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SUBMITTED TO THE

HOUSE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

ON

THE STATUS OF THE NATION'S WATERS, INCLUDING WETLANDS,

UNDER THE JURISDICTION OF THE FEDERAL WATER POLLUTION

CONTROL ACT

JULY 19, 2007

Mr. Chairman, members of the Committee, I appreciate the opportunity to appear today to give you the views of Trout Unlimited (TU) on “The status of the Nation’s waters, including wetlands, under the jurisdiction of the Federal Water Pollution Control Act,” better known as the Clean Water Act (CWA).

Because of two recent Supreme Court decisions and the federal government’s flawed guidance interpreting those decisions, the “status” of the Nation’s waters under jurisdiction of the CWA is threatened, shrinking, and confused.

If we as a nation are to ever have any prospect of achieving the CWA’s splendid goal – “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”—this situation must be rectified as soon as possible. TU supports the Clean Water Restoration Act, HR 2421, as a critical step for restoring the historic scope of CWA jurisdiction and placing the nation back on track to achieve the goals of the CWA. TU believes the bill a good fix to the current confusion and commends the Committee for holding this important and timely hearing.

TU is the nation’s largest coldwater fisheries conservation group dedicated to the protection and restoration of our nation’s trout and salmon resources and the watersheds that sustain them. TU has over 150,000 members in 400 chapters in 38 states. Our members generally are trout and salmon anglers who give back to the waters they love by voluntarily contributing substantial amounts of their personal time and resources to fisheries habitat protection and restoration efforts. The average TU chapter donates 1,000 hours of volunteer time annually. Members’ time is often donated to partnership projects with state and federal fisheries and water quality agencies designed to restore fish habitat in streams and rivers of vital interest to our members in their local areas.

Questions of constitutional authority loom large over the subject at hand today. TU members and staff generally are not constitutional law experts, but we do know a good bit about restoring and maintaining the Nation’s waters. We always view these waters in a watershed perspective. Water resources within a watershed are all connected, from the top of the mountain to the smallest headwater to the remotest wetland to the majestic river in the valley to the coastal bays and to the oceans. TU works to conserve water resources and the trout and salmon fisheries they yield in the following ways:

- First, we **protect** the highest quality habitats for fish, wildlife, and water resources
- Second, we **reconnect** rivers to floodplains and higher elevation headwater streams to lower elevation lands;
- Third, we engage communities in land and water **restoration**. We work with landowners, industry leaders in conservation, towns, states and federal agencies from Alaska to Maine to accomplish our mission.

One of the most valuable lessons we have learned is that watershed restoration is impossible without maintaining the health of our headwater streams. Headwater streams, especially the intermittent and ephemeral streams that are dry for parts of the year, are the “Rodney Dangerfields” of the water resource world: they don’t get enough respect.

Yet the best science we have tells us how extremely valuable headwater streams are. They are the very “roots” of all of our watersheds. If we damage or kill the roots, we damage or kill the “trees” --- the larger rivers that flow through our valleys, towns, and cities. The two Supreme Court decisions, and the guidance that followed each, threaten the health of the headwaters of many of the Nation’s rivers. Headwater streams and geographically isolated wetlands must receive the level of protection from the CWA that they had prior to the rulings and guidance. That is why we so strongly support HR 2421. Below, I will briefly describe adverse impact of the decisions and guidance, the resources at risk, the activities that pose the risks, and the need for HR 2421.

Adverse Impact of the Supreme Court Decisions and Federal Agency Guidance

In 1972, Congress passed the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters. To achieve the goal, Congress recognized the importance of broadly applying the CWA’s programs to the “waters of the United States,” including headwater streams and remote wetlands. The two recent split decisions of the U.S. Supreme Court: *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*, issued in 2001, and *Rapanos v. United States*, issued in 2006, have narrowed and confused the extent of the CWA’s geographic scope. The plurality in the *Rapanos* decision seemed to be especially hostile to small headwaters streams that are vital to healthy watersheds and successful implementation of the CWA.

EPA and the Army Corps of Engineers (Corps) responded to each decision with “guidance” that went even further than the decisions themselves in curtailing CWA geographic jurisdiction. In 2003, the Corps and EPA interpreted the narrow *SWANCC* decision broadly, directing Corps field offices not to assert jurisdiction over geographically separated waters like prairie potholes, playa lakes, and other wetlands. Then, in June 2007, in an overdue attempt to clarify the very confusing *Rapanos* decision, the federal government finally issued its *Rapanos* “guidance.” For many non-navigable waters and wetlands, the *Rapanos* guidance insists on a narrowly focused case-by-case evaluation that promises to be both highly time intensive and unnecessarily narrow, thereby hurting both the regulated community and the waters Congress intended the CWA to protect. In the end, the guidance leaves key questions unanswered, and fails to provide a workable and protective framework for safeguarding the waters of the United States.

