THE CLEAN WATER ACT AFTER 37 YEARS: RECOMMITTING TO THE PROTECTION OF THE NATION'S WATERS

(111–70)

HEARING

BEFORE THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

October 15, 2009

Printed for the use of the
Committee on Transportation and Infrastructure

U.S. GOVERNMENT PRINTING OFFICE

52–881PDF WASHINGTON : 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
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U.S. House of Representatives
Committee on Transportation and Infrastructure
Washington, DC 20515

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October 14, 2009

SUMMARY OF SUBJECT MATTER

TO: Members of the Committee on Transportation and Infrastructure

FROM: Committee on Transportation and Infrastructure Staff

SUBJECT: Hearing on "The Clean Water Act after 37 Years: Recommitting to the Protection of the Nation's Waters"

PURPOSE OF HEARING

The Committee on Transportation and Infrastructure will meet on Thursday, October 15, 2009, at 10:00 a.m., in room 2167 of the Rayburn House Office Building to receive testimony from representatives of the U.S. Environmental Protection Agency (EPA), the Government Accountability Office (GAO), the states, and other stakeholder entities on the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500) (the Clean Water Act), with a special focus on its compliance and enforcement programs.

BACKGROUND

This memorandum summarizes both the overarching framework of the Clean Water Act, as well as describing the compliance and enforcement programs.

I. STRUCTURE OF THE CLEAN WATER ACT

On October 18, 1972, Congress overrode President Nixon's veto to pass the the Clean Water Act. As stated in Title I, the central goal of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Although the title makes amendments to existing legislation, these amendments marked a clear delineation from the previous iterations of the Federal Water Pollution Control Act (33 U.S.C.A. § 1251 et seq.) through both a strengthening of pollution control programs and a shifting of the primary responsibility for water pollution control efforts to the Federal Government. Central to the Clean Water Act, however, was the establishment of a Federal-state partnership in protecting water quality. The framework

established a process by which states could assume regulatory authority for water pollution prevention through EPA-approved state programs. Since it was approved in 1972, 46 states are authorized to administer the Clean Water Act section 402 program, the primary water pollution control program in the statute.[1]

The Clean Water Act identified two national goals: that the discharge of pollutants into navigable waters be eliminated by 1985, and that wherever attainable, an interim goal of water quality that provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water (also known as "swimmable and fishable waters") be achieved by July 1, 1983.

In this regard, the Clean Water Act rests on three primary supports. First, it authorizes Federal financial assistance for municipal wastewater treatment plants. Second, it mandates that water quality standards must be established for waters. These standards are the foundation for the Clean Water Act's water quality control program. Water quality standards define the goals for a waterbody by designating its uses (e.g., recreation, water supply, agriculture, and aquatic life); setting criteria to protect those uses; and establishing provisions to protect water quality from pollutants (as per designated uses). Third, the Clean Water Act establishes an enforceable permit program to protect water quality.

National Pollutant Discharge Elimination System: The Clean Water Act's enforceable permit program to protect designated water quality uses is operated largely through section 402, the National Pollutant Discharge Elimination System (NPDES). Facilities that discharge into waters must meet various standards based on the type of pollutant discharged and the age of the facility (e.g., "best available technology economically achievable"). For municipalities (such as publicly owned treatment works (POTWs)), secondary treatment (defined in regulation as an 85 percent reduction in certain conventional pollutant concentrations as well as maintaining pH levels within a certain range) must be achieved. Additional limitations may also be imposed on dischargers where pollution levels in receiving waters continue to be too high to protect designated uses; this is accomplished through water quality based effluent limitations.

EPA is responsible for defining what the required level of treatment is for municipalities and for each type of industry to meet EPA's standards. EPA does this through establishing 'effluent limitation guidelines.' EPA also must develop water quality criteria, specifying the maximum concentrations of pollutants permitted for different designated use of waters.

These requirements are implemented and enforced through permits. All point source dischargers that discharge pollutants directly into waters must obtain a permit for that discharge either from EPA or a state, if the state has an EPA-approved section 402 permitting program. Permits are based on both technology requirements and water quality impacts, and set the concentration and amount of pollutants allowed to be discharged.

A state may exercise its own permit program in lieu of the Federal program if it meets specified requirements, such as the requirement to develop water quality standards. Water quality

[1] EPA continues to administer the section 402 program in the states of Idaho, Massachusetts, New Hampshire, and New Mexico. In addition, EPA administers this program in the District of Columbia, American Samoa, Guam, Johnston Atoll, Midway Island, Northern Mariana Islands, Puerto Rico, and Wake Island.

standards consist of a designated use for a body of water, such as fishable and swimmable, suitable for spawning, or drinking water source; criteria for the amounts of various pollutants which will permit and sustain that use; and a policy to prevent or minimize degradation of water quality. For water bodies not meeting water quality standards following implementation of technology-based controls, more stringent limitations on dischargers may be imposed in order to protect the quality of the receiving waters.

Indirect dischargers, those that do not discharge directly into a waterway, but instead discharge into a POTWs system, must meet treatment standards similar to those established for direct industrial discharges, since POTWs traditionally are designed primarily for the treatment of domestic sewage. Pretreatment requirements are either enforced by the POTW or by Federal or state authorities.

The Clean Water Act also establishes permit programs under the NPDES program for the regulation of discharges from stormwater and concentrated animal feeding operations (CAFOs).

Most U.S. cities have separate stormwater sewer systems through which stormwater flows directly into waterways. Stormwater that travels through separate stormwater sewer systems is typically not treated before discharged into a water body. As a result, any constituents picked up by the stormwater are carried into these water bodies. The water bodies are also subject to higher volumes and rates of flow, as discussed above, in cities that use separate storm sewer systems.

As noted above, stormwater discharges are subject to the NPDES program. The permitting program for separate stormwater sewer systems is the Municipal Separate Storm Sewer System (MS4) program. It includes Phase I (1990) and Phase II (1999) stormwater regulations that stipulate requirements for separate stormwater sewer systems and industrial activities, including construction. The MS4 permit system typically requires municipalities to develop a stormwater management plan and to implement best practices.

Over 745 other municipalities, located in 31 states and the District of Columbia, use another sewer collection configuration, commonly referred to as combined sewer systems. These municipalities are primarily located in the northeast, the Great Lakes, the Ohio River valley, and the Pacific Northwest. In these systems, stormwater flows into the same pipes as sewage. This combined wastewater (sewage and stormwater) is intended to be treated at wastewater treatment facilities. During dry weather or wet weather events with low precipitation, the system works as intended. However, during larger wet weather events, the combined sewer systems can be overwhelmed by the large volumes of stormwater in the system. As a result, the systems are designed to discharge untreated wastewater (untreated sewage and stormwater) into nearby water bodies through outlets known as combined sewer overflows (CSOs). Whether CSO events occur (i.e., the discharge of untreated wastewater through CSO outlets), is contingent on the engineering design of a given sewer system, the topography of a city, and the amount of impervious surface present in the city. Depending on these factors, a CSO event in a given city may occur in only heavy wet weather events, in other cases during light rain events, and in others, during dry weather. The age and condition of a CSO system (for example, blockages in the sewer system) may play a role in determining whether CSO events occur.

Because CSO events are considered illegal discharges under the Clean Water Act, municipalities that have CSO outlets are required to develop and implement short- and long-term

strategies to reduce CSO overflows during wet weather events. Long-term CSO control plans must detail procedures and the infrastructure modifications necessary to minimize CSO overflows during wet weather events, and necessary to meet water quality standards. Associated with this, the Clean Water Act directs states to develop Total Maximum Daily Load (TMDL) plans for water bodies that are impaired. These should include the pollutant-load reduction measures necessary to meet water quality requirements.

II. THE CLEAN WATER ACT'S COMPLIANCE AND ENFORCEMENT PROGRAMS

Because one of the central elements of the Clean Water Act is an enforceable permit structure, the Clean Water Act's compliance and enforcement program is a central feature of achieving its public health and environmental protection goals.

The Compliance Program: Compliance in a Clean Water Act context means conformity with the Clean Water Act and regulations implementing the Clean Water Act. EPA uses a variety of methods to achieve compliance, including compliance assistance and compliance monitoring. EPA's compliance activities are organized out of each of the 10 EPA regions, as well as the Office of Compliance in the Office of Enforcement and Compliance Assurance (OECA). EPA may conduct compliance monitoring activities independently or through the states and tribes under cooperative agreements or grants.

Compliance assistance involves activities and programs that assist the regulated community in maintaining compliance with the statutory and regulatory obligations. This could include tools, workshops, or information on what should be done to achieve compliance. The aim behind compliance assistance is to enable members of the regulated community to stay in compliance so that enforcement actions never have to be taken.

Compliance monitoring consists of qualified state or EPA inspectors visiting regulated facilities to ensure that the facility is in compliance with all applicable regulations. Compliance monitoring also includes review documents and materials, such as Discharge Monitoring Reports. Compliance monitoring activities can include: Determination of facility or site compliance status; Entry of results of activities into national data systems; Response to citizen complaints; and Support in the development of enforcement cases.

The Enforcement Program: EPA's civil, cleanup, and criminal enforcement programs work with the U.S. Department of Justice, state, and tribal governments to take legal actions in both Federal and state courts that bring polluters into compliance with Federal environmental laws. The Clean Water Act includes a number of enforcement provisions, including administrative, civil, and criminal penalties, as well as citizen suits. Enforcement actions also include the issuance of notices of violation to dischargers that are not in compliance with their permit.

EPA's civil enforcement program protects human health and the environment by taking legal action to bring violators of the Clean Water Act into compliance with the Federal environmental laws. If intentional or deliberate violations are found, they are referred to EPA's criminal enforcement division.

III. TRACKING CLEAN WATER ACT COMPLIANCE AND ENFORCEMENT ACTIVITY

With regard to overall compliance data, EPA's Office of Inspector General (OIG) has stated: "Compliance is at the heart of any regulatory agency's mission, and the U.S. Environmental Protection Agency cannot be effective without a strong enforcement and compliance program. Ensuring compliance with environmental laws and regulations is critical to accomplishing EPA's mission."[2] To achieve these goals, as well as the goals of the Clean Water Act, EPA must collect reliable compliance data.

Compliance data is used for a number of purposes, including:

- Identifying problems in need of EPA or state attention;
- Monitoring program performance; and
- Improving program effectiveness.

Data for tracking Clean Water Act compliance outcomes comes from a variety of sources, including facilities and Federal and state inspections.

EPA receives information on Clean Water Act NPDES permit holders that discharge large volumes of effluent. These facilities, usually those that discharge flows of more than one million gallons per day, are referred to as major dischargers.[3] States must provide compliance and enforcement information about these facilities, as well as individual facility discharge information.[4] Approximately 6,700 major discharges are currently subject to regulations across the United States.

Smaller facilities that have individual NPDES permits, or entities that have general NPDES permits,[5] are referred to as non-major dischargers. States are not required to provide any periodic information or data to EPA other than whether a facility or entity is in non-compliance. All other types of information or data are provided to EPA on a voluntary basis. Non-major entities make up the vast majority of EPA's regulated Clean Water Act universe. Approximately 39,000 facilities have non-major individual permits. Another 71,000 entities are currently subject to general NPDES permits.

EPA tracks compliance and enforcement information for facilities in its Enforcement and Compliance History Online (ECHO) database. This is accessible to the public on the Internet. Clean Water Act information for the ECHO database is populated by two other databases: the Permit Compliance System (PCS) and the Integrated Compliance Information System (ICIS) databases.

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[2] EPA OIG, *EPA Performance Measures Do Not Effectively Track Compliance Outcomes* (2005) at 1.

[3] EPA defines major dischargers as: Any NPDES facility or activity classified as such by the Regional Administrator, or in the case of approved state programs, the Regional Administrator in conjunction with the State Director. Major municipal dischargers include all facilities with design flows of greater than one million gallons per day and facilities with EPA/State approved industrial pretreatment programs. Major industrial facilities are determined based on specific ratings criteria developed by EPA/State [sic] (http://cfpub.epa.gov/npdes/glossary.cfm?program_id=0#M (Accessed 13 October, 2009)).

[4] Facility discharge information is provided in discharge monitoring reports (DMRs).

[5] EPA defines general permits as: An NPDES permit issued under 40 C.F.R. § 122.28 that authorizes a category of discharges under the Clean Water Act within a geographical area. A general permit is not specifically tailored for an individual discharger (http://cfpub.epa.gov/npdes/glossary.cfm?program_id=0#G (Accessed 13 October, 2009)).

IV. EFFECTIVENESS OF FEDERAL AND STATE CLEAN WATER ACT COMPLIANCE AND ENFORCEMENT ACTIVITY

On July 2, 2009, EPA Administrator Lisa Jackson issued a memorandum to EPA's chief compliance and enforcement manager, Cynthia Giles, committing EPA to a reevaluation of the compliance and enforcement program for the Clean Water Act to achieve better compliance and cleaner water quality.[6] In the memorandum, Administrator Jackson noted:

> We are also falling short of this Administration's expectations for the effectiveness of our clean water enforcement programs. Data available to EPA shows that, in many parts of the country, the level of significant non-compliance with permitting requirements is unacceptably high and the level of enforcement activity is unacceptably low. Our commitment to the rule of law as a foundation principle for EPA requires that we take action against significant violations and that we assure a consistent standard for compliance across the country. A level playing field for enforcement and compliance is important for fair treatment of industrial facilities across the country and to prevent some regions from achieving an economic advantage over others.[7]

Among the central points for improvement emphasized by Administrator Jackson were:

- **Improving Transparency**: EPA will improve and enhance information available to the public on compliance and enforcement activity in each state;
- **Improve Compliance and Enforcement Performance**: EPA and the states must take "strong and effective action…when serious violations of law threaten our water quality;" and
- **Improvement to Information Systems**: EPA's data systems must not only collect and disseminate information, but should also be analytic tools that allow the public and regulators to better understand and assess the impacts of violations on aquatic systems.

In its 2008 summary of state and EPA compliance and enforcement actions for its universe of 6,464 major facilities, EPA provided the following national information:

- 3,877 (60 percent) of these were physically inspected (3,700 state inspections; 372 EPA inspections);
- 91 percent provided discharge monitoring reports;
- 3,541 (55 percent) were in noncompliance at some point during 2008. Noncompliance could include minor infractions, as well as more serious violations;
- 1,576 (24.4 percent) were in Significant Noncompliance (SNC). The category of SNC encompasses a range of more serious violations;[8]

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[6] http://www.epa.gov/compliance/data/results/performance/cwa/jackson-ltr-cwa-enf.html (Accessed 13 October, 2009).

[7] *Id.*

[8] SNCs represent priority violations of NPDES permit conditions that EPA believes merit special attention. These include: a) Violations of monthly and non-monthly effluent limits for two or more months during consecutive quarterly review periods, by (i) 20 percent for toxic pollutants such as metals, and (ii) 40 percent for conventional pollutants such as total suspended solids; b) Non-effluent violations, such as POTW bypasses or unpermitted discharges, which cause or have the potential to cause a water quality problem such as beach closings; c) Permit compliance schedule violations; d)

- 406 major facilities had enforcement actions taken against them; and
- A total of $3,852,042 in penalties were assessed in 2008. The states assessed $1,607,445 in penalties, while EPA assessed $2,244,597 in penalties against violators.[9, 10]

The information above applies only to major source NPDES dischargers. EPA is limited in its ability to produce similar summary information for non-major NPDES permit holders, because it does not require states to report such information.

On September 13, 2009, the New York Times (NYT) ran a story titled *Toxic Waters: Clean Water Laws Are Neglected, at a Cost in Suffering.*[11] The article itself focused on both drinking water issues, covered under the Safe Drinking Water Act, and clean water issues, covered under the Clean Water Act. However, the thrust of the story was on Clean Water Act violations. Because EPA does not have comprehensive or reliable compliance and enforcement data for the vast majority of the Clean Water Act NPDES regulated universe, the NYT developed its own database for assessing compliance and enforcement records of the major and non-major regulated universes. The reliability of the NYT database is unknown, but because it was constructed from EPA and state data, which EPA has acknowledged has known problems, it may not be fully accurate. This database included records from 2004 to 2008. The NYT found that for this time period, across all individual major and minor facilities, 506,870 violations of the Clean Water Act took place. These violations are a mix of both minor and significant Clean Water Act violations. States (or the EPA in the states where it administers the Clean Water Act program) took 11,119 enforcement actions for those 506,870 violations (2.19 percent).

WITNESSES

PANEL I

The Honorable Lisa P. Jackson
Administrator
United States Environmental Protection Agency

PANEL II

Ms. Judy Treml
Luxemburg, Wisconsin

Mr. Dennis Kavanaugh
Representative
Sandy Hook Waterman's Alliance

Reporting violations, including failure to submit timely DMRs (filing a DMR more than 30 days late, or not at all); and e) Violations of existing enforcement orders, including judicial or administrative orders.

[9] Assessed penalties do not necessarily equal the final penalty figure that an entity found to be in violation may have to pay out. The assessed figure is considered to be a maximal amount, the actual figure is likely lower.

[10] States are required to report assessed penalty information for judicial but not administrative penalties. Therefore, state and total figures may not reflect a final total assessed penalty figure.

[11] Charles Duhigg, *Toxic Waters: Clean Water Laws Are Neglected, at a Cost in Suffering*, NYT, Sept. 12, 2009.

Dr. Patricia Butterfield, Ph.D., R.N.
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Testifying on behalf of: American Nurses Association

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Mr. R. Steven Brown
Executive Director
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Nevada Division of Environmental Protection
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Association of State and Interstate Water Pollution Control Administrators

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Senior Attorney
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HEARING ON THE CLEAN WATER ACT AFTER 37 YEARS: RECOMMITTING TO THE PROTECTION OF THE NATION'S WATERS

Thursday, October 15, 2009

HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
WASHINGTON, DC.

The Committee met, pursuant to call, at 10:00 a.m., in Room 2167, Rayburn House Office Building, the Honorable James Oberstar [Chairman of the Full Committee] presiding.

Mr. OBERSTAR. The Committee on Transportation and Infrastructure will come to order on this dreary, rainy day of a long commute into Washington.

This hearing marks the 37th anniversary of passage of the Clean Water Act. Two years ago we did the 35th anniversary. But I set this hearing as an opportunity to reflect on the progress made in pollution cleanup; an opportunity to evaluate somewhat the successes of the Act but, more importantly, the shortcomings.

This hearing also comes just two days short of the anniversary of President Nixon's veto of the Clean Water Act, particularly nostalgic to me since I spent 10 months of 1972, a good share of it in this room, as administrator of the Committee on Public Works, as it was known then, under the leadership of the gentleman whose portrait is in the corner, John Blatnik, who is my predecessor and Chairman of the Committee at the time. We spent 10 months negotiating with the Senate and the White House on the provisions of the Clean Water Act, which we expected would meet with hostility at the White House, and we were not disappointed.

But I think it is remindful to look at again, to revisit President Nixon's veto message. October 17, 1972, he says, "I am concerned that we attack pollution in a way that does not ignore other real threats to the quality of life." What? What is more fundamental to life than water? "Legislation which would continue our efforts to raise water quality, but which would do so through extreme and needless overspending does not serve the public interest. There is a much better way to get this job done," said Mr. Nixon, "a bill whose laudable intent is outweighed by its unconscionable $24 billion price tag." Twenty-four billion? That is kind of a footnote in today's budget.

"The bill that has now come to my desk would provide a staggering budget wrecking $24 billion." Of course, he didn't say it this way and I apologize for that, but that is the way I read it. "Another provision would raise the Federal share of the cost of future facilities from 55 percent to 75 percent, actions which would not in any

real sense make our waters any cleaner. I have nailed my colors to the mast on this issue. The political winds can blow where they may; I am prepared for the possibility that my action on this bill will be overridden"; and it was, 10 to 1. Ten to one, overwhelming bipartisan consensus.

Two years ago, in our review of the Clean Water Act, I cheered the steps that had been made, or cited—probably a better way to express it—the steps made in improving the Nation's water quality. But that was not really a celebration. Two-thirds of the Nation's waters meet water quality goals as established by the Act, but a third of the Nation's waters remain impaired; and the assessment for today's hearing for me is just plain alarming. Some successes have been clear, but most of the big success came at a time when the Nation's waters were bubbling over with phenols and untreated sewage, and impairment was readily apparent to the naked eye.

The challenges today are very different from those of the past. No longer is there an imminent fear that the Cuyahoga River will again catch on fire. No longer do we see the tidal basin just down the road from us bubbling over and foaming with raw sewage and toxic wastes, the best-dressed cesspool in America, as my predecessor, John Blatnik, called it. All that sewage ringed with the flowering Cherry Blossoms made him think of that image.

The issues facing the Clean Water Act and the Nation's waters today are ever more complex and difficult to address; nonetheless malevolent, perhaps even more fearsome and more dangerous than the early threats of pollution. But there are still three fundamental elements of this Act. First, sound science and technology should guide our national discharge standards. Second, we need adequate funding, despite what Richard Nixon said way back when and the budgets he submitted that were repeatedly overturned and increased. Despite the Reagan budget in 1981 that converted the entire sewage treatment grant program into a loan program and cut it from $6 billion a year to $2 billion, at a time when the smallest cities of America had to bear the sizeable burdens of cost of borrowing the money, repaying it with interest to State revolving loan funds. And, third, a strong enforcement program still is critical to consistent and effective implementation.

The Federal Government and the States have to work in partnership. The Clean Water Act was intended as a partnership program. But we are losing ground. We are losing ground in that partnership; we are losing ground in oversight of publicly owned treatment works and private sector treatment activities. Over the past decade, I have repeatedly expressed my concerns.

This Committee, under both Republican and Democratic leadership between 2001 and 2009, has issued numerous reports criticizing the prior administration for cutting Federal and State funding and personnel to implement the Act; repeatedly cited EPA for failing to provide a credible Clean Water Act enforcement program. Time and again the Committee documented cases where reduced funding for the Clean Water Act programs directly affected water quality programs of the States.

Congressman Waxman and I, he the Chair of the Government Oversight Committee, detailed the drastic deterioration to be EPA's enforcement program during the previous administration.

Simply put, enforcement has set back—or deterioration, I should say, of the enforcement program has set back progress in achieving the central goals of the Clean Water Act. The New York Times, just last month, ran a front page story detailing the systemic failure by Federal and State governments to enforce the Clean Water Act. The Times found that "fewer than three percent of Clean Water Act violations resulted in fines or other significant punishment by State officials" and that "unchecked pollution remains a problem in many States."

In the course of the interview I did for that story, I said EPA and the States have dropped the ball. It is time to pick up that ball and start moving it again.

I am keen to hear from Administrator Jackson, who comes with resolve, the commitment, and with a directive from the President to make this clean water program an effective one. She sent a memorandum to EPA staff saying "data available to EPA shows that, in many parts of the Country, the level of significant noncompliance with permitting is unacceptably high and the level of enforcement activity is unacceptably low." I agree. We are going to explore those issues in the course of today's hearing.

If dischargers are allowed to violate permits, if enforcement remains only a threat, then the program is failing, and I look to Administrator Jackson to begin taking the management steps necessary to protect the water, the public health, and the environment; and she has already demonstrated her strength of character and determination to do so and is off to a very strong start. I welcome Administrator Jackson to this hearing.

I now turn to Mr. Boozman, who is—or, Mr. Mica, do you wish to go at this point?

Mr. MICA. Thank you, I will, and I won't take too much time. I had the great pleasure of being on the Committee for 17 years and only as a Ranking Member for the full Committee the past three years; gotten more into some of these water resources issues.

Let me say, for our side of the aisle, I don't know anybody that I have talked to in Congress and our Republican conference that is not a strong advocate of making certain that we have clean water, that we go after people who carelessly flaunt laws, regulations, that pollute. We should do everything we can in a bipartisan effort to make certain that the beautiful land and water that we have been given in this Country is preserved and not polluted. So I don't know anyone on our side of the aisle that isn't in favor of that.

