S. HRG. 106–590

CLEAN WATER ACT ISSUES

HEARING

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

S. 188, A BILL TO AMEND THE FEDERAL WATER POLLUTION CONTROL ACT TO AUTHORIZE THE USE OF STATE REVOLVING LOAN FUNDS FOR CONSTRUCTION OF WATER CONSERVATION AND QUALITY IMPROVEMENTS

S. 669, A BILL TO AMEND THE FEDERAL WATER POLLUTION CONTROL ACT TO ENSURE COMPLIANCE BY FEDERAL FACILITIES WITH POLLUTION CONTROL REQUIREMENTS.

S. 1706, A BILL TO AMEND THE FEDERAL WATER POLLUTION CONTROL ACT TO EXCLUDE FROM STORMWATER REGULATION CERTAIN AREAS AND ACTIVITIES, AND TO IMPROVE THE REGULATION AND LIMIT THE LIABILITY OF LOCAL GOVERNMENTS CONCERNING CO-PERMITTING AND THE IMPLEMENTATION OF CONTROL MEASURES

OCTOBER 13, 1999

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C O N T E N T S

CLEAN WATER ACT ISSUES

WEDNESDAY, OCTOBER 13, 1999

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

The committee met, pursuant to notice, at 10:04 a.m. in room 406, Senate Dirksen Building, Hon. John H. Chafee (chairman of the committee) presiding.

Present: Senators Chafee, Thomas, Voinovich, Hutchison, and Wyden.

OPENING STATEMENT OF HON. JOHN H. CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator CHAFEE. Good morning, everyone. I would like to welcome all to this committee, and thank all the witnesses for testifying. The purpose of today's hearing is to learn more about three bills that seek to amend different sections of the Clean Water Act.

The Clean Water Act has been one of our most successful environmental laws. Many of us are familiar with the statistics that before the Act was passed, two-thirds of our water bodies in the U.S. were not suitable for fishing and swimming. Now after almost three decades of hard work, roughly two-thirds of our water bodies are fishable and swimmable.

We have made outstanding progress under the Act, but there is still a lot of work to be done. EPA estimates that over the next 20 years, our country faces $200 billion—that is a lot of money—$200 billion in waste water infrastructure needs. The threats to our water bodies are also becoming more complicated and difficult.

Our first bill is S. 188, introduced by Senators Wyden and Burns. Last week, we held a hearing to discuss the appropriate funding levels for the SRF. Today, we will discuss a proposal to use the SRF, that is a revolving loan fund, to finance an expanded list of activities.

The SRF is currently restricted to the construction of publicly owned treatment works, the implementation of nonpoint source management programs under Section 319, and the development and implementation of estuary management plans under Section 320.

S. 188 would broaden that list to include projects that result in water conservation benefits or water quality improvements. Loans for these projects would be available to a wide range of entities, including water users, associations, non-profit private organizations, and lending institutions.

The second bill is S. 1706, a bill by Senator Hutchison of Texas, relating to storm water regulation. EPA is in the process of completing a rulemaking to expand the scope of the agency's storm water regulations.

S. 1706 would limit the scope of EPA's rule by providing statutory exemptions for certain categories, including vegetated ditches, construction sites under five acres, and routine road maintenance activities.

In addition, the bill would limit the liability of local governments with respect to the action of co-permittees, and the implementation of control measures.

The final bill is one by Senator Coverdell, S. 669. The bill would waive the Federal Government's sovereign immunity under the Clean Water Act, and hold Federal facilities to the same standards of compliance as States, local government, and private entities.

S. 669 would subject non-complying Federal facilities to the same administrative orders, penalties, and fines that are used against other violators.

Senator Thomas, do you have some comments?

OPENING STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM THE STATE OF WYOMING

Senator THOMAS. Yes, sir, thank you, Mr. Chairman. I am glad you are having this series of committee hearings on the Clean Water Act. It is one of the most important things we deal with.

Reviewing innovative proposals to improve water quality or to provide resources is increasingly important. Undoubtedly, we will need additional resources to do the things that we have set our mind to do. However, we need to continue to address the proposals and have oversight to ensure that we have regulations that are not overly burdensome to our States and local communities and landowners.

Along these lines, Mr. Chairman, and for the information of the committee, I intend to request an extension of the comment period on EPA's Guidance Manual and Examples and NPDES Permit for Concentrated Animal Feeding. I realize that is not on this morning, but I want to make this point to the agency.

I am disappointed that the Guidance Manual has been issued for public comment at the same time the agency is revising the underlying regulations. I think you have to question how interested parties can possibly provide comments on a guidance manual, when the agency is currently revising those regulations.

It seems to me that the process is a little backward there. I hope that the members of the committee will agree.

I am also interested in two of the bills that will be discussed today, S. 669, which would require Federal facilities to operate in compliance with pollution control requirements.

I am chairman of the Parks Subcommittee, and we have had some experience with that. Local folks feel pretty put out when Federal facilities can do the same things they do, and get by, when they can not.

Also we have S. 1706, with exclusions to the Storm Water Phase II regulations.

So I think these are useful, Mr. Chairman, and I hope we can move forward after having the hearing.

Senator CHAFEE. Thank you, Senator.

Senator Voinovich?

Senator VOINOVICH. Mr. Chairman, with your permission, I would like to reserve my opening comments until we give Senator Burns an opportunity to testify.

Senator CHAFEE. Sure, and then you would like to speak after him?

Senator VOINOVICH. Yes.

Senator CHAFEE. All right, fine.

All right, Senator Burns?

Senator THOMAS. I might want to speak after him, too, Mr. Chairman.

Senator CHAFEE. You are on. You and Senator Wyden have introduced S. 188. Please proceed.

STATEMENT OF HON. CONRAD BURNS, A UNITED STATES SENATOR FROM THE STATE OF MONTANA

Senator BURNS. Thank you, Mr. Chairman. Why do I feel like I have moved into the crosshairs, here?

[Laughter.]

Senator VOINOVICH. We thought you might have something else to do, and we are giving you a chance.

Senator BURNS. That is exactly right. Well, I thank you, and I thank the committee this morning.

I want to thank you for your consideration of S. 188, the Water Conservation and Quality Incentives Act, which I introduced with my colleague from Oregon, Senator Wyden.

The bill is designed to do a couple of things, to improve water supplies and water habitats, and create incentives to conserve our nation's water resources.

One does not have to look around this nation very long to see that its most precious resource is fresh water. It is now, and the demand for it in future years will continue to increase.

From the very first year that I moved from the Midwest to the West into a watershed State, I said at that time, and that was a long time ago, that fresh water that comes out of my State of Montana will be her greatest resource. That has turned out to be true.

In the West, whiskey is for drinking and water is for fighting. It is a most precious commodity to those of us who live there. We are concerned not only with the quality of the water, but also the quantity of our water and who controls it.

Not surprisingly, the largest group of water users there are farmers and ranchers. These are the people that provide the American people with the safest and most abundant food supply in the world. They need water to grow their crops and to feed their livestock.

A good deal of water out West is provided through irrigation systems, which divert waters from reservoirs and from rivers, and even from aquifers. However, substantial quantities of water diverted for irrigation do not make it to the fields and ranches. A large portion of that water is lost due to evaporation and seepage within canals and ditches in which the water flows.

Although the water is not lost, since it seeps into the soil and assists the overall soil moisture and also charges the aquifer that follows our alluvial valleys, it is not immediately available to the producer.

Water supplied through irrigation systems could be increased through improved water conservation measures. With improved water delivery, less water will be wasted, resulting in more water remaining in our rivers and our streams and aquifers; in other words, increasing in-stream flow.

Irrigation water is an economic factor in today's market. In most irrigation districts, farmers and ranchers pay for any water released to them. Any displacement or reduction of this water does not help that producer's financial bottom line.

Today, when food and meat prices are low and markets are questionable, and in fact, we have quite a lot of stress in the ag community today, it is important that we provide the tools to these producers to make sure that they have every opportunity to stay in business.

States encourage water conversation measures by recognizing the rights of those who conserve water. Irrigators and other water users who conserve water are afforded rights to use the water they conserve. Water supply problems are also addressed in some States by financial incentives, which encourage water users to implement cost effective water conservation measures consistent with State law.

However, States are not the only ones who can create such incentives. The Federal Government can play a key role by creating incentives such as providing greater flexibility to the States to loan Clean Water Act funds for water conservation projects. Also, allowing water users to apply a portion of the water they save for further use encourages more water conservation.

This is the approach that my colleague Senator Wyden and I have chosen this bill.

Our bill will authorize the States to make Clean Water Act revolving fund loans available to irrigation districts. They can construct pipelines and develop additional water conservation measures.

Any water conservation project could be structured to allow participating users to receive a share of the water saved through their conservation efforts and more efficient use, which they could use in accordance with State law.

This type of an approach would create a win/win situation, with more water available for both the conservers and for rivers and streams.

By using State SRF program funds, the loan money would be repaid over time, to become available in the future to fund other water conservation measures, to solve water quality and quantity problems in other areas.

The key underlying feature of this legislation is that water saved under this bill would not only help the producer in water and cost savings, but it would also save many of the rivers and streams.

For example, water conserved could be made available to increase the volume of water in our rivers, or in-stream flow, thereby facilitating fish habitat and migration routes.

This is especially critical out West, where two fish species, the northwest salmon and the bull trout, are listed as endangered and would greatly be helped.

To illustrate how this bill would work, I would like to share a real-life problem in Racetrack Creek, located in western Montana. It is a tributary of the Clark Fork River within an EPA Superfund site, due to historic damage from copper mining and milling.

Racetrack Creek is a spawning ground of bull trout and it has had problems maintaining its water level since the turn of the century.

A local watershed management group, the Upper Clark Fork Steering Committee, is working on this problem with a wide cross section of representation from the Clark's Fork River basin.

The Upper Clark Fork Steering Committee and the Montana Department of Fish, Wildlife, and Parks are working to line Morrison Ditch, which diverts water for irrigation into the local area.

A portion of the water rights salvaged by lining Morrison Ditch under this bill would be leased by the Montana Fish, Wildlife, and Parks from the Ditch Association to benefit the fishery.

I would like to point out that this bill has broad support by senators on both sides of the aisle, as well as from the Farm Bureau and the Environmental Defense Fund. Such a diverse range of interests in support of this bill makes for a favorable consideration of this bill.

It addresses the problem of adequate water supplies for agriculture producers. It addresses the problem from nonpoint source runoff. It creates new incentives for water users to conserve water. It provides the States greater flexibility to make loans from the Clean Water State Revolving Fund for water conservation projects, and does not increase the budget, since it recovers money provided for water conservation projects through loan repayments to State revolving loan funds.

I believe S. 188 deserves our attention. If it can be changed to be better, we are open to those suggestions.

I would like to thank Senator Wyden and this committee for showing interest in this piece of legislation. I thank the Chairman.

Senator CHAFEE. Well, thank you very much, Senator Burns. I think it is an intriguing idea. I appreciate very much your having proposed this, you and Senator Wyden.

Senator Voinovich, do you wish to make some comments?

Senator VOINOVICH. Not in regard to Senator Burns' legislation.

Senator CHAFEE. OK. Yes, Senator Thomas?

Senator THOMAS. My understanding, Senator, is that this would be discretionary, this use to the States.

Senator BURNS. That is exactly right.

Senator THOMAS. I understand it also would not affect the distribution among the States that were not involved?

Senator BURNS. It would not.

Senator THOMAS. Thank you, sir.

Senator BURNS. If you have any suggestions, and I know you and I have a common interest of that 45th parallel that separates us—we have some common water problems with Wyoming. So we appreciate your interest.

Senator THOMAS. It runs, generally, from Wyoming toward Montana, fortunately.

Senator BURNS. Yes.

Senator CHAFEE. All right, thank you very much, Senator.

Senator VOINOVICH. Mr. Chairman, could I give my statement?

Senator CHAFEE. Yes.

Senator VOINOVICH. Thank you.

Senator CHAFEE. Go to it.

OPENING STATEMENT OF HON. GEORGE V. VOINOVICH, U.S. SENATOR FROM THE STATE OF OHIO

Senator VOINOVICH. Yes, I would like to make a couple of comments in regard to Senate 669, that some of these witnesses were going to be talking about.

Senator CHAFEE. I could not quite hear you.

Senator VOINOVICH. I would like to refer to Senate Bill 669, which some of our witnesses will speaking about.

Senator CHAFEE. All right.

Senator VOINOVICH. I am pleased that I am a cosponsor of the Federal Facilities Clean Water Compliance Act. Mr. Chairman, this bill would ensure that the Federal Government is held to the same enforcement mechanism under the Clean Water Act as private entities, States, and localities.

Something that is troublesome to me is that in this particular case, the Federal Government is not held to the same standards as others.

Under current law and order for the Federal Government to be sued, it must first waive its sovereign immunity. If there is any question as to what extent the Federal Government has waived its sovereign immunity, courts must rule in favor of the Federal Government. This bill waives sovereign immunity for the Federal Government.

In 1992, the U.S. Supreme Court ruled in Department of Energy versus Ohio that Congress had not waived Federal immunity for liability for civil punitive fines imposed by a State for past violations of the Clean Water Act. As a result of this ruling, States can not obtain penalties for past violations of the Act from Federal agencies.

It is important to note that in almost every other environmental statute, Congress has waived sovereign immunity, and allows States to enforce State environmental laws at Federal facilities. This bill would make the Clean Water Act and State and local water pollution laws enforceable for Federal agencies.

I have supported the same position in regard to Superfund, that Federal agencies, such as the Department of Energy, should be held accountable to the same clean-up standards that private entities and State and local governments are required to follow.

All Federal agencies should be held to the same environmental compliance standards are everyone else. It is really disturbing to me that in so many Federal facilities around this country, Mr. Chairman, they are not held to the same standards.

If a private sector was doing what the Federal Government has been doing around this country, people would be up in arms. Environmental groups would be on the steps of the Congress. I think

that we need to have the same kind of aggressiveness with our Federal facilities.

In my State, we have Piketon, where we have got some real problems dealing with plutonium, phenol. We have a site up in Marion, Ohio, where a school is probably going to ultimately have to be maybe moved because of a Federal dump that was there, and people neglected it.

Up in the northern part of the State, there is the Toussant River, where the Department of Defense last year had 5,000 pieces of ordinance on a beach, 20 percent of them, live. We do not seem to be concerned about this.

But, again, if it was a private company that was involved, you know what would be happening. We would have every Federal agency down on their back like a hawk, threatening to put them out of business, threatening to sue them.

I think that we need to apply the same standards to the Federal Government as we do everyone else in this country. That is why this legislation is so important.

Senator CHAFEE. Well, we are going to hear from the Assistant Secretary of Defense on this subject. You will certainly have an opportunity to quiz him.

All right, now, Mr. Fox, if you will come forward, and Mr. deGrazia, from the Defense Department. We will start with you, Mr. Fox, and go to it.

STATEMENT OF HON. J. CHARLES FOX, ASSISTANT ADMINISTRATOR FOR WATER, U.S. ENVIRONMENTAL PROTECTION AGENCY

Mr. FOX. Thank you, Mr. Chairman.

Good morning to you and members of the Committee. It is a pleasure to be here, again. It is my understanding I might be here a few times in coming weeks, too. It is good to spend some time with you.

Next Monday, October 18, is the 27th anniversary of the enactment of the Clean Water Act. Twenty-seven years ago, the Potomac River was too dirty to swim in, Lake Eerie was dying, and the Cuyahoga River was so polluted that it burst into flames.

Senator CHAFEE. I think that Cuyahoga River bursting into flames was the—I do not know what the exact word is I am seeking—but in any event, that was it, when the river caught fire. I think that really gave the incentive for the Clean Water Act to be enacted.

Mr. FOX. I think that is right.

Senator VOINOVICH. Mr. Chairman?

Senator CHAFEE. Yes.

Senator VOINOVICH. You might be interested that while I was Mayor of Cleveland, we suspended a police officer who, on his official time, was fishing in the Cuyahoga River.

[Laughter.]

Senator VOINOVICH. Things have improved.

Mr. FOX. Well, in fact, that was my point, that enactment of the Clean Water Act under your leadership, Mr. Chairman, and members of this committee has dramatically improved the health of the rivers, lakes and coastal waters in this country.

It has stopped literally billions of pounds of pollution from fouling our waters and doubled the number of waterways that are safe for fishing and swimming.

Before commenting on the several bills before the committee today, I want to briefly take a moment to look a the broader issue of the Clean Water Act reauthorization.

Last week, I testified before this committee on bills to amend the Clean Water Act SRF program, introduced by Senator Voinovich, and to address overflows from combined sewers.

Today, I am testifying on bills related to storm water permits, expanded use of the SRF and expanded enforcement of Federal facilities, and additional legislative hearings that are planned.

Although this Administration is pleased to provide comments on the specific provisions of each of these narrowly crafted bills, I want to encourage the committee to consider the need to strengthen the Clean Water Act in several critical areas that are not now the subject of proposed legislation.

For example, the Administration proposed in 1994 to call for strengthened authority to reduce polluted runoff, to better protect wetlands, and to reduce toxic pollution to improve compliance and enforcement.

In addition, a recent court decision allowing the draining of wetlands threatens literally the loss of tens of thousands of acres around the country. I hope the committee will give attention to some of these critically needed changes in the Act.

Turning to the legislation pending before the committee today, I will first direct my attention to bill S. 1706, introduced by Senator Hutchison and Senator Graham, to make amendments to the Storm Water Pollution Control Program authority under the Clean Water Act. The Administration has significant concerns with several provisions of the bill, and is opposed to the bill as drafted.

As you recall, Congress established the Storm Water Program in 1987. EPA published regulations addressing discharges of storm water from large cities, industrial facilities, and construction sites in 1990. We will shortly publish a second round of regulations called the Phase II Storm Water Program, addressing smaller cities and construction sites.

As we developed the Phase II Program, we solicited input from stakeholders by convening a Federal Advisory Committee, which met 14 times. We developed three preproposal public drafts and received 40 to 50 sets of comments on each one.

We also convened a SBREFA panel to solicit input from potentially regulated small entities. After proposal, we held six public hearings and received 550 comments, roughly half of which were in fact from the State of Texas.

We are now in the final stages of development, and expect to propose the final rule on October 29, consistent with a court order deadline.

We have several objections to the proposed bill, which would modify the Storm Water Program. First, the bill would provide that when a permittee relies on a second governmental entity to carry out storm water related actions, the permittee is not subject to enforcement action if the second governmental entity does not do its job.

Because the second governmental entity is not officially part of the permit, it too, is not subject to enforcement action. This approach would create cases where no one is legally responsible for storm water pollution control.

Without effective enforcement response, compliance with storm water permits and control of storm water pollution will be significantly reduced.

Second, the bill would also waive the requirement that a local government obtain a permit for storm water discharges from above ground vegetated ditch or a drainage way. This provision would substantially narrow the scope of the program and reduce water quality benefits.

Above ground conveyances can carry pollutants to waters of the United States, as do underground storm sewers, albeit a slower and perhaps more controlled rate. Many of the management measures provided for in the Phase II Rule are equally appropriate for above ground and underground conveyances.

Finally, the bill would exempt any storm water discharges associated with construction activity of less than five acres from the permit requirements of the Clean Water Act. The bill would undercut the existing Phase I regulations, as well as the construction provisions of Phase II. These construction activities are a significant source of water pollution in meeting the goals of the Clean Water Act.

Turning to the Federal Facilities Clean Water Compliance Act of 1999, S. 669, I would simply say that the Administration supports this legislation. My colleague from the Defense Department will be adding more detail on that in his testimony.

Finally, turning to S. 188, introduced by Senators Wyden and Burns, it would specifically authorize SRF loans for water conservation activities outside of municipal sewer systems for nonresidential water conservation, specifically, conservation of water used in agriculture. The bill would also make private organizations and individuals eligible for the loans.

Conservation of agricultural water can have dramatic benefits for water quality. The Administration supports using SRFs to finance such projects under specific circumstances. For example, water conservation projects that would make more water available to augment flow in a water body that the State has identified as a priority should be eligible for SRF funding.

As presently drafted, however, the bill would allow States to use SRF loans for water conservation projects with limited environmental benefits.

Senator CHAFEE. I could not hear that last part.

Mr. FOX. As presently drafted, the bill would allow the SRF loans to go to projects with limited water quality benefits. We would like the opportunity to work with the committee and the bill sponsors to better define the circumstances under which SRF loans could be available for these purposes.

That concludes my prepared remarks.

Senator CHAFEE. All right, Mr. Secretary, will you proceed?

STATEMENT OF HON. BRUCE DE GRAZIA, DEPUTY ASSISTANT UNDER SECRETARY OF DEFENSE FOR ENVIRONMENTAL QUALITY, U.S. DEPARTMENT OF DEFENSE

Mr. DEGRAZIA. Thank you, Mr. Chairman.

Good morning. My name is Bruce DeGrazia. I am the Assistant Deputy Under Secretary of Defense for Environmental Quality in the Office of the Secretary of Defense.

I would like to thank you for the opportunity to speak before this committee on the proposed bill Senate 669, the Federal Facilities Clean Water Compliance Act of 1999.

The Department of Defense already complies with the Clean Water Act. Our installations have permits, comply with discharge standards, and submit regular monitoring reports, just like any other entity subject to the Clean Water Act.

In addition, we are subject to enforcement actions and compliance agreements, just like any other entity subject to the Clean Water Act.

The Department has almost 1,900 clean water permits throughout the United States. These permits cover domestic waste water industrial waste water, and storm water. In fiscal year 2000, the Department will invest $215 million in upgrading and replacing waste water treatment infrastructure.

On top of these investments, the Department spends millions of dollars each year, complying with the day-to-day requirements of these permits, operating treatment plants, sampling of water, repairing and maintaining of the plants, and submitting regular monitoring reports to the regulators.

Our compliance record in the area of clean water is excellent. In 1998, the Department received only 46 enforcement actions. Ninety-eight percent of our almost 1,900 permits were in compliance.

Still, we can do better. The military departments are making great strides to reduce enforcement actions to reach a state of full and sustained compliance.

The Department of Defense has supported a limited expansion of the waiver of sovereign immunity that would subject us to penalties for all Clean Water Act violations for which a private person would be liable. Whenever possible and consistent with our other statutory obligations, we should be held to the same standards as other private or public entities.

The proposed bill tracks closely the language used in recent years to amend the Resource Conservation and Recovery Act and the Safe Drinking Water Act to expand the waiver of sovereign immunity. The Administration, including the Department of Defense, has supported both of these efforts.

Although the Administration supports the goals of Senate 669, we are concerned with one of the provisions in the bill. This provision, in rare circumstances, could interfere with our ability to carry out critically important responsibilities in a manner protective of national security.

The proposed bill would eliminate the Presidential exemption provision currently included in Section 313 of the Federal Water Pollution Control Act. This provision is carefully circumscribed, and allows the President to exercise his authority only in the paramount interest of the United States.

Similar provisions are in the Clean Air Act, the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response Compensation and Liability Act. Historically, Presidents have used these provisions infrequently, and the standard required is difficult to meet.

These exemptions are essential tools to ensure that the President has the flexibility he needs to act quickly and decisively to protect the national interests when strict compliance with these environmental laws could jeopardize the overall interests of the United States.

I would like now to turn to the implications of the sovereign immunity waiver in the Comprehensive Environmental Response, Compensation and Liability Act.

The Department of Defense, with the support of the Administration, has consistently opposed efforts to change the waiver of sovereign immunity in CERCLA. Given that strong opposition, the question arises why the Department can support the changes in the waiver proposed in Senate 669.

I would like to take this opportunity to clarify before this committee the differences in our positions, and explain the rationale for opposing the waiver under CERCLA.

The Department of Defense already complies with environmental laws to the same extent as private parties conducing a cleanup under CERCLA. We follow the procedural requirements of CERCLA, and comply with the substantive requirements of State and Federal environmental laws and regulations.

CERCLA exempts all parties from many purely procedural requirements of other State and Federal laws, such as the requirement to obtain permits, so the cleanups can be implemented as quickly as possible.

There already is a waiver of sovereign immunity in CERCLA, which we believe works very well. The current waiver encourages the Department of Defense and States to reach consensus on disputed issues at the negotiating table, rather than resorting to litigation.

Also, CERCLA addresses a different type of situation than the other laws, where the Department supports waivers of sovereign immunity. The Clean Water Act is prospective and seeks to control or limit pollution from occurring. Waiting for approval of a new water permit discharge permit should not impact public health or the environment, because a discharge can not occur until the proven permit is approved.

However, at CERCLA sites, the contamination already at the site can spread during the wait, with the potential for impacting public health and the environment, and increasing costs significantly.

In summary, the Department supports most of the entire bill. However, we believe the bill should be amended to retain the President exemption provision in the present law.

