANCC case and the Rapanos case have put those longstanding protections in jeopardy. That is precisely why we are here today to voice our strong support for S. 1870, the Clean Water Restoration Act of 2007.

As you noted, for 35 years the Clean Water Act was understood as regulating the discharge of pollutants, including fill, in the traditional navigable waters and non-navigable tributaries and wetlands adjacent to these water bodies. This view of the scope of the Act was contained in regulations promulgated by both EPA and the Army Corps, as Administrator Browner just testified to.

More precisely, it was embodied in the regulatory definition of the term "waters of the United States," a legal definition that is fundamental to the scope and jurisdiction of the Clean Water Act. New York and the vast majority of States have expressed strong support for the EPA and Army Corps' longstanding position on the broad scope of the Clean Water Act. As you mentioned, 34 States and the District of Columbia filed an amicus brief before the Supreme Court which supported this regulatory definition during the Rapanos proceedings. The position advocated in the States' amicus

brief is essentially identical to that presented by the Clean Water Restoration Act.

New York, over time, has lost an estimated 60 percent of the wetlands since its early colonial times. Many other States have suffered even greater losses. The member from Louisiana has been talking about that, and this has been an issue across the Country. Restoration efforts are costly, difficult and time-consuming.

Our greatest fear is that once wetlands and the biodiversity which they foster are lost, it may be difficult, if not downright impossible, to reestablish them. Preserving wetlands and small streams through effective Federal statutory and regulatory directives is environmentally beneficial, economically effective, and provides reasonable certainty to the regulated community.

It is in our Nation's interest to protect the wetlands and small streams that remain, and to prevent the future need for costly restoration efforts. The Clean Water Restoration Act, we believe, is critical to achieving this goal. Wetlands generally drain into adjacent tributaries or other waters, and the health of the lower reaches of our watersheds rely on the vitality of up stream tributaries and their adjacent wetlands. Federal agencies must continue to apply the Clean Water Act to both non-navigable tributaries and to the wetlands adjacent to them. To do otherwise would undermine the Act's purpose of restoring and maintaining the physical, chemical and biological integrity of the Nation's waters.

For 35 years, the States have relied on the Act's core provisions and have structured their own water pollution programs accordingly. We have done so in New York. While States play a vital role in administering parts of the Act, being forced to assume the role of sole responsibility for regulating activities on wetlands adjacent to the non-navigable tributaries and smaller streams would be a very heavy burden.

New York State benefits from some of the most extraordinary water resources in the Country. Industries have located in our State because of our water supply. Tourism and recreation thrive along our waterways. Protecting these resources can save money. New York City's successful effort to avoid building an $8 billion water filtration plant is based in large part on protecting and restoring these resources.

The fact is that none of the improvements made to New York's water resources over the last 35 years could have occurred without the active participation and partnership with the Federal Government. We need to continue the Federal role in this partnership. By reaffirming and articulating the original intent of the Clean Water Act, S. 1870 effectively frames the Federal role in wetland and small steam regulation and ensures that New York and other States once again be able to work together to protect and enhance these essential resources.

It is for these reasons, Madam Chair, that we strongly support enactment of S. 1870. Thank you.

[The prepared statement of Mr. Grannis follows:]

Written Testimony of
Alexander B. Grannis
Commissioner
New York State Department of Environmental Conservation

Before the

United States Senate
Environment and Public Works Committee

Hearing on
The Clean Water Restoration Act of 2007
April 9, 2008

Washington, DC

Good morning Senator Boxer and Members of the Full Committee on Environment and Public Works. My name is Alexander B. Grannis. I am the Commissioner of the New York State Department of Environmental Conservation in the administration of Governor David Paterson. Thank you for the opportunity to testify today about the importance of restoring the protections afforded by the Clean Water Act to America's lakes, streams, rivers and wetlands.

The Clean Water Act has been integral to the restoration and protection of our Nation's waters for more than 30 years. Unfortunately, rulings by the United States Supreme Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC) in 2001 and *Rapanos v. U.S.* (Rapanos) in 2006 jeopardize federal water pollution protections for the majority of the nation's streams, rivers, and wetlands.

New York, therefore, strongly supports S. 1870, the "Clean Water Restoration Act of 2007." This legislation would truly be in the nature of a "restoration." For over three decades following the enactment of the Clean Water Act in 1972 it was understood that the Act regulated the discharge of pollutants, including fill, into "traditional" navigable waters, their non-navigable tributaries, and wetlands adjacent to these water bodies. This definition of what constitutes "waters of the United States" was contained in long-standing regulations promulgated by both the Environmental Protection Agency and the Army Corps of Engineers[1] – a legal definition that is fundamental to the scope and jurisdiction of the Clean Water Act.

While I only speak here on behalf of New York State, it is important to stress that the vast majority of the States recently expressed strong support for the long-standing definition of "waters of the United States" that was contained in these EPA and Army Corps regulations since 1975. Indeed, some 34 States and the District of Columbia joined an *amicus curiae* brief

[1] 33 C.F.R. § 328.3(a)(1), (5), (7) (Corps definition); 40 C.F.R. § 230.3(s)(1), (5), (7) (EPA definition); 40 Fed. Reg. 31,320, 31,324-25 (July 25, 1975).

(attached) which supported this regulatory definition in proceedings before the U.S. Supreme Court during the controversial *Rapanos* matter. The position expressed in the states' *amicus* brief concerning the scope of the "waters of the United States" protected under the Clean Water Act is essentially identical to that presented in the Clean Water Restoration Act of 2007.

I would also like to express New York's strong technical and scientific concurrence with the legislative findings of the Clean Water Restoration Act of 2007. These findings are an excellent and scientifically valid summary of the environmental and economic connections between all waters, connections that extend from the largest bodies to small tributaries and headwater wetlands.

New York has lost an estimated 60% percent of its wetlands since early colonial times. Many other States have suffered even greater losses. Therefore, we as a Nation need to protect and enhance those wetlands that remain. The Clean Water Restoration Act of 2007 is critical to achieving that goal.

Importance of Clean Water to New York State

New York benefits from some of the most extraordinary water resources in the country, ranging from Long Island Sound to Lake Champlain and the Adirondack mountain lakes to Niagara Falls and the Great Lakes. New York is blessed with water resources that include over 52,000 miles of rivers and streams, nearly 7,900 lakes and ponds, 600 miles of Great Lakes coastline, 1,530 square miles of estuaries and 120 linear miles of Atlantic Ocean coastline.

New York's abundant water resources are integral to the State's economy and environmental quality. Industries have located in New York State because of our water supply. Tourism and recreation thrives along New York's waterways, and important events in the history of our Nation are intrinsically linked to New York's water resources – such as Henry Hudson's travels up the river now named after him; the Battle of Saratoga during the American Revolution that helped to change the course of our history; and the welcoming of millions of immigrants to our Nation at Ellis Island. Clean water – so greatly tied to New York's past, present and future – is essential for drinking water, economic development, tourism and recreational activities, fish and wildlife habitat, and many other activities in New York.

New York has developed a solid track record in the preservation of the quality of many streams, wetlands, lakes and groundwater resources, and the improvement of water bodies which were polluted in the past. Working with EPA, we have developed and implemented comprehensive plans for the Hudson River Estuary, Long Island Sound, Lake Erie, Lake Ontario and Lake Champlain. State officials continue to work with our local and federal colleagues and other interested parties to clean up Onondaga Lake, the New York-New Jersey Harbor, the Buffalo River and other waters.

Together with New York City, upstate communities, EPA and many other parties, in 1997 New York negotiated and implemented an agreement to ensure that a high quality, unfiltered drinking water supply is available for the daily use of the over eight million residents and visitors to the City, as well as at least one million users in Westchester, Orange, Ulster and Putnam Counties – about half of the population of New York. This "New York City Watershed" is the largest unfiltered drinking water supply in the country, providing approximately 1.3 billion gallons of drinking water every day.

Through the implementation of a comprehensive watershed protection program, EPA has granted New York City a waiver from the Safe Drinking Water Act's mandate to filter drinking water supplies. This waiver has, in turn, saved the City of New York a projected $8 to $10 billion that would otherwise be necessary to construct a water filtration plant, as well as approximately $1 million a day to maintain and operate this plant. Wetland and stream protection programs, including very small streams and headwater wetlands, have been critical components of this highly successful drinking water watershed protection effort.

States' Reliance on the Clean Water Act

None of the improvements that we have made in New York's water resources could have occurred without the active participation of the federal government. Congress has been at the forefront of these efforts, through past actions to create and reauthorize the Clean Water Act and the Safe Drinking Water Act, as well as through annual appropriations to fund the mandates of these laws. Recent attacks on the Clean Water Act's traditionally broad protections for all types of waters would leave only certain waters – such as those that are "navigable-in-fact" or permanently flowing – covered by the law with any degree of certainty or predictability. This is not consistent with scientific understanding of the connections between waters and fails to offer sufficient environmental protections.

States have relied on the federal Clean Water Act for the past 35 years to set criteria and establish programs to ensure that their waterways are clean and safe. For many reasons, states such as New York need a federal program that serves as a consistent and strong national "floor."

Simply put, water flows downhill. It is an important fact that affects each of the lower 48 States. All of these states have water bodies that are downstream of one or more of the other states. For example, New York, Pennsylvania, New Jersey and Delaware share the Delaware River. Therefore, the need to stop pollution at its source, in the headwaters, is important to every state. New York takes this responsibility seriously. For example, we are actively working with local stakeholders to implement a "Tributary Strategy" for the New York portion of the Chesapeake Bay watershed that identifies pollutant source reductions that can be achieved. This strategy identifies actions that can be taken to help restore a valuable national resource that is approximately 300 miles downstream of New York's border.

In addition, wetlands generally drain into adjacent tributaries or other waters, and the health of the lower reaches of watersheds relies on the health and vitality of tributaries and their adjacent wetlands. Federal agencies have properly applied the CWA to both non-navigable tributaries and to the wetlands adjacent to them for more than 30 years. To do otherwise would frustrate the Clean Water Act's purpose of restoring and maintaining the physical, chemical and biological integrity of the Nation's waters. For these reasons, New York strongly supports continued federal protection for these wetlands and other waters, including intermittent and headwater streams. New York protects all surface and ground waters of the State, including intermittent and headwater streams, through the State Pollutant Discharge Elimination System (SPDES), which has been approved by EPA to meet the requirements of the Clean Water Act.

It is essential to maintain a strong federal floor for water pollution programs throughout the country through the Clean Water Act. Otherwise, there could be a "race to the bottom" as financially hard-pressed States reduce environmental protections to obtain a perceived economic advantage. Our country's rivers, lakes, streams and wetlands depend on federal protections to guarantee that pollution does not poison or destroy these waters. It is not likely that alternative conservation programs or regulatory programs at the state or local level will provide adequate or appropriately broad surrogate protections should the jurisdiction of the Clean Water Act be reduced.

Over the past three decades, the states have relied on the Act's core provisions and have structured their own water pollution programs accordingly. While states play a vital role in administering parts of the Act, they would be heavily burdened, both administratively and financially, if forced to assume sole responsibility for regulating fill activities in wetlands adjacent to non-navigable tributaries and in smaller streams. The proposed clarification is needed to prevent a reduced role for citizens, who can file suits under the Act's citizen suit provisions. Limiting the definition of the term "waters of the United States" limits the rights of citizens. States themselves might lose significant authority to seek relief from pollution discharged into unprotected waters of up-stream states.

Further Legal Challenges to the Definition of Navigable Waters

EPA relied upon the Clean Water Act's broad authority in defining navigable waters in developing regulations to implement the federal oil spill prevention program (Section 311(j) of the CWA). The American Petroleum Institute and Marathon Oil challenged the definition of "waters of the Unites States" in EPA's spill prevention regulations - the same definition used elsewhere in its Clean Water Act regulations - seeking to limit the extent to which the federal program would apply to damaging oil spills for many of the nation's streams, creeks and wetlands (see *American Petroleum Institute v. Johnson* and *Marathon Oil Company v. Johnson*). New York State intervened in these cases. By restricting the scope of the term "waters of the United States," the state's waters would be afforded less protection under federal law and therefore more vulnerable to pollution.

Oil spills have caused extensive and expensive environmental damage in New York. Nationally, more than 9,000,000 gallons of gasoline escape into the environment annually during the course of transportation, storage, sale or use. Contaminated private and public drinking water wells in New York, as well as traditional navigable waters, have resulted from these spills. If the challenge by the oil companies is successful, fewer waters in New York would be afforded protection from oil spills and hazardous waste discharges under Section 311 of the Clean Water Act. New York would lose its ability, granted by the Oil Pollution Act of 1990, to file cost recovery claims with the federal government for oil spill clean ups undertaken in wetland areas. Such a decision would leave New York State with less money in its Oil Spill Fund to properly address the more than 20,000 active spills statewide. In just one New York watershed, the eastern shores of Lake Ontario, there are approximately 10,600 acres of wetlands, 65% of which are not adjacent to navigable waters. Therefore, if the oil companies prevail, pollution would be allowed into these waters with no remedy under the Clean Water Act.

Unfortunately, this possibility came one step closer to reality last week. On March 31st the US District Court for the District of Columbia ruled against EPA and intervenors, including New York State. This ruling is further evidence of why Congress must act now to reaffirm and clarify the Clean Water Act.

Support for the Continuation of CWA Protections

Wetlands and adjacent tributaries are extremely important for downstream water quality. For example, an analysis of Lake Champlain by Vermont and New York concluded that of the estimated 647 metric tons of phosphorus (which tends to deplete dissolved oxygen and thereby create low oxygen conditions in which most aquatic life cannot survive) entering the lake from all sources each year, 573 tons — 89% — entered the Lake through its tributaries, most of which are non-navigable and intrastate waters.

In addition, headwater streams and isolated wetlands greatly enhance biodiversity or the variety and composition of biotic life. In New York alone, isolated wetlands provide habitat for hundreds of species of animals and plants, including more than 20 rare animals and 140 rare plants. Headwater streams are so critical for maintaining biodiversity that a panel of scientists, writing in the Journal of the American Water Resources Association, concluded: "Degradation and loss of headwaters and their connectivity to ecosystems downstream threaten the biological integrity of entire river networks."

Moreover, headwaters are vital in their own right. EPA has found that non-navigable tributaries in the mid-Atlantic region contain 558 separate sources of drinking water, serving a population of 5.2 million people. Headwater streams comprise about 53% of the total stream length in the lower 48 states.

Similarly, certain non-navigable bodies of water and wetlands in the New York City Watershed have been designated as Critical Resource Waters because of their importance in assuring the

purity of the City's water. New York City has successfully provided quality drinking water, in part, by protecting the wetlands and headwater streams north of the city that feed the reservoirs the City uses as sources of drinking water.

Clearly, states find all types of waters important to the health and safety of their citizens. Wetlands, their adjacent streams and tributaries as well as other small streams and tributaries are extremely important to protect our communities from flooding. These systems naturally absorb flood waters during heavy rain events and then release those waters after rain events. In 2007, New York experienced a significant flooding in some of our communities, including Westchester, Rockland, Ulster and Orange Counties. The damages, just to public properties in Westchester County, totaled $38 million from floods caused by a nor'easter'. If damages from this one storm to public and private properties in all the affect counties were combined, they would easily reach into the hundreds of millions of dollars. In New York, we are concerned that, if small wetlands and streams are removed from protection under the Clean Water Act, increased flooding would be likely, and the financial losses would be dramatic.

Without wetlands, fish and wildlife species lose much-needed habitat that, in turn, seriously impacts hunting, fishing and other recreational activities that are important to regional economies. Wetlands also reduce the natural filtering of water contaminants and sediments flowing from tributaries to the lakes, streams and rivers, and when they are lost we witness increased stagnation and noxious algae growths that foul beaches and shorelines. For that reason, New York is taking many steps to restore wetlands in areas such as Jamaica Bay in New York City and along the shores of Lake Ontario. We have undertaken successful wetlands restoration projects in the Upper Susquehanna region of New York's Southern Tier, and have restored wetlands as a successful technique to prevent flooding in some regions of the state.

Restoration efforts are costly, difficult and time-consuming. Our greatest fear is that, once wetlands and the biodiversity which they foster is lost, it may be difficult or impossible to re-establish. Preserving wetlands and small streams, through effective federal statutory and regulatory directives, is environmentally beneficial, economically effective, and provides reasonable certainty to the regulated community.

Conclusion

Clearly articulated Congressional guidance on the regulation of headwater wetlands and small streams is clearly needed to protect these wetlands, and to prevent the future need for costly restoration efforts. As New York argued in the amicus brief filed in the *Rapanos* case:

> "It is not enough for the Clean Water Act to be invoked only when there is proof that a specific discharge is connected to navigation or interstate movement. Even if the chances are small that any particular discharge will reach a downstream State or a traditional navigable waterway, collectively such discharges have an enormous effect – often the dominant effect – on water quality and quantity...

> Comprehensive coverage under the Clean Water Act is necessary to maintain the balance between federal and State authority established by the Act."

This is the guidance that the states are seeking from Congress. I believe that S. 1870, by reaffirming and articulating the original intent of the Clean Water Act, frames the federal role in wetland and small stream regulation effectively. By clearly defining this issue, the states will be able to once again work with the federal government to effectively regulate all connected wetlands and streams.

Thank you for providing me with the opportunity to testify.

Senator BOXER. Thank you very much, Mr. Grannis.

Now, let's turn to Mr. Brand, who is Sanitary Engineer, Madison County, State of Ohio. We welcome you, sir.

STATEMENT OF DAVID P. BRAND, SANITARY ENGINEER, MADISON COUNTY, STATE OF OHIO

Mr. BRAND. Thank you, Madam Chairman, Ranking Member Inhofe, distinguished members of the Committee. Thank you for the opportunity to testify on behalf of the National Association of Counties and the National Association of County Engineers. My name is David Brand. I am an elected County Engineer from Ohio. We elect our engineers in Ohio.

My county is a rural county. It is under 50,000 in population. It is a high-producing agricultural county and has a farmland preservation plan and relies on systematic drainage and county-maintained ditches to protect the farming community. As County Engineer, I maintain 343 miles of roads, 180 bridges, 200 miles of drainage improvements outside the public road right-of-ways. As Sanitary Engineer, I provide sanitary service to three sewer districts. I wear a few hats. I have a few titles. I hold a few professional registrations and I have just a few employees, 35. It is something we pride ourselves at the local level, doing more with less.

As I stated before, I am here on behalf of NACo and NACE. Both groups have strong concerns with S. 1870, the Clean Water Restoration Act. Our Nation's counties believe in the Clean Water Act. We believe in its accomplishments and we believe it was instrumental in clearing our waterways.

But rather than cleaning up our waterways further, we are concerned that the Clean Water Restoration Act moves far beyond this universally agreed principle. NACo and NACE believe the Clean Water Restoration Act would preempt State and local government authorities, cause unfunded mandates, create more paperwork, without—and I repeat without—enhancing environmental protection of waterways and wetlands.

The Clean Water Restoration Act proposes to take out one single word, navigable, from the Act, and seemingly it is a simple thing to do. However, the word navigable is important for several reasons. The term was instrumental in the Rivers and Harbors Act of 1899. The term navigable was used to differentiate between Federal and State waters. The Clean Water Act uses the word navigable nearly 100 times. It was purposefully used.

One of the basic tenets of NACo philosophy centers on State and local government responsibility to oversee State and local planning, policies, processes and decisions. More than 2,200 of our Nation's 3,066 counties are considered rural, under that 50,000 population mark. Local governments, especially those in the rural category, provide many services on limited budgets with part-time elected officials in most cases, and minimal support staff. They stretch their budgets over a wide variety of mandatory expenses, from education, public welfare, health care, highways, police and fire, and they provide direct services to our citizens. They are the first line of defense. It is where the rubber meets the road.

What this bill would essentially do, especially for the 404 permit program, is create more paperwork. This is problematic for those

rural counties who have the minimal staff, and can't hire the consultants to do the required paperwork. As written, the bill leaves many more questions than answers. It does nothing about clean water. It only dooms us to more legal wrangling at the Federal level and uncertainty at the local level.

NACo recognizes that the current system is not ideal. Our counties would like to have certainty in the jurisdictional process and overall clean water legislation. We also recognize that a one size fits all system will not work. Geographic differences vary widely across the Country, and the Federal plan needs to take into account these regional differences and plan accordingly with flexibility.

Unfortunately, the bill doesn't bring us any closer to the goal of clean water. In my community, partnerships altered locally require stormwater detention basins to make them water quality ponds. This wasn't done with Federal involvement. It was done by local government without any cost to Federal Government.

Local governments are doing that across the Country. This is where the Clean Water Act is being achieved, at the local level with local flexibility. The counties are committed to keeping our waterways safe for generations to come, and we believe in the objective of clean water and we believe it is attainable. However, it is going to take a variety of methods to achieve that goal.

We need strong partnerships in all levels of government, flexibility, workable definitions that don't burden local governments, and incentives to bring all levels of local government and State government to the table like the original Clean Water Act did. We have ideas and we would like to share them. We would like to move forward. With Chairman Oberstar, we think we can build this effective partnership among all levels of government for this purpose.

We look forward to working with you, and I would love to entertain any questions.

Thank you.

[The prepared statement of Mr. Brand follows:]

STATEMENT OF

THE HONORABLE DAVID BRAND, P.E., P.S.
COUNTY ENGINEER
COUNTY SANITARY ENGINEER
MADISON COUNTY, OHIO

ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES AND THE NATIONAL ASSOCIATION OF COUNTY ENGINEERS

THE CLEAN WATER RESTORATION ACT OF 2007

BEFORE THE SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE

APRIL 9, 2008

WASHINGTON, DC

Madame Chair, Ranking Member Inhofe, and distinguished members of the Environment and Public Works Committee, thank you for the opportunity to testify on behalf of the National Association of Counties (NACo) and the National Association of County Engineers (NACE). My name is David Brand and I am an elected county engineer from Madison County, Ohio. Yes, I said elected County Engineer. In Ohio the county engineer stands for county-wide election every 4 years. I will start my third term this January.

Madison County is a rural county in the Columbus, Ohio Metropolitan Area with a population of just under 50,000 people. It is a high producing agricultural county with a strong farmland preservation plan and relies on systematic drainage and county maintained ditches to protect this farming economy. I have two interstate highways crossing my county, and I have two State and National Scenic Rivers in my county, the Big Darby and the Little Darby. Roughly half of the 467 Square miles of Madison County drain directly into these two scenic rivers.

As County Engineer, I maintain 343 miles of county roads, 180 bridges and 200 miles of drainage improvements outside of the public road right-of-ways. As County Sanitary Engineer I am appointed by the County Commissioners to provide sanitary service to three sewer districts. I wear a few hats, have a few titles, hold a few professional registrations, and have a few employees (35). Something we pride ourselves on at the local level, doing more with less.

I want to thank you for allowing me to be apart of today's hearing on the Clean Water Restoration Act (CWRA). NACo has strong concerns with the CWRA because we fear that it would drastically expand federal clean water act jurisdiction. Additionally, we believe it would create significant bureaucratic obstacles and lead to increased costs to counties without enhancing environmental protections of waterways and wetlands.

Rather than cleaning up our nation's waters, we are concerned that CWRA moves far beyond this universally agreed on principle. The bill is essentially a one-size fits all approach, changing every area within the Clean Water Act. Removing the word "navigable" from the definition of the act will have expensive, far-reaching and unintended consequences for local as well as state governments.

One of the basic tenets of NACo philosophy centers on a state and local governments' responsibility to oversee state and local planning policies, processes and decisions. Counties are responsible for a wide range of activities designed to protect the health and well-being of their citizens. It is very likely that CWRA may preempt some of these ingrained local land use decisions.

That indeed was the major tenet of Supreme Court Justice Scalia's Plurality decision in the *Rapanos* case when he wrote, "In applying the definition [of waters of the United States] to

"ephemeral streams," "wet meadows" storm sewers and culverts, "directional sheet flow during storm events," drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term "waters of the United States" beyond parody. The plain language of the statue does not authorize this "Land is Waters" approach to federal jurisdiction" 126 S.Ct. at 2222 (2006). The CWRA, as written, could be interpreted extremely broadly by both the Courts and the regulators, without regard for state and local responsibilities that the current act maintains.

While a broad interpretation would affect counties on many different levels, no more so than in the Army Corps of Engineers 404 permit program. There could be a limitless possibility of future federal permits required to do things such as construct a new driveway or simply cross a swale on an individual's property. Counties are responsible for a number of manmade ditches, such as culverts, storm channels and road-side ditches. Currently, they face tremendous challenges getting permits approved in a timely manner.

My experience is that most permits get denied the first time and the total length is closer to 12 months than it is to 3 months. This is very different than the timeframes being quoted by the bill's sponsors. This is very problematic when debris clogs storm channels, which in turn floods homes. The county then deals with angry residents who don't understand why the county has to wait for 404 permit approval before they can clean the channel out. Just over the weekend, the Associated Press highlighted one such project in Findley, Ohio that the Army Corp of Engineers stated will take five years for them to study, make permitting determinations, and provide any relief at an estimated cost of $93 million (Akron (Ohio) Beacon Journal, Thursday Apr 03, 2008).