I think our emphasis is that we take our hard-earned taxpayers' money and we do the best job we can, cost-effectively cleaning up, enforcing. Learned a little bit about the enforcement regiment, and one of the things I did learn is, of course, the Federal Government can't be everywhere enforcing every source point problem that we have across the Country. We do rely on States, and I am told 46 States are responsible for enforcement, and we want them to do a good job.

One of the things that concerns me right now is they are strapped just like we are strapped, but even more so because they actually have to balance their budgets in almost every instance; we just print more money. But they are strapped, and if they are

charged with enforcement, sometimes they do tend to cut back, and that could have an impact, an adverse impact going after people who are violating the laws, regulation, or polluting. So I think we have to figure out what to do in the meantime in assisting them, but in a meaningful manner and cost-effective manner to make certain that what we intend is to hold people's feet to the fire and hold them responsible if they are polluting.

Another thing I have learned is some of the data that we collect, we need some way to get better information. I have seen some reports that just don't make sense. Some so-called violations end up being paperwork. I am not so concerned about people messing up paperwork as I am messing up our waters and polluting them and going after those violations.

The other thing I will close with is I sat in a couple of the Chesapeake Bay hearings and that is an incredible national treasure, but I was interested to learn how you have different States that contribute to the pollution and different point sources, and controlling that. Some folks may do a good job; maybe Virginia does a good job, Maryland may do a good job, we will take it up to Pennsylvania and maybe not as good a job there, or some jurisdictions within those State lines. So how we effectively, in multi-jurisdictional situations, deal with violators or polluters and making certain that our efforts all come together and are successful in what we hope to achieve, which is clean water and dealing with source pollution point solution.

So we are very open to suggestions working with our colleagues on the other side of the aisle, and, again, I think everyone has the same intent, but we want to get there as effectively and as cost-efficiently as we can for the taxpayer.

Thank you, Mr. Chairman. I yield back.

Mr. OBERSTAR. Thank you for those very pertinent and thoughtful reflections. I appreciate your comments.

Now the Vice Chair of the Committee, Mr. Rahall. Welcome.

Mr. RAHALL. Thank you, Mr. Chair.

Mr. OBERSTAR. You have sat here on the Committee with me through many, many years of hearings on this legislation.

Mr. RAHALL. I was just prepared to do that same recalling of our past histories on this legislation.

I do appreciate your having these oversight hearings today, Mr. Chairman, and appreciate Administrator Lisa Jackson and her staff for taking the time to be with us.

The Clean Water Act, as we all know, for the most part has served this Nation and its citizens well, but as we hold this hearing on the CWA after 37 years, it is apparent that this law is still a study in perpetual motion. As you have so well recalled, Mr. Chairman, I was a Member of this Committee, as, of course, you were when we passed major amendments to the Federal Water Pollution Control Act of 1972 in the form of the CWA Act of 1977, and, as well, the last time that significant amendments were made by the Water Quality Act of 1987.

In 1977, myself, as a freshman Member of this body, in addition to passing amendments to the CWA that year, the Congress also enacted the landmark Surface Mining Control and Reclamation Act of 1977, otherwise known as SMCRA. That is the Federal law

which regulates surface coal mining and reclamation in the U.S., short of water quality considerations, and that is where, of course, the Clean Water Act picks up.

Ever since 1977 there has been an attempt to dovetail these two laws. At times they have worked relatively well together, but there have also been conflicts between them, as we are seeing today in the Appalachian coal fields.

The Surface Mining Act explicitly provides for the practice known as mountain removal mining, MTR, under a prescribed set of circumstances. Meanwhile, under the Clean Water Act, companies engaging in this activity are required to obtain their Section 401 certification, NPDES permit, and Section 404 permits. The situation we face today in the Appalachian coal fields is that the EPA has invoked its authority to, for lack of a better term, second-guess the U.S. Army Corps of Engineers' issuance of these Section 404 permits.

At stake are not just 79 mining permits now subject to what is being called an enhanced review process, but also, and more fundamentally, the future of surface mining. In fact, many of my constituents believe that the future of coal, all coal, is at stake in this discussion. There is a great deal of frustration and concern in the Appalachian coal fields as a result of the current review, and I cannot under-emphasize that fact.

I have to say that I share that concern. For many years, our coal miners, our coal operators, mining community residents, State agencies, and those best representing coal regions have sought clarity and certainty about the permitting process. We want to know what the rules are so that miners can stay on the job and continue to fuel America. We all want to do what is right by the environment. Of course we do. But we must also protect coal field jobs and the economy.

So I do, as I conclude, thank the Administrator for being with us today and, most importantly, for maintaining an open line of communication, as she has, with me on this matter. We have had several meetings already; we will have more in the future. I also want to say thank you to the Assistant Secretary of the Army for Civil Works, Jo-Ellen Darcy, and the U.S. Army Corps of Engineers for also meeting with me on these issues. And thank you, Administrator Jackson, for being with us today.

Thank you, Mr. Chairman.

Mr. OBERSTAR. Thank you, Mr. Rahall.

Mr. Boozman?

Mr. BOOZMAN. Thank you, Mr. Chairman. We do appreciate your holding this very important hearing today, and we appreciate having you, Ms. Jackson, before us, and we appreciate your hard work.

We celebrate the 37th anniversary of the Clean Water Act and review its compliance and enforcement programs today. When the Clean Water Act was enacted in 1972, it was during an era when raw sewage was being dumped into the Nation's rivers and streams. While the Clean Water Act has put a stop to this practice, today's pollutants are subtle and much more difficult to detect. Recently, The New York Times, based on EPA and State data, revealed that there were allegedly more than half a million Clean Water Act violations in the last five years.

Unfortunately, the data is filled with unexplained anomalies. For instance, the World War II Memorial in Washington, D.C., less than three miles from here, is cited as having six separate Clean Water Act violations. The Blue Plains Waste Water Treatment Facility in Washington, D.C., is having as cited 62 separate violations. In another case, no violations were reported, but fines were collected by the agency.

As the Chairman stated, there was overwhelming support of the Clean Water Act, and the challenge of today is to focus on bipartisan solutions as we go forward.

I think one of the solutions is helping the agency to collect data in a uniform manner that will allow us to determine the effectiveness of compliance and enforcement. The database utilized by the EPA is full of anomalies which calls into question the value of the data being collected. For purposes of collected data, compliance, and enforcement, the agency divides national pollution discharge elimination system permits into two categories, those that involve major discharge flows of one million gallons or more and those with less volumes or flow. There are 6700 individual permits in the major category and 39,000 in the non-major category involving less effluent discharge.

But the agency collects these data differently from major and non-major discharge permit holders, and there are differences in how States report information to the agency. It is not always clear whether a violation is a paperwork violation or something far more serious.

EPA itself acknowledges that there are problems with the database. Until we solve the issues surrounding the database utilized by the agency, we will be unable to determine the effectiveness of the compliance enforcement programs. Congress and the Administration should continue to focus on water quality violations, not paperwork errors. The EPA and the States should work quickly to resolve water quality violations through compliance assistance. Only when compliance assistance does not resolve the violation, the agency and the States should then move towards more formal enforcement actions.

Mr. Chairman, we stand ready to work with you and the Administration to ensure that the compliance and enforcement regime authorized by the Clean Water Act is robust and responsive to the rapidly changing needs of the Nation. I think it is clear that the agency's databases need to be improved, and I hope the witnesses today will help us in that effort.

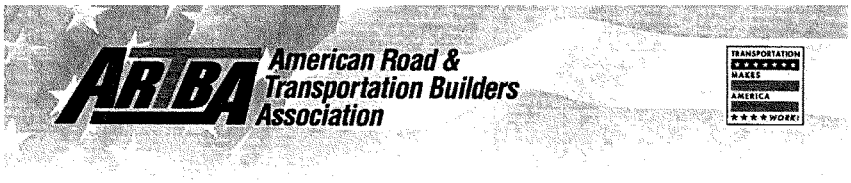
Thank you, Mr. Chairman.

Mr. OBERSTAR. I thank the gentleman for those observations.

Mr. BOOZMAN. Mr. Chairman, with your permission, I have some testimony that I would like to be entered into the record, if that is okay.

Mr. OBERSTAR. The statement from ARTBA and others we have also received, and we will include that in the Committee hearing record, with a notation, however, that the thrust of the testimony is directed toward the Clean Water Restoration Act, which is not the subject of today's hearing.

[The information follows:]



October 15, 2009

The Honorable James L. Oberstar, M.C.
Chairman
United States House of Representatives
Committee on Transportation and Infrastructure
Room 2165
Rayburn House Office Building
Washington, DC 20510

The Honorable John Mica
Ranking Member
United States House of Representatives
Committee on Transportation and Infrastructure
Room 2163
Rayburn House Office Building
Washington, DC 20510

Dear Chairman Oberstar and Ranking Member Mica:

The American Road and Transportation Builders Association (ARTBA) would like to formally request our written statement submitted for the October 15 hearing on "The Clean Water Act after 37 Years: Recommitting to the Protection of the Nation's Waters" be included in the formal hearing record. ARTBA's written statement for this hearing has been emailed to Ryan Seiger and Jon Pawlow of your respective staffs. ARTBA and its members appreciate the Committee examining this issue and believe that our testimony may provide some useful insight on how to balance needed environmental protections with efficient delivery of all modes of transportation vital to the nation's public health and safety.

Thank you for your consideration of this request.

Sincerely,

Nick Goldstein
Assistant General Counsel and Director of
Regulatory Affairs

cc: Ryan Seiger, Jon Pawlow

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The Clean Water Act after 37 Years: Recommitting to the Protection of the Nation's Waters

Statement of the American Road and Transportation Builders Association

Submitted to the United States House of Representatives Transportation and Infrastructure Committee

October 15, 2009

On behalf of the American Road and Transportation Builders Association (ARTBA) and its 5,000 member firms and public agencies nationwide, the association would like to thank Chairman Oberstar and Ranking Member Mica for commemorating the 37th anniversary of the Clean Water Act (CWA) and reviewing the Act's successes and future challenges.

ARTBA's membership includes public agencies and private firms and organizations that own, plan, design, supply and construct transportation projects throughout the country. ARTBA members are directly involved with the federal wetlands permitting program and undertake a variety of construction-related activities under the CWA. In the 37 years since the CWA's passage ARTBA has actively worked to combine the complementary interests of improving our nation's transportation infrastructure with protecting essential water resources. In doing so, we are proud to note the constant efforts of the transportation construction industry to minimize the effects of transportation infrastructure projects on the environment.

One of the main reasons for the success of the CWA over the past 37 years is the Act's clear recognition of a partnership between the federal and state levels of government in the area of protecting water resources. The lines of federal and state responsibility are set forth in Section 101(b) of the CWA:

> "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities of States to prevent,

> reduce, and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources..."[1]

This structure of shared responsibility between federal and state governments allows states the essential flexibility they need to protect truly ecologically important and environmentally sensitive areas within their borders while, at the same time, making necessary improvements to their transportation infrastructure. The success of the federal-state partnership is backed by dramatic results. Prior to the inception of the CWA, from the 1950s to the 1970s, an average of 458,000 acres of wetlands were lost each year. Subsequent to the CWA's passage, from 1986-1997, the loss rate declined to 58,600 acres per year and between 1998-2004 overall wetland areas increased at a rate of 32,000 acres per year.[2]

ARTBA has a long history of working with the Transportation and Infrastructure Committee to build upon the successes of the CWA by finding common-sense solutions to environmental issues through seeking to protect natural resources and efficiently deliver transportation improvements. A continuing recognition of the federal-state partnership embodied in the CWA is particularly important to state departments of transportation as it allows them to balance the unique environmental needs of their state against the equally important need to develop their transportation infrastructure.

Since the enactment of the CWA there have been both judicial and legislative attempts to blur the lines of the CWA's federal-state partnership. Straying from the original intent of the CWA to preserve the rights of state and local governments has caused the transportation construction industry and state departments of transportation to grapple with jurisdictional issues and face confusing and conflicting interpretations on the scope of federal jurisdiction. Many of the CWA issues confronted by the transportation construction industry involve wetlands and the wetlands permitting process. Often project planners do not know what is or is not a federally-jurisdictional wetland. The confusion created by such jurisdictional ambiguity complicates long-term transportation planning because planners can never be sure where permits will or will be not required.

ARTBA supports the reasonable protection of environmentally sensitive wetlands with policies balancing preservation, economic realities, and public mobility requirements. Much of the current debate over federal jurisdiction, however, involves overly broad and ambiguous definitions of "wetlands." This ambiguity is frequently used by anti-growth groups to stop desperately needed transportation improvements. For this reason, ARTBA has, and continues to, work towards a definition of "wetlands" that would be easily recognizable to both landowners and transportation planners and is consistent with the original scope of the CWA's jurisdiction. As an example of this, official ARTBA policy recommends defining a "wetland" as follows: "If a land area is saturated with water at the

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1 CWA §101(b).

2 *Draft 2007 Report on the Environment: Science*, USEPA, May 2007, available at http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=140917

surface during the normal growing season, has hydric soil and supports aquatic-type vegetation, it is a functioning wetland."

As part of the highway construction process, ARTBA members are actively involved in the restoration and preservation of wetlands. ARTBA has consistently supported the concept of mitigation banking, which is particularly beneficial to the transportation project delivery process, as it provides project planners flexibility in meeting wetlands restoration obligations by allowing the choice of a mitigation site based on environmental value rather than proximity to a highway project. Mitigation banking also enables project sponsors to chose areas for mitigation that are well suited for wildlife and wetlands management (such as the enhancement of already degraded wetlands).

Mitigation banking represents one of the CWA's many achievements and demonstrates how the federal-state partnership creates flexibility allowing for both environmental protection and efficient delivery of transportation projects. For this reason, ARTBA continues to be actively involved in the development of regulations concerning mitigation banking and is actively promoting mitigation banking as an alternative to the more restrictive "postage- stamp" style of wetlands reclamation. Expansion of the use of mitigation banking as a preferred alternative for addressing the environmental impacts of transportation projects will help to build upon the CWA's successes.

ARTBA has been also actively involved in CWA litigation concerning federal jurisdiction over the nation's waters and wetlands for the better part of the past two decades. ARTBA was a main participant in litigation spanning 14 years concerning the United States Army Corps of Engineers (Corps) "Tulloch Rule" regulating incidental fall back from dredging and filling operations. Also, ARTBA was involved in multi-year litigation over modifications to the Corps' Nationwide Permit (NWP) program. Most important to this hearing, however, is that ARTBA filed amicus briefs representing the transportation construction industry's interests in the United States Supreme Court decisions of *Solid Waste Association of Northern Cook County v. United States Army Corps of Engineers* (*SWANCC*) and *Rapanos v. United States* (*Rapanos*). ARTBA's involvement in all of these cases helped to preserve the federal-state balance that is the foundation of the CWA's 35 years of success.

The decisions in both *SWANCC* and *Rapanos* benefited the transportation project delivery process by setting limits on Corps' jurisdiction. Specifically, *SWANCC* struck down the so-called "migratory bird rule," which was being used by the Corps to assert jurisdiction over intrastate wetlands based on the flight patterns of migratory birds. The theory behind such an expansion of Corps authority was based on migratory birds being instruments of commerce due to the possibility of hunters, bird-watchers or other interested state parties crossing state lines to view them. ARTBA's brief to the Court took issue with the Corps theory of jurisdiction, noting:

> "[t]he almost 'limitless' expansion of federal authority inherent in the migratory bird rule allows the Corps to essentially arrogate federal power over state and local

> governments contrary to the express language of the CWA and fundamental principles of federalism."[3]

The "migratory bird rule" was a severe hindrance to transportation planners as it made federal jurisdiction extremely hard to predict. Project developers, not knowing the habits of migratory birds, were unable to tell what was and was not a jurisdictional wetland. Again, ARTBA's brief illustrated this point:

> "The Corps's expansion of jurisdiction to include all migratory bird habitat could have the practical effect of allowing the Corps to overturn state and local approvals of public works projects impacting isolated 'wet areas' based on an alleged federal interest in the 'aggregate' health of the Nation's migratory bird population."[4]

The Court agreed with the issues raised in ARTBA's brief and recognized expansion of federal jurisdiction would threaten the fundamental principles upon which the CWA was created. As then Chief Justice Rehnquist stated:

> "These are significant constitutional questions raised by respondents' application of their regulations, and yet we find nothing approaching a clear statement from Congress that it intended [the CWA] to reach an abandoned sand and gravel pit such as we have here. Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use. See, *e.g.*, *Hess* v. *Port Authority Trans-Hudson Corporation,* 513 U.S. 30, 44 (1994) ('[R]egulation of land use [is] a function traditionally performed by local governments'). Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States ... to plan the development and use ... of land and water resources ... .'"[5]

The decision in SWANCC was a victory reaffirming the balance of jurisdiction intended by the CWA. By striking down the "migratory bird rule" the Court recognized the role of state and local governments in continuing to protect important environmental resources

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[3] *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), Amicus Curiae Brief of the American Road and Transportation Builders Association, p.12.

[4] *Id.* at 13.

[5] *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 174 (2001).

while at the same time managing their own development needs without unnecessary delay or interference.

The CWA's jurisdictional scheme was brought before the Court once again in the *Rapanos* litigation. At issue in *Rapanos* were two separate wetlands cases which were consolidated for the Court's review. The Court was asked to decide whether the Clean Water Act allows Corps regulation of "isolated wetlands" that have no connection with "navigable waters." The Court was also asked to decide whether or not a tenuous connection between a wetland and "navigable water" is enough to allow regulation by the Corps, or if there is a minimal standard that should be applied. Once again, ARTBA explained the CWA's legislative scheme of state and federal shared responsibility to the Court:

> "By federalizing any wet area, no matter how remote from navigable waters, [this Court would adopt] an unprecedentedly broad jurisdiction of the geographic scope of CWA jurisdiction. As this Court held in *SWANCC*, the courts should be hesitant to intrude upon the delicate balance between federal and state regulation of land and water resources...In enacting the CWA, Congress did not seek to impinge upon the States' traditional and primary power over land and water use when setting out the scope of jurisdiction under the CWA."[6]

The Court's split decision in *Rapanos* preserved the CWA's essential jurisdictional balance by preventing sweeping federal authority over isolated wetlands and man-made ditches or remote wetlands with finite connections to navigable waters. However, because the Court's decision was not issued by a majority of the justices, these issues are currently being examined by lower courts on a case-by-case basis. While ARTBA applauds the fact the decision prevented an expansion of already inefficient federal wetlands regulation, we also recognize the need for clarity in *Rapanos'* wake in order to preserve the necessary balance between federal and state jurisdictions that is essential to the continuation of the CWA's success.

In decisions such as *Rapanos* where four justices agree in both the plurality opinion (authored by Justice Scalia) and the dissenting opinion (authored by Justice Stevens) and one Justice (Justice Kennedy) writes a concurrence, the effects of the opinion should be taken from the areas where the plurality and the concurrence agree. The Supreme Court has spoken to this point specifically, stating:

> "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that

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[6] *Rapanos v. United States*, 126 S.Ct. 2247 (2006), Amicus Curiae Brief of the American Road and Transportation Builders Association, p. 25.

> position taken by the members who concurred in the judgments on the narrowest grounds.'"[7]

In *Rapanos*, the five justices who agreed in the final judgment of the case were Justices Scalia, Thomas, Alito, Roberts and Kennedy. Thus, in responding to the *Rapanos* decision, the focus should be on those areas where agreement can be found among these five justices.

The Scalia plurality and the Kennedy concurrence agree on several points which should guide any regulatory or legislative response to the *Rapanos* decision. Most importantly, both Scalia and Kennedy disagreed with the existing Corps theory of jurisdiction that a wetland with tenuous and questionable connections to navigable water can be subject to federal jurisdiction if one molecule of water flows between both points. This has been termed by some as the "migratory molecule" theory of jurisdiction. Justice Kennedy specifically rejects the idea of the "migratory molecule" by noting that a "central requirement" of the Clean Water Act is "the requirement that the word 'navigable' in 'navigable waters' be given some importance."[8]

Justice Kennedy also explains the CWA's establishment of certain basic recognizable limits to the Corps' excluding man-made ditches and drains by refuting portions of Justice Stevens' dissent:

> "[t]he dissent would permit federal regulation whenever wetlands lie alongside a ditch or a drain, however remote and insubstantial, that eventually flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far."[9]

Further, Justice Kennedy notes such an over-expansive view of the Corps' authority is incompatible with the CWA:

> "Yet the breadth of this standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact-water and carrying only minor water-volumes towards it—precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters that the isolated ponds held to fall beyond the Act's scope in SWANCC."[10]

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7 *Marks v. United States*, 430 U.S. 188, 193 (1977).

8 *Rapanos v. United States*, 126 S.Ct. 2247 (2006) (Kennedy, J. concurring).

9 *Id.*

10 *Id.* at 2249, referring to the holding in SWANCC

This leads to a central point of *Rapanos* echoed by members of the plurality, dissent and Justice Kennedy—there needs to be some sort of regulatory response from the Corps reflecting these limits on its jurisdiction. In his concurrence, Justice Kennedy states:

> "Absent more specific regulations, however, the Corps must establish a specific nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to navigable tributaries. Given the potential overbreadth of the Corps regulations, this showing is necessary to avoid unreasonable applications of the statute."[11]

Chief Justice Roberts was more direct with his wording, noting a regulatory response from the Corps has been long overdue, and should have been promulgated after the *SWANCC* decision first recognized the jurisdiction of the Corps needed to be limited:

> "Rather than refining its view of its authority in light of [the Court's] decision in *SWANCC*, and providing guidance meriting deference under [the Court's] generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency."[12]

Finally, Justice Breyer's dissent warns a refusal from the Corps to issue a regulatory response to *Rapanos* will only result in more litigation:

> "If one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of the present cases (subject to deferential judicial review). In the absence of updated regulations, courts will have to make ad hoc determinations that run the risk of transforming scientific questions into matters of law. This is not the system Congress intended. Hence, I believe that today's opinions, taken together, call for the Army Corps of Engineers to write new regulations, and speedily so."[13]

Thus, the one thing that is clear from the *Rapanos* decision is the need for a response recognizing the limits of Corps jurisdiction and clarifying the existing wetlands regulations. The response can be either administrative or legislative in nature. In crafting either type of response, ARTBA recommends the result be a clarified, consistent regulatory program that operates within the proper jurisdictional limits of the CWA as reflected in the *Rapanos* and *SWANCC* decisions.

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11 *Id* at 2250.

12 *Id.* at 2236 (Roberts, C.J., concurring).

13 *Id.* at 2266 (Breyer, J., dissenting).

ARTBA would like to offer several principles that should be the basis of any legislative initiative. It is essential for any legislative clarification of federal wetlands jurisdiction to preserve the federal-state partnership embodied in the CWA. As both *Rapanos* and *SWANCC* stressed, a scheme of shared jurisdiction is necessary to carry out the original intent of the CWA. States need to be allowed to maintain full control over intrastate water bodies in order to allow them the flexibility to balance their own environmental needs with unique infrastructure challenges.

There have also been legislative responses attempting to solve the confusing issue of Corps jurisdiction. While ARTBA appreciates the desire of Congress to protect legitimately environmentally sensitive wetlands, we believe such efforts should not extend federal regulation to isolated areas that have no environmental value and have been removed from the Corps' jurisdiction by both *Rapanos* and *SWANCC*. Protecting an area simply for the sake of protection adds little from the standpoint of environmental quality, but can create needless, time-consuming regulatory complications. Specifically, removing the word "navigable" from the CWA would lend to this type of unnecessary regulation.

Also, ARTBA has repeatedly stated the involvement of multiple agencies (including EPA) in wetlands regulation only hinders the overall efforts of the Corps' permitting program. One of the principal problems that has plagued the 404 program is indecision and inaction, with no benefit for the environment. Justice Breyer reiterated this in his aforementioned *Rapanos* dissent, stating "If one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of [federal wetlands jurisdiction]."[14] Congress reiterated this point in the National Defense Authorization Act for Fiscal Year 2004 by authorizing only one agency, the Corps, to issue 404 permitting program regulations. This direction should be continued. Thus, it should be the sole responsibility of the Corps to take the lead and build a stronger, more predictable compensatory mitigation program to both enhance environmental protection and provide a measure of certainty to regulatory staff and permit applicants. ARTBA continues to believe the Corps should be the principal agency administering the 404 wetlands regulatory program.

