

## **CONGRESSIONAL STATEMENT OF MR. LARRY FORESTER**

### **“THE UNINTENDED AND FORESEEABLE CONSEQUENCES OF EXTENDING THE SCOPE OF THE CLEAN WATER ACT – THE SOUTHERN CALIFORNIA EXPERIENCE”**

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#### **UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE**

Subcommittee on Water Resource and the Environment

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Committee Room 2167, Rayburn Building

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#### **I.**

#### **SUMMARY STATEMENT**

On behalf of the City of Signal Hill, California, and the many other member cities of the Coalition for Practical Regulation (CPR), I am respectfully submitting this Congressional Statement for your consideration. CPR testified before Congress in 2003, expressing our concern over the unprecedented expansion “upstream” of the scope of the Clean Water Act (CWA) in the Southern California region by regulators, treating flood control channels and public storm drains as “navigable waters of the United States” and designating them for fishable and swimming beneficial uses, resulting in an impractical, inflexible and unworkable approach, including assigning “numeric limits” to urban runoff. The resulting regulatory problems in the Southern California region are now systemic, manifesting in all CWA programs, from basin planning, to setting water quality standards, to NPDES Permits and to the Total Maximum Daily Load (TMDL) program.

Southern California should be seen as a microcosm of the impractical, inflexible, unworkable and costly approach of expanding the scope of the CWA to all waters of the United States. CPR requested Congressional relief in 2003, hoping that Congress could bring a degree of common sense to the regulatory excesses in Southern California, where regulators have improperly extended federal authority to a full range of waters, including intermittent flow, concrete lined channels. Unfortunately, Congress is now considering treating the entire country like Southern California by extending the CWA’s reach to all waters of the United States in the proposed Clean Water Restoration Act (HR2421).

Although well intentioned to protect wetlands, the legislation will have unintended and foreseeable consequences, including extending the enforcement of federal “numeric water quality limits” far upstream and interfering in local land use decision making. The bill contains limited exemptions, but is silent on whether HR2421 would extend federal numeric limits and water quality standards to local drains, streets, curbs and gutters, creating a major federal unfunded mandate on local government. HR2421 is also silent on whether the federal government will now regulate ground water and reclaimed water, which are extensively regulated by the States. HR2421 would undo the balance in the CWA, where section 101(b) of the act preserves important decision on land use and water supply to the States.

One major unintended and foreseeable consequence of expanding the scope of the CWA will be exposing thousands of local governments nationwide to legal actions taken by third-parties, as authorized by the CWA, when local governments fail to achieve the current unworkable numeric limits and impractical beneficial uses assigned to local storm drains. The Los Angeles Region Water Quality Control Board (the L.A. Regional Board) is now placing numeric standards into the NPDES Permits for Ventura County and incorporating numeric limits from TMDLs into the NPDES Permits for Los Angeles County for enforcement purposes. These actions are exposing local governments to unnecessary third-party litigation, such as the potential forthcoming lawsuit, Santa Monica Baykeeper & NRDC v. the County of Los Angeles and the City of Malibu, which alleges that the County and the City are discharging contaminated storm water and urban runoff, thus causing exceedances of water quality standards and objectives, in violation of their MS4 permits.

At a minimum, Congress should consider referring the questions of the unintended consequences to a review by the National Academy of Sciences. The National Academy assisted Congress in understanding the scientific and implementation implications of the CWA, most recently in a review of the issues associated with the TMDL program. The Academy found that it is much easier to foresee and correct for the problems created by amending the CWA, than to blindly adopt legislation that would create decades of unintended consequences. If Congress decides to move forward on HR2421, Congress should consider granting additional exemptions, in order to preserve local land use control and authority of the State to establish water quality standards. Exemptions should be created for local drains and streets, treatment facilities, such as constructed wetlands, and for reclaimed and ground water. Exemptions should also be created for small entities, such as small communities under 50,000 in population, as required under the federal Regulatory Flexibility Act.

## **II.**

### **DESCRIPTION OF INTEREST**

I have served as Mayor and Councilman for the last 9 years and have a master degree in Ocean Engineering from Catholic University and a Bachelors Degree in Civil Engineering from the University of Notre Dame. In addition to my duties as councilman and mayor, I serve on the Steering Committee for CPR, which is a broad coalition for forty-three Southern California Cities formed to participate in the review and application of storm water regulations. CPR’s goal

is to ensure that storm water regulations for the Southern California region make common sense and are cost-effective, taking into consideration the interest of the regulators, the regulated community and the public welfare.