State and federal money is sometimes tied to county road projects. If a project is delayed due to delayed 404 permit approval, the county faces losing much needed money to complete a road project or at the very least yearly cost increases currently averaging 10% per year. Additionally, the dollars associated with getting these permits can be costly, especially for a rural county who does not have the manpower, expertise, or the resources.

As a county engineer, I take my responsibilities very seriously, as do the rest of our nation's elected and appointed county officials. Counties fully support the CWA and play an important role in implementing the Clean Water Act as partners with their state as well as the federal government. Our counties work very hard in meeting the goals of the Clean Water Act while bearing a heavy responsibility to protect the health, welfare, and safety of its residents, while enhancing their quality of life.

Counties have risen to the challenge, by protecting the environment through a variety of environmentally-friendly and cost-effective programs. You have heard this through previous testimony on the House side from Benjamin H. Grumbles, Assistant Administrator for Water at the U.S. EPA. He stated that the United States Environmental Protection Agency (EPA) has leveraged $25 billion through the Clean Water State Revolving Loan Fund into $61 billion in wastewater infrastructure and water quality projects over the last 19 years as a result of partnerships with state and local government (Committee on Transportation and Infrastructure, United States House of Representatives, October 18, 2007).

As a county engineer, I see first-hand how these partnerships can provide real water quality improvements. In one example, I was able to bring the Ohio Department of Natural Resources, a local village, and the local soil and water department together on a development project to alter the locally required stormwater detention basin for the development into a water quality pond. This was done without federal involvement and without any investment from the local government. Below, on the left, is what the finished product looks like and what a similar adjacent development has constructed without partnerships, on the right.

Who are counties?

There are 3,066 functioning county governments nationwide. They range in size from 26 square miles to over 87, 000 square miles. Similarly, the population of counties varies tremendously from 67 residents to just under 10 million. But, it's important to remember that most of the counties in this nation, over 2,200 counties, are considered rural, because they have a population of less than 50,000 people.

Local governments, especially those in the under 50,000 category, provide many services on very limited budgets. Elected officials are often part time, with minimal support staff. Their average budgets are approximately $18 million. And they stretch these budgets over a wide variety of mandatory expenses from education, public welfare, health care, highways, police, to fire. Local governments are the direct service providers for our citizens, the first line of defense, where the rubber meets the road.

County Responsibilities in CWA

Counties have a unique role in the protection of natural resources for they are both the regulator and the regulated under the Clean Water Act. In the role of regulator, counties administer a number of CWA programs that regulate water quality: storm water management and flooding, water quality management plans, Total Maximum Daily Load (TMDLs), etc. Additionally, many states require, as part of the state water acts, primary implementation at the local level. Coastal zone management acts in Alaska and California, fresh water acts in Massachusetts, Connecticut, Florida and Maryland, and in Virginia. An increase in the scope of CWA jurisdiction would increase the local scope in all these programs.

In the role of the regulated, counties are responsible for a number of public infrastructure projects, including roads and manmade ditches that would require wetland permits. We've heard

nightmarish stories from our counties who have had jurisdictional problems on projects. NACo has documented both commonplace and extreme stories. Some Washington and California state counties tell us they have mitigation requirements in the millions...just for one road project.

CWA Permit Process

When a project is deemed jurisdictional, that means the project requires a federal CWA permit. In my experience, these are cumbersome, expensive, and time-consuming to obtain.

Once jurisdictional, the project is then subjected to a multitude of regulatory requirements required under CWA. It triggers application of other federal laws like environmental impact statements, NEPA and impacts on ESA. These involve studies and public comment periods, all of which can cost both time and money. And often, as part of the approval process, the permit requires the applicant to "mitigate" the environmental impacts of the proposed project, sometimes at considerable expense.

Additionally, the Army Corps of Engineers who oversees the 404 permit program is already significantly behind in processing permits. All this bill would do is increase the number of projects that are deemed jurisdictional, while increasing the Corps' burden. This is folly.

One such example centers on the spraying of pesticides. Let's say that there has been an outbreak of West Nile Virus and the county has to quickly respond by spraying mosquito breeding grounds to kill the larva. Under this bill, technically, the spraying would be a point source affecting the waters. The county would have to wait for a permit before it could spray, leaving its citizens further at risk. Far-fetched? Not anymore. Due to the Ninth Circuit's *Talent* decision, municipalities and private landowners in Washington state are required to get permits for spraying activities that have the potential to flow into streams, wetlands, lakes, constructed drainage systems (including ditches), or other waters.

Intrastate Waters in the CWRA

We have concerns with several phrases within the bill, beyond the "navigability" issue. First, is the classification of "intrastate" waters as "waters of the U.S." with CWRA. This is problematic since historically, states have been responsible for setting water quality standards in intrastate waters.

We believe CWRA would impose significant new administrative requirements on state and local governments. This means that the states would be required to expand their current water quality designations to include all waters within the state, not just high priority waters. It would change reporting and attainment standards, including preparation of total maximum daily loads and allocations where necessary.

For example, many counties, in the role of regulator, have their own watershed/storm water management plans that would also have to be modified based on federal and state changes. Counties would then have to oversee all of the "waters" within its border. Changes at the state level would impact comprehensive land use plans, floodplain regulations, building and/or special codes, watershed and stormwater plans, etc.

Local governments, large and small, are also responsible for a number of public infrastructure projects that may be impacted by the proposed changes. These include: roads, gutters, and ditches; drainage channel maintenance; pesticide application, mosquito control, and fire retardant sprays; sewers and wastewater disposal, including settling ponds; water supply, transfers, and rights; solid waste disposal; county owned/operated airports; stormwater detention infrastructure; erosion control; maintenance/construction of county-owned schools, nursing homes, hospitals, any municipal buildings; marinas, dams, and reservoirs; parks, greenways, and forestlands; cleanup/ rebuild after natural disasters; and economic development.

To classify "intrastate" waters as "waters of the U.S.," will eliminate the current separation between the state and federal government, bringing the federal government into local land use decisions. Federal preemption of state and local law presents a very serious challenge to our constitutional system of federalism. By preempting state and local laws, you reduce the ability of state and local governments to do their job effectively. If a local government has been preempted, then its ability to respond quickly is taken away.

Groundwater and the CWRA

Currently, most states specifically list groundwater in their definition for "waters of the State." However, if intrastate waters are classified as "waters of the U.S." the language as written, could be interpreted broadly to mean every wet area within a state, including groundwater. Additionally, the bill could be interpreted in future rulemaking, to include ditches, gutters and streets.

Tributaries, AKA Ditches in the CWRA

Ditches are pervasive in counties across the nation and, until recently, were never considered to be jurisdictional by the Corps, until after the 2001 *Solid Waste Agency of Northern Cook County* (SWANCC) Supreme Court decision. Since SWANCC, both the courts and the Army Corps of Engineers have classified ditches, including roadside ditches, as tributaries. CWRA classifies tributaries as "waters of the U.S." This designation is key for counties, since many counties construct and maintain roads and ditches.

In Ohio, the history of these ditches go back to the 1800's and must be maintained in order to provide the drainage purpose they were constructed for. In Madison County this directly affects over half of the land, the majority of which drains directly to the two Darby National Scenic Rivers. We have managed this resource and ditches concurrently at the local level very well.

Numerous NACo members have voiced concern regarding officials at local Corps offices deciding to regulate man-made ditches as jurisdictional waters under the CWA. While some Corps offices regulate ditches, other offices have continued the existing policy of not regulating them. This expansive and inconsistent application of the law frustrates many counties' ability to provide and conduct vital projects for the public.

For example, one Midwest county received Federal Highway Authority funding to replace two old county bridge structures. The Corps determined that because the project would impact 300 feet of a roadside ditch, the county would have to go through the individual permit process.

The county disagreed with the determination but decided to acquiesce to the Corps rather than risk further delay and the withdrawal of federal funding. The cost associated with going through the Corps process required the county to significantly scale back its intended project in order to stay on time and budget. Ultimately, the project's completion was still delayed by several months.

The delay that can result from regulating local drainage features is evidenced by another Midwestern county that wanted to conduct a storm water improvement project to address local flooding concerns. The project entailed adding a second structure to a concrete box culvert and replacing a corrugated metal culvert. These structures were deemed jurisdictional by the Corps because they had a "bank on each side" and had an "ordinary high water mark." Thus, the county was forced to go through the individual permit process.

The delay associated with going through the federal process nearly caused the county to miss deadlines that would have resulted in the forfeiture of its grant funds. Moreover, because the project was intended to address flooding concerns, the delay in its completion resulted in the flooding of several homes during heavy rains. The county was also required to pay $10,000 in mitigation costs associated with the impacts to the concrete and metal structures.

Ultimately, no changes were recommended by the Corps to the project, and thus, no additional environmental protection was provided by going through the federal process.

"…Activities affecting these waters" in the CWRA

The bill goes on to include "activities affecting these waters." While the intent may be to limit nonpoint and point sources going into major water sources, it could be interpreted quite differently. This language could be interpreted broadly to allow the federal regulation of any and all activities that "affect" waters. The examples listed under intrastate waters are good examples because many are based on previous court cases and Army Corps of Engineers decisions. It is possible that a nonpoint source 10's to 100's of miles away could be regulated, even though there is no direct hydrological connection. This definition does not exist anywhere in current law or regulation.

As written, the bill leaves more questions than answers. This bill does nothing to bring about clean water; it only dooms us to more legal wrangling at the federal level and uncertainty at the local level. It will lead to more lawsuits over the interpretation of limits, not less. The sponsors of the bill state that its purpose is to restore historic protections for waters (prior to the 2001 SWANCC decision). That is a difficult to believe when the bill does nothing more than removes words from the original act. Restoring by rewriting is a new concept. However, the truth is, since the CWA passed in 1972, the determination of what is "navigable" or jurisdictional has changed through the years because of the lack of clear language and agency rulemaking.

NACo recognizes that the current system is not ideal. Our counties would like to have certainty in the jurisdictional process and overall in the Clean Water Act. However, we also recognize that a one-size-fits-all system will not work. Geographical features differ widely across this nation. Any federal plan needs to take into account these regional differences and plan

accordingly with flexibility. Unfortunately, this bill as written does not bring us any closer to the goal of clean water.

I want to assure you that counties are committed to keeping our waterways safe for generations to come. We do believe that the objective of clean water is attainable however we also believe that it will take a variety of methods to reach that goal. Primarily, we need strong partnerships among all levels of government, flexibility, and workable definitions that do not create an unnecessary burden on local governments, and incentives that bring all levels of government to the table, like the Clean Water Act did. We have some ideas and would love to share them with you.

We look forward to working with you and Chairman Oberstar to build an effective partnership among all levels of government for this purpose. I believe that we can achieve this vision together and I look forward to working with you. And I would be glad to entertain any questions from the committee.

Senator BOXER. Thank you, sir, very much.

So we are going to move now to Joan Card. Joan Card is the Water Quality Division Director from the Arizona Department of Environmental Quality.

We welcome you.

STATEMENT OF JOAN CARD, WATER QUALITY DIVISION DIRECTOR, ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY

Ms. CARD. Thank you very much, Madam Chair and members of the Committee. Thank you for the opportunity to testify today regarding S. 1870, the Clean Water Restoration Act of 2007.

The Arizona Department of Environmental Quality implements a number of water quality protection programs in our State, including the Clean Water Act. Arizona's Governor, Governor Janet Napolitano, issued a letter of support for the legislation and we thank Senator Feingold and the co-sponsors in this Committee for your leadership in this matter of great importance to our State.

The Arizona Department of Environmental Quality has very serious concerns about the potential impact of the 2006 plurality decision in the Rapanos and Carabell cases on Clean Water Act programs in Arizona. The decision could minimize, if not devaState, surface water quality protections that have been implemented in Arizona at least since the 1972 amendments.

While the decision alone is of grave concern, the implementation guidance jointly issued by the EPA and Army Corps of Engineers further puts Arizona's waters at great risk. Our specific concern for Arizona stemming from the Rapanos decision and guidance is the potential elimination of Clean Water Act protections, particularly section 402, which is the NPDES program, point-source permitting protections for ephemeral and intermittent or non-perennial waters and our headwaters streams. Ephemeral waters, as you may know, are those streams that contain surface flow only in response to precipitation and intermittent waters of those streams that contain continuous surface flow only part of a year, for example from a seasonal spring or a response to snow-melt. Arizona's landscape includes a vast network of these non-perennial streams.

Arizona's largest water body, second in size only to the perennial-flowing Colorado River, which forms our western border that we share with Nevada and California, is the Gila River. The Gila River, an interState stream originating in our neighboring State of New Mexico, drains two-thirds of the land area in Arizona. The Gila flows intermittently in very wet years, but in time of long-term droughts, such as we are presently experiencing, this massive water body is largely dry and any flow is highly disconnected. The Gila's main tributaries include the Salt, the Santa Cruz and the Hassayampa Rivers, which are very large and mainly ephemeral streams.

Arizona's largest and fastest-growing counties, Maricopa, Pima and Pinal Counties—I believe Maricopa is the fastest-growing county in the Nation—are located in the heart of the mostly ephemeral Gila River drainage. Subdivisions require sewage treat-

ment facilities, and many of these facilities construct outfalls and discharge to ephemeral arroyos in their neighborhoods.

These facilities currently hold Clean Water Act point source permits for discharges of wastewater that are protective of aquatic life, agriculture irrigation, and livestock watering, and body contact uses. Without Clean Water Act protections, the Arizona Department of Environmental Quality will be unable to require permits that are protective of these uses. Arizona law prohibits my agency from being more stringent than the Federal Clean Water Act.

Arizona's non-perennial stream water quality has benefited from Clean Water Act protection since the early 1970's when 402 point source permits were issued for several facilities discharging wastewater to large ephemeral streams, including permits for major publicly owned treatment works serving the cities of Tucson and Phoenix, and discharging large amounts of effluent to the Salt and Santa Cruz Rivers, which are tributaries to the Gila River, as I have described.

Combined, these facilities treat over 200 million gallons per day of municipal and industrial sewage and still discharge these large ephemeral waters under 402 point source permits. The Rapanos decision, and principally the guidance, have presented the opportunity for these large POTWs and other dischargers in Arizona to argue that their discharges do not require Clean Water Act pollution permits.

The impacts of the Rapanos decision and guidance in Arizona may be widespread, impacting surface water quality standards for nearly all of our surface streams and nearly all of our 160 section 402 permits for wastewater and stormwater discharges, to waters other than the Colorado River, which has been deemed by the Army Corps of Engineers as Arizona's only traditionally navigable water.

Without these Federal Clean Water Act protections, which have been in place in Arizona for 35 years, my agency may not be able to protect Arizona streams for aquatic life uses, including species like Arizona's native Gila and Apache trout. We may not be able to protect surface streams for agricultural irrigation use or livestock watering. And we may not be able to protect wastewater discharges to our most pristine, high-quality streams like Sabino Creek and the Little Colorado River.

Our Governor and the Arizona Department of Environmental Quality support the Clean Water Act Restoration Act of 2007 because it ensures the longstanding, pre-Rapanos Clean Water Act protections and programs remain in place to protect the surface water resources of our State.

Thank you.

[The prepared statement of Ms. Card follows:]

Written Testimony of

Joan Card
Water Quality Division Director
Arizona Department of Environmental Quality

Before the United States Senate
Environment and Public Works Committee
Regarding "The Clean Water Restoration Act of 2007"

April 9, 2008
Dirksen Senate Office Building
Washington D.C.

Madam Chairman and members of the Committee, thank you for the opportunity to testify today regarding S. 1870, the Clean Water Restoration Act of 2007. The Arizona Department of Environmental Quality implements a number of water quality protection programs in our state, including the Federal Water Pollution Control Act and amendments, known as the Clean Water Act. Arizona's Governor, Governor Janet Napolitano, issued a letter of support for the legislation and we thank Senator Feingold, the co-sponsors, and this Committee for your leadership in this matter of importance to our state. We also thank Chairman Oberstar in the House of Representatives for introducing this legislation.

The Arizona Department of Environmental Quality has very serious concerns about the potential impact of the 2006 United States Supreme Court plurality decision in the *Rapanos* and *Carabell* cases, 165 L. Ed. 2d 159 (2006), hereinafter, the Decision, on Clean Water Act programs in Arizona. The Decision could minimize, if not devastate surface water quality protections that have been implemented in Arizona at least since the 1972 Amendments. While the Decision alone is of grave concern, the implementation guidance jointly issued by the Environmental Protection Agency and the Army Corps of Engineers, 72 Fed. Reg. 31824 (June 8, 2007), hereinafter, Guidance, further puts Arizona's waters at great risk.

The *Rapanos* Decision arises out of cases involving jurisdiction over construction activities on or around "four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditionally navigable waters . . . ." 165 L. Ed. 2d at 164. It is, therefore, from our perspective, highly unfortunate that the Decision and Guidance are expected to have such an enormous impact on the quality of Arizona's arid environment and the health of its citizens. We believe that a different set of facts presented to the Court, for example facts involving a large discharge of pollutants to an ephemeral stream, necessarily would have led to a different conclusion that would have been more protective of the environment.

As Governor Napolitano stated in her September 26, 2007 letter of support: "The implementation of the Clean Water Act in Arizona long has protected Arizona's

wetlands, streams, canals, and lakes for drinking, wildlife, recreation, tourism and irrigation, to name a few important uses of our water resources. Arizona and the federal government combined properly have spent millions since the enactment of the Federal Water Pollution Control Act to assess water quality throughout our state and to protect those uses through point source permitting, Total Maximum Daily Load studies and monitoring, Section 319 nonpoint source grants, and other Clean Water Act programs. The Clean Water Restoration Act of 2007 offers a recognition and ratification of these critical efforts to protect the scarce and precious water resources in our arid state."

Like other states, Arizona devotes significant resources to Clean Water Act programs. Since the late 1970s, Arizona has developed and implemented surface water quality standards, performed Total Maximum Daily Load studies, and monitored, assessed and reported surface water quality under Sections 303 and 305 of the Clean Water Act; since 2000 Arizona has approved over $11 million in non-point source water quality improvement grants. Since 1973, Arizona has participated in the issuance of point source permits under Section 402 of the Clean Water Act and since 2003 has issued and enforced Section 402 point source permits under a delegation from the EPA. If as a result of the *Rapanos* Guidance ephemeral and intermittent waters are deemed non-jurisdictional, all Clean Water Act protections for these water bodies may be lost. Such a result would seriously impede my agency's ability to achieve its mission to protect and enhance the quality of Arizona's environment.

Our specific concern for Arizona stemming from the *Rapanos* Decision and Guidance is the potential elimination of Clean Water Act protections, particularly Section 402 point source permitting protections, for ephemeral and intermittent, or non-perennial, waters. Ephemeral waters are those streams that contain surface flow only in response to precipitation and intermittent waters are those streams that contain continuous surface flow only part of the year, for example, from a seasonal spring or in response to snow melt. Arizona's landscape includes a vast network of these non-perennial streams. In cooperation with the United States Geological Survey, we recently have quantified this network and determined that approximately 96% of the stream miles in Arizona are non-perennial. See attached Arizona Streams map, November 27, 2007.

Arizona's largest water body--second in size only to the perennially flowing Colorado River, which forms the western border we share with Nevada and California--is the Gila River. The Gila River, an interstate stream originating in our neighboring state of New Mexico, drains two thirds of the land area in Arizona to the Colorado River a few miles north of the Mexican Border and the Colorado River Delta of the Gulf of California. The Gila flows intermittently in wetter years, but in times of long-term drought, such as we presently are experiencing, this massive water body is largely dry and any flow is highly disconnected. The Gila's main tributaries include the Salt, Santa Cruz, and Hassayampa Rivers, which are very large and mainly ephemeral streams. See attached Important Rivers, Streams and Washes of Arizona.

Arizona's largest and fastest growing counties, Maricopa, Pima and Pinal Counties, are located in the heart of the mostly ephemeral Gila River drainage. Subdivisions require

sewage treatment facilities and many of these facilities construct outfalls and discharge to ephemeral arroyos in these neighborhoods. These facilities currently hold Clean Water Act point source permits for discharges of wastewater that are protective of aquatic life, agricultural irrigation and livestock watering, and body contact uses. Without Clean Water Act protections, the Arizona Department of Environmental Quality will be unable to require permits that are protective of these uses. Arizona law prohibits the Arizona Department of Environmental Quality from being more stringent than the federal Clean Water Act. We will be unable to assure the public and water users that these discharges of wastewater in the desert are not harmful to the environment.

Arizona's non-perennial stream water quality has benefited from Clean Water Act protections since the early 1970s when Section 402 point source permits were issued for several facilities discharging wastewater to ephemeral streams, including permits for major publicly owned treatment works (POTWs) serving the cities of Tucson and Phoenix and discharging large amounts of effluent to the Salt and Santa Cruz Rivers, which are tributaries to the Gila River, as described above. Combined, these facilities treat over 200 million gallons per day of municipal and industrial sewage and still discharge to these large ephemeral waters under Section 402 point source permits. The Rapanos Decision and Guidance have presented the opportunity for these large POTWs and other dischargers to argue that their discharges do not require Clean Water Act pollution limits, known as effluent limits.

Further, in 1975, the United States District Court for the District of Arizona ensured Clean Water Act protection for small ephemeral streams, or arroyos. The Court held that: "[A] legal definition of 'navigable waters' or 'waters of the United States' within the scope of the Act includes any waterway within the United States also including normally dry arroyos through which water may flow, where such water will ultimately end up in public waters such as a river or stream, tributary to a river or stream, lake, reservoir, bay, gulf, sea or ocean either within or adjacent to the United States." *United States v. Phelps Dodge Corp.*, 391 F.Supp. 1181, 1187 (1975). This Arizona District Court decision long ago set the stage for the standard that dischargers to desert waters must obtain Clean Water Act Section 402 permits to be in compliance with the law.

As this Committee well knows, the Clean Water Act provides for the development and implementation by the states of water quality standards for the nation's surface waters that are protective of the water bodies' uses as designated by the states. Since 1980 Arizona has included express protections for ephemeral water bodies in Clean Water Act standards promulgated in rule under Arizona law and approved by EPA. This has been necessary to protect the large ephemeral streams, like the Salt and Santa Cruz Rivers, receiving discharges from large POTWs, but also is necessary to protect ephemeral arroyos from pollution caused by smaller municipal dischargers and industrial dischargers, such as uranium and hard rock mines.

The Clean Water Act also has provided a valuable tool to protect tribal resources in Arizona. Central Arizona tribes, such as the Gila River Indian Community, the Ak-Chin Indian Community and the Tohono O'Oodham Nation, inhabit Reservations with

ephemeral stream networks also tributary to the Gila River. These Communities have been severely impacted by growth surrounding their Reservations. The Clean Water Act point source permitting process and permit conditions have assured these Communities that point source discharges that may reach their Reservations have sufficient water quality protections. Moreover, we have worked with the Ak-Chin Indian Community to stop a proposal for effluent discharges to three arroyos upstream of the Community. The Community's elders and elected leaders objected to the proposal because the Tribe values highly, for cultural reasons, the ephemeral nature of the washes. Arizona will propose in its update of Clean Water Act water quality standards a prohibition on discharges into these special arroyos. Without the Clean Water Act's applicability to ephemeral streams, these protections are not possible.

Though the amount of surface water in Arizona, in dry and normal years, is well below the amount of surface water in many parts of the United States, the rate of pollutant loading to Arizona streams is not significantly different. Arizona's non-perennial streams require at least the same protections from pollution as do perennial streams in order to protect the overall quality of our environment, aquatic life and the people who use those streams.

In sum, the impacts of the *Rapanos* Decision and Guidance in Arizona may be widespread, impacting surface water quality standards for nearly all of our surface streams and nearly all of our 160 Section 402 permits for wastewater and stormwater discharges to waters other than the Colorado River. Without these federal Clean Water Act protections, which have been in place for 35 years, my agency may not be able protect Arizona streams for aquatic life uses, including Endangered Species Act listed species like Arizona's native Gila and Apache Trout; we may not be able to protect surface streams for agricultural irrigation use or livestock watering, and we may not be able to prohibit wastewater discharges to our most pristine, high quality streams, like Sabino Creek and the Little Colorado River. Our Governor and the Arizona Department of Environmental Quality support the Clean Water Restoration Act of 2007 because it ensures the longstanding, pre-*Rapanos*, Clean Water Act programs and protections remain in place to protect the surface water resources in our state. In the Governor's words, in times of explosive growth, long term drought and the impacts of climate change, these water resources are "far too precious to waste."

Senator BOXER. Thank you very much.

And finally, our last but not least witness is Randall Smith, Smith 6-S Livestock. Welcome.

STATEMENT OF RANDALL P. SMITH, SMITH 6-S LIVESTOCK

Mr. SMITH. Thank you, Chairwoman Boxer, Ranking Member Inhofe, members of the Committee. My name is Randy Smith. I am a cattle rancher from Glen, Montana. I am the Chairman of the Big Hole Watershed Committee in southwestern Montana. I appreciate this opportunity to provide testimony regarding the jurisdiction of the Clean Water Act.