Many ARTBA members are directly involved in tremendously successful mitigation efforts as part of the projects they construct. ARTBA public official members also are integrally involved in the permitting process itself, as they regulate at the state and local level. A prime reason for the success of current mitigation efforts is the flexibility of individual states to delegate which wetlands to protect and direct mitigation efforts appropriately. Removing this flexibility and possibly mandate protection of all wet areas, no matter how environmentally important, could dilute both state and federal resources. Retaining state autonomy over wetland protection efforts is essential to maximize the efficiency of these programs and public sector resources. From a federal legislative perspective, mitigation should be declared as the preferred, first-choice method of wetlands restoration and development. The permitting process should be altered to require mitigation banking, provided that it is advantageous to both the environment and

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[14] *Id.*

project sponsors. Federal mitigation regulations should place a premium on flexibility and not be bogged down by requirements which offer no additional environmental protection and could lead to further delay of desperately needed transportation infrastructure projects

ARTBA looks forward to continuing its long tradition of working with the committee in order to continue building upon the successes and addressing the future challenges of the CWA and its essential scheme of shared federal and state jurisdiction.

Mr. OBERSTAR. The gentleman made an interesting observation and it does seem somewhat incongruous that a monument on the National Mall should be cited. But I recall very clearly in the construction the contractor did not take appropriate steps to control sediment from the construction site that was running down 14th Street, and that point is the lowest point in Washington, D.C., and discharges actually reached the Potomac directly along 14th Street, so the contractor was indeed cited. And the monument, with the pool that has chlorine in it, also runs into the gutters on 14th Street and goes directly into the Potomac. That has to be stopped. And it does seem incongruous that a monument should be a pollution source, but it is.

Do others wish to be heard? Ms. Johnson, Chair of our Water Resource Subcommittee.

Ms. JOHNSON. Thank you very much, Mr. Chairman, for holding this hearing. This is an important anniversary, and one thing we do know, that our water is cleaner and safer than it was 37 years ago, and I look forward to hearing the witnesses, and I ask unanimous consent to put my statement in the record.

Mr. OBERSTAR. Without objection, so ordered.

Mr. Ehlers?

Mr. EHLERS. Thank you, Mr. Chairman. It is a pleasure to be here and note this important event, and I certainly want to thank Administrator Jackson for being here. You hold one of the most important jobs in the Federal Government and we certainly appreciate it and realize it here.

I also would note that, coming from a solid Dutch background, I will not offer this statement with as much emotion as you offered yours, Mr. Chairman, but I totally agree with your comments and what you said, and I appreciate the fervor that you show on this particular subject. You can tell we are both from the Great Lakes area.

But as an environmentalist, a scientist, and a representative from the Great Lakes State of Michigan, I know that water is our most important natural resource. However, water is virtually useless unless it is appropriately clean. Regrettably, for hundreds of years, we as a Nation neglected our God-given responsibility to preserve and protect our clean water resources. We degraded our water so badly that some river surfaces actually caught on fire and fish died in mass quantities. However, we were able to reverse this degradation by passing the Clean Water Act in 1972.

Since that time, we have made significant progress in bringing our waters back to a healthy state. That being said, we still have a long way to go, especially in the Great Lakes; and I am pleased that the Legacy Act has enabled us to make considerable progress there. But, in fact, I am afraid that we may once again be on a downward path of neglect due to regulatory uncertainty caused by two differing U.S. Supreme Court cases. Hopefully, we will l earn from our past mistakes and clarify these uncertainties so that we can ensure clean waters are passed along to our children and their children.

We must act as a Congress to clarify the scope of the Clean Water Act. And, in the interest of time, I will not go into all the details, but Chairman Oberstar has been a leader on this and I

have been pleased to support his efforts in the past, and I hope we will be able to continue to make progress on that issue.

Although may people fixate on the interpretation of legal terms such as navigable waters and waters of the United States, it is important that we not lose sight of the basic intent of the Clean Water Restoration Act, which is to protect our waters from pollution. We must never forget that and we must earnestly and sincerely pursue that.

Mr. Chairman, I look forward to working with you and the rest of the Committee to ensure the continuing success of the Clean Water Act, and thank you for all your good work on it. We have a lot of work to do yet.

Mr. OBERSTAR. We most certainly do. I am grateful for your scientific input and assessment, and your thoughtful approach to these issues. Thank you for your participation.

Do other Members wish to be heard? Mrs. Capito?

Mrs. CAPITO. Thank you, Mr. Chairman. Thank you for holding this very important hearing on a very important issue. It is clear that protecting our Nation's water is important to all of us, and we depend on Federal and State agencies to monitor water conditions.

As Members of Congress, we have a responsibility to exercise legitimate oversight of these agencies. With that in mind, I would like to thank all of today's witnesses and, Administrator Jackson, I appreciate your being here.

As you are well aware, your agency is engaged in an elevated review process for coal mining permits in the Appalachian Corps district. Generally speaking, the process of obtaining Federal coal mine permits is complicated and can involve years of coordinated effort before the companies, interest groups, and State and Federal agencies. Now the EPA has added another layer of review, in essence, a do-over, further delaying permitting decisions at the cost of West Virginia jobs. We are very frustrated.

This new process is second-guessing decisions made by qualified experts in Federal and State agencies, including permits on which the EPA has already commented. EPA is essentially holding back critical permits until National Headquarters reviews and approves them. The way I and many of my States see this, this is a veiled attempt to block not just surface mining, but all mining of coal.

Over the course of the summer, I met with officials from your agency and highlighted the stakes associated with continued delays in the permit review process. In my discussions with officials at EPA, I have regularly stressed that their decisions stand to have real implications on West Virginians. I was, however, repeatedly assured of an expedient review process. Administrator Jackson, it has now been 18 weeks since that meeting, added to the years these permits have been active, and there has been very little or no movement.

Administrator, West Virginians are becoming very frustrated and there are a lot of unanswered questions. We are concerned about our jobs, our families, and our communities. We are hearing what you say, but we are watching much more closely what you do, and we are extremely concerned. Miners across Appalachia want to play by the rules. We want clean water. They want to know and work with your agency to resolve these permits in a way that pro-

tect both jobs and the environment. But as it stands right now, we don't know what rules you want us to play by, and your agency's indecision is jeopardizing many jobs in my State. I look forward to your testimony clearing up this uncertainty.

Thank you, Mr. Chairman.

Mr. OBERSTAR. Thank you, Mrs. Capito.

Mrs. Napolitano?

Mrs. NAPOLITANO. Thank you, Mr. Chair. I add my thanks for holding this very important hearing.

In my Subcommittee of Water and Power, we are very concerned. And thank you, Ms. Jackson, the work that EPA has done in my area in California has been exemplary.

I caution some of the Members and I can tell you that for years we have been looking at contaminated aquifers as a result of discharges from either farming or some of the aerospace industry that has contaminated our waterways. And while we may think that these may be a little bit harsh, I would protect the water that my grandchildren and my great-grandson are going to be utilizing, and that we must be vigilant to ensure that any waters that are affected are cleaned for the use of those following us.

It is very important. We find that we don't have any new water sources. Mother Earth hasn't given us any more, so we need to be able to ensure that what we have we recycle, we retreat, whatever needs to be done to it, and that the responsible parties own up to it or take steps not to pollute those waters.

So it is a very key issue for me and for some of those that I know feel the same way. So thank you, Mr. Chair.

Mr. OBERSTAR. Thank you.

Gentleman from Ohio, Mr. Latta.

Mr. LATTA. Well, thank you very much, Mr. Chairman. I appreciate the opportunity of being here today on this hearing.

Administrator Jackson, thank you so much for being with us.

If I may, Mr. Chairman, I would like to summarize my written remarks for the record today.

I want to echo Mr. Mica's remarks that we are all in favor of clean water. One of the things, though, that he mentioned, I think just to paraphrase it, is that we need to be very, very practical with what we are doing.

In a later life or earlier life, I should say, I served as a Wood County Commissioner for six years, and as a commissioner, besides all of the things from the budget to you name it, water and sewer was one of our areas that we were assigned in the State of Ohio. Wood County is approximately 619 square miles; we have all or part of five cities, 21 villages; many, many unincorporated areas in the county. I have the Maumee River as my northern boundary, which flows into Lake Erie, so we are all very cognizant of that. Also, before the settlers came, it was also known as the Great Black Swamp. So we have a very unique ecosystem in my area.

But one of the things, to be honest, when I was a county commissioner, your day was going to start off bad when the mail came and we got a letter from the EPA that started off Dear Commissioners. What that usually meant was one of our communities in our counties was being placed under orders. And when you are out in your

communities all the time, you really get to know it and you get to know what they can afford to do.

Now, as a Member of Congress, I have all or part of 16 counties in northwest and north central Ohio, and, as I said, I am out in my district all the time. There is great consternation out there when these orders are received. Just to give you a couple points, in some cases it would actually be cheaper for us to actually buy the community than do the projects that these localities are being put under, and that is not a joke. Not too long ago, I was at one of my smaller villages, and when you have folks that are in these villages that are now senior citizens, they have very limited incomes, or folks that can't move away because of their economic status and this is their home. But the Toledo Metropolitan Council of Governments has done a study for us not too long ago, and if you live in a large metropolitan area, some of these projects would cost around $2,000 per household. But in some of these areas, where they only have 300 and some people left in the entire village, it would be over $22,000. Literally, that is what I mean, it would be cheaper for us to buy them out.

In other cases, cities that have intakes out into the different rivers in my area have situations where they are expected to put the water back into the river cleaner than they pulled it out. And my question always is how clean is it and how far down the river is it before it is commingled to be at the exact same level it was before the city had it come out of the intake.

So one of the problems we run into, then, we have a lot of companies in my area and I have the largest manufacturing district in Ohio, the 15th largest in Congress, and we are hard hit with unemployment and trying to get people back to work. So we have companies out there now that are actually saying, you know, if these projects have to go through, we are just going to move out because their parent companies say we can't have you there, we can't afford to compete with somebody else with those high costs.

So one of the things I would like to stress is I think that when these orders are being placed and when the rules are being made, I think they have to be cognizant of the fact of what is going on out there. And as was already mentioned by our Ranking Member and also by Mr. Boozman, we are pretty hard hit out there, and we have to really look at what we are doing.

So I appreciate your being here and hear from your testimony today, and, Mr. Chairman, I appreciate the opportunity. Thank you.

Mr. OBERSTAR. I thank the gentleman for those comments. I am particularly touched by his reference to the cost of cleanup shouldered by local government. We had intended in the Clean Water, while not in legislation, but as a matter of policy, that the early going would be some 70 percent of the funds would be directed toward the biggest waste streams in the Nation, and by the early 1980s that would be reversed, that 60 percent of the funding would go to smaller communities, those under 50,000 population. That was at the point at which the Reagan Administration converted from a grant to a loan program and reduced the total size of the program.

In the stimulus this year we had $4.6 billion for wastewater treatment and an additional $100 million for drinking water systems. That was to go out by rankings of the States. I think we need—and with some initial problems due to the Buy America language, that funding is underway. We need to continue it and we need to continue that commitment to deliver on the commitment we made to small communities to help them with the costs of cleanup. In the end, it is a cost, but it is a shared cost that all America has an interest in clean water and all America has an interest in cleaning up.

So I welcome the gentleman's comments and welcome his participation.

Mr. Hall.

Mr. HALL. Thank you, Mr. Chairman, and thank you for holding this hearing.

Administrator Jackson, thank you for being here.

In my district also we have all kinds of water problems, a district that spans from the Delaware across the Hudson River, all the way to the Connecticut border, and have waterways that flow directly into Long Island Sound through Connecticut and others that flow into Delaware Bay and, of course, the Hudson flowing down through New York Harbor.

We have, in Hopewell Junction, my home county in Dutchess, we have a trichloroethylene spill that has contaminated a plume of aquifer a mile and a half long and I believe three dozen families or so on bottled or trucked-in water because their wells are unsafe for them to drink, and they have vapor intrusion systems that are being provided by EPA and DEC. We have schools right now in my district where students with high blood pressure problems are being warned not to drink the water from the drinking fountains because of high sodium levels. We have every lake, virtually, in my district suffering from eutrophication from over-fertilization of nitrates and runoff from either lawn chemicals or from inadequate sewage treatment plants that are old and failing.

My towns also can't afford it, but the question they are asking me first is not—they do ask how we are going to pay for it, but the first thing they say is we need clean water for our children and ourselves and our future generations; and the cost will be borne somehow by a combination of Federal, State, and local funds, but we do need to figure out the most efficient way to do it, but especially we need to do it.

So thank you so much for being here, and I yield back.

Mr. OBERSTAR. I thank the gentleman.

The gentleman from Maryland, Mr. Cummings.

Mr. CUMMINGS. Thank you very much, Mr. Chairman. First of all, I want to associate myself with the comments of Mrs. Napolitano and I want to thank you, Mr. Chairman, for calling this hearing on the importance of reviving real enforcement of the Clean Water Act.

The past eight years were an era of conscious neglect of environmental laws, and the data collected by both EPA and The New York Times bears that out. Staggering statistics have been recently released by each of these entities. As Administrator Lisa Jackson points out in her testimony, roughly one in four major facilities

subject to Clean Water Act enforcement was in substantial noncompliance. Possibly more disturbing was the conclusion reached by this Committee and others that the data accumulated by The New York Times was more comprehensive than the EPA's own information.

I am pleased to read of the new initiatives taking place at the EPA under the leadership of Ms. Jackson. She has made a commitment both to her employees at the EPA and to the American public that it is a new day at the EPA. Based upon her stellar reputation and her actions so far, I believe that her leadership will bring about real institutional reform, because it will take nothing short of that to rebuild the public's trust in this agency.

When, according to The New York Times, only 2.2 percent of the Clean Water Act violations led to enforcement actions, there is a natural skepticism as to whether this agency was truly committed to its mission. As I am sure the Chairman will agree, delegation of responsibility to the States is no excuse for dropping the ball. While the States had their failures, EPA's unwillingness to exercise its own authority and to ensure enforcement at the State level was negligent disregard for the American people at best. This is our watch.

As I mentioned, I am encouraged by Ms. Jackson's bold actions in her short tenure at the EPA. I look forward to her testimony, as well as the testimony of all of our witnesses, and hope that this yields a productive discussion about this critical issue.

With that, Mr. Chairman, I yield back.

Mr. OBERSTAR. I thank the gentleman.

Mr. Arcuri.

Mr. ARCURI. Thank you, Mr. Chairman. Thank you for holding this hearing.

I would like to thank Administrator Jackson and the other witnesses for being here.

The enactment of the Clean Water Act was a seminal event in our Nation's history and the preservation of its natural beauty. Being from New York, I consider myself exceptionally fortunate; we not only have the benefits of the Great Lakes, being on the Great Lakes, but also abundant water. It is a wonderful natural resource to have and it certainly makes the quality of life substantially higher.

But I am very concerned with the fact that the Energy Policy Act of 2005 exempted some of the exploration activities for natural gas from the Clean Water Act. We are very fortunate in New York, we are on the Marcellus shale deposit and the Utica shale deposit, which means that we have access to a wonderful natural resource, that is, natural gas, and clearly it is important that we do all we can to bring that natural gas and use it to develop energy independence. But we shouldn't do it at the expense of our greatest natural resource, which is our water.

I have a concern because while the State of New York takes strong measures to regulate and to enforce the same type of EPA laws, other States don't necessarily have to do that. Obviously, just to give you an example, the northernmost point of Chesapeake Bay begins in my district, in the Village of Cooperstown, and that runs right through the Marcellus shale deposits. So, obviously, it is in-

cumbent upon New York and it is important that New York takes steps to make sure that the water that runs through there is clean so that the Chesapeake Bay doesn't experience the pollution as a result of what we call hydraulic fracking the natural gas development. So I think it is very important that we take measures to ensure that the Energy Policy Act of 2005 is changed and amended so that the Clean Water Act also applies to that.

There is no question that achieving energy independence is important, but it should not come at the cost of protecting our greatest natural resource, which is our water.

Thank you, Mr. Chairman, again, for holding this hearing, and I yield back the balance of my time.

Mr. OBERSTAR. Thank you very much.

We will now proceed with our very patient Administrator. You have heard a wide range of views from Members and will hear a lot more after your testimony is delivered. Thank you very much for participating today and for your vigorous start with EPA.

TESTIMONY OF THE HONORABLE LISA P. JACKSON, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Ms. JACKSON. Thanks, Mr. Chairman. I will try to be brief, but I ask for your patience too, because there are a number of things I want to make sure I present to the Members of the Committee.

Thank you to the Committee for having me here today. I am delighted to be here to discuss the state of our Nation's waters. I would like to focus my remarks on our Nation's water quality and the challenges we face to improve it, along with EPA's implementation of the Clean Water Act and the steps we are taking to improve Clean Water Act compliance and strengthen our clean water enforcement program.

We certainly all agree, and I heard this morning, that having clean and safe water in our communities is a right for all Americans. We also know that clean water is essential to our health, our environment, and our economy. As we commemorate the 37th anniversary of the Clean Water Act, I want to begin by thanking you, Mr. Chairman, for your steadfast leadership and constant concern for the issue of clean water. I do not believe it is an understatement to say that we would not be where we are today were it not for your leadership and many Members of this Committee, and I thank you for that.

But we must also reflect on the progress that has been made over the past 37 years and also focus on the enormous challenges ahead. To put it in a phrase, Mr. Chairman, we have a long way to go.

The Clean Water Act was enacted to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, and EPA is the agency that has primary responsibility to achieve these goals. As such, it is EPA's mandate to use its resources effectively, including vigorously enforcing the rule of law to achieve this result.

There are significant water quality problems facing too many communities. There are many diffuse pollution sources that are not regulated by the Clean Water Act. There is inadequate information

about some sources, which can limit the ability to identify serious problems quickly and the ability to take prompt actions to correct them. And adding to our challenges, recent Supreme Court decisions have increased the difficulty of determining which water bodies are covered by the Clean Water Act in many parts of the Country.

The main tool that EPA has to achieve positive water quality results is the National Pollutant Discharge Elimination System, or the NPDES program. EPA established this program soon after the passage of the Clean Water Act, and its implementation by EPA and authorized States has resulted in significant water quality improvements throughout the Country.

Under the Clean Water Act adopted in 1972, the universe to be covered by the NPDES permit program was estimated to be 100,000 point sources. Today, nearly 1 million point sources are covered by the NPDES program. This increase has significantly affected the ability of EPA and the States to administer and enforce the NPDES program. We are falling short of this Administration's expectations for the effectiveness of our clean water enforcement programs. Simply put, Mr. Chairman, the time is long overdue for EPA to reexamine its approach to Clean Water Act NPDES enforcement to be better equipped to address the water pollution challenges of this century.

Data available to EPA shows that, in many parts of the Country, the level of significant noncompliance with permitting requirements is unacceptably high and the level of enforcement activity is unacceptably low. For example, one of every four of the largest Clean Water Act dischargers had significant violations in 2008. Many of these violations were serious effluent violations or failure to comply with existing enforcement orders.

The Government's enforcement response to the violations is uneven across the Country. For example, a violation in one State results in the assessment of mandatory minimum penalties, while in another State no enforcement action is taken for the exact same violation. This situation creates a competitive disadvantage for States that are enforcing the law, and we need to change this.

Strong and fair compliance and enforcement across the Country is vital to establishing a level playing field for industrial facilities, preventing some regions from attempting to achieve an economic advantage over others. Most importantly, clean water is not a luxury. Rather, we need to make sure that all citizens, regardless of the State that they live in, should be able to drink safe water and swim and play in clean lakes, rivers, and bays.

We need to address these key problems, and that is why I am happy today to announce EPA's new Clean Water Act enforcement plan.

EPA's Enforcement Office, led by Cynthia Giles, has decided to act on three crucial steps to strengthen Federal and State Clean Water Act enforcement to better protect water quality.

First, we need to develop more innovative approaches to target our enforcement to the most serious violations and the most significant sources. We need to ensure that the million permits out there we find them to be protective and that appropriate civil and criminal enforcement for factories and large wastewater treatment

plants that unlawfully discharge pollutants to our waterways exist. We need to reshape our enforcement program to be more effective in tackling violations from the many dispersed sources that continue to be serious threats to our waters and a major reason many of our waters don't meet standards. Some of the biggest threats are posed by concentrated animal feeding operations and by contaminated stormwater flows from industrial facilities, construction sites, and urban streets that end up in our waters.

Second, we need to strengthen our oversight of State permitting and enforcement programs. Many States have strong water quality protection programs and take enforcement to ensure compliance, but we have seen great variability amongst the States in enforcement performance. It is EPA's job to clearly articulate the acceptable bar for State clean water programs and consistently hold States accountable. In situations where States are not issuing protective permits or taking enforcement, EPA needs to act to strengthen programs and pursue Federal enforcement as necessary.

Third, we are and will continue to take immediate steps to improve transparency and accountability. We have a responsibility to tell it like it is to the American public.

We have already published the data and information that EPA has on Clean Water Act compliance and enforcement across the Country on our Web site. We will continue this practice as new information becomes available. We are also working to accelerate the development of 21st century information technology tools to help us gather information more efficiently and make it easier for the public to access that information.

For example, I am directing my staff to quickly develop a proposed rule requiring electronic reporting from regulated facilities to replace the current paper-based system. Electronic reporting could save regulated facilities, EPA, and the States millions of dollars each year. At the same time, providing that information to the public shines a spotlight on facility performance.

We believe that making information on environmental discharges available to the public will increase the pressure on regulated facilities to self-police and reduce their pollution, just as we have seen with the Toxics Release Inventory.

EPA plans to work closely with States to implement these actions and make long-term improvements in our Clean Water Act enforcement and compliance plan.

I could quickly highlight some actions we are taking now to focus our enforcement actions on those actions that pose a serious threat to water quality.

We are strengthening our efforts to enforce existing rules from limiting pollution from concentrated animal feeding operations. Where there are facilities or clusters of facilities with large numbers of animals that are discharging without a permit or in violation of their permits, they can cause significant pollution problems and concerns to communities. It is difficult to know where these facilities are when they do not have to apply for permits; however, we are working to develop innovative strategies that will identify the facilities that are violating requirements and present the most

significant threats, and we will ensure that appropriate enforcement action is taken in these situations.

Mr. Chairman, enforcement is one tool that we can use to address water quality problems, but long experience has shown that effective enforcement is essential to the integrity of our Clean Water Act protections and enforcement makes a real difference in our ability to deliver the water quality the American public expects.

EPA is committed to building the Nation's confidence that these resources will be protected.

We greatly appreciate the leadership of this Committee and we look forward to coordinating with the Chairman and the entire Committee as we work to achieve these important goals. Thank you.

Mr. OBERSTAR. Thank you very much, Madam Administrator. Your testimony is refreshing; it shows a firm commitment, a determination to move ahead, and you have already laid that on the table. You got it going in the right direction.

Just a comment before I go to Members for our overall sort of structure, and that is Section 309 of the Clean Water Act sets the requirements for calculation of a civil penalty for violation of the permitting requirements. It establishes as criteria seriousness of the violation, the history of violations, and the economic benefit resulting from the violation, that is, the economic benefit that would result if the violation is lifted, cured. The law is clear that economic benefit from violation of the Clean Water Act should be recaptured in the potential enforcement not only to reduce the incentive to pollute, but to promote deterrents.

So I want to say that I want Members to keep that in mind as they go forward, and I am going to now recognize Members who did not make an opening statement, in the order in which they serve on the Committee. So we will begin with Mr. Kagen.

Mr. KAGEN. Thank you, Mr. Chairman. It is an honor to follow you at any point in time. Because of your great efforts, this Committee is going to move forward a bill that really will address its title, the Clean Water Act.

Administrator Jackson, thank you for being here this morning. Thank you for the work you are about to do. I don't envy you in your position. I came to Congress in 2006 as a doctor; I thought all I had to do was fix health care. Then the roof caved in on the economy and everything else that we are doing. So I understand what it is like to have a large mess to clean up.

