



STATEMENT OF

**THE HONORABLE ROBERT COPE
COUNTY COMMISSIONER
LEMHI COUNTY, ID**

ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES

THE CLEAN WATER RESTORATION ACT OF 2007

**BEFORE THE HOUSE TRANSPORTATION AND INFRASTRUCTURE
COMMITTEE**

APRIL 16, 2008

WASHINGTON, DC

Chairman Oberstar, Ranking Member Mica, and distinguished members of the Transportation and Infrastructure Committee, thank you for the opportunity to testify on behalf of the National Association of Counties (NACo).

My name is Robert Cope and I am an elected county commissioner from Lemhi County, ID. I also serve as Chairman of NACo's Environment, Energy and Land Use Steering Committee, a large and diverse committee representing many county views. I have been a county commissioner seven years and a past President of the Western Interstate Region Board of Directors.

As a county commissioner and as an appointed NACo chair, I take my responsibilities very seriously, as do our nation's elected and appointed county officials. Let me stress our nation's counties believe in the Clean Water Act (CWA) and its accomplishments. The CWA was instrumental in cleaning our waterways. State and local governments play an important role in implementing the CWA and we do our part proudly. 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 their citizens, as well as maintain and improve their quality of life. Counties have risen to the challenge, while protecting the environment through a variety of environmentally-oriented and cost-effective programs.

I want to thank you for allowing me to be apart of today's hearing on H.R. 2421, Clean Water Restoration Act (CWRA), a bill that was meant to clarify jurisdictional water issues. Unfortunately, as written, NACo cannot support the bill. Removing the word "navigable" from the definition of the CWA act will have expensive, far-reaching and unintended consequences for local as well as state governments.

NACo did not come to this conclusion lightly – four committees of over 300 people, a 125 member board of directors, and several thousand NACo members – vetted our position and came to this conclusion.

Let me emphasize again that counties are not opposed to the CWA, we support it. However, we are opposed to what we see as an alarming expansion of the federal reach of the Act under the proposed bill. Any reasonable person would understand that, from a definitional standpoint, there is a difference between "waters of the U.S." and "navigable waters of the U.S." Since 1972, the word "navigable" has had meaning – it has been fought over and clarified through court battles. The word "navigable" sets boundaries between federal and state waters, it states where federal waters end and state waters begin. Taking out the word "navigable" removes those boundaries. Furthermore, the bill makes no attempt to clarify through statute what congressional intent is or is not.

If the sponsors do not intend to regulate specific activities or wet areas, they need to clearly state that. Otherwise, this bill could and probably will be interpreted very broadly, going far beyond where the current Act goes. This will lead to even more confusion and costly lawsuits about what is and is not jurisdictional. That is why we believe that CWRA is an expansion.

The bill's sponsors state that the purpose of the bill is to restore the historical protections of CWA. To what time period? It is our experience that since CWA was passed in 1972, there has never been a fixed set of jurisdiction definitions in place. These have been ever-changing in regulations and guidance. For example, in the 1970's manmade ditches were not considered "waters of the U.S." In the 1980's, manmade ditches were generally not "waters of the U.S." however, that determination was made on a case-by-case basis. By 2000, only ditches in upland areas were not considered "waters of the U.S."

We agree with the sponsors of the bill that certainty is needed in the jurisdictional process, however, we do not believe that H.R. 2421 is the mechanism in which to get there. As written, there are no governing boundaries defining where federal waters end and a state's waters begin. Additionally, we believe it would create significant bureaucratic obstacles and lead to increased costs to counties without enhancing environmental protections of waterways and wetlands. Essentially, it would mean more paperwork for us, without ensuring clean water.

It is important to remember that counties are both the regulators and the regulated when it comes to the Clean Water Act (CWA). It is on the regulated front that counties may take the biggest hit, especially in the Army Corps of Engineers (USACE) 404 permit program. Once a project requires a 404 permit, it then triggers application of other federal laws. This ultimately means additionally costs and time delays.