As a member of the National Cattlemen's Beef Association and the Montana Stock Grower's Association, I am proud of our industry's tradition as stewards and conservators of America's land, air and water. Cattlemen work hard every day to protect these precious resources.

My comments today address efforts to redefine the jurisdiction of the Clean Water Act. NCBA and MSGA do not agree with Senator Feingold that his bill restores congressional intent regarding the extent of Federal jurisdiction over our waters. Instead, the bill ignores congressional intent and greatly expands the Federal jurisdiction far beyond anything Congress imagined at the time of enactment.

U.S. cattlemen own and manage nearly one-third of all the acreage in the continental United States, more land than any other segment of agriculture or any other industry. Therefore, any change in the definition of waters of the United States directly affects many cattlemen because they operate on much of the land where wet areas are located. Deleting the word navigable from the definition of waters of the United States would have a profound and negative affect on America's beef cattle business. This bill would result in the imposition of huge financial burdens on farmers and ranchers, and would take away private property rights to the productive use of their land, and would do little to better our environment.

It is one thing to regulate navigable waters and wetlands that have significant nexus to those waters because they have a true environmental value. It is another thing to regulate every wet area or potentially wet area simply because it is wet, regardless of the fact that these areas provide very little, if any, environmental value.

To think that a rancher would be forced to get a section 404 permit whenever a cow stepped in a dry wash or a puddle is nothing less than shocking. Cattle producers support a reasonable program for conserving and enhancing waters that have true environmental value. We believe such waters are currently being protected by State and Federal Governments. Any clarification of jurisdiction should take place within our regulatory process, not Congress. The EPA and the Army Corps of Engineers are very capable of doing this work. There is no need for this legislation.

Many cattle producers also voluntarily implement conservation practices in an effort to be as environmentally friendly as possible in their operations. Just one example is EQIP, which has invested billions of dollars in water quality projects. Farmers and ranchers

are excellent stewards of their land and natural resources water. Their livelihoods depend on it. They should be enabled and encouraged through programs like these to continue to produce our Nation's food and fiber in an environmentally sound and sustainable way.

The Big Hole Watershed Committee is just one example in Montana of a voluntary effort involving diverse interests, including Federal agencies, State agencies, county government, wildlife, conservation and agricultural groups coming together to work toward a goal of a cleaner and more plentiful water supply. State and local partners have been critical to our success. This legislation would take away their seat at the table. All authority over our Nation's water would be given to the Federal Government.

Cattle producers agree that we need to continue to protect the quality of our Nation's surface and groundwaters. But, no expansion of Federal jurisdiction is necessary to accomplish this goal. Federal agencies already 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. Any attempt at usurping authority over these issues and vastly expanding Federal jurisdiction must not be allowed.

Thank you.

[The prepared statement of Mr. Smith follows:]

Testimony on behalf of the

National Cattlemen's Beef Association

With regard to

The Clean Water Restoration Act

Submitted to the

United States Senate – Committee on Environment and Public Works

The Honorable Barbara Boxer, Chairwoman
The Honorable James Inhofe, Ranking Member

Submitted by

Randall Smith
Cattle Producer, Glen, Montana
Montana Stock Grower's Association
National Cattlemen's Beef Association

April 9, 2008

Chairwoman Boxer, Ranking Member Inhofe, members of the Committee, my name is Randy Smith, and I am a cattle rancher from Glen, Montana. I appreciate this opportunity to provide testimony to the Senate Committee on Environment and Public Works regarding the jurisdiction of the Clean Water Act. I am here on behalf of the National Cattlemen's Beef Association (NCBA) and the Montana Stockgrowers Association (MSGA). NCBA is the national trade association representing U.S. cattle producers with more than 31,000 individual members and 64 state affiliate, breed, and industry organization members. All together, NCBA represents more than 230,000 cattle breeders, producers, and feeders. NCBA works to advance the economic, political, and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions and economic interests. MSGA is a non-profit organization representing nearly 2,500 members across the state of Montana. MSGA strives to serve, protect, and enhance the economic, political, environmental, and cultural interests of cattle producers, the largest sector of Montana's number one industry – agriculture. Our members are proud of their tradition as stewards and conservators of America's land, air, and water. They work hard every day to protect these precious resources.

My comments today will address Senator Feingold's effort to redefine the jurisdiction of the Clean Water Act in his so-called "Clean Water Restoration Act." NCBA and MSGA do not agree with Senator Feingold that S. 1870 "restores" Congressional intent regarding the extent of federal jurisdiction over our waters when the Clean Water Act was enacted in 1972. Instead, the bill ignores Congressional intent and greatly expands federal jurisdiction far beyond anything Congress imagined at the time of enactment.

U.S. cattlemen own and manage considerably more land than any other segment of agriculture or any other industry for that matter. Cattlemen graze cattle on approximately 666.4 million acres of the 1.938 billion acres of the contiguous U.S. land mass. In addition, the acreage used to grow hay, feed grains, and food grains adds millions more acres of land under cattlemen's stewardship and private ownership.

Any change in the definition of "waters of the United States," therefore, directly affects many cattlemen because they own much of the land where wet areas are located. Deleting the word "navigable" from the definition of waters of the United States would have a profound and negative effect on America's beef cattle business. NCBA and MSGA believe S. 1870 is unconstitutional, unnecessary and unjustifiable. We strongly oppose its passage and urge the Committee to reject this effort.

I. Overview of the Federal Clean Water Act

Congress enacted the Clean Water Act (CWA), to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 101(a). Section 301(a) of the CWA prohibits the "discharge of any pollutant by any person" except in compliance with the Act. 33 U.S.C. 301(a). The term "discharge of a pollutant" is defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 502(12)(A). The CWA defines the term "navigable waters" as "waters of the United States, including the territorial seas." 33 U.S.C. 502(7).

The Clean Water Act has been tremendously successful. It is arguably the most successful environmental law on the books. Millions of miles of rivers, lakes, streams, wetlands, estuaries, ponds, and other waters are cleaner and functioning appropriately thanks to the CWA. The Environmental Protection Agency's (EPA) most recent Water Quality Report to Congress indicates that approximately 59 percent of the waters assessed were fully meeting their designated uses. NCBA and MSGA support building on this success story with agriculture water quality programs that achieve and protect state designated uses, without being unreasonably burdensome on America's farmers and ranchers.

II. Congressional Intent

Since 1870, it has been well settled law that Congress' authority to regulate waterways is limited to regulating waters that could carry foreign or interstate commerce under the Commerce Clause of the U.S. Constitution. *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 563 (1870). Thus, until recently, only waters that were navigable in fact, had been historically navigable, or were susceptible to navigation with reasonable improvement fell under federal jurisdiction, thereby excluding many wetlands. 39 Fed. Reg. 6113 (1974). It was not until 1968 that environmental and navigational factors began to be considered when determining federal jurisdiction. 33 CFR §209.120 (superseded by 72 Fed. Reg. 37, 133 (1977)).

With passage of the Clean Water Act in 1972, Congress acknowledged Constitutional limits and granted the federal government broad, but not unlimited, jurisdiction over our Nation's waters. There can be no clearer indication of Congressional intent with regard to the limits of federal jurisdiction than the fact that Congress used the term "navigable" repeatedly when establishing those limits and drafting and passing the CWA in 1972. If the term "navigable" meant nothing, the term would not have been used throughout the law. It is clear that Congress did not intend the CWA to regulate all waters of the United States. Rather, the stated goal of the CWA is to eliminate the discharge of pollutants into the Nation's "navigable" waters. Thus, Congress deliberately kept in place the constitutionally mandated system under which the states have "virtually plenary" authority to regulate intrastate, non-navigable waters. *California Oregon Power Co. v. Beaver Portland Cement Co.* U.S. (1935).

In fact, when the CWA was passed in 1972, Congress clearly recognized a partnership between the federal and state levels of government when it comes to protecting our waters. This recognition is set forth in Section 101(b) as follows:

> "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities of States to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources..."

CWA 101(b). It is this provision and the use of the word "navigable" throughout the CWA to describe federal jurisdiction that recognizes an essential dividing line between federal and state jurisdiction.

Nevertheless, Senator Feingold has attempted to explain his introduction of S. 1870 by claiming that Congressional intent has been ignored in recent Supreme Court cases that have challenged the extent of federal jurisdiction under the CWA. It is Senator Feingold's stated desire to undo these decisions which he believes go too far in restricting the reach of federal jurisdiction, and to "restore" the original intent of Congress when it passed the Clean Water Act. Specifically, Senator Feingold has said he believes U.S. Supreme Court decisions in *SWANCC* and *Rapanos* (holdings briefly explained and cited below) have so restricted federal jurisdiction that Congressional intent regarding such jurisdiction must be reaffirmed. NCBA and MSGA believe Senator Feingold and the other cosponsors of S. 1870 are mistaken. The *SWANCC* and *Rapanos* decisions did not contravene Congressional intent; rather the U.S. Supreme Court reasonably interpreted the law using the U.S. Constitution, the legislative history, and language of the CWA statute itself.

An individual unfamiliar with U.S. water regulation might interpret Senator Feingold's justifications to mean that states have skirted their responsibilities or are incapable of protecting their waters. Nothing could be further from the truth! States have very strict programs in place to protect their waters. To remove the word "navigable" from the CWA would take state authority away and give it to the federal government, violate the U.S. Constitution, contravene expressed Congressional intent, and subject cattle producers to unprecedented and unwarranted federal regulatory intrusion into their private business operations. Such a vast expansion of federal control must not be allowed. The federal-state partnership embodied in the CWA must be preserved.

III. Cattle Producers and the Clean Water Act

Two core provisions of the CWA which directly affect cattle producers are: 33 U.S.C. 404, the program which authorizes the issuance of permits for the discharge of dredged or fill material to waters of the U.S., and 33 U.S.C. 402, the National Pollutant Discharge Elimination System (NPDES) program which authorizes the issuance of permits to discharge pollutants from point sources to waters of the U.S. Each of these provisions is discussed below.

A. The Section 404 Program

The Army Corps of Engineers and the EPA share responsibility for implementing and enforcing Section 404 of the CWA which authorizes the issuance of permits for the discharge of dredged or fill material into waters of the U.S. Therefore, the definition of "waters of the United States" is critical to determining the reach of this program. Until 1983, the Corps regulations limited section 404 coverage to truly navigable waters. When the Corps expanded its jurisdiction by regulation to include "wetlands adjacent to navigable waters and their tributaries," the expansion was challenged by Riverside Bayview Homes. *United States v. Riverside Bayview Homes, Inc.* 474 U.S. 121, 129 (1985). On December 4, 1985, the U.S. Supreme Court determined that Congress intended "to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term" and determined that adjacent wetlands that are "inseparably bound up with the 'waters of the United States'" fall under federal jurisdiction. *Id.* at 133.

In 2001, the Supreme Court considered whether "isolated waters" or ponds that are not traditionally navigable or interstate, nor tributaries thereof, nor adjacent to any of these waters fall under federal jurisdiction if migratory birds land on them from time to time. The Court held that the use of isolated non-navigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal CWA jurisdiction. *Solid Waste Agency of Northern Cook County v. United States Army corps of Engineers,* 531 U.S. 159, 166-174 (2001) (SWANCC).

In 2006, the Court again considered the meaning of the term "waters of the United States" in *Rapanos v. United States,* 126 S. Ct. 2208 (2006). The case involved whether federal CWA jurisdiction extends to pollutant discharges into wetlands adjacent to non-navigable tributaries of traditional navigable waters. *Id.* at 2219. In a plurality opinion, four Justices agreed that waters of the United States covers "relatively permanent, standing or continuously flowing bodies of water" that are connected to traditional navigable waters, as well as wetlands with a continuous surface connection to such water bodies. *Id.* at 2225-2227. Justice Kennedy, concurring, determined that jurisdiction should include wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made," and "wetlands adjacent to navigable-in-fact waters." *Id.* at 2248.

It is not unreasonable, nor surprising, that the U.S. Supreme Court has extended CWA jurisdiction to some non-navigable waters, as discussed in the *SWANCC* and *Rapanos* decisions. In addition to expanding the reach of federal jurisdiction beyond truly navigable waters, the cases also provide a reasoned and thoughtful view of the limits of federal jurisdiction. Without such limits, federal jurisdiction would be boundless and would place an undue and unacceptable burden on the private property of cattle producers and others.

It is this kind of boundless jurisdiction that Senator Feingold's legislation would allow. There must be hundreds of millions of isolated, intrastate pools, ponds, and depressions filled with water on an intermittent basis, drainage and irrigation ditches, artificially irrigated areas, stock ponds, mud puddles, sloughs, and damp spots located on farm and ranch lands that are nowhere near any navigable waters, and provide very little if any environmental value. Surely, Senator Feingold understands and agrees that not all waters are the same in terms of their environmental function and value. To think that Senator Feingold intends to force farmers and ranchers to get section 404 permits whenever a cow or a plow affect one of these environmentally-insignificant waters is nothing less than shocking. Such an expansion of federal jurisdiction boggles the mind, is unwarranted, irrational, is not in the national interest, and would be disastrous for U.S. agriculture.

S. 1870 would result in the imposition of huge financial burdens on farmers and ranchers, would take away private property rights to the productive use of their land, and would do little to better our environment. It is one thing to regulate navigable waters and wetlands that have a "significant nexus" to those waters, because they have true environmental value. It is another thing to regulate every wet area simply because it is wet, regardless of the fact that these areas provide very little if any environmental value.

NCBA and MSGA support a reasonable program for conserving and enhancing waters that have true environmental value. We believe such waters are currently being protected by state and federal governments. Any clarification of jurisdiction should take place within our regulatory processes, but not in Congress. The EPA and the Army Corps of Engineers are very capable of doing this work. There is no need for this legislation.

B. The NPDES Permit Program and Cattle Operations

1. Overview

As noted above, the NPDES permit program regulates and authorizes discharges from "point sources" to waters of the U.S. Section 502(14) of the CWA specifically includes "concentrated animal feeding operations" (CAFOs) in the definition of the term "point source." The term "does not include agricultural storm water discharges and return flows from irrigated agriculture." The EPA has defined the term CAFO to be a "lot or facility" where animals "have been, are or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12 month period and crops, vegetation, forage growth, or post harvest residues are not sustained in the normal growing season over any portion of the lot or facility," 40 CFR 122.23, and confine more than a threshold number of animals detailed in 40 CFR 122.23(b)(4). The threshold number for beef cattle is 1000 head. Smaller size feedlots can be determined to be CAFOs in certain defined situations.

Some of NCBA's and MSGA's members own CAFOs and are regulated under the federal NPDES permit program. Our members support efforts to and work hard every day to ensure that CAFOs are environmentally sound operations. We are, however, concerned that some members of this Committee and others may be misled by activists who are opposed to the existence of CAFOs and want to create the perception that they are problematic for human health and the environment. Indeed, some activists are working hard to do away with CAFOs. We urge the Committee to carefully evaluate the facts and scientific evidence rather than opinion, perception, and hype created by activists with anti-CAFO agendas.

The fact is, CAFOs are subject to a vast array of federal, state and local environmental laws and authority to deal with every conceivable environmental problem presented by them. The Clean Air Act, the Clean Water Act, FIFRA, soil conservation, dust and odor control, and nuisance laws apply broadly throughout the country to provide environmental protection from every aspect of animal agriculture operations. For example, the EPA has recently promulgated extensive new regulations to control discharges from CAFOs under the NPDES program. Indeed, there has been a significant shift over the past several years in federal efforts to regulate and prohibit production area discharges from CAFOs except in the most extreme circumstances. In addition, CAFOs must utilize and comply with strict nutrient management plans when land applying manure to agricultural fields to ensure that manure is applied at agronomic rates. Any violation of these requirements can result in substantial penalties and, in certain situations, imprisonment. NCBA and MSGA urge the Committee to consider these new regulatory requirements that ensure protection of our waters and give them time to work prior to issuing unjustified criticisms. Zero discharge from the production area means just that – zero discharge.

Once this program is given time to work, it can no longer be claimed that CAFOs are a concern with regard to water quality.

2. NPDES Permit Program

The EPA or states with authorized NPDES permitting programs may issue general or individual NPDES permits allowing the discharge of pollutants to surface waters of the United States as long as certain conditions are met. The Clean Water Act includes both technology-driven limits and water-quality-based limits on pollution. The technology-driven limits in the form of effluent limitations aim to prevent pollution by requiring the installation and implementation of various forms of technology designed to reduce discharges. These limitations are dictated by the more general "effluent limitations guidelines" (ELGs) which are separately promulgated by the EPA. An effluent limitation is "any restriction established . . . on the quantities, rates and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into . . . water." Water quality based regulations apply once a given body of water's pollution level exceeds the level that a state deems acceptable for the body of water's intended use or function. These regulations may ratchet up the pollution control required of individual polluters. Permits also include extensive reporting and recordkeeping requirements to help ensure compliance with effluent limitations.

In February 2003, the EPA updated and issued a final rule governing regulation of CAFOs under the NPDES permit program. After its release, a number of environmental and agricultural organizations separately appealed several aspects of the rule. The appeals were consolidated and heard by the Second Circuit Court of Appeals on December 13, 2004, and a final decision was issued on February 28, 2005. The decision overturned several aspects of the 2003 rules, upheld several other challenged provisions, and remanded other issues for further consideration by the EPA. In June 2006, the EPA released its proposed rule to address the 2nd Circuit decision; a final rule is expected to be released in July or August 2008. All newly regulated CAFOs are required to submit to the permitting authority an NPDES permit application and nutrient management plan by February 27, 2009.

The provisions that were either not litigated or were upheld in the final rule of 2003, taken together with the proposed rule issued in June 2006 provide for a comprehensive approach to regulating CAFOs under the Clean Water Act, and ensure that no production area discharges will occur except in the most extreme circumstances. The regulations impose a zero-discharge limitation on the production area of a CAFO by prohibiting the discharge of pollutants into waters of the United States, except in the event of discharges that might occur during the worst 24-hour storm in a 25-year period. For many producers, this requirement means spending hundreds of thousands of dollars to build basins around portions of their feedyards to catch any runoff.

In addition, the CAFO rule establishes non-numerical effluent limitations in the form of best management practices (BMPs) for the land application and production areas of CAFOs. BMPs are measures or methods that have been determined to be the most effective, practical means of preventing or reducing pollution from nonpoint sources. BMPs for the production area include daily and weekly inspections, maintenance of depth markers in lagoons to determine design

capacity, and on-site recordkeeping. A BMP for the land application area requires that CAFOs develop and implement a nutrient management plan (NMP) that sets application rates designed to minimize phosphorus and nitrogen transport to surface waters in compliance with applicable technical standards, ensures adequate storage of manure and process wastewater, and prevents direct contact of animals with waters of the United States. These NMPs must be made available to permitting authorities and the public for review, comment, and hearing prior to issuance of a permit. After approval by the permitting authority, portions of the NMP must be included as enforceable terms and conditions of the producer's NPDES permit.

Sanctions for violation of a CAFO's NPDES permit include severe civil and criminal penalties for each day of violation. The basic monetary penalties range up to $32,500 per day. Stiffer penalties of as much as $50,000 per day, three years' imprisonment, or both, are authorized for criminal (negligent or knowing) violations of the Act. A fine of as much as $250,000, 15 years in prison, or both, is authorized for 'knowing endangerment', i.e. violations that knowingly place another person in imminent danger of death or serious bodily injury. Injunctive relief is also available. These penalties and sanctions are an effective deterrent to violations of the Clean Water Act.

Currently, CWA enforcement of the NPDES permit program is appropriately shared by the EPA and states, with states having primary responsibility. However, EPA has oversight of state enforcement and can bring a direct action whenever it believes a state has failed to take appropriate action or where states request EPA involvement. In addition, private citizens may bring suit against persons who violate the Clean Water Act or against the EPA or equivalent state official for failure to carry out the requirements of the Act.

IV. Conservation and Clean Water

In addition to the array of regulatory programs described above, many cattle producers also voluntarily implement conservation practices in an effort to be as environmentally friendly as possible in their operations. Just one example is the popularity among producers of USDA's Farm Bill conservation programs. These programs provide resources to assist producers in their private land conservation goals as they work to improve their land, air, water, and natural resources. In FY2006, the Natural Resources Conservation Service (NRCS) spent over $1 billion through the Environmental Quality Incentives Program (EQIP) providing farmers and ranchers with technical and financial assistance on conservation practices and projects. From 2002 to 2006, NRCS dispersed over $2.7 billion for projects to improve water quality—the majority of those funds were in EQIP projects. In the same time period, they spent almost $1.2 billion conserving and improving wetlands, mainly through the Wetlands Reserve Program.

My family ranch, Smith Six Bar S Ranch, was a regional recipient of the Environmental Stewardship Award in 1992, given by NCBA and sponsored by Dow AgroSciences and USDA's NRCS. For years, we have realized the importance of resource conservation and worked to implement practices and projects to enhance wildlife habitat and water quality and quantity on our property. Farmers and ranchers are excellent stewards of their land, natural resources, and water—their livelihoods depend on it. They should be enabled and encouraged, through

programs like these, to continue to produce our nation's food and fiber in an environmentally sound and sustainable way.

V. Property Rights Implications

Approximately 70 percent of the land in the lower 48 states is privately owned. A substantial portion of this land is used for the production of food which is arguably the most important use for this land. The production of food in our country cannot be taken for granted. In fact, farmers and ranchers in other countries are increasingly able to produce comparable food at lower cost to the American market. Additionally, society also looks to this private land and associated waters for many other services, including wildlife habitat, clean water, and open space, most notably. American producers face an ever tightening web of regulation which economically marginalizes an increasing number of operations. While many, if not all, of the environmental regulations are well-intended, it must also be recognized that limiting and ultimately choking the ability of farming and ranching operations to earn a living will come at a considerable cost to the entire nation.

The challenge for society in using private lands is to strike a sensible balance between the demands of food production and conservation of natural resources. Unfortunately, the United States through both Republican and Democratic administrations failed to strike a reasonable balance between protecting wet areas and respecting people who make their living on the land. Not only has no balance been struck, but in fact regulation has been allowed to proceed unlawfully and directly at odds with teachings from the leading Supreme Court cases on the issue. Fortunately, the Supreme Court provided a roadmap for resolving the situation in its recent decision in Rapanos v. United States, 126 S.Ct. 2208 (2006).

VI. Big Hole Watershed Committee Work

I serve as the Chairman of the Big Hole Watershed Committee, headquartered in Butte, Montana. The mission of the Big Hole Watershed Committee is to seek understanding of the Big Hole River and agreement among individuals and groups with diverse viewpoints on water use and management in the watershed. We are a non-profit organization that makes decisions through consensus. Our twenty-two member Governing Board represents diverse interests including ranching, utilities, local government, conservation organizations, outfitters/guides, and sportsmen. State and federal agencies participate on the Committee as technical advisors; among them are the Montana Department of Fish, Wildlife, and Parks; the Montana Department of Natural Resources and Conservation; the U.S. Fish and Wildlife Service; USDA's Natural Resources Conservation Service; the U.S. Forest Service; and the Bureau of Land Management.

Attached, please find as Appendix 1 more detailed information about the Big Hole Watershed Committee and the work we are doing, in particular with drought mitigation and Arctic grayling recovery. All of these organizations and individuals have come together on a voluntary basis to work toward a clean and plentiful water supply for all. If anything, we need more incentives to work together to achieve regional goals of cleaner, more plentiful water, not legislation that will bring wholesale change to the framework in which we are all working. State and local partners have been critical to the success of our Committee—this legislation would take away their seat at the table, and put all authority over our nation's water with the federal government.

VII. Conclusion

NCBA and MSGA agree that we need to continue to protect the quality of our Nation's surface and ground waters, but no expansion of federal jurisdiction is necessary to accomplish this goal. Federal agencies already 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. Senator Feingold's attempt at usurping authority over these issues and vastly expanding federal jurisdiction must not be allowed.

Senator BOXER. Thank you.

Sir, Mr. Smith, I just feel like, in all due respect, you may have missed the savings clause in the Feingold bill. Let me read it to you because what you say is now you are going to have to get a permit for it, is explicitly an exception here. So let me tell you what I am talking about.

You do not have to get a permit under the Feingold bill and under current law for a wetlands permit if you are doing normal farming, ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, forest products or upland soil and water conservation practices.

You don't need it for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such a dikes, dams, levees, riprap, breakwaters. I am not reading it all.

You don't need a permit for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches or the maintenance of drainage ditches. You don't need it for the purpose of construction of temporary sedimentation basins or construction sites, which does not include placement of fill into the navigable waters. You don't need it for the purpose of construction or maintenance of farm roads or forest roads or temporary roads.

It goes on and on. And you don't need a permit if your activity results from any activity with respect to which a State has an approved program. So the way you describe it, I couldn't support the Feingold bill, but that is not what the Feingold bill does.

I would ask Mr. Grannis and Ms. Card, who support the bill, is that your understanding, that there is this savings clause and that these things are not going to have to get a permit?

Ms. CARD. Yes, Madam Chairman, I agree.

Senator BOXER. That was important.

Mr. GRANNIS.

Mr. GRANNIS. We definitely agree. We have farming interests in New York, business interests, and they have all lived with the existing authority, both at the Federal Government and the State Government, over our wetlands.