You mentioned in your opening remarks about the importance of enforcement, the importance of oversight and providing accountability and transparency in everything that you intend to be doing, and you hadn't focused on prevention. We are going to be hearing testimony after yours of one of my constituents from northeast Wisconsin, Mrs. Treml, about her situation that her family and her neighbors and many people in the region experience when farming and agricultural activities take place over an escarpment, a land mass that allows nutrient material and manure to seep directly into the drinking water.

But what are you doing in terms of prevention? What is your orientation?

Ms. JACKSON. Thank you, Congressman. The entire NPDES structure, the idea of requiring a permit from those who intend to discharge into waters of the United States was intended to say up front that we know that any amount of pollution acts as a detriment to water quality. There are some times when we have to allow some amount of pollution; that is what the permits are, but also gives us a framework to come back later to find out if people are abiding by it.

The particular case that you reference—and I have read the testimony—is that of an issue where we do not have jurisdiction, per se. The Clean Water Act does not cover permitting or prevention for groundwater seepage of nutrients. In this case, I understand it actually wasn't through groundwater, it sort of ran over a snow pack or land and into a well.

Mr. KAGEN. So it is true, then, that in the existing legislation and laws there is no legislative language for you to follow that would allow for your jurisdiction over the runoff of agricultural wastes?

Ms. JACKSON. The runoff, yes. If it ends up into surface water and it is jurisdictional surface water, there is a potential for permitting and enforcement in those cases, and we are committing, as I said in my testimony, to vigorous enforcement there. The particular case in Ms. Treml's case was one in which there was no surface water nexus, so I am not sure that there would have——

Mr. KAGEN. Is it also true that entities in agriculture and other businesses can self-regulate themselves and self-determine what they are going to allow to run off their properties or into our waterways?

Ms. JACKSON. Well, the current CAFO rules say that a concentrated animal feeding operation should identify whether it believes it will discharge, and then, and only then, will it be required to get a permit. So for inadvertent discharges or discharges that end up entering surface water, we cannot say, right now, to a facility you are required to have this permit, they must self-identify.

Mr. KAGEN. Well, it is an obvious thing to point out, but I will point it out, that no matter how perfect we are in crafting legislation to help prevent runoffs, to help prevent the pollution of our waterways, it really does come down to human behavior and to the judgment of people who are operating their businesses, whether it is an agricultural industry or otherwise, to not just interpret the law, but to understand what would be good for their environment and also for their neighbors.

Along those lines, do you feel that the local Department of Natural Resources in States like Wisconsin are adequately staffed?

Ms. JACKSON. I believe, sir, that resources are a real concern. As we have learned more about the threats to our drinking water and our surface water, a great deal of the program really does fall not only on State governments, but oftentimes—I know from my experience in New Jersey—to local jurisdictions—county, health departments; very important to ensuring safe drinking water. And I know and agree with comments made earlier that these are tough times and that resources are a real concern.

Mr. KAGEN. Thank you for your comments. As someone who represents some of the greatest measurement of coastline, not just

Lake Michigan, but many of the lakes and rivers in northeast Wisconsin, it is a pleasure to look forward to working with you and making certain that we can prevent additional problems. It is a lot easier to prevent a problem than to clean it up after it has already taken up, and it is also more cost-effective.

And I yield back my four seconds.

Mr. OBERSTAR. The gentleman from Kansas, Mr. Moran.

Mr. MORAN. Mr. Chairman, thank you. I have no questions, but I would like to seek consent to offer a statement of the Kansas Farm Bureau regarding the Clean Water Act letter dated October the 14th from its President, Steve Baccus.

Mr. OBERSTAR. Without objection, the letter will be included in the record.

Mr. MORAN. Thank you, Mr. Chairman.

[The information follows:]

KANSAS FARM BUREAU
The Voice of Agriculture

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Office of the President

October 14, 2009

The Honorable James Oberstar
Chairman, Committee on
Transportation and Infrastructure
2165 Rayburn House Office Building
Washington, DC 20515

The Honorable John Mica
Ranking Member, Committee on
Transportation and Infrastructure
2163 Rayburn House Office Building
Washington, DC 20515

RE: Statement for the Record, Clean Water Act Hearing
Thursday, October 15, 2009

Chairman Oberstar and Ranking Member Mica;

I am writing today to express concern about attempts to broaden the scope of the Clean Water Act. Current proposals could have far reaching regulatory impacts on agriculture that will negatively affect the industry. These concepts would allow regulation of all waters in Kansas and across the country, including private surface waters like farm ponds, roadside ditches and ephemeral streams that carry water only when significant precipitation falls.

Applying the Clean Water Act to all interstate and intrastate waters extends the reach of the Act to many farming and ranching activities, but also to the housing industry, wastewater industry, manufacturing and commercial enterprises. Agriculture and these business sectors could be required to obtain federal permits for activities and tasks considered everyday, standard ways of doing business. As an example, a rancher might be required to obtain a permit to move livestock from one pasture to another if the livestock had to cross a small creek or even a dry stream bed. How can this be considered reasonable and within the original intent of the law?

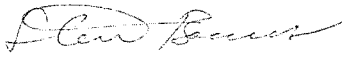
Based on analysis of the National Hydrologic Database, the estimated number of regulated stream miles in Kansas would increase from approximately 54,000 stream miles to 145,000 stream miles. Many of these now unregulated "streams" are dry reaches for months at a time and run water only when significant precipitation events occur. Additionally, it is estimated that at least 250,000 private farm ponds would face regulation under the proposal.

Any amendment to current law that deletes the term "navigable" and provides subsequent exemptions continues to present a concept that is too far reaching with little protection from federal regulators attempting to control private lands.

For our members this is an unacceptable compromise. Farmers and ranchers in Kansas and across the nation clearly understand the need to apply the Clean Water Act to navigable waters and some tributaries, but allowing federal regulations to reach beyond those waters indiscriminately is improper use of a long-standing law. If there are specific waters that need to be protected by the Act that are currently not, then those waters should be identified and the interest in protecting them explained. Only then should amendments be made to the Clean Water Act.

Please reject attempts to modify the Clean Water Act.

Respectfully,



Steve Baccus, President

Cc: Congressman Jerry Moran, KS-1
Congresswoman Lynn Jenkins, KS-2
Congressman Dennis Moore, KS-3
Congressman Todd Tiahrt, KS-4

Mr. OBERSTAR. Mr. Duncan.

Mr. DUNCAN. Well, thank you very much, Mr. Chairman. I just have a couple questions.

Administrator Jackson, have you considered and do you support or would you support setting up a clean water trust fund and wastewater trust fund similar to the aviation and highway trust funds? Have you ever thought about that?

Ms. JACKSON. The Administration has no position on any additional trust funds for water quality. I would point out that there has been a significant influx of money in the revolving funds right now for infrastructure investments in communities, as the Chairman mentioned, $6 billion for wastewater and drinking water infrastructure investments, against, admittedly, a need that is much, much greater than that.

Mr. DUNCAN. As I was going through your testimony, it was very brief, and in that brief testimony I counted up there were 26 times where you used the word enforcement or enforcing. Maybe you are trying to send a message that you intend to get very tough, but what I am wondering about, will the EPA try to help communities, first, to comply, or are you just going to come down on them without first trying to work with them to help them come into compliance?

Ms. JACKSON. I do, sir, believe that enforcement plays a very important role. Research shows that enforcement, that the belief on the part of those who hold permits, that they mean something, that there is a penalty if they are violated is very important to changing behavior, it is one of the ways to do it.

In the case of communities, I think EPA has a strong and long history of trying to work hard to come up with meaningful time lines to get into compliance, so that when you are talking about municipal impacts, when you are talking about impacts on ratepayers, to try to spread that out over a period of time to be in compliance.

When it comes to industrial facilities, especially significant noncompliance, remember, this is noncompliance that often shows a pattern, that in order to be in significant noncompliance like 25 percent of these facilities are, it is oftentimes a severe problem and it could be one that has gone on over time. So the ideal of enforcement is that the punishment, if you will, should sort of fit the nature of the crime. If it is a severe problem, we should have some deterrents and people should know that that is not going to be tolerated.

Mr. DUNCAN. I noticed in our briefing paper that all but four States have assumed the regulatory authority for water pollution programs. Do you intend to work primarily through the States first, since 46 States have that primary authority, or do you see problems with that?

Ms. JACKSON. No, sir. I think we absolutely must work with the States. Forty-six out of 50 have jurisdiction; they are delegated to run these programs and they are delegated essentially to stand in EPA's footsteps and permit and enforce under the Clean Water Act. As I said in my testimony, I think EPA's role, 37 years after the Act was passed, is to act as a fair arbiter, look across the Country and ensure that a violation in one State is being handled similarly

to another; otherwise, there is an unfair playing field for business and an unfair playing field, frankly, for clean water.

Mr. DUNCAN. Do you think that the States are doing an adequate or good or excellent job on this in those duties at this point?

Ms. JACKSON. I think that it varies across the Country. There are States who run very good programs, and it also depends on the program. I think almost every—I would hesitate to guess, this is an educated guess, that every State is balancing its resources as best it can. With the explosion in the universe of permitted facilities from 100,000 expected to over a million, there is some juggling, and I think it is EPA's job to help States figure out where enforcement should be targeted to get clean water. Not to get huge penalties, to get cleaner water. Where can we have a big impact on water quality? And that is where we should use limited resources.

Mr. DUNCAN. What you have now, you have two-thirds of the counties in the U.S. are losing population. But then you have real fast growth in certain other areas, so the circumstances and the needs and the resources vary widely across the Country. So it seems to me that it is going to be pretty difficult to come up with one size fits all solutions when you have such a wide variation in the population movement in the Country.

Thank you very much, Mr. Chairman.

Mr. OBERSTAR. I want to acknowledge the gentleman's work as Chair of the Water Resources Subcommittee for six years, holding hearings frequently on the issue that he raised of a funding mechanism, including a trust fund, including other ideas such as infrastructure bank. He has been very persistent and very participatory in discussions of this issue, and this Committee, in the last Congress, under Ms. Johnson's leadership, and again in this Congress, continued searching for an acceptable mechanism to create a trust fund. We look forward to any ideas the Administration may have on this issue, but the vexing problem is a revenue source, revenue stream, and we have to work with Ways and Means Committee on that.

We have already passed our State revolving loan fund, the reauthorization, passed it in the 110th Congress. The Senate didn't act on it under threat of veto from the previous administration, and now the Senate seems to be impaled on its own procedural problems, so we look forward to them hopefully doing something—if we were a unicameral legislature, I tell you we would have a whole lot of stuff in law.

Ms. Richardson.

Ms. RICHARDSON. Thank you, Mr. Chairman. Out of respect to my colleagues, I am only going to ask one of my questions, because I know they would like to ask before we break for votes.

Ms. Jackson, you recently came to my district on October 3rd. Unfortunately, I wasn't aware you were coming; otherwise, I would have shown you a few things and would have liked to have chatted with you about my question. I notice in your testimony you make reference to factories, large wastewater treatment plants, animal feeding, industrial facilities, construction sites, urban streets into our waters, but you failed to say anything about beaches and flood channels that are going into our water that is serious pollutants and many problems in my community.

In 2007, the beach closings and advisories nationwide hit their second highest level in 18 years. The Natural Resources Defense Council has been tracking them since that time, and in Los Angeles County alone there were over 1,696 beach closings and advisory days due to elevated bacteria levels, sewage spills, and stormwater runoff.

What do you intend upon doing about this and what additional resources do you think the EPA can bring to bear to focus enforcement in this area?

As I said, I was a little disappointed that in your testimony there was absolutely no reference to these areas, which for me, coastal communities that many of us represent, is a very serious problem.

Ms. JACKSON. Thank you. I do apologize for the oversight, and I will get back out and I would love to see you in your district, Ms. Richardson. Let me say, coming from New Jersey, that perhaps it was an era of taking for granted something, which is that, yes, our coastal areas tend to be the final outfall. You know, we spend so much time trying to prevent any major contamination entering waterways, but EPA has had, for years, a strong emphasis on wet weather flows on combined sewer overflows, municipal sanitary sewer systems, trying to get old facilities under contract to try to ensure that, whether it be floatables or pathogen contamination, that we reduce and, over time, see fewer and fewer beach closures and other water quality incidents further upstream of the beaches. So it is an oversight not to mention that. Beaches ultimately see quite clearly the impacts of water quality degradation.

All of the things that I mentioned in my testimony would have the kinds of impacts that I think you would hope for, specifically the emphasis on looking for enforcement on the places that have the most potential to impact water quality and also to impact recreation or places like beaches, where people congregate in order to specifically enjoy water quality and enjoy the resource of the water.

I believe that the emphasis on the major permittees is important, but the non-point source pollution, the kinds you mentioned, especially stormwater discharge, whether it be from agricultural operations or urban streets, is a huge issue that is quite visible along our beaches as well. So as we look to step up enforcement to target our enforcement, I commit that we will make sure that one of the things we look at are impacts on outfalls that can potentially impact beach water quality and beach closure issues as well.

Ms. RICHARDSON. Thank you very much.

Ms. JACKSON. Thank you.

Mr. OBERSTAR. Ms. Schmidt, before you leave, would you like to—we have plenty of time to vote.

Ms. SCHMIDT. I am fine.

Mr. OBERSTAR. All right.

Ms. Fallin.

Ms. FALLIN. Ms. Jackson, I appreciate your coming today. Thank you for being here. Do you feel like States are doing all that they need to be doing to make sure that we have clean water and enforcing the rules and regulations that we have right now?

Ms. JACKSON. I think State performance varies. Let me also point out that the four States where EPA implements the Clean

Water Act, our performance varies, and I think that one of the things we need to be able to do is hold up an honest mirror, give information, as much accurate information as we can about State performance, and allow States certainly to tell their story, but also as an agency sort of hold States to a steady bar.

Ms. FALLIN. I understand the need to have uniform consistency around our Nation as it comes to the States and the different divisions that they have for enforcement regulations, but I have been hearing, back in my home State of Oklahoma, from business communities that they have seen a big difference in the administration of the EPA since the new Administration took over, and have just said that they felt like there is a heavy hand on business right now during this economic recession.

I guess my only comment would be that as we continue to make sure that we do keep our environment clean—I am all for keeping clean water and our environment clean and being responsible in the business sector—that we also make sure that we work with the States, that we work with the communities as we are dealing with the rules and regulations and enforcement to give them a chance to try to do the right thing.

And I heard your comments that you want to make sure that they understand there are laws, rules, and regulations, and they have to comply with that, but I have heard from several businesses in my community that they are feeling a lot of pressure right now during a tough time, and they want to comply, they want to do the right thing, but they want to have a chance to do the right thing.

That is just my comment.

Ms. JACKSON. And I really appreciate it. It gives me a chance to make a couple of points. First, about Oklahoma, good inspection coverage of facilities, accurate reporting of noncompliance, and high rate of timely enforcement. So I think one of the things that having a level playing field does is those States who have sort of been on the job, I would hope, that facilities wouldn't see a huge difference as we say we are going to raise the bar, because they have already sort of been working to that standard.

So I am troubled by what I would say to those businesses is that the idea here is to continue to realize that this is a program that works through the States, for the most part, that we need to help States with technical assistance in those cases where they need it, but we also need to put the data out there and challenge them and, in some cases, be ready to step in if we are not met with agreement. But I wouldn't think that would be a case back home.

Ms. FALLIN. Okay.

Ms. JACKSON. Thank you.

Ms. FALLIN. Well, I appreciate your comments, and I guess my comment is, especially during these challenging times, just to enforce the law, but yet work with the States and work with the local authorities, especially the business community. Thank you.

Ms. JACKSON. Thank you.

Mr. OBERSTAR. I thank the gentlewoman. We have now four minutes remaining on this vote. We will recess and return hopefully within 20 minutes. I know the Administrator has a noon departure obligation, so we will try to honor that.

The Committee stands in recess.

[Recess.]

Mr. OBERSTAR. The Committee on Transportation and Infrastructure will resume its sitting. When we left, the rotation goes to the Democratic side and the Chair recognizes Mr. Teague.

Mr. TEAGUE. Thank you, Mr. Chairman, for hosting this meeting and for allowing me the opportunity to ask some questions.

Ever since being elected to Congress, there is an issue that constituents of mine in New Mexico have brought up time and time again. What I have found most remarkable about this issue is that it is not just one organization or one industry that is talking about it. I hear from a wide range of New Mexicans representing diverse constituencies. It could be a dairy farmer or cattle grower, an oil and gas producer, or a developer, or someone who builds our roads, or local government official, but they have a central concern. The issue they are concerned with is the extent of Federal authority under the Clean Water Act.

Many of my constituents fear that the effective State and local regulation will be replaced by vague, all-encompassing Federal term "waters of the United States." They fear—and I share this concern—that the legislation expanding Federal authority under the Clean Water Act would result in unneeded Federal jurisdiction over the work that many of our businesses and agriculture producers do on a daily basis.

Keeping our water clean is one of our most important responsibilities because, where I come from, there is not much water and we need to keep what we have clean. But the regulation needs to be smart and honor the effective roles that States and local governments have in managing our most precious resource.

I guess one of the questions I would like to ask is assessing the jurisdiction of the Clean Water Act, while it may be difficult, but the deletion of the term "navigable" from the definition of waters of the United States, as proposed by the Clean Water Restoration Act, is a blunt instrument that could lead to an unreasonable expansion of the legislation to waters it was never intended to apply to. Wouldn't an alternative approach, one that perhaps leaves the definition alone but lists the precise type of waters the Clean Water Act would apply to, resolve all of EPA's jurisdictional problems without creating the uncertainty deletion of the term "navigable" would cause?

Ms. JACKSON. Thank you. I appreciate your recognition of the jurisdictional issues associated with implementation of the Clean Water Act right now, and I also appreciate your suggestion and, with the Chairman, look forward to continuing dialogue on this issue, because I know jurisdictional issues are something that he has indicated and the Administration has joined him in believing can only be fixed by Congress, and must be fixed. We are actually calling on your help.

With respect to your specific question, I would enjoy a conversation on it as well. There are certainly many different ways to do it, but what I can tell you is that the scope of the Supreme Court decisions have made it such that the Federal agencies, and State agencies as well, face significant challenges right now in implementing, permitting, and enforcement programs because so much time and effort is spent simply trying to determine whether or not

jurisdiction can be asserted. So recognition, I believe that we need to fix this, is a very, very important thing.

Mr. TEAGUE. You know, one of the questions is some things—this was partially asked and answered earlier, but it has to do with the jurisdiction through the Clean Water Restoration Act. The New York Times ran an article, and in the article it said that there are not problems with the Act's jurisdictions but, rather, the permit violations that were enforced. So, in other words, if jurisdiction was not taken and a permit had not been issued, States would never have found the violation in the first place, and I was wondering how you see is there association between a supposed lack of enforcement and the need for more jurisdiction?

Ms. JACKSON. Enforcement, Mr. Teague, is made harder when you are not sure whether you have jurisdiction. So we have actually seen cases that are lost over—water quality cases that are lost over the question of whether or not jurisdiction had or could be established because, right now, the Supreme Court cases, and now, increasingly, circuit court cases behind the Supreme Court cases, make it so that nobody is quite sure what the rules of the road are. So there certainly is an impact.

Where I thought you were going on your question, as well, is that we know that about a third of the U.S. population gets some or all of their drinking water from intermittent, ephemeral, or headwater streams, many of which are the water bodies where jurisdiction is most in question right now.

Mr. TEAGUE. Okay. Thank you for answering those questions.

Ms. JACKSON. Thank you.

Mr. OBERSTAR. In further response to the question the gentleman raised about the Supreme Court decisions, I want to state once again the Act of 1972, the Clean Water Act, to provide for water pollution control activities, public health service of the Federal Security Agency and the Federal Works Agency and for other purposes, that goes back to the origins of the Act in 1956.

But in the 1972 Act, Section 101, declaration of goals and policy, the objective of this Act—and you stated it in your opening remarks—is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. No distinction about it, the Nation's waters; and that is how the Act has been administered for all these many years.

Now, Mr. LoBiondo.

Mr. LOBIONDO. Thank you, Mr. Chairman, very much.

Madam Administrator, welcome. It is good to see you.

Madam Administrator, as you are aware, the EPA was recently forced by the courts to develop a permit under the Clean Water Act, the NPDES system, to regulate the discharge of ballast water and other incidental discharges like bilge water and deck wash from vessels. While we all agree that the discharges should be subject to regulation, I am very concerned and many of the people that I represent are very concerned that under this system the States are adding additional and often contradictory requirements on vessel operators that impair the flow of commerce and undermine the economic viability of our maritime sector.

An example of this would be, in Michigan, vessel operators are required to treat their ballast water with chemicals. But if you

travel across the lake, you cannot discharge any ballast treated with chemicals in Wisconsin because of Wisconsin's regulations. And now the Coast Guard is coming out with a separate standard for ballast water discharge and your staff has informed us that it will be impossible for you to ensure uniformity between the EPA standard, the Coast Guard standard, and standards implemented by the various States.

So, in a few months we are going to have the EPA, the United States Coast Guard, and what looks like to be about 30 States with different standards for discharge of ballast water. It is an impossible situation for our folks to sort through when they are transporting along our coast, the Great Lakes, and the inland rivers.

So, Chairman Oberstar, I want to particularly thank you for working with me and those of us who find this issue critical—and many of them are involved in the fishing industry—and for your commitment to solve the problem before the move the Coast Guard bill forward. That is a tremendous help, Mr. Chairman, and I know this is a daunting task.

But, Madam Administrator, my question to you is how would you recommend we best regulate ballast water and other incidental discharges to avoid the problems we have now?

Ms. JACKSON. Thanks, Congressman, and thanks for your leadership on this and so many clean water issues in New Jersey and for the Country as a whole.

I believe that you, in your question, lay the foundation for an answer we must come up with. States feel very strongly that because of a lack of regulation for such a long period of time, they were watching invasive species—which is what these ballast water regulations are aimed at—becoming increasing problems. Places like the Great Lakes, California, and other great water systems see invasive species as a huge threat, so there has been a response.

But you point out the countervailing view, which is, nationally, it is almost impossible for any shipper now to know what the rules of the water are as they move through national commerce; and international adds an even greater level of complexity because much of the Coast Guard's work, as I understand it, is also dealing with the international community on ballast water standards as well.

I am happy to work on this issue with you further and with the Committee. I believe it is important to get all the players in a room to try to come up with a set of rules of the road for the Country as a whole that we can work on together.

Mr. OBERSTAR. Would the gentleman yield?

Mr. LOBIONDO. Certainly.

Mr. OBERSTAR. If I might supplement the gentleman's question with an approach we discussed in meetings with States, authorities and shippers, and with EPA as a possibility of, rather than amending the Clean Water Act on the issue of priority or preemption, to engage the States in a compact in which they would agree to abide by a single national standard and engage EPA in the shaping of that compact. That could work for both the Great Lakes and the east and west coast States. It would still be within the ambit of the Clean Water Act. We would not have to deal with the preemption issue and we would achieve the goal.

Have I stated it right, Mr. LoBiondo?

Mr. LOBIONDO. Yes, sir.

Mr. OBERSTAR. What do you think about that? Give it some thought?

Ms. JACKSON. Yes, I am happy to give it thought, Mr. Chairman. I think it is an intriguing idea and I think it, again, highlights the importance of having all the folks at the table who have the ability to regulate here agree on the need to come up with a set of rules on the road that allow business to operate, quite frankly, to bring us the products we need and export the products that we want to sell, but also recognize that invasive species are increasingly a huge threat and a huge concern, and it is hard to put that genie back in the bottle. But I think it is an intriguing idea and I would be happy to work with you on it.

Mr. LOBIONDO. I think it would be great, although it would take a whole bag of pixie dust to get all the States to agree on this. I think a system like we deal with with the sewage from vessels, where we can get together might be the one, but you can see the dilemma. And I want to make it clear that my vessel operators, fishing boats, and otherwise, it is not the regulations they are upset with. You can set the standard wherever you want to set it, but they want that to be the standard so they know that, when they are moving from port to port, they are not going to be put out of business and then have a whole different set of regulations to work with; and I don't think that is unreasonable.