I would be happy to answer any questions from the committee. Thank you.

Senator CHAFEE. Thank you very much, Mr. Secretary.

I must say, I am a little bit confused here. As I understand what you are saying, you are opposed to changes to the Superfund waiver of sovereign immunity.

Mr. DEGRAZIA. That is correct, Senator.

Senator CHAFEE. You state that the Clean Water Act is different from Superfund, and you say Superfund's existing waiver is working well. Now the people who are in charge with enforcing this, namely, the Attorneys General in the various States, do not agree with you.

I have got a copy of a letter here that was signed by 41 State Attorneys General that refutes the argument that DOD makes that changing CERCLA's sovereign immunity provision will result in delays and excessive costs for the Department of Defense. In other words, they argue that that is not so.

I would like to make that letter part of the record.

[The material from the State Attorneys General follows:]

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July 26, 1999

Senator John Warner, Chairman
Senate Armed Services Committee
United States Senate
Washington, D.C. 20510

Senator Carl Levin, Ranking Member
Senate Armed Services Committee
United States Senate
Washington, D.C. 20510

RE: Response to Department of Defense and Department of Energy Report on Clarification of CERCLA Waiver of Sovereign Immunity

Dear Chairman Warner and Senator Levin:

Enclosed, please find a copy of the response of the National Association of Attorneys General (NAAG) to the February 1999 report of the Departments of Defense (DOD) and Energy (DOE) regarding the potential impacts of a proposed amendment to the waiver of Federal sovereign immunity under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

As you know, the States have long supported a waiver of federal sovereign immunity under CERCLA, and were instrumental in achieving a waiver of federal sovereign immunity under the Resource Conservation and Recovery Act in 1992, and more recently under the Safe Drinking Water Act Amendments of 1996. During the previous Congress, your committee, in response to a bi-partisan amendment to S.8, the "Superfund Cleanup Acceleration Act," waiving Federal sovereign immunity under CERCLA, directed DOD and DOE to submit a report addressing "(1) any additional costs that might be incurred...as a result of the proposed amendment; and (2) any impact that the amendment may have on the cleanup of Department of Defense and...Energy sites."

In February of 1999, DOD and DOE submitted their Report to your Committee. The Report predicts negative impacts from passage of the amendment and further finds that the current waiver in CERCLA is working and therefore does not need to be clarified. As the attached response indicates, we disagree with these conclusions, which we believe are not based on a sound understanding of the current law and practice of federal agencies, the well-established record of sensible regulation by states, or reasonable, supportable predictions of potential impacts.

We thank you for considering our views on this subject, and look forward to working with Congress in the future on this matter of critical importance to the States.

Sincerely,

Ken Salazar
Attorney General of Colorado

Bruce M. Botelho
Attorney General of Alaska

Richard Blumenthal
Attorney General of Connecticut

M. Jane Brady
Attorney General of Delaware

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Paul Summers
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Enclosure
Enclosure

cc: Senator John Chafee
Senator Max Baucus
Senator Wayne Allard
Representative Thomas Bliley, Jr.
Representative John Dingell
Representative Bud Shuster
Representative James Oberstar
Representative Sherwood Boehlert

STATE RESPONSE TO
DEPARTMENTS OF DEFENSE AND ENERGY'S
REPORT TO CONGRESS
REGARDING
"POTENTIAL IMPACTS OF THE PROPOSED AMENDMENT TO THE CERCLA WAIVER OF SOVEREIGN IMMUNITY"

INTRODUCTION

On March 26, 1998, the Senate Committee on Environment and Public Works marked up S.8, the "Superfund Cleanup Acceleration Act," which would amend the Comprehensive Environmental Response Compensation and Liability Act (CERCLA). During this mark-up, a bipartisan amendment sponsored by Senators Wayne Allard of Colorado and Ron Wyden of Oregon was approved. This amendment would strengthen the waiver of sovereign immunity currently in CERCLA. Some months later, in its report accompanying the Defense Authorization Act for Fiscal Year 1999, the Senate Armed Services Committee directed the Departments of Defense (DOD) and Energy (DOE) to submit a report addressing "(1) any additional costs that might be incurred...as a result of the proposed amendment; and (2) any impact that the amendment may have on the cleanup of Department of Defense and...Energy sites...."

In February of 1999, DOD and DOE submitted their Report (the Report). The Report concludes that 1) the current waiver is working and therefore does not need to be clarified; 2) the potential unintended consequences of the amendment are unclear and troublesome; 3) the amendment would result in disparate treatment of federal facilities; and 4) the amendment would disrupt cleanup programs and the DOD Nationwide Priority Program. States dispute each of these conclusions, which are based on fundamental misunderstandings of the current state of the law, and unfounded mistrust of states. We address each of the arguments in turn below.

A. The Current Waiver of Sovereign Immunity is **Not** Working

The report repeatedly asserts that clarification of the waiver is not needed because the current waiver is "working to ensure that the Federal agencies are treated the same under CERCLA as private parties...." This is not true. As discussed below, federal agencies are not treated the same as private parties under CERCLA or under state environmental laws. It is because of this double standard that every state association involved in the CERCLA debate in the past several years has called for a clarification of the waiver.[1] As recently as March 26, 1999 the National

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[1]NAAG resolution adopted at summer meeting, July 7-10, 1993; NAAG resolution adopted at summer meeting June 22-26, 1997. See also, National Governor's Association (NGA) Policy on Superfund, revised at winter meeting 1997; Letter from Jim Warner, Association of State Territorial Solid Waste Management Officials (ASTSWMO) president, to United States Representative Diana DeGette supporting HR617, which clarifies waiver of sovereign immunity; ASTSWMO Policy Position on Federal Facilities, approved January 13-14, 1992, Retained

Association of Attorneys General (NAAG) once again passed a resolution calling upon Congress to clarify the CERCLA waiver. (Attachment A)

1. Civil Penalties

In at least one instance, a Federal Circuit Court found that "CERCLA Sec. 120 ... does not provide a clear waiver of sovereign immunity from civil penalties...."[2] The statement at page 4 of the Report, that "IAGs are enforceable by injunctive relief and penalties in Federal Court by states and other citizens," is contrary to the position that DOJ has taken in negotiations with regard to civil penalties under CERCLA. Rather, it is currently the position of the Department of Justice (DOJ) that federal agencies are not subject to civil penalties under CERCLA because Congress has not waived their sovereign immunity for such penalties.[3] To ensure that the federal government is subject to civil penalties to the same extent as private parties, Congress must clarify the waiver in CERCLA to specifically cover punitive as well as coercive fines.[4] Punitive fines include those in § 121(e)(2) for violations of consent decrees, § 106(b) for violations of orders, and § 109 for violations of § 103 notice and destruction of records provisions as well as violations of orders, consent decrees and agreements.

2. Formerly Used Federal Sites

Under most state superfund laws, former owner/operators of contaminated sites are liable for cleanup. The federal government, however, argues that it has not waived sovereign immunity for formerly owned or operated sites. Because of the use of the present tense in § 120(a)(4) of CERCLA, which is the section that deals with state laws, courts have agreed with this argument.[5] Clarification of the waiver of sovereign immunity in CERCLA to include formerly owned and utilized sites is essential to enable states to enforce their laws at Formerly Used Defense Sites (FUDs)[6], Formerly Used Sites Remedial Action Program sites (FUSRAPs)[7], and any other sites

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and Revised by the board of Directors, January 12-13, 1998.

[2] *Maine v. Dept. of Navy*, 973 F.2d 1007 (1st Cir. 1992).

[3] Presentation by Mary Elizabeth Ward, Assistant Chief, Environmental Defense Section, Environment & Natural Resources Division, United States Department of Justice, at 28th Annual Conference on Environmental Law, March 11-14, 1999, Keystone, Colorado.

[4] Coercive penalties are imposed to induce compliance with injunctions or other judicial orders designed to modify behavior prospectively; punitive fines are imposed to punish past violations. For a discussion of the difference, see *Ohio v. DOE,* 503 U.S. 607 (1992).

[5] *Rospatch Jessco Corp. v. Chrysler Corp.*, 829 F. Supp 224 (W.D.Mich. 1993)("This Court believes that the waiver of sovereign immunity in section 9620(a)(4) applies only to facilities currently owned or operated by the United States." *See also, Redland Soccer Club v. Dept. of Army*, 801 F. Supp 1432 (M.D.Pa. 1992); *Crowley Marine Services, Inc. v. Fednav Ltd.*, 915 F. Supp. 218 (E.D. Wash. 1995)("To the extent that Plaintiffs allege the United States is responsible for property not currently owned by the United States, the court finds the reasoning of *Redland Soccer Club, Inc. v. Department of Army [citations deleted]* persuasive. Therefore, the United States can not be held liable for any sites not currently owned or operated by the United States." *But see, Tenaya Associates Ltd. Partnership v. U.S.F.S.,* 1995 WL 433290 (E.D. Cal. 1993) (It is quite clear from the language of § 9620(a)(4) that the waiver expressed therein is meant to include all actions brought against the United States for harms which occur during a time when the United States owns or operates a facility.")

[6] According to the "Defense Environmental Restoration Program 1997 Annual Report to Congress," Department of Defense, March 31, 1998, pp. 74-75, as of September 30, 1997, there were 9,078 properties "identified for potential

where federal agencies owned or operated facilities while disposal activities were taking place, and where federal agencies themselves generated, transported, or arranged for disposal of hazardous substances. FUDS and FUSRAPs alone constitute thousands of sites, many of which pose threats to surrounding communities.[8]

3. External Regulation

Contrary to statements made in the Report,[9] although some facilities have agreed to comply with the law, generally DOD denies that CERCLA effects a waiver of immunity from state actions at all. Rather, DOD argues that § 120(a)(4) merely requires federal agencies to comply with the substantive provisions of state laws as applicable or relevant and appropriate requirements (ARARs).[10] Furthermore, it insists that states cannot enforce their laws until after the remedial action under CERCLA is completed.[11] Although this reading is inconsistent with legal precedents,[12] DOD's general refusal to recognize its responsibility to comply with state environmental laws to the same extent as private parties forces state regulators to either litigate or compromise their authority. Thus, federal agencies are not being held to the same standard as are private parties.

The position that federal agencies should only have to comply with "substantive standards" is unacceptable to the states. Under DOD's reading of the law, it is the federal polluter who decides if the state standard is an ARAR, and whether to waive compliance with the standard pursuant to § 121(d)(4). In addition, it is the federal polluter, not the state regulator, who interprets the standard, and determines how the standard would apply to a site. The polluter, under the federal government's interpretation of the statute, substitutes its own professional judgment for that of the state regulator. Such an interpretation robs the provision of meaning, precludes the benefits of meaningful, independent oversight, and allows federal polluters advantages not enjoyed by private parties.

In footnote 5, the Report states that "[b]ecause some of the procedures of CERCLA section 120(e) at NPL sites, such as the requirements for an IAG and mandatory timetables and deadlines, do not apply at non-NPL Federal Facility sites, this report may not fully reflect activities at such non-NPL sites." Indeed, it does not. Yet, meaningful, external regulation at

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inclusion in the [FUDS] program ... and 2541 properties identified as requiring environmental response actions."

[7] There are 23 FUSRAP sites. DOE *Accelerating Cleanup: Paths to Closure*, June 1998.

[8] ASTSWMO, "Survey of the States on the Status of NOFA [no further action] Review Efforts at Formerly Used Defense Sites," December, 1998.

[9] See page 4 of Report.

[10] See e.g., letter from Chief Counsel for the National Guard Bureau, Mr. James Hise, to Assistant Attorney General Steve Shackman, regarding Duluth Air Force Base State Superfund Site, September 13, 1996: "[c]ompliance with a state CERCLA law's substantive requirements, via the ARARs process, [which includes provisions to waive ARARs], fulfills CERCLA's legal requirements."

[11] *id.*

[12] *Colorado v. United States,* 707 F. Supp 1562 (D. Colo. 1989). *See also, United States v. Colorado,* 990 F.2d 1565 (10th Cir. 1993), in which the Court held that listing on the NPL did not eliminate the state's ability to enforce its hazardous waste law at a DOD site not withstanding the preenforcement review ban in § 113(h).

non-NPL sites is a driving consideration in states' efforts to strengthen the CERCLA waiver. At NPL sites EPA, pursuant to § 120, has ultimate remedy selection authority. At non-NPL sites, federal polluters are generally not subject to oversight by EPA, but unlike DOE[13] and some cooperative DOD Program Managers, DOD largely refuses to acknowledge the regulatory authority of states at non-NPL sites. Instead, DOD insists on "regulating" itself. As DOD states in the Hise letter referenced above, "the Department of Defense has [pursuant to Executive Order 12580] been delegated the cleanup responsibilities under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) at federal defense facilities and cannot give up that authority to any state." In a recent memo, the Air Force's legal counsel makes it clear that retaining control of cleanup decisions is a higher priority than creating productive working relationships with regulators. Among other things, this memo responds to "commonly encountered" questions. One such question is the following: "Good relations with regulators are critical to a successful cleanup program. If getting permits helps create a better overall working relationship with regulators, isn't it better for our program in the long run to just get permits?" To this the authors respond in part as follows:

> No....
>
> Under DERP [Defense Environmental Response Program] and CERCLA, we make ARARs determinations and select response actions, subject to limitations in CERCLA Section 120(e)(4) [Interagency Agreement provisions] and dispute resolution provisions in FFAs[, which only apply at NPL sites]. In a permitting process, the state or local regulators would in essence determine substantive requirements of our response actions.[14]

Clearly private parties do not enjoy the privileges claimed by DOD.

If a state does not pass a law pursuant to a federal program which includes a waiver, for example RCRA or the Clean Water Act (CWA), the law is not enforceable against the federal government unless Congress passes a clear and comprehensive waiver that includes such state laws. Unfortunately, as discussed above, the language currently in § 120(a)(4) has not proven itself to be an effective waiver.[15] A more comprehensive and unequivocal CERCLA waiver is necessary to ensure the enforceability of all state environmental laws that address releases or threatened releases of hazardous substances, pollutants and contaminants.

4. EPA Empowerment

Although distinct from the sovereign immunity issue, the Allard/Wyden amendment also borrows from the FFCA language that would enable EPA to issue orders against sister agencies without first obtaining permission from the DOJ attorneys who, under the unitary executive

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[13] See page 3 of Report.

[14] Memo from AFLSA/JACE to SAF/GCN,SAF/MIQ, dated February 1, 1999.

[15] *But see United States v. Pennsylvania Department of Environmental Resources*, 778 F. Supp. 1328 (M.D. Pa. 1991) ("We conclude that CERCLA section 9620(a)(4) waives the sovereign immunity of the United States from suit under the [Pennsylvania Clean Streams Law and the Solid Waste Management Act].")

theory, represent the polluting agencies as well as EPA. This language is necessary to supersede Executive Order 12580 which provides that the "authority under Sections 104(e)(5)(A) and 106(a) of the Act to seek information, entry, inspection, samples, or response actions from Executive departments and agencies may be exercised only with the concurrence of the Attorney General."[16] Although the new language would not be sufficient to enable EPA to regulate its sister agencies with the same autonomy that states would enjoy, it would at least strengthen EPA's hand to some degree and is therefore desirable and strongly supported by states.

5. Summary

In summary, DOD and DOE's assertion that the waiver in CERCLA is working, and that it currently ensures that federal agencies comply with CERCLA and other environmental laws to the same extent as private parties is simply not true. The report conspicuously omits discussion of the disparities discussed above. The agencies' complaint that passage of the Allard/Wyden amendment would "alter the current balance of relationships," we hope, is true; such alteration is seriously needed to ensure effective, external regulation as envisioned by Congress when it passed § 120 as part of the Superfund Amendments and Reauthorization Act of 1986 (SARA).

B. The Amendment would **Not** Create Confusion and Ambiguity

DOD and DOE imply in their Report that under current law, the respective roles of state and federal regulators, and federal polluters are immutably set and universally understood, and that passage of the Allard/Wyden Amendment would result in chaos because it would allow parties to argue that state laws are directly enforceable at CERCLA sites. Again, these representations are simply untrue.

As numerous Courts have held, CERCLA is not a model of clarity. The interaction between CERCLA and state laws, abbreviated as "RCRA/CERCLA interface," has been fiercely contested, and even litigated. In the clearest statement of the relationship, the 10th Circuit in United States v. Colorado held that

> "§ 9614(a) and 9652(d) expressly contemplate the applicability of other federal and state hazardous waste laws regardless of whether a CERCLA response action is underway. Given that RCRA clearly applies during the closure period of a regulated facility, [citations omitted] the ARAR's provision cannot be the exclusive means of state involvement in the cleanup of a site subject to both RCRA and CERCLA authority."[17]

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[16] Executive Order 12580, § 4(e).
[17] *U.S. v. Colo.* at 1581.

In fact, current interagency agreements (IAGs), to which states are parties, invariably reserve the states' right to pursue their own state remedies in the event that disputes are not resolved to their satisfaction.

Thus, the report oversimplifies and misrepresents the current state of the law. It is not accepted that CERCLA preempts state laws. In fact, as the court in United States v. Colorado points out, it is even more clear that CERCLA does not preempt at federal facilities because, in addition to § 114(a), 42 USC, § 9614(a) and § 302(d), 42 USC, § 9652(d), the Act at § 120(i), 42 USC § 9620(i) expressly provides that "[n]othing in this section shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement of the Solid Waste Disposal Act (including corrective action requirements)." Implementation of the Solid Waste Disposal Act occurs at the state level, with states enforcing their own EPA approved laws in lieu of the federal Act.

The Administration recognized that CERCLA establishes "dual regulation" when it sponsored its CERCLA reauthorization bill in 1994. Federal agencies, congressional staff and state representatives spent a significant amount of time negotiating provisions which would address the duplication inherent in dual regulation without preempting state law, which would be unacceptable to the states and most members of Congress. The result of those negotiations, among other provisions, was essentially the language reflected in the Allard/Wyden amendment. This language was expressly designed to minimize any disruption to the status quo regarding the independent enforcement of state laws at CERCLA sites.

Private parties do not enjoy sovereign immunity. By clarifying the waiver of sovereign immunity, Congress does not amend the underlying substantive law; it does not redefine the relationship between CERCLA and state law. Rather, it eliminates one defense to enforcement, a defense unique to the federal government. Passage of the Amendment will not create any ambiguity and uncertainty that does not already exist at CERCLA NPL sites; it will, however, increase the states' ability to enforce CERCLA and their own state laws.

C. The Amendment Would **Not** Result in Disparate Treatment of Federal Facilities

The Report repeatedly states that if the Allard/Wyden Amendment were passed, it could be interpreted by others as depriving federal facilities of the protections of §113(h)(pre-enforcement review ban), §121(e)(1)(permit exemption) and the ARARs provisions of CERCLA, including waivers, as well as the limitations on recovery of attorneys fees established in Key Tronic Corporation v. United States.[18] It concludes that, since private parties enjoy these protections, such an interpretation would result in the imposition of more stringent requirements on federal facilities. The authors acknowledge that such arguments would likely fail; however, they cite the possibility of such arguments as reasons to oppose the amendment.

The language in the Allard/Wyden amendment could not be interpreted as feared by DOD/DOE. As discussed above, sovereign immunity waivers do not change the underlying substantive

[18] 511 U.S. 809 (1994).

provisions of the law. Nor would the proposed § 120(e)(7), which merely states that "an interagency agreement ...shall not impair or diminish the authority of a State...." Private parties do not enter into interagency agreements for private sites; therefore, they could not have an interagency agreement compromise the independent enforcement authorities of states. Federal facilities, on the other hand, have defended themselves against attempts to enforce state law by pointing to interagency agreements as proof that all required environmental work is being done pursuant to CERCLA and is therefore protected by § 113(h) from pre-enforcement challenges[19]-- even where the interagency agreement describes environmental work that is done to comply with laws other than CERCLA. The amendment would merely abrogate that specific argument so that states would be free to enter into these cooperative agreements (which is in all of the parties' best interest) without worrying that the agreements will be used as a defense in a suit to enforce state law.

The amendment would not upset the scheme currently set forth in CERCLA; it would not repeal §121(d)(4) (ARARS waivers), §121(e)(1) or §113(h), or preclude federal agencies from arguing that those provisions relieve them of responsibility to comply with state and local laws. Nor would it overturn the limitation on recovering attorneys fees set forth in Key Tronic. It would merely clarify the original intent of Congress to hold the federal government to the same standard as private individuals and corporations -- the oft-cited goal of states and Congress as well as the current and previous Administrations.

Furthermore, the amendment subjects federal agencies to environmental laws only "to the same extent as any nongovernmental entity is subject to those provisions of law." And it expressly limits the waiver "to the extent that a State law would apply any standard or requirement to the Federal department, agency, or instrumentality in a manner that is more stringent than the manner in which the standard or requirement would apply to any other person." Therefore, if a party attempted to treat a federal agency disparately, the agency could assert immunity. Courts have held that if there is the slightest ambiguity regarding the scope of a sovereign immunity waiver, they will find that a waiver was not intended.[20]

D. Enactment of the Amendment Would **Not** Delay Cleanups

1. Disruption

DOD/DOE argue on the one hand that a clarified waiver is unnecessary because under the current law they already comply with state law to the same extent as private parties. On the other hand, they claim that if the amendment were passed it would completely disrupt the on-going process. Obviously, if the agencies are currently in compliance and cooperating with state regulators, little or no disruption would be anticipated. If major disruption occurred it would

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[19] *Heart of America Northwest V. Westinghouse Hanford Co.*, 820 F.Supp 1265 (E.D. Wash. 1993).

[20] *Ohio v. DOE,* 503 U.S. 607 (1992). ([A]ny waiver of the National Government's sovereign immunity must be unequivocal, [citations omitted]. Waivers of immunity must be construed strictly in favor of the sovereign; [citations omitted], and not enlarge[d]...beyond what the language requires."

reflect the fact that the facilities were out of compliance, and had not obtained the concurrence of state regulators. In such an event, a short-term adjustment would be preferable to a long-term situation where federal agencies were allowed to continue to practice "self-regulation."

It should be remembered, however, that the amendment would merely put federal facilities in the same position as private parties with regard to compliance with state law. There is no evidence that states have delayed private party or EPA-funded cleanups by requiring adherence to procedural requirements, and there is no motivation for states to delay cleanups at federal facilities. States have historically pushed for faster cleanups at these sites.

In the early 1990's DOD and DOE at first vociferously objected to passage of the Federal Facility Compliance Act (FFCA) which clarified the sovereign immunity waiver in RCRA. Their objections were the same as those expressed in the Report -- that states would assert their RCRA jurisdiction at NPL sites and throw cleanups into a morass of litigation. Seven years later, despite the fact that most federal facilities are also subject to RCRA, passage of the FFCA has not resulted in cleanup delays. Rather, it has engendered many cooperative agreements among states, EPA and federal polluters to address contaminated sites in a responsible and efficient manner, pursuant to appropriate state and federal laws.

2. Prioritization

In the Report, DOD argues that the "S.8 amendment could diminish its lead agency authority and disrupt its relative risk priority schedule." Again, this argument was urged during the FFCA debate; again DOD's fears have proven to be unfounded. The issue of prioritization is one that has been exhaustively debated, most notably in the context of the EPA-chartered federal advisory committee which drafted the Federal Facility Environmental Restoration Dialogue Committee Report (FFERDC). This report, which reflected the views of states, citizens and tribes as well as EPA and polluting federal agencies, recommends a responsible, common-sense, consensus-driven approach for reordering priorities based upon appropriation short-falls. These recommendations were endorsed by EPA and the federal agencies, and reflect an approach palatable to most states and citizens. What is not palatable is DOD's suggestion that it should decide unilaterally whether and when to comply with environmental laws. Such an attitude violates the fundamental principle embraced by Congress that all federal agencies comply to the same extent as private parties.

3. Costs

DOD suggests that passage of the Allard/Wyden amendment would result in significant cost increases to the program. These "projections" are grossly distorted and unfounded. Under separate cover, ASTSWMO will be submitting comments which will address these arguments in greater detail. For purposes of this response, we merely point out that a.) state cleanup programs have proven themselves to be efficient and cost-effective; b.) states have a record of saving

federal facilities money with cost-cutting suggestions;[21] c.) costs cited for obtaining permits would not be in addition to current costs of the program as most of these costs, for example characterization and alternative analysis, would be incurred regardless; and d.) to the extent that a remedy would cost more if the amendment were passed, such cost would not exceed that which would be faced by a private party under identical circumstances.

In reality, states' enforcement capabilities are always limited by Congress' willingness to appropriate funds. For this reason, despite our best efforts, federal facilities will always have an advantage over private parties. If, for example, Congress declines to provide funding for assessed penalties, those penalties will not be paid. States believe, nonetheless, that the federal agencies should be held accountable under environmental laws to the same extent as their private counterparts.