Senator BOXER. Yes, that is the point. And agriculture is my biggest industry in my State. So clearly, I hope, Mr. Smith, maybe if you would be willing to meet with us, we want to show you this. We would like to reassure you of this.

And I would say to Mr. Brand, your position, it seems to me, will result in a situation where water pollution may not be controlled at the source, and local governments will have to shoulder the cost of more expensive drinking water treatment and infrastructure. I don't understand why anyone in local government—and I came from local government—would want your county to have to pay for the extra infrastructure necessary to clean up water that our families depend upon.

Would you agree with that, that this is a consequence if we step out of this, then you are going to have to be the one? Because you know, Senator Whitehouse—really I appreciated what he put in the record, showed how many systems are at risk that serve our families, in my case many millions. And now if we don't apply this Act, somebody is going to have to clean this up at the end of the day

if you find that polluters are dumping toxins into these previously covered waters.

So that would be just really more a comment that I hope that our folks who oppose this will take a look at what you are opening up here, which is much more costs for local government, local people. I think if we continue in this limbo that it is going to be very difficult to figure this out.

In any case, that is more a statement than a question.

Senator Barrasso.

Senator BARRASSO. Thank you very much, Madam Chairman.

I would just like the record to reflect that of all of us here, the only guy that brought his own water with him was the rancher from Montana.

[Laughter.]

Senator BARRASSO. So thank you, Mr. Smith.

Senator BOXER. He doesn't trust our water at the Capitol.

Senator BARRASSO. No, ma'am. He knows more about it than we do.

Senator BOXER. I think we ought to change what we do up here maybe.

[Laughter.]

Senator BARRASSO. Mr. Smith, I appreciate your being here because I read the bill the same way you do, what it does to the ranchers and water users in Wyoming. I am just wondering if Wyoming as well as Montana, strong ranching industries, and Idaho, can you further elaborate on what you as a rancher, and Wyoming ranchers, can expect in terms of just day to day operations of your ranches if this bill is passed?

Mr. SMITH. Senator, I guess we really don't know what the bill is going to do. It frightens me because it is taking away local control. Yes, the Clean Water Act has worked, but it is being defined more critically, I guess, for lack of a better word. To take out the navigable part of the streams just opens up a whole can of worms.

On our ranch, which isn't a large ranch, but we are a family ranch, I can see the potential for hundreds, if not thousands, of permits if this bill was passed. The time of getting those permits from the Federal Government right now is terribly slow at best, and it always has been slow. I guess there is some sort of fast track movement within the Corps of Engineers, but in our watershed committee, just to do some watershed work along the Big Hole River, it has taken several months to get permits, maybe even almost a year just for doing water quality work.

So it is a terrible effect on the ranching community, in my opinion.

Senator BARRASSO. The Wyoming Stock Growers wrote to me and they say their opinion is that the expansion of Federal jurisdiction in this bill would effectively give the Federal Government an authority over private lands in Wyoming and obviously in Montana as well, and over the ranches, kind of equal to the authority that are currently exercised over public lands and national forests. Is that your concern as well?

Mr. SMITH. Yes. We maintain our water systems on a lot of our Federal land out of necessity. If we had to, for instance, have a permit for the cows to cross a stream, every time they crossed a

stream, you can see it is a little bit ridiculous. Maybe it is mind-boggling, I don't know, to me, it certainly doesn't have much common sense.

There may be areas in the Country where we need to have this sort of legislation, but out west, we don't need it.

Senator BARRASSO. And this is something you wouldn't want to have to go to the courts, go to a judge, and try to deal with it on a day to day basis, and make your life very difficult, I would imagine.

Mr. SMITH. Yes. Every time we do anything, it seems like it is litigated. And this looks to me like it is a dream for a litigator, a lawyer's dream. I don't want to offend anybody, but we use lawyers enough already and sometimes the best interests aren't always followed.

Senator BARRASSO. Thank you, Madam Chairman.

Senator WHITEHOUSE. I would like to ask Mr. Brand and Mr. Smith a very simple question. If it were clear and without dispute that the entire purpose and function of the Clean Water Restoration Act was simply to restore the Clean Water Act to running exactly the way it had for all those years before the Rapanos decision created this uncertainty about what navigability meant, would you object to that? Are you objecting to the underlying traditions of the Clean Water Act?

Mr. BRAND. I guess the question I would have back is——

Senator WHITEHOUSE. Answer my question before you ask a question back.

Mr. BRAND. The Clean Water Act has been interpreted differently depending on what year you are asking about. The Clean Water Act has seen most of its change in interpretation occur in the last 10 years. In the last 10 years, it is very different from when it was originally enacted and the problems are very different.

Senator WHITEHOUSE. I guess my question is, are you arguing that this piece of legislation would create something new that you don't like? Or if you would accept the proposition that this just goes back to the way things were beforehand, are you objecting also the way things were beforehand? Are you objecting to the underlying Clean Water Act as it was enforced before the Rapanos decision?

Mr. BRAND. I don't think we are objecting to the Clean Water Act, but the interpretation of the Act is very different and we do not buy in one bit to the fact that this is restoring some protection that was already there. This is clearly an expansion. So if we can get past that and define clearly what the limits were of the Clean Water Act prior to Rapanos, I think we could answer that question.

But I think to say that enough times and to keep repeating that doesn't make it true that the Act has changed over the years, and what you are saying you are going back to never existed until the last few years.

Senator WHITEHOUSE. Well, it actually kind of does make it true, because the way courts would look at this is they would take the language and they would want to see what the congressional intent was in this. In trying to divine congressional intent, they would look at the legislative history of the Act.

And when they look at the legislative history of the Act, they are going to look at what you are saying right here in this room today.

They are going to look at what I am saying right here in this room today. They are going to look at the record of this hearing, and the record of this hearing could not be more indisputably clear that the only intention of this piece of legislation is to go back to the status quo ante before the Rapanos decision and reinState the Clean Water Act as it had been enforced for those 34 years.

I think nobody with a rational power of observation and any kind of honorable intent toward the process of this could dispute that is what we are trying to get to. And certainly I think any court looking back would see that loud and clear. I appreciate my friends on the other side raising this point and challenging it because it gives us the opportunity here to reinforce over and over again, and reinforce the legislative history that a court will look at that all we are trying to do is to go back before the status quo ante and pick up where we left off, with a train of analysis and precedent that regulators in Arizona for many years—I see Ms. Card nodding her head—regulators in New York for many years, they knew exactly what they were doing. The developers knew what they were doing. The lawyers who tried to work this knew what they were doing.

It would create enormous clarity, in my view, if that were the understanding. Is that of value that you as regulators, Ms. Card and Mr. Grannis, are trying to achieve here, is to go back and sort of recapture the legislative history, the precedent that had built up around the previous Clean Water Act and continue forward in an undisturbed way?

Ms. CARD. That is absolutely correct. If I could just say to suggest that this legislation is a can of worms and an unprecedented expansion is frankly just not a recognition of the last 35 years. For example, in Arizona the Federal District Court in 1975 regarding point source pollution from a hard-rock mine said a legal definition of navigable waters or waters of the U.S. within the scope of the Act includes any waterway within the U.S., also including normally dry arroyos through which water may flow, where such water will ultimately end up in public water such as a river or stream tributary, et cetera, et cetera.

That is a 1975 Arizona District Court opinion that set the stage for the last 30 and more years for us to protect waterways against pollution under the Clean Water Act.

Mr. BRAND. Madam Chairman, if I may?

Senator BOXER. Certainly.

Mr. BRAND. I believe, Senator, that the Rapanos decision did that. They looked at the legislation and they came down and said that it was clearly an expansion beyond repute. The problem with the Rapanos decision is that it threw this significant nexus test in there which muddied the waters. That is the problem we have, is the significant nexus.

It is not that the significant nexus test is inappropriate. It is that has caused the environmental agencies to turn around and try and find out how far "significant" can be pushed to create some kind of nexus between that isolated wetland in the middle of that field that may not be anything more than a replant area in a bean field, and try and establish through not point source pollution, but through non-point source pollution that it has some connection to some stream which has some connection to some navigable water,

and then exercise control over it. The court did make that clarification. They have done that.

Senator WHITEHOUSE. Mr. Brand, I hear you saying these things, and even from my own experience as an Attorney General and working in the Governor's office in my State, I just know them not to be true. I just know them not to be true. It is discouraging to me to hear you say that there has been a tradition of trying to develop the Clean Water Act from its very beginnings. All the way through, the question of navigability ha always been an important question. It was resolved over the years through endless administrative determinations that were able to create the connection that was important here between the safety of the water you and I drink and the regulatory reach of this statute.

It is a very natural connection. This is to protect clean water. We drink clean water. What could be more natural than to have the regulatory reach of the statute protecting clean water reach as far as what is necessary to make sure that the water we drink is clean? There aren't puddles in bean fields being regulated and never have been under this. It has always had this clean water protection purpose.

Maybe there is some crazy place where this happens, but in no regulatory agency I have ever been around or near has that ever happened. What I worry about is that if we don't go back to where we were before, then we are trying to redefine something. And in that redefinition, there is going to be enormous room for both mischief and mistake and for lawyers to come into this and complicate life, and have to go back and re-litigate issues that were settled.

I feel really badly. I think, Mr. Smith, you seem like an absolutely wonderful man. I think if we were in another forum, I would love to go out and sit down and have a beer with you or have a walk with you, or let you show me your farm. You sound like just a wonderful, wonderful guy. And yet, what you say about this piece of legislation bears absolutely no relationship to the reality of this legislation as I know and believe it to be.

I guess all I can say from my perspective here is that I hope the regulators here will chime in because you live with this all the time. The purpose of the exercise here is to protect the water that we drink. For 34 years, people who are Republicans and Democrats worked terribly hard to try to make it right to do that. The EPA has no interest in chasing around cow puddles that don't affect anybody's clean water. They have better things to do. They have limited resources. They try to target this stuff.

I just think that we create such risk of confusion, of mischief, of damage, of danger to clean water, of all these things, if we don't pick up where we left off, with what has been done by professionals in Democratic and Republican Administrations for decades.

It is frustrating to me to hear these worries, because I know they are heartfelt. I know you have these concerns. I wish there were a way I could more clearly reassure you that they just make no sense at all, at least from this Senator's perspective.

Mr. Grannis could you—I see both of the regulators nodding their heads.

Senator BOXER. Sure. And I will say, Senator Barrasso——

Senator WHITEHOUSE. I apologize for going over.

Senator BOXER. No, that is all right. We will make it a closing statement and we will give that opportunity to Senator Barrasso, and then I will make my final remarks.

Mr. GRANNIS. Senator, we agree completely. Our goal here is not to expand our jurisdictional authority. It really is to go back to the pre-Rapanos effective collaboration we have had with the Federal Government for over 30 years. It has had remarkable results in cleaning up our water.

Our water knows no jurisdictional boundaries. It is not partisan. It starts in the Adirondacks. It starts at the headwaters of the Susquehanna River and the Delaware River. What we do in those northern headwaters in wetland protections and other kinds of things have their effects 300 miles down river. So it is very important to make sure there is a Federal floor on what people do along these great waterways, recognizing the interconnection of all of these smaller tributaries, whether they flow full-time or part-time in wetlands to the overall good of the water quality. That is our goal.

We are not seeking new authority, expanded authority. We are happy and I think very effective with the authority we have, and that is where we want to end up.

Senator BOXER. Senator Barrasso.

Senator BARRASSO. Thank you very much, Madam Chairman.

Just to say from my opening statement, in Wyoming where the frontier spirit of smaller government and individual liberty are still sacred traditions, where we have a State of people like Mr. Smith, we are always very concerned about the Federal Government's involvement in issues, and most specifically related to our water.

We read these bills very carefully. We think about them very carefully, and we see all of the things that Ms. Smith testified today as potential downside risks and we don't see any up-side benefit to the hard-working ranchers of our communities.

Thank you, Madam Chairman.

Senator BOXER. I would say that in our State, we don't have a theology about who should make sure that the water is safe and clean, but we want it clean. And the most efficient way to do that is what we ought to do. I would argue after Rapanos there is such confusion that even the people who didn't like the whole system before are begging for it back. These are anecdotal now, but I put something in the record about that.

So I think what Russ Feingold has done, and I praise him mightily for it, is he wants to protect our water quality in a way that works, that goes back to the way it was done, keeps the same exemptions in there so that folks like Mr. Smith are not going to be burdened when they are working their farms. He brings certainty back to a situation where projects ironically are being delayed because nobody knows what anybody meant. That is extremely ironic that the views of the people who say let's weaken the Clean Water Act resulting in longer delays to get projects built because of the confusion.

So I am very hopeful we can work together. I don't know that there is room here. I know we are going to try to get this resolved legislatively. If it not going to happen this session of Congress, I predict to you it will happen in the future.

I just want to say to this panel, you have all been really helpful to us. You have been clear, straightforward, and we really appreciate your all coming here at I am sure some inconvenience. You did that for your Country and we appreciate it very much.

Thank you all.

We stand adjourned.

[Whereupon, at 12:03 p.m. the committee was adjourned.]

TESTIMONY OF
VIRGINIA S. ALBRECHT
HUNTON & WILLIAMS, LLP
APPEARING ON BEHALF OF
THE WATERS ADVOCACY COALITION
BEFORE THE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
U.S. HOUSE OF REPRESENTATIVES
HEARING ON "THE CLEAN WATER RESTORATION ACT OF 2007"
APRIL 16, 2008

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

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

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

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

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

1. The successes of the last 35 years will not alone yield the solutions for the next 35 years. The significant water challenges we face today as a nation demand more cooperative federalism, not more federal regulation.

2. While proponents of the CWRA contend that the proposal seeks only to restore federal authority taken away by the Supreme Court, a fair reading of the plain text of the CWRA simply does not support that contention.

3. Altering the Act's definitional structure could have dire and unintended consequences by imposing further regulatory burdens on states and local communities, usurping state authorities to manage vital water resources, including groundwater, and imposing substantial costs and delays in the replacement of aging water infrastructure.

4. If Congress wants to fix this problem, it will direct EPA and the Corps to develop comprehensive regulations that provide greater clarity and predictability regarding the extent and limit of federal jurisdiction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. The CWRA's Unintended Consequences For Clean Water Act Regulatory Programs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WATERS ADVOCACY COALITION

WAC

October 17, 2007

Dear Chairman Oberstar and Ranking Member Mica:

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

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

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

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

Thank you for your consideration.

American Farm Bureau Federation
American Forest & Paper Association
American Public Power Association
American Road and Transportation Builders Association
Associated General Contractors of America
Croplife America
Edison Electric Institute
The Fertilizer Institute
Foundation for Environmental and Economic Progress
Industrial Minerals Association North America
International Council of Shopping Centers
National Association of Counties
National Association of Flood & Stormwater Management Agencies
National Association of Home Builders
National Association of Industrial Office Properties
National Association of Manufactures
National Association of Realtors
National Association of State Departments of Agriculture
National Cattlemen Beef Association
National Corn Growers Association
National Mining Association
National Multi Housing Council
National Pork Producers Council
National Stone, Sand and Gravel Association
Responsible Industry for a Sound Environment
Western Business Roundtable

Clean Water: 35 Years of Progress

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

1. In the mid-1970's, 30-40% of surface waters monitored met water quality goals. By 2000, 60 – 70 % of waters met their goals.

2. In 1972, only 141.7 million people were served by wastewater treatment facilities, and only 60% of those people were served by secondary treatment or better. Today, 222.8 million people (over 1.5 times as many as 35 years ago) are served by wastewater treatment facilities; nearly 99% of those people are served by secondary treatment or better.

3. Since 1972, total oxygen-demanding pollution from sewage treatment plants across the country has been cut by nearly 50%, despite a major increase in the amount of sewage sent to these plants for treatment.

4. Water quality standards have now been set for every river, stream, lake, and bay in the country. These standards protect aquatic life and human health, and reflect numeric criteria published by EPA for about 190 pollutants.

5. By the end of 2006, monitoring has shown that about 39,000 waterbodies still do not meet their water quality standards. However, States have now developed (and EPA has approved) over 25,000 individual clean-up plans for cutting pollution and for meeting standards. EPA estimates that all remaining plans will be completed within 10 years.

6. Since 1972, EPA has regulated pollution discharges from 56 major categories of industry, and updates its regulations regularly. EPA's regulations specify limits for industrial discharges which reflect the application of the best available control technology for existing sources and the best demonstrated control technology for new sources.

7. Since 1972, EPA and States have issued over 60,000 individual discharge permits to limit pollution with best available technologies and in many cases, to require even more stringent limits to solve local water quality problems. About 15,000 concentrated animal feeding operations are also covered, plus more than 500,000 stormwater sources.

8. From the 1950s to the 1970s, an average of 458,000 acres of wetlands were being lost each year. By the 1986-1997 time period, the loss rate had declined to 58,600 acres per year. In the most recent study period, 1998-2004, wetland area increased at a rate of 32,000 acres per year.

9. There are many regional and local examples of clean water progress over the last 35 years:

    a. In 2006, whitefish returned to the Detroit River for the first time since 1976.

    b. The extent of submerged aquatic vegetation (which is important to healthy ecosystems) nearly doubled in the Chesapeake Bay from 1978 to 2005.

    c. Atlantic salmon disappeared from the Connecticut River in the late eighteenth century as a result of overfishing and massive pollution. Salmon were first seen again in the late 1970s and were first observed to spawn and reproduce in 1991 – for the first time in about two hundred years.

Sources

1. "The Clean Water Act: An Effective Means to Achieve a Limited End," article by Tracy Mehan scheduled for publication in *Water Environment and Engineering* Magazine, October 2007. Also, 2000 Water Quality Inventory, USEPA, http://www.epa.gov/305b/2000report/

2. Communication from Bob Bastian, Senior Environmental Scientist, USEPA Municipal Support Division. Based on Progress in Water Quality: An Evaluation of the National Investment in Municipal Wastewater Treatment, EPA832-R-00-008, June 2000, updated 2004.

3. *ibid.*

4. Communications with EPA water quality standards staff. Also, EPA Current Water Quality Criteria, http://www.epa.gov/waterscience/criteria/wqcriteria.html (September 28, 2007)

5. EPA National TMDL Report, http://iaspub.epa.gov/waters/national_rept.control (September 28, 2007)

6. EPA 2006 Section 304(m) Plan, 76648 Federal Register, Vol. 71, No. 245 (December 21, 2006), p. 76648

7. "Growth of the NPDES Permits Program," charts prepared by USEPA Permits Division, October 2007.

8. Draft 2007 Report on the Environment: Science, USEPA, May 2007 http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=140917

9. a. "The Clean Water Act: An Effective Means to Achieve a Limited End," article by Tracy Mehan scheduled for publication in *Water Environment and Engineering* Magazine, October 2007. Also, 2000 Water Quality Inventory, USEPA, http://www.epa.gov/305b/2000report/

   b. Draft 2007 Report on the Environment: Science, USEPA, May 2007 http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=140917

   c. "Salmon Return to Old Spawning Spot, Two Centuries Later," New York Times, December 4, 1991.

AMERICAN FOREST & PAPER ASSOCIATION

GROWING WITH AMERICA SINCE 1861

AMERICAN FOREST & PAPER ASSOCIATION
STATEMENT SUBMITTED FOR THE RECORD

U.S. SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE
LEGISLATIVE HEARING ON S. 1870
THE CLEAN WATER RESTORATION ACT

APRIL 9, 2008

The American Forest & Paper Association (AF&PA) appreciates the opportunity to provide our views on S. 1870, the Clean Water Restoration Act. AF&PA is the national trade association of the forest, paper, and wood products industry. AF&PA represents approximately 175 companies and related associations that engage in or represent the manufacture of pulp, paper, paperboard, and wood products. The industry accounts for approximately 6 percent of the total U.S. manufacturing output, employs more than a million people, and ranks among the top 10 manufacturing employers in 42 states with an estimated payroll exceeding $50 billion.

AF&PA believes that S.1870 would result in a dramatic expansion of Clean Water Act (CWA or Act) jurisdiction and would have a significant adverse effect on the forest products industry.

We have three primary concerns. First, the use of the term "navigable waters" in the original Act was deliberate and reflected Congressional intent to ground CWA jurisdiction in the Commerce Clause, a clause frequently relied upon by Congress over the years as the basis for its authority to enact wide-ranging legislation. Proponents of the Clean Water Restoration Act have argued that limiting CWA jurisdiction to truly "navigable" waters prevents CWA jurisdiction of very important categories of waters that need protection. However, since at least 1985, the Supreme Court has not limited jurisdiction to truly navigable waters, and neither has guidance issued by this or previous Administrations. Nonetheless, the bill would remove those words and insert the language "to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution." This is a significant, but ambiguous, expansion of the original jurisdiction of the Act, and will result in many legal challenges to determine the boundaries of agency authority. For manufacturers of paper and wood products, the legislation creates uncertainty and could require costly and unnecessary permits for ditches, culverts, and log ponds, again imposing severe burdens on the facilities

The second concern pertains to the savings clause in the bill. Because the language of the bill is so broad, encompassing "all interstate and instrastate waters," it is critical that existing legislative and regulatory exemptions from jurisdiction are clearly preserved. We do not believe the wording of the savings clause in Section 6 of the bill adequately

protects existing legislative and regulatory exemptions, including those that are important to forest management activities. Specifically, we are concerned that future courts could interpret the bill's silence on regulatory exemptions as nullifying the existing regulatory exclusion for waste water treatment ponds.

The wastewater treatment pond exemption is very important to the manufacturing segment of our industry. Approximately 75 percent of the larger AF&PA member manufacturing facilities are direct dischargers that treat their effluent before discharge (as compared to indirect dischargers that use publicly owned treatment works (POTWs) for treatment). Many of those facilities have wastewater treatment ponds and would be adversely affected by the loss of the exemption. Without the exemption, water entering waste treatment ponds would have to meet water quality standards, since these ponds would be classified as "waters of the United States." These ponds are critical to the water quality treatment process itself, and mills would have to find other extremely expensive, if not impossible, ways to treat their discharges.

Finally, the bill seems to extend CWA jurisdiction to "activities affecting these waters," a jurisdictional phrase that does not appear in the existing CWA or regulations. It could easily be argued that this language, if enacted into law, reflects Congressional intent to expand the activities that are subject to CWA jurisdiction. This is another example of language that could be interpreted to apply CWA permitting requirements on activities critical to sustainable management of our forest resources. For example, where forest landowners currently use best management practices to protect water quality, the legislation could require those landowners to obtain permits, with the accompanying expense and delay. Current state best management practices have resulted in significant improvements to water quality. A new layer of regulation is not needed and may, in fact, impede water quality.

The United States forest products industry is dedicated to environmental protection and has made great strides in improving the quality of the water it discharges, and has also adopted and implemented numerous sustainable forestry practices meeting and exceeding environmental protection requirements. We are committed to protecting and restoring America's wetland and water resources and we support constructive measures to achieve these goals. Because the bill would dramatically expand CWA jurisdiction and would regulate treatment ponds, ditches, and culverts, we do not believe it is helpful in this regard and we respectfully oppose the legislation.

For more information please contact:
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American Forest & Paper Association
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arizona municipal water users association

4041 north central avenue • suite 900 • phoenix, arizona 85012 • phone (602) 248-8482 • fax (602) 248-8423

Thursday, April 3, 2008

Honorable James L. Oberstar, Chairman
House Committee on Transportation and Infrastructure
2165 Rayburn House Office Building
Washington, D.C. 20515

Honorable John Mica, Ranking Member
House Committee on Transportation and Infrastructure
2163 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman and Ranking Member:

The Board of Directors of the Arizona Municipal Water Users Association (AMWUA) has thoroughly reviewed and unanimously voted to support the concerns raised in the testimony of Mark Pifher submitted to the Committee on Transportation and Infrastructure for its hearing on H.R. 2421, The Clean Water Restoration Act of 2007.

The Arizona Municipal Water Users Association (AMWUA) is a non-profit organization established to assist its member cities and towns in the areas of water resource management and development of urban water policy. The members of AMWUA are Avondale, Chandler, Gilbert, Glendale, Goodyear, Mesa, Peoria, Phoenix, Scottsdale and Tempe. Collectively AMWUA members represent 3.29 million people or over 87% of the population of Maricopa County, Arizona. AMWUA municipalities provide water, wastewater and stormwater management services to their communities and join other western municipalities as strong supporters of the basic tenets of the federal Clean Water Act.

The testimony that Mr. Pifher has prepared, on behalf of the municipal members of the National Water Resources Association (NWRA), the Western Urban Water Coalition (WUWC), and the Western Coalition of Arid States (WESTCAS), accurately reflects the potential issues and concerns similarly identified by the AMWUA membership. We support his testimony before the

House Transportation and Infrastructure Committee regarding "The Clean Water Restoration Act of 2007" and urge the Committee to address the concerns Mr. Pifher has raised as it deliberates this legislation.