So this genie is out of the bottle here. We are going to have to somehow either figure out how to get it in the bottle or come up with something else.

Mr. Chairman, I have all the confidence in the world that your leadership abilities will get us to that point.

Mr. OBERSTAR. I am not sure about that bag of pixie dust, though.

Mr. LOBIONDO. Okay. Thank you.

Mr. OBERSTAR. Maybe if we get them all in one room, we can reason together and achieve some good.

Mr. Rahall?

Mr. RAHALL. Thank you, Mr. Chairman.

Administrator Jackson, I would like to ask you, just for the record, so we can be very clear, whether you believe that clarity and certainty is the goal of the EPA in the reviewing of coal mining permits. There are concerns that EPA is not providing clear cut directions, that coal operators are not being told what requirements with which they need to comply. There is the fear that there are no clear rules of the game by which to seek mining permits.

Would you care to comment on those concerns and frustrations that are out there?

Ms. JACKSON. Yes, thank you, Congressman. I certainly have heard them and I am happy to address them. Yes, I absolutely believe that the end of the road should be clarity and certainty in the regulations that EPA is imposing through the Clean Water Act. You highlighted in your opening remarks the interplay between SMCRA and the Clean Water Act, and it is sometimes rocky as well.

On individual permits, on the permits that are currently being reviewed, those permits have been in litigation for literally years and years, and that is a normal outcome of what happens when there isn't clarity in regulation up front and when all the regulators who may have a stake and an issue are not consulted up front on that issue. So you get sort of this step-wise process where people apply for applications and it seems endless, and litigation results as well. So I believe that clarity is something that EPA owes the regulated community and the American public in its implementation of the Clean Water Act.

Mr. RAHALL. As you are aware, some of the more ardent and vocal opponents to what EPA is doing claim that you want to end all coal mining. Again, I just wanted to give you a chance for the record to clarify that.

Ms. JACKSON. Yes, I am happy to state for the record and say unequivocally that neither EPA nor I personally have any desire to end coal mining, have any hidden agenda, any agenda whatsoever that has to do with coal mining as an industry. I believe that coal can be mined safely and cleanly; I believe that it can be done in a way that minimizes impacts to water quality; and I believe it is EPA's role and responsibility and duty under the Clean Water Act to speak to those issues and only those issues.

Mr. RAHALL. Thank you. I appreciate the opportunity to meet with you prior to this hearing and prior to the questioning period, and look forward to meeting with you more in the future.

Ms. JACKSON. Absolutely, sir.

Mr. RAHALL. Thank you.

Ms. JACKSON. Thank you.

Mr. OBERSTAR. Continuing those who had not—Mr. Young—made an opening statement.

Mr. YOUNG. Thank you, Mr. Chairman. I am sorry I am a little bit late.

In this legislation we are talking about water. Where does the EPA stand and the Administration stand on the constitutionality of navigable waters, and who has authority over operating those waters?

Ms. JACKSON. The Administration, in a letter that was signed by the Council on Environmental Quality, myself, USDA, Department of the Interior, and the U.S. Army Corps of Engineers, put forth principles about the need to address the jurisdictional uncertainty around what is and isn't a water of the United States. The letter I think best outlines the Administration's position.

The first principle essentially says that waters need to be looked at broadly; that we need to look at jurisdiction broadly over the waters of the United States. I believe it is the second principle that says it should be a clear test, it should not be a test that requires, as it does now, almost half of our staff time at the Federal level just trying to determine jurisdiction. We need to be able to get on to the business of protecting waters as well.

Mr. YOUNG. That is well and good, but it sounds to me like the Administration and EPA and the rest of them are really looking for a seizure of the authority on what is navigable and what is not. Now, in my Constitution in the State of Alaska, which was ratified by this Congress and by the people of Alaska, it specifically men-

tions the State has control over navigable waters and I am very concerned that there is a desire for a Federal agency to take and start asserting use of waters within a State that are State waters. Now, the Federal waters I am not particularly concerned about that, but the State waters are State waters.

Ms. JACKSON. You know, we are not asking for an expansion of jurisdiction; it is really putting the stated law back to what it has been for 30 years. The jurisdictional issues that we deal with now are over the state of the Clean Water Act as it was interpreted for literally 30 years. So what we are seeing now as a result is a huge logjam in the system, where there is so little clarity on jurisdiction——

Mr. YOUNG. But the legislation does not do that, and I am suggesting, Mr. Chairman, with all due respect to the author of this bill, before we move any legislation, it has to be perfectly clear, especially as has been ratified by the citizens and by this Congress when we became a State, that the waters belong to the State. There was never any argument about the State; it is by your agencies, you, EPA, Interior, start interpreting how they think it should be, not as the law says.

Now, Mr. Chairman, with all due respect, this bill is not on my wish list if that isn't clarified, because that is a taking from a constitutional act of this Congress by agencies.

Mr. OBERSTAR. Would the gentleman yield?

Mr. YOUNG. Gladly.

Mr. OBERSTAR. What legislation is the gentleman——

Mr. YOUNG. The water legislation that you are proposing, I believe.

Mr. OBERSTAR. Oh, that is not the subject of this hearing.

Mr. YOUNG. Well, I am bringing it up——

Mr. OBERSTAR. We are not holding a hearing on that bill.

Mr. YOUNG.—because I think she is in the seat and she is part of it.

Mr. OBERSTAR. And that bill has not been introduced yet, by the way.

Mr. YOUNG. I understand, Mr. Chairman, but when I have a witness—because I have a hard time getting hold of Administration chiefs of staff, etcetera, when I ask. When I was in the majority, there was no problem. But they have a tendency not to answer. So I am asking this question specifically for the reason for the State of Alaska.

Mr. OBERSTAR. Well, in the Supreme Court decision, SWANCC, Justice Rehnquist clearly recognized authority of the Federal Government over navigable waters, but the opening paragraph of the Clean Water Act of 1972 makes it very clear that the objective of the Act is to establish and maintain the chemical, physical, and biological integrity of the Nation's waters. It did not distinguish.

While there are references within the Act to navigable waters, what the Administrator has said is the confusion created by the SWANCC decision and Rapanos decision has caused, both in the Bush Administration and now for this Administration, excessive amount of time consumed in the permitting trying to delineate the meaning of the Court's decision.

And if you are referring to the bill that I introduced in the previous Congress, the purpose was to establish consistency and clarity, and to incorporate into law the previous regulatory body by which the Act was administered, to respect some of those concerns that you have already expressed.

Mr. YOUNG. I thank the Chairman, but one of the things we have is how do you define what water is. Everybody knows what water is, but in the definition of water, is it a navigable stream, is it a puddle, is it a swimming pool? Whatever it is. And I am just very reluctant, when we deal with water—we have water battles in California, water battles in Arizona, water battles over the Colorado River, and we have water battles from Lake Michigan; and States have to have a real part of this program, and just not the Federal Government.

Mr. OBERSTAR. That is correct, and that is the purpose. And we will have hearings further on specifically on the Clean Water Restoration Act, as it was called in the previous Congress. We are going to call it something else. We have heard all these concerns and I have several adjustments to the Act that I think the gentleman will be interested in.

Mr. YOUNG. Well, I am always interested in what the Chairman likes to adjust. Thank you, Mr. Chairman.

Mr. OBERSTAR. Ms. Hirono?

Ms. HIRONO. Thank you, Mr. Chairman.

Mr. OBERSTAR. Administrator, if you can hold off for just a few more minutes, there are three more Members.

Ms. HIRONO. Ms. Jackson, when we took our break, I was able to apprise you of a particular situation affecting the city and county of Honolulu. Mainly, I was very gratified to hear you say that when you are dealing with enforcement actions relative to municipalities, the impact of adverse decisions has a huge effect on ratepayers and that you want to be able to work with the municipalities and, of course, based on science and those conclusions that should be drawn. I was gratified to learn that you would be sending someone to my office to talk about that particular circumstance.

You have been asked earlier about the witness who will be testifying right after you, and you noted that EPA would not have jurisdiction, did not have jurisdiction in that situation because it involved drinking water, not surface water.

Ms. JACKSON. Not quite, Ms. Hirono. The jurisdiction has to do with—we certainly have a safe drinking water act, which governs water safety of drinking water, and there is some amount of wellhead protection there. As I understand it—and I am cognizant that the witness is sitting right behind me, so she knows her situation better than me. But as I understand it, we would not have been able to assert jurisdiction over the application of the manure that eventually ran off and contaminated the well, as I understand the situation.

Ms. HIRONO. So you actually would have had jurisdiction over some elements of that whole situation.

Ms. JACKSON. We certainly have jurisdiction over any manure that enters surface water. I don't know, I am assuming this might be a private well, so whether or not we have jurisdiction over that private well, I would say no.

Ms. HIRONO. I think that is what gets so confusing for our people who are impacted by these kinds of actions. It is really hard for a normal person, regular person to figure out who to contact. So if this is an area that needs to also be clarified, perhaps you can look at it. And knowing that the water doesn't just stay in one place, that it just goes all over, right? And I don't know how you draw the line as to who has jurisdiction when. So perhaps that is something you can look at, because the circumstances described are really outrageous.

Thank you.

Ms. JACKSON. I am happy to do that. Thank you.

Ms. HIRONO. Thank you, Mr. Chair.

Mr. KAGEN. [Presiding] Thank you, Ms. Hirono.

The Chair recognizes Mrs. Capito.

Mrs. CAPITO. Yes.

Madam Administrator, thank you for being here. I would like to have a one-on-one conversation because I am sure you could tell from my opening statement I have a lot of concerns about what is going on with EPA in my State and the coal mining permits, so I appreciate that if that could occur.

I have just been informed I get one question, so, in response to my colleague from West Virginia on the clarity issue and the definite steps that need to be taken, this is where a lot of the frustration is coming from our constituents, is the delaying, the inability to really see where not so much the end is, but how to get to the end. Whether it is an up or down, yes or no, it is this maybe land that we are living in that is extremely frustrating and is threatening a lot of jobs in West Virginia.

So I guess what I would ask you—and in your statement here, when you talk about transparency and accountability, you state, quite rightly so, that it is your responsibility to tell it like it is. But even I have had meetings to try to figure out where this process is going and how it actually is going to be resolved in the end.

My understanding is that, of the 79 permits, only 4 have gone to the Corps and those would be under a 60-day time. So that leaves another 75. Where are they? When could I tell my constituents that they will have an answer on that? And then once the Corps makes their decision after the EPA has had a chance to weigh in on these decisions, then it is my understanding that the EPA can then come back in and render another decision. So there again it is more uncertainty and lack of clarity as to what the end is.

So I guess I would ask you would the EPA seek to suspend or revoke a permit further down the road? Can you go back to the former permits? And does this process really lend itself to the clarity that you have stated in your mission under your administratorship want to see at the EPA?

Ms. JACKSON. Thank you.

Mrs. CAPITO. And, again, I would emphasize a lot of economic environmental issues are so intertwined in our State, as in many of these States, as you have heard.

Ms. JACKSON. Yes, thank you, and I am happy to meet with you on this issue separately, since time is limited. In response to your question, I will say this. As I mentioned earlier, these 79 permits

have been held up for years by litigation. It is also no secret that EPA had significant staff level concerns that were raised with the Department of the Interior when the stream buffer rule, the rule that came out in 2008, that is, ostensibly authorizes some of this work and is interpreted a long time by the State of West Virginia to allow large amounts of these valley fills. There has been scientific concern about it for quite some time.

So we found ourselves, as I took over at EPA, at a situation where we had 79 permits that have been held up by litigation, some that EPA had never reviewed. These are not re-reviewed permits, they had not been reviewed because of the litigation. All work had been stopped. And what we committed to was a process that we would outline the work, as much as possible, with the Corps of Engineers to work through those 79.

Now, the 75 or so that are remaining are with the Corps of Engineers. As they notify us, they begin a 60-day clock for review of those permits——

Mrs. CAPITO. They are not at the Corps yet.

Ms. JACKSON. Well, they are not physically there.

Mrs. CAPITO. They are not on the 60-day clock yet.

Ms. JACKSON. The Corps starts the 60-day clock under the Memorandum of Understanding when they initiate review of these projects. It was EPA's job to determine which of the projects it wanted to have enhanced review on. We have done that and we did it after a 15-day period we went final on that list. So now as the Corps opens these permits for review and there begins the work of working with the permit applicants to try to address whether or not they have minimized valley fill and potential water impacts.

What we are seeing with the science here is that, as these watersheds have more and more valley fill in them, frankly, we see water quality impacts, and it starts at the ecosystem level with conductivity increases that indicate selenium and other increases, and we believe that over time that is going to be a larger problem, not a smaller one. So what really has to happen is rolling up the sleeves to minimize in these instances.

Mr. KAGEN. Meaning no disrespect, the gentlewoman's time has expired.

The Chair recognizes Mr. Hare for a single question to move things along.

Mr. HARE. Thank you, Mr. Chairman.

Welcome, Ms. Jackson. I just want to say I think the President did a wonderful job selecting you.

I know you have to leave, so maybe you can just even send the answer to my office so you can get out of here. But you said that EPA is developing innovative strategies that will identify animal feeding operations that are violating discharge requirements and present a significant threat to water quality. I was wondering you or your office might be able to elaborate on these identification strategies that you are developing.

Ms. JACKSON. I am happy to send information over. Cynthia Giles is right here. And I didn't introduce Pete Silva, so you give me an excuse to do that. He runs our water program. Cynthia runs our enforcement program.

We are, right now, collaborating to try to identify ways to really look for large sources, and those concentrated animal feeding operations that either inadvertently or by practice are not getting permits, or get them and then violate them, are real concerns for water quality. So we would be interested in working with you if there are ideas on how to find the worst——

Mr. HARE. That would be wonderful. Thank you very much and thank you for coming.

Ms. JACKSON. Thank you.

Mr. KAGEN. Thank you.

The Chair recognizes our gentleman from down south, Mr. Taylor.

Mr. TAYLOR. Thank you, Mr. Chairman.

Ms. Jackson, thank you for sticking around longer than you were supposed to. Mine is a little bit different. As you know, the President is touring the Gulf Coast today. His schedule did not permit him to go to Mississippi, which is where the storm hit; Louisiana got the flood. One of the things that has happened since the storm is communities that, prior to the storm, had taken out loans for water and sewer based on the population at that time have had, in many instances, 40 percent population reductions from people who lost their homes and have not returned.

We have made Ms. Woodcow, who is the Gulf Coast Recovery person, aware of this problem and asked for some, as best as you can, even loan restructuring or loan help for those communities that are down 40 percent through no fault of their own four years after the storm. We are going to send you some of that information today and I would ask the folks in your Department—I would have told this to the President had he visited Mississippi today, but I am going to ask the folks in your Department to take a look at that and see what we can do to help those communities, again, through no fault of them own with 40 percent fewer people than they had on August 28th of 2005 to help pay back those loans.

Ms. JACKSON. Okay, thank you, sir. I will look for that information and I am happy to discuss it with you.

Mr. KAGEN. Administrator Jackson, thank you for appearing here. You are now dismissed and we will now call our next panel of witnesses, if they would please move to the table.

We will be hearing from Judy Treml from Luxemburg, Wisconsin, Dennis Kavanaugh, who is a Representative of the Sandy Hook Waterman's Alliance; and Dr. Patricia Butterfield, our nurse and Dean and Professor, College of Nursing, Washington State University.

The Chair is pleased to recognize Ms. Treml from Luxemburg, Wisconsin, a tremendous community of caring people. Thank you for coming here to Washington to give us your story.

TESTIMONY OF JUDY TREML, LUXEMBURG, WISCONSIN; DENNIS KAVANAUGH, REPRESENTATIVE, SANDY HOOK WATERMAN'S ALLIANCE; DR. PATRICIA BUTTERFIELD, PH.D., R.N., DEAN AND PROFESSOR, WASHINGTON STATE UNIVERSITY, TESTIFYING ON BEHALF OF AMERICAN NURSES ASSOCIATION

Ms. TREML. Thanks for having me. My name is Judy Treml. I am here representing myself, my husband, Scott, and my three daughters, Kaitlyn, Emily, and Samantha. I am also speaking on behalf of many other families who find themselves facing the same potentially life-threatening effects from exposure to contaminated water in northeast Wisconsin.

I brought today—actually, I can keep this. I brought today some water samples—I am more of a presentation kind of person—for your viewing. If you look at these three bottles of water, two of them are polluted with E. coli, one of them is not. I present this to my local legislators, my State, and all of them would pick this bottle as the clean water. If I asked you to pick which bottle you think is the clean water of the three, which one would you pick? If you pick this one and you drank this water or gave it to your infant daughter, you would be poisoning her with E. coli. This is the new safe drinking water flowing into my house after the DNR made recommendations to the depth of my well water to be 400 feet. I would not give my children a bath in this water; I would not drink this water. This water has to be filtered with three different filtering systems, to the tune of about $6,000.

Like I was saying, my six-month-old daughter was poisoned. We went to the doctor, we found out that in the event that this illness would turn bad, the outcome for her would be death. To me, that is unconscionable. I had a safe water test on February 4th, 2004, and by March 2nd, in a State-run lab test I had measurable counts of E. coli at 2800 parts per milliliter, that is, 1800 parts per milliliter more than what it takes to close a public beach in Wisconsin and near our home.

Right now there are no laws protecting groundwater in Wisconsin or anywhere. I believe it is EPA's duty to install new laws that protect groundwater to address groundwater specifically. We all need groundwater to survive. It is unconscionable to me, as a mother and as a taxpayer, to see all the laws and regulations to protect our lakes, streams, fish, and wildlife, and absolutely no groundwater protection to protect people. Does anybody here see what is wrong with this picture of protecting fish and not children? Not that the environment isn't important, but does no one here see the problem that I see when our Federal laws protect fish and not people?

I am also appalled by my State's mismanagement of Federal funding for enforcing the existing clean water rule. That may be neither here nor there to Wisconsin or people here in Washington, but when parents have to call a stay-at-home mom from Luxemburg, Wisconsin to help remedy a polluted well that is sickening their children, something needs to be done and these parents deserve better. We all deserve better.

What I am asking for from this Committee and from the EPA, this Government, essentially, is protection from groundwater and surface water pollution from these tolerated practices.

I am a hobby smoker. I am not allowed to smoke this in this building. Why? Because this Government and our State, Wisconsin, impose smoking bans in public places and in restaurant and workplaces and in these Federal buildings. Yet, there are absolutely no laws to protect my groundwater from pollution from another source. You all have protected yourselves from the air pollution that secondhand smoke causes; yet, nobody seems to think that when somebody pollutes somebody else's well, that there needs to be any kind of law against that.

Please give us the same protection you gave yourselves from the secondhand smoke and create new regulations for the large-scale farming operations that pollute our groundwater, sicken our families, and kill our fish. And please don't force us to have to wait for the tragedy to happen as what happened with the E. coli contaminated spinach a few years back. People had to die from that before anybody really paid attention. Just as it would be illegal for me to light this cigarette and force you to breathe in my smoke, it should be just as illegal for someone to poison my groundwater supply.

Thank you.

Mr. KAGEN. Thank you, Judy, for your story and thank you for your written testimony as well.

We now call on Mr. Kavanaugh.

Mr. KAVANAUGH. Thank you for the opportunity for to let me come down and address the Committee.

The Sandy Hook Waterman's Alliance was formed to promote and protect commercial fishing in Northern Monmouth County, New Jersey. Currently, the most successful fishery we have now are shell fish, mainly mercenaria mercenaria, which are hard clams. Unfortunately, all of our available range is pollute. All of the Raritan Bay, Sandy Hook Bay, Navesink and Shrewsbury Rivers are under some form of harvest restriction. The current harvest uses depuration, which is a process where they submerge clams for 48 hours in radiated water. Unfortunately, or fortunately, we have an $8 million payroll, but we lose 40 to 60 percent of that due to handling and regulations.

Shell fish are a good indicator of water quality because a significant amount of the catch is consumed raw, which leads to a number of health issues if not handled correctly. An indicator of water quality is fecal count, measured in parts per million. To dip a child in a fecal count of about 100 parts per million is a good target. Shellfish require 15 parts per million to be consumed raw. Aiming for shell fish would ensure good swimming quality for the children.

Our enemies in Monmouth County are runoff and poor sanitation management. These are the same problems that killed a billion dollar oyster industry around the turn of the century. Without an aquaculture option, prohibited by water quality, the industry has been downgraded to working poor without a social network for support.

Our first offender that we have, Monmouth Race Track, has a history of 15 years of allowing horse waste to enter the Shrewsbury River. This summer, a plan to contain the runoff was suggested by

the track and has a completion date of 2012. The reason for the length of this is construction is not to conflict with track operations. 2009's improvements were to put gutters on the horse sheds. Funding has yet to be approved for any of these improvements. Monmouth Track is owned and operated by the Sports and Exposition Authority, a.k.a., the State of New Jersey. The worst polluter in Monmouth County is the State of New Jersey.

Our second offender is the municipality of Colts Neck. This municipality has single-handedly defeated efforts to fund the Navesink River Water Shed Project. In March of 2007, Colts Neck's response for not participating and killing the funds was that their effort to control groundwater was better than what the county could come up with. The only problem was the report that came out in February 2008, done by the State, found human feces in local streams of Colts Neck. What made this particularly upsetting was that the site was 25 yards from Monmouth County's drinking supply, Swimming River Reservoir. It seems that Colts Neck surrounds the reservoir and all of Colts Neck is served by septic waste systems.

Our last offender is the borough of Red Bank. An extensive study was done in the same report in February of 2008 by the State of New Jersey because of a downgrade in water quality. Red Bank's ground system is a colander with human, animal, and multiple antibiotic sources acknowledged. Sadly, the same report refers to discoveries of non-point, which means no accountability. This discussion is made easier because all these documents have Lisa Jackson's name on them. She is intimately familiar with all the problems that we have in Monmouth County.

Groundwater pollution is based on economics. It is cheaper not to comply and externalize the responsibility and expense downstream. Over the past three generations, government has failed to slow the assault on New Jersey's coastal resources. We can defend our own interests given the right tools. The change will be expensive, dramatic, and correct.

I would like to leave you with two thoughts. I am running out of time. All the offenses fall under the shadow of the EPA. Every summer, the Garden State Parkway, a main artery in New Jersey, is locked up with families going south for the summer. What happens to the kids that can't get on that artery? Clean water is a civil right that begins with permits issued by the EPA.

Secondly, a substantial amount of racketeering, fraud, and tax evasion is sucking the life out of my industry. My pleas to three governors, three attorneys general, one inspector general, one Federal prosecutor, and two congressman have gone unanswered. Is there any chance one of you gentleman could place a call for me for some Federal help?

Thank you.

Mr. KAGEN. Thank you, Mr. Kavanaugh.

The Chair recognizes now Nurse Patricia Butterfield.

Ms. BUTTERFIELD. Thank you.

Chairman Oberstar, Subcommittee Chair Johnson, and other distinguished Members of the Committee, it is a privilege to speak to you today on behalf of the American Nurses Association and the Washington State Nurses Association to discuss regulatory and transparency issues relating to the Clean Water Act.

As you know, the ANA is the only professional organization representing the interests of the Nation's 2.9 million registered nurses. The ANA recognizes the fundamental link between our environment and our Nation's health, and I am honored to discuss that link. As a public health nurse with expertise in environmental health, I am here to discuss the research we have conducted in the low-income homes of rural residents from Montana and Washington State.

As you know, the Clean Water Act addresses surface water and coastal areas. Surface waters can contaminate drinking water sources in a variety of ways, including agricultural runoff, combined sewage overflow, and discharge of mining and industrial waste. In this context, I will discuss our research.

Our study involved collecting biological and chemical data from the homes of more than 400 low-income rural children. Our research is funded by the National Institute of Nursing Research at NIH. Many of the families that we study live out in the country not by choice, but by necessity. They seek the least expensive housing available, a mobile home or a cabin poorly equipped for Montana's cold winters.

Although we test for many contaminants, the most common reason that families sign up for our study is to learn about their water. Families tell us they want to know about their water. They cannot afford testing on their own and they seem willing to put up with our research team in order to find the answers that they want. Compared with every other environmental issue from radon to lead, mothers consistently tell us that their top priority is to know about their water.

As you can imagine, our testing yields a variety of results. Many families receive results that their water contains no contaminants above threshold levels. This is very good news. However, 29 percent of the homes that we test test positive for at least one risk; 17 percent of the homes tested positive for chloroforms; 3 percent for E. coli; 6 percent exceeded the arsenic threshold; and 3 percent exceeded the nitrate threshold.

One family we worked with had E. coli in their well. In such cases, we typically walk the family through disinfecting their well by adding bleach, letting it sit, and then flushing the bleach from the well and plumbing. After this well had been disinfected, we retested it and E. coli was found again. We had the family repeat the process and we found E. coli a third time. No matter what guidance we gave the family, their well remained contaminated. At this point we ran out of inexpensive options. We recommended that the family install a UV disinfection system or switch the children to bottled water. There was simply no other low-cost or no-cost solutions that we could provide.

The tests we conduct don't differentiate between point and nonsource point pollution, but for a mother it doesn't make any difference. Whether surface water source is from mine waste, a local feed lot, or agricultural runoff, it makes little difference to the mother. She only knows that yesterday she thought that giving her child a glass of water was a healthy action. Today she is not so sure.

One thing we have learned is that families want their government to look out for them. They want to know that surface water contaminants being dumped into the watershed, either intentionally or inadvertently, are being monitored. They want to know that those that are doing the dumping are being held accountable because when we fail to hold the polluters accountable, we shift the cost of healthy water from the polluter to the family. When a well becomes contaminated and a family begins to purchase bottled water, that family incurs a very real cost, and the families we study can ill afford such costs.

The simple truth is that, despite our recommendations, the families who find out their water is at risk almost always turn to bottled water. Even when we recommend other low-tech solutions, families rarely have the time, money, or expertise to look at other alternatives. When families turn to bottled water, they increase their own cost, as well as the Nation's cumulative burden of plastic bottles.

As a scientist, as a nurse, and as a citizen, I want to know that the EPA and their State designates have the resources to enforce the Clean Water Act. I want to know that the more than one million people who are immunosuppressed and at very real risk of dying from water-borne disease are protected. It is important to me to know that intentional polluters who seek to profit by poisoning our Nation's coastal areas are prosecuted to the full extent of the law, because, in the end, we see too many parents who believe, no matter how egregious or how deliberate the actions of polluters are, the voices of citizens will not be heard.

I thank you for taking action that recommits our Government to the Clean Water Act and provides our agencies with the resources they need to act proactively on behalf of public health. Trust can be restored by committing the requisite resources to the protection of our surface waters. Our citizens and your constituents deserve nothing less. Thank you.

Mr. KAGEN. Thank you, Ms. Butterfield. Appreciate all three of you being here.

I will turn to Gene Taylor and ask if you have any questions at this moment, Mr. Taylor.

Mr. TAYLOR. No.

Mr. KAGEN. Mr. Hare?

Mr. HARE. Thank you.

Ms. Treml, just a couple questions. First of all, how did you find out this was in your—this is well water?

Ms. TREML. Yes.

Mr. HARE. How did you come to find out that you had E. coli in your well?

Ms. TREML. On a Sunday. It was February 28th. It was a Sunday morning. Our neighbor came over. She lives just adjacent; her property adjoins the field that was spread 80,000 gallons of liquid manure in 18 inches of snow in 40 degree weather. The manure was running across her front lawn. She came over crying because her well water was black; it looked like the manure that was being spread. And she was selling her home and you can't sell a home in Wisconsin with a faulty well.

And my husband had been talking to the DNR up until this point when he was spreading the manure and it was running off, and they were doing nothing about it. He actually took video of it and DNR didn't have an interest in it. So he took the water and he says to her, well, I am going to take this in for you and certainly they will be interested in this. He did that on Monday and there was no interest in it; they told us to call someone else. One of the employees, Charles Rehoben, from the northeast region, actually told my husband to pick up a phone book and call someone else. And when my husband asked who to call, he said, just open it and find someone. He gave us nothing.

So my husband came home from work and told me what happened with our neighbor's well, and I was preparing dinner that night and I was washing some food off and I flipped the switch of my kitchen faucet and out comes brown cow manure smelling water, literally. I turned to my husband and he said—I said you need to call the DNR; they need to do something about this, that is his manure over there. We didn't have cows. We had a septic system that had just human waste in it. We didn't own any cows that we spread manure on our fields. We live on a farm. And my husband, just exasperated, told me, Judy, they aren't going to do anything. So I ended up calling the media and the media was interested because you could physically see—this is our water—chunks of manure coming out into my kitchen sink.

This was our water. This is what my water looked like the night before when I gave my daughter a bath. What I learned subsequently through all of the research I did when she was sick, my pediatrician said this was grossly contaminated with manure, E. coli, when I gave her a bath. I couldn't tell; it didn't look bad, it didn't smell bad. It looked perfectly fine. She was six months old. You lay a baby in the water. What do they do in the bath? They suck on a wash rag. That is how she got exposed to the contaminated water.

Mr. HARE. Well, I have to tell you, I don't know, whatever it takes to get this thing fixed, we have to fix it. That is just absolutely——

Ms. TREML. Sadly, this happens to about 100 families a year in Mr. Kagen's district. He is ground zero, where his office is in Brown County, Kewaunee County. There is about 100 families a year and, like I said, they have no one to turn to in the government, no one. We are in a black hole of regulation; there is no regulation for this kind of——

Mr. HARE. Well, you may be in a black hole right now, but we are going to fix that. I mean, we have to do that. I cannot imagine turning on your faucet and having manure coming out. It is almost——

Ms. TREML. We have tons of video if you want to see it.

Mr. HARE. No, I will pass on the video; I will take your word for it. But we have to fix that.

Doctor, you bring up a good point. When people go to bottled water, they have the plastic bottles, so, A, you have the expense of output for people who can't afford it. They somehow have to try to afford it. And then, ultimately, environmentally, we are creating

an additional problem on top of what we already have. And these are hitting families that just don't have anyplace else where to go.

Ms. BUTTERFIELD. I agree, Congressman Hare. That makes a lot of sense and that is what we see all the time. We work with families under 250 percent poverty. None of them have the resources to make this type of switch.

Mr. HARE. Then, lastly, Mr. Kavanaugh, if you need somebody to make a phone call, I will give you my card before you leave. I don't know if it will——

Mr. KAVANAUGH. I am sorry, I missed that.

Mr. HARE. I said if you need somebody to make a call—I am from Illinois, not New Jersey, but I still have a big mouth anyway, so I would be happy to make a call for you.

Mr. KAVANAUGH. I sure could use some help.

Mr. HARE. Well, I will do the best I can.

I just want to say to all of you I appreciate your being here. This is my first tour of duty on this Committee and I am glad I am here today. When you hear about these things, I was sitting here as you were testifying, just kind of shaking my head, trying to get my mind around what you and your family and your kids are doing, and this has absolutely got to get fixed, and it has to get fixed now. This is nothing something that can be delayed. So we have to move and move very quickly, and get it done right.

And for those people who wouldn't pay attention to your husband, I think it is shameful. They have a responsibility to protect you and your family. So we will try to get this thing done quickly and get it right for you and your family. But I cannot believe that a family would have to put up with that.

Thank you, Mr. Chairman.

Mr. KAGEN. Thank you for your questions, Mr. Hare. And just to set the record straight, the State of Wisconsin, DNR did what they were supposed to do in following their rules, but their rules weren't sufficient to cover the harm. I would quote one of my favorite justices of the Supreme Court, Hugo Black, who, during one of his rulings—it may have been a bar fight, I am not sure—where he said, "Sir, your freedom to swing ends where the other person's chin begins." So when it comes to a source of pollution, their freedom to pollute our air, our water, and our soil ends where the other person's environment begins, be it internal or external.

My question really has more to do with all three of you come from different regions of the United States and you have a common problem, and that problem you feel, if I hear you correctly, is that our groundwater needs adequate protection. Is that correct?

Ms. TREML. That is correct.

Mr. KAGEN. And yet there is an economic cost to this because once the groundwater has become polluted, once an aquifer has become polluted or collapses altogether, it is very, very expensive, if not impossible, to bring it back to life, so to speak. So I would like to hear your comments first, Mr. Kavanaugh, about how you think you can produce cleaner, healthier shell fish.

Mr. KAVANAUGH. Pretty simple: you have to put some teeth in the watchdog. In my particular case, we already got bounced out of Federal court once. In additional documentation that I brought in as part of my testimony, you will find out that a very expensive

study was done in Red Bank. Nowhere did they use the word point source. I mean, you have to give me—I will fight the fight. We will defend our families and our way of life.

But you have to give me a law I can fight with. When I am getting thrown out of Federal court—and nobody in the State is paying any attention to me. I only have the Federal arena. And I am willing to go to the Federal arena. We are willing to defend our shores and our families, but if I have no standing because it is a colander and you have to say—if everything is leaking sewage and antibodies and you say, well, it is not a point source, then I have to go home.

Mr. KAGEN. Thank you, Mr. Kavanaugh.

Ms. Butterfield, do you feel that the EPA has what it needs now in terms of the legislative authority to oversee and enforce the actions that are taking place in Washington and Montana?

Ms. BUTTERFIELD. Congressman Kagen, you spoke about the importance of prevention and that, once water is contaminated, it is extremely expensive to uncontaminate that water. That is why enforcement and resources for enforcement are key, so that when I drive on a highway and I see a highway construction project where the sediment and fumes and diesel are contaminating surface waters that will affect the water systems of people downstream, that people know that enforcement will be effective.

The second thing would be stronger connections between local health departments about information and public awareness so that people can make the connections between water contamination and public health as an issue, and strengthening that so that communities can work together. Thank you.

Mr. KAGEN. Ms. Treml, any remarks in that regard?

Ms. TREML. The only remark I have is just a clarification to Ms. Jackson. There was a question posed to her, and to you as well, that, in our case, the Clean Water Act was clearly violated when the manure ran off over the neighbor's property and into School Creek, which is a navigable waterway, it is a waters of the State. Our Federal lawsuit got seated in Federal court in April of 2004 and it was only three months later the State of Wisconsin decided to file its own lawsuit for violations of the Clean Water Act.

So we did have the rules in place, so to speak, to have the DNR and the State of Wisconsin act on our water contamination claim—not our private drinking water claim—but what we found is that the State of Wisconsin became our adversaries versus our allies. When we were going toe-to-toe with DNR employees in depositions, when they were becoming a hindrance to our case rather than a help, that was when we realized we had a problem in Wisconsin and that other families in Wisconsin had a real big problem.

Mr. KAGEN. Well, thank you all very much and thank you again for appearing before the Committee. You have the full support of a majority of the Members of this Committee in taking actions to try and prevent further point source and non-point source pollutions. Thank you very much and you are free to go.

We have three votes.

If panel three would get mentally prepared to take your chairs. That would be Anu Mittal, Wade Najjum, Steven Brown, Tom Porta, John Rumpler, Dr. Jay Shimshack, and Eric Schaeffer.

We will adjourn for a period of time until we vote and come back.

[Recess.]

Mr. OBERSTAR. [Presiding] The Committee will resume its sitting following the series of votes, and we will begin with panel three. I believe it was already—counsel, was the panel already called?

VOICE. No, they were not.

Mr. OBERSTAR. Oh, then I call the panel. We have Ms. Anu Mittal. That is quite an interesting name. It is of Indian origin and at least your namesake——

Ms. MITTAL. Is a very rich man, yes.

Mr. OBERSTAR.—bought a steel company and is building a plant in my district.

Ms. MITTAL. Really?

Mr. OBERSTAR. Yes. They also have an iron ore mining operation.

Ms. MITTAL. Every one of my family members has tried to find some relationship with him but has not been able to.

Mr. OBERSTAR. It hasn't worked yet. Oh well, thank you for being with us today.

Mr. Wade Najjum of Office of Inspector General at EPA; Mr. R. Steven Brown, Executive Director for Environmental Council of the States; Tom Porta, Deputy Administrator for the Nevada Division of Environmental Protection for ASIWPCA; Mr. John Rumpler, Senior Attorney for Environment America; Dr. Jay Shimshack, Assistant Professor of Economics at Tulane and Visiting Scholar at Erb Institute for the University of Michigan; and Mr. Eric Schaeffer, Executive Director for the Environmental Integrity Project.

Welcome. Ms. Mittal, we will begin with you. Put your microphone on so we can hear every word of wisdom.

TESTIMONY OF ANU K. MITTAL, DIRECTOR, NATIONAL RESOURCES AND ENVIRONMENT TEAM, GOVERNMENT ACCOUNTABILITY OFFICE; WADE T. NAJJUM, ASSISTANT INSPECTOR GENERAL, OFFICE OF INSPECTOR GENERAL, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; R. STEVEN BROWN, EXECUTIVE DIRECTOR, ENVIRONMENTAL COUNCIL OF THE STATES; TOM PORTA, DEPUTY ADMINISTRATOR, NEVADA DIVISION OF ENVIRONMENTAL PROTECTION, TESTIFYING ON BEHALF OF ASSOCIATION OF STATE AND INTERSTATE WATER POLLUTION CONTROL ADMINISTRATORS; JOHN RUMPLER, SENIOR ATTORNEY, ENVIRONMENT AMERICA; DR. JAY P. SHIMSHACK, ASSISTANT PROFESSOR OF ECONOMICS, TULANE UNIVERSITY, AND VISITING SCHOLAR, ERB INSTITUTE, UNIVERSITY OF MICHIGAN; AND ERIC SCHAEFFER, EXECUTIVE DIRECTOR, ENVIRONMENTAL INTEGRITY PROJECT

Ms. MITTAL. Thank you, Mr. Chairman and Members of the Committee. We are pleased to be here today to participate in your hearing on the 37th anniversary of the Clean Water Act.

Since the Act was passed, GAO has been asked by Congress several times to monitor EPA's enforcement efforts under the Act, and my testimony today is based on several reports that we completed in the last nine years which highlight some longstanding issues with EPA's efforts. These include inconsistencies in regional enforcement activities, the impact of inadequate resource and work-

force planning, efforts to improve national priority planning and oversight of State programs, and limitations in some measures of program effectiveness.

With regard to inconsistencies in EPA's enforcement programs, while we recognize that some variation is necessary to take into account local conditions and concerns, core enforcement requirements must be consistently implemented and similar violations should be met with similar enforcement responses.

However, in 2000, we found significant variations in the regions and this had led to inconsistent enforcement and more in-depth reviews in some regions than in others. Variations that we identified included inspection coverage, the number and type of actions taken, the size of the penalties assessed, and the criteria used to determine penalties. Several factors contributed to these variations, including differences in State laws and authorities, variations in resources, and incomplete and inadequate enforcement data.

In 2007, when we again examined EPA's oversight of State programs, we found that by implementing the State review framework EPA had, for the first time, the potential of providing consistent oversight of the State programs. By using this framework, EPA had identified several weaknesses in the State programs that were consistent with our findings of 2000, but we concluded that until EPA addressed these weaknesses and their root causes, it would not be able to determine whether the States were performing timely and appropriate enforcement, and whether penalties were being applied fairly and consistently.

With regard to the adequacy of enforcement resources, our past work has recognized that EPA's and the State's responsibilities and workload under the Clean Water Act have increased significantly and that EPA's work has shifted from direct implementation to oversight of State programs. Our work has also shown that while overall funding for enforcement has increased, these increases have not kept pace with inflation or growth in responsibilities.

In this environment of constrained resources, what is more troubling is that EPA continues to lack a systematic data-driven process for budgeting and allocating resources. We have repeatedly found that EPA makes incremental adjustments and relies on historical precedent when making resource allocations, instead of using a bottom-up data-driven approach. The most significant obstacle to comprehensive reform in this area is the agency's lack of complete and reliable workload data. As long as EPA lacks these data, it will be hampered in its ability to target limited resources to the areas of greatest risk.

In contrast, we have found that EPA has made substantial progress in improving priority setting and enforcement planning with the States. Specifically, EPA's partnership system for those States that demonstrate strong environmental performance has provided States with greater flexibility and autonomy in planning and operating their programs. This partnership system has fostered a more cooperative relationship with the States and has helped with joint planning and resource allocation.

Finally, in 2008, we reviewed three key measures that EPA uses to assess and report on the effectiveness of its enforcement programs. Specifically, we reviewed EPA's measures for assessed pen-

alties, injunctive relief, and pollution reduction. Our review found a number of shortcomings in how EPA calculates and reports information on these measures, which may result in an inaccurate assessment of the program.

In conclusion, over the past decade, we have identified and recommended a number of actions that EPA can take to strengthen its enforcement program under the Clean Water Act. However, EPA's implementation of our recommendations has been uneven and, as a result, many of the issues that we have identified in the past remain unaddressed even today. We continue to believe that the agency needs comprehensive, accurate, and reliable data; better resource allocation processes; and accurate performance measures to help ensure that it is implementing the Clean Water Act consistently across the Country and that like violations are being addressed in the same manner.

Mr. Chairman, this concludes my prepared statement. I would be happy to respond to any questions.

Mr. OBERSTAR. Thank you very much for your testimony and for the splendid work that GAO did on its evaluation of the Clean Water Act enforcement.

Now, Mr. Najjum.

Mr. NAJJUM. Thank you, Mr. Chairman. Good afternoon, Mr. Chairman. I am pleased to be here today marking the 37th anniversary of the Clean Water Act to talk about the OIG's work that bears on EPA's ability to manage, oversee, and enforce environmental laws, including clean water.

Over the years, the OIG has issued many reports that pertain to aspects of the Clean Water Act, ranging from EPA's oversight of major facilities and long-term significant noncompliance, efforts to clean up the Chesapeake Bay and the Great Lakes, and delays in establishing water quality standards for nutrients. We are currently processing a report that will be released in the coming days on Wetlands Section 404 enforcement. In these individual reports, we identified problems and made recommendations for corrective actions specific to the scopes of those reviews. Many of these reports are summarized in my full statement. While the Agency does not always agree with our assessments, we believe we have a good working relationship and that good faith efforts are made to resolve and correct the issues we report.

We also have a significant body of work addressing enforcement and enforcement-related issues in other programs at EPA. For example, we just issued a report on high priority violations, a Clean Air Act enforcement process that is comparable to significant noncompliance of the Clean Water Act. Our work includes evaluating the process or basis for establishing the standards for enforcement. We have also evaluated aspects of the overall management of enforcement, like our report on EPA's Office of Enforcement and Compliance Assurance strategic planning for priority enforcement areas.

I mention these other areas because we believe that there are common roots to many of the problems we identify in each of the media. We believe that some of the roots of these issues are beyond the Agency's ability to fix without assistance. We call these management challenges. We define management challenges as a lack of

capability derived from internal, self-imposed constraints or, more likely, externally imposed constraints that prevent an organization from reacting effectively to a changing environment. Each year we update and revise our list. For fiscal year 2009, we have ten.

I would like to talk about one management challenge in particular that we believe directly impacts EPA's effectiveness regardless of the media or statute organization and infrastructure. Many of the other challenges also impact Clean Water Act enforcement, but organization is the major common denominator. We have repeatedly reported that EPA regions do not ensure consistent enforcement of environmental laws. The usual causes addressed are related to a lack of national guidance establishing an EPA position, lack of national oversight over the regions, and a lack of regional oversight over delegations to the States. Also, inconsistent data collected from the States and others as interpreted by ten regions adds to the problem. The OIG addresses these issues within the scope of our work, but underlying the Agency's problems is an organization not designed to do its mission.

The Agency's current strategic plan calls for having the right people in the right place at the right time. However, since EPA's formation in 1970, a comprehensive study has not been completed to analyze EPA's mission, organization, and the related number and location of employees needed to most effectively carry out EPA's mission at least cost. This affects all functions, not just clean water.

To quote from the 1970 memo creating an organization for environmental protection: "The functions assigned to EPA are not the only determinants of its effectiveness. Performance will be helped or hindered by the way the programs and functions which make up the EPA are structured within the new organization." We also note that it specifically rejected trying to achieve EPA's objectives by organizing around media such as air, water, and land. According to EPA's history, there was a three-phased plan to streamline and consolidate functionally for efficiency. The Agency never implemented the third phase, which would have eliminated the media-oriented program offices altogether.

In 1995, the House and Senate Appropriations Committees commissioned the National Academy of Public Administration to assess EPA's efforts in setting environmental priorities and allocating resources. In part, NAPA recommended the following: "The environmental control efforts should be integrated. In consultation with Congress, and as part of the process of integrating environmental statutes, the agency should begin work on a reorganization plan that would break down the internal walls between the agency's major 'media' program offices for air, water, waste, and toxic substances." That did not happen.

In our opinion, many of the problems we see that impact the efficiency and effectiveness of Agency operations have their roots in EPA's organization. We believe that the protection of the Nation's waters can be improved by an EPA that is strategically aligned to consistently enforce environmental statutes and provide oversight over the State delegations. This is not an original issue. The challenge is not to evaluate whether the task is needed or what the design would be; the challenge is to actually get it done.

This concludes my prepared remarks. I would gladly answer any questions the Committee may have.

Mr. OBERSTAR. Thank you very much, Mr. Najjum. Appreciate your testimony.

Mr. Brown.

Mr. BROWN. Thank you, Mr. Chairman and Members of the Committee. First, ECOS's president, Mike Linder of Nebraska, couldn't be here today because his State is having a special session of the legislature to deal with tax revenue shortages, which is, I am sorry to say, an all too familiar story around the Country that I hear from my members. Mike and Administrator Jackson shared leadership of the ECOS Compliance Committee only last year, and he very much wanted to be here and sends his apologies for not being able to.

The Committee is interested in what we can do to improve enforcement in the Clean Water Act. We very much share that desire and we look forward to the rest of the testimony that will be given here today.

One of the things that I hope you understand is that States do conduct 95 percent of the enforcement that is conducted between us and EPA. It is not a qualitative statement, it is a quantitative statement. But we are now living in an era not of doing more with less, but of doing less with less.

There are three main points I want to make to you today, and that is, one, both the States and EPA have a role in enforcement, and we must work cooperatively if we are both going to succeed, and that is something that we very much want to do. Secondly, that States are committed to achieving full compliance for all regulated sources and keeping them in compliance, and we will use the full spectrum of environmental enforcement tools to do that. And the third point is that State enforcement is under duress due to reductions in funding from both Federal and State sources.

ECOS understands that EPA's Clean Water Act enforcement action plan, which was just released today—we haven't had a chance to study it, but it contemplates using regional and State staff worksharing to utilize resources efficiently and maybe to ask States to certify data that goes to EPA. We think these are positive direction steps. We hope to work with EPA as we jointly implement that enforcement plan, and we anticipate doing that with them.

From a State perspective, returning a facility to compliance to achieve clean water goals is our top priority. Enforcement occurs when compliance does not. But enforcement has many faces. For routine non-compliances, if there is such a thing—and we believe there is—States will often undertake so-called informal enforcement actions.

Having done these myself, I assure you that most facilities do not consider them informal. Such actions may include oral and written warnings and voluntary compliance agreements, and the important thing about them is they return the facility to compliance quickly about 80 percent of the time. Such actions also cost the State agencies less than the so-called formal enforcement actions, which States also regularly use.

Formal actions are, however, what EPA measures. This is part of the reason that State and EPA compliance data sometimes don't

match, because if a State completes an informal action and returns a facility to compliance, but EPA was under the impression that a formal action was needed, it will still show that a formal action was never taken, even though the facility is actually in compliance.

To the funding issue. State enforcement implementation is under duress for two reasons: because of the budget deficits that are occurring in 48 of the 50 States and in the territories, and because of lackluster Federal support. States are imposing hiring freezes, they are furloughing employees, and they are reducing enforcement staff.

In the period 2001 to 2009, inflation ran at about 24 percent, but the increase in EPA's operational grants to States only rose 11 percent. Federal support for State environmental agencies increased to an all-time high in 2009 thanks to ARRA, and we should see many compliance improvements over the next few years at municipal sources because of that. However, this increase did not extend to the operational funds that States use to implement the Act, including enforcement, and States receive no Federal grants that are dedicated to enforcement.

Furthermore, during this period of 2001 to 2009, EPA issued hundreds of new rules which the States are expected to implement and which we are eager to implement. EPA has estimated—and you have heard this testimony earlier today—that as many as one million new sources will be regulated by the Clean Water Act. For example, over 60,000 vessels were added to the list of regulated facilities this year alone. New sources means more enforcement responsibilities under the Act.

Finally, I agree with the Administrator that continuing uncertainty in the Clean Water Act due to several court cases has increased the difficulty in ascertaining jurisdictional authority over some polluters. ECOS has recommended steps to Congress to address this issue and worked with this Committee, and we continue to believe this is needed.

I would be happy to take questions.

Mr. OBERSTAR. Thank you very much. Very overall comprehensive review of matters.

Mr. Porta.

Mr. PORTA. Good afternoon now, Mr. Chairman and Members of the Committee. My name is Tom Porta. I am the Deputy Administrator for the Nevada Division of Environmental Protection and the current President of the Association of State and Interstate Water Pollution Control Administrators, or ASIWPCA, as we are known.

I have been working in the State environmental quality programs for over 25 years. The members of my association appreciate the opportunity to provide testimony before you today regarding States' administration of the Clean Water Act, particularly in the arenas of discharge, permit compliance, and enforcement. By far, the States and interstates do the lion's share of work in protecting and improving the quality of our Nation's waters.

Our message to you today is that States are doing a good job enforcing the provisions of the Clean Water Act and should be commended, given the many constraints they work under.

Recent headlines and news stories have highlighted potential Clean Water Act violations that have gone unchecked or unre-

ported. While these situations warrant further investigation, they represent a small part of the compliance picture. It is important to consider other factors, including the total number of parameters permit holders are required to meet and report.

In the short time we had to prepare for this hearing, we evaluated enforcement data from a handful of States. Additionally, we looked at effluent limit violations versus reporting violations. From the information compiled, the data shows compliance rates in excess of 99 percent when it comes to effluent violations and in excess of 95 percent when it comes to reporting violations. While this was only a sampling of States, I believe it is representative.

That is not to say that all aspects of State compliance and enforcement programs are perfect. As with any environmental program, improvements can always be made.

Administrator Jackson announced earlier this year her intent to improve on the Clean Water Act enforcement and compliance programs, and you heard her roll-out of the 90-day action plan this morning. ASIWPCA agrees that improvements should be made, and we have offered to closely work with EPA as co-regulators to make this initiative work, with the caveat that the expectations must be reasonable and will focus on adding value to our enforcement and compliance programs.

So what should be done to enhance our States' efforts and provide for effective State enforcement and compliance programs? We believe there are five elements to effective program, and they include the following: first, identify the problems before they become violations through technical and compliance assistance. EPA must rethink the value placed on compliance assistance as the current oversight framework is primarily focused on enforcement. Enforcement is necessary and has its place, but is not the sole measure of success for the water programs.

Second, water quality violations are top priority. Paint an accurate picture of enforcement by redefining what truly is significant noncompliance. The current definition is too broad and includes minor paperwork in reporting violations that do not impact water quality. While minor violations are important, separating out these types of infractions would show a true depiction of enforcement actions that impact water quality.

Third, when appropriate, resolve violations quickly through nonformal enforcement actions. A wide variety of administrative tools exist, from warning letters to consent decrees. These approaches often result in prompt compliance and more effectively use staff resources.

Fourth, take enforcement actions when necessary. The authority to issue formal actions and assess penalties is provided in Federal and State statutes, as well as regulations. Formal enforcement actions should be reserved for cases involving illicit dischargers, recalcitrant behavior, and other significant violations.

And fifth and finally, track enforcement and compliance with reasonable data systems. We can achieve greater levels of information accuracy and transparency with the use of electronic reporting and strategic data integration across States. This would be a significant benefit to States and EPA, given the ever-increasing number of new sources.

However, disincentives prevent full participation by the regulated community. As an example, the requirements for authenticating signatures for electronic filing are so onerous it is easier for permittees to submit their information by regular mail. The public should be able to easily obtain this information through a simple, accurate, and accessible database. Please note that enforcement information has always been available to the public through State records and databases, but the data has rarely been complete or accurate through Federal data systems.

I have provided you with a few examples of problem areas in the Clean Water Act enforcement programs and suggestions for addressing these issues. In closing, ASIWPCA and its members look forward to working with Administrator Jackson and her staff to develop reasonable and sustainable measures to improve upon the success of compliance and enforcement programs.

Thank you. That concludes my testimony.

Mr. OBERSTAR. Thank you, Mr. Porta. Appreciate your participation and the information you have submitted.

Mr. Rumpler.

Mr. RUMPLER. Chairman Oberstar, Members of the Committee, good afternoon. My name is John Rumpler, Senior Attorney with Environment America. We are a federation of 27 State-based citizen supported environmental advocacy organizations, and in my role as senior attorney I coordinate our clean water advocacy work from Puget Sound to the Great Lakes to the Chesapeake Bay. Just as the previous two speakers have talked about, the great deal of our work is at the State level.

And while we don't exclusively focus on enforcement, we have worked on reducing the use of toxic chemicals, we have worked on runoff pollution, and a number of things. We have also been deeply involved directly in clean water enforcement. Most specifically, we have prevailed in 99 citizen suits to compel violators of Clean Water Act permits to curb their pollution and come in compliance with the law for our rivers, lakes, and streams.

More systematically, we have done an overview of compliance of major facilities with their NPDES permits. I am afraid that our results paint a little bit of a different picture than Mr. Porta just represented. Now I want to note for the record that we were not talking about any paperwork violations. We were not talking about minor violations. We were talking about discharges of pollution in excess of limits set to protect water quality.

Here is what we found in the year of 2005, and we had similar results in previous years when we did this assessment. Number one, the problem is widespread. Fifty-seven percent of major facilities violated at least one discharge limit that year. Overall, those facilities had 24,000 discharge exceedances, again exceeding limits to protect public health and the environment.

Nor were these minor. Of these 24,000 violations of these permit limits, they averaged nearly four times the amount of pollution allowed under law. In many cases these were chronic repeat offenders. More than 600 of these facilities reported effluent violations again and again and again just in the year of 2005 alone.

Indeed, the best indicator of whether we, America, the States, EPA, all of us, are doing a good job with the Clean Water Act is

whether our rivers, lakes, and streams are clean. Unfortunately, with so many polluters dumping so much pollution from direct sources into those waterways, it is not surprising to us that nearly half of our rivers and streams are not safe for fishing, drinking, or other uses. That is a fundamental problem.

We offer the following solutions: We believe we need tougher enforcement, more resources, and to restore the protection of the Clean Water Act to all of America's waterways.

Tougher enforcement, it is time to put the environmental cop back on the beat. While there is some value to informal measures from time to time, the practical reality of the matter is that deterrence demands that penalties are certain, swift, and severe enough to ensure that pollution no longer pays.

Moreover, we need to make sure that the underlying permits themselves are strong enough to protect water quality. The original Clean Water Act envisioned an end of direct discharges by 1985. We are nowhere near that. States are not systematically reviewing the permits and ratcheting down the permit levels. We need to toughen the permits to get to clean water.

Now, all of this takes resources. I couldn't agree more that our State agencies and EPA—all of us—need more resources to be able to do this job well. Possibly we should consider a mandatory permit fee scheme, which I think some of my colleagues can speak more specifically to.

But in addition to money for enforcement agencies, we also need money for infrastructure. I want to applaud Congress and the Obama Administration for the $4 billion in Clean Water infrastructure money in the stimulus package. But we need to build on that if we are ever going to end sewage overflows.

Finally, I would be remiss if I did not note to this Committee the need to make sure that all of our waterways are protected. There are many problems and challenges that we have here today but that is one that this Committee has the power to directly solve.

I thank you for your time. Let me make one final note, Mr. Chairman. Next Thursday, a week from today, we will be releasing a new report documenting the millions of gallons of toxic chemicals discharged into our waterways using TRI data.

Thank you.

Mr. OBERSTAR. We will certainly look forward to that report. Thank you for your testimony and your stout defense of clean water.

Now, Mr. Shimshack?

Mr. SHIMSHACK. Mr. Chairman and distinguished Members of the Committee, thank you for the invitation to speak today. While there are many facets of water quality management, I will focus my remarks on understanding and strengthening the performance of Clean Water Act monitoring and enforcement from an independent research perspective.

To fully appreciate the issues, it is useful to first provide some context. The first thing to note is that broadly characterizing Clean Water Act performance is challenging. Aggregate snapshots of Clean Water Act compliance are highly sensitive to the chosen measurement instrument. Some reasonable metrics suggest very high compliance while other reasonable metrics simultaneously

suggest low compliance. This may explain some of the differences in opinion here today.

Second, regardless of how one defines noncompliance, enforcement activity is infrequent compared to the number of violations. Third, monetary penalties are especially rare and levied fines tend to be extremely modest relative to fines allowable under the law. Fourth, on average, enforcement activity is declining over time.

Despite the relative scarcity of enforcement, a growing academic and policy literature shows that State and Federal Clean Water Act monitoring and enforcement actions, when actually used, are highly effective. The research evidence suggests that Clean Water Act inspections and sanctions generate substantial specific deterrence, meaning that inspections and enforcement actions consistently reduce future violations at the evaluated or sanctioned facility. Formal Clean Water enforcement actions and especially fines also generate substantial general deterrence. Here, sanctions spill over to deter violations at facilities beyond the sanctioned entity. The essential intuition is that an enforcement action at one facility enhances the regulator's reputation for toughness across all facilities in the same State and sector.

The evidence also suggests, perhaps surprisingly, that Clean Water Act enforcement actions not only meaningfully affect compliance but they meaningfully affect pollution discharges as well. When inspections and fines are deter violations, pollution is of course reduced. However, enforcement also encourages beyond compliance behavior. Facilities with discharges that are typically below their legally permitted levels often reduce discharges further when the regulatory threat increases. Also, likely non-compliant facilities often respond to increased regulatory threats by reducing discharges beyond those required simply to meet statutory limits.

To reiterate, the published evidence suggests that Clean Water Act monitoring and enforcement actions, when used, importantly influence both compliance and pollution. Several implications follow.

First, a substantial improvement in environmental performance may be achieved with a modest additional investment in traditional monitoring and enforcement activity. The speed and strength of observed pollution responses to relatively small changes in the likelihood of enforcement suggests that regulated entities can increase their current environmental performance without incurring large capital costs such as those required by installing new equipment.

Second, a substantial improvement in environmental performance may be achieved with a modest additional investment in enforcement stringency. The evidence suggests, perhaps not surprisingly, that more stringent penalties deter more violations and reduce more pollution. The research evidence on informal actions, in contrast, is quite mixed. A reallocation of discretionary enforcement resources towards more rigorous sanctions may enhance performance.

Third, improving the performance of the Clean Water Act may not require sweeping changes. Policy observers increasingly advocate for voluntary, cooperative, informational, or other alternative

approaches to water pollution management. The published evidence on the effectiveness of these approaches is mixed.

In contrast, the evidence for important deterrence effects from traditional enforcement is quite strong. In my opinion, greater and more nuanced use of our current tools will have predictable and meaningful results for environmental quality. The potential impacts of more radical changes are poorly understood.

Fourth, environmental regulators should consider more vigorously publicizing their enforcement actions. Spillover effects of sanctions on non-sanctioned facilities require that companies know about monitoring and enforcement actions at other companies. State and EPA authorities should consider pilot programs that publicize sector-specific enforcement details.

Finally, Congress, EPA, and the States should facilitate more research on environmental enforcement and compliance through enhanced research funding and improved data access.

Mr. Chairman and Committee Members, it is an honor to be here today. Thank you for the opportunity.

Mr. OBERSTAR. We are glad to have you. Thank you.

Mr. Schaeffer?

Mr. SCHAEFFER. Thank you, Mr. Chairman and Members of the Committee, for the opportunity to testify today. I am Eric Schaeffer, Director of the Environmental Integrity Project. We are a nonprofit organization that advocates for more effective enforcement of Federal law. Formerly I worked in the enforcement program at EPA.

First and foremost, let me thank you for holding this hearing. I think, and many others think, that the Clean Water Act is one of the best things Congress ever did. But as you have heard today and as you have said yourselves, we have a lot of work left to do. The law's implementation needs your attention. So your oversight is very, very welcome and I think it will do a lot of good.

As we have already heard, State agencies do bear most of the responsibility for writing and enforcing Clean Water Act permits under grants of authority from EPA. It is just a fact that some States do a reasonably good job carrying out those responsibilities while others have not. The Agency has got to step up oversight of State agencies where the States are either not able or willing to do the job. That is the only way we are going to make sure that all citizens have access to clean water, and that we get the level playing field that the law is actually supposed to provide.

This is difficult, grinding work. We certainly need EPA to work in partnership with the States and give them assistance where they need it. But there are times when EPA has to say that what we are seeing from this particular agency on this issue is not good enough. That is just very difficult to do.

EPA has to methodically look at permits, and sometimes object to bad permits. It certainly needs to be ready to take enforcement action where the States aren't doing it, or won't do it.

We also need regular program reviews to see how not only State agencies are doing, but how EPA regional offices are doing. Perhaps that function ought to be set up and standardized at the Inspector General's Office so that you can get the kind of arm's

length audit of the program to decide whether things are going in the right direction.

Now, I agree with what we have heard from Mr. Brown. It is very difficult, impossible really, for States to run a complex Federal program like the Clean Water Act without adequate resources. States are badly under-funded. You spoke earlier, Mr. Chairman, and other Members of the Committee did as well, about stepping up public financing of wastewater treatment plants. That is critical, and I hope you are successful in that effort. But we also need to find a way to pay for the State agencies' staff that do the hard work of reading the permits, writing the permits, dealing with public comments, and carrying out the enforcement actions.

Under the Clean Air Act, the Congress requires States to assess emission fees that are actually adequate to cover State program costs. That is a requirement in Federal law. It has worked pretty well. State air programs, while there is never quite enough money, are largely self-financed now through those emission fees. Perhaps you could consider the same thing under the Clean Water Act. That would be a Federal mandate to assess fees on the big dischargers that are high enough to pay for program costs.

I will put in a plug for electronic data. I agree with Mr. Porta that we are in the electronic age. Information about violations and about discharges ought to be readily available on EPA's website and on State websites. EPA has tried to make this happen through the ECHO database. I should say that this was an initiative started under the Clinton Administration but strongly supported under the Bush Administration, to its credit, so it has a bipartisan track record. Certainly it can be improved. EPA will need State cooperation. Some data is not entered that ought to be into that national database. We need to get States to do that.

I think the last point I will try to make quickly is that it is good, with all the complexities about trying to measure compliance and how we are doing, to just remember the first principles that ought to really underlie any law but are certainly true of the Clean Water Act: Polluters ought to pay for their violations. The more you pollute, the more you should have to pay.

I have attached at the back of my testimony an example of effluent discharges at major power plants. As you can see, these are companies that are regularly reporting that they exceed their permit limits by a factor of 20 or 30 times. In other words, their discharges are 20, 30, 40 times what the permits actually allow. By all means, let us not waste our time with minor paperwork. There are plenty of large polluters that I think today are going unpunished. Basically, there is not really much of an enforcement response.

I have taken this data from EPA's website. If it is correct, I would encourage you to follow up and ask EPA and the State agencies where these plants are located what they plan to do about these facilities. What is the enforcement status? Has anyone issued a notice of violation? How much are they going to pay? There are many other examples in the database that you could use. Focus on the illegal discharges, as everybody I think here has suggested, and I think you will find plenty of work to do.

Thank you very much for the opportunity to testify.

Mr. OBERSTAR. Thank you, Mr. Schaeffer. I appreciate your testimony as well.

All witnesses have covered a wide range of issues of importance in this review of the EPA enforcement program.

The law seems clear that economic benefit from a violation of the Clean Water Act should be recaptured in the enforcement both—I said this at the outset—to reduce the incentive or the temptation to pollute but also as a deterrence. How do you calculate economic benefits? Can the GAO do an assessment of that issue? Is this being done? Is that aspect of the Act being carried out?

Ms. MITTAL. We didn't actually do an assessment of how the penalties are being calculated. What we did find is that it is a very subjective process and different States do it differently. Some States have the authority to assess the economic benefit, some States do not. So what we found are huge variations in how the States were actually making the calculations of the penalty.

Mr. OBERSTAR. Do others have a comment on that issue? Mr. Porta?

Mr. PORTA. Yes. EPA has what they call the BEN Model. It is an economic benefit model. In our State when we have run the model or tried to get the data to run the model, it comes up with a number that is fairly exorbitant for the smallest violation, in the six and seven figure range. So there is the tool out there but I would think the tool would need to be refined.

To gather the data to determine economic benefit from a company, it is not easy. It is not an easy task to try to find out through tax records or what have you what their actual economic benefit was by going over the limit.

So it is not an easy task to do but there is a tool that EPA has. I think it definitely needs refinement.

Mr. OBERSTAR. This notion of benefits and costs runs through a number of programs under the jurisdiction of this Committee, including that of the Corps of Engineers and also the Federal Transit Agency. In the previous Administration, they used benefits analysis to deny projects or slow down transit projects by including some costs and excluding other benefits.

I think what GAO is saying is that there is an inconsistency. In fact, the thrust of your testimony is that the whole management of the EPA program is shot through with inconsistencies.

Ms. MITTAL. That is correct. We believe that there is a lot of inconsistency in how the whole enforcement program is being managed by EPA.

One of the biggest concerns we have is that they do not have the data that they need to find out what is causing these inconsistencies. Are these inconsistencies bad, are they okay? Is it all right for the States to continue to have inconsistent enforcement of the Act?

We don't think inconsistency is a good thing. We believe that EPA should have some fundamental, basic principles to ensure that all State programs will provide a certain minimum level of enforcement. But right now they don't have the data to find out what is causing all of these variations in the State programs.

Mr. OBERSTAR. I just made note of the various kinds of inconsistencies. You said the enforcement varies on inspection for facilities.

Penalties vary by region. There is varied enforcement by region. There are different strategies for oversight by region. There are differences in State laws. That is something that EPA should work to develop consistency in, though not totally because water situations differ from place to place. Funding by EPA regions varies. Data on enforcement is incomplete and inadequate. That is a sorry state of affairs at EPA and one that leads to discrediting the program.

Ms. MITTAL. Well, we are very concerned about it, sir. The variations are in and of themselves not bad. That is what we try to emphasize. Sometimes you need to have variations because you have got local conditions, you have got local concerns. You have got to have a program that is flexible enough to address all of these concerns. The problem is when we look behind those variations.

EPA could not provide us good information on what was causing those variations. We had to do that analysis ourselves. When we look at what causes those variations, that is what leads to inconsistency. We believe that inconsistency is bad.

Mr. OBERSTAR. One of the thrusts of the Clean Water Act—we will go back to 1971 and 1972 when we were shaping the bill in this very Committee room and then the House-Senate conference—was that a whole range of industries, the chemical industries, manufacturing of various kinds, and processing, supported the notion of the Clean Water Act because they wanted consistency among the States. They did not want to have runaway pollution-friendly States where their competitors could seek comfort while they were locked in a State that has high standards and couldn't go to another one that has low standards or no standards. That was the thrust of the conferees, both House and Senate, establishing consistency. Now you are saying that consistency has deteriorated.

Mr. Brown?

Mr. BROWN. ECOS also had a concern about the consistency back in 2005 when we proposed the State Review Framework to EPA. I think it is probably fair to say that it is no longer in development, but we are in the process now of doing the second tier of those. The first tier clearly was a learning experience for everyone involved. But it was because States were concerned about some of the inconsistencies that Ms. Mittal mentioned. So we agree, they need to be reconciled. We are hoping the other SRF, as we call it, the State Review Framework for enforcement, will help reveal those and eliminate them.

Mr. OBERSTAR. Mr. Najjum?

Mr. NAJJUM. Thank you, Mr. Chairman. We agree with a lot of what GAO has found in terms of inconsistency in policy across the regions. It is one of the things that we note constantly when we are looking at a national program and go out to see how it is being enforced and what is actually happening.

We find that it is more of a symptom. The symptom is a lack of a national concept of what it is that EPA would like the regions to do. When they talk about flexibility, we find often that the flexibility is that there aren't really any rules. You are leaving it up to each of the regions to independently determine how they will actually enforce. When you have ten regions determining how they will enforce, recognizing that sometimes you do need to have some local thoughts in there, you really have a mishmash of enforcement

sometimes. The flexibility reaches a point where it can become chaos.

Mr. OBERSTAR. Thank you very much.

I yield now to Mr. Boozman.

Mr. BOOZMAN. Thank you, Mr. Chairman. It sounds like we all agree, then, that we need much better data coming from EPA so we can evaluate what the problems actually are.

I think you all found that there is inconsistency in enforcement. Yet, as was stated, sometimes there is a reason. Individual locations vary so there is going to be some inconsistency. But when you go back to the reason for that, the logic ought to be the same in every place. We can agree on that. The enforcement piece, that we have more consistent enforcement throughout the regions, I think we can agree on that.

The other thing that I see is that there is inconsistent logic and inconsistent science behind some of the enforcement. Instead of things that are reasonable or that can be done where it is manageable from an expense standpoint, sometimes we get into such stringent enforcement. You can do a tremendous amount of good by enforcing in some manner. Then you get down and you get way below that and the cost becomes just so expensive that it becomes a real problem.

I was visiting with the Chairman as we were sitting here earlier. I am here at all these hearings. I know all about the Chesapeake. I know all about all of our different water bodies now and their problems. One of the things I am hearing from Members more and more, though, is that they are getting these things thrust upon them that their constituents just can't meet in terms of the standards. Somebody mentioned earlier, I think Mr. Latta, that they would be better off just buying the communities out because the standard is so tough that they just can't meet it. If we have that trend continue, we are going to lose Congressional support. I really fear for that as we start doing that. You guys who are involved in these studies can understand that. That is a real, real problem.

I guess what I would like to do is see what else we can, again, those three things that I mentioned with the enforcement piece, being more consistent, and better data, what else we can agree on that we can go forward with. Mr. Brown?

Mr. BROWN. I think you have a good list, but I would add one thing to the data part. It is not enough that we have a good exchange of data, that the data is clear, and that we agree on it. We also have to agree on how to interpret that data. That is something we have never really talked about much. We need to have methodologies of data interpretation that are defensible and that are based on good statistics. Many of the things that Dr. Shimshack said, I completely agreed with. You can look at the same data and come up with widely varying conclusions if you don't use good techniques for reviewing that data. That is something I think we also need to have.

Mr. BOOZMAN. Well, that is one of the leading causes, probably, of the inconsistency of enforcement in different regions. As you say, that data can mean different things to different regions and lead to different remedies. But I agree with you very much. So in that sense we need better science as to what that really means.

What else can we agree on? Yes, sir?

Mr. SCHAEFFER. Congressman, just reacting to Mr. Brown's response, I am all for better methodologies and finer statistics but I want to make sure we don't over-complicate the problem. For about 40 years, the law has required facilities to report their discharges. Those discharge limits that facilities have to meet are set in permits. Those are more often than not economically sensitive. They are set to be affordable. I think we don't need a lot of work on methodology to agree that if you are 20 or 30 times over your limit, something ought to be done. That is a serious violation and there ought to be a response. I am hoping we can at least agree on that.

I understand there are issues with whether or not paperwork violations ought to have the agencies' attention. I just want to reiterate that we have lots and lots of information about discharges that are way over permit limits. The question in those cases is not whether enforcement is consistent or what are the differences in enforcement response? There is no enforcement at all. I hope that gets the Committee's attention as well.

Mr. BOOZMAN. I agree. Certainly, all crimes are not the same. Certainly those need to be enforced. Some of them really need to be enforced, I am sure.

Yes, sir?

Mr. PORTA. When the New York Times article came out, obviously the States looked at their own enforcement and compliance data. I just want to give you an idea for that same four year period that the New York Times looked at in the State of Utah. Over four years they had 116 permitted facilities. There was a potential for effluent violations 236,976 times in that four year period. To have a compliance rate of 99.3, those are the data and percentages that I look at.

If you have got that many potential points to violate, inevitably you are going to violate a standard at some point either through a plant malfunction or a system operator mistake. It is going to happen. Literally, the number of points for potential effluent violations throughout the Country is in the millions every year.

Mr. BOOZMAN. Very good.

Thank you, Mr. Chairman. I hope that in working together on these things that we have agreed upon, the data piece and things like that, that we can get together and figure out either through oversight or legislation how to help EPA. It might be that we are just not giving them the resources that we might need to do a better job of oversight. But these things that we all seem to agree on we need to get straight.

Mr. OBERSTAR. Thank you for that comment. This is the beginning of that process of inquiry and understanding, of establishing a database, finding the shortcomings, and then proceeding from there on how we ought to correct them.

Mr. Taylor, the gentleman from Mississippi?

Mr. TAYLOR. I will pass.

Mr. OBERSTAR. You can't pass. You are the only one who hasn't spoken.

Mr. TAYLOR. Mr. Chairman, I am very much aware that two thirds of the continental United States drains down the Mississippi

River. When the wind blows out of the west, it goes right in front of my district.

I am very much appreciative for your efforts to remind everyone that water moves from place to place. Pollution in one State ends up in another State. The dead zone in the Gulf of Mexico is very much a result of the over-use of fertilizers in some States and the levies along the Mississippi taking what used to flow into the marshes naturally and channeling it all into the Gulf.

So I support your efforts. I understand where you are coming from. I welcome these folks' thoughts as we try to do this right.

Mr. OBERSTAR. I thank the gentleman for that observation. My wife is from Louisiana, as Mr. Taylor knows. The Mississippi begins in my State, if not exactly in my district, and I have said we and the other ten States along the Mississippi are responsible, the Ohio, the Illinois, the Missouri River systems, for all the debris that wind up in Mississippi and Louisiana. Jean sometimes jokes that that is the reason their bread is so good, that it is taken from such sturdy water with all the flavors of the 11 States that drain into the Gulf of Mexico.

Mr. TAYLOR. Mr. Chairman, it has a lot more to do with the oysters we harvest than the bread that is produced in someone else's State. That is why I have great empathy for the clam fisherman who was here a little while ago. Obviously all of that is a function of whether or not those industries will thrive and survive or will go out of business.

Mr. OBERSTAR. Thank you.

The Inspector General's testimony, Mr. Najjum, refers to a separation between media programs and functional categories. It was the intent of the Act that the program be administered according to water, air, pesticide, radiation, solid waste and so on. A few years later during the Nixon Administration these were all combined into functional categories which made the operation of the program difficult. Could you unwind that for us and tell us how we can get back to that in your experience and your overview of the program?

Mr. NAJJUM. I am not sure I can unwind it completely. What we have noticed in looking at the stovepipes within EPA as we look at each of the programs, we think that there is a better use of resources in a functional basis particularly for enforcement. We mention the original 1970 memo on the Government reorganization. I think it was the Ash Council.

Mr. OBERSTAR. The Ash Council is right, correct.

Mr. NAJJUM. I am probably not the right one to be talking to you about the history of the Environmental Protection Agency. But the Agency's own history said that when they looked at it, they were organizing and combining functions, they had decided at that time that organizing by media was not the correct way to go. They had a three phase plan to get to it. They got through the second phase and the third phase became too hard because of the issues they were facing. It has come up again and again.

We look at it from a point of view much like Goldwater-Nichols in the Department of Defense where you had to take the three services and organize them into a modern-day Department of Defense that actually does its mission. I worked for DOD back in the

1980s and 1990s. That was a hard, hard thing. DOD would never have done that itself. I think we also have seen the quadrennial review that Homeland Security has taken on.

Look at the organization from a mission perspective of what it is that you would like the Environmental Protection Agency to accomplish and how it should go about accomplishing it. Part of that may be the electronic infrastructure we talk about in terms of bringing information together. You certainly don't need to filter that through ten different regions. Maybe in 1970 we did but in 2010 we don't. We have a whole different electronic infrastructure. EPA's infrastructure has pretty much been organized along media lines and not a functional line.

So we think there are some big resource savings in organization and infrastructure.

Mr. OBERSTAR. That is an administrative adjustment that can be made?

Mr. NAJJUM. Correct.

Mr. OBERSTAR. Mr. Rumpler, you made a very important distinction about enforcing discharge of pollutants versus enforcement on paper or reporting violations. Where does one end and the other begin? Where does paper end? Where does technical violation end and where does polluting of the waters begin?

Mr. RUMPLER. Well, I think it is quite simple. In terms of the discharge monitoring reports that the facilities themselves are required to submit to the State agencies and the EPA in those cases where EPA administers directly, on those forms they indicate exactly how much pollution of each type that is regulated they are putting into the water body. So these are self-admitted exceedances of a clearly defined pollution limit in the permit.

Let me just say before we completely dismiss so-called paperwork or reporting problems that while I agree with all of my colleagues here that they are a less important priority than the obvious discharge of pollutants in excess of permit limits, it is possible that failure to report is masking substantive violations.

Mr. OBERSTAR. Well, that is what I am getting at.

Mr. RUMPLER. We just won't ever know. I do believe that in California there are actually small but mandatory minimum penalties even for reporting violations to ensure that those reports are routinely and regularly put through. Because they are mandatory minimums that are administratively assessed, they take very little agency resources to do. So I am not suggesting that we should put a lot of agency resources into this. But there may be an automated way to clean up some of that stuff in addition to, of course, focusing most of the agency resources on the substantive pollution that is coming up.

Mr. OBERSTAR. In aviation we place a heavy reliance on data and the paper trail of maintenance actions. Absence of reporting often leads to an absence of maintenance with the resulting failure of a part and a crash and fatalities.

We have two minutes before we have to go—we probably should be leaving right now—so I want to make sure that I yield to Mr. Boozman.

Mr. BOOZMAN. I just very quickly want to say, because we do have to go, that the Federal Government under the past two Presi-

dents has put a little bit more money into enforcement. In the States, is their enforcement money going down or is it staying the same as far as their budgets?

Mr. BROWN. Well, it is tough to say because we don't separate enforcement out from all the rest of it. As I said in my testimony, we don't——

Mr. BOOZMAN. How about all of it?

Mr. BROWN. You mean overall? It is going down right now, overall. That is not just for environment but across State government.

Mr. BOOZMAN. That is a problem. It is difficult for them to go down and then for us to take up the slack. So that is something else I think we need to look at, Mr. Chairman.

Mr. OBERSTAR. Thank you very much, Mr. Boozman. I just want to say that we provided funding for State enforcement actions in the State Revolving Loan Fund bill that passed the Congress in the 110th. We have it again in this year's version of that bill. I also included such funding in the House version of the stimulus bill but it didn't make it through conference.

Mr. Porta, you had something to add?

Mr. PORTA. Yes, just real quickly. With the States' economic situation, obviously as water administrators we have to make decisions. As the funding goes down, the first people we typically will look at are the data gatherers. I would rather have inspectors in the field than permit writers in terms of paying for those positions. So typically data is unfortunately a lower priority.

With regard to Mr. Rumpler's comment about reporting, it is very significant. My response to him would be that if there are reporting violations, you deal with that. Once the reports come in, then if there are effluent violations, you deal with that. It is not like these are neglected.

On the effluent violations, sometimes we are dealing with very small overages of the standard. Therefore, how do you deal with that? Do you bring out the heavy guns and assess a huge penalty because they were slightly over for iron but may have not affected the water quality?

Mr. OBERSTAR. I have to interrupt you at that point, Mr. Porta, because we are down to zero. We have to get over to the Floor to vote. I have a series of other Committee activities before I rap the gavel.

I just want to observe that Mr. Shimshack discussed issues of publication of enforcement action, data access, research funding, and traditional monitoring. Mr. Schaeffer discussed oversight of State programs and State agency staffing, which Mr. Porta has also referred to. That, combined with the inconsistency in enforcement and the functional problems within the program, is enough for us to continue a serious oversight of the EPA enforcement program. We will continue that work all throughout this session and the next session of Congress. We will impress upon the Agency those changes that can be done administratively and, where necessary, we will take legislative action.

We appreciate your participation and the contributions that all of you have made to a deeper understanding of the state of our enforcement of EPA programs. Thank you very much.

The Committee is adjourned.

[Whereupon, at 2:45 p.m., the Committee was adjourned.]

Rep. Tim Bishop
Opening Statement
Transportation & Infrastructure Committee
The Clean Water Act after 37 Years:
Recommitting to the Protection of the Nation's Waters"
October 15, 2009

Thank you Chairman Oberstar for holding this important hearing on the Clean Water Act after 37 years. Your dedication to clean water issues has shaped the way our nation views its most valuable resource. I would also like to commend Water Resources and the Environment Subcommittee Chairwoman Johnson for her commitment to resolving the problems facing our waterways. Without this committee's vigilance, it would be very easy for this country to revert to the habits that choke the environment and pose significant risks to public health.

Water quality and availability may be the most important issue this committee and this congress face in the years to come. While the Clean Water Act's jurisdiction is limited to the United States, it is a shining example of how carefully crafted and thoughtful regulation can reverse a nation's direction on a collision course with disaster and revitalize a system on the brink of disaster, protecting it for future generations.

Clean water is not only vital to public health and environmental sustainability, it is also critical to a fully functioning and vibrant economy. My district is encompassed by 300 miles of coastline, and I'm very proud to represent some of this country's most popular and beautiful beaches. Maintaining coastal health is an integral objective toward preserving the nation's environment and sustaining the tourist economies of our states. The beach-going public that flocked to our nation's shores this summer reminds us that we deserve pristine waterways to enjoy with our families and that we need to preserve them for future generations of Americans.

It is the responsibility of this committee to ensure that federal agencies and local governments have the resources necessary to combat irresponsible actors when it comes to our nation's waterways. Whether our goals are reached through additional funding or regulation with the leadership of this committee, we can ensure that our waterways continue on a path of sustainability. I look forward to continuing to work with my colleagues, on both sides of the aisle, to achieve these ends.

Thank you Chairman Oberstar, and I thank today's panelists for coming here today to share their perspectives.

OPENING STATEMENT OF
THE HONORABLE RUSS CARNAHAN (MO-03)
HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE

Hearing on
The Clean Water Act After 37 Years: Recommitting to the Protection of the Nation's Waters

Thursday, October 15, 2009
2167 Rayburn House Office Building

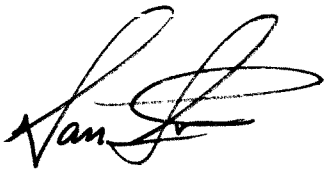
Thank you Chairman Oberstar and Ranking Member Mica, for holding this hearing on the 37th Anniversary of the Clean Water Act.

The Clean Water Act was passed in 1972 to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. This was a defining moment in improving the quality of our waters and a great deal of progress has been made in making our waters cleaner and safer than they were thirty-seven years ago.

Critical to achieving the public health and environmental goals central to the Clean Water Act is its enforcement and compliance program. This is a shared responsibility between the Environmental Protection Agency and states. A recent article in *The New York Times* is an alarming reminder that there still a great to be done to ensure enforcement of the Clean Water Act. Critical to effective enforcement is uniform and effective implementation nationwide. We cannot see vast variances between different regions and states.

Unfortunately, over the course of the previous Administration we saw a decline in not only the necessary funding to ensure adequate funding for federal and state programs to implement the Clean Water Act as well as a disregard by the EPA to run an adequate enforcement program. I look forward to hearing from Administrator Jackson on the steps being taken by the current Administration to improve enforcement measures under the Clean Water Act. I am confident that under her leadership we will see the Clean Water Act again work to protect our waters.

In closing, I want to thank our witnesses for joining us today and I look forward to hearing their testimony.



Congressman Sam Graves
Opening Remarks
T&I Full Committee Hearing
October 15, 2009

THANK YOU, CHAIRMAN OBERSTAR AND RANKING MEMBER MICA, FOR HOLDING THIS HEARING TODAY ON THE CLEAN WATER ACT.

AS A 6TH GENERATION FARMER I FULLY APPRECIATE THE PROPERTY I OWN. IN ORDER FOR ME TO ACHIEVE THE GREATEST YIELDS ON MY LAND I NEED TO TAKE CARE OF MY PROPERTY. TRUST ME WHEN I SAY FARMERS ARE THE VERY BEST STEWARDS OF THE LAND – IT IS IN THEIR BEST INTEREST.

HOWEVER, RECENTLY LEGISLATION HAS BEEN INTRODUCED IN THE U.S. SENATE, NEARLY IDENTICAL TO LEGISLATION INTRODUCED IN THE HOUSE IN PREVIOUS CONGRESSES, WHICH GREATLY EXPANDS THE ROLE OF THE FEDERAL GOVERNMENT IN REGULATING WATERS ACROSS OUR NATION. THE CLEAN WATER RESTORATION ACT EXPANDS THE SCOPE OF THE CLEAN WATER ACT TO ESSENTIALLY REGULATE ANYTHING THAT IS WET: PONDS, STORM WATER RUNOFF, AND DITCHES ARE JUST A FEW EXAMPLES. THIS IS ACHIEVED BY REPLACING THE TERM "NAVIGABLE WATERS" WITH THE TERM "WATERS OF THE UNITED STATES" AND I BELIEVE EXPANDING THE GOVERNMENT'S REACH IN SUCH AN AGGRESSIVE MANNER IS

ILL-CONCEIVED AND IRRESPONSIBLE. FOR THESE REASONS, I OPPOSE THE BILL IN ITS CURRENT FORM.

TO BE CLEAR, THIS CHANGE WOULD NEGATIVELY IMPACT AND DELAY TRANSPORTATION CONSTRUCTION, FARMING, REAL ESTATE DEVELOPMENT, MINING AND ENERGY EXPLORATION, AND NEARLY EVERY ECONOMIC ACTIVITY INVOLVING NATURAL OR MAN-MADE AND NAVIGABLE OR NON-NAVIGABLE WATER SUPPLIES. MOREOVER, THE PATH THIS BILL LEADS US DOWN SEEMS TO BE LESS ABOUT PROTECTING OUR NATION'S WATER AND MORE ABOUT EXPANDING THE FEDERAL GOVERNMENT'S POWER TO REGULATE PRIVATE PROPERTY. ACCORDINGLY, IT IS IMPORTANT THIS COMMITTEE FULLY UNDERSTAND THE CONSEQUENCES OF OUR LEGISLATIVE ACTIONS.

AGAIN, THANK YOU CHAIRMAN OBERSTAR AND RANKING MEMBER MICA FOR HOLDING THIS HEARING TODAY. I LOOK FORWARD TO WORKING WITH MY COLLEAGUES ON THIS COMMITTEE AND INDUSTRY STAKEHOLDERS TO DEVELOP BI-PARTISAN, COMMON-SENSE SOLUTIONS, TO IMPROVE THE QUALITY OF OUR NATION'S WATER.

STATEMENT OF
THE HONORABLE EDDIE BERNICE JOHNSON
WATER RESOURCES SUBCOMMITTEE HEARING ON
THE CLEAN WATER ACT AFTER 37 YEARS:
RECOMMITTING TO THE PROTECTION OF THE NATION'S WATERS
15 OCTOBER, 2009

Thank you, Mr. Chairman, for holding this hearing in honor of the 37th anniversary of the Clean Water Act. I believe that this hearing presents us with an important opportunity to assess our progress towards meeting the goals of this Act.

The Clean Water Act was passed in 1972 to eliminate pollution to the nation's waters, with a goal to make all waters safe for fishing and swimming. Since the passage of the Act, significant progress has been made to control the largest point sources of pollution to our waterways. As a result, our waters are both cleaner and safer than they were 37 years ago.

However, this hearing comes at a critical time for the health and viability of our nation's waters. Because of a number of factors, the reality that all of our waters are safe for public health and the environment continues to elude us. In fact, over the last decade, States have reported that progress in improving water

quality has slowed, and we may be witnessing a reversal in gains we have already made.

According to the U.S. EPA's National Water Quality Inventory, 44% -- almost half -- of all U.S. waterbodies are currently impaired. In addition, over two-thirds of our lakes are impaired, contaminated by poisons such as mercury, PCBs, and other heavy metals.

This is especially troubling to me because of my former career as a professional nurse. The presence of toxic contaminants and pathogens where families fish and our children play poses a significant health threat to those who unknowingly come in contact with them.

There are few public health concerns more serious than the contamination of the public's water supplies.

Yet, the waterbodies in which we discharge our wastes are often the same waters, or are connected to waters, on which we rely for our drinking water. With this in mind, we need to be all the more vigilant in our protection of the nation's waters from potentially harmful pollutants.

This anniversary of the Clean Water Act gives us the opportunity to reflect upon the successes and remaining challenges in protecting our waters.

Over the past three years, the Subcommittee on Water Resources has examined several of these challenges in meeting the goals of the Act, including the challenges of addressing ongoing pollution from nonpoint sources or urban stormwater runoff.

However, today, we are focused on traditional point source discharges, which are specifically targeted in the Clean Water Act, and the concern that these continue to be a significant source of contamination.

To examine this issue, we must recognize that the implementation of the Clean Water Act is a partnership between the Federal government and the States and Tribes.

Today, 46 States have direct responsibility for the operation of their Clean Water Act programs.

However, testimony from today's witnesses shows that it is nearly impossible to determine the effectiveness of Federal and State efforts to protect water quality from point sources of pollution.

For example, Federal and State data on these efforts are fragmented at best, and completely inadequate at worst.

Unfortunately, if the facilities that have been subject to Federal oversight are any indicator of compliance levels, things do not look good.

Data from the EPA shows that many major facilities with Clean Water Act permits violate their permits over and over again, apparently with no fear of retribution. In 2005, well over half of all major facilities in this country illegally discharged pollution into our waterways.

These facilities reported almost 25,000 instances of such discharges, which included harmful bacteria, pathogens, and heavy metals, such as mercury and arsenic. Yet there are very few enforcement actions on record for any of these facilities.

This is a very troubling state of affairs. These are not new sources of pollution. These are sources that were supposed to be ended under the 1972 Act.

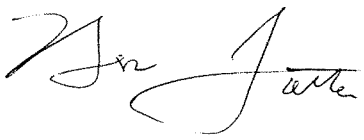
And yet, we know that without a robust and accountable enforcement program, these sources of pollution and toxic contamination will continue.

It is time that we take implementation and enforcement of our Clean Water laws seriously. We must hold polluters responsible for their actions and end recurring violations of the Clean Water Act.

We must also restore America's faith that, regardless of where you may travel, the water will be safe.

If we do not, we are failing not only to protect the environment, but also failing to protect the public's health.

Mr. Chairman, I thank you once again for holding this important hearing, and I look forward to the testimony from all of our witnesses here today.



Congressman Robert E. Latta
Transportation & Infrastructure Committee
Hearing on the Clean Water Act – Submitted for the Record
October 15, 2009

Good morning. Chairman Oberstar and Ranking Member Mica:

I believe there is an impending crisis in this country in relation to water infrastructure issues. During my time in Congress one of main priorities has been to assist the local communities in my District with their water infrastructure issues. It is the main issue I hear over and over from local communities, as they simply do not have the financial means to address regulations that have been placed upon them in relation to drinking water and wastewater infrastructure.

Last spring, I sent Administrator Jackson, along with some of my Ohio colleagues, a letter requesting information about the Ohio Environmental Protection Agency (OEPA) and its enforcement of water infrastructure issues in the state. I was disappointed that the response came from the EPA Chicago Region 5 office rather than from Ms. Jackson herself.

I contacted Ms. Jackson to bring to her attention very serious issues relating to wastewater and drinking water infrastructure facing communities across the state of Ohio. According to estimates by the Congressional Budget Office, Environmental Protection Agency and the Water Infrastructure Network, it could take between $300 and

$400 billion to address our nation's clean water infrastructure needs over the next 20 years to keep our drinking water and waterways clean and safe. The need in Ohio is substantial, with an estimated $21 billion needed to adequately address Ohio's water infrastructure needs. While this in itself has put undue strain on the budgets of these local communities, many of these Ohio communities are facing serious, expensive enforcement proceedings by the Ohio Environmental Protection Agency because they could not afford the upgrades required by law in the first place.

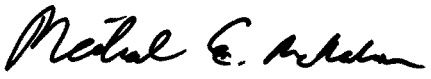
During these difficult economic times for our country and its citizens, Ohio communities are being put in a very tough situation: feeling great pressure to comply with regulations while at the same time facing the reality that, in many cases, there simply are not funds available for these communities to fund the projects being mandated upon them.

To make the best of this situation, I respectfully requested then, and respectfully request now, that Ms. Jackson direct the Ohio Environmental Protection Agency to, as appropriate, grant variances so these communities can make the improvements needed to their drinking water and wastewater systems.

While we all agree that our nation's health, quality of life, and economic well-being rely on adequate drinking water and wastewater treatment, the current requirements present

an undue burden on these Ohio communities during these tough economic times.

I look forward to continuing to work the Committee and the EPA on this very important issue. Thank you and I yield back my time.



Statement
The Honorable Michael E. McMahon
Transportation and Infrastructure Committee
October 15, 2009
The Clean Water Act after 37 Years: Recommitting to the Protection of the Nation's Waters
2167 RHOB

Thank you Chairman Oberstar, Ranking Member Mica -- and a special welcome to our superb EPA Administrator Lisa Jackson. I look forward to working with you in the years ahead.

The Clean Water Act is one of the hallmarks of our efforts to protect our waterways and our environment.

Because of decades of serving as the literal dumping ground for New York City's garbage, and because we are surrounded by some of the most active shipping lanes and oil refinery facilities in the US, my district of Staten Island and Brooklyn, NY has some incredibly polluted waterways.

Strong compliance and enforcement programs under the Clean Water Act are critical to ensuring all Americans access to clean water – and I am glad that we are focusing this oversight hearing on such an important topic.

The issue of safe drinking water is of particular concern to me -- and to all New Yorkers -- because as you know our drinking water comes relatively unfiltered and naturally from the Catskill and Croton Reservoirs just north of the City.

In the 1800s, a number of civic leaders identified these important reservoirs and preserved the land around those reservoirs from development and pollution.

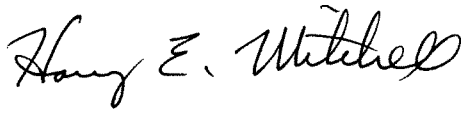
Because of the foresighted actions of those leaders, and decades of constant vigilance, we have been able to preserve the integrity of our water system. And as one of just a handful of water systems around the world that does not require a manmade water purification system, New York City's system should be a model for how to run an urban watershed system.

As we work to improve the Clean Water Act and its enforcement we need to be sure that it supports and strengthens local and state efforts.

But to do that we must recognize that the recent Supreme Court cases -- *Rapanos* and *SWANCC* -- have called into question whether certain rivers, streams, wetlands and other waters remain protected from pollution by the Clean Water Act.

The Environmental Protection Agency dropped enforcement of hundreds of alleged violations of the Clean Water Act, lowered others in priority, and has had to fight attempts to evade responsibility because of muddled jurisdiction.

Public health and safety are threatened each day the Clean Water Act jurisdiction is not clarified and Clean Water Act enforcement is weakened – and legislation must restore protections to waters that had been covered by the law before these Supreme Court decision.



Statement of Rep. Harry Mitchell
House Transportation and Infrastructure Committee
10/15/09

--Thank you, Mr. Chairman.

--You have long been such an expert on these clean water issues -- we are really lucky to have you as our Chairman.

--There is no doubt that the progress that has been made under the Clean Water Act has been tremendous.

--However, pollution clearly remains a very real problem.

--Like so many here today, I read the recent *New York Times* investigation and was shocked to learn that in the last five years alone, factories, manufacturing plants and other workplaces have violated water pollution laws more than half a million times.

--These violations happened across the country, including Arizona.

--While many of these violations were minor, some were not.

--Regardless, if the investigation's findings are true – that the vast majority of those responsible escaped punishment -- then this is certainly disturbing.

--As Environmental Protection