CONCLUSION

The fundamental question of whether Congress should allow states to regulate federal facilities just as they regulate private parties and local governments, or whether Congress should rely on the federal government to police itself, has been the subject of heated debate. As mentioned above, however, the basic premise that the federal government should be held to the same standards as private parties has been widely accepted not only by Congress, but also by this Administration. As Thomas Grumbly, past Assistant Secretary for Environmental Management at the Department of Energy, stated in his December 23, 1994 letter to the New York Times, "[t]he principle of living by the same rules that the government imposes on others is an important stake that has been driven deeply into the ground by both Republicans and Democrats." He went on to state that "your article indicating that I said that 'the agency has decided to ask Congress to amend laws like the ...Federal Facilities Compliance Act...' is not only absolutely false, but has raised serious concerns among state government readers of your paper throughout the country about our credibility." The same could be said of any Administration efforts to block the clarification of the sovereign immunity in waiver CERCLA.

As explained above, a clarification of CERCLA's waiver of sovereign immunity is sorely needed to ensure that the federal government complies with environmental laws to the same extent as private parties. The painfully negotiated and carefully drafted language in the Allard/Wyden amendment accomplishes the goals identified by state officers throughout the country without disrupting the underlying regulatory scheme. DOD's complaints that its program will be disrupted bespeaks an unwillingness to submit to such equal treatment, a position that is inconsistent with the repeated, express intent of Congress, the will of the states and the people, and DOD's own rhetoric.

The Report is rife with speculation and apprehension. Perhaps half of its paragraphs speak of DOD and DOE's "fear" that others "may" "might" or "could" construe or act upon passage of the amendment in ways adverse to the government's interest. Of course, Congress cannot control

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[21] See e.g. Testimony of Gale Norton, Attorney General of the State of Colorado Before the House Subcommittee on Trade, and Hazardous Materials, Commerce Committee, June 16, 1995.

how others will try to interpret its laws, or prevent them from bringing lawsuits. However, where a statute is drafted to clearly reflect Congressional intent so that it is sure to withstand judicial scrutiny, and it is carefully designed to address a serious problem, as this amendment is, it should be passed without speculating about how someone may attempt to read it or use it. It is up to Congress to overcome the unfounded fears and resistance that permeates the federal agencies, and force them to face meaningful external regulation which will hold them accountable under state and federal laws.

Contrary to assertions in the DOD/DOE Report, the current waiver of sovereign immunity in CERCLA is not working. It is sufficiently ambiguous to allow federal agencies to argue that states cannot enforce their environmental laws against federal facilities or recover penalties for violations. The language in the Allard/Wyden amendment would strengthen the waiver, thereby providing equal treatment under the law. It would also strengthen the hand of EPA in its efforts to obtain compliance from its sister agencies. And it would do so without subjecting federal facilities to more stringent standards than are imposed on private parties, and without significantly disrupting the on-going process.

Regardless of how elected officials feel about external regulation of federal polluters, the debate should not be clouded by misunderstandings regarding the current state of the law or the ramifications of the amendment passed by the Environment and Public Works Committee. We hope this response helps to rectify some of these misconceptions.

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ATTACHMENT A

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Adopted

Spring Meeting
March 24-26, 1999
Washington, D.C.

RESOLUTION

CLARIFICATION OF SOVEREIGN IMMUNITY WAIVERS IN FEDERAL ENVIRONMENTAL LAWS

WHEREAS, the Attorneys General of the States have significant responsibilities in implementing and enforcing environmental laws;

WHEREAS, the federal government is the largest generator and disposer of hazardous substances in the country;

WHEREAS, federal agencies should be held to the same standard of environmental compliance as are private entities and individuals;

WHEREAS, protection of the health and welfare and the environment of the citizens of the United States is not possible without ensuring that federal agencies comply with environmental laws;

WHEREAS, the Attorneys General are hampered in their ability to ensure such compliance because of inadequate waivers of sovereign immunity in current environmental laws;

WHEREAS, the Attorneys General have advocated clarifications of these waivers for the past decade;

WHEREAS, clarifications of the waivers of sovereign immunity in the Resource Conservation and Recovery Act and in the Safe Drinking Water Act were passed by Congress in 1992 and 1996 respectively;

CLEAN WATER ACT

WHEREAS, the U.S. Supreme Court decided in *Ohio v. DOE* that the waiver of sovereign immunity in the Clean Water Act did not apply to the imposition of civil penalties for past noncompliance;

WHEREAS, legislation has been introduced in Congress to clarify the waiver in the Clean Water Act to provide a clear and unambiguous waiver of federal sovereign immunity, including immunity for civil penalties for past noncompliance;

CLEAN AIR ACT

WHEREAS, in *United States v. Georgia* and in *California v. United States,* federal district courts held that the Clean Air Act did not waive sovereign immunity from civil penalties for past noncompliance;

WHEREAS, in *United States v. Tennessee Air Pollution Control Board,* the district court distinguished *Ohio v. DOE,* and held that the Clean Air Act waives immunity from such penalties. but the United States appealed the decision to the Sixth Circuit, which has not yet ruled;

CERCLA

WHEREAS, in the report to Congress, "Potential Impacts of the Proposed Amendment to the CERCLA Waiver of Sovereign Immunity", the Departments of Defense and Energy state that "the existing waiver in CERCLA section 120(a) is working to ensure that the Federal agencies are treated the same under CERCLA as private parties and should not be altered";

WHEREAS, to the contrary, at least one federal district court, in *Maine v. Department of Navy,* has held that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) "does not provide an adequately clear waiver of sovereign immunity from civil penalties";

WHEREAS, three federal district courts, (*Rospatch Jessco Corp. v. Chrysler Corp., Redland Soccer Club v. Dept. of Army, and Crowley Marine Services, Inc. v. Fednav Ltd.),* have held that CERCLA does not waive sovereign immunity from the enforcement of state cleanup laws at sites that are no longer owned or operated by federal agencies even where such agencies clearly contaminated these sites;

WHEREAS, federal agencies interpret CERCLA not to waive sovereign immunity from enforcement of state cleanup laws, but only to require them to comply with substantive provisions of such state laws as the regulators determine them to be legally applicable or relevant and appropriate;

WHEREAS, current Executive Order 12580 precludes the Environmental Protection Agency from issuing CERCLA administrative orders against sister federal agencies without express approval from the Department of Justice, thereby severely compromising the regulator's enforcement authority;

WHEREAS, the National Association of Attorneys General in July of 1993 and June of 1997 adopted resolutions urging Congress to clarify the waiver of federal sovereign immunity in CERCLA;

WHEREAS, legislation has been introduced in Congress to satisfactorily address these deficiencies in the current law;

WHEREAS, in their Report to Congress, the Departments of Defense and Energy have stated that the legislation could "subject Federal facilities to requirements and procedures that do not apply to private parties";

WHEREAS, this legislation provides that the waiver of sovereign immunity would not apply to the "extent a State law would apply any standard or requirement to such Federal department, agency, or instrumentality in a manner that is more stringent than such standard or requirement would be applied to any other person";

WHEREAS, as stated in the Report to Congress, "[t]he Department of Defense is concerned that [a clarification of the CERCLA sovereign immunity waiver] could diminish its lead agency authority and disrupt its relative risk priority";

WHEREAS, such lead agency authority and unfettered discretion in allowing the Department's budget to dictate cleanup results in a double standard being applied to Federal agencies as opposed to private parties; and

WHEREAS, a clarified waiver would merely aid States in holding Federal agencies to the same standard of compliance as they do private parties;

NOW, THEREFORE, BE IT RESOLVED THAT THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL:

1. Urges Congress to clarify the Clean Air Act, the Clean Water Act, and CERCLA to provide clear and unambiguous waivers of federal sovereign immunity, including immunity for civil penalties for past noncompliance and other deficiencies in current law as described above.

2. Authorizes its Executive Director and General Counsel to transmit this resolution to the Administration, appropriate Congressional Committees, appropriate federal agencies, and other interested organizations and individuals.

Senator CHAFEE. Now how come there is such a difference of opinion here on the consequences in the change in Superfund's sovereign immunity waiver?

Mr. DEGRAZIA. Well, Mr. Chairman, the Department of Defense believes that the waiver of sovereign immunity currently in CERCLA worked very well because it happens to encourage negotiation, rather than litigation.

We believe that our paramount interest is protecting the health of the people and the public and the environment. If litigation is allowed to occur under a new waiver, under an expanded waiver,

we believe that this could cause delays that could, in fact, impact the health of the public, or damage the environment further. We think that negotiation here, rather than litigation, is really the important way to go.

Now the States may feel differently. The States have particular ideas of how they think a cleanup should proceed. We think that under the current system, the Department of Defense can sit down with the State regulators and work something out. We think that, by and large, that ultimately what we ended up with is something that is amenable to both parties.

Senator CHAFEE. Well, I have trouble understanding how the Federal Government can hold private parties to certain standards. But, I mean, why should not the Federal Government be held to the same standards as private parties? You know, you talk about negotiations and so forth.

Mr. DEGRAZIA. Well, Mr. Chairman, we already must meet the State substances requirements through the ARAR process. We just believe that to impose a State's procedural process on top of the CERCLA scheme that we are already required to follow could result in delay and confusion and possible litigation, and just generally believe it would not contribute to the protection of human health and the environment.

Senator CHAFEE. Well, currently, as I understand it, the States have no legal resource, if DOD does not conform. In other words, States can not seek judicial relief. They can only negotiate, because DOD has the final say.

I must say, if I were in your position, I would have the same position you have got. You have got a pretty strong hand here. But I am not sure that looking at it objectively here, I can totally agree with you.

Mr. Fox, you note in your testimony, you are prepared to work with this committee to strengthen the Clean Water Act. What is your top priority?

Mr. FOX. Given the changes that I have seen around the country in wetlands protection programs, as a result of that recent court case, that would have to be tops on my list.

We are still trying to get good data on this, Mr. Chairman. But as a result of this court case, we are now estimating that probably in excess of 30,000 acres of wetlands have been lost since the court ruling a little bit over a year ago.

Basically, the effect of the court ruling is to take a whole range of activities that would otherwise be permitted out of the program, so that not only do they not get permits, we do not have the mitigation requirements and such.

This is the result of the so-called Tulloch decision. That would have to be tops on my list of priorities. I can give you a list of some others.

Senator CHAFEE. Yes, I must say, the Tulloch decision was a body blow. Where does it stand? Was it appealed, or what happened?

Mr. FOX. This was an appellate court, as is my understanding, if my memory serves me right. The Government has decided at this point not to appeal it. We will be doing additional rulemaking, trying to limit the impact of the court case. But, fundamentally, we

are going to need a statutory change to be able to protect these wetlands.

It has to do with the way the Clean Water Act is structured. It regulates only the discharge of materials to waters of the United States, as opposed to activities that result in impacting waters of the United States

The fundamental problem here is some of these wetlands are being drained without discharging significant amounts of pollutants. So we would have to start approaching this from regulating the activity, like draining wetlands. That is the fundamental challenge.

Senator CHAFEE. Senator Voinovich?

Senator VOINOVICH. In terms of waiver of immunity for CERCLA, obviously, the States Attorneys General have got a difference of opinion with the Department of Defense.

I only can conclude that one of the reasons why the Defense Department is opposed to this is because of the cost involved in cleaning up these facilities throughout the country.

I know I have had some experience recently in terms of the appropriations. Basically, the answer I got when we wanted some money to clean-up the problem we had in our State was, we can not give you the money for that, because we need the money for readiness and for other priorities of the Defense Department.

I think that that is of real concern to all of us. We are all interested in readiness and doing an adequate or more than adequate job in that area. But I think that incumbent with that responsibility is the past activity of the Department of Defense, and the environmental problems that it has created throughout this country.

It seems to me that the Department ought to go forward with a major initiative to do an inventory of all of these sites throughout the country.

I mean, I would be interested in knowing, for example, do you have an inventory of the various defense facilities in this country, and the condition of those facilities, or are we going to continue to have these things popping up like we have in Marion, Ohio?

Mr. DEGRAZIA. Well, Senator, I would like to take that particular question, for the record, if I may.

Senator VOINOVICH. Yes.

Mr. DEGRAZIA. But I would like to respond, if I may, to your comment on cost. Certainly, cost is an issue. But it is not the only issue with regard to the expansion of the waiver of sovereign immunity.

The Department of Defense conducts cleanups by working with the communities to decide what the cleanup remedy should be. The States are part of that dialog. In fact, local communities, including the public, are part of our restoration advisory boards, at the various cleanup sites that the Defense Department has.

What we would like to do is keep everyone working together. We believe that under the current system, this is a way by which everybody gets an opportunity to be heard, and we get to work out something that results in having everyone have a result that is satisfactory.

Senator VOINOVICH. Well, I suspect, and I have been on this committee and I am new to the Senate, but I will bet you that the Chairman of this committee has heard that, the same statement,

made by one business organization after another, saying, if we did not have this, we could work it out, and so on.

The issue is, why should you be different than everyone else? If we are going to grant you the waiver, why should not we do it with the private sector? Why are you different than private sector people that would be sitting at the table, asking for the same thing that you want?

Mr. DEGRAZIA. Senator, unlike private partners, the Department of Defense is required by law to follow the CERCLA process at all sites, regardless of whether they are on the National Priorities List or not. In that regard, we are different, in any event.

But you are right, Senator, in that the Department of Defense has a large number of cleanup sites. We are trying to get them cleaned up as quickly as possible. Also, many of our sites tend to be fairly large sites, and have a great impact on the community.

What we are trying to do is, we are trying to work with a system that enables the community and the public to have more of a voice. We simply believe that if we were treated in such a way that we would have to deal with and have to comply with a number of the procedural requirements, that we would not be able to serve the public the way that we feel that we are doing.

Senator VOINOVICH. I would like to ask another question to Mr. deGrazia and to Mr. Fox. To your knowledge, do we have an inventory of compliance with the Clean Water Act at Federal facilities in this country?

Mr. DEGRAZIA. Mr. Senator, every year, the Defense Department facilities send to the Environmental Security Department in the Department of Defense a list and rendition of all of the compliance actions that have been brought against the Department of the Defense. So the short answer to your question is, absolutely, yes.

Mr. FOX. I would confirm that, Senator.

Senator VOINOVICH. This is a list of the ones where actions have been brought, or an overall list of all of the facilities and the status of their compliance?

Mr. DEGRAZIA. It is both.

Mr. FOX. Right.

Senator VOINOVICH. The latter?

Mr. DEGRAZIA. All of the above.

Senator VOINOVICH. So if I asked for a list of all of the Federal facilities that are under your jurisdiction in terms of their compliance with the Clean Water Act, you would have that information available?

Mr. DEGRAZIA. Yes, sir, and we would be happy to provide that to you.

Senator VOINOVICH. OK, thank you.

Senator CHAFEE. Are you all set?

Senator VOINOVICH. Yes.

Senator CHAFEE. All right, thank you very much, gentlemen.

Mr. DEGRAZIA. Thank you, Mr. Chairman.

Senator CHAFEE. Now the next panel has the Honorable Helen Walker, Mr. Doug Harrison, Mr. Steve Fleischli, Ms. Sweeney, and Ms. Lee. If you could all come forward.

We will take you in the order that we called them off, starting with the Honorable Helen Walker, County Judge, Victoria County, Texas. You can proceed, please.

STATEMENT OF HON. HELEN WALKER, COUNTY JUDGE, VICTORIA COUNTY, TEXAS, ON BEHALF OF THE TEXAS ASSOCIATION OF COUNTIES AND THE TEXAS COUNTIES STORM WATER COALITION

Judge WALKER. Thank you, Mr. Chairman and members of this distinguished committee for the opportunity to speak to you today.

I am Helen Walker, Victoria County, Texas Judge and cochair of the Texas Counties Storm Water Coalition, made up of 115 counties united due to our concern about our ability to perform under the EPA's proposed Storm Water Phase II rules. You each have written materials which supplement this statement.

Although we are from Texas, this is not a Texas problem. Counties in most of your States and others will be similarly impacted. Phase II would regulate two types of storm water discharges, those from small municipal storm sewer systems and those from constructions activities that disturb one acre or more of land.

Most of Texas' 160,000 miles of county roads, have ditches with grass on either side. EPA's own strategies use vegetated areas to improve water quality; yet, they choose to regulate such ditches. Those should be exempt, we feel.

The construction activities have been broadly define to include linear construction; in other words, roads. If one of my commissioners needs to blade about a third of a mile of county road, gravel, or caliche, introducing no unnatural materials, he has got to get an EPA permit. On 160,000 miles of roads, gentlemen, that is a lot of permits.

To make matters worse, the county has become both the regulated and the regulators. In Texas and many other States, we lack the authority to permit and to assess an environmental fee for that permit, so the entire burden of cost falls on the counties. We have no choice except the ad valorem tax system, adding to the burdens of our local taxpayers.

San Antonio, Texas, a Phase I city, states that their cost was between $7 and $10 per capita, per year. That is with the infrastructure already in place to do the program. Texas counties and those of many of your States have no such infrastructure, so it is logical that the cost would be even higher.

Both the MS4 requirements and the one acre threshold for construction are proposed without adequate data to show that they would, in fact, enhance water quality.

Senator Hutchison has filed legislation which address many of our concerns. Senate bill 1706 would exclude from consideration as regulated MS4s the thousands of miles of vegetated county road ditches, which already serve as a natural treatment system, and should not be covered by this Act.

Second, to eliminate permitting of construction sites less than five acres, in the Phase I regulation, EPA itself chose the five acre threshold for permitting.

Third, it would exclude routine road maintenance from being considered as a construction activity.

Fourth, it would protect the county from liability for not complying with regulations that require actions exceeding the authority vested in counties under State law. Many counties across the Nation do not have ordinance making or enforcement authority. Our choice would be, do we break State law or Federal law in trying to do our duties?

Fifth, it would enhance the ability of counties to rely upon another governmental entity's implementation of MS4 measures. By protecting us from liability, if the implementing entity fails to comply with Phase II, we are not trying to make no one responsible for that compliance. We are saying one or the other should be responsible.

If we contract with a builder to build a building for the county, we receive a performance bond. Therefore, if one entity contracts with another and pays for that privilege, we feel that we should be, in effect, bonded. The entity who takes on that responsibility should be the responsible party.

As a local elected official, I know better than most that clean water is a precious commodity. I am not only responsible to the 80,000-plus people in my county, but I am also telling you that my kids and my grandkids live in my county. I am going to make sure that they have clean water for the future.

Clean water is the key to a successful community. That is why Congress, in its wisdom, passed the Clean Water Act. But we believe that the proposed rule goes well beyond the Act and does not truly target improving water quality. Otherwise, this would not be based strictly on population thresholds.

We know that there are areas of the country that have severe water problems. Some of those are in Texas. We feel that they should be singled out.

Senator Hutchison's bill takes a logical alternative to correcting the broad brush approach. We believe the legislation, if passed, will help local governments throughout the nation, and that this is an opportunity for Congress to make clear to EPA the intent of the Clean Water Act, and to further the goal of cleaning up our water.

Texas counties are committed to clean water. Senator Hutchison's proposed bill serves that goal faithfully, addressing water quality concerns, while acknowledging the local legal and practical realities of county government.

Again, thank you for this opportunity. I will be happy to answer questions.

Senator CHAFEE. Thank you very much, Ms. Walker.

Senator Wyden has joined us. Do you have a statement you would like to make at this time?

OPENING STATEMENT OF HON. RON WYDEN, U.S. SENATOR FROM THE STATE OF OREGON

Senator WYDEN. Well, Mr. Chairman, I think it would be the height of bad manners to just come on in now and interrupt this. We have been all tied up this morning on the assisted suicide issue, which Rhode Island physicians have been very involved in. I would ask that my statement be part of the record.

As you know, Senator Burns and I have introduced a bill that has managed to bring together the Environmental Defense Fund

and the Farm Bureau, which is a coalition that you do no see every single day in Washington, D.C. We are very grateful to have their support.

You and your staff have been just extraordinarily kind and gracious to us in putting together this legislation, as has Senator Baucus'. I will have some questions when we get done. But I just want to let you know, I feel badly about my manners this morning.

Senator CHAFEE. No, no, no, do not worry.

Senator WYDEN. I am anxious to hear the witnesses.

Senator CHAFEE. OK, that is fine. Well, thank you very much.

Now Mr. Doug Harrison, General Manager and Secretary, from the Fresco Metropolitan Flood Control District. You may proceed, Mr. Harrison.

STATEMENT OF DOUG HARRISON, GENERAL MANAGER AND SECRETARY, FRESNO METROPOLITAN FLOOD CONTROL DISTRICT, ON BEHALF OF THE NATIONAL ASSOCIATION OF FLOOD AND STORM WATER MANAGEMENT AGENCIES

Mr. HARRISON. Thank you, Mr. Chairman and members of the committee. It is my pleasure to appear on behalf of the National Association of Flood and Storm Water Management Agencies. A brief profile of our association is included in our written statement. My remarks will supplement that statement, and hopefully provide some insights.

First, I would like to comment on Senate bill 188. NAFSMA supports the use of SRF on water quality related capital projects. We would just note that as the list of authorized uses of SRF increases, the amount of money needs to increase, as well.

Second, as to Senate bill 669, NAFSMA supports the obligation of Federal agencies to comply with the same obligations imposed on local government. Even now, though, various agencies are exempting themselves from the storm water quality programs and from participating in their fair share of the local cost of the BMPs that we are required to implement.

I would like to focus the balance of my comments on Senator Hutchison's bill, and would note that we appreciate the Senator's efforts to bring the storm water problem, as we know it, to the Congress.

The bill addresses three proposals: one, to limit copermittee liability, which we support; second, it proposes protections against Federal mandates, which exceed State law authority. Again, NAFSMA has worked to support that concept, as well.

Third, the bill proposes exclusion of certain specific facilities and activities. Among those is routine road maintenance. Again, NAFSMA agrees that the regulations need to be clarified to exempt nonimpact maintenance activity.

The bill also proposes to exclude from the Storm Water Program construction sites less than five acres and communities that are served by vegetated drainage ditches. These latter two exclusions are difficult, because they can not be excluded simply on a presumption of no impact.

NAFSMA has consistently urged recognition that storm water is a unique form of Clean Water Act discharge. If it is to be regulated, the regulations must be based on sound science, technological, and

financial feasibility, and on watershed principles that recognize that storm water is a nonpoint source and not a controllable point source.

In the case of construction sites, NAFSMA has proposed that sites less than five acres only be regulated if there is an important resource water at risk.

In the case of the vegetated ditches, we believe that the issue is not the type of conveyance, but rather the quality of the water going through the conveyance, and the location of the discharge.

A community of 50,000 served by ditches can have as serious an impact as a community served by pipelines. It simply does not appear possible to us to create equitable categorical exclusions. This tends to reinforce our belief that the effort to regulate a nonpoint source such a storm water through the point source based NPDES program is unworkable for all agencies, Phase I and Phase II, alike.

While local agencies have received significant help in the recent Ninth Circuit Court decision, there is still much in the character of storm water that warrants a new approach for all communities. The science is not yet sound. We still can not define the relationships between episodic discharges and impacts on the ecosystem. The science still can not demonstrate the value of most of our BMPs, with perhaps the exception of detention.

Technological feasibility is still in doubt. Many of our BMPs simply relocate pollutants to new locations. Many of our urban runoff pollution sources are beyond the control of local agencies; for example, air quality, and the design of automobiles.

Financial impacts are still beyond the capability of our local agencies. Our storm water program compliance efforts, based on BMPs alone, will be in the $100 to $200 billion range.

Also, there is a continuing avalanche of new regulations, related to storm water, stacked on top of the existing, flawed stormwater regulatory framework; efforts to use the Federal storm water regulations to intervene in local land use decisions; the pending TMDL regulations that would impose numeric discharge limits; a pending anti-degradation rule that would mandate stormwater discharge reductions in growing communities for storm water; pending effluent limitations on construction sites; and just flat out inconsistent regulations—for example, the sale and use regulations on pesticides being more liberal than the discharge standards for the same constituent, if it comes out the end of the storm drain.

In summary, Mr. Chairman, absent a fundamental change in direction, municipalities will spend hundreds of billions of dollars on storm water programs, without any reasonable hope of achieving the objective, as it is currently stated. All communities generate runoff. All runoff is dirty; some more so than others. But rather than creating categorical exclusions from a poorly structured mandate, NAFSMA continues to believe that the better course is the fundamental repair of the storm water portions of the Clean Water Act and its programs.

We thank you for the opportunity to bring our comments to you, Mr. Chairman and members of the committee.