Sincerely,

Steven L. Olson
Executive Director

slo/mla

Copies to:
Honorable Eddie Bernice Johnson, Chair, Water Resources and Environment Subcommittee
Honorable John Boozman, Ranking Member, Water Resources and Environment Subcommittee
Honorable Harry Mitchell, Member of Congress
Honorable Janet Napolitano, Governor of Arizona
Steve Owens, Director, Arizona Department of Environmental Quality
AMWUA Board of Directors

April 8, 2008

The Honorable Barbara Boxer
Chairwoman, Senate Committee on Environment and Public Works
United States Senate
Washington, D.C. 20515

The Honorable Jim Inhofe
Ranking Member, Senate Committee on Environment and Public Works
United States Senate
Washington, D.C. 20515

Dear Chairwoman Boxer and Ranking Member Inhofe:

On behalf of Associated Builders and Contractors (ABC) and its more than 25,000 general contractors, subcontractors, material suppliers and construction related firms across the United States, I would like to take this opportunity to voice my strong opposition to S. 1870, the *Clean Water Restoration Act of 2007*. Due to the detrimental impact this legislation would have on our members if passed, I ask your committee to reject S. 1870.

Specifically, I oppose the removal of the term "navigable waters" from the *Clean Water Act* and replacing it with "Waters of the United States" which is defined in Section 4 of this legislation as being "all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing,". This definition is much too broad and will negatively impact many of ABC's member companies.

Moreover, if the above definition is signed into law it could potentially cause construction projects to grind to a halt due to the broad spectrum of water bodies that it includes. Most construction sites, out of necessity, create water holding areas in order to keep excess water out of the job site. This bill would essentially place all excess water holding areas, puddles of water, or even water that has accumulated in the tire ruts made by heavy machinery or vehicles on a job site under the Clean Water Act. You can imagine the havoc this would cause on every single construction site across the country.

In view of the current strain on the construction industry, this it not the time to pass legislation that would do nothing but create mass confusion in our industry. For this reason I ask you to oppose S. 1870, the *Clean Water Restoration Act of 2007*.

Sincerely,

William B. Spencer

William B. Spencer
Vice President, Government Affairs

CC: Members of the Senate Committee on Environment and Public Works

Statement of

The Associated General Contractors of America

Presented to the

Committee on Environment and Public Works
United States Senate

For a hearing on

S. 1870, the Clean Water Restoration Act of 2007

April 9, 2008

Building Your Quality of Life

The Associated General Contractors of America (AGC) is the largest and oldest national construction trade association in the United States. AGC represents more than 32,000 firms, including 7,000 of America's leading general contractors, and over 12,000 specialty-contracting firms. Over 13,000 service providers and suppliers are associated with AGC through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation/utilities installation for housing development, and more.

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
2300 Wilson Boulevard, Suite 400 • Arlington, VA 22201 • Phone: (703) 548-3118 • FAX: (703) 548-3119

STATEMENT
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE
APRIL 9, 2008

I. Introduction

The Associated General Contractors of America (AGC) is pleased to submit these comments on S. 1870, the Clean Water Restoration Act of 2007. AGC strongly opposes S. 1870, 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 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, and it 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.

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 $32,500 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 S. 1870, the Clean Water Restoration Act of 2007

AGC strongly opposes S. 1870, the Clean Water Restoration Act of 2007, 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 S. 1870 neither "restores" the original intent of the CWA nor "clarifies" CWA jurisdiction; rather, S. 1870 would create the greatest expansion of the CWA since it was signed into law in 1972.

S. 1870 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 ground water, 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.

S. 1870 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 S. 1870 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 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, S. 1870'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. 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 S. 1870, the Clean Water Restoration Act of 2007, 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

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[1] Scalia, slip op. at 20-21.
[2] Scalia, slip op. at 23-24.
[3] Kennedy, slip op. at 24.

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 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

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[4] Kennedy, slip op. at 25.
[5] 539 U.S. 306, 325 (2003).
[6] 430 U.S. 188, 193 (1977).
[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).

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 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.

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[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.

(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.

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:

> [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.

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[14] Kennedy, slip op. at 28.
[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.

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 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).

V. Corps/EPA Joint Guidance Not Enough

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[19] Kennedy, slip op. at 25.
[20] Kennedy, slip op. at 24.
21 Kennedy, slip op. at 22-24.
[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.

On June 5, 2007 the Corps and EPA jointly issued guidance regarding the scope of CWA jurisdiction following *Rapanos* and announced a 180-day public comment period that the agencies later extended until January 2008. The agencies also issued an accompanying instructional guidebook to aid regulators and the public in making jurisdictional determinations. The guidance will influence regulators' decisions on whether CWA Section 404 discharge permits are required—*and whether they will be issued*—for construction activities impacting wetlands, tributaries, and other waters. It will also impact civil and criminal environmental enforcement. Many jurisdictional determinations beyond traditional navigable waters and their adjacent wetlands will be decided on a case-by-case basis according to a "significant nexus" test described in the guidance. The agencies also announced in the guidance hydrologic features that they generally will not assert jurisdiction over, including roadside ditches as long as they are excavated wholly in and only drain upland and do not carry a relatively permanent flow of water (i.e., less than three months).

On January 22, 2008, AGC joined a group of organizations representing the housing, mining, agriculture, and energy sectors in submitting detailed comments to the Corps and EPA regarding the guidance. The group's comments state that the agencies have "misinterpreted *Rapanos*" and have "adopted lengthy and cumbersome procedures and onerous documentation requirements not required by *Rapanos*." For example, the guidance gives EPA a new and significant role in determining federal jurisdiction and spells out complicated procedures for the Corps and EPA to follow in deciding whether a "significant nexus" exists in each instance between traditional navigable waters and intermittent, non-navigable tributaries; wetlands adjacent to such tributaries; and wetlands separated from relatively permanent tributaries by uplands, dikes, or beams. Under the guidance, the government must document why the impact on the chemical, physical, and biological integrity of the traditional navigable waters is more than "speculative or insubstantial."

Accordingly, the group argues that "these policies are resulting in further confusion and delays, more costs, and less predictability and certainty with regard to permitting." To achieve greater clarity and transparency, which the regulatory community and the public have long desired in the section 404 program, the group recommends that the agencies improve the guidance immediately and ultimately undertake a rulemaking.

VI. Conclusion

AGC strongly opposes S. 1870, the Clean Water Restoration Act of 2007, or similar legislation that would redefine 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.

CALIFORNIA FARM BUREAU FEDERATION
EXECUTIVE OFFICES
2300 RIVER PLAZA DRIVE, SACRAMENTO, CA 95833-3293 · PHONE (916) 561-5520 · FAX (916) 561-5690

VIA FACSIMILE: (202) 228-2382

April 7, 2008

The Honorable Barbara Boxer
Chair, Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Dear Senator Boxer:

On behalf of more than 91,500 members, the California Farm Bureau Federation ("Farm Bureau") would like to express our concerns regarding S. 1870 (Feingold D-WI), "The Clean Water Restoration Act of 2007," which will be heard in the Environment and Public Works Committee this Wednesday, April 9th. Farm Bureau strongly opposes S. 1870 because it would unnecessarily impede the ability of California's farmers and ranchers to produce a safe, sustainable food supply. S. 1870 is duplicative of current state water quality laws and would create unnecessary confusion in the regulatory system.

Farm Bureau's purpose is to protect and promote agricultural interests throughout the State of California and to find solutions to the problems of the farm, the farm home and the rural community. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources.

Currently, S. 1870 removes the word "navigable" from the Clean Water Act (CWA), thereby granting the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers federal regulatory authority over all "intrastate waters." This would greatly expand the regulatory reach of the CWA to the detriment of U.S. agriculture, economic growth and future wetlands protection. Appropriate protections are already afforded waters of the United States under the existing law and as defined by a series of United States Supreme Court cases. Furthermore, in the recent *Rapanos* case the unifying theme of all the Justices was not to amend the CWA, but rather that the ACE and EPA clarify their existing regulations.

Existing CWA discretion and California law already protect the intrastate waters and isolated wetlands that S. 1870 seeks to include, and it avoids the overly broad application of covering every wet area, pothole, or roadside ditch. S. 1870 would unnecessarily expand federal jurisdiction of CWA, pre-empt traditional state and local government authority over land and water use decisions, and alter the balance of federal and state authority by regulating all "activities affecting these waters." This would impose significant administrative burdens on all levels of government. At the federal level, S. 1870 would produce permitting delays and increased costs, thus impeding a host of agricultural activities and conservation practices, such as wildlife habitat improvements, stream restoration, and many other land enhancement projects.

Farm Bureau respectfully calls on Congress to preserve the traditional power of states over land and water use and avoid unnecessary alterations to the regulatory reach of the CWA. Thank you for considering Farm Bureau's concerns regarding this legislation. Please contact us with any questions you may have at 916-561-5610.

Kind Regards,

DOUG MOSEBAR
President

The Nationwide Public Projects Coalition

609 W. Littleton Blvd., Suite 101, Littleton, CO 80120 (303) 798-6772)

Statement to Members of the
Committee on Environment and Public Works
United States Senate
With Regard to S.1870

Chairman Boxer, Ranking Member Inhofe, Committee Members:

The Nationwide Public Projects Coalition (NPPC) was chartered 17 years ago to present the case for reforms and improvements of the Federal Water Pollution Control Act (FWPCA) and other environmental protection laws and regulations from the vantage point of state and local public agencies that provide services to citizens of the nation. In other words, your constituents also are our constituents.

We urge you to consider what seem to be unintended consequences when you take up S.1870 for markup.

NPPC's members are cities, counties, water and wastewater districts, flood control and drainage districts, and highway agencies that build and maintain public infrastructure. Its symbol is a simple balance like the one that traditionally depicts Justice in our nation. The phrase "Environmental Values" is on one side of the scale. On the other side is "Needs of People."

Our membership includes public sector entities and associations ranging from Alaska to Georgia and from Connecticut to California. Nearly all of them are custodians of water or of transportation corridors that require the high order of environmental quality that best serves their constituents. We believe that S.1870, as introduced, would interfere with what should be state or local land use policies infinitely more than it would restore clean water, as its title proclaims.

Our Coalition's longstanding mission is to do what we can to help re-balance environmental laws, as well as de facto laws devised by Executive branch agencies and the Judiciary that seem to ignore the original intents of the framers of FWPCA, the Clean Water Act (CWA) that followed, plus the Endangered Species Act (ESA).

For example, NPPC has entered amicus curiae briefs in such high profile CWA related litigation as *Solid Waste Association of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)* and, more recently, *John A. Rapanos, et al, .v U.S. Army Corps of Engineers.* Also, we have been a resource for drafters of a number of bills intended to make ESA and CWA more responsive to the basic needs of people

Our message will be brief, recognizing that several witnesses at the Committee's April 9 Legislative Hearing on S.1870 effective present detailed historical perspectives on the troublesome issues raised by the bill.

A major thrust of S.1870 is to excise the term "Navigable Waters" wherever it appears in FWPCA and ESA and replace it with "Waters of the United States."

We acknowledge that the meaning of "navigable waters" has become muddied in the years since it was used repeatedly, and clearly purposefully, in the Clean Water Act of 1972. At that time the term was well understood and had been quite serviceable in application by Federal regulatory agencies, particularly the U.S. Army Corps of Engineers, for nearly a century.

In fact, "Navigable Waters of the U.S.," applicable to the Corps under *33 CFR, Part 329,* was defined simply and precisely as "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce."

But, in the decades that have followed, Federal agency rulemaking and practices in the field have stretched the meaning of "Navigable Waters" almost beyond recognition. Occasionally that license has been in the national interest, but in our view the result much more often has been delay or thwarting of vital public infrastructure projects with little or no benefit to environmental quality or other needs of people.

The definition of "Waters of the United States" in Section 4 of S.1870 includes not only the historic language of *33 CFR, Part 329,* but also "all interstate and intrastate waters and their tributaries," followed by a laundry list of the kinds of places that always, occasionally or very rarely are wet. It would seem to define every drop of precipitation that falls anywhere in the nation as "Waters of the United States." We feel that, should S.1870 actually become law pretty much as it is presently written, a whole new era of regulatory excess and litigation will be ushered in, to the detriment of your constituents and ours.

NPPC's public sector members would vastly prefer that such additional Federal and local government agencies' workloads – and expenditures of public funds --instead be used to provide tangible benefits to our constituents ranging from lower taxes to reasonable and practicable environmental protection, and improved delivery of essential services.

We urge the Committee to take a step back in the markup session and find ways to bring the requirements and constraints of "Navigable Waters" into the realities of the 21st Century without opening the floodgates of the aforementioned regulatory excess and litigation that surely would attend S.1870's new and frankly ominous definitions of "Waters of the United States."

Thank you.

NATIONAL WATER RESOURCES ASSOCIATION
Meeting Tomorrow's Challenge

President W.E. "Bill" West, Jr.
Vice President Lawrence M. Libeu
Treasurer Wade Noble
Executive Vice President Thomas F. Donnelly

March 28, 2008

The Honorable Barbara Boxer
U.S. Senate
410 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable James Inhofe
U.S. Senate
456 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairwoman Boxer and Ranking Member Inhofe,

I am writing to express very serious concern about the "Clean Water Restoration Act of 2008," S 1870, as introduced by Senator Russ Feingold to vastly expand the definition of "waters of United States" in the Clean Water Act. The Board of Directors and members of the National Water Resources Association strongly believe that this legislation is the wrong approach at the wrong time.

As water providers to municipalities and agriculture in the 17 Western States, NWRA members strongly oppose the expansion of the definition of "waters of the United States." The proposed amendment will "federalize" all waters thus usurping the authority and rights of States over their water resources. The result will dramatically limit access to water distribution facilities for water quality and safety related maintenance activities. Under the proposed new definition, such necessary water service activities will require National Pollution Discharge Elimination System (NPDES) and/or Section 404 Wetlands permits which are not likely to be obtainable in a timely manner, if at all. The economic cost of compliance and disruption of service will be unprecedented. In many instances, the proposed amendments will make it impossible for many water delivery entities to continue to perform their essential functions.

Our country has made great strides in cleaning our nations waterways since the Clean Water Act was first enacted in 1972. While it is possible to improve a successful program, as the Clean Water Act is, S 1870 is the wrong approach at the wrong time. As population growth in the West continues to strain existing water supplies and infrastructure, the additional restrictions, prohibitions, and limitations which will result will do much more harm than any intended good.

Senate hearings on the proposed legislation are currently scheduled to occur on April 9, 2008. We encourage you to voice concerns to Committee members prior to the hearing.

If the legislation comes to the full Senate for a vote, please do not support this legislation and encourage your colleagues' opposition. It is not needed and is an extreme approach which will produce only negative consequences. We look forward to working with you and your staff on this important issue.

Sincerely,

Thomas F. Donnelly
Executive Vice President

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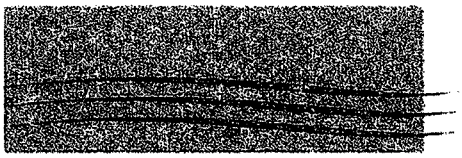

WATER RESOURCES COALITION

April 8, 2008

The Hon. Barbara Boxer
Chairwoman, Environment and
Public Works Committee
U.S. Senate
Washington, D.C. 20515

The Hon. James Inhofe
Ranking Member, Environment
and Public Works Committee
U.S. Senate
Washington, D.C. 20515

Dear Chairwoman Boxer & Ranking Member Inhofe:

The Water Resources Coalition is writing to express our concerns with the *Clean Water Restoration Act of 2007* (S. 1870/H.R. 2421). The Coalition appreciates your steadfast and tireless championing of water resources projects and policies and looks forward to continuing to work with you in support of common goals. While the Coalition agrees with you that confusion over the jurisdictional scope of the Clean Water Act exists, we are unable to support the approach taken to eliminate this confusion in S. 1870/H.R. 2421.

The Coalition works to ensure that a comprehensive national water resources policy is developed, implemented and funded to provide a sustainable, productive economy, a healthy aquatic ecology and public health and safety. The members of the Coalition represent state and local government, engineering and construction, ports and waterways, transportation services and conservation organizations with an interest in comprehensive national water resources policy. Water resources projects such as waterways and ports construction and maintenance, flood control, hydroelectric projects, irrigation, water supply and environmental restoration, are critical to the nation's economy, environment and quality of life.

With each passing day, the inability of our nation's aging infrastructure to meet the needs of our growing population further threatens our economy. Similarly, the need to bring new projects under construction to completion to meet new water resources challenges continues to grow. The changes proposed in the *Clean Water Restoration Act of 2007* have the potential to delay or halt important and necessary local projects, increase project costs and possibly increase litigation risks further threatening our economic competitiveness.

ASCE
101 Constitution Ave., NW
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Washington, DC 20001
202-789-7850 (ASCE)

AGC
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Suite 400
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703-837-5325 (AGC)

The U.S. Army Corps of Engineers (Corps) has been operating during the last several years with a severely restricted budget and as such, the agency does not have the financial or staff resources to absorb any increase in additional non-core work such as section 404 jurisdictional determinations. Currently, the Corps faces a significant backlog of water resources construction and maintenance projects. Moreover, $23 billion in new projects and studies were recently authorized in the Water Resources Development Act of 2007. Since the *Clean Water Restoration Act* fails to provide any additional resources to keep pace with the increased demand for permit reviews, these costs and delays will certainly increase once the bill is enacted.

Rather than enacting S. 1870/H.R. 2421, we believe Congress should encourage the Corps and the Environmental Protection Agency to undertake a formal rulemaking process which offers an alternative approach to clarifying section 404 jurisdiction and will result in a scientifically based and more predictable rule. The administrative rulemaking process will result in a new rule that reflects the expertise of the agencies and emphasizes the scientific basis for extending federal jurisdiction over waters of the United States. Moreover, this approach affords all interested stakeholders with an opportunity to comment on and shape the revised regulatory proposal resulting in a clearer and more predictable rule.

Any new rule should refrain from trying to incorporate every detail of the fractured *Rapanos* decision and instead should strike a middle ground that clearly delineates the scope of section 404 jurisdiction under the Clean Water Act and embrace an unambiguous test for determining whether there is a significant nexus to navigable waters. Continued reliance on the dual test approach outlined in the joint agency guidance issued by the agencies in response to the *Rapanos* decision will only further the current confusion over the proper application of section 404 jurisdiction and lead to more delays and increased project costs. A well-crafted, national, binding rule that has followed notice and comment requirements will bring needed clarity, consistency, predictability and a sense of fairness to the section 404 program and will reduce unnecessary jurisdictional determination delays and litigation risks while protecting the nation's water resources and maintaining the nation's economic competitiveness.

The Water Resources Coalition appreciates your consideration of our comments and we look forward to discussing these issues further with you and your staff.

Sincerely,

Brian Pallasch
American Society of Civil Engineers

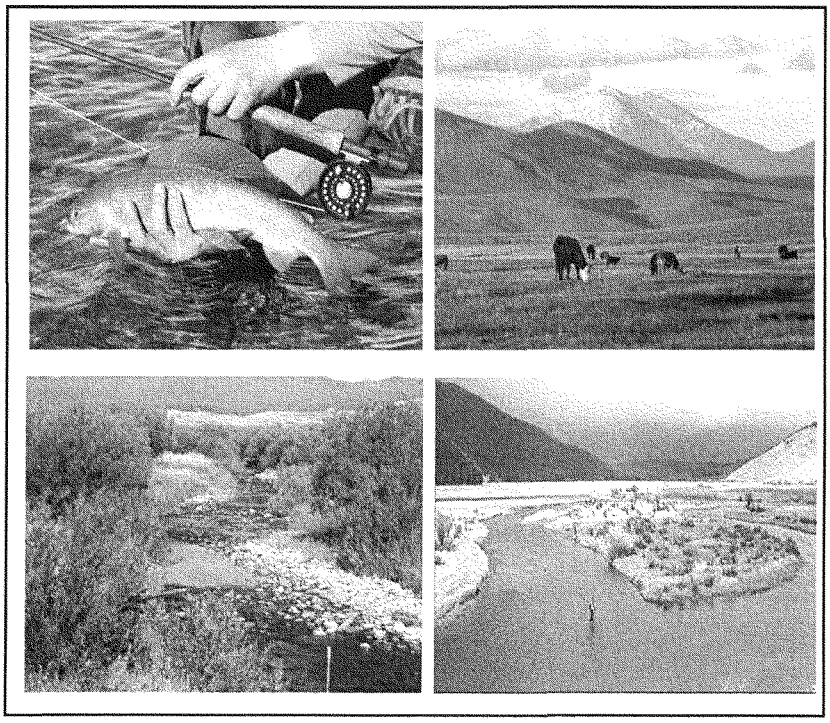
Marco Giamberardino
Associated General Contractors of America

Coalition Co-Chairs

Big Hole River Drought Mitigation and Grayling Recovery Project

Appropriation Request FY 2009

Big Hole Watershed, Montana
March 2008



Prepared by: **Big Hole Watershed Committee**
P.O. Box 931
Butte, MT 59703
www.bhwc.org

Partnering with:
Trout Unlimited
The Nature Conservancy
Big Hole River Foundation
Montana Department of Fish, Wildlife and Parks
Montana Department of Natural Resources and Conservation
U.S. Fish and Wildlife Service
Natural Resources Conservation Service

Table of Contents

Project Description

Project History and Background
Historically, a vital ranching heritage has been the economic mainstay of our region. Agriculture has protected the Big Hole Basin from the uncontrolled development faced by nearly every other mountain valley in the West and has supported the Big Hole's status as a premier, world-renowned Blue Ribbon trout fishery. Because of this, recreational fishing along with associated service and retail business, is an increasingly important industry fueling our economy. In addition, ours is the last remaining river in the United States to support a native population of fluvial Arctic grayling, an imperiled species of special concern.

For 10 out of the last 12 years, summer flows of the Big Hole River have averaged approximately one-third of normal due to drought. Resolving conflicting concerns around water requires community support, innovative problem-solving abilities, and highly developed collaboration skills. The Big Hole Watershed Committee (BHWC) serves that role.

One of the group's first accomplishments was the development of a pioneering Drought Management Plan that asks for and receives "shared sacrifice" to meet the needs of all. The BHWC drought management plan is the first of its kind in Montana and is the model used by all other watersheds in the state, In 1999, the BHWC was recognized with the State of Montana Watershed Stewardship Award for its innovative and successful approach to drought management. **Drought mitigation continues to be one of our primary areas of concern.**

Another of our current priorities is support of the Fluvial Arctic Grayling Candidate Conservation Agreements with Assurances (CCAA) program. The Big Hole CCAA represents the largest program of its kind in the country and offers a tremendous opportunity toward a more effective vision for protecting endangered species. The CCAA is a comprehensive restoration plan that simultaneously addresses the difficult private lands issues facing grayling recovery (damaged riparian areas, inadequate flows, entrainment, and nonfunctioning stream channels) while removing substantial risk and uncertainty from the operations of agricultural producers. This effort is an ecosystem approach that includes the headwaters of the Big Hole River watershed. Currently, 32 landowners have signed up, enrolling nearly 160,000 acres. This represents 48% of the private land within the CCAA project area.

The Big Hole Watershed Committee, private landowners, Montana Fish, Wildlife, and Parks, Montana Department of Natural Resources and Conservation, the US Fish and Wildlife Service, Natural Resources Conservation Service, Trout Unlimited, the Nature Conservancy, the Big Hole River Foundation, and other organizations have all contributed in a variety of ways to move this program forward and are committed to following it through to completion.

Project Goals
The Big Hole Watershed Committee will continue our momentum in water management, ecological enhancement, and grayling recovery. We will seek solutions to increase inadequate stream flows through improved water management and irrigation efficiency and repair damaged riparian areas and non-functioning stream channels. We will provide further opportunities for local government to achieve land use planning that will provide for a natural flowing river. Our project will enhance the ecological integrity of our native ecosystems which support one of the most diverse and intact wildlife populations in the United States. Our combined efforts will result in saving a critically imperiled species while simultaneously benefiting the agricultural community and the regional economy.

While agency partners in the CCAA program are limited in their scope to the upper half of the Big Hole River, the BHWC has no such limitations and can address issues on an entire watershed scale. Additionally, the BHWC provides a forum for the local community to have a voice in how funding should be distributed to meet local concerns and needs.