We are not saying that the permit process is not a valuable program, because it is, as long as everything is not considered potentially jurisdictional. The bill needs to clearly define what is and is not jurisdictional, rather than leaving it up to the agencies for interpretation.

Additionally, we have several other concerns: removing the word "navigable" from the definition of the Clean Water Act (CWA); including intrastate waters and tributaries in the definition; and including all activities affecting these waters. We believe that these changes will drastically expand federal clean water act jurisdiction.

Counties are out there pursuing proactive water projects at the local level, with these goals in mind, and have had amazing results. NACo is proud of these counties. For example, Lake County, Illinois, balances protection of wetlands and water resources with economic development through its countywide Watershed Development Ordinance (WDO). Over 3, 856 acres of isolated wetlands were protected through the WDO. The WDO has reduced flooding incidences, countywide, while ensuring economic growth and protecting important resources. Orange County, Florida, a low-lying, rapid growth area, promotes community involvement on floodplain management activities, while promoting wetlands conservation and stormwater management. Worcester County, Maryland, restored county stream banks through its Stream Restoration, Enrichment and Attitudes for Success (SEAS) program. SEAS offered at-risk youth the opportunity to participate in scientific research by restoring stream banks and monitoring water quality. These are just a few of the county-driven water quality programs nationwide that have produced positive results. We would encourage further investment and collaboration for these local-based programs.

Additionally, NACo has a number of assistance programs to educate and support counties in water and wetlands resource management. NACo has provided technical and financial assistance to counties on a range of water resources topics including: wetlands restoration, watershed management and source water protection. County best practices are shared throughout the membership through conference workshops, publications and fact sheets. The longstanding Five Star Wetland Restoration program is a collaborative effort of NACo, the Wildlife Habitat Council and the National Fish and Wildlife Foundation to provide 'seed' grants for community-based wetland and stream-bank restoration projects around the country. To date, over 16,800 acres of wetlands have been enhanced and 109 miles of streams have been restored through 433 projects.

There also has been some confusion about the NACo policy process itself, how do we set policy, etc. This process will be explained later in the testimony.

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. The fear is that H.R. 2421 may preempt some of these ingrained local land use decisions. This stems from the fear that, H.R. 2421, as written, may be interpreted extremely broadly by both the Courts and the regulators.

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 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 storm channels and road-side ditches. Currently, they face tremendous challenges getting permits approved in a timely manner. For example, in some California counties this becomes a detriment 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.

Additionally, 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. Just last week when one of our elected county engineers from Ohio, David Brand, testified before the Senate Environment and Public Works Committee, he stated that in his experience "most permits get denied the first time" they are submitted. The total length of time "is closer to 12 months" for approval, rather than the three months stated by the bill's sponsors.

The cost associated with getting these permits can be costly, especially for a rural county who does not have the manpower, knowledge, or the extra monies. 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.

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. CWRA is essentially a one-size-fits-all approach, sweeping all waters and perceived waters into its definition.

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 statute 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.

As stated before, we do agree on the fact that, there are areas within the CWA that are not working as well as they could be. However, we do not believe this bill is the answer. Ultimately, this bill will cause more bureaucracy and paperwork than clean water.

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. Our counties pride themselves on at the local level, doing more with less.

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).

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.

Current NACo Policy Regarding CWRA

This past July, NACo membership chose to build on their existing language and passed a resolution in opposition to removing the word "navigable" from the CWA. The policy also opposes any expansion of Army Corps of Engineers authorities. This language was approved through four NACo steering committees, the Board of Directors and the NACo membership.

Prior to this position, NACo had policy to oppose any efforts to classify manmade ditches (such as roadside ditches, etc.), streets and gutters as “waters of the U.S.” This policy was first passed over five years ago and has been reaffirmed every year since.