Senator CHAFEE. Well, thank you very much. I see we are joined by Senator Hutchison. Senator, if you would like to have a state-

ment, you could do it now, or you could wait, and we could accommodate you a little later, if you would like.

Senator HUTCHISON. Are they making their opening statements at this time, or are you into questions?

Senator CHAFEE. No, we are not up to the questions, yet.

Senator HUTCHISON. OK.

Senator CHAFEE. Ms. Walker has spoken.

Senator HUTCHISON. I hope you gave her a great welcome, my constituent.

Senator CHAFEE. Well, she has referred to your legislation. If you would like to make some comments now, or what would you prefer?

Senator HUTCHISON. We can finish with the panel.

Senator CHAFEE. Fine.

Senator HUTCHISON. Then I would love to, thank you.

Senator CHAFEE. Fine. All right, Mr. Steve Fleischli, Executive Director, Santa Monica BayKeeper.

STATEMENT OF STEVE FLEISCHLI, EXECUTIVE DIRECTOR, SANTA MONICA BAYKEEPER, ON BEHALF OF THE CLEAN WATER NETWORK

Mr. FLEISCHLI. Good morning, Mr. Chairman and members of the committee. My name is Steve Fleischli. I am the Executive Director of the Santa Monica BayKeeper, here today on behalf of the Clean Water Network, a coalition of environmental groups from across the country concerned with water quality issues.

The bulk of my comments will focus on S. 1706. But just briefly, I will go through the other two bills. On S. 669, with regard to its waiver of sovereign immunity, we support the concept very much. We do think Federal facilities need to be held accountable to the same standards, and we would encourage that.

There are some minor changes that we would like to see in the bill to ensure that there is clarification that it is not only a waiver for administrative penalties, but also for civil penalties.

Also, we would like to see a waiver with regard to enforcement of settlement agreements or consent decrees that may have been entered into, pursuant to the Clean Water Act, down the road. I think there is some debate about whether or not those are contractual agreements that would need waivers or not.

With regard to the S. 188 SRF bill, we applaud Senator Wyden's efforts to try to find a solution to the problem of water conservation. It is certainly a serious issue on the West Coast, as is water quality.

We would like to see additional funding. We would like to see, also, some sort of categorization, so that we know that water quality is not being undermined for this other lofty goal. I am sure we can work together on that.

With respect to the remaining issue, S. 1706, we have heard a lot about the improvements that have been in clean water over the last 27 years, and everyone seems to agree that there is still a long way to go.

In the environmental community, many of us believe that many of our waterways are dying a death of 1,000 cuts, and something must be done. This is through control of storm water.

Many areas of the Clean Water Act clearly state that the goal of the Act is to achieve water quality standards and to have fishable, swimmable waters across the country. In the end, the Act's goal is to eliminate the discharge of pollution to waters of the United States.

Unfortunately, the Clean Water Act's stormwater provisions, as written, leave much room for debate, and thus allow municipalities to escape responsibility for many violations of water quality standards.

What makes most sense for the Federal Government right now is to move forward and set the overall goals in a very strong way to protect beneficial uses; to establish meaningful numeric limits on storm water controls. Part of this will be achieved through the TMDL program, but we need to go further in terms of clarifying language in the Clean Water Act.

What is being proposed today with S. 1706, however, falls very short of this goal. Among other things, this bill proposes to eliminate the requirement that construction sites less than five acres be subject to storm water permits.

This comes despite the fact that EPA has recognized that construction sites can pollute waterways with sediments, phosphorous, nitrogen, nutrients from fertilizers, pesticides, petroleum products, construction chemicals, and solid wastes. EPA has long recognized that, over a short period of time, construction sites can contribute more sediment to streams than was previously deposited over several decades.

Indeed, short term loadings may have shock loading effects on receiving water, such as low dissolved oxygen. It is also acknowledged that erosion rates from construction sites are much greater than from almost any other land use.

Evidence suggests that in some areas of the country, there may be as many as five times as many construction sites under five acres as there are over five acres. Based on this evidence, it makes little sense for Congress to now back off this requirement to regulate sites greater than one acre, and in essence, reduce the effectiveness of the 1987 amendments.

The proposed exemption under 1706 on vegetated road ditches creates a similar situation. This type of blanket exemption fails to recognize that even vegetated drainage ways can convey storm water pollution, much the same as ordinary streams or channelized storm drain conveyance systems that run along the surface.

Moreover, many drainage ways are operated in connection with a roadway or street. Arguably, this proposal could allow the exemption of miles upon miles of polluted storm water conveyance systems.

In addition, municipalities—and I know this, in my area, I am sure this will come up—will try to argue that modified river beds in our area would fall under the exemption language that is being proposed today.

Finally, this bill also attempts to exempt from storm water requirements liability for municipalities which contribute to violations of water quality standards. This bill does so under the guise of one co-permittee's reliance upon another co-permittee or another entity's willingness to act.

This is entirely unworkable, as it simply creates a scenario where one municipality will point the finger at another, saying that something needs to be done. Then the other municipality will simply point back and say, well, you were supposed to do it; no you were supposed to do it.

This is what we see in Los Angeles, constantly. We have 85 cities under one permit. Every time, they point their fingers back and forth, saying, "It is not my responsibility. It is the county's responsibility, or it is the city's responsibility." Therefore, we oppose that.

With regard to the issue that was raised by Ms. Walker, that they need this sort of protection, it seems like it is an issue that can be dealt with locally, through contracts, through indemnification provisions in the contract. It does not need to be dealt with at the Federal level.

In closing, concerned citizens have worked for years for strong action to address numerous sources of pollution that contribute to impairment of our waterways. For every person who says that storm water is an impossible problem to conquer, there is another person finding a way to get there.

Technological development in this area is flourishing right now. There are simple technologies such as silt fences and sand bags which, when properly used, will help reduce sediment loading from construction sites.

Numerous different types of other catch basin inserts are being developed. Storm drain treatment systems are being installed. New methods of landscape architecture are being designed. Scientists around the country have demonstrated the effectiveness of these technological developments, despite what has been said this morning, in reducing contamination of the nation's waterways.

The Federal Government should move forward to set standards to which everyone should be held accountable. There should be baseline standards.

The waters of the United States belong to everyone and to no one. As such, they must be protected in a way that does not allow any individual, municipality, or corporation to jeopardize that well-being.

Thank you.

Senator CHAFEE. All right, fine, thank you very much.

Ms. Sweeney, Assistant Attorney General for the State of Maryland.

Ms. SWEENEY. Thank you, Senator.

Senator CHAFEE. You may proceed.

STATEMENT OF MARY ROSEWIN SWEENEY, ASSISTANT ATTORNEY GENERAL FOR THE STATE OF MARYLAND, ON BEHALF OF ATTORNEY GENERAL J. JOSEPH CURRAN, JR. AND THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Ms. SWEENEY. Mr. Chairman and members of the committee, I am Rosewin Sweeney, an Assistant Attorney General from the State of Maryland. I am here on behalf of Attorney General Joe Curran, a member of the National Association of Attorneys General, to testify in support of S. 669, a bill amending the Federal Water Pollution Control Act, to ensure compliance by Federal facilities with pollution control requirements.

I would like to thank Senator Coverdell and the bill's cosponsors for their attention to this issue. I would also applaud Senator Voinovich's comments here today in support of the waiver of sovereign immunity.

The waiver of sovereign immunity has been a key issue for the National Association of Attorneys General for many years. The Attorneys General adopted a resolution in support of similar legislation in 1993. I have provided a copy of that resolution with my testimony.

The Attorneys General support for this bill is based essentially on the same reasons that they had in 1993 to support the similar legislation.

First, there is a need for clear authority for Federal, State, and local officials, with regard to the enforcement of water pollution control laws at Federal facilities.

Second, Federal agencies and facilities should be subject to the same service charges and enforcement provisions as are applied to State and local governments and to private industry. They should be held equally accountable for their noncompliance with water pollution laws.

Third, the passage of this legislation will enhance water pollution control practices at Federal facilities in the future by requiring those facilities to fully comply with Federal, State, and local water pollution requirements.

This bill makes the waiver of sovereign immunity in the Clear Water Act essentially the same as the waivers presently contained in RCRA and in the Safe Drinking Water Act.

The language of S. 669 differs in minor but appropriate respects from the waiver language contained in RCRA and the Safe Drinking Water Act, with only one difference in language that the committee may wish to correct.

That was mentioned by Mr. Fleischli in his remarks. That is to change paragraph (a)(3)(D) of the bill to make it clear that immunity is waived for judicially imposed penalties and fines, as well as for those imposed in administrative proceedings.

This change would make the Clean Water Act's waiver language more consistent with RCRA and the Safe Drinking Water Act, and would avoid any confusion over whether the waiver of immunity for penalties or fines includes penalties and fines imposed by State courts.

The State of Maryland's experience has been that the waiver of sovereign immunity in RCRA and the Safe Drinking Water Act resulted in an improvement in Federal compliance under those laws in recent years. I believe Mr. Fox's testimony indicated that Maryland's experience is typical among the States.

Federal compliance with the Clean Water Act has not seen a comparable improvement. By way of example, Federal laboratories, research facilities, hospitals, and military installations in Maryland have been repeatedly responsible for a variety of violations of water pollution laws, including overflows from waste water treatment plants; unauthorized discharges of pollutants; thermal pollution; and the discharge of sediments from many construction sites.

In preparation for my testimony, I asked my client for some examples of recent violations from Federal facilities within Maryland.

In the space of 2 hours, they were able to provide me with a dozen examples of violations at Federal facilities, occurring recently, within the last 2 years to 18 months. Seven of those examples were at Department of Defense installations.

Because of sovereign immunity, Federal facilities have been able to drag their feet when responding to the State's complaints about water pollution problems.

In our experience, the managers of some of these facilities are reluctant to enter into agreements with the State with regard to corrective action, not because of the terms proposed by the State were unreasonable, but because the managers were fearful of how such agreements would reflect on their performance at those facilities—their management skills.

If the Clean Water Act is amended as proposed, Federal facilities will be more likely to identify and promptly correct pollution problems. There is simply no reason for Federal facilities to continue to be held to a lower standard than private industry or State and local government.

I appreciate the opportunity to appear before you today.

Senator CHAFEE. Thank you very much, Ms. Sweeney.

Now, Ms. Lee.

STATEMENT OF JAN LEE, EXECUTIVE DIRECTOR, OREGON WATER RESOURCES CONGRESS

Ms. LEE. Thank you, Mr. Chairman, committee members.

I am Jan Lee, Executive Director of the Oregon Water Resources Congress, which represents local governments who provide non-potable water, water mainly for agriculture water supply.

We strongly support Senate bill 188 as an additional tool for enhancing water quality. Our testimony will reflect that we have over 13,000 miles of Oregon streams on the 303(d) list of EPA's TMDL listings for water limited bodies.

Most of those streams are listed because of cold water fish habitat. That, combined with the Endangered Species Act, provides a nexus that will consistently require Oregon water users and water suppliers to have additional tools for water quality enhancement.

There has been a considerable success so far with the non-point source plan, of course, with $96 billion dedicated to those resolutions. Certainly, no commitment to that level has been made at this point on non-point sources. Currently, the SRF funding programs in the State of Oregon do not allow for those kinds of projects to be funded from EPA's moneys for the revolving funds.

The State program provides infrastructure potential loans for waste water facilities. But for irrigation canals within the irrigation districts, which are also local governments, there is no such source. Yet, there is potential of saving up to half of the water which is now lost, due to evapotransportation and conveyance in those systems.

There have been projects done around the State where water has been saved in these conveyances for a public investment of some amount of the project cost. That amount of water has been returned in stream.

In Deschutes County in the Deschutes Basin of Central Oregon, for example, two miles of canal were lined, returning a significant

amount of water, half of the water saved to the stream to benefit water quality in Oregon's fishery.

Our State program would be able to incorporate irrigation district and local governments into the SRF funding programs if you made the change defined in Senate bill 188.

We also agree with EPA that there should be a nexus to the public benefit for water quality. We would be glad to work with EPA and the committee and staff to find language to develop that.

For example, if water impaired bodies were to be enhanced by a project under this fund, perhaps that should be a requirement of this particular bill.

Currently, there is over $250 million in projects for waste water facilities in Oregon. We did have an irrigation district who attempted to secure a loan under that program. Even with an innovative project that would match some waste water facilities with the district, the waiting list is over two decades. So it is not viable that something will occur there in the near future, without additional funding.

Oregon's law, since 1987, has allowed for in stream water rights the protection of water in stream for fishery and other purposes. We also, in the same year, in 1987, encouraged the legislature and the legislature enacted the Water Conservation Incentive Program.

That means, if you are to save or conserve water, then 25 percent or more of that conserved water must go in stream. Perhaps more than that can go in stream, if that is negotiated between the conserver and the State and the other parties. That has been a successful way for us to get some more water in stream to protect fishery.

There is a very considerable potential in Oregon for these kind of projects in canal systems. Many of my association's members are irrigation districts. They are committed to making these kind of changes, but they do need some public investment to assist in that area.

This is a loan program, not a grant program. We are just asking for the opportunity to take advantage of the loan program, itself. I think if you were to pass this law, we would receive the required flexibility to make the program workable for more.

I would like to thank the other interests who have worked with us on this bill, with Senator Wyden, the Environmental Defense Fund, and the American Farm Bureau Federation.

The Oregon Farm Bureau, Mr. Pete Test, asked me to reflect their comments as matching their own, today. We also work very close with Zach Willey, who is the Northwest Environmental Defense Fund representative.

Our three groups have worked together on projects. Specifically, in the Deschutes, with EDF, we have worked on putting water in stream on a number of projects.

Thank you for the opportunity.

Senator CHAFEE. Well, thank you very much.

Ms. Sweeney, you spoke about the sovereign immunity. In its testimony previously to this panel, the Department of Defense witness talked about the waiver of sovereign immunity at Superfund sites.

I know this is an issue important to the Attorneys General of the United States, although we did not ask you to address that particularly, today.

What is the position of the National Association of Attorneys General on Superfund immunity? Is there any information you would like to transmit to us now?

Ms. SWEENEY. It is my belief, Senator Chafee, that the association is very much in favor of there being comparable waivers of sovereign immunity in all environmental statutes, regardless of the media that is dealt with. That would certainly apply in the Superfund context.

Senator CHAFEE. Well, I suspect that is also true, and you are right on that.

Mr. Harrison, you indicated that 75 percent of the Phase II communities do not have public educational outreach, and 46 percent currently do not spend money on any of the storm water activities. What should they be doing, these communities?

Mr. HARRISON. Senator, that information came from a survey that we took of communities that were going to be impacted by the pending Phase II rule, to see where they were in terms of their current storm water programming, and to try to measure the impact of the Phase II rule on those communities.

The question of what Phase II communities should be doing, ultimately will depend on the final definition of what a Phase II community is: Assuming that it is urbanizing areas, as is currently proposed in the draft regulation, we believe that there are a variety of management practices that have been demonstrated in the Phase I communities that will be applicable in the Phase II communities, as well.

Our problem is that we do not have the ability to prove that those BMPs produce a particular amount of improvement in the quality of the receiving water. What we can demonstrate is that we can remove pollutants from many of the sources in the urban community, through those management practices.

Senator CHAFEE. Now are you for categorical exemption for the vegetative drainage ditches, or should it be based on water quality?

Mr. HARRISON. Well, we believe that water quality is ultimately the test that has to be applied relative to the regulation, and the practices that are to be applied. Categorical exemptions run the risk of having unequal impacts on local communities, in terms of regulatory requirements, and produce an array of related problems.

Senator CHAFEE. Ms. Walker, I have some trouble with the five acre exemption you are talking about. That does not give you problems?

Judge WALKER. Well, basically, I think that our goal is drop it back to the one acre.

Probably our biggest problem with that is in the linear construction or in roads, because the basic county road of approximately a third of a mile is acre. So anytime my commissioner wants to go out and blade a road, or realign a drainage ditch of a very, very small area, we have hit the one acre limit.

So that was the basis of our feelings on that. That one acre of linear construction, since there is no—although EPA has indicated that they are willing to exclude routine road maintenance, as the

rule is written, as is my understanding, there is no exclusion of routine road maintenance.

So the expense to a county or any other entity in the one acre on routine road maintenance is extremely onerous to local governments.

Senator CHAFEE. Senator Voinovich?

Senator VOINOVICH. Yes, Ms. Walker, the proposed rule—one of the other responsibilities of this committee is that we are concerned about road building in this country, and the 1309 provisions of the Act in terms of speeding things up, and at the same time being consistent with good environment.

Do you have any comment on what the proposed rule would have in regard to road construction and maintenance in your area?

Judge WALKER. It is my belief that we would not be against road building being a construction activity. Our main problem is with routine road maintenance.

Senator VOINOVICH. In other words, you believe that it would really interfere with your ability to do your routine maintenance?

Judge WALKER. Yes, sir, it would, because many of the roads we are talking about are gravel roads, caliche roads, or simply some other kind of dirt road.

Disturbing that dirt, that dirt is going into the ditches and going into the water, as it is, every day, any time it rains. So we have a problem. Those types of roads require more maintenance than the paved roads.

So it is an extremely onerous burden to local governments to have to get a permit every time we do that routine road maintenance. It would cost a great deal, and cost a lot of time lost to the counties or the local entities.

Senator VOINOVICH. Thank you.

Ms. Lee, I am the sponsor of the reauthorization of the State revolving loan fund. Congress appropriates about $1 billion, $300 million under that program today for waste water infrastructure, while the need is $200 to $300 billion.

One of my concerns is that if we expand SRF eligibility, that will intrude upon our ability to do the basic job that the SRF is supposed to do.

Do you have any idea of how much money you would spend in your State if we expanded the areas that that money could be used?

Ms. LEE. Senator, I believe that the record of these projects that have gone forward would show we are using around $1 million a year, which would be less than 10 percent of the current SRF funding resources in Oregon.

Right now, the Clean Drinking Water Act fund, under SRF, just received a letter from EPA indicating that there is $10.5 million that would have to be returned to EPA if not used for projects. Project sponsors are being looked for, but that would be money that could be moved to the Waste Water Program for these instances.

I think what we would like to see in Oregon would be a demonstration portion of the SRF fund, perhaps a 5 percent, or some constructed amount, looked at as a repository for these kinds of projects, where there would be specific State and Federal benefits for water quality. We will work with the State to try to do that,

if this legislation can key in that these projects definitely can be financed under the structure.

Senator VOINOVICH. Thank you.

Mr. Harrison, you cited Cincinnati, Ohio, and the refusal of the National Institute of Occupational Safety and Health to pay the local storm water fee. Would you like to elaborate on that a bit?

Mr. HARRISON. Certainly, Senator. This was a case where the Federal agency took the position that they were not obligated to participate in the cost of the local Storm Water Program, even though their storm water from their site was discharged into the municipal system.

All landowners were sharing in an apportioning of that cost, through an annual charge. The Federal Government took the position they were not subject to that charge. They took it to court and succeeded, at least in the early rounds of that litigation.

That case is not an uncommon experience. We have had others. I recently received a letter on the new Federal Courthouse in our city, indicating that they would really like to cooperate with us, but they did not have to. So it is a problem that we are seeing throughout the country.

Senator VOINOVICH. So it comes about as a result of the immunity aspect of this. If we waive that, that problem would not exist?

Mr. HARRISON. Well, we certainly think there would be a dramatic improvement in the attentiveness of the Federal agencies to work with local communities on these compliance efforts.

Senator VOINOVICH. Thank you.

Thank you, Mr. Chairman.

Senator CHAFEE. Senator Hutchison?

OPENING STATEMENT OF HON. KAY BAILEY HUTCHISON, U.S. SENATOR FROM THE STATE OF TEXAS

Senator HUTCHISON. Thank you, Mr. Chairman.

First, let me thank you for holding a prompt hearing on my bill, as well as the others. You kept your word, and I appreciate that very much. I think most of my bill has been discussed. certainly, I am sure that Judge Walker addressed the major issues.

I am very pleased that the EPA has said exempting routine road maintenance would be acceptable, although they do not think it is necessary. I would like to ask them to consider, and will do that in a formal way, putting that exemption in the final rule.

Because I believe that would go a long way toward alleviating the pain that many of the counties are feeling, for exactly the reason that Judge Walker mentioned. That is, their biggest concern is not being able to do routine maintenance on a third of a mile road that would make them have to go through a permitting process. So I would hope that that would be looked at in the final rule.

But the other issues that I would just like to point out for the record are that the regulation has really focused on these counties, based on population and proximity to urban areas. I would hope that the EPA would look at water quality, and look at areas where there are problems. Because you are looking at counties that are 50,000 people, 25,000 people, that do not have budgets like urban counties do.

An outside consulting firm that was asked to look at the cost to these small counties by the National Association of Counties estimated that a town or county with a population of 50,000 estimated that they would be looking at an initial cost of $216,000 a year, and then an annual cost of $300,000, as the regulation is now perceived.

Many of counties think it would be much more than that. But that is a big hit for a very small community. I think, once again, routine road maintenance exemptions would alleviate much of that.

Second, I wanted to mention a study done by the University of Texas Center for Research in Water Resources, the Bureau of Engineering Research, that concluded that a grassy swell was found to be effective for reducing runoff volumes and pollutant concentrations, and that they provide a low maintenance alternative to structural controls, where sufficient land is available and the topography is appropriate.

This is one of the reasons that we are trying to exempt the ground vegetated road ditches, because that has been cited as an example of one way to help the environmental run-off.

Then the other issue that I just wanted to deal with, and I would like to ask Judge Walker about this, and that is my bill protects counties from liability for failing to comply with measures requiring actions exceeding their authority under State law.

Under the EPA's proposal, they are mandating regulations that some counties do not have the power to address, because they do not have ordinance making power, such as in Texas. I am told that other States that have counties without ordinance making power include Oklahoma, Wyoming, Illinois, Ohio, Pennsylvania, and New York.

I would just like to ask Judge Walker if she believes that counties in Texas would have the ability to adhere to these rules without ordinance making power.

Judge WALKER. Thank you, Senator. No, I really do not. As I stated before, we do not have that authority. In Texas, counties can only do those things that they are allowed to do, or are empowered to do, by the State legislature.

So, as I have noted, we would be put in the position of either breaking Federal law or breaking State law. We do not have any mechanisms to permit or to assess a fee. The cities normally would assess an environmental fee, put it on the water utility bills, whatever, across the board to gain the funds with which to do these programs.

Counties in Texas and in many other States do not have that capability. So we would have to revert to the ad valorem tax base. We, as every other State in the Union, have taxpayers who are overburdened already, and who have a real problem with that.

As we talked before, we would simply ask that on several of these issues, they be based on water quality, rather than just on population. We are willing to accept our responsibility for clean water in our communities.

To do those things, we just do not want them based strictly on, if you have got 50,000 people, you must have a problem. You must be creating a problem. Let us talk about quality.

Then we would certainly be willing to work with the Senator, and with the EPA and the committee, in finding a way to resolve those differences.

Senator HUTCHISON. Thank you. That was another issue, the inability to assess fees to cover these costs, which means that the only avenue a county in Texas has is the ad valorem tax. You are not able to levy a sales tax. You can not assess a fee.

So your only avenue is to add to property taxes. Of course, that is the major funding source for schools. So property tax owners are pretty heavily hit. Since it is the only thing that counties can do, that would be a pretty tough burden.

Judge WALKER. That is entirely correct.

Senator HUTCHISON. Just one last question, do you have an estimation of what it would cost counties to implement Phase II?

Judge WALKER. There have been estimates all the way from very low estimates, up to—we use the San Antonio Phase I, it cost them, each year, between $7 and $10 per capita, per year.

We think that would be even greater for counties who do not have the infrastructure in place to do those. San Antonio already had an environmental and a permitting department. So they have that structure in place. We feel that the cost would be even larger than that.

With the increased problem that in many small counties, there simply is nobody who is qualified to be an environmental engineer, or to carry out those duties. So they would actually be looking at contracting with someone from a larger town, in many cases, 150 to 200 miles away, to enable them to even put the program into place.

Senator HUTCHISON. Let me just mention, too, that in many of the rural counties that might be next to an urban area, and this is very common in Texas, where you would have contiguous rural counties to an urban area, they actually do farm and raise livestock in these counties. An added ad valorem tax is very harmful to farmers and people trying to raise livestock.

So I just think if we could address some of the major issues, which is that the vegetated ditches do work, and they are shown to work in many instances. If the exemption for routine road maintenance would be an area that we could explore, that would help a lot.

Then, of course, the exemption from liability where a county just does not have the legal authority to do what the Federal Government is requiring, I think those three things should be fairly noncontroversial. I would like to try to work on some of the other areas, as well. But I think we do have a nugget where we could give relief here.