Detailed Budget Breakdown for FY 2009 Appropriations Request

FY 2009 Appropriations Request		
TASK	**DESCRIPTION**	**COST**
Task 1 Habitat Restoration & Enhancement Projects	Riparian Vegetation, Streambank Stabilization, In-Stream Habitat Development, Fish Ladders, Fish Screens, Weed Management, Monitoring	**$2,051,000**
Task 2 Water Management, Irrigation Efficiency Improvements	Improved Water Management and Irrigation Efficiency Projects, Flow Measuring Devices, Culvert Replacements, Monitoring	**$649,000**
Task 3 Project Management and Oversight (8%) *(see note below)*	Outreach & education; Project management and oversight; Administration	**$234,000**
	TOTAL	**2,934,000**
Note: Director FTE; Project Coordinator/Administrator - FTE; Weed Coordinator-0.75 FTE		

Five Year Budget
Drought Management and Fluvial Arctic Grayling Recovery Project[1]
Based on MFWP CCCAA Cost Estimates (refer to next page)

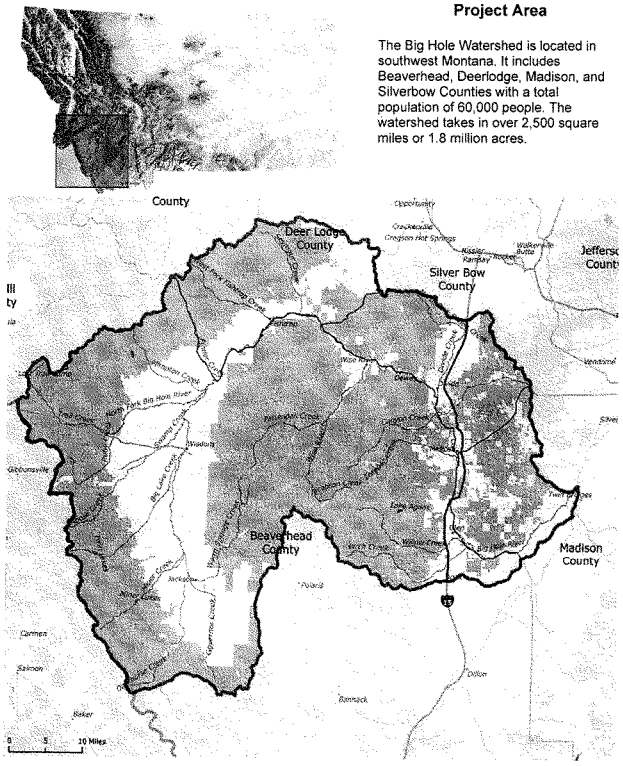
Timeline	Project	Note	Total
Year 1	Stream Restoration	20% of total	$1,210,000
	Measuring devices	All	$98,000
	Headgates	All in Segment C	$30,000
	Culvert	Segment A	$250,000
Total			**$1,588,000**
Year 2	Stream restoration	20% of total	$1,210,000
	Fish ladders	14	$70,000
	Headgates	7	$35,000
	Culverts	2 in Segment C	$150,000
	Stream crossings	16	$16,000
	Feedlot Mitigation	3 feedlots	$360,000
	Fish Exclusion	5 ditches	$750,000
Total			**$2,591,000**
Year 3	Stream Restoration	20% of total	$1,210,000
	Fish ladders	14	$70,000
	Headgates	7	$35,000
	Feedlot mitigation	3	$360,000
	Fish Exclusion	5	$750,000
	Stream crossings	16	$16,000
Total			**$2,441,000**
Year 4	Stream Restoration	20% of total	$1,210,000
	Fish ladders	14	$70,000
	Headgates	7	$35,000
	Feedlot mitigation	3	$360,000
	Fish Exclusion	4	$600,000
	Stream crossings	16	$16,000
Total			**$2,291,000**
Year 5	Stream Restoration	20% of total	$1,210,000
	Fish ladders	12	$60,000
	Headgates	4	$20,000
	Feedlot mitigation	1	$120,000
	Fish Exclusion	4	$600,000
	Stream crossings	15	$15,000
Total			**$2,025,000**

[1] Costs do not include prioritized projects outside of CCAA-reach.

CCAA - Cost Estimate
Montana Department of Fish Wildlife & Parks[2]

AREA	ITEM	APPROX. #	UNIT COST	TOTAL
CCAA Segment A	Fish Ladder	2	$5,000	$10,000
	Headgate	10	$5,000	$50,000
	Culvert Removal/Bridge Installation	1	$250,000	$250,000
	Stream Restoration	2 miles	$125,000	$250,000
	Fish Exclusion Device	2	$150,000	$300,000
	Measuring Device	15	$1,200	$18,000
Segment Total				$878,000
CCAA Segment B	Fish Ladder	7	$5,000	$35,000
	Headgate	4	$5,000	$20,000
	Stream Crossing	18	$1,000	$18,000
	Fish Exclusion Device	2	$150,000	$300,000
	Measuring Device	12	$1,200	$14,400
Segment Total				$387,400
CCAA Segment C	Fish Ladder	28	$5,000	$140,000
	Headgate	6	$5,000	$30,000
	Culvert Removal/Bridge Installation	2	$75,000	$150,000
	Stream Restoration	18 miles	$150,000	$2,700,000
	Fish Exclusion Device	8	$150,000	$1,200,000
	Measuring Device	20	$1,200	$24,000
	Feedlot mitigation	2	$120,000	$240,000
Segment Total				$4,484,000
CCAA Segment D	Fish Ladder	16	$5,000	$80,000
	Headgate	10	$5,000	$50,000
	Stream Crossing	34	$1,000	$34,000
	Stream Restoration	20 miles	$150,000	$3,000,000
	Measuring Device	20	$1,200	$24,000
	Feedlot Mitigation	6	$120,000	$720,000
Segment Total				$4,808,000
CCAA Segment E	Fish Ladder	1	$5,000	$5,000
	Headgate	1	$5,000	$5,000
	Stream Crossing	11	$1,000	$11,000
	Stream Restoration*	10 miles	$10,000	$100,000
	Feedlot Mitigation	2	$120,000	$240,000
	Measuring Device	15	$1,200	$18,000
Segment Total				$379,000
Total				$10,936,400**

[2] Costs are only estimates based on rapid assessment data from 2005.
Costs are based on the NRCS Cost List FY 2006 and the cost of projects recently completed in the Big Hole watershed. Actual implementation costs can only be known once all CCAA site-specific plans are complete.
*Due to local hydrology and geomorphology, passive restoration approach likely most applicable.
** Rough estimate that does not include potential significant changes or improvements to irrigation systems or stock-water development projects. These projects likely cost-shared through NRCS EQIP. Costs do not include prioritized projects outside of CCAA-reach.


Project Area
The Big Hole Watershed is located in southwest Montana. It includes Beaverhead, Deerlodge, Madison, and Silverbow Counties with a total population of 60,000 people. The watershed takes in over 2,500 square miles or 1.8 million acres.
County
Deer Lodge County
Silver Bow County
Beaverhead County
Madison County
Dillon
Ramsack
Salmon
Baker
0 5 10 Miles

Big Hole Watershed Committee – Mission and Accomplishments

The mission of the Big Hole Watershed Committee is to seek understanding of the river and agreement among individuals and groups with diverse viewpoints on water use and management in the watershed. We are a non-profit organization that makes decisions through consensus. Our 22-member Governing Board represents diverse interests including ranching, utilities, local government, conservation organizations, outfitters/guides, and sportsmen. State and federal agencies participate on the Committee as technical advisors; among them are Montana Fish, Wildlife and Parks, U.S. Forest Service, Montana Department of Natural Resources, Conservation, Bureau of Land Management, Natural Resources Conservation Service, and U.S. Fish and Wildlife Service. Detailed information is available at our website: www.bhwc.org.

Among our accomplishments are the following:

1. Drought Management Plan
2. Land Use Planning
3. Weed Management
4. Recreation Management
5. Support of Grayling Recovery

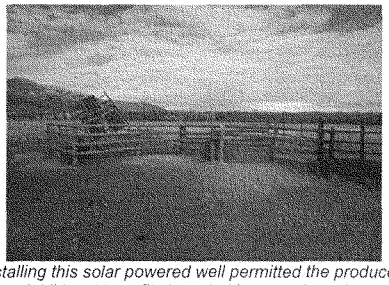
Accomplishments - Drought Management Plan

The BHWC created the first drought management plan in Montana, a plan that serves as a model for drought plans subsequently adopted throughout the state (*refer to Appendix 1*). Our drought management plan has been successful in improving stream flows compared to years prior to the plan. Adopted in 1998, the purpose of the plan is to mitigate the effects of low stream flow and lethal water temperatures for the benefit of the fishery (particularly fluvial Arctic grayling) through a voluntary effort among agriculture, municipalities, business, conservation groups, anglers, and affected government agencies. The drought management plan asks for and receives support through shared sacrifices for those affected by drought.

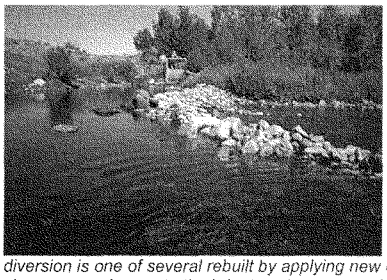
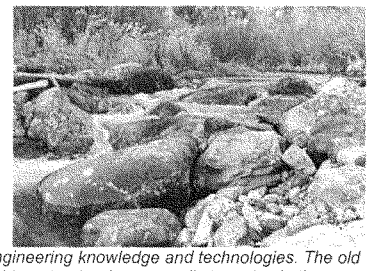
The BHWC drought management efforts include three additional components:

1. *Drought Management Plan - Research and Studies Completed Within the Last Five Years*
    a. *Storage Study* – The goal of this study was to identify potential water storage locations that might be suitable for contributing to in-stream flows in the critical upper reach of the Big Hole River. This study was supported by FY 2003 appropriations.
    b. *Water Management Study* – This study examined water management alternatives that could contribute additional sources of water for the purposes of late-season in stream flow (for example: irrigation management, irrigating for hay versus pasture, stock water wells, restoring wetlands, reintroducing beaver to tributary headwaters). This study was supported by FY 2003 appropriations.
    c. *Vegetation Community-Water Budget Study* – This study examined the relationship between historic changes in upland vegetation and flows in the upper Big Hole River basin and predicts the ways in which manipulation of coniferous forests in the headwaters would affect in stream flow. This study was supported by FY 2003 appropriations.
    d. *Ground Water–Surface Water Study* – Under the auspices of the Montana Bureau of Mines and Geology, this study examines the relationship of irrigation practices in the upper Big Hole to in stream flow. This study was partially supported by FY 2003 appropriations. Other funding sources included Montana Bureau of Mines and Geology, US Bureau of Reclamation, US Geological Survey, Montana Department of Natural Resources Conservation and others.
    e. *Irrigation Infrastructure Survey and Prioritization Study* – This prioritization will help the BHWC focus our efforts on improving structures that provide irrigators increased opportunities to manage their water use. This study was supported by Montana Department of Natural Resources Conservation, Ruby Valley Conservation District, and BHWC.

2. *Drought Management Plan - Enhanced Water Management* The water management component of our work includes a plan to strategically install flow measuring devices. We support drilling stock water wells which will permit ranchers to "turn off' water through ditches, leaving that water in the river. Finally, we work with willing irrigators to replace aging infrastructure, thus offering increased ability to manage water more beneficially.



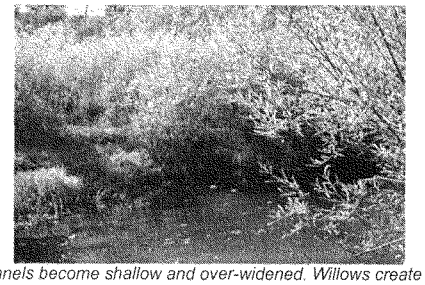

Installing this solar powered well permitted the producer to abandon a long leaky ditch, leaving water in the river. Additional benefits included improved grazing management for the producer, recovery of riparian areas, and improved upland range condition.

This diversion is one of several rebuilt by applying new engineering knowledge and technologies. The old diversion was a nuisance to the irrigator who was required to enter the river annually to maintain the structure. The new design protects streambed morphology and water quality, and permits fish passage during low flows.

3. *Drought Management Plan - Enhanced Riparian Habitat Conditions*

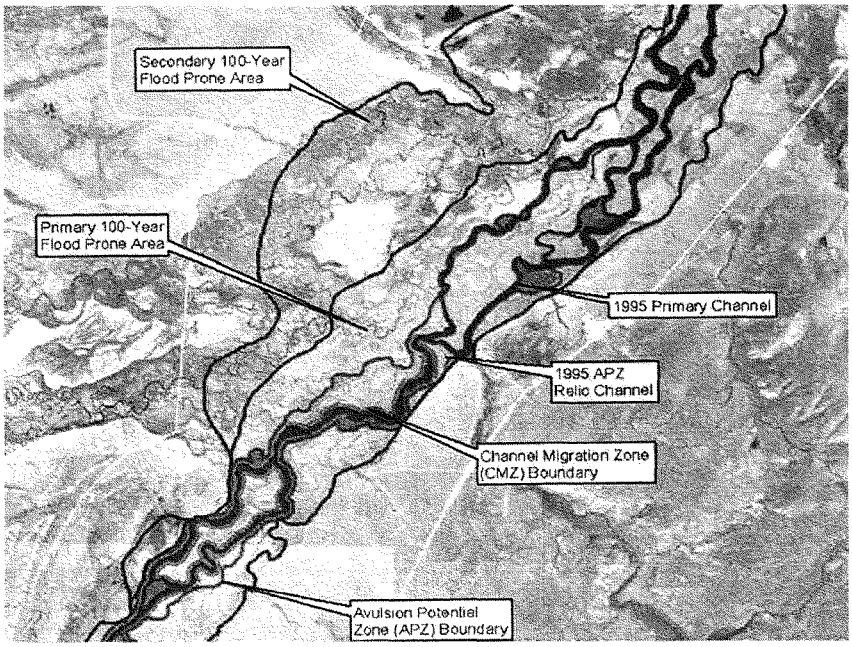
Enhancing, protecting, and restoring riparian areas helps maintain a deep narrow river channel, benefitting stream flows, water temperatures, and fish habitat.

Without healthy riparian plant communities, stream channels become shallow and over-widened. Willows create cool deep pools that offer abundant fish habitat while protecting water quality.

Accomplishments – Land Use Planning

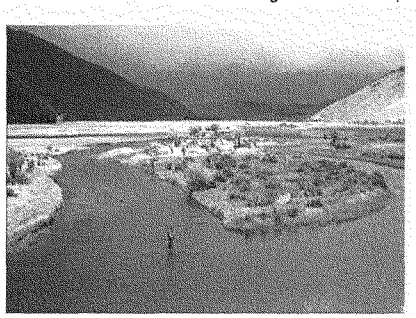
The BHWC shepherded forward community-supported development standards which were adopted along the length of the river across four county jurisdictions. As part of the process, the BHWC, using past appropriations funding, collaborated with the four counties, to develop a 100-year FEMA-recognized floodplain map of the river. This floodplain map is an invaluable tool to our planners, county commissioners, planning board members, sanitarians, and floodplain administrators. The Big Hole adopted a Development Setback Ordinance which precludes development within 150 feet of the normal high water mark along the *entire* length of the river. **Another first in the Montana, this unique model is an example of the BHWC's abilities to accomplish complicated projects with broad community support. Our setback standard is recognized in Montana and nation-wide as an example of progressive planning.**

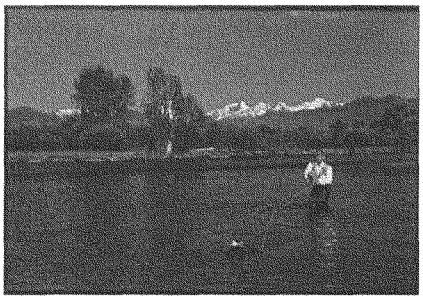


Accomplishments – Weed Management

As a headwaters drainage, the Big Hole has a higher level of responsibility toward weed control and weed management than other drainages do. The BHWC Weed Committee provides those who live, work, and play in the Big Hole with support through education and financial means to control noxious weeds, thus maintaining the ecological integrity of our native and agricultural environments. In 2007 the BHWC Weed Committee was the recipient of the State of Montana's Weed Association Award for Excellence. Appropriations funding supports education and cost-share for community weed management activities.

Accomplishments – Recreation Management
The Big Hole River has in place a recreation management plan that provides equitable opportunities for resident and nonresident anglers alike and protects the fishery from overuse.





Accomplishments – Support of Grayling Recovery
Since our inception in 1995, the BHWC has supported grayling recovery efforts. In 2005, as part of the US Fish and Wildlife Service/ Montana Fish, Wildlife and Parks CCAA program, the upper half of the Big Hole River was assessed to identify threats to grayling. The assessment provided guidance as to CCAA requirements as part of management plans developed with participating land owners. CCAA requirements include improving stream flows, improving and protecting the function of riparian habitat, eliminating entrainment, and removing barriers to fish passage. Many of these requirements are goals the BHWC has been working on since 1995.

Our driving goal has been finding win-win solutions, which has culminated in the CCAA program in the Upper Big Hole Valley. Several large owners, who merely three years ago turned cold shoulders to state fisheries biologists, are now voluntarily turning over entire reaches of their privately owned Big Hole frontage and tributaries to the same biologists to restore and letting government hydrologists manage their major water diversions. This is a level of trust with few if any parallels in the West and opens doors of opportunities that we cannot treat lightly.

The vast scale of this effort also comes with a similarly large funding need. Partners in this program include US Fish and Wildlife Service, Montana Fish, Wildlife and Parks, Montana Department of Natural Resources Conservation, Natural Resources Conservation Service, The Nature Conservancy, Trout Unlimited, the Big Hole River Foundation, and Montana Trout Unlimited.

In the last three years, several million dollars were raised from 14 grant programs and organizations for implementation of habitat restoration projects in the upper Big Hole Basin (not including appropriations). A few of these are listed here:

Natural Resource Conservation Service (infrastructure designs and cost-share)	$2,500,000
Montana Department of Fish, Wildlife and Parks (SWIG, FFIP)	$ 600,000
Orvis Company and Orvis Challenge	$ 78,000
National Fish and Wildlife Foundation	$ 43,000
Montana Department of Natural Resources Conservation Grant Programs	$ 194,000
US Bureau of Reclamation	$ 65,000
US Geological Survey	$ 15,000
US FWS Private Stewardship Program	$ 100,000
Intermountain West Joint Venture	$ 80,000
North American Wetland Conservation Act	$1,000,000

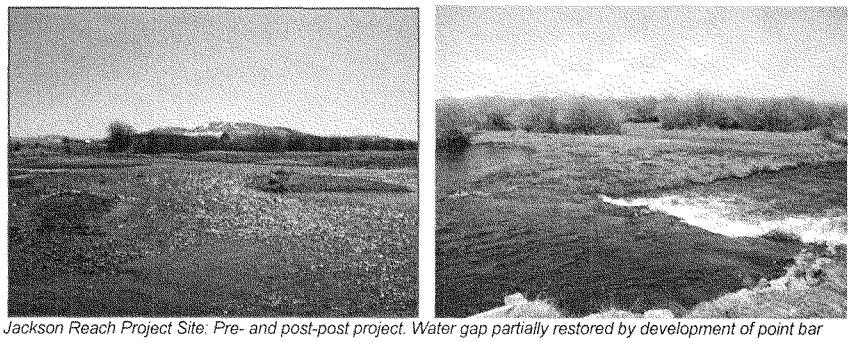
Examples of Recently Completed CCAA Projects

Each of the following habitat restoration, infrastructure improvement, and monitoring projects was supported in large part by appropriations received by the BHWC in FY 2003 and FY 2006 (*refer to Appendix 2 and Appendix 3*). These are only a few representative examples of the many projects completed or underway.

An intensive, multidisciplinary and multi-agency monitoring plan is developed for every project and will assess the success of the projects over the next twenty years. Monitoring plans include:

- Stream flow Monitoring and Water Conservation;
- Fish and Wildlife Monitoring (Permanent Grayling Population Monitoring Reaches, Restoration Related Monitoring, Bird Monitoring, Entrainment Surveys, Fish Movement Studies);
- Riparian, Rangeland, and Noxious Weed Monitoring (Riparian Assessments, Weed Monitoring and Control, Willow Plantings and Survival);
- Stream Habitat Monitoring (Permanent Cross-sections, Restoration Related Monitoring);
- Stream Temperature Monitoring (Permanent Sites, FLIR, Restoration Related Monitoring).

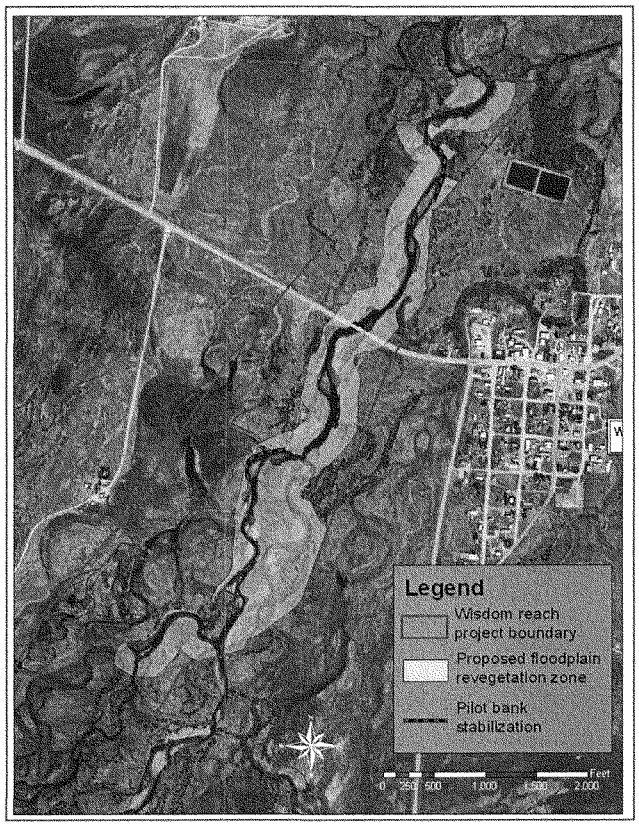
Big Hole Restoration – Jackson Reach: This project restored riparian habitat and stream channel at two locations on approximately 0.75 miles of the Big Hole River near the town of Jackson, Montana. The project area is protected by riparian fence. Results of the project are improved water quality, reduced water temperature, improved fish habitat, and management benefits to the landowner.



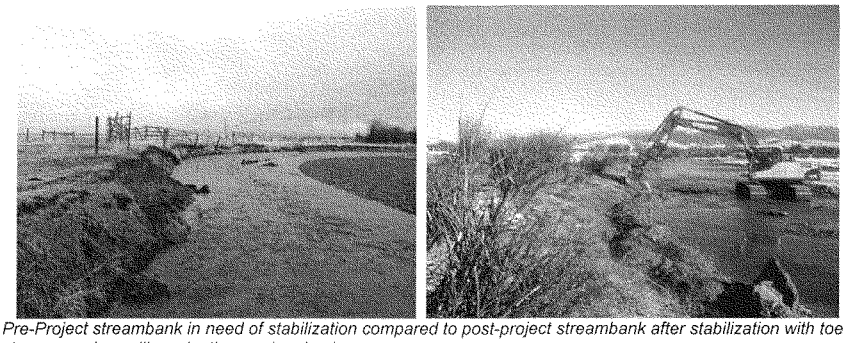
Jackson Reach Project Site: Pre- and post-post project. Water gap partially restored by development of point bar

Funding Partner	Financial Contribution
BHWC – Design (2003 Appropriations)	$18,628.50
BHWC (2006 Appropriations)	$22,231.99
MFWP - FFIP	$16,688.00
Landowner/NRCS	EQIP - fencing
Landowner	Value of on-site materials

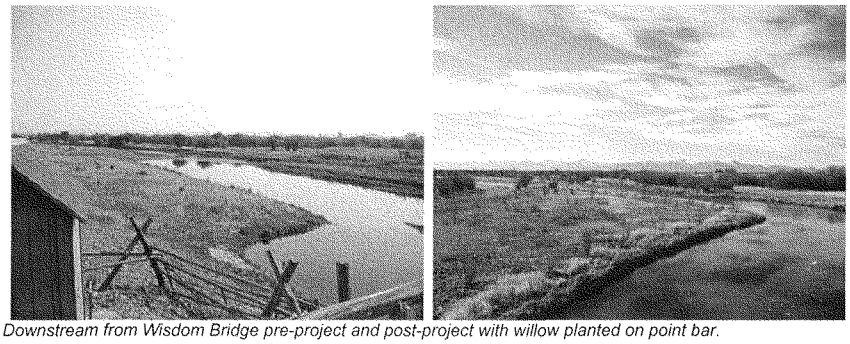
Big Hole Restoration – Wisdom Reach: This project focused on riparian habitat restoration and streambank stabilization on 1.75 miles of the Big Hole River adjacent to the town of Wisdom, Montana. Both the riparian habitat and streambank were in dire need of enhancement. In addition to other partners, the Montana Conservation Corps contributed labor to this project. The project includes 3.5 miles of riparian fence, riparian revegetation using both mature transplants and nursery stock, and streambank stabilization using sodmats, revegetation, and toe armoring. This reach of the Big Hole is considered critical to grayling spawning and juvenile rearing.



