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TESTIMONY OF

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**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 before 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 (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 to our nation. 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 and 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 Coalition's members share a common interest in preserving and protecting our nation's water resources and have a unique appreciation for the role that water plays in our nation's livelihood. In performing services for society such as building the homes we live in, protecting our homes from destructive floods, and growing the food and paper products we consume, and providing the energy we use in our homes and business, the Coalition's members appreciate and understand full well the importance of our nation's aquatic resources. While many are themselves dependent upon sustainable water resources, all are dependent upon 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 to the next 35 years. The intractable water challenges we face today as a nation demand more cooperative federalism, not more federal authority.

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

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

4. If Congress wants to fix this problem, it will direct the EPA and 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 treatment¹ 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

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 then 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, 6400 pages of testimony, 45 different mark-up sessions, 39 separate sessions of Senate and House conferences, and numerous days of raucous floor debate. 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 addressing their impairments; established regulatory programs to control the discharge of pollutants to waters of the United States, including "direct" discharges of storm water associated with industrial, construction, and municipal activities and to regulate "indirect" discharges through integrated sewer drainage systems. The CWA also requires many industrial facilities to take personal stock in the chemicals they use and store and develop plans to manage, prevent, report and employ

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>.

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 wellbeing of our nation's water resources. While Congress's power under the CWA was founded in the Commerce Clause, the states' authorities are uniquely 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 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 sole and proper role 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, streams (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’ authorities to plan the development and use of land and water resources and to allocate water within each state’s jurisdiction, CWRA relegates the

states to the handmaiden of the federal government only to “*preserv[e] for States the ability to manage permitting, grant, and research programs to prevent, reduce, and eliminate pollution . . .*.” Far from recognizing the *independent* and primary authority of states to manage and regulate water resources within their jurisdiction, the CWRA reduces the states’ role to simply administer programs designed and dictated by the federal government. 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 the basic dictionary definition to the term, “all intrastate waters” could be reasonably interpreted as meaning any or all waters found within a state, no matter how small or seemingly unconnected to a federal interest. Under this seemingly 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 has been a basic function of local and state governments. State and local governments construct and maintain ditches along roadways for the purpose of keeping our roadways safe and free from standing water.⁵ In many cases, these ditches also serve as corridors for essential water infrastructure pipes. Unfortunately, the CWRA would transform ditches into a federally-

⁵ Indeed, federal and state laws require that roadside ditches be maintained for the purpose of allowing drainage of roadways. *See, e.g.*, 30 C.F.R. § 816.151(d)(1) (Department of Transportation regulation requiring that any federally funded primary road be “designed . . . and maintained to have adequate drainage, cross drains, and ditch relief drains.”).

regulated conveyance 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 Section 404 of 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.⁷ 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.

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 define what “activities affecting” means, thus we are left

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).

⁷ For example, Arizona ____ [discuss Arizona example].

to reasonably conclude that Congress intends to quite literally give federal authorities jurisdiction to control any activity that has any impact, no matter how de minimis, 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.”⁸ 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 “activity affecting” any intrastate water. Authorizing federal regulations 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 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 powers, whereas the current statute exercises only Congress’s Commerce Clause powers. Specifically, the legislation identifies a seemingly boundless universe of waters that includes all intrastate waters and defines 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 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

⁸ The Clean Water Act 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.

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 promises jurisdiction over merely “discharges” but rather appears to regulate *all* activities affecting waters, the impact of this clause is hard to predict. Although certain activities would not be regulated as discharge (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, *i.e.*, the maintenance of an irrigation ditch, that does not mean that the place where the activity takes place is not a water of the United States. Thus, although 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.

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 such sweeping authority to regulate to the fullest extent of Congress’ power; on the contrary, Congress’

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 of a ball of yarn, changing the Act’s key jurisdictional terms (*i.e.*, “navigable waters” and “waters of the United States”) can result in an unraveling of the Act’s entire regulatory system. This untangling would result in two categories of unintended consequences. First, 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 perhaps one of the most complex statutes ever passed by Congress, consisting of multiple 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 set forth under section 303 that could be unintentionally, and 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, 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 newly-defined term “waters of the United States,” the CWRA would substantially expand the number of water bodies subject to section 303. All “intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes” would be subject to the new water quality standards.

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 otherwise 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 consequence 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 further 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 system ("MS4"), 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 any "intrastate waters."⁹ Local officials would bear the responsibility of securing permits and would bear the burden and expense of achieving these limits. Failure to obtain

⁹ The Clean Water Act'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. § 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.

permits could result in civil penalties totaling \$32,500 per violation per day 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 is a federal water?" 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, the EPA, the Corps, and the general public will have to determine from scratch how far the CWA reaches. It will be no easy task. Would the CWA, as amended by the CWRA, regulate rainwater the moment it hits the ground? Would the Act regulate ditches or small water bodies? Would the Act regulate water underground? 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. Courts would be invited into

the process to determine just how far the newly expanded Act goes in regulating “all intrastate waters.” In particular, the EPA and the Corps would be subject to lawsuits if they did not regulate “all intrastate waters.” The reach of the CWRA would leave the agencies very little room or discretion to limit their jurisdiction. The agencies might not be able to create reasonable exemptions or reasonably curtail the exercise of their jurisdiction. Rather than allowing the agencies to exercise discretion, courts could interpret the word “all” as literally meaning “all” and therefore compel the agencies to regulate every “intrastate water” -- perhaps even the smallest trickle. The agencies could become easy targets for groups who wish to use the courts to push the CWA to its unintended extreme.

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 water bodies in the United States, but also “activities affecting” such waters. The legislation also does not define what it means to be an “activity 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 unintended consequences of exacerbating an already difficult and costly task of solving our nation’s aging water infrastructure. As this Committee is fully aware, our nation faces an estimated shortfall of between \$300-500 billion over the next 20 years to maintain and upgrade community water systems that are integrally linked to the quality of our nation’s waters. Expanding the federal government’s reach over all waters, including storm sewers, drainages, and roadside ditches, will invariably increase the permitting burden on local

communities seeking to replace leaking sewers and wastewater pipes, adding to the replacement costs and delays for federal approvals.

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 emanate from nonpoint 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 Any Uncertainties About The Scope Of Federal Jurisdiction Under The Clean Water.

The members of the Waters Advocacy Coalition 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 broken. The CWA is not the problem. Rather, it is the Agencies' implementation of the CWA that is the problem.

For decades, the Agencies have openly admitted that they needed to enact regulations that better define the scope of regulation under the CWA. For decades, the general public has eagerly awaited the Agencies' action. The EPA and the Corps took a preliminary step in January 2003 toward promulgating regulations defining "waters of the United States" by issuing an Advanced

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 propose that the solution to resolving any uncertainties regarding the CWA is not by substantially revising the Act as this legislation proposes. There is no need to reinvent the wheel. Rather, Congress should make the Agencies do their job. This 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.

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're in today -- *i.e.*, waiting on the Agencies to pass rulemaking 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' ultimate goal of protecting our nation's water resources. The CWRA, however, is not a good 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 the agencies themselves through rulemaking.