Then, of course, I would say the last thing is judging the area, rather than an arbitrary population or proximity test; but actually see if there is a need for these kinds of permitting requirements, based on the actual potential for pollution.

So thank you very much.

Senator CHAFEE. Thank you, Senator.

Mr. Fleischli, how do you react to—I know there are a series of exemptions that are suggested here, five acres, under five acres,

and so forth. But the routine road maintenance activity, that seems like a sensible provision. What do you say to that?

Mr. FLEISCHLI. When I hear the term "routine road maintenance," it does not insult me. I think it is how you define that and what you look at.

If you are talking about grading even a quarter mile of roadway, you can have serious environmental impacts from that. I do not know if I would call that road maintenance. Road maintenance, in my mind, means going out there and mowing, things like that.

So if it is going to be the grading or clearing, where you are going to have sediment exposure of more than an acre, I think it needs to be dealt with.

This is not rocket science. I was driving down from Baltimore, yesterday. I saw about a third of an acre site, probably, very small. They had silt fences around it; not a big deal.

In terms of this issue of having to get so many different permits for this, and every little site is going to have to deal with this, in California we have a system under the construction permit, where we have a State-wide general permit.

When you do a construction project, you fill out a one-page piece of paper that says you are going to comply with that permit. That lays out what your restrictions are, and what you need to do.

So it is not like someone is going to have to go through this huge, lengthy process to deal with this for every site. They are going to have to simply send in these forms saying that they intend to comply. I do not know how Texas does it. But they certainly could look into those types of ideas.

There are a couple of other issues I would like to respond to, if you would not mind, Mr. Chair. On the issue of funding, in the Clean Water Act right now, under some of the enforcement provisions, there is language that says if the local entities do not or have certain restrictions within their States on how they can raise funds for certain projects, the State then can be held liable for the violations of the Act.

That is designed mostly in the sewage context, I think. But it is designed to ensure that that participation occurs, and that the State does not hold up people at the local level from doing what needs to be done.

Senator CHAFEE. OK. Senator Wyden?

Senator WYDEN. Thank you, Mr. Chairman, and again, my apologies.

Senator CHAFEE. There is no need.

Senator WYDEN. There has been a kind of frenzy back and forth with the Assisted Suicide Hearing.

Mr. Chairman, what Senator Burns and I were trying to do was deal with this situation where millions of gallons of water are being wasted, every single day.

It is in the West, obviously. But it is not just in the West. It is all over the country.

You know, what you have is these old irrigation systems. They are sort of like ditches. We lose a tremendous amount of water due to evaporation or leakage, and then we do not have the water for the fish. We do not have the water for the crops. We do not have

the water, either, for environmental issues or agricultural kind of purposes.

We have got one district in Oregon, the Tumalo District, where about 70 percent of the water is diverted, where it just does not go for any valuable use such as fish or the crops or the like. Frankly, we are seeing this all over the West.

So with the help of your staff and Senator Baucus', we were able to bring together the Environmental Defense Fund and the Farm Bureau behind this legislation.

We really appreciate your having Jan Lee, particularly, here today. I am sorry, with the Assisted Suicide Hearing which, as you know, is so controversial at home, that I could not be here for the entire presentation.

But I wonder if you could give us an example of a water quality problem in Oregon that could be solved by a conservation project that puts saved water into a stream, but could not be addressed by any of the existing uses under today's State revolving fund program?

Ms. LEE. Yes, thank you, Senator Wyden, Mr. Chairman.

The North Unit Irrigation District actually piped 1,200 feet, or about two miles of canal, and was able to return over a CFS or equitable to 350 acres of water use, one acre foot per acre, to the stream to benefit the fishery.

These are the kinds of projects that we see as those that would both benefit water quality, return water to the stream, and also help farmers in reducing their costs and providing maximized benefits.

Senator WYDEN. That is the irrigation project over, I think, in Madras?

Ms. LEE. Yes, Senator Wyden, in Madras in Central Oregon in the Deschutes Basin.

Senator WYDEN. Very good. Now one of the issues that we have been dealing with is that the Environmental Protection Agency has said, to some extent, that it is possible to use State revolving funds for water conservation projects.

But what we have found, when we have talked to people, not just in Oregon, but around the country, is that there are all kinds of bureaucratic hoops and obstacles in terms of trying to actually use these State revolving funds.

Have you all found that there have been bureaucratic obstacles in terms of trying to use the money for these kinds of projects?

Ms. LEE. Yes, Senator, we have. When Senate Bill 2189, the predecessor to this bill, was introduced, we talked with the SRF folks in Oregon. We actually had an irrigation district submit an application to see if the process would work.

What we found is that application is in a long cue of applications, and it would be 27 years before it would rise to the top of the stack, so to speak, to be possibly funded.

At the same time, our drinking water at SRF has $10.5 million which has gone unused, and could be moved over to waste water, and used for these types of projects.

So we think that if this legislation were passed, we could get the State to amend its rules for the SRF programs to look at these kind

of projects, perhaps setting aside some amount as a demonstration project, if nothing else.

Senator WYDEN. Twenty-seven years is a long time, even by Federal Government standards.

[Laughter.]

Senator WYDEN. You know, just know that we will work with you. I mean, our motivation, and I think what was the motivation for the Environmental Defense Fund and the Farm Bureau on this is that conservation projects are not clearly identified as an eligible use of the State resolving funds. So the States really have had difficulty trying to figure out exactly how these projects would fit.

So I think the value of this to clearly make this a priority, and to say, we are going to bring environmental folks and farmers and irrigators together and say, when we have a chance to save millions of gallons of water—I mean, millions of gallons of water is being wasted every single day—let us stop putting projects in the queue for 27 years, and go out and try to have it right now.

So you have been really helpful. The environmental community has been very helpful, and took note of some of the suggestions. We are anxious to work with you on this. With the leadership of Chairman Chafee and Senator Baucus, I think we can get there.

I just thank you for your thoughtfulness, Mr. Chairman.

Senator CHAFEE. Thank you very much, Senator. I want to thank all the panel. You have come a long ways, and we appreciate that, from Texas and Oregon, and different places. So we are very, very grateful to you.

That concludes the hearing. It has been very helpful.

[Whereupon, at 11:45 a.m., the committee was adjourned, to reconvene at the call of the Chair.]

[Additional statements submitted for the record follow:]

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

Good morning, Mr. Chairman. Thank you for holding this hearing today on Clean Water Act issues.

I am particularly interested in hearing more from the Environmental Protection Agency about its proposed stormwater rule to control polluted runoff. I have very serious concerns about Senator Hutchison's proposal which, in my view, would weaken that long awaited for rule.

The problem of polluted runoff, and the viruses and toxic pollutants it often carries into our rivers, lakes, streams and oceans, is the last and most difficult clean water problem we face.

Today, nearly 40 percent of our waters do not meet the goals of the Clean Water Act of keeping our waters fishable and swimmable.

The leading reason for our failure to meet those goals is polluted runoff.

While polluted runoff affects nearly every corner of the country, the Los Angeles area suffers some of the worst runoff problems in the nation.

According to the Southern California Coastal Water Research Project, the amount of polluted runoff flowing from L.A. area rivers and streams to the ocean has dramatically increased since the Clean Water Act was passed in 1972.

They estimate that in that year about 65 billion gallons of runoff made it into the ocean. Today, they estimate that the amount has skyrocketed to nearly a half a trillion gallons.

When it comes to polluted runoff, we are looking at a clean water problem that's getting worse, not better. Polluted runoff clouds our waters and threatens our fisheries by smothering the eggs of fish.

It also closes beaches.

This past summer, state officials closed practically all of Huntington Beach waters in Orange County, California, in the face of high bacteria counts.

Further investigation showed that the water contained human viruses capable of making swimmers sick. These viruses are believed to be so hearty that they can remain capable of causing infection for weeks, and may disproportionately affect children who are more vulnerable to such infections.

The pollution that was responsible for the Huntington Beach closures was ultimately traced to polluted runoff coming from, in part, a nearby construction site.

The Huntington Beach incident isn't an isolated one.

A 1995 study by the University of Southern California of 14,000 beach goers in Santa Monica and Malibu found that one of every twenty-five people who swam within 400 yards of storm drains came down with gastrointestinal viruses or infections.

The Centers for Disease Control estimates that nationwide up to 900,000 cases of illnesses occur each year due to the pathogens in drinking and recreational waters.

Mr. Chairman, approximately 60 million people visit the 50 miles of shoreline in Santa Monica area each year.

If we don't control polluted runoff, we will either have to turn those people away, or tell them that they and their children swim at their own risk.

That's the wrong answer.

The right answer, it seems to me, is to adopt strong regulations to control this pollution.

I am concerned, however, that EPA's proposal to control this pollution may be weak in certain respects.

In particular, I am interested in hearing from EPA why its proposal fails to provide that stormwater permits contain actual numerical pollution limits in the permits. Wouldn't the inclusion of numerical limits bring certainty to implementing the stormwater program?

In addition, I am seriously concerned that Senator Hutchison's proposal would further take the rule in the wrong direction.

For example, the proposal would exempt construction activities affecting five or less acres from the stormwater program.

This would reinstate a reading of the Clean Water Act that was invalidated by the Ninth Circuit in 1991. It would also effectively exempt most construction activity—a leading cause of polluted runoff- from the stormwater rule.

In my view, Mr. Chairman, we need to toughen EPA's proposed rule to combat the problem of polluted runoff, not weaken it.

Thank you.

STATEMENT OF HON. CONRAD BURNS, U.S. SENATOR FROM THE STATE OF MONTANA

S. 188—WATER CONSERVATION AND QUALITY INCENTIVES ACT BEFORE THE SENATE ENVIRONMENTAL AND PUBLIC WORKS COMMITTEE

Mr. Chairman and members of the committee, thank you for your consideration of S. 188, the Water Conservation and Quality Incentives Act, which I introduced with my colleague from Oregon, Senator Wyden. This bill is designed to improve water supplies, water habitats, and create incentives to conserve our nation's water resources.

In the West, whiskey is for drinking and water is for fighting! It is the most precious commodity to those of us who live out West. We are concerned not only with water quality but also water quantity and those who control the water.

Not surprisingly the largest group of water users is farmers and ranchers. These people, who provide the American people with the safest and most abundant food supply in the world, need water to grow their crops and feed their livestock.

A good deal of water out West is provided through irrigation systems which divert waters from reservoirs, rivers, and aquifers. However, substantial quantities of water diverted for irrigation do not make it to the fields or ranches. A large portion of the water is lost due to evaporation or seepage within the canals and ditches in which the water flows. Although the water is not lost, since it seeps into the soil and assists in the overall soil moisture, it is not immediately available to the producer. Water supplied through irrigation systems could be increased through improved water conservation measures. With improved water delivery, less water would be wasted, resulting in more water remaining in our rivers, streams, and aquifers.

Irrigation water is an economic factor in today's market. In most irrigation districts, farmers and ranchers pay for any water released to them. Any displacement or reduction of this water does not help that producer's financial bottom line. Today

when food and meat prices are low and markets are questionable, it is important that we provide tools to these producers to make sure that they have every opportunity to stay in business.

States encourage water conservation measures by recognizing the rights of those who conserve water. Irrigators and other water users who conserve water are afforded rights to use the water they conserve. Water supply problems are also addressed in some states by financial incentives which encourage water users to implement cost effective water conservation measures consistent with state law.

However, states are not the only ones who can create such incentives. The Federal Government can play a key role by creating incentives such as greater flexibility to the states to loan Clean Water state revolving funds for water conservation projects. Also, allowing water users to apply a portion of the water they save for further use encourages more water conservation. This is the approach that my good colleague, Senator Wyden, and I have chosen in this bill.

Our bill will authorize the states to make Clean Water state revolving fund (SRF) loans to irrigation districts. They can construct pipelines and develop additional water conservation measures. Any water conservation project would be structured to allow participating users to receive a share of the water saved through conservation or more efficient use, in accordance with state law. This type of approach would create a win/win situation with more water available for both the conservers and for river and stream flows. By using state SRF program funds, the loan money would be repaid over time to become available to fund other water conservation measures to solve water quality problems in other areas.

A key underlying feature of the legislation, is that the water saved under this bill will not only help the producer in water and cost savings, but will also save many rivers and streams in the West. For example, water conserved could be made available to increase the volume of water flowing through our rivers and streams thereby facilitating fish habitat and migration routes. This is especially critical out West. Two fish species, the Northwest salmon and bull trout listed as endangered would greatly be helped.

To illustrate how this bill would work, I'd like to share a real life problem in Racetrack Creek located in western Montana. It is a tributary of the Clark Fork River within an EPA Superfund site due to historic damages from copper mining and milling. Racetrack Creek is a spawning ground for bull trout (a listed threatened species) and it has had problems in maintaining its water levels since the turn of the century. A local watershed management group, the Upper Clark Fork Steering Committee, is working on this problem with a wide cross section of representation from the Clark Fork River basin. The Upper Clark Fork Steering Committee and the Montana Department of Fish, Wildlife, and Parks (FWP) are working to line Morrison Ditch which diverts water for irrigation in the local area. A portion of the water right "salvaged" by lining Morrison Ditch, under this bill, would be leased by Montana's FWP from the ditch association to benefit that fishery.

I would like to point out that this bill has broad support by Senators on both sides of the aisle, as well as from the Farm Bureau and the Environmental Defense Fund. Such a diverse range of interests in support of this bill begs favorable consideration of this bill. It:

1. addresses the problem of adequate water supplies for our agricultural producers;
2. addresses the problem from nonpoint source runoff;
3. creates new incentives for water users to conserve water;
4. provides the states greater flexibility to make loans from their Clean Water state revolving fund for water conservation projects; and
5. does not increase the budget since it recovers money provided for water conservation projects through loan repayments to state revolving loan funds.

I would like to thank Senator Wyden for his work on this measure and am pleased to work with him on this issue of great importance. If there are any suggested changes, we are open to them.

I thank you Mr. Chairmen, for the Committee's consideration of this bill.

STATEMENT OF HON. PAUL D. COVERDELL, U.S. SENATOR FROM THE STATE OF GEORGIA

I would like to thank the distinguished Chairman for holding a hearing on this important piece of legislation, the Federal Facilities Clean Water Compliance Act; my distinguished colleagues, Senators Breaux, DeWine, Grams, Chafee and Voinovich, for cosponsoring this bill, and the witnesses that have come today to help illustrate the need for this legislation. This legislation will guarantee that the Fed-

eral Government is held to the same full range of enforcement mechanisms available under the Clean Water Act as private entities, states, and localities. Each Federal department, agency and instrumentality will to be subject to and comply with all Federal, State, and local requirements with respect to the control and abatement of water pollution and management in the same manner and extent as any person is subject to such requirements, including the payment of reasonable service charges.

It has been over 26 years since the enactment of the Clean Water Act. This Act has been an effective tool in improving the quality of our nation's rivers, lakes, and streams. Over that period of time, however, states have not had the ability to impose certain fines and penalties against Federal agencies for violations of the Clean Water Act. This is a double standard that should not be continued.

In 1972, Congress included provisions on Federal facility compliance with our nation's water pollution laws in section 313 of the Clean Water Act. Section 313 called for Federal facilities to comply with all Federal, state, and local water pollution requirements, However, in 1992, the U.S. Supreme Court ruled in U.S. Department of Energy v. Ohio, that States could not impose certain fines and penalties against Federal agencies for violations of the Clean Water Act and the Resource Conservation Recovery Act (RCRA). Because of this decision, He Federal Facilities Compliance Act (H.R. 2194) was enacted to clarify that Congress intended to waive sovereign immunity for agencies in violation of RCRA. Federal agencies in violation of the RCRA are now subject to State levied fines and penalties. However, this legislation did not address the Supreme Court's decision with regard to the Clean Water Act. The Federal Facilities Clean Water Compliance Act of 1998 makes it unequivocally clear that the Federal Government waives its claim to sovereign immunity in the Clean Water Act.

The Federal Government ovens hundreds of thousands of buildings, located on millions of acres of land, none of which have to abide by the same standards as a private entity does under the Clean Water Act. This legislation simply ensures that the Federal Government lives by the same rules it imposes on everyone else.

I would like to thank Senator Chafee, Senator Breaux, Senator DeWine, Senator Voinovich and Senator Grams for cosponsoring this important legislation, and look forward to working with them and my other colleagues in the U.S. Senate on its speedy consideration.

STATEMENT OF J. CHARLES FOX, ASSISTANT ADMINISTRATOR FOR WATER, U.S. ENVIRONMENTAL PROTECTION AGENCY

Introduction

Good morning Mr. Chairman and members of the Committee. I am Chuck Fox, Assistant Administrator for Water at the U.S. Environmental Protection Agency (EPA). I am pleased to be able to talk with you this morning about the Nation's clean water program and several bills that would amend the Clean Water Act.

Next Monday, October 18, is the 27th anniversary of the enactment of the Clean Water Act (CWA). Twenty-seven years ago, the Potomac River was too dirty to swim in, Lake Erie was dying, and the Cuyahoga River was so polluted it burst into flames. Many rivers and beaches were little more than open sewers.

Enactment of the CWA, under the leadership of this Committee, dramatically improved the health of rivers, lakes and coastal waters. It stopped billions of pounds of pollution from fouling the water and doubled the number of waterways safe for fishing and swimming. Today, many rivers, lakes, and coasts are thriving centers of healthy communities.

In my testimony today, I want to describe the work EPA is doing to carry the clean water program forward to the next century and comment on several bills to amend the CWA that are before the Committee today.

CLEAN WATER FOR THE FUTURE—THE CLEAN WATER ACTION PLAN

Despite tremendous progress, almost 40 percent of the Nation's waterways assessed by States still do not meet water quality goals. Pollution from factories and sewage treatment plants, soil erosion, and wetland losses have been dramatically reduced. But runoff from all sources, including that from city streets as well as from farmland and rural areas continues to degrade the environment and puts drinking water at risk. Fish in many waters still contain dangerous levels of mercury, polychlorinated biphenyls (PCBs), and other toxic contaminants. Beach closings are increasingly common.

Several years ago, after taking a hard look at the serious water pollution problems around the country, the Administration concluded that implementation of the

existing programs was not stopping stop serious new water pollution threats to public health, living resources, and the Nation's waterways, particularly from polluted runoff. We concluded that clean water programs lacked the strength, resources, and framework to finish the job of restoring rivers, lakes, and coastal areas.

In response to this concern, President Clinton and Vice President Gore announced, in February 1998, a major new effort to speed the restoration of the Nation's waterways. The Clean Water Action Plan builds on the solid foundation of the Clean Water Act and describes over 100 actions—based on existing statutory authority—to strengthen efforts to restore and protect water resources.

The Action Plan is built around four key tools to achieve clean water goals.

- A Watershed Approach The Action Plan envisions a new, collaborative effort by Federal, State, Tribal, and local governments; the public; and the private sector to restore and sustain the health of the over 2,000 watersheds in the country. The watershed approach is the key to setting priorities and taking action to clean up rivers, lakes, and coastal waters.
- Strong Federal and State Standards The Action Plan calls for Federal, State, and Tribal agencies to revise standards where needed and make programs more effective. Strong standards are key to protecting public health, preventing polluted runoff, and ensuring accountability.
- Natural Resource Stewardship Most of the land in the Nation's watersheds is cropland, pasture, rangeland, or forests, and most of the water that ends up in rivers, lakes, and coastal waters falls on these lands first. Clean water depends on the conservation and stewardship of these natural resources. This Action Plan calls on Federal natural resource agencies to support State and local watershed restoration and protection.
- Informed Citizens and Officials Clear, accurate, and timely information is the foundation of a sound water quality program. Informed citizens and officials make better decisions about their watersheds. The Action Plan calls on Federal agencies to improve the information available to the public, governments, and others about the health of their watersheds and the safety of their beaches, drinking water, and fish.

We are making good progress in implementing the over 100 specific actions called for in the Clean Water Action Plan. Congress has provided vital support to this work by appropriating critical funding, including almost doubling funding for State grants to reduce polluted runoff to the level of $200 million per year.

Some key accomplishments include unified assessments of watershed health by States, initiation of several hundred Watershed Restoration Action Strategies, a new BEACH action plan, a response plan for pollution threats to coastal waters, new efforts to support development of riparian buffers, and a contaminated sediment strategy. Many other critical projects are underway at EPA, the Department of Agriculture, the Department of Interior, the National Oceanic and Atmospheric Administration, and other agencies, as well as in States, local governments, and the private sector.

The Clean Water Action Plan is a sound blueprint that takes clean water programs into the next century. I ask, Mr. Chairman, that a copy of the first annual report of progress to implement the Clean Water Action Plan be included as part of my testimony in the hearing record.

PROPOSED CLEAN WATER ACT AMENDMENTS

Before commenting on the several bills before the Committee today, I want to take a moment to look at the bigger picture of CWA reauthorization.

As you know, Mr. Chairman, key funding authorization and several clean water SRF provisions of the CWA expired in 1994. At that time, the Administration saw this as an opportunity to release a detailed proposal for comprehensive amendments to strengthen the CWA.

Last week, I testified before this Committee on bills to amend the Clean Water State Revolving Loan Fund program and to address the challenging problem of controlling overflows from combined storm and sanitary sewers. Today, I am testifying on bills related to storm water permits, expanded use of the State Revolving Loan Funds, and expanded enforcement at Federal facilities. I gather that additional legislative hearings are likely to be scheduled.

Although the Administration is pleased to provide comments on the specific provisions of each of these narrowly focused bills, I want to encourage the Committee to consider the need to strengthen the CWA in several critical areas that are not now the subject of proposed legislation. For example, the Administration's proposal in 1994 called for strengthening statutory authority to reduce polluted runoff, better protect wetlands, reduce toxic pollution, and improve compliance and enforcement.

The clean water program has evolved over the past 5 years, but most of the recommendations we made in 1994 are still appropriate today.

In addition, there is a relatively recent development that poses a serious threat to water quality in coastal and other waters that should be addressed quickly. Congress should act to close a regulatory gap that threatens the loss of tens of thousands of acres of wetlands to drainage and excavation each year. This gap—which resulted from a court decision invalidating the U.S. Environmental Protection Agency and Army Corps of Engineers "Tulloch" rule requiring permits for drainage and channelization that affect our Nation's wetland resources—promises to defeat wetlands protection efforts unless Congress takes prompt action.

The Administration is ready to work with this Committee and Congress to strengthen the CWA.

Let me now comment on the pending bills to amend the CWA, including bills to clarify the storm water program, strengthen enforcement against Federal facilities, and expand eligibility of the clean water State Revolving Loan Funds.

Legislation to Revise Storm Water Programs

The Committee asked that I comment on a bill—S. 1706—to make amendments to the storm water pollution control authority of the CWA. The Administration has significant concerns with several provisions of the bill and is opposed to the bill as drafted.

In 1987, Congress added subsection 402(p) to the Clean Water Act to requiring EPA to develop a phased regulatory program to control contaminated discharges associated with storm water runoff. Congress was responding to scientific evidence that storm water discharges contributed to the impairment of one-third of all assessed surface waters in the United States.

In the first phase of the program, the most significant sources of storm water were to be controlled. EPA finalized Phase I storm water regulations in November 1990. Those regulations generally required CWA permits for storm water discharges associated with certain industrial activities, medium and large municipalities, and large construction sites. Permits generally give sources flexibility to implement various management practices to reduce pollution levels in storm water. Today, the existing Phase I storm water program is resulting in significant improvement of surface water quality in the United States.

In response to statutory requirements to identify a second tier of storm water sources, EPA developed, and is now working to finalize, Phase II storm water regulations. As we developed the Phase II regulation, EPA solicited input from stakeholders by convening a Federal advisory committee which met 14 times. EPA developed 3 pre-proposal public drafts and received 40–50 sets of comments. EPA received additional input by convening a SBREFA Panel to solicit input from potentially regulated small entities.

On January 9, 1998 EPA proposed Phase II storm water regulations that address storm water discharges associated with small municipal storm sewer systems and small construction sites. Small municipal storm sewer systems include incorporated places, counties, and other places under the jurisdiction of a governmental entity that are located in an urbanized area but not included in Phase I. Small construction sites are defined as sites that disturb between 1 acre and 5 acres of land. The proposed rule, however, included several waivers of the permit requirement for these construction sites (e.g. construction that occurs in low rainfall periods).

The Phase II regulations are modeled after the Phase I rule and would establish a cost-effective, flexible approach for reducing environmental harm by storm water. The management measures in Phase II reflect Phase I management measures which are well-accepted, common-sense practices that many local governments and other stakeholders agree are cost-effective and appropriate for controlling water pollution.

Core storm water management measures include:

- public education and outreach;
- public participation and involvement;
- illegal discharge detection and elimination;
- control of construction site runoff;
- post construction runoff control; and??
- pollution prevention and good housekeeping.