NACo Policy Process

The NACo resolutions process provides the membership with the ability to create national policies affecting county governments. The process is intended to be as open as possible, in order to allow participation from the entire membership. More importantly, it is vital to note that all policy is originated and passed by NACo members. It is vetted via a through process, moving from steering committee to the Board of Directors and ultimately, to the NACo membership, as a whole, to review.

NACo has eleven policy setting steering committees, including the Environment, Energy and Land Use Steering Committee. Steering committees annually review and make recommendations on issues and legislation through resolutions and the platform process. The policy development process initiated by the steering committees leads to the publication of the American County Platform, which NACo uses as a guide to deliver the county government message to the Administration, Congress and the American public. The platform contains our long term policy and can only be changed once a year at the Annual Conference.

Resolutions, on the other hand, are meant for short term policy issues. They are valid, anywhere from several months to one year, depending on whether they were passed at the Annual Conference or and the Legislative Conference.

The policy process is completely member-driven. The policies are only submitted by NACo members and only voted on by NACo members. Like all important issues, there will be opponents to agreed upon policies, but the wishes of a loud vocal minority cannot prevail over the majority.

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 important for counties, since many counties construct and maintain roads and dit

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.

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.

To that end, last summer the President of NACo set up the Waters of the U.S. Task Force within NACo, comprised of NACo members, to study alternative CWA language proposals beyond the issue of navigability. This task force has been meeting on a biweekly schedule. They will present their recommendations to NACo membership this July. At that point, I should have a more detailed plan to present to you. In the meantime, I can provide some suggestions based on our existing policy:

- 1). Collaboration among all levels of government - We need coordinated federal, state and local programs to manage, protect, conserve and restore water resources in local communities, including innovative and non-regulatory approaches. We believe the federal government should provide financial and other incentives to support the most cost effective, multi-jurisdictional watershed planning and management programs to meet water quality goals. This should include loans and grants to counties to meet all CWA mandates imposed on counties. The use of loan or grants should be tailored to the specific needs and capacity of each county, including the county's ability to pay.
- 2). Flexibility – We recognize that it will take a coordination of various programs to ensure clean water. We believe that local governments should be involved in all levels of water management planning, however, there needs to be an acknowledgment that a one-size-fits-all strategy will not work. Geographic features differ widely across this nation, as do local ecological features. The decisions on how to protect them is best left up to state and local governments. State and local governments should have the flexibility to implement programs that will protect public health balanced with environmental and economic impacts. Additionally, we support flexible and voluntary water quality trading policies that control and reduce watershed nonpoint pollution.
- 3). Wetlands mitigation requirements - NACo supports a requirement to offset unavoidable wetland loss by mitigating, restoring through enhancement of existing wetlands, or creating new wetlands, when public need requires that public facilities, utilities, or improvements be developed over sensitive ecological areas. Additionally, local streets, gutters and human made ditches should not be classified as “waters of the U.S.”
- 4). Water conservation, reclamation, recycling, reuse and desalination incentives and projects – Water scarcity issues used to be known strictly as a western problem. In the past several years, however, it has become a national problem. Local governments are the first line of defense when weighing their options on how to best protect their citizens, and lack of clean, affordable water is no exception. Many counties nationwide have been on the cutting edge of technology, integrating water resources planning into their local land use plans and everyday lives. Whether it is water conservation, reclamation, or reuse, local governments and innovative individuals are out there making dreams a reality. NACo supports federal financial and technical assistance to state and local governments to design, implement, and evaluate appropriate water conservation measures. Further research and grant programs

should focus on water reclamation, recycling, reuse, and desalination. Federal reserved water rights should be determined in state courts and administered based on local and state water conservation and development plans.

These are just a few of the ideas that I can offer on behalf of NACo until our task force completes its work this July. I want to assure you that counties are committed to keeping our waterways safe for generations to come. We look forward to working with you and other members to build an effective partnership among all levels of government for this purpose. I believe that we can achieve this vision together. I would be glad to entertain any questions from the committee.