The City of Signal Hill and other CPR members have a significant interest in the potential amendments to the CWA. We are permittees regulated under the CWA, with permits issued by the L.A. Regional Board and reviewed by U.S. EPA. CPR cities have been plaintiffs in litigation challenging our MS4 National Pollution Discharge Elimination System (NPDES) Permit, in certain TMDLs issued by the L.A. Regional Board and U.S. EPA. We are currently challenging certain aspects of the local basin plan, including the failure of the L.A. Regional Board to consider the impact on city services, the local economy and housing in our region by extending numeric limits to urban runoff.

Water quality programs are court-regulated in our region, as U.S. EPA entered into a Consent Decree with various environmental groups, after these groups brought litigation under the CWA in 1999 to force the development of TMDLs. The Consent Decree was negotiated by U.S. EPA with little, if any, municipal government input and it dictates the terms of the TMDL program. This decree has resulted in poorly conceived TMDLs, additional controversies and litigation. The same scenario will unfold if the CWA is broadened to regulate all waters of the United States.

We believe that our regulatory agencies have incorrectly assumed that waters of the United States (the navigable waters) have no upstream boundaries, and can be pushed as far inland and upland as the agencies arbitrarily decide, including into public storm drains. The CPR cities clearly have interest in any expansion of the scope of the CWA.

### **III.**

#### **THE UNINTENDED AND FORESEEABLE CONSEQUENCES OF EXTENDING THE SCOPE OF THE CLEAN WATER ACT**

##### **A. Entire Public Storm Drain System Declared "Waters of the United States"**

The San Diego Regional Water Quality Board in 2001 issued an MS4 permit for the public storm drains in that region. The definition of waters of the United States contained in that permit states that: "a Municipal Separate Storm Sewer System (MS4) is always considered a Waters of the United States." (Order No. 2001-01, Page D-8) The agency defines MS4s to include all "roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, natural drainage features or channels, modified natural channels, man-made channels, or storm drains." Thus, under this agency's view, the entire municipal storm drain starting at the curb and gutter is regulated under the CWA.

**B. Classification Limits Treatment and Control Options**

The ramifications of this approach are deeply troubling. Point source discharges to waters of the United States require NPDES permits. The permit requires compliance with water quality standards at the point of discharge or “end of pipe.” Imagine the number of “point sources” that “discharge” to our urban and suburban streets. Are driveways and sidewalks point sources requiring a permit under this scheme? This permit approach has now been adopted by the L.A. Regional Board and has been hailed by environmental groups as a “national model.” One of the first public controversies of the 2001 San Diego permit was concern over citations issued for car washing by church groups for a fund raiser. Perhaps more importantly, such an approach strongly restricts the options available to communities to improve storm water, as detailed below.

**C. Constructed Wetlands/Regional Treatment Would Be Precluded**

The practical result of labeling an MS4 system as waters of the United States is that the CWA’s water quality standards will be *directly* applied to the municipal storm drains. If all the water in the public storm drain system must meet water quality standards, then the water will need to be treated *before* it enters the collection system. Such an approach would preclude the use of “regional treatment systems” to improve water quality, requiring water quality standards to be met at all points of the system, even those points where beneficial uses cannot and do not occur (e.g. requiring standards intended to protect recreational use to be met in enclosed, underground storm drains, where swimming cannot occur. One need only appreciate the fact that water enters the public storm drain at untold locations in a vast urban metropolis like Los Angeles to understand the impractical nature of this “micro” approach, and the danger of making it an enforceable norm by mandating it through the NPDES program. Because urban runoff comes from so many different and diverse sources, it is not possible to effectively and efficiently regulate these sources on an individual basis.

Alternatives being proposed by CPR and others include the construction of natural treatment wetlands at locations after runoff enters the public storm drain but *before* it enters true open and “navigable” waters, or where beneficial uses might actually occur. CPR cosponsored a feasibility study on the use of constructed wetlands in the L.A. area. (Brown & Caldwell, *Regional Solutions for Treating Stormwater in Los Angeles County: A Macrofeasibility Study*, April 2003) In the study, Brown & Caldwell, a nationally recognized environmental consulting firm, concluded that regional facilities such as constructed wetlands offer several advantages over site-specific controls. Constructed wetlands can support comprehensive watershed planning efforts in which conditions throughout the watershed can be addressed. Constructed wetlands can provide a community with multiple-use areas, such as green spaces, walking, biking and jogging areas, and ball fields. However, water *within* constructed treatment wetlands may not be able to meet federal water quality standards, and the proposed expansion of the CWA would preclude their use, as it would make the treatment facility a component of the MS4 system and “waters of the United States.”