Funding Partner	Financial Contribution
BHWC – Design (2006 Appropriations)	$17,453.50
BHWC - (2006 Appropriations)	$70,000.00
MFWP - FFIP	$59,203.86
Arctic Grayling Recovery Program	$22,000.00
The Nature Conservancy	$20,840.00
Landowner 1/NRCS	$4,259.00
Landowner 2.	Value of on-site materials



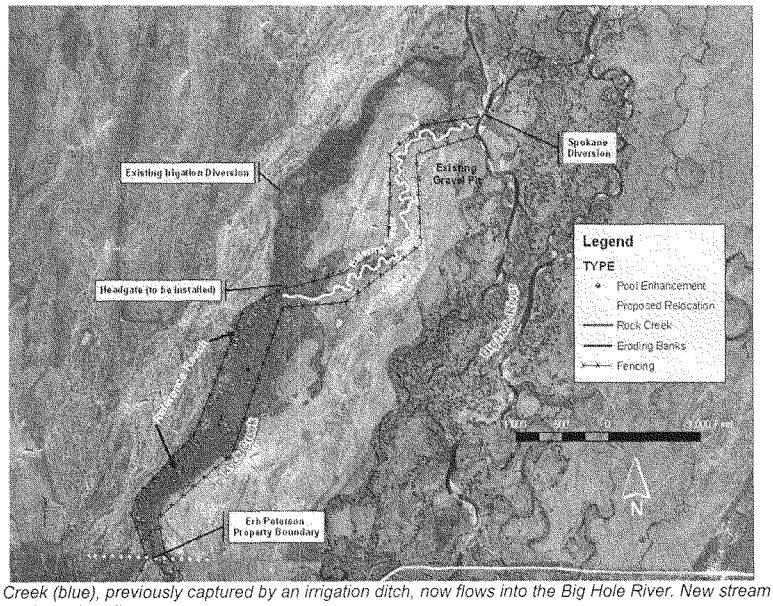
Pre-Project streambank in need of stabilization compared to post-project streambank after stabilization with toe slope armoring, willow planting, and sodmats.



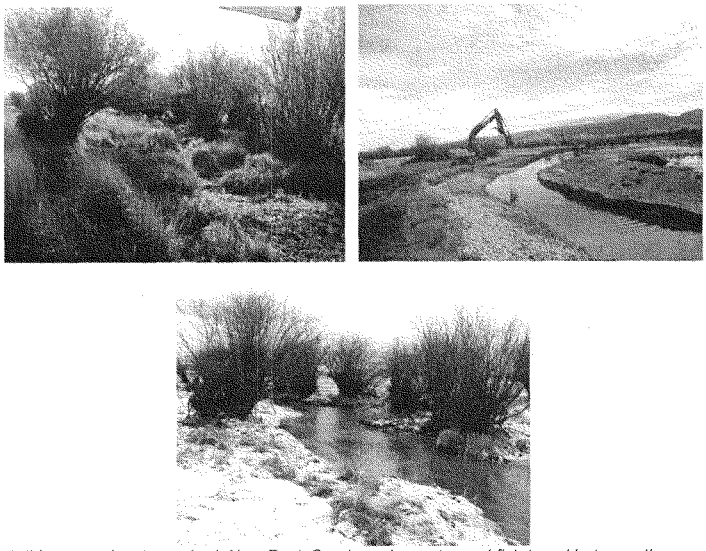
Downstream from Wisdom Bridge pre-project and post-project with willow planted on point bar.

Big Hole Restoration – Rock Creek Reconnection Project: In 2006, reconnection of Rock Creek to the Big Hole River was completed. The design and some of the project implementation were accomplished with help from a 2003 cooperative agreement between BHWC and USFWS.

This significant sub-watershed previously drained into a major ditch, not the Big Hole River. The landowner agreed to participate in the project as part of their CCAA site-specific plan. Four hundred fifty feet of new stream channel was constructed and 4,400 feet of an existing swale were reconstructed which diverted the existing tributary *from* the ditch *to* the Big Hole River. The project incorporated pool habitat enhancement techniques throughout approximately two miles of stream that significantly increased the carrying capacity of the stream. The entire restoration reach was revegetated with mature willows and will be protected by temporary fencing for two years. The reconnection of Rock Creek to the Big Hole River will lead to improved streamflows in the river by allowing water not needed for irrigation to flow into the Big Hole River. Within one month of completion of this project, grayling and other fish species were discovered using the stream during an MFWP fish survey.



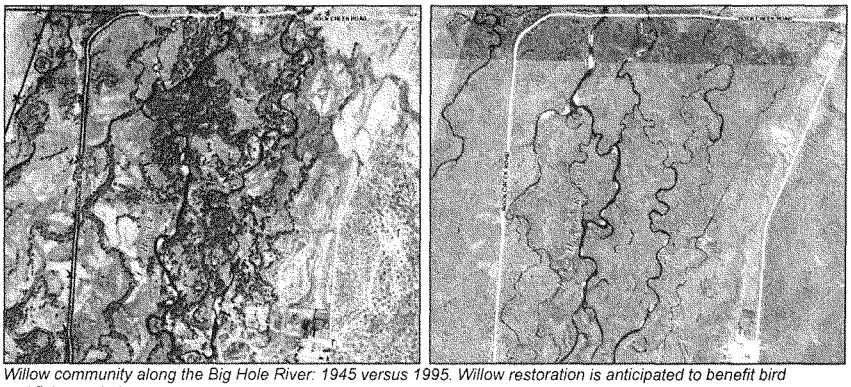
Rock Creek (blue), previously captured by an irrigation ditch, now flows into the Big Hole River. New stream channel shown in yellow.



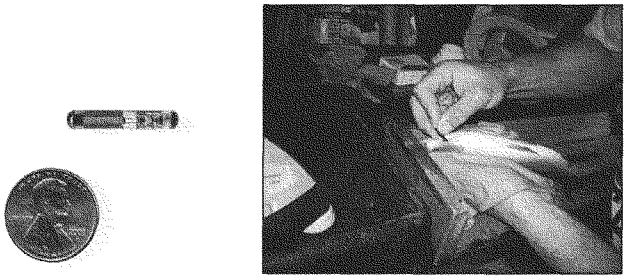
Pre-project, this was a dry stream bed. Now Rock Creek carries water and fish travel between the creek and the river.

Big Hole Restoration - Avian and Fish Monitoring: Baseline and post-project monitoring are invaluable components of every project. In addition to agency partners already mentioned, the Avian Science Center of the University of Montana in Missoula and the Fish Research Center at Montana State University in Bozeman have been partnering with USFWS and MFWP to monitor and survey changes in bird and fish movement in the Big Hole as a result of restoration efforts.

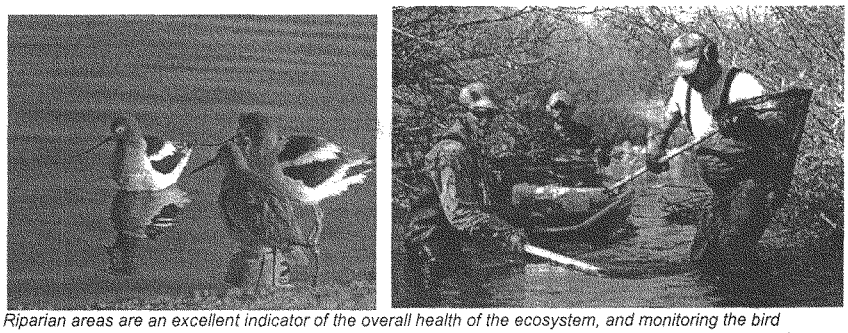
Riparian areas are an excellent indicator of the overall health of the ecosystem, and monitoring the bird communities and changes in fish populations and migrations is another barometer with which to gauge the success of our efforts. What are the seasonal movement patterns of fluvial Arctic grayling and other fish species and how competitive are their interactions? How do temperature, flow and other habitat conditions relate to fish movement, distribution, and relative abundance? How important are thermal refugia (cool spots)? Will we see a reduction in non-native bird populations with a concomitant increase in our native bird species, as we anticipate?



Willow community along the Big Hole River: 1945 versus 1995. Willow restoration is anticipated to benefit bird and fish population.

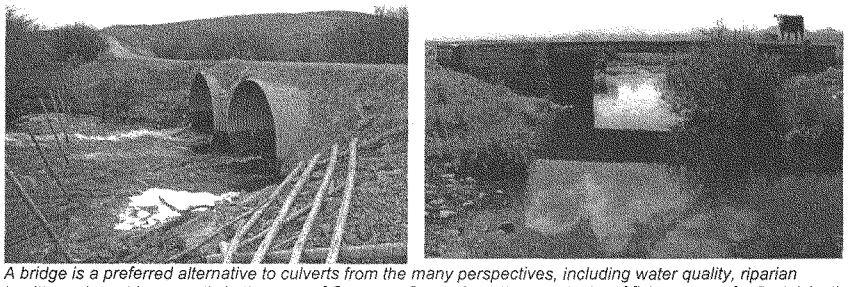


Passive integrated transponders (PIT) offer CCAA partners a wealth of new information using a technology that is safe to fish.



Riparian areas are an excellent indicator of the overall health of the ecosystem, and monitoring the bird communities and changes in fish populations and migrations is another barometer with which to gauge the success of our efforts.

Upcoming Project - Governor Creek Culvert Replacement: Once an important grayling stream, no grayling have been found in Governor Creek for nearly 20 years. In 2005, FWP conducted a "Rapid Assessment" of barriers to fluvial Arctic grayling recovery as part of the CCAA process. The Governor Creek culvert was identified at that time as a barrier to fish migration and was given a high priority under the CCA. Replacing the deteriorated culverts with a concrete bridge will address all water quality and fish passage concerns and allow for the stream to function naturally under the road crossing. This project has received widespread support from a diverse partnership including private landowners. Funding support has come from MFWP, Beaverhead County, USFWS, and the BHWC through 2006 appropriations. This project is anticipated to be completed in 2009.



A bridge is a preferred alternative to culverts from the many perspectives, including water quality, riparian health, and most importantly in the case of Governor Creek, from the standpoint of fish passage for fluvial Arctic grayling.

APPENDIX 1

Big Hole Watershed Committee

Drought Management Plan

Big Hole River Drought Management Plan
The Big Hole Watershed Committee
Adopted 1997
(Amended 1999, 2000, 2002, 2004, 2005, 2007)

Purpose
The purpose of the drought management plan is to mitigate the effects of low stream flows and lethal water temperatures for fisheries (particularly fluvial Arctic grayling) through a voluntary effort among agriculture, municipalities, business, conservation groups, anglers, and affected government agencies.

Overview
The Big Hole Watershed Committee has agreed on this dry year plan to help mitigate damage to the fishery during dry years as indicated by flows and temperature. This plan has been designed to take into full account the interests of all affected parties including ranching, municipalities, anglers, and conservation groups.

The Big Hole Watershed Committee agrees that if this plan is to be successful in a dry year, it will need broad-based support and understanding. Big Hole Committee members are committed to helping secure the support of their constituencies for the successful implementation of this plan.

This initial plan is intended as a starting point from which modifications can be made based on the lessons learned from research projects, such as the Big Hole Watershed Committee's return flow study, increased information from new river gauges, and from the experiences gained by implementing this plan. The plan will be reviewed by the Big Hole Watershed Committee every January for modifications.

Roles and Responsibilities
Big Hole Watershed Committee roles:

- Educate interested and affected parties;
- Develop, adopt, and modify annually the dry year plan;
- Receive, monitor, and act on information regarding stream conditions and snow pack levels throughout the year;
- Notify interested and affected parties of implementation and secure support; and
- Evaluate the environmental, social, and economic impact of the plan.

Montana Fish, Wildlife and Parks (MFWP), Montana Department of Natural Resources and Conservation (DNRC), and the United State Natural Resource Conservation Service (NRCS) roles;

- Provide accurate and timely information regarding stream conditions and snow pack levels throughout the year;
- Provide technical assistance in reviewing the plan and monitoring its implementation; and
- Ensure coordination of effort among all affected government agencies.
- Contacts and informs media of dry year plan implementation and stream flow and temperature status.

Definition of Dry Year Conditions and Recommended Actions

The Big Hole Watershed Committee will monitor snow pack levels and forecasted low stream level information provided by the USGS and NRCS throughout the year to prepare for potential water conservation measures. Stream flow information gathered from the USGS Wisdom, USGS Mudd Creek, USGS Melrose, and USGS Glen gauging stations will be used to initiate specific voluntary actions to conserve water and mitigate the effects of dry year conditions on fisheries from May 1 through October 31.

The following flow targets take into consideration preparation time necessary to implement this voluntary plan. The annual evaluation of the effectiveness of the dry year plan will provide information to more intensively analyze the minimum in stream flows necessary to sustain adequate habitat quality and buffer water temperatures.

I. Rock Creek Road to Mouth of the North Fork

Flows – *Monitored at the USGS Wisdom Gauge*

160 cfs May 15 – June 30. When flows decrease below 160 cfs a phone tree will be used to contact water users advising of flow conditions and encouraging conservation measures.

60 cfs DNRC and MFWP officials will meet with the Big Hole Watershed Committee to present data; formulate options including voluntary reduction of irrigation, stock water diversions, municipal water use, angling, and encourage the use of stock watering wells; and prepare to take action. A phone tree is initiated to advise water users, outfitters, and anglers of low water conditions and encourage conservation measures.

40 cfs Notice to outfitters and anglers requesting they voluntarily limit their angling activities to earlier, cooler hours of the day . Well use will be encouraged for stock watering. A phone tree will advise water users and outfitters of low water conditions and encourage conservation measures. The media will be contacted and news articles released to inform publics of low flow conditions.

20 cfs FWP will close the upper river to fishing, MFWP will close the upper river to fishing, and will not conduct electrofishing surveys (subject to approval or change by the Fluvial Grayling Workgroup). Voluntary reduction of irrigation and public municipal water use is initiated, and continued well use for stock watering encouraged. The phone tree is again initiated to contact water users advising of extreme low water conditions and encourage conservation measures. The media is contacted and informed of fishing closures and encourages public conservation efforts. The river remains closed until flows exceed 40 cfs for seven consecutive days.

Note: Definition: Flow trigger levels will be based on the Average Daily Flow measured in cubic feet per second (cfs). Therefore, flows will be reviewed the following day to determine trigger levels and fishing closures.

Temperature *July 15-September 1:*

Step 1 When temperatures exceed 70°F for over 8 hours per day for three consecutive days at the USGS Wisdom gauge and flows are above 30 cfs, a phone tree is used to contact outfitting businesses and a news release is issued advising publics and anglers of potential stressful conditions to the fishery and encouraging anglers to seek other destinations (mountain lakes and streams, spring creeks).

Step 2 When flows are 25-30 cfs at the USGS Wisdom gauge and temperatures exceed 70°F for more than 8 hours per day for three consecutive days, and evidence of thermally induced stress to the fishery occurs, MFWP will close the upper river to fishing. News releases will be issued and a phone tree will again contact local outfitting businesses. The upper river will be closed until temperatures do not exceed 70°F for more than 8 hours per day for three consecutive days and flows are greater than 30 cfs for seven consecutive days.

Step 3 — When flows are 25 cfs or less at the USGS Wisdom gauge and temperatures exceed 70°F for more than 8 hours per day, for three consecutive days, MFWP will close the upper river to fishing. News releases will be issued and a phone tree will again contact local outfitting businesses. The upper river will be closed until temperatures do not exceed 70°F for more than 8 hours per day for three consecutive days and flows are greater than 30 cfs for seven consecutive days.

The wetted stream perimeter (flow below which standing crops of fish decrease (DNRC 1992)) of the upper Big Hole River is 60 cfs. While this flow may be reasonable to maintain in ample moisture years and should be the goal for flow preservation efforts, in most years it is not a realistic quantity. Data from the USGS Wisdom gauge from 1988 -1999 recorded flows below 60 cfs in each of the twelve years. Population and flow data indicate 40 cfs is feasible to maintain while still sufficient to protect the Arctic Grayling population. A minimum survival flow of 20 cfs will provide flows necessary to maintain a wetted channel and ensure survival of the grayling population during brief, critical periods.

Temperatures above 70°F are generally considered stressful to salmonids. Warm water temperatures typically occur between July 15 - September 1 in the Big Hole River. Although temperatures above 70°F can occur before and after this period, cooler night temperatures alleviate long periods of warm daytime temperatures. The upper incipient lethal temperature (e.g. that temperature that is survivable indefinitely for periods longer than one week by 50% of the population) for Arctic Grayling is 77°F (Loher et. al. 1997). Critical thermal maximum temperature is 85°F resulting in instantaneous death.

II. Mouth of the North Fork to Dickie Bridge

Flows: Monitored at USGS Mudd Creek Gauge

100 cfs — When flows decrease to 100 cfs or temperatures exceed 70°F for over 8 hours per day for three consecutive days. DNRC and MFWP officials will meet with the Big Hole Watershed Committee to present data; formulate options including voluntary reduction of irrigation, stock water diversions, municipal water use, angling, and encourage the use of stock watering wells; and prepare to take action. A phone tree is initiated to advise water users, outfitters, and anglers of low water conditions and encourage conservation measures.

80 cfs — When flows decrease to 80 cfs or temperatures exceed 70°F for over 8 hours per day for three consecutive days. Notice to outfitters and anglers requesting fishing be voluntarily limited to morning hours. Well use will be encouraged for stock watering. A phone tree will advise water users and outfitters of low water conditions and encourage conservation measures. The media will be contacted and news articles released to inform public of low flow conditions.

60 cfs — When flows decrease to 60 cfs or temperatures exceed 70°F for over 8 hours per day for three consecutive days, MFWP will close the river to fishing and not conduct electrofishing surveys. Voluntary reduction of irrigation and water use is initiated. A phone tree and media releases inform water users, outfitters, angler, and public of water the continued decline of in stream flows and encourages water conservation. The river remains closed until flows exceed 80 cfs for seven consecutive days and temperatures do not exceed 70°F for more than 8 hours per day for three consecutive days.

Temperatures: Monitored at the Sportsman's Park Thermograph Site (July 15 – September 1)

Step 1: When Temperatures exceed 70° F. for more than 8 hours per day for 3 consecutive days at the MFWP Sportsman's Park Thermograph and flows exceed 90 cfs at the USGS Mudd Creek Gauge, a phone/Email tree is used to contact outfitting businesses and a news release is issued advising publics and anglers of potential stressful conditions to the fishery and encouraging anglers to seek other destinations (reservoirs, mountain lakes and streams, spring creeks, etc.).

Step 2: When flows are 70 – 90 cfs at the USGS Mudd Creek Gauge and temperatures exceed 70° F. for more than 8 hours per day for 3 consecutive days, and evidence of thermally induced stress to the fishery occurs*, MFWP will close the Middle Reach to fishing. News releases will be issued and a phone/Email tree will again contact local outfitting businesses. The Middle Reach will remain closed to fishing until temperatures do not exceed 70° F. for more than 8 hours per day for 3 consecutive days and flows are greater than 80 cfs for 7 consecutive days.

Note: Thermally induced stress as observed by trained, experienced observers may include any of the following: Observed mortality in significant numbers of Age I and older mountain whitefish and other salmonid species in lieu of other logical sources of mortality; Outbreaks of stress related piscid diseases such as Bacterial Furunculosis; Extraordinary concentrations of fish in thalweg or riffle tailout habitats; Hyperactivity to include gasping, rolling, jumping, etc., of large, concentrated numbers of fish; and frenzied feeding activity at inappropriate times and under inappropriate conditions.

Step 3: When flows are 70 cfs or less at the USGS Mudd Creek Gauge and temperatures exceed 70° F. for more than 8 hours per day for 3 consecutive days, MFWP will close the Middle Reach to fishing. News releases will be issued and a phone/Email tree will again contact outfitting businesses. The Middle Reach will remain closed until temperatures do not exceed 70° F. for more than 8 hours per day for 3 consecutive days and flows are greater than 80 cfs for 7 consecutive days.

Note: In years with clear-cut drought conditions under which triggers in both the Rock Creek to Mudd Creek Reach and the Mudd Creek to Dickie Bridge Reach are met, or about to be met, these two reaches could be treated as one unit (Rock Creek Road to Dickie Bridge).

The Mudd Creek Gauge has limited data (beginning in 1998). Continued data on various flow scenarios will allow better analysis of wetted perimeter and in stream flow regimes. This plan should be fine tuned or modified as needed as additional data becomes available.

Dickie Bridge to Melrose Bridge

Monitored at USGS Melrose Gauge

260 cfs DNRC and MFWP officials meet with Big Hole Watershed Committee to present data; formulate options including the voluntary reduction of irrigation, municipal water use, and angling; and prepare to take action. A phone tree is initiated to advise irrigators and outfitters of stream flow conditions.

200 cfs Notice to outfitters and anglers requesting they voluntarily limit their angling activities to earlier, cooler hours of the day. The phone tree will inform local water users, anglers and outfitters of stream flow conditions. The media will be contacted and news articles released to inform public of low flow conditions.

140 cfs — FWP will close the river to fishing and not conduct electrofishing surveys. Voluntary reduction of irrigation and water use is initiated. A phone tree and media releases inform water users, outfitters, anglers, and public of the continued decline of in stream flows and encourages water conservation. The river will remain closed until flows exceed 200 cfs for seven consecutive days.

Temperature triggers are the same as previous Reach.

III. Melrose Bridge to confluence with the Jefferson River

Monitored at USGS Glen Gauge

250 cfs — DNRC and MFWP officials meet with Big Hole Watershed Committee to present data; formulate options including the voluntary reduction of irrigation, municipal water use, and angling; and prepare to take action. A phone tree is initiated to advise irrigators and outfitters of stream flow conditions.

200 cfs — Notice to outfitters and anglers requesting they voluntarily limit their angling activities to earlier, cooler hours of the day. The phone tree will inform local water users, anglers and outfitters of stream flow conditions. The media will be contacted and news articles released to inform public of low flow conditions.

150 cfs — FWP will close the river to fishing and not conduct electrofishing surveys. Voluntary reduction of irrigation and water use is initiated. A phone tree and media releases inform water users, outfitters, anglers, and public of the continued decline of in stream flows and encourages water conservation. The river will remain closed until flows exceed 200 cfs for seven consecutive days.

Temperatures: Monitored at the MFWP Notch Bottom Thermograph Site (July 15 – September 1)

Step 1: When Temperatures exceed 70° F. for more than 8 hours per day for 3 consecutive days at the MFWP Notch Bottom Thermograph and flows exceed 230 cfs at the USGS Glen Gauge, a phone/Email tree is used to contact outfitting businesses and a news release is issued advising publics and anglers of potential stressful conditions to the fishery and encouraging anglers to seek other destinations (reservoirs, mountain lakes and streams, spring creeks, etc.).

Step 2: When flows are 180 – 230 cfs at the USGS Glen Gauge and temperatures exceed 70° F. for more than 8 hours per day for 3 consecutive days, and evidence of thermally induced stress to the fishery occurs*, MFWP will close the Melrose to the Mouth Reach to fishing. News releases will be issued and a phone/Email tree will again contact local outfitting businesses. The Melrose to the Mouth Reach will remain closed to fishing until temperatures do not exceed 70° F. for more than 8 hours per day for 3 consecutive days and flows are greater than 200 cfs for 7 consecutive days.

Note:Thermally induced stress as observed by trained, experienced observers may include any of the following: Observed mortality in significant numbers of Age I and older mountain whitefish and other salmonid species in lieu of other logical sources of mortality; Outbreaks of stress related piscid diseases such as Bacterial Furunculosis; Extraordinary concentrations of fish in thalweg or riffle tailout habitats; Hyperactivity to include gasping, rolling, jumping, etc., of large, concentrated numbers of fish; and Frenzied feeding activity at inappropriate times and under inappropriate conditions.

Step 3: When flows are 180 cfs or less at the USGS Glen Creek Gauge and temperatures exceed 70° F. for more than 8 hours per day for 3 consecutive days, MFWP will close the Melrose to the Mouth Reach to fishing. News releases will be issued and a phone/Email tree will again contact outfitting businesses. The Middle Reach will remain closed until temperatures do not exceed 70° F. for more than 8 hours per day for 3 consecutive days and flows are greater than 200 cfs for 7 consecutive days.

Notification and Monitoring Process

Montana, Fish, Wildlife and Parksand Montana Department of Natural Resources and Conservation Service will keep the Big Hole Watershed Committee fully informed throughout the year regarding stream flows, water temperature, and snow pack data. This will allow for timely information to help in encouraging appropriate courses of action.

Stream conditions, water temperature, and snow pack levels will be a standing agenda item at each Big Hole Watershed Committee meeting. Based on the year long monitoring of weather conditions that may influence flow, the Big Hole Watershed Committee will publish a notification of impending dry year conditions. Notifications will be sent to the press, ranchers, municipalities, outfitters, conservation and sportsmen groups, and posted on the "world wide web".

While most attention is on late summer conditions, it is crucial to certain species, including Fluvial Arctic Grayling, that spring flows are closely monitored.

The BHWC will issue weekly updates to irrigators during drought periods. Weekly updates will be provided in hard copy, electronic mailings and on the BHWC web site. In non-drought periods the BHWC will issue regular updates as needed.

The BHWC will work with MFWP on press releases and other public outreach efforts. The BHWC will work with local newspapers and televisions to secure flow updates in these communication mediums.

The BHWC will issue an annual update in the form of a mailing (hard copy and electronic) which will include: a copy of the most recent Drought Management Plan, flow forecasting, updates on water conservation programs and assistance, and other related news items.

Montana Fish, Wildlife and Parks will offer assistance to irrigators who are willing to cut back on water diversions. The BHWC will hold an open public meeting to present the information and conduct discussions with all parties concerning proposed actions.

Each caucus within the BHWC will communicate with their respective groups concerning implementation of the plan and secure support.