The proposed rule also conditionally excludes discharges from those industrial facilities that have "no exposure" to storm water, thereby significantly reducing the current Phase I requirements. the rule proposed to extend from August 7, 2001 until 3 years and 90 days from publication the deadline by which certain industrial facilities owned by small municipalities must obtain CWA permit coverage.

EPA received 550 comments on the proposal, held 6 public hearings to gather additional information from stakeholders and adopted many recommendations in the final rule. The Phase II rule is scheduled to be promulgated on October 29, 1999.

The legislation before the Committee today would amend section 402(p) of the CWA in ways that would both seriously weaken existing storm water pollution controls and dramatically restrict the water pollution controls to be promulgated in Phase II regulations.

The proposed Phase II regulations provide that a municipality holding a storm water permit may rely on another local government to carry out specific permit conditions without establishing a co-permittee relationship. EPA believes that this provision gives local governments flexibility in addressing storm water problems and will reduce overlap of program effort. In this case, the permittee, however, is still responsible for assuring that permit conditions are met and is subject to enforcement action if a permit condition is violated.

The bill would create a new subparagraph 402(p)(3)(B)(iv) to provide that when a permittee relies on a second governmental entity to carry out storm water related actions, the permittee is not subject to enforcement action if the second governmental entity does not do its job. Because the bill would not require the second governmental entity to be officially part of the permit (i.e. not a "co-permittee") it too would not be subject to enforcement action. The bill would create cases where no one is legally responsible for storm water pollution. Without an effective enforcement response, compliance with storm water permits, and control of storm water pollution, will be significantly reduced.

EPA recognizes that various municipal governments around the country have different authorities and capacities and that in many areas, implementing storm water permit requirements will require a cooperative effort among diverse local agencies. EPA expects that when a Phase II storm water permit provides for implementation by several parties, that permit will specifically assign duties to "limited co-permittees" that are liable for permit compliance. Where a Phase II storm water permit makes clear assignments, EPA will, in the event of noncompliance, direct enforcement to the party that has failed to do its job. In this respect, the Phase II storm water program is unlike other permit situations (e.g. situations where one party has substantial operational control over another party and both entities are jointly liable "co-permittees.") The waiver of liability in the draft bill for any "co-permittee" is inappropriately broad.

Proposed section 402(p)(7)(A) would waive the requirement that a local government obtain a permit for storm water discharges from an "above-ground vegetated drainage ditch or a drainage way owned or operated in conjunction with a road or street under the jurisdiction of a local government." This provision would remove any "above ground" storm water conveyance (as opposed to an underground conveyance) from the Phase II permit program, thereby substantially narrowing the scope of the program and reducing water quality benefits.

Above ground conveyances convey storm water pollutants to waters of the United States as do underground storm sewers, albeit sometimes at a slower or more controlled rate. Many of the management measures provided for in the Phase II rule are equally appropriate for above ground and underground conveyances (e.g. control of dumping of non-storm water pollution into storm sewers).

Proposed section 402(p)(7)(B)(i) would exempt any storm water discharges associated with construction activity of less than 5 acres from the permit requirements of the CWA. These construction activities are a significant source of water pollution and meeting clean water goals will be virtually impossible without the effective control of the substantial sediment and nutrient pollutants form these sources.

Under current Phase I storm water rules, storm water discharges from construction activity disturbing more than five acres is subject to regulation under the clean water permit program as "storm water associated with industrial activity."

In addition, Phase I rules provide that a discharge from activity disturbing less than five acres is subject to regulation if (1) the activity it is part of a larger common plan of development or sale or (2) the permitting authority designates discharges from the activity as a contributor to a violation of a water quality standard or a significant contributor of pollutants. The bill could be interpreted to overturn these existing water pollution controls.

Authority to require permits for small construction sites that are part of a larger plan of development or sale is important because construction typically occurs in stages. Regardless of the individual lot size in a development of many small lots, the cumulative water quality impact of this work can be equivalent to a larger development.

Case-by-case designation of small construction sites as needing a clean water permit is an essential tool for protecting sensitive water bodies. In addition, States and

EPA need designation authority to assure that measures to restore impaired waters identified in a "total maximum daily load " analysis are effectively implemented.

The bill would, of course, also overturn the provision of the soon to be promulgated Phase II rule requiring small construction sites to have a clean water permit. There is extensive evidence of the serious water pollution problems caused by small construction sources. We believe the Phase II rule strikes the right balance in responding to this problem by requiring permits for these sources but also waiving the permit requirements where the likelihood of pollution is shown to be limited (e.g. in low rainfall periods).

Proposed section 402(p)(7)(B)(ii) would codify previous EPA statements about interpretation of "land disturbance" as it relates to storm water associated with construction activity. EPA distinguishes road construction (initial disturbance) from road maintenance (subsequent regrading and leveling) to exclude the latter. EPA does not oppose this section, but believes it is unnecessary.

Legislation to Strengthen Federal Facilities Enforcement

In April 1992, the Supreme Court ruled in Department of Energy v. Ohio that the United States has not waived its immunity from liability for civil "punitive" penalties for violations of the CWA. As a result, neither States or citizens can obtain punitive penalties for violations of the Act.

The Federal Facilities Clean Water Compliance Act of 1999—S. 669—would explicitly waive Federal sovereign immunity for all penalties for violations of the CWA and would create new authority for administrative penalties against Federal facilities. This legislation is consistent with Administration proposals for amendments to the CWA made in 1994 and amendments to the Act reported by this Committee the same year.

The Administration supports the legislation. However, the Agency would like to work with the Committee to clarify several issues. Most importantly, the CWA should continue to provide the President with the authority to exempt Federal facilities from compliance with certain requirements where it is in the paramount interest of the United States to do so; S. 669 may operate to remove this existing authority.

Amending the CWA as proposed in S. 669 would continue the precedent of clearly waiving sovereign immunity in other reauthorizations of environmental laws. In October 1992, partially in response to the Department of Energy v. Ohio decision, Congress passed the Federal Facility Compliance Act.

That legislation (1) waived the Federal Government's immunity from penalties for violations of the Resource Conservation and Recovery Act (RCRA) and (2) provided EPA with RCRA administrative order authority against Federal facilities under RCRA. Likewise, the 1992 amendments to the Toxic Substances Control Act (TSCA) gave EPA order and penalty authority for violations of the lead-based paint notification provisions of TSCA.

In the 1996 re-authorization and amendment of the Safe Drinking Water Act (SDWA), Congress provided EPA with enforcement authorities against Federal facilities similar to those applicable to RCRA.

In 1997 the Justice Department Office of Legal Counsel issued a decision clarifying EPA's administrative penalty authorities under the Clean Air Act (CAA).

The clear message here is that, with the help of Congress, we are beginning to "level the playing field" for Federal facilities.

By enhancing enforcement authorities, Congress has sought to ensure that EPA would be an independent force to keep environmental compliance a high priority for the Federal community. EPA and the States have been taking this role seriously. Since the Federal Facility Compliance Act was passed in 1992, EPA and the States have issued over 200 RCRA administrative orders to Federal Facilities with assessed penalties of over $20 million. Last year, EPA issued its first ever administrative penalty orders at Federal facilities under the SDWA, CAA, and TSCA (lead-based paint).

Perhaps more important than penalty or order numbers is the fact that, since 1993, we have seen an increase in RCRA compliance rates by Federal facilities. In the same time period, CWA compliance rates by Federal facilities have not followed that same pattern. While it is too early to see any Federal facility compliance rate trend associated with the recent penalty authorities under SDWA, CAA, and TSCA, the correlation between penalty authority and increased compliance rates under RCRA as compared to the lack of penalty authority and current compliance rates under CWA cannot be dismissed.

Legislation to Expand SRFs Use for Water Conservation

S. 188 would amend the CWA to make an expanded group of organizations and persons eligible for loans from the Clean Water State Revolving Loan Funds (SRFs) to implement water conservation projects and other projects with water quality benefits.

Today, the clean water SRFs are able to make loans to publicly owned treatment works to finance projects to conserve water including "structural" approaches (e.g., publicly owned water meters, water saving or recycling devices, and grey-water separation systems) and "non-structural" measures (e.g., public education and incentive wastewater service charges). These conservation measures reduce flows to sewage treatment works, reduce capital expansion needs, and thereby, provide significant public benefits.

In addition, under current law, when a nonpoint pollution plan approved by EPA under section 319 or an estuary plan approved by EPA under section 320 provide for water conservation, projects to implement these plans are currently eligible for SRF loans. Diverse public and private parties (i.e. parties other that publicly owned treatment works) can be eligible to receive the loans, depending on State law.

The proposed legislation would specifically authorize SRF loans for water conservation activities outside of a municipal sewer system for non-residential water conservation activities, specifically, conservation of water used for agriculture. The bill would also make private organizations and individuals eligible for the loans.

Conservation of agricultural water can have dramatic benefits for aquatic life and water quality and the Administration supports using SRFs to finance such projects under specific circumstances. For example, water conservation projects that would make more water available to augment flow in a water body where the State has identified low flow as a cause of nonattainment of a designated use should be eligible for SRF funding.

We are concerned that, as presently drafted, the bill would allow States to use SRF loans for water conservation projects with limited environmental benefits, and would expand eligible loan recipients. New authority for use of SRFs for projects with a "water quality benefit" is vague and needs to be better described and discussed. The Administration intends that the primary focus of clean water SRFs remains infrastructure investments to help municipalities meet water quality goals. We would like the opportunity to work with sponsors of the bill and the Committee to better define the circumstances under which SRF loans could be made to public and private entities for water conservation or other purposes.

CONCLUSION

Thank you, Mr. Chairman and members of the Committee for this opportunity to testify on proposed amendments to the CWA. EPA stands ready to provide additional technical assistance on issues related to these bills.

I will be happy to answer any questions.

RESPONSES BY CHARLES FOX TO ADDITIONAL QUESTIONS FROM SENATOR WYDEN

Question 1. The Administration's Clean Water Action Plan identifies polluted runoff as the leading water quality problem today. Yet, in your testimony, you stated that "The Administration intends that the primary focus of clean water SRF's remains infrastructure investments to help municipalities meet water quality goals. Aren't you essentially saying that the SRF program, which is EPA's largest water quality program, is not going to be used primarily to address the biggest current water quality problem? Shouldn't Clean Water SRF funds be available to meet the biggest water quality needs and hasn't it been the case that 5 percent or less of SRF funds have gone toward runoff projects?

Response. The fiscal year 2001 President's budget proposes appropriations language that will allow States discretion to use up to 19 percent of their annual capitalization grants for the Clean Water State Revolving Fund for grants, rather than loans, to finance projects to reduce nonpoint source pollution and protect estuaries. This new authority would give States much needed flexibility in designing financing packages for nonpoint source control projects that are viable. This proposal was also included in the fiscal year 2000 proposal. Congress did not pass an appropriations bill that included this new authority for fiscal year 2000.

States began issuing loans from their Clean Water SRF's in 1988, and in the first 2 years, the loans went exclusively toward construction, expansion, and/or upgrading of publicly owned treatment works. SRF loans for treatment works have greatly assisted municipalities in meeting human health and water quality goals, and we

are very proud of the success of the SRF's and what they have contributed toward improved water quality across the nation.

The SRF's began to issue nonpoint source (i.e., runoff) loans in 1990, and since then, there have been significant increases in the number of states funding nonpoint source projects (25 states to date with another 6 expected in 2000) and in the variety of nonpoint source projects being funded (agricultural cropland and animal best management practices, silviculture, urban runoff, ground water protection, brownfields remediation, underground storage tank remediation, landfill remediation, septic tank replacement, hydromodification, and estuary improvement). The amount of money going to nonpoint source projects is still relatively small compared to the amount going toward publicly owned treatment works, because nonpoint source projects tend to be much smaller and less expensive than traditional wastewater treatment plant construction projects. To illustrate, 6 percent of funds loaned in 1999 went to nonpoint source projects, corresponding to 36 percent of all loan agreements for nonpoint source projects.

EPA encourages states to identify their water quality concerns across the state, both point source and nonpoint source, and to direct the funds in their SRF's toward the highest-priority water quality projects, whether they be point source or nonpoint source.

Question 2. You say in your testimony that you're concerned that my bill would allow States to use SRF loans for water conservation projects with limited environmental benefits. The SRF provisions of the Clean Water Act already include language assuring there must be water quality benefits for any funds used in the SRF program. Specifically, Clean Water Act Section 602(b)(5) requires all SRF funds to be used "to assure maintenance of progress, as determined by the Governor of the State, toward compliance with the enforceable deadlines, goals, and requirements of the [Clean Water] Act. . . " A State must demonstrate that all SRF funds it receives from EPA will meet this test. This requirement is already in the law and my bill doesn't change it, so this requirement would continue in effect for any funds used for water conservation projects. Why does EPA think making progress toward achieving Clean Water Act goals and requirements is not sufficient assurance that there will be environmental benefit from water conservation projects when this is the same test currently applied to other uses of SRF funds? If EPA thinks additional assurance of environmental benefits is needed for water conservation projects, what language would EPA propose including in S. 188 to provide this assurance?

Response. The Administration intends that the primary focus of the Clean Water SRF remains infrastructure investments to help municipalities meet water quality goals. We would like the opportunity to work with the sponsors of the bill and the Committee to better define the circumstances under which SRF loans could be made to public and private entities for water conservation or other purposes.

Water conservation is already an eligible purpose for the CWSRF in many cases. The clean water SRFs are able to make loans to publicly owned treatment works to finance projects to conserve water including "structural" approaches (e.g., publicly owned water meters, water saving or recycling devices, and gray-water separation systems) and "non-structural" measures (e.g., public education and incentive wastewater service charges). These conservation measures reduce flows to sewage treatment works, reduce capital expansion needs, and thereby, provide significant public benefits.

In addition, under current law, when a nonpoint pollution plan approved by EPA under section 319 or an estuary plan approved by EPA under section 320 provide for water conservation, projects to implement these plans are currently eligible for SRF loans. Diverse public and private parties (i.e. parties other that publicly owned treatment works) can be eligible to receive the loans, depending on State law.

As noted in the testimony, there are several important policy changes in S. 188 about which the Administration is concerned. Without minimizing the need for additional dialog, in response to your question, we would suggest some slight modifications to S. 188, Section 3 (2) "Financial Assistance" so as to ensure that the projects funded contribute to water quality improvements as well as water conservation.

STATEMENT OF BRUCE DEGRAZIA, ASSISTANT DEPUTY UNDER SECRETARY OF DEFENSE (ENVIRONMENTAL QUALITY)

S. 669, Federal Facilities Clean Water Compliance Act of 1999

Good morning. My name is Bruce deGrazia. I am the Assistant Deputy Under Secretary of Defense (Environmental Quality) in the Office of the Secretary of Defense. I would like to thank you for the opportunity to speak before this Committee

on the proposed bill S. 669, "Federal Facilities Clean Water Compliance Act of 1999."

Secretary Cohen stresses the importance of Defense preparedness so the United States can lead the world into a new, more peaceful century. Our National Security Strategy works to foster a stable international order, allowing critical regions to be stable and free from domination by hostile powers, where the global economy and trade are free to grow, where democratic norms are widely accepted, and where nations freely cooperate to prevent and also respond to natural and political calamities.

The three elements of the Secretary's defense strategy are: Shape, Respond and Prepare. Environmental Security is active in each of these categories helping:

- SHAPE the international security environmental in ways favorable to U.S. interests, promoting regional stability through military-to-military cooperation
- RESPOND by supporting critical environment and health requirements of military operations
- PREPARE by sustaining access to land, air, and sea for training through responsible management of our installations and training lands.

I'm here today to discuss how Environmental Security is protecting our waters while supporting the Secretary's priorities and defense strategy.

ENVIRONMENTAL SECURITY VISION AND GOALS

Recognizing the Secretary's top priorities—people, readiness, and modernization within the context of the hierarchy of the National Security Strategy Environmental Security prepared a new vision statement this year. The new vision statement emphasizes the importance of integrating environmental, safety and health activities into DoD operations, protecting readiness through wise environmental management of ranges, and supporting modernization by improving the quality and reducing the costs of defense acquisition and procurement.

VISION: To have fully incorporated environmental, health and safety values into the culture of the Department of Defense. These core values are recognized by the uniformed and civilian customers throughout the Department of Defense and its external stakeholders. They are vital parts of all operational and business decisions whereby the safety and health of our people, protection of weapons systems, facilities, and the environment are integrated into all worldwide national defense activities.

We have identified five specific goals within the Environmental Security program to meet the safety, health, and environmental needs of the new millennium.

- Support readiness of U.S. Forces by ensuring access to air, land and water for training and operations
- Improve quality of life by protecting military personnel and families from environmental, safety and health hazards and by providing recreational opportunities (e.g., hunting, fishing, camping, hiking)
- Ensure weapons systems, logistics, installations, et al., have greater performance, lower lifecycle costs, and minimal health and environmental effects
- Serve customers, clients, stakeholders through public participation and advocacy
- Enhance international security through military-to-military cooperation.

These goals are the underpinnings for current activity at Environmental Security. The second goal improving quality of life is especially relevant to today's hearing.

DEPARTMENT OF DEFENSE CLEAN WATER PROGRAM

The Department of Defense has long had a policy of full and sustained compliance with environmental laws and regulations. We take our commitment to protecting the men, women, and children living and working on our installations and the surrounding communities very seriously. A significant part of that commitment is protection of the waters of the United States.

The Department of Defense already complies with the Clean Water Act. Our installations have long worked closely with the Federal, state, and local regulators to ensure that our facilities comply with the Federal Water Pollution Prevention Control Act (FWPCA), commonly known as the Clean Water Act. Our installations have permits, comply with discharge standards, and submit regular monitoring reports, just like any other entity subject to the Clean Water Act. In addition, we are subject to enforcement actions and compliance agreements, like any other entity subject to the Clean Water Act.

We are not above the law. The Department of Defense abides by the same standards and regulations as states, local governments, and the private sector. We have been complying for decades.

The Department has almost 1,900 Clean Water permits throughout the United States. These permits cover domestic wastewater, industrial wastewater, and storm water. In addition, some of our installations discharge wastewater to municipalities and cities. In Fiscal Year 2000, the Department will invest $215 million in upgrading and replacing wastewater treatment infrastructure. On top of these investments, the Department spends millions of dollars each year complying with the day-to-day requirements of these permits operating treatment plants, sampling the water, repairing and maintaining of the plants, submitting regular monitoring reports to the regulators, etc.

Our compliance record in the area of Clean Water is excellent. In 1998, the Department received only 37 enforcement actions. 98 percent of our almost 1,900 permits were in compliance. This is significant. Most of these actions were administrative, such as paper work and late reporting. Still, we can do better. The Military Departments are making great strides to reduce enforcement actions and to reach a state of full and sustained compliance.

Senate 669, Federal Facilities Clean Water Compliance Act of 1999

The Department of Defense is committed to complying with all provisions of the Clean Water Act. In addition, the Department has supported a limited expansion of the waiver of sovereign immunity that would subject us to penalties for all Clean Water Act violations for which a private person would be liable. Whenever possible and consistent with our other statutory obligations, we should be held to the same standard as other private or public entities.

The proposed bill tracks closely the language used in recent years to amend the Resource Conservation and Recovery Act and the Safe Drinking Water Act to expand the waiver of sovereign immunity. The Administration, including the Department of Defense, has supported both of these efforts.

Although the Administration supports the goals of S. 669, we are concerned with one of the provisions the bill. This provision, in rare circumstances, could interfere with our ability to carry out critically important responsibilities in a manner protective of national security.

Presidential Exemption

The proposed bill would eliminate the Presidential Exemption provision currently included in Section 313 of the Federal Water Pollution Control Act. This provision is carefully circumscribed and allows the President to exercise his authority only "in the paramount interest of the United States." Similar provisions for exemption are found in:

- the Clean Air Act, 42 USC 7418;
- the Safe Drinking Water Act, 42 USC 300j–6;
- the Resource Conservation and Recovery Act, 42 USC 6961; and
- the Comprehensive Environmental Response, Compensation, and Liability Act, 42 USC 9620j.

Historically, Presidents have used these provisions infrequently, and the standard required is difficult to meet. These exemptions are essential tools to ensure that the President has the flexibility he needs to act quickly and decisively to protect the national interests when strict compliance with these environmental laws would jeopardize the overall interests of the United States. The Presidential Exemption has not been abused.

In fact, the use of the Presidential Exemption can protect our waters. This exemption has only been used twice. In October 1980, President Carter directed the Department of Defense to rapidly construct housing for the Haitian refugees at Ft. Allen in Puerto Rico. An integral part of this housing was a system to collect and treat wastewater. Because the process of obtaining a permit would not allow us to meet the pressing needs of the Haitian refugees in a timely manner, President Carter issued an exemption to the permitting aspects of the Clean Water Act in this specific situation. President Reagan renewed the Exemption for another year in October 1981. The result was that we were able to protect the health of the Haitian refugees. Had we not been able to invoke this Presidential Exemption, the collection and treatment of the wastewater would not have been possible.

The Administration opposes the elimination of the Presidential Exemption provision.

Comprehensive Environmental Response, Compensation and Liability Act Implications

The Department, with the support of the Administration, has consistently opposed efforts to change the waiver of sovereign immunity in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Given that strong opposition, the question arises why the Department can support the changes in the

waiver proposed in Senate 669. So you can clearly understand why the Department of Defense has differing positions on waiver of sovereign immunity for these two Acts, I would like to clarify the differences and explain our rationale for opposing the waiver under CERCLA.

Compliance with Environmental Requirements under CERCLA

You may have heard the allegation that the Federal Government does not comply with environmental laws to the same extent as private parties. The truth is that the Department of Defense already complies with environmental laws to the same extent as private parties conducting a cleanup under CERCLA. CERCLA already requires the Federal Government to cleanup to state standards. The Department of Defense follows the procedural requirements of CERCLA and complies with the substantive requirements of state and Federal environmental laws and regulations. This means that the Department follows the process prescribed by the Environmental Protection Agency for CERCLA and that we meet all the applicable or relevant and appropriate requirements (ARARs) in state and Federal laws. CERCLA exempts all parties from many purely procedural requirements of other state and Federal laws, such as the requirement to obtain permits. This is to speed up the process so that cleanups can be implemented as quickly as possible.

CERCLA is Different from Other Environmental Regulations

Some may perceive that because we support a waiver of sovereign immunity for the Federal Water Pollution Control Act, but do not support an amendment to the current waiver of sovereign immunity in CERCLA that we are being inconsistent. This is far from the case for two important reasons. One there already is a waiver of sovereign immunity in CERCLA, which we believe works very well. The current waiver encourages the Department of Defense and states to reach consensus on disputed issues at the negotiating table rather than resorting to litigation. The negotiation process has worked to change planned cleanups, without increasing the costs of those cleanups by orders of magnitude as, on occasion, a state has sought. Second, CERCLA addresses a different type of situation than the other regulations where the Department supports waivers of sovereign immunity. Our job is to determine what contamination is present, if it presents a threat and then to take appropriate action. The Department of Defense is required by provisions of Title 10 to follow the CERCLA process at all of our sites, whether they are on the National Priorities List or not. The Clean Water Act is prospective and seeks to control or limit pollution from occurring. Waiting for approval of a new water permit discharge permit should not impact public health or the environment, because the discharge cannot occur until the permit is approved. However, at CERCLA sites, the contamination already at the site can spread during the wait with the potential for impacting public health and the environment and increasing costs significantly. Similarly, imposing other processes under state law to cleanup actions required by Federal law to be performed under CERCLA would slow down the cleanup process, and create duplication of effort and confusion.

The Department of Defense believes that a waiver of sovereign immunity for the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) modeled after the Federal Facility Compliance Act of 1992 (FFCA) is inappropriate. For a more complete discussion, we will be pleased to provide a copy of a Report to Congress on the Potential Impacts of the Proposed Amendment to the CERCLA Waiver of Sovereign Immunity we prepared with the Department of Energy in February of this year.

CONCLUSION

In summary, the Department supports almost all of the entire bill. However, we believe the bill should be amended to retain a Presidential Exemption provision in the present law.

We would be happy to meet with your staff to discuss our concerns with this proposed bill.

Thank you.

STATEMENT OF JUDGE HELEN WALKER, VICTORIA COUNTY, TEXAS

Chairman Chafee and other distinguished Senators, I am Helen Walker, Victoria County Judge, in Victoria Texas and co-chair of the Texas Counties Storm Water Coalition which currently represents 115 counties in Texas. The Coalition was formed in early 1998 because of the concern Texas counties had with the burden of the Phase II rules and the ability to comply with many of the regulations.