*Constructed Wetlands – San Joaquin Marsh*

**D. Vertical-Walled Box Culvert Being Regulated As Waters Of The United States That Is Swimmable**

The difficulties created by extending federal regulations to all waters is clearly seen in the Ballona Creek, a vertical, walled, concrete-lined box culvert, controlling flooding in a portion of Los Angeles. Water quality standards were developed for the Los Angeles area in 1978 for dozens of vertical-walled, concrete-lined, boxed culverts, designed for flood protection and restricted from public access. These flood control devices were assigned beneficial uses for swimming, for drinking water and for fishing, regardless of the existence of any region plans or funding to remove these culverts and return them to natural conditions. These designations were made at a time when regulators stated that federal standards could not practically apply to urban runoff.

During the 1990's, it became clear to municipal governments and the L.A. Regional Board staff, that U.S. EPA would not assist in undoing these original use designations, even if the originally uses clearly did not apply. The State and Regional Water Boards are required by the CWA to undertake a "structured scientific process" called a Use Attainability Analysis (UAA) even to remove uses that clearly do not apply. The difficulty in making any headway in correcting these inappropriately designated uses is found in the UAA process. The L.A. Regional Board voted on June 5, 2003 to maintain the swimming designation for a concrete-lined, boxed, access prohibited, flood control channel, in direct conflict with the recommendations of their staff and U.S. EPA.



*Typical Vertical-Walled, Concrete-Lined, Boxed Flood Control Channel*

The State Water Resources Control Board was able to provide some common sense, when they reversed the L.A. Regional Board on January 20, 2005. The change of beneficial use took four years and untold amounts of staff time and costs; in what was a clear case where federal water quality standards for swimming could not practically be applied. Congress should carefully consider the implications of extending the reach of the CWA to all waters of the United States in terms of the sheer number of UAA's that would be triggered by the application of federal standards to what are clearly not federal waters.

**E. Extending the Toxics Rules To All Waters**

California, like several states, has federally adopted water quality standard intended to protect aquatic life from toxicity. Known as the California Toxic Rule (the "CTR") limits, these standards were developed using idealized, laboratory conditions and not real world water and native species. There is a major scientific argument as to whether CTR standards, when established by U.S. EPA in 1999, were adopted as overly protective of aquatic life. In many cases local drinking water, although meeting all human health standards, exceeds CTR requirements, and studies in local waters indicate that the CTR limits for metals are overly protective (i.e. too low) by a factor of five or more.

The U.S. EPA has recognized that additional science would be beneficial and has adopted protocols for completing studies (known as Site Specific Objectives) to determine if the CTR standards can be adjusted for local water bodies regulated under the CWA. These water body studies are expensive. A recent cost estimate by the City of Los Angeles to study the CTR limits of copper, zinc, lead, selenium and cadmium on the Los Angeles River is estimated to cost the City over \$2.3 million and will require three years of scientific research.

Extending the reach of the CWA act to all waters of the United States will have the unintended and foreseeable consequence of requiring additional Site Specific Objective studies for large number of waters not the current subject of federal regulation, with untold future expenses for local governments.

**F. Economic Consequences Of Extending The CWA To All Waters – The Southern California Experience**

The costs of complying with federal water quality standards for all waters in the Los Angeles Region has been the subject of debate, since the release of a study by the University of Southern California in 2002 illustrating that regional treatment of storm water could costs upwards of \$43.7 billion to control for the CTR on 70% of the average historic storm events. With the adoption of several TMDLs in the Los Angeles Region since 2002, the large costs of meeting federal standards in the Region are no longer being debated, as the Region contemplates additional tax measures to partially fund the new programs. Voters in the City of Los Angeles adopted Proposition “O” in 2005. The one-half billion tax measure is considered a “down payment” and a series of additional bond measures are being considered.

The L.A. Regional Board estimates that partial compliance with the Los Angeles River Metals TMDL will cost local government \$2.4 billion; while the cost to local governments for compliance with a similar TMDL on the San Gabriel River is estimated at \$2.6 billion. The cost of implementation of the Trash TMDL on the Los Angeles River is estimated by the Board to be \$1.1 billion. These are three examples, where the Regional Board has dozens of water bodies and hundreds of TMDLs to complete in the Los Angeles Region in the next seven years. These CWA implementation costs are either passed on to the local taxpayers or absorbed by local governments by reducing or eliminating existing municipal services.