Public Education

The BHWC will develop and distribute educational material with agency assistance, describing the need for a drought management plan, its provisions, and anticipated benefits.

Information will be provided on the possible actions people can take to mitigate damage from dry years including but not limited to:

- Voluntary reduction of irrigation and diversion stock watering during critical times;
- Increase flood irrigation during spring runoff to augment return flows;
- Water conservation policies by municipalities and industries during sensitive times;

- ❖ Emergency water reduction policies by municipalities and industries during critical times;
- ❖ Reduced recreation uses during sensitive times; and
- ❖ Elimination o fall recreation uses at critical times.

For Information Contact:
Randy Smith, BHWC Chairman 406-835-3451
Noorjahan Parwana, Director 406-782-3682 nparwana@bhwc.org
Jill Luebeck, Administrative Assistant, 406-494-6216 jmluebeck@bhwc.org

Other Contacts:
Montana Department of Fish, Wildlife & Parks,
For information contact:
Dillon office – 406-683-9310

U.S. Fish and Wildlife Service
Dillon Office – 406-683-3893

Montana Drought Monitoring
406-444-5354

Internet Resources
Drought Report
http://www.nris.state.mt.us/drought

USGS Real Time Flow Data
http://waterdata.usgs.gov/mt/nwis/current?type=flow

NRCS Snowpack Monitoring
http://www.wcc.nrcs.usda.gov/snow/

Montana Fish, Wildlife & Parks Closure Policy
http://www.fwp.state.mt.us/drought/closurepolicy.asp
http://www.fwp.state.mt.us/drought/default.asp

Chronological Listing of Amendments

Addendum 2002 – Definition

Flow trigger levels will be based on the Average Daily Flow measured in cubic feet per second (cfs). Therefore, flows will be reviewed the following day to determine trigger levels and fishing closures.

Addendum 2002 – Publicity

It is recognized that flow levels, forecasting and angling closures affect local businesses and residents. Whenever possible, maps and specific locations will be included in press releases and other communications (MT FW&P website).

Addendum 2004 – Publicity and Outreach

The BHWC will issue weekly updates to irrigators during drought periods. Weekly updates will be provided in hard copy, electronic mailings and on the BHWC web site. In non-drought periods the BHWC will issue regular updates as needed.

The BHWC will work with MFWP on press releases and other public outreach efforts. The BHWC will work with local newspapers and televisions to secure flow updates in these communication mediums.

The BHWC will issue an annual update in the form of a mailing (hard copy and electronic) which will include: a copy of the most recent Drought Management Plan, flow forecasting, updates on water conservation programs and assistance, and other related news items.

Addendum 2004 - May 15- June 30 Wisdom Reach Flow Levels (J. Magee MFWP)

Upper Reach:
160 cfs May 15 – June 30. When flows decrease below 160 cfs a phone tree will be used to contact water users advising of flow conditions and encouraging conservation measures.

20 cfs MFWP will close the upper river to fishing, and will not conduct electrofishing surveys. (Subject to approval or change by the Fluvial Grayling Workgroup)

Rationale:
1) The upper and lower wetted perimeter inflection points for the upper Big Hole River are 160 and 60 cfs respectively (MFWP 1989). The upper inflection point is the flow required to maximize standing crop. While this flow may not be realistic in most years it should be the target goal for conservation measures. Maintaining this flow during grayling spawning and emergence in May and June will enhance survival and recruitment. Reduction of wetted perimeter is accelerated below the lower inflection point of 60 cfs. The flow goal for late summer and fall should be to maintain flows at 60 cfs or greater to avoid accelerated losses in standing crop. A minimum survival flow of 20 cfs will provide flows necessary to maintain a wetted channel, allow for migration into flow and temperature refugia and allow survival of some portion of the population during brief, critical periods.

2) Montana Fish Wildlife and Parks will not conduct electrofishing survey in the Wisdom West reach (Wisdom bridge downstream approximately 5 miles) if flows are less than 20 cfs and maximum daily temperatures are greater than 64°F.

Addendum 2004 - Thermal Series for the Middle Reach (R. Oswald, MFWP)

Rationale: Last summer, we encountered extremely high water temperatures at the Sportsman's Park Thermograph (MFWP) in the Middle Reach. These temperatures often exceeded our Upper Reach Drought Plan standard of 70° F for more than 8 hours per day for 3 consecutive days. When we consulted the Drought Plan, we found a somewhat contradictory set of standards at the 3 triggers. That is, each flow trigger (100, 80, and 60 cfs) contained the same default thermal statement, i.e., *"or temperatures exceed 70° F for over 8 hours per day for 3 consecutive days."* This left us with a situation in which the river would have closed to angling at any time we encountered the temperature standard at 100 cfs or less. Moreover, the only standard for reopening the river following closure was linked to seven consecutive days of flows greater than 80 cfs. Thus thermal closure at flows less than 80 cfs would have required the same reopening criteria as flows below 60 cfs. The alternative of changing *"or"* to *"and"* in the thermal series also didn't work because that would have rendered any temperature considerations redundant as the drought response actions would have defaulted to the flow triggers. In order to cope with the problem, we (MFWP) merely monitored key segments of the reach for biological indicators of thermal stress.

In order to eliminate this problem in the future, I have drafted the following proposed Thermal set of Triggers for the Middle Reach. The set of Triggers parallels the series currently applied to the Upper Reach.

Temperature (July 15 – September 1)

Step 1: When Temperatures exceed 70° F. for more than 8 hours per day for 3 consecutive days at the MFWP Sportsman's Park Thermograph and flows exceed 90 cfs at the USGS Mudd Creek Gauge, a phone/Email tree is used to contact outfitting businesses and a news release is issued advising publics and anglers of potential stressful conditions to the fishery and encouraging anglers to seek other destinations (reservoirs, mountain lakes and streams, spring creeks, etc.).

Step 2: When flows are 70 – 90 cfs at the USGS Mudd Creek Gauge and temperatures exceed 70° F. for more than 8 hours per day for 3 consecutive days, and evidence of thermally induced stress to the fishery occurs*, MFWP will close the Middle Reach to fishing. News releases will be issued and a phone/Email tree will again contact local outfitting businesses. The Middle Reach will remain closed to fishing until temperatures do not exceed 70° F. for more than 8 hours per day for 3 consecutive days and flows are greater than 80 cfs for 7 consecutive days.

* Thermally induced stress as observed by trained, experienced observers may include any of the following: Observed mortality in significant numbers of Age I and older mountain whitefish and other salmonid species in lieu of other logical sources of mortality; Outbreaks of stress related piscid diseases such as Bacterial Furunculosis; Extraordinary concentrations of fish in thalweg or riffle tailout habitats; Hyperactivity to include gasping, rolling, jumping, etc., of large, concentrated numbers of fish; and Frenzied feeding activity at inappropriate times and under inappropriate conditions.

Step 3: When flows are 70 cfs or less at the USGS Mudd Creek Gauge and temperatures exceed 70° F. for more than 8 hours per day for 3 consecutive days, MFWP will close the Middle Reach to fishing. News releases will be issued and a phone/Email tree will again contact outfitting businesses. The Middle Reach will remain closed until temperatures do not exceed 70° F. for more than 8 hours per day for 3 consecutive days and flows are greater than 80 cfs for 7 consecutive days.

Addendum 2005 – Voluntary Angling Limits (R.Oswald, MFWP)

Modify the Second Trigger language to request anglers "voluntarily limit their angling activities to earlier, cooler hours of the day".
Rationale: It does not necessarily make sense to limit angling to morning hours when some days, differing climatic conditions and flow regimes result in high water temperatures well before noon while other days exhibit cool water temperatures well into the early afternoon. This approach sends the message to consider the temperature and time of day as diminishing flows compound stress on the system.

Addendum 2007 – Proposal to replace original language in the Drought Plan with the accepted Amendments.

Rationale: The current format of the Drought Plan is confusing. The initial read lists criteria that are no longer in affect and the Amendments in the back appear to contradict the Plan.
Recommendation: The original language of the Plan should be replaced by the current appropriate Amendments. Maintain the list of Amendments in the back of the Plan to maintain the history and reasoning behind the changes.

Addendum 2007 (a) –Split the lower reach into two reaches and incorporate a thermal series into the new lower reach (R. Oswald, MFWP)

Rationale: The present reach from Dickie Bridge to the mouth is 71 miles in length and spans a very wide range in flows, species composition, and thermal regime. A single set of triggers often spans a flow range of 200 cfs or more and temperature ranges of 8 degrees or more. Moreover, trout species domination from approximately Melrose downstream favors brown trout which data show to be more severely affected by low flows than rainbow trout which increase in dominance upstream from Melrose.
Recommendation: Split current reach from Melrose Bridge (Salmon Fly Fishing Access) (about 33 miles downstream and 38 miles upstream) into the Dickie Bridge to Melrose Bridge Reach and the Melrose Bridge to the Confluence with the Jefferson River Reach. In the Melrose Bridge to Mouth Reach, maintain original flow triggers generated below the WETP Minimum Flow. Return Dickie Bridge to Melrose Bridge Reach to original 1994 calculations of 260 -200 -140 cfs (see Addendum 2007(b)). Incorporate a series of Thermal Triggers similar to those in place for the upper reaches of the river to be measured at MFWP Thermographs at Notch Bottom and at *Melrose Gauge*.

***Consider adding an additional component for PM closure under any flows below 260 cfs when temperatures at Notch Bottom or Pennington Bridge exceed 72 degrees for more than 8 hours per day for 3 consecutive days with lifting of closure when daily temperatures do not exceed 70 degrees for more than 8 hours per day for at least 3 consecutive days.

Addendum 2007 (b) – Return Dickie Bridge to Melrose Bridge Reach Flow Triggers to original 1994 calculations of 260 -200 -140 cfs (R. Oswald, MFWP).

The original triggers were generated from MFWP WETP Minimum Flow (and Instream Flow Reservation) of 260 cfs which represents a 40% depletion of wetted perimeter from the Upper Inflection Point Flow of 60 cfs. The original closure trigger was calculated to be 140 cfs, representing an additional 21% depletion in Wetted Perimeter from the minimum and closely approximating the August 95% Exceedence flow at the USGS Melrose Gauge. The second stage trigger represents the mid-point between the Upper and Lower Trigger Flows. Dropping the Stage 3 Closure Trigger from 150 to 140 cfs represents an additional loss in Wetted Perimeter of 5 feet and 4% of the total 21% depletion from the 260 cfs minimum. This would maintain a better biologically defensible base for the triggers and bring the Stage 3 (Closure) Trigger into compliance with current MFWP statewide Drought Policy.
Recommendation: Adjust the Dickie Bridge to Melrose Bridge Reach Triggers as recommended.

APPENDIX 2

Big Hole Watershed Committee

Project Ranking System

Big Hole Watershed Committee
Project Ranking System
for
Stream and Watershed Habitat Restoration

GRAYLING REACH OF THE BIG HOLE RIVER

Project Name: _____ **Applicant Name:** _____

Meeting Date: _____ **Advisory Panel Recommendation:** _____

Geographic Values *Select only one category with the highest value. If the project does not score in this category, it will not be considered for funding.*

Mainstem Big Hole River between Wisdom Bridge and Peterson Bridge	+20 ☐
Tributary to Big Hole River between Wisdom Bridge and Peterson Bridge	+15 ☐
Mainstem Big Hole River or tributary upstream of Peterson Bridge	+10 ☐
Mainstem Big Hole River Wisdom downstream to Deep Creek	+10 ☐
Tributary to Big Hole River between Wisdom downstream and including Deep Creek	+10 ☐
Bonus Value- Project addresses multiple tributaries	+5 ☐

Biological Values I (Limiting factors – dewatering, riparian habitat, channel stability/floodplain function, water quality, entrainment, habitat connectivity).

Corrects limiting factor for fluvial grayling – occupied reach	+10 ☐
Corrects limiting factor for fluvial grayling – formerly occupied reach	+5 ☐

Biological Values II *Select all that apply*

Measurably improves instream flows during critical period in occupied reach	+10 ☐
Improves riparian health in occupied reach or potential habitat for grayling	+5 ☐
Improves floodplain function or stream channel stability in occupied reach or potential habitat for grayling	+5 ☐
Improves complexity of in-stream habitat (especially pools and riffles)	+5 ☐
Expands connectivity by eliminating documented barrier to grayling movement	+5 ☐
Eliminates or significantly reduces documented entrainment of grayling in irrigation ditch	+5 ☐
Bonus Value- Addresses documented TMDL concern on TMDL-listed stream	+3 ☐

Cumulative Conservation Values *Select all that apply.*

Project is included in a conservation agreement under CCAA	+10 ☐
Baseline data available	+3 ☐
Post project monitoring is not assured	-5 ☐

Bonus Value-

Project supports other enhancement activities	+3 ☐

Social and Financial Values I *Select only one category with the highest value. Disregard this section if request is for Design or Monitoring.*

Cost match from landowner is 50 percent for project cost or greater (can include in-kind)	+10 ☐
Cost match from landowner for project cost is less than 50 percent	+5 ☐
Landowner contribution toward project is less than 5 percent of project cost.	-10 ☐

Social and Financial Values II *Select only one category with the highest value*

Project requires operational change on a traditional ranch (i.e. sole ownership and primary purpose of ranch raising cattle and hay)	+8 ☐
Cost/stream mile or overall cost is low (based on costs of comparable projects)	+5 ☐
Project has demonstrated recreational value to public (i.e. increases angling access or improves sportfishing opportunities)	+3 ☐

For Design and Monitoring Requests Only

Design is a critical component of this project. Other design funding sources not available	+10 ☐
Monitoring plan will provide valuable information about the success of this project. Other funding sources are not available	+10 ☐

Bonus Value-

Project provides an important unique or critical benefit	+5 ☐

Notes

_____
_____
_____
_____
_____
_____
_____
_____

Projects that do not achieve a score of 50 points will not be considered for funding

Big Hole Watershed Committee
Project Funding Recommendation Process
for CCAA-reach of the Big Hole River
Version 2 Amended May 2007

Advisory Panel

Voting members of the Advisory Panel shall consist of Big Hole Watershed Committee members or participants (stakeholders) and professionals with scientific and technical backgrounds in fish biology, riparian ecology, hydrology, and other pertinent areas of concern, *and* who are not personally engaged in upper Big Hole watershed projects.

BHWC representation shall include the following stakeholders:

- Agriculture/Ranching– At least two from the grayling reach (Headwaters to Dickie Bridge)

There shall be at least one stakeholder representing each of the following interests:

- Conservation/Fisheries/Wildlife
- Organized Sportsmen/Outfitters/Guides

Conflict of Interest Policy

Advisory Panel members shall sign a Conflict of Interest statement which will be kept on file with the Director of the BHWC.

Technical Advisory Members

Technical Advisors from local, state, and federal agencies engaged in the projects and programs in the Big Hole watershed are encouraged to attend Advisory Panel meetings to serve in a *consultative* capacity.

Meetings

The Advisory Panel will meet on the third Monday of October and March and the second Monday of January (due to conflict with Martin Luther King Day). Project proposal will be accepted at the October and March meetings. Purpose of meetings shall be to review project proposals and make recommendations for project funding to be brought before the BHWC at regularly scheduled monthly meetings. The purpose of the January meeting will be to provide a forum for applicants and Advisory Panel members to review and discuss designs, monitoring plans and results, status and progress of projects, evaluation, budget review, and process issues.

Locations of Advisory Panel meetings shall be in communities within the Big Hole watershed.

Application Process
Send six hard copies of proposals, including any maps and supporting documentation, to the BHWC. Proposals must be postmarked by the deadline date, five weeks prior to Advisory Panel meeting. Proposals must also be provided in digital format, preferably by email, to the director of the BHWC. Email address: nparwana@bhwc.org.
Send hard copies of proposals to:
BHWC
P.O. Box 931
Butte., MT 59703

Applications will include discussion of each of the following items:

1. Project Name
2. Purpose and Brief Description of Project (Be clear about specific objectives)

3. Is the project on the mainstem of the Big Hole, or a tributary?
4. Is there more than one tributary involved in the project?
5. Is the Project on a 303-d listed reach and if so, what are the compromised water quality factors at issue? Does this project address those water quality factors?
6. What are the benefits of Project?
7. Description of monitoring method, baseline data, schedules and timelines, and measurable indicators of success.
8. Total Project Cost (for projects exceeding $5,000, an itemized list and project plan from at least two sources must be provided for consideration).
9. Funding Request
10. List of other contributors (differentiate monetary and in-kind)
11. Specific project plans, detailed sketches, photographs, maps, and any other information necessary to evaluate the merits of the project.

Applicants and/or consultants may make brief presentations to the Advisory Panel about the project and answer questions. No consultant will remain in the meeting room during the question and answer process. No applicants or consultant will remain in the meeting room during project ranking process.

Advisory Panel will use the *Ranking System* to determine which projects will be recommended to receive funding.

At each Advisory Panel meeting, an Advisory Panel member will volunteer to present recommendations to the BHWC for acceptance at the next regularly scheduled monthly meetings (third Wednesdays).

At the BHWC monthly meeting, applicants will provide a very brief description of project, not to exceed ten minutes (this will NOT require a power point presentation) and will be available to answer questions about their proposals. The volunteer Advisory Panel member will explain the basis by which a recommendation to fund the project was made.

Follow-up and Project Evaluation

Within three months of project completion the following will be provided to the director of the BHWC:

- Short (1-2 page) summary of completed project
- Photographs -before, during, and after- and other supporting documentation

The BHWC may request follow-up monitoring data one year after project completion (e.g. flow data, fish population surveys, entrainment surveys etc)

Current Advisory Panel Members

John Jackson (rancher), Ray Weaver (rancher), Liz Jones (rancher), Steve Parker (Big Hole River Foundation), Bruce Farling (Montana Trout Unlimited), Dale McKnight (US Forest Service, retired), John Dooling (rancher), Phil Ralston(rancher), Craig Fellin (Outfitter/Guide), Nathan Korb (The Nature Conservancy), Warren Kellogg (DNRC/NRCS), Buddy Drake (Arctic Grayling Recovery Program), Andrew Hanson (Outfitter/Guide), Noorjahan Parwana (BHWC).

APPENDIX 3

Big Hole Watershed Committee

Partial List of Appropriations- Supported Projects

BILLING STATEMENT

Project: Habitat Restoration Projects, Monitoring and Research

Big Hole Watershed Committee - Habitat Projects Funded by 2006 Appropriation

Habitat Budget	**$416,700.00**
Habitat Budget Balance	**$79,682.19**

Task	Description	Approval Date	Project Cost	BHWC commitment	Uncommitted Funds	Matching Organizations	Total Match	Comments
Grayling HT Restoration- Wisdom Reach	Riparian Rehab	6/21/2006	$176,302.86	$70,000.00	$0.00	AGRP, TNC, NRCS, FWP	$86,502.86	
Grayling HT Restoration- Jackson Reach	Riparian Rehab	6/21/2006	$44,463.98	22,231.99	$0.00	FWP	$22,231.99	
Grayling HT Restoration- Little Lake Creek Reach	Riparian Rehab	6/21/2006	$142,352.04	75,000.00	$886.68	FWP	$67,352.04	
Livestock Well Drilling	Late Season Flow Augmentation	10/16/2006	$21,360.00	20,000.00	$0.00	USFWS	$1,360.00	Billing Completed
Jackson Reach Irrigation Infrastructure	Improve water mgmgt	10/16/2006	$53,404.32	$43,836.82	$14,163.32	FWP, AGRP	$9,567.50	Billing Completed
Rock Creek Monitoring Project	Monitoring	2/21/2007	$32,721.00	$18,801.00	$0.00	FWP, DNRC, MSU		Billing Completed
McDowell Reach	Survey Design and Planning	2/21/2007	$46,198.00	$46,198.00	$0.00	FWP, AGRP	$0.00	
Ralston Ranch Riparian Enhancement	Fencing/Stockwater well	3/21/2007	$45,353.00	$10,000.00	$0.00	DNRC, FWP (Wildlife), USFWS,		
Fish Exclusion Project	Design	Not approved	$37,600.00	$0.00	$37,600.00		none	Not Supported
Rock Creek Headgate		3/21/2007	$11,000.00	$2,000.00	$0.00	FWP, AGRP	$2,000.00	
Avian Monitoring Proposal	Monitoring	2/21/2007	$10,000.00	$4,000.00	$0.00	USFWS, Grimes Charitable		Billing Completed
Schindler Reach Restoration	Design & Planning	6/18/2007	$20,000.00	$10,000.00	$10,000.00	MFWP, NRCS		Design funded through other sources as per H&S 1/16/08
Swamp Creek	Design & Planning	6/18/2007	$30,000.00	$20,000.00	$20,000.00			Design funded through other sourcesas per H&S 1/16/08
Landscape Thermal	Study	6/18/2007	$30,000.00	$10,000.00		AGRP, USFWS, MFWP	$20,000.00	From Research & Monitoring Task
Grayling PIT-Tag Study	Grayling Population/Migration Monitoring	6/19/2008	$148,356.00	$4,600.00		Water Center,- MSU, USFWS,	$143,756.00	From Research & Monitoring Task
Weed/Willow Brose Study	Riparian Restoration Monitoimg	6/19/2008	$3,000.00	$3,000.00		MFWP, USFWS		Match is an-kind From Research and Monitoring Task
Avain Monitoring	Baseline Restoration Monitoring	3/19/2008	$31,775.00	$10,000.00		ASC, USFWS, MFWP,TNC,MT	$21,775.00	From Research & Monitoring Task
Governor Creek Culvert	Riparian Habitat Enhancement	3/19/2008	$432,000.00	$50,000.00		USFWS, MFWP, Beaverhead County	$372,000.00	$150,000 requested fr. 2007 Approp (10/06)
Totals			**$1,315,886.20**	**$419,667.81**	**$82,650.00**		**$746,545.39**	

BILLING STATEMENT

Project: Habitat Restoration Projects
Big Hole Watershed Committee - Habitat Projects Funded by 2003 Appropriation

Habitat Budget	$197,400.57
Habitat Balance	0.00

Task	Description	Project Cost	BHWC commitment	Matching Organizations	Total Match
Steel Creek	Riparian Rehab	$33,929.00	$10,000.00	FWP, USFWS, Bvhd. Co.	$23,942.00
Fish Trap	Riparian Rehab	$7,985.00	$2,150.00	FWP, USFWS, Bvhd. Co.	$5,835.00
Hirshey Diversion Reconstruction	Redesign Diversion	$21,658.20	$10,829.00	BHWC, BLM	$10,829.20
Fish Ladders	Assure voluntary flows	$10,000.00	$4,600.00	FWP, USFWS, BHWC	$5,400.00
Headgate Replacement	Replacement of headgate	$3,200.00	$1,600.00	BHWC, BLM	$1,600.00
Floodplain Mapping	Mapping of 100-year flood plain	$33,000.00	$10,000.00	Beaverhead Co, BSB, Madison Co., BHWC	$23,000.00
LaMarche Creek	Restore pool habitat	$33,000.00	$10,000.00	Landowners, Future Fisheries, Patners Program,	$23,000.00
Wise River Project	Redesign Diversion	$13,000.00	$0.00	Landowners, DNRC (WAG), BHWC	$11,000.00
Flow Measuring Devices	Provide ability to gauge water	$7,284.42	$7,284.42		$0.00
Reinhardt Ranch Stockwater Well	Pasture Management	$10,000.00	$2,500.00	Landowner, MFWP, USFWS, BHWC	$7,500.00
BH River Restoration Feasibility	Generate Stream Habitat Design	n/a	$4,230.00	FWP, Confluence, FWP-pending grant -Mt. Trout	$12,000.00
Rock Creek Reconnection	To restore connection between Rock Creek and the Big Hole	$160,000.00	$65,000.00	Erb Livestock (in kind) FWP, FWP remaining cost	$95,000.00
Ditch Rider	Assure voluntary flows	$6,000.00	$1,000.00	TU ($5,000);DNRC; FWP(in-	$126,000.000000
Weed Committee	Support weed control efforts	$120,000.00	$1,000.00	NWTF (96,000)NRCS ($24,0	$120,000.00
Green Bridges Project	Irrig. Infrastucture Project	n/a	$10,000.00	USFWS, FWP, Landower, N	$29,000.00
FWP	Design 1 Wisdom Br. Reach		$19,558.50		
	Design 2 Heidi Hirschy Reach		$18,628.50		
	Design 3 Green Bridges Reach		$17,453.50		
Design 1-3 total		$55,640.00			
DNRC	Flow Measuring Devices		$2,969.00		
USFWS	Willow Transplantation	$6,000.00	$4,000.00	AGRP	$2,000.00
Hub & Spoke Effort	Grayling Support Coordinator	$25,000.00	$15,000.00	BHRF	$10,000.00
Totals		**$459,056.62**	**$217,802.92**		**$494,106.20**

APPENDIX 4

Letters of Support

- George Grant Chapter of Trout Unlimited
- Montana Stockgrower's Association
- Beaverhead County Commissioners
- Beaverhead Conservation District
- Montana Department of Fish, Wildlife, and Parks
- Montana Department of Natural Resources Conservation
- Governor Brian Schweitzer
- U.S. Forest Service

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