TU was especially disappointed by the Corps and EPA interpretation of Justice Kennedy’s “significant nexus” test in the guidance. Kennedy emphasized a regional approach to establishing a significant nexus, indicating that wetlands may be within jurisdiction if they “either alone or in combination with similarly situated lands in the region, significantly affect” the physical, chemical, or biological health of a downstream, navigable river. Justice Kennedy also suggested that the federal agencies could establish rules regarding significant nexus for whole categories of tributaries.

Instead of following Kennedy's lead, the Corps/EPA Guidance requires that the agencies look only at the *directly affected* tributary reach to determine significant nexus—not, as Kennedy suggests, at the relationship of that particular tributary to the larger region. While it may be hard to document that every single small, pristine headwater tributary alone contributes significantly to the health of the mainstem of a river miles downstream, these tributaries, when grouped with others similarly situated in the region, most certainly do have a significant impact on that downstream mainstem of the river.

Therefore, six years after the *SWANCC* decision, important wetland areas and headwater streams that were protected for over 30 years have had their federal Clean Water Act protections inappropriately removed or threatened. As a result of these confusing decisions and the agencies' overly narrow interpretation through guidance, we now have doubt where there once was certainty. Consequently, an immense number of wetlands and streams are at risk.

Aquatic Resources at Risk

Waters most at risk from the *Rapanos* and *SWANCC* decisions are small, headwater streams, other intermittently flowing streams, wetlands associated with such streams, and geographically separated wetlands like prairie potholes, playa lakes, and vernal pools. Far from being “isolated” or “remote” waters, these waters are in fact the life blood of larger waters and some of the most vital waters to fish and wildlife. I am confident that my friends from Ducks Unlimited and the National Wildlife Federation will provide ample evidence of the functions and values of wetlands at risk. I will focus on the headwater streams at risk.

First, it is simply impossible to characterize any small stream, even if ephemeral or intermittent, as isolated. It is elementary that all water that starts out in small channels ultimately flows downstream in to larger waters. These small channels and streams, moreover, comprise a very large portion of the drainage of most watersheds, and their functioning profoundly affects the health of the entire watershed. In eastern watersheds, first and second order streams (most of which are ephemeral or intermittent) typically drain approximately fifty percent of the watershed, meaning that approximately half of the water moving through the watershed comes from these first order streams. A recent Forest Service study found that intermittent streams account for more than half the channel length in many watersheds of the Pacific Northwest. In more arid parts of the West, the numbers are even more striking. In Wyoming, 76 percent of Wyoming's 26,000 stream miles have a base flow of only 10 cubic feet per second (cfs) or less. Colorado has over 107,000 miles of streams; over 70,000 miles are either ephemeral or intermittent.

These numbers have several significant implications. First, small headwater streams are absolutely critical to the health of entire river systems. Small streams are the primary source for water, nutrients, and sediments in many river systems. Intermittent and ephemeral streams are capable of storing large quantities of sediment eroded during large storm events and releasing the it slowly over time. Major alterations to headwater streams can increase peaking flows and flood damage, increase sedimentation in larger rivers, and affect water quality in larger rivers.

In addition to playing a significant role in the physical processes of larger watersheds, ephemeral and intermittent streams play a critical biological role. Small headwater streams provide spawning and rearing habitat for a variety of species, including trout and salmon. This is true not only of perennial streams, but also of streams that do not flow year around. Very small ephemeral and intermittent channels can provide spawning habitat during higher flows. They can also provide refuge for juvenile fish to escape high flows or predators.

The body of studies documenting the importance of intermittent and ephemeral streams to the health of trout and salmon populations is large and growing. A 1976 California study estimated that 39-47 percent of the adult rainbow trout in the stream being studied spawned in an intermittent tributary. Trout were able to move into the stream and spawn during high spring flows, and young of the year were able to emigrate before low water periods. Similarly, westslope cutthroat trout in Lake Coeur d'Alene, Idaho use intermittent tributaries to spawn, with the fry emerging and moving downstream before the streams go dry.

An ongoing study of intermittent streams in the Sacramento River drainage funded by the U.S. Fish and Wildlife Service has shown heavy use of small intermittent tributaries by juvenile Chinook salmon for rearing purposes. A study in Washington state found that intermittent channels are an important winter refuge for juvenile coho salmon and steelhead trout.