**G. Application Of “Tributary Rule” To Upstream Curbs and Gutters**

Another unintended consequence of broadening the definition of “Waters of United State” is exemplified in the 1994 L.A. Region Basin Plan (“Plan”). This Plan contains policy commonly referred to as the “tributary rule,” which states that “those waters not specifically listed (generally smaller tributaries) are designated with the same beneficial uses as the stream, lakes, or reservoirs to which they are tributary.” Most of the inland surface waters with the Los Angeles and Ventura Region are subject to several beneficial use designations. This rule, however, can be read to extend designated uses to virtually every water body’s tributary system (i.e., extending the downstream uses to the upstream tributaries). Because pollutant concentrations may decrease as a result of dilution or via physical or chemical transformation, it is important to consider downstream impacts prior to applying downstream beneficial uses to tributaries. The L.A. Board’s approach raises numerous questions about which tributaries are properly classified as “waters of the United State,” including whether flows in gutters, or intermittent flows in rivulets in small canyons, should be subject to designations applied to perennial streams or lakes.

In its 2001 triennial review priority list, the L.A. Board acknowledges that “in the highly developed Los Angeles Region, many “tributaries” to a water body may be underground storm drains... (The regional also includes) numerous coastal streams, which are essentially tributaries to the ocean.” This interpretation would require collection and treatment of storm flows, urban runoff, and other nonpoint sources on a very small, localized scale, a requirement that would likely be impractical and extremely costly, as detailed above. Thus, there is considerable uncertainty about where the waters of the United States begin, and how far upstream the “tributary rule” extends. Uncertainty regarding the definition of “waters of the United States” has created massive confusion in the Southern California. The proposed legislation would lead to confusion regarding not only the upstream application of the CWA, but the application to isolated waters as well.



*Shady Canyon Drive Drain*

**G. Application Of Standards To Drinking and Reclaimed Water Reservoirs**

The water system in Southern California is a complex to above ground reservoirs and storage in natural aquifers. Many of our communities rely on surface storage of drinking and reclaimed waters in small ponds and lakes. There is an increased need to expand the uses for reclaimed water in the semi-arid climate of Southern California. These water bodies have been constructed explicitly for the storage of reclaimed water, but have been assigned designations for habitat and other beneficial uses. The water quality objectives for these beneficial uses often require a higher degree of treatment (i.e., “better” water quality) for the reclaimed water than would be required in the absence of the designations. As a result of classifying these waters as “waters of the United States,” to protect the beneficial uses created solely by reclaimed water discharges and storage, reclaimed water producers would have to illogically cease making the very same discharges or treat to a level that may provide no tangible benefit to the environment.

A similar contradiction results from applying beneficial use designations to drinking water supply reservoirs, some of which are open to the environment (uncovered). Although public access to these reservoirs is prohibited, most have been designated for potential recreational uses by the L.A. Regional Board. As a result, they are regulated to protect potential uses that are not compatible with their actual functions and which will almost certainly never be allowed. Operators of the affected reservoirs have repeatedly stated in the record that these water bodies should not be regulated as “waters of the State” or as “waters of the United States,” because they are part of a closed water distribution system and that recreational uses would result in the degradation of water quality.



*Upper Oso Reclaimed Water Reservoir*

## CONCLUSION

These examples from Los Angeles, Orange and San Diego Counties are just several of the hundreds of examples that can be found in the Southern California of the problems of extending CWA standards, as has been the practice of local regulators the last several years.

Congress should carefully consider any legislation that would extend CWA jurisdiction to all waters of the United States. Cities in Southern California are struggling with unfunded mandates extending CWA standards to local storm drains, curbs and gutters. Expansion of the CWA would trigger these problems nationwide, for thousands of communities.

Even well intentioned regulations can have harmful unintended consequences. Many of these unintended consequences can be seen in advance, if Congress takes the opportunity to consult broadly with all stakeholders, including local government. Exemptions to the CWA should be considered, including for constructed wetlands and in waters treatment devices, reclaimed and drinking water reservoirs and local storm drain systems. The CWA, along with the NPDES Permits and the TMDL program are sufficient tools to improve the nation's water quality, without expanding federal regulations to an impractical level.

Congress should be concerned about the watershed of litigation underway in Southern California, over the expansion of the CWA to local storm drain systems, by regulatory agencies. Expansion to the scope of the CWA nationwide would set aside 35 years of jurisprudence, permits and policies, which has resulted in tangible improvements to the nation's water quality. The water quality in our nation's water bodies have been improving and local governments are committed to finding cost-effective measures to continue this improvement.

Congress should direct the National Academy of Sciences to report back on the effects of any proposed expansions to the scope of the CWA, prior to taking any legislative action. Congress should also request that the U.S. EPA survey local governments nationwide on the anticipated costs of expanding the scope of the CWA on local agency budgets. Hopefully practical regulations and common sense will prevail.