I am here today to voice our concerns with the EPA proposed Storm Water Phase II rules and to explain why this is not a manageable rule. Although I am from Texas, this is not solely a Texas problem. Counties in your home states will also be severely impacted by these rules.

As you are aware EPA, initially proposed Phase II in January 1998 to regulate two types of storm water discharges: (1) those from small municipal separate storm sewer systems and (2) those associated with construction activities that disturb between one and five acres of land.

The EPA has made population the basis for the Phase II regulatory scheme, which means that "urbanized" areas (as defined by the census) will be covered by the rule whether or not they present any water quality concerns. In the proposed rules EPA automatically identifies 38 counties in Texas as owners and operators of small municipal separate storm sewer systems (MS4s) based on this population definition. We anticipate that 10 more counties, in Texas, will meet the "urbanized" definition after the 2000 census. Several of these counties are in West Texas, which is very arid and receives little precipitation. However, because the rule is based on population and not water quality, these arid counties will be required to administer the same type of program as those entities which might truly have water quality impairments.

In these approximately 48 Texas counties, roadside vegetated ditches will be considered MS4s under EPA's current definitions. Counties and cities with identified MS4s will be required to enact ordinances and enforce those ordinances to comply with the six minimum control measures, required for MS4s entities. Counties in Texas as well in many other states lack the authority to enact these ordinances and implement all of the regulatory requirements that Phase II requires. Further, these vegetated ditches serve as a natural treatment system and should not be considered an MS4.

The proposed rule does provide for co-permitting among entities. In Texas we can see this as a real advantage. Since the "urbanized" area is not the entire county, but a donut around the city, co-permitting could be advantageous to the city and the county. The city in many areas has the capability to meet all the necessary permit requirements and therefore, the county, which does not, would be interested in co-permitting. The problem with the proposed rule is that liability for noncompliance remains with all entities. For example, if a county contracts with the city to co-permit and the city obtains the permit and has agreed to comply with all necessary Best Management Practices requirements, but the city fails to do so, the liability remains with both the city and the county. In this instance the county relied on the city to administer the program, but could be subjected to fines and penalties along with the city.

All 254 counties in Texas as well as counties in other states with the responsibility of road construction and maintenance of county roads will be impacted by the construction provision of the rule. As the rule is proposed counties would be required to obtain permits for a multitude of core county activities, such as routine road maintenance, drainage ditch clearance, and pothole repair. In Texas alone there are thousands of county road miles. An acre threshold is not very large and would include almost every county road project. Many of these roads are gravel roads and again many of these counties are located in arid areas of the state Mat receive little rain. They would be required to obtain the permits and comply with the requirements regardless of the water quality impacts.

Senator Hutchison has filed legislation, which addresses many of our concerns. S. 1706 would:

1) Exclude from consideration as regulated MS4s, the thousands of miles of vegetated county road ditches which already serve as a natural treatment system and should not be covered by the Clean Water Act;

2) eliminate permitting of construction sites less than five acres; EPA chose the five acre threshold for permitting under the Phase I regulation.

3) exclude routine road maintenance from being considered as a construction activity;

4) protect counties from liability for not complying with Phase II regulations that require actions exceeding the authority vested in counties under State law. (Many counties across the Nation do not have ordinance making or enforcement authority); and

5) enhance the ability of counties to rely on another governmental entity's implementation of MS4 measures by protecting counties from liability if the implementing entity fails to comply with Phase II.

As a local elected official I know better than most that clean water is a precious commodity. Clean Water is the key to a successful community and that is why Congress in its wisdom passed the Clean Water Act. However, we believe that this pro-

posed rule goes well beyond the Act and is not aimed at truly improving water quality. If it was, then it would be based on areas -with water quality problems, instead of being based on population thresholds. The EPA has opted to paint with a broad brush and in loose language that assumes that everyone is the same. Everyone is not the same. Cities and counties across the Nation have different regulatory and statutory authorities.

I am certain there are areas of the country that have severe water quality problems. Accordingly, those areas should be singled out with a proven solution to address those problems. We believe that these rules are based largely on assumptions. The rule assumes that if you have a population of 50,000 you must have water quality problems; it assumes that if you are involved in a construction activity of one acre you must be contributing to water quality problems. These assumptions are evident because EPA is issuing a Phase II rule without ever analyzing the Phase I data. The Phase I rule was issued in the early 1990's and applied to large cities of 100,000 or more as well as large industrial sites. Was Phase I program successful in improving water quality? This question has not been answered with any proven data other than the assumption that if you have a program it must work.

Senator Hutchison's bill takes a logical approach at correcting the broad brush approach. We believe that if this legislation is passed, it will help local governments throughout the nation. This is an opportunity for Congress to make clear to EPA the intent of the Clean Water Act and to further the goal of cleaning up our water.

Again, I thank you for this opportunity and will be glad to answer any questions.

STATEMENT OF DOUG HARRISON, GENERAL MANAGER/SECRETARY, FRESNO METROPOLITAN FLOOD CONTROL DISTRICT

On behalf of the National Association of Flood and Stormwater Management Agencies, I am pleased to submit testimony on the Water Regulation Improvement Act of 1999, introduced by Senators Hutchinson and Gramm. NAFSMA represents more than 100 flood control and stormwater management agencies serving a total population of more than 76 million citizens. Many of our members are participants in the Phase I NPDES Stormwater program and also administer water resources projects with the Corps of Engineers and work closely with the Federal Emergency Management Agency, as well as participating in the National Flood Insurance Program. NAFSMA also served on the Federal Advisory Committee convened to help design the Phase II Stormwater Program and participated on the Urban Wet Weather Federal Advisory Committee.

NAFSMA's membership includes public agencies whose function is the protection of lives, property and economic activity from the adverse impacts of storm and flood waters. As a national association whose mission is to advocate public policy, encourage technologies and conduct education programs to facilitate and enhance the achievement of the public service functions of its members, NAFSMA appreciates the Committee's attention to the stormwater issue and looks forward to continued work with you on this important priority.

Background on the Stormwater Issue

In adopting the Clean Water Act Amendments in 1987, Congress clearly recognized the differences between stormwater and wastewater discharges and required stormwater permitters to reduce the discharge of pollutants in urban stormwater to the "maximum extent practicable" or "MEP." It is the MEP standard and best management practice approach that drive the Federal stormwater program.

A requirement to include numeric effluent limits in NPDES stormwater permits has been alleged by various environmental groups. In a suit against five public agencies in Arizona responsible for administering the stormwater program, the Ninth Circuit Court upheld the Arizona permits and rejected the position of both petitioners, the Defenders of Wildlife and the Sierra Club that the Clean Water Act § 402(p) is ambiguous and that compliance with water quality standards is required for municipal stormwater permits. NAFSMA joined the National League of Cities, the National Association of Counties, the American Public Works Association and the Association of Metropolitan Sewerage Agencies in filing as amici curiae in support of the Arizona permitters in this case.

Although the decision was favorable on the water quality standards issue, such litigation needlessly ties up local staff and resources that could otherwise be directed to stormwater management activities. We urge Congress to clarify its intent to recognize that municipal stormwater systems and the related NPDES permits are not adaptable to traditional NPDES requirements and that the goal of improved water quality is to be achieved through municipal stormwater management pro-

grams, not the application of nonachievable, nonpracticable numeric limits. Even the U.S. Environmental Protection Agency in the interim guidance for the Phase I stormwater program issued in the summer of 1997 clearly states that numeric limits are not necessary or appropriate in NPDES stormwater permits.

Our members with NPDES permits have also had to face citizen suits for failing to meet water quality standards, which in most cases are technologically unattainable. A number of our members are also facing legal action over the imposition of stormwater utility fees, which for many localities is the only approach available for funding their stormwater activities. In Cincinnati, Ohio, the Federal Government's National Institute of Occupational Safety and Health facility refused to pay the local stormwater fee and at least one other Federal agency in the area has also expressed its intent not to pay the municipal stormwater fee.

Additional Research on Water Quality Impacts on Phase I is Needed

NAFSMA is encouraged by language currently attached to the VA-HUD Independent Agencies Appropriations bill that calls on the U.S. Environmental Protection Agency to report to Congress on the actual water quality gains brought about nationwide as a result of the Phase I NPDES stormwater program. However, in order for Congress to clearly see the stormwater Phase I impact, we urge that the report examine both the costs and benefits of the Phase I program to date. We also support the request that EPA report to Congress on the successful and unsuccessful best management practices that have been used in the NPDES stormwater program to date.

The lack of research on the impacts of the Phase I stormwater program has long been an issue for NAFSMA members. A few years back, NAFSMA surveyed communities over 100,000 in population to determine the average amount spent at the local level on NPDES stormwater permits. We reported to Congress and U.S. EPA at that time that our individual members had expended on average $650,000 per community on the application process alone.

In a recent survey of Phase II communities undertaken by NAFSMA, nearly 75 percent of the respondent communities indicated that they do not currently have a public education or outreach program on stormwater and 46 percent of the respondents do not currently spend money on any of the stormwater activities identified in the survey. It is also significant to note that 39 percent of the respondent communities believe they will need to hire a consultant to assist them in preparing the application. The 54 percent of Phase II communities that currently fund stormwater programs or activities spend upwards of $4,000 per square mile or on an average of $2.76 per capita on these programs. It is clear that the economic impacts of the Phase II program will be significant.

S. 1706—Water Regulation Improvement Act

NAFSMA commends the committee for looking at ways to improve the Federal stormwater program and the Phase II regulation. However, it is important to note that S. 1706 only gets to the tip of the iceberg. The problems with the stormwater regulation are not limited to Phase II, but include the Phase I program as well. Problems such as the potential inclusion of numeric effluent limits in NPDES stormwater permits have critical national impacts and should be considered by the committee as part of legislation to improve the Federal stormwater regulation. The lack of research on the impacts of Phase I, both cost and benefits, is another issue that merits national attention.

Also looming are the impacts of current regulatory proposals such as Total Maximum Daily Loads (TMDLs), a tool for attaining water quality standards, and the parallel NPDES regulation that modifies the antidegradation rule. NAFSMA appreciates the committee's efforts to provide additional time for review of these regulations as well as scheduling an oversight hearing on the proposal. The impacts of the proposed TMDL and antidegradation rule on NPDES stormwater permit holders throughout the country (whether Phase I or Phase II) will be great and we appreciate your attention on this issue. We also urge that even more attention be given and a thorough review the impacts of this program be carried out over the upcoming months.

The inadequacy of funding for wet weather programs is also an extremely important issues. There has been very little Federal funding provided to implement the Federal stormwater program. The regulatory requirements have continued to grow while funding to carry out these wet weather activities has been reduced. Congress needs to look at providing adequate resources to conduct the requisite research, demonstration projects and to implement the national environmental mandates.

The most recent estimates of the costs of compliance with Clean Water Act mandates are staggering—more than $330 billion over the next 20 years. No locality,

no matter how large, how well off, or how committed—can find or generate the resources required to finance needs of this magnitude. This estimate does not include anticipated mandates to meet TMDLs, which has the potential to require extraordinarily costly or unattainable reductions of pollutants from municipalities and/or industry, further straining limited resources.

S. 1706—Section 2. Waiver of Liability of Co-Permittees

NAFSMA supports protection for a co-permittee in compliance with their NPDES stormwater permit from liability for the failure of another co-permittee or other governmental entity to implement a specific control measure required under the NPDES permit. NAFSMA also supports and urges protection for NPDES stormwater permit holders who are in compliance with their NPDES permits from citizen suits for failure to meet water quality standards.

Vegetated Road Ditches

NAFSMA understands this provision to exclude vegetated road ditches in rural areas from NPDES Phase II requirements. This language could be clarified to ensure that the exemption does not apply to those Phase II MS4s that are located in urbanized areas, which are automatically designated for Phase II regulations. Many communities around the country have expressed concerns that the donut holes (currently unregulated small cities surrounded by Phase I cities) need to be brought into the Federal stormwater program since these currently excluded cities have similar discharges and frequently impact the Phase I city's stormwater system and stormwater quality program efforts.

Of central importance is not the structural nature of the stormwater conveyance, but the quality of the waters flowing therein and their point of disposal. (Discharges which do not reach waters of the United States are already exempted.) This point well supports the need for stormwater systems to be seen as more typically nonpoint sources requiring a reasonable watershed based approach.

Construction Activities and Routine Road Maintenance

NAFSMA and other organizations involved with the Stormwater Phase II Federal Advisory Committee were concerned with the reduction from the five acres requirement down to one acre in the proposed Phase II regulation. This change will greatly increase the workload on the permitting agencies, be it either the states or U.S. EPA and will probably result in significant stormwater permitting delays. NAFSMA proposed during the Phase II FACA process that construction sites below 5 acres not be included in the regulatory framework unless sensitive resource waters were at risk.

NAFSMA also wishes to highlight its concern as to the current and proposed Federal regulation of routine local stormwater system maintenance issues. The regulatory burden on state and local government agencies to carry out their routine maintenance activities has intensified in recent years and has created a public safety threat in many cases. Our members have experienced great delays in carrying out routine maintenance not only because of NPDES requirements, but because of Section 404 regulatory requirements implemented by the U.S. Army Corps of Engineers. The general regulatory move from environmental protection to environmental perfection has left our agencies unable to carry out their local maintenance responsibilities. In many cases it has taken months, and in some cases years of work, to obtain necessary Federal permits to carry out local maintenance activities due to section 7 consultations and water quality certification reviews that are required as part of the permitting process.

NAFSMA recently commented on the Corps proposed nationwide permit regulations which have been designed to streamline the wetlands permitting program and we would be pleased to submit those comments as part of the record. The combined effect of the nationwide proposals will put many of our flood control activities into the individual permits. By adding restrictions such as limiting our flood control and stormwater management projects in the 100-year floodplain and reducing acreage limitations in the program, many of our public safety activities will now fall into the individual permitting process. NAFSMA therefore also urges the Committee to delay implementation of these new nationwide permits until some of these significant problems are addressed.

We would be pleased to work with the Committee to provide language to address local exemptions for routine maintenance activities.

We appreciate the opportunity to address the Committee and would be pleased to answer any questions at this time.

TESTIMONY OF STEVE FLEISCHLI, EXECUTIVE DIRECTOR, SANTA MONICA BAYKEEPER

Introduction

Good morning Members of the Committee. My name is Steve Fleischli. I am the Executive Director of the Santa Monica BayKeeper, a non-profit organization dedicated to the protection of Santa Monica and San Pedro Bays near Los Angeles, California. Thank you for the opportunity to be here to discuss important issues addressing national water quality.

The good news is that over the last 27 years water quality across the Nation has improved because of the adoption of the Federal Water Pollution Control Act. At the time of the Act's adoption, nearly two-thirds of the nations waters failed to meet their intended beneficial uses. This number has been reduced because national efforts to reduce pollution from sewage treatment plants and large industrial facilities. Meanwhile, however, more diffuse sources, such as runoff from municipalities and construction sites, have remained a significant source of pollution.

The Current Problem

Today nearly 40 percent of the nations waters still do not meet the objectives of the Act. These polluted waters not only present a public health problem, but also contribute to economic losses and threaten important aquatic habitat. In Los Angeles and Ventura Counties alone, more than 156 rivers, beaches and lakes do not meet the objectives of the Clean Water Act.

According to the Natural Resources Defense Council, during 1998, there were at least 7,236 days of closings and advisories nationwide. Polluted runoff and stormwater—accounting for more than 1,541 closings/advisories plus 8 extended closings and 10 permanent.

Rain or preemptive closings accounted for more than 1,110 closings/advisories.

Almost every coastal and Great Lakes state reported having at least one beach where stormwater was a known source of pollution at or near bathing beaches. New Jersey, California, Florida, and Connecticut are among the states that reported having numerous beaches where stormwater is a known pollution source.

With tourist expenditures in just portions of only 10 coastal states total over $77 billion, the impacts from this type of pollution are far too real.

For example, in Huntington Beach, California—one of California's most popular surfing areas—beaches were closed much of this summer. One suspect was a construction site where dredging material was illegally discharged to a storm drain. Unfortunately, the source of the problems has not been identified and local businesses suffer to the tune of millions of dollars in lost revenues.

Meanwhile, as beaches are closed, many lakes and streams are also impaired because of excessive sediment and nutrient loading and metal deposition.

Sediment can smother fish larvae. Sediment loading can obscure sunlight that is necessary for aquatic vegetation growth, upon which fish and other species depend. Sediments can also act as the transport mechanism for harmful pollutants such as nutrients or heavy metals.

These nutrients can contribute to algal blooms, the decomposition of which requires extensive amounts of dissolved oxygen. This often depletes dissolved oxygen levels for other aquatic life in coastal waters. In recent years, a number of coastal waters and their tributaries have experienced frequent hypoxic (low dissolved oxygen levels) and occasional apoxic (no dissolved oxygen levels) conditions leading to massive fish kills. It is also believed that excessive nutrients can trigger outbreaks of the toxic microbe Pfiesteria piscicida.

Finally, Heavy metals can also create toxic conditions for juvenile as well as adult organisms, and present threats to those who consume them.

What's Presently Being Done

While some problems still exist at sewage treatment plants and large industrial facilities, it is now widely accepted that storm water and non-point source pollution is the No. 1 threat to water quality across the country. These sources were essentially left unregulated for decades because of, as one Federal court put it, perceived "administrative infeasibility."

Fortunately, in 1987 the Clean Water Act was amended to include certain provisions designed to reduce or eliminate pollution from various classes of storm water. This includes pollution from municipalities as well as industrial activities, including construction activities. In many cities and states, permits have been in effect for years. In other areas, these permits are just being considered, with EPA slated to issue new regulations this fall.

As part of the proposed regulations for Phase II storm water control, EPA has once again concluded that "storm water from a variety of sources including separate

storm sewers, construction sites, waste disposal and resource extraction are major causes of water quality impairments.]" 63 Fed. Reg. 1356 (January 9, 1998).

What Needs to Occur

In the environmental community, many of us agree that our waters are dying a death of a thousand cuts. Something must be done.

Many areas of the Clean Water Act clearly state that the goal of the Act is to achieve water quality standards, and to have fishable swimmable waters across the country. In the end, the Act's goal is to eliminate the discharge of pollutants to waters of the United States. Unfortunately, the Clean Water Act's storm water provisions, as presently written, leave much room for debate, and thus, allow municipalities to escape responsibility for violations of water quality standards. In Los Angeles, for example, many municipalities subject to the Act have managed to evade responsibility because of weak provisions in the law and poor implementation. Too much time is taken developing plans and strategies which lose focus on the overall objectives of cleaning local waters through the achievement of water quality standards.

What makes the most sense is for the Federal Government to move forward and set the overall goal that is desired—i.e. protection of beneficial uses. This should be accomplished through the mandatory setting of meaningful numeric limits for all discharges—which would guarantee that everyone knows what is expected.

What is being proposed today with S. 1706, however, falls far short of this need.

Among other things, this bill proposes to eliminate the requirement that construction sites less than five acres be subject to a storm water permit.

This comes despite the fact that EPA has recognized that "[c]onstruction sites can pollute with soils sediments, phosphorous, nitrogen, nutrients from fertilizers, pesticides, petroleum products, construction chemicals and solid wastes." Natural Resources Defense Council v. EPA, 966 F.2d 1292,1305 (June 4,1992), citing 55 Fed. Reg. at 48,033. EPA has also long recognized that "[o]ver a short period of time, construction sites can contribute more sediment to streams than was previously deposited over several decades." NRDC v. EPA, at 1306, citing 55 Fed. Reg. at 48,033.

Indeed, short term loadings may have shock loading effects on receiving water, such as low dissolved oxygen. See, 63 Fed. Reg.1539 (January 9,1998). It is also acknowledged that "erosion rates from construction sites are much greater than from almost any other land use. " Id. at 1540. Numerous scientific studies support this conclusion. These sites can threaten drinking water supplies, increase the need for dredging of coastal sediments for navigation, damage habitat of fish and aquatic species, and even lead to the destruction of coral reefs.

Further, the Ninth Circuit Court of Appeal found that the concept that a less than five acre exemption is "de minimum" is contradicted by [EPA's] admission that even small construction sites can have a significant impact on local water quality." NRDC v. EPA, at 1306. Evidence also suggests that in some areas of the country there may be as many as five times as many construction sites smaller than five acres for every site larger than five acres. See, 63 Fed. Reg. at 1542.

Based on this information, it makes little sense for Congress to now back off this requirement, and, in essence, reduce the effectiveness of the 1987 Amendments. To do so will only serve to worsen water quality, rather than improve it.

The proposed exemption under S.1706 of vegetated road ditches creates a similar situation. This type of blanket exemption fails to recognize that even vegetated drainage ways can convey storm water pollution, the same as a concrete channel or a river. Moreover, many drainage ways are operated in "connection with" a road or street. Arguably, this proposal could allow the exemption of miles upon miles of polluted storm water conveyance systems. Again, the overall objective of the Act should remain the protection of water quality.

Finally, this bill also attempts to exempt from storm water requirements liability for municipalities which contribute to violations of water quality standards. The bill does so under the guise of one co-permittees "reliance" upon other co-permittees to act. This is entirely unworkable as it will simply create a scenario wherein one City will point its finger at another, while the other will simply point right back. Municipalities will then argue about who is "causing" the problem. Thus, no one will ever accept responsibility for the fact that water quality is impaired, leading to endless debate and an intentional diversion away from the true intent of the Act: that those who cause—or contribute to—the water quality problems are held accountable. Requiring otherwise is a direct attack on the Act's overall objective of improved water quality.

Conclusion

Concerned citizens have worked for years for strong action to address the numerous sources of pollution that contribute to the impairment of our nation's waters. We don't want any more delays or rollbacks.

For every person who says that storm water is an impossible problem to conquer, there is another person who is finding a way to get there. Technological development in this area is flourishing. There are simple technologies such as silt fences and sand bags, which, when properly used, help reduce or eliminate sediment loading from construction sites. Numerous different types of catch basin inserts are being developed. Storm drain treatment systems are being installed. New methods of landscape architecture are emerging. Scientists around the country have demonstrated the effectiveness of these developments in reducing contamination of our nation's waters.

The Federal Government should move forward to set the standards to which everyone should be held accountable.

The waters of the United States belong to everyone and to no one. As such, they must be protected in way that doesn't allow individuals, municipalities or corporations to jeopardize the well-being of these resources at the expense of the public trust.

STATEMENT OF MARY ROSEWIN SWEENEY, ASSISTANT ATTORNEY GENERAL OF THE STATE OF MARYLAND, ON BEHALF OF ATTORNEY GENERAL J. JOSEPH CURRAN JR.

Mr. Chairman and members of the Committee, my name is Man Rosewin Sweeney and I am an Assistant Attorney General for the State of Maryland. I am here on behalf of Attorney General Joe Curran, a member of the National Association of Attorneys General, to testify in support of S. 669, a bill Mending the Federal Water Pollution Control Act to ensure compliance by Federal facilities with pollution control requirements.

I would like to commend Senator Coverdell and the bill's co-sponsors for their attention to this issue The waiver of sovereign immunity has been a key issue for NAAG for many years and the Attorneys General adopted a resolution supporting the waiver of Federal sovereign immunity under the Clean Water Act in 1993. A copy of that resolution is attached to my testimony.

The Attorneys General support this bill for the same reasons that they supported similar legislation in 1993. First, there is a need to provide clear authority to Federal, states and local officials for the enforcement of water pollution laws at Federal facilities. Second, Federal agencies and facilities should be subject to He same accountability, reasonable service charges, and procedural and substantive enforcement provisions that apply to state and local governments and private industry. Third, the passage of this legislation will enhance water pollution control practices at Federal facilities in the future by requiring those facilities to comply with Federal, state, and local water pollution laws.

Furthermore, this bill makes the waiver of sovereign immunity in Me Clean Was Act essentially the same as the waivers present!' contained in the Solid Waste Disposal Act, or RCRA, and in the Safe Drinking Water Act. The language of S. 669 differs in minor but appropriate respects from the waiver language contained in RCRA and the Safe Drinking Water Act. However, there is one difference in language that the Committee may wish to correct. That is to change paragraph (a)(3)(D) to make it clear that immunity is waived for judicially imposed penalties and fines as well as for those imposed in administrative proceedings. This change would make the Clean Water Act's waiver language more consistent with that of PCKA and the Safe Drinking Water Act and would avoid any confusion over whether the waiver of immunity for penalties or fines includes penalties and fines imposed by state courts.

The State of Maryland's experience has been that the waiver of Sovereign immunity in RCRA and the Safe Drinking Water Act resulted in an improvement in Federal compliance under those laws in recent years. Federal compliance with the Clean Water Act has not seen a comparable improvement. Federal facilities in Maryland have been responsible for: overflows from wastewater treatment plants; unauthorized discharges of pollutants from laboratories, research facilities, hospitals, and military installations; thermal pollution; and the discharge of sediments from many construction sites. Because of sovereign immunity, these facilities were able to drag their feet when responding to the State's complaints about these water pollution problems The managers of some Federal facilities have refused to enter into agreements for corrective action with the State, not because the terms were unreasonable but because the managers feared that such an agreement reflected poor-

ly on their performance. Maryland also encountered reluctance on the part of Federal agencies to take effective measures to control contractors that were causing pollution.

If the Clean Water Act is amended as proposed in S. 669 and Federal facilities become subject to penalties for water pollution, Hey will be more likely to identify and promptly correct pollution problems. There is simply no reason for Federal facilities to continue to be held to a tower standard than private industry or state and local governments.

I appreciate the opportunity to appear before the Con mitten and would be happy to respond to arty questions you might have.

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

ADOPTED—SPRING MEETING MARCH 28–30, 1993 WASHINGTON, DC

RESOLUTION URGING THE CONGRESS TO CLARIFY THE WAGER OF FEDERAL SOVEREIGN IMMUNITY UNDER THE CLEAN WATER ACT

WHEREAS, a significant number of the most dangerous sources of water pollution in the United States that pose a significant threat to public health and the environment are located at Federal facilities; and

WHEREAS, Federal facilities are among the worst violators of Federal and state water pollution laws; and

WHEREAS, Executive Order 12088 requires all Federal agencies to comply with all applicable pollution control standards; and

WHEREAS, the states have experienced significant problems in bringing Federal facilities into compliance with Federal and state water pollution laws because the Federal facilities refuse to acknowledge state regulatory authority over their facilities; and

WHEREAS, disputes over state environmental authority at Federal facilities has caused costly, time-consuming and acrimonious litigation between the states and the Federal agencies; and

WHEREAS, the U.S. Environmental Protection Agency's and the states' lack of clear enforcement authority has eroded the public confidence in the Federal Government's willingness and ability to address the serious water pollution problems at the Federal facilities; and

WHEREAS, the states' role in enforcing Federal and state water pollution laws against recalcitrant Federal agencies has become more important because of the U.S. Department of Justice contention that the Constitution prohibits EPA from enforcing water pollution laws at Federal facilities and from imposing sanctions against Federal agencies; and

WHEREAS, Federal agencies must be subject to the same sanctions as private industry, states, and local governments for violations of Federal and state water pollution laws to deter violations of and ensure compliance with these laws; and

WHEREAS, the U.S. House of Representatives is considering H.R. 340, which would clarify the Federal sovereign immunity waiver under the Clean Water Act;

NOW, THEREFORE, BE IT RESOLVED THAT THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL:

1) urges Congress to adopt H.R. 340 or similar legislation which would:

a) provide clear authority to Federal, state and local officials, to enforce water pollution programs at Federal facilities;

b) subject Federal agencies and Federal facilities to the same accountability, procedural, and substantive enforcement provisions and reasonable service charges that apply to state and local governments and private industry; and

c) enhance proper water pollution control practices at Federal facilities in the future by ensuring that Federal agencies comply with Federal, state and local water pollution laws; and

2) authorizes the NAAG Environment Legislative Subcommittee to represent the views of the Association on this matter before the Congress and Federal agencies.

3) authorizes the Executive Director and General Counsel to transmit this resolution to the President and EPA Administrator Carol Browner and appropriate members of her staff; Secretary Les Aspin of the Department of Defense; Secretary Hazel O'Leary of the Department of Energy; Congress; and other interested associations.

STATEMENT OF JAN LEE, EXECUTIVE DIRECTOR, OREGON WATER RESOURCES CONGRESS

S. 188, WATER CONSERVATION AND QUALITY INCENTIVES ACT

Introduction

Thank you for the opportunity to testify today. I am Jan Lee, Executive Director of the Oregon Water Resources Congress. OWRC represents water suppliers in Oregon, those who operator reservoirs and delivery systems for non-potable water. The majority of the water is for agricultural supply, but we also represent some cities, counties and ports who supply water for other than domestic or human consumption. Our association has represented water interests in Oregon since its formation in 1912. I am also Vice President of the Western Coalition of Arid States (WESTCAS).

Need for S. 188

We strongly support S. 188 as an additional tool for enhancing water quality in Oregon. There are over 1300 Oregon stream segments listed on the 303(d) TMDL (total maximum daily load) exceedance list approved by EPA. The majority of these streams are listed based on the need to meet a lower temperature standard (64 degrees statewide) to protect cold-water fish habitat. A significant portion of Oregon streams are either listed under the Endangered Species Act (ESA) or are being considered for listing in the near future. With the convergence of the ESA and the CWA (Clean Water Act), the need to reduce water temperatures for habitat protection will be the focus of challenge to water suppliers and water users and to Oregon's future growth and economy.

Oregon's 303(d) TMDL list for the year 1998:

1,067 streams and rivers listed
32 lakes listed
1,168 stream segments listed
A total of 13,892 stream miles, not including lakes

The nation has witnessed success with the point-source program as the result of funding that has now exceeded $96 billion. We have not committed that level of funding toward reducing non-point sources for water pollution. If we can invest resources in reducing non-point sources in a similar fashion with the same kind of incentive programs, both point source and non-point source water users will benefit, as well as our prized Northwest fishery resource.

SRF Funding Capability

Currently Oregon receives the following SRF (State Revolving Fund) moneys distributed by the Environmental Protection Agency (EPA).

Clean Water State Revolving Fund, Oregon Department of Environmental Quality (water pollution control facilities)
$12–15 million approximately annually
Safe Drinking Water Revolving Loan Program, Oregon Health Division
$12 million approximately annually

Neither of these loan programs currently provide funding for local governments supplying agricultural water supply to participate at the state level and no loans have been granted for such purposes.

The Clean Water State Revolving Fund provides money for wastewater facility infrastructure. While the Federal program may allow more flexibility, the state program does not accommodate the needs of local government borrowers who are not investing in wastewater infrastructure. If the legislation before the committee is passed, it will clearly indicate that conservation and water quality projects, in addition to municipal wastewater infrastructure, are projects for which SRF funding can be expended. This will then enable Oregon to draft rules that puts these projects on equal footing with infrastructure projects. With the passage of S. 188, innovative water quality projects can move forward through Oregon's loan program.

There are requests totaling over $250 million for wastewater/sewer infrastructure projects. The longer term need identified by Oregon in 1996 was approximately $1.63 billion by the year 2010. Since Oregon receives an average of about $13 million annually from EPA for the wastewater program, there is in essence a line that has formed that will require 2 decades to complete before any of the other projects are addressed.

In the drinking water project program, there is currently $10.5 million which has not been committed to projects in Oregon. Recently EPA sent a letter indicating the $10.5 million may be called back by EPA if not used. The state has the ability to

move the $10.5 to the wastewater program but would only do that as the very last resort prior to EPA pulling the funding.

These examples show that it is almost impossible at the state level to access SRF dollars for the additional Federal purposes (non-point source control) Congress originally designated, e.g., allowing for conservation and water quality projects other than those that represent project infrastructure dollars for wastewater or drinking water facilities.

Reduction of Non-Point Sources

How are we reducing non-point sources in Oregon?

First, placing water instream for fishery protection is a policy of the state and has been since 1987 when the Legislature enacted the instream water right law (ORS 537.332 to .360). In the same legislative session, the state also enacted the "water conservation incentive program" (ORS 537.455 to .500 as attached). This program allows water users to conserve water, dedicate 25 percent or more to instream benefits for fishery protection, water quality and recreation, while the conserver retains a portion of the conserved water to store to stabilize their own water supply or to apply to additional use.

The transfer statutes generally also allow for the transfer of water to instream benefits. The state also provides a temporary leasing program to allow for beneficial uses instream on an annual basis (ORS 537.348).

In some circumstances, additional flow will reduce water temperature. Conservation projects that transition water delivery from open canals subject to evapotransportation water losses reap instream benefits when the delivery systems are piped and thus withdraw less water to deliver the same crop need. If there can be public investment in such projects, the public can receive a share of the benefit by receiving additional water flows instream.

Many of my association's members are irrigation districts. Irrigation withdrawal is the second largest use of water in the state of Oregon. (Hydropower use is the largest beneficial use.) While our association does not support taking agricultural lands out of production, we do support conserving water that results in a new net supply made available. We have cooperated with the Bureau of Reclamation and other interested groups in developing water-conservation projects which result in placing additional water instream. Several of these projects have been in Central Oregon, in the Deschutes Basin.

The Oregon Water Trust is leasing and purchasing conserved water in small amounts to place instream in key sections of stream where water is needed for fishery migration and protection. The Trust has been in place since the late 1980's and has acquired over 300 leases and a limited number of permanent water right transactions for instream benefit.

Other Tools

We believe that the language of this bill will also provide the opportunity to develop other kinds of water-quality related projects that will benefit water users and instream needs.

Conservation practices that result in less runoff to streams, that minimize discharges to streams, could be funded under this program.

Flexibility for the State Operated SRF Programs

By providing language to make it clear that conservation and water quality projects for other than drinking water and wastewater infrastructure were intended by the law to be funded from SRF moneys, the states would be provided the flexibility to use SRF funding for a mix of projects.

Coalition of Interests

We have worked with Senator Wyden's office on this legislation with the Environmental Defense Fund and the American Farm Bureau Federation. The Oregon Farm Bureau supports this legislation. Mr. Pete Test of the Oregon Farm Bureau asked me to include his support in my remarks to you today. Our association in Oregon has worked closely with Zach Willey of the Environmental Defense Fund, Northwest Headquarters in Bend, Oregon, and with the Oregon Farm Bureau and our own local government members to effect conservation projects in Oregon. This legislation will enhance those opportunities by providing a funding resource. We strongly urge your passage of S. 188 to achieve those goals.

II

106TH CONGRESS
1ST SESSION

S. 188

To amend the Federal Water Pollution Control Act to authorize the use of State revolving loan funds for construction of water conservation and quality improvements.

IN THE SENATE OF THE UNITED STATES

JANUARY 19, 1999

Mr. WYDEN (for himself and Mr. BURNS) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

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A BILL

To amend the Federal Water Pollution Control Act to authorize the use of State revolving loan funds for construction of water conservation and quality improvements.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Water Conservation and Quality Incentives Act".

SEC. 2. FINDINGS.

Congress finds that—

(1) in many parts of the United States, water supplies are insufficient to meet current or expected future demand during certain times of the year;

(2) a number of factors (including growing populations, increased demands for food and fiber production, and new environmental demands for water) are placing increased demands on existing water supply sources;

(3) increased water conservation, water quality enhancement, and more efficient use of water supplies could help meet increased demands on water sources;

(4) in States that recognize rights to conserved water for persons who conserve it, irrigation suppliers, farmers, ranchers, and other users could gain rights to use conserved water while also increasing the quantity of water available for other beneficial uses by implementing measures to reduce water loss during transport to, or application on, the fields;

(5) reducing the quantity of water lost during transport to the fields and improving water quality can help areas better meet changing population and economic needs; and

(6) the role of the Federal Government in helping meet those changing water needs should be to

provide financial assistance to help irrigators, farmers, and ranchers implement practical, cost-effective water quality and conservation measures.

SEC. 3. USE OF STATE REVOLVING LOAN FUNDS FOR WATER CONSERVATION IMPROVEMENTS.

Section 603 of the Federal Water Pollution Control Act (33 U.S.C. 1383) is amended—

(1) in the first sentence of subsection (c)—

(A) by striking "and (3)" and inserting "(3)"; and

(B) by inserting before the period at the end the following: ", (4) for construction of water conservation improvements by eligible recipients under subsection (i)"; and

(2) by adding at the end the following:

"(i) WATER CONSERVATION IMPROVEMENTS.—

"(1) DEFINITION OF ELIGIBLE RECIPIENT.—In this subsection, the term 'eligible recipient' means a municipality, quasi-municipality, municipal corporation, special district, conservancy district, irrigation district, water users' association, tribal authority, intermunicipal, interstate, or State agency, nonprofit private organization, a member of such an association, authority, agency, or organization, or a lending

institution, located in a State that has enacted laws that—

"(A) provide a water user who invests in a water conservation improvement with a right to use water conserved by the improvement, as allowed by State law;

"(B) provide authority to reserve minimum flows of streams in the State; and

"(C) prohibit transactions that adversely affect existing water rights.

"(2) FINANCIAL ASSISTANCE.—A State may provide financial assistance from its water pollution control revolving fund to an eligible recipient to construct a water conservation improvement, including—

"(A) piping or lining of an irrigation canal;

"(B) wastewater and tailwater recovery or recycling;

"(C) irrigation scheduling;

"(D) water use measurement or metering;

"(E) on-field irrigation efficiency improvements; and

"(F) any other improvement that the State determines will provide water conservation benefits.

"(3) VOLUNTARY PARTICIPATION.—The participation of an eligible recipient in the water conservation improvement shall be voluntary.

"(4) USE OF CONSERVED WATER.—The quantity of water conserved through the water conservation improvement shall be allocated in accordance with applicable State law, including any applicable State law requiring a portion of the conserved water to be used for instream flow enhancement or other conservation purposes.

"(5) LIMITATION ON USE FOR IRRIGATED AGRICULTURE.—Conserved water made available under paragraph (4) shall not be used to irrigate land that has not previously been irrigated unless the use is authorized by State law and will not diminish water quality.".

SEC. 4. USE OF STATE REVOLVING LOAN FUNDS FOR WATER QUALITY IMPROVEMENTS.

Section 603 of the Federal Water Pollution Control Act (33 U.S.C. 1383) (as amended by section 3) is amended—

(1) in the first sentence of subsection (c), by inserting before the period at the end the following: ", and (5) for construction of water quality improve-

ments or practices by eligible recipients under subsection (j)"; and

(2) by adding at the end the following:

"(j) WATER QUALITY IMPROVEMENTS.—

"(1) DEFINITION OF ELIGIBLE RECIPIENT.—In this subsection, the term 'eligible recipient' means a municipality, quasi-municipality, municipal corporation, special district, conservancy district, irrigation district, water users' association or member of such an association, tribal authority, intermunicipal, interstate, or State agency, nonprofit private organization, or lending institution.

"(2) FINANCIAL ASSISTANCE.—A State may provide financial assistance from its water pollution control revolving fund to an eligible recipient to construct or establish water quality improvements or practices that the State determines will provide water quality benefits.

"(3) VOLUNTARY PARTICIPATION.—The participation of an eligible recipient in the water quality improvements or practices shall be voluntary.".

SEC. 5. CONFORMING AMENDMENTS.

Section 601(a) of the Federal Water Pollution Control Act (33 U.S.C. 1381(a)) is amended—

(1) by striking "and (3)" and inserting "(3)"; and

(2) by inserting before the period at the end the following: ", and (4) for construction of water conservation and quality improvements by eligible recipients under subsections (i) and (j) of section 603".

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II

106TH CONGRESS
1ST SESSION

S. 669

To amend the Federal Water Pollution Control Act to ensure compliance by Federal facilities with pollution control requirements.

IN THE SENATE OF THE UNITED STATES

MARCH 19, 1999

Mr. COVERDELL (for himself, Mr. BREAUX, Mr. DEWINE, and Mr. GRAMS) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

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A BILL

To amend the Federal Water Pollution Control Act to ensure compliance by Federal facilities with pollution control requirements.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Facilities Clean Water Compliance Act of 1999".

SEC. 2. FEDERAL FACILITIES CLEAN WATER COMPLIANCE.

(a) APPLICATION OF CERTAIN PROVISIONS TO FEDERAL FACILITIES.—Section 313 of the Federal Water Pollution Control Act (33 U.S.C. 1323) is amended—

(1) by redesignating subsection (b) as subsection (d); and

(2) by striking subsection (a) and inserting the following:

"(a) COMPLIANCE.—

"(1) DEFINITION OF REASONABLE SERVICE CHARGE.—In this subsection, the term 'reasonable service charge' includes—

"(A) a fee or charge assessed in connection with the processing, issuance, renewal, or amendment of a permit, review of a plan, study, or other document, or inspection or monitoring of a facility; and

"(B) any other nondiscriminatory charge that is assessed in connection with a Federal, State, interstate, or local regulatory program concerning the control and abatement of water pollution.

"(2) REQUIREMENT.—Each department, agency, and instrumentality of the executive, legislative, or judicial branch of the Federal Government that has jurisdiction over any property or facility, or is engaged in any activity that results, or that may result, in the discharge or runoff of a pollutant shall be subject to, and shall comply with, all Federal,

State, interstate, and local substantive and procedural requirements (including any requirement for a permit or reporting, any provision for injunctive relief and such sanctions as are imposed by a Federal or State court to enforce the relief, and any requirement for the payment of a reasonable service charge) concerning the control and abatement of water pollution in the same manner, and to the same extent, as any other person is subject to the requirements.

"(3) WAIVER OF SOVEREIGN IMMUNITY.—The United States waives any immunity otherwise applicable to the United States with respect to any substantive or procedural requirement described in paragraph (2), including immunity from process in an administrative or court action seeking—

"(A) injunctive relief;

"(B) imposition of a sanction referred to in this subsection;

"(C) enforcement of an administrative order;

"(D) imposition of an administrative penalty or fine; or

"(E) payment of a reasonable service charge.

"(4) ADMINISTRATIVE ORDERS AND PENALTIES.—The substantive and procedural requirements described in paragraph (2) include all administrative orders and all civil and administrative penalties or fines, regardless of whether the penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations.

"(5) INJUNCTIVE RELIEF.—The United States (including any agent, employee, or officer of the United States) shall not be immune or exempt from any process or sanction of any State or Federal court with respect to the enforcement of any injunctive relief referred to in paragraph (2).

"(6) CIVIL PENALTIES.—No agent, employee, or officer of the United States shall be personally liable for any civil penalty under any Federal, State, interstate, or local law concerning the control and abatement of water pollution with respect to any act or omission within the scope of the official duties of the agent, employee, or officer.

"(7) CRIMINAL PENALTIES.—

"(A) AGENTS, EMPLOYEES, AND OFFICERS.—An agent, employee, or officer of the United States shall be subject to a criminal

sanction (including a fine or imprisonment) under any Federal or State law concerning the control and abatement of water pollution.

"(B) DEPARTMENTS, AGENCIES, AND INSTRUMENTALITIES.—No department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government shall be subject to a sanction referred to in subparagraph (A).

"(b) ADMINISTRATIVE ENFORCEMENT ACTIONS.—

"(1) IN GENERAL.—

"(A) COMMENCEMENT.—The Administrator, the Secretary of the Army, and the Secretary of the department in which the Coast Guard is operating may commence an administrative enforcement action against any department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government pursuant to the enforcement authorities authorized by this Act.

"(B) MANNER AND CIRCUMSTANCES.—The Administrator or Secretary, as applicable, shall initiate an administrative enforcement action against such a department, agency, or instrumentality in the same manner and under the

same circumstances as the Administrator or Secretary would initiate such an action against another person.

"(C) CONSENT ORDERS.—Any voluntary resolution or settlement of an action described in subparagraph (B) shall be set forth in a consent order.

"(2) OPPORTUNITY TO CONFER.—An administrative order issued to a department, agency, or instrumentality under paragraph (1) shall not become final until the department, agency, or instrumentality has had the opportunity to confer with the Administrator or Secretary, as applicable.

"(c) LIMITATION ON STATE USE OF FUNDS COLLECTED FROM THE FEDERAL GOVERNMENT.—Unless a State law in effect on the date of enactment of this subsection or a State constitution requires the funds to be used in a different manner, all funds collected by a State from the Federal Government from penalties and fines imposed for violation of a substantive or procedural requirement described in subsection (a) shall be used by the State only for projects designed to improve or protect the environment or to defray the costs of environmental protection or enforcement.".

(b) DEFINITION OF PERSON.—

(1) GENERAL DEFINITIONS.—Section 502(5) of the Federal Water Pollution Control Act (33 U.S.C. 1362(5)) is amended—

(A) by striking "or any" and inserting "an"; and

(B) by inserting before the period at the end the following: "or a department, agency, or instrumentality of the United States".

(2) OIL AND HAZARDOUS SUBSTANCE LIABILITY PROGRAM.—Section 311(a)(7) of the Federal Water Pollution Control Act (33 U.S.C. 1321(a)(7)) is amended—

(A) by striking "a"; and

(B) by inserting before the semicolon at the end the following: "and a department, agency, or instrumentality of the United States".

(c) CITIZEN SUITS.—Section 505 of the Federal Water Pollution Control Act (33 U.S.C. 1365) is amended—

(1) in subsection (a)—

(A) in paragraph (1), by striking ", or" and inserting a semicolon;

(B) in paragraph (2), by striking the period at the end and inserting "; or"; and

(C) by adding at the end the following:

"(3) for the collection of a penalty by the United States Government (and associated costs and interest) against any Federal agency that fails, by the date that is 18 months after the effective date of a final order, to pay a penalty assessed by the Administrator under this Act."; and

(2) by striking subsection (b) and inserting the following:

"(b) NOTICE.—

"(1) IN GENERAL.—Except as provided in paragraph (2), no action may be commenced—

"(A) under subsection (a)(1)—

"(i) before 60 days after the plaintiff has given notice of the alleged violation to—

"(I) the Administrator;

"(II) the State in which the alleged violation occurs; and

"(III) any alleged violator of the standard, limitation, or order; or

"(ii) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with the standard, limitation, or order

(but in any such action in a court of the United States any citizen may intervene as a matter of right);

"(B) under subsection (a)(2), before 60 days after the plaintiff has given notice of the action to the Administrator; or

"(C) under subsection (a)(3), before 60 days after the plaintiff has given notice of the action to the Attorney General and the head of the Federal agency referred to in subsection (a)(3).

"(2) EXCEPTION.—An action may be brought immediately after the giving of notice in the case of an action under this section respecting a violation of section 306 or 307(a).

"(3) MANNER OF GIVING NOTICE.—Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.".

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II

106TH CONGRESS
1ST SESSION

S. 1706

To amend the Federal Water Pollution Control Act to exclude from stormwater regulation certain areas and activities, and to improve the regulation and limit the liability of local governments concerning co-permitting and the implementation of control measures.

IN THE SENATE OF THE UNITED STATES

OCTOBER 7, 1999

Mrs. HUTCHISON (for herself and Mr. GRAMM) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

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A BILL

To amend the Federal Water Pollution Control Act to exclude from stormwater regulation certain areas and activities, and to improve the regulation and limit the liability of local governments concerning co-permitting and the implementation of control measures.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Water Regulation Improvement Act of 1999".

SEC. 2. WAIVER OF LIABILITY OF CO-PERMITTEES.

Section 402(p)(3)(B) of the Federal Water Pollution Control Act (33 U.S.C. 1342(p)(3)(B)) is amended—

(1) in clause (ii), by striking "and";

(2) in clause (iii), by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following:

"(iv) shall—

"(I) recognize the responsibility of governmental entities to carry out the control measures described in clause (iii), including responsibilities established through co-permits or other mechanisms; and

"(II) provide that, in the case of a local governmental entity (including a municipality, county, city, or borough) that relies on a co-permittee or another governmental entity to comply with any requirement to implement a control measure in which the co-permittee or other governmental entity assumes responsibility for implementation of, but fails to implement, the control measure, the local governmental entity shall not be liable for

the failure of the co-permittee or other governmental entity to implement the control measure.".

SEC. 3. EXCLUSION OF CERTAIN AREAS AND ACTIVITIES FROM STORMWATER REGULATION.

Section 402(p) of the Federal Water Pollution Control Act (33 U.S.C. 1342(p)) is amended by adding at the end the following:

"(7) EXCLUSIONS.—

"(A) VEGETATED ROAD DITCHES.—For stormwater discharges identified under paragraph (5), the Administrator shall not require any local governmental entity (including a municipality, county, city, or borough), to apply for and obtain a permit for any stormwater discharge associated with an above-ground vegetated drainage ditch or a drainage way owned or operated in connection with a road or street under the jurisdiction of the local governmental entity.

"(B) CONSTRUCTION ACTIVITIES AND ROUTINE ROAD MAINTENANCE.—A discharge regulated under subparagraph (B) or (E) of paragraph (2), and any stormwater discharge identified under paragraph (5), shall not include—

"(i) a stormwater discharge associated with a construction activity (including grading, clearing, and excavation) that disturbs not more than 5 acres of land; or

"(ii) a routine maintenance activity associated with a road, street, vegetated road ditch, or vegetated drainage way.

"(C) PROHIBITION OF REQUIREMENTS EXCEEDING STATE LAW AUTHORITY.—Nothing in this subsection requires a local governmental entity to exceed the authority granted to the local governmental entity under State law to implement a regulatory requirement.".

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