Dry Creek, a tributary of the Missouri River near Townsend, Montana, is an intermittent stream that goes dry from October through March, and flows at less than 5 cfs for most of the rest of the year. Rainbow trout migrate into the stream during April and May, eggs incubate until mid-July, and fry migrate to the Missouri River before the stream dries out. Trapping conducted by the state of Montana in 1991 suggested that this intermittent stream produces approximately 8,000 rainbow trout fry each year. Pierce Creek is an intermittent tributary of the Swan River in Montana. Every spring cutthroat trout move upriver and occupy the creek for two to three months. Numerous other fauna, including other fish, amphibians, and insects, also use these streams for habitat.

Activities that threatened to harm the resources

Eliminating CWA jurisdiction over many small streams and geographically isolated wetlands means CWA jurisdiction may be eliminated for a substantial percentage of all watersheds. The implications for water quality and the functioning of larger streams are grave, as small streams are subject to a variety of polluting activities. In recent years, headwater streams have been threatened by sewage treatment plants associated with urbanizing communities, sedimentation from road construction, pollution from large animal feeding operations, channelization for flood control purposes, and fill and other manipulation for purposes of urban development, mining, and energy development.

TU has worked with many developers, landowners, state and federal agencies to ensure that development projects such as these are done in a manner that produces minimal or no impact on aquatic resources. The backbone of this work is the regulatory framework of the CWA and its programs. Provisions of these programs provide critical protection elements on their own, but

they also serve as the backstop for state and local regulatory programs, many of which are integrally connected to CWA programs.

Section 404, for example, is a critical CWA program for protecting streams and wetlands of all sizes, and locations within watersheds, from being filled in by various types of development. Section 404 is far from being a “just say no” regulatory program; the vast majority of permit applications are approved. Yet, it requires developers to avoid destruction of aquatic resources as much as possible and to mitigate for unavoidable impacts. TU members, chapters, and staff comment on Section 404 permit applicants and work with Corps and EPA to enforce its rules to protect streams, wetlands and valuable fisheries. Potentially destructive permit applications to bulldoze headwater streams in New York and West Virginia for flood control purposes in recent years are important examples of how we engage in Section 404 on the ground. Obviously, if CWA jurisdiction is lost for many headwater streams, the protection of Section 404 is lost as well.

The very heart of the CWA, Section 402’s regulation of point source discharges from towns, counties, and polluting industries, is also jeopardized by the reduction in jurisdiction over headwater streams. The May 18 documents released by the EPA to Earthjustice show a surprisingly high percentage of NPDES permits with location data on the very intermittent and ephemeral streams which may lose jurisdictional coverage. Western states were especially noteworthy, including Wyoming with 46 percent, New Mexico with 55 percent, Montana with 21 percent, and Colorado with 32 percent. In the east, states that are especially important to TU are also striking, include Pennsylvania with 20 percent, Wisconsin with 28 percent, and Virginia with 19 percent.

This evidence fits our experience: development and urbanization are moving uphill, upstream, and into the mountains. New and expanded ski and golf recreational areas, for example, with associated housing and infrastructure, are driving the increased frequency for NPDES permits uphill to smaller, headwater streams. It is almost unthinkable that the vital protective programs of the CWA, such as its NPDES and stormwater programs, might be hamstrung by jurisdictional mess that we are in.

Congress should pass HR 2421 and get the CWA back on track for doing the job it always was intended to do.

For the health of the waters of the United States, Congress must act to restore the protections that existed prior to the *SWANCC* ruling in 2001. In the absence of a legislative fix, the *Rapanos* and *SWANCC* decisions will leave the protection of many waters in doubt as the federal agencies try and work through confusing jurisdictional determinations on a cumbersome case-by-case basis and courts create a patchwork of judicial guidance that will likely jeopardize the health of our waters.

H.R. 2421 offers a clear fix by providing a statement of congressional intent to restore the Clean Water Act protections that existed prior to the *SWANCC* ruling in 2001. The bill removes the words “navigable waters” that were given such a narrow construction by the Supreme Court, and substitutes the words “waters of the United States” – the term Congress used in the Clean Water

Act to define “navigable waters.” The bill then defines “waters of the United States” in a manner nearly identical to the definition promulgated in rule and used by the Corps and EPA for over 30 years. Finally, the bill includes findings that emphasize the economic and ecological importance of wetlands, intermittently flowing streams, and other intrastate waters put at risk by the recent Supreme Court rulings, the economic activities that threaten them, and the constitutional basis for protecting them. TU urges the Committee to approve the bill and send it on to the floor of the House as soon as possible.

On behalf of Trout Unlimited, thank you for the opportunity to provide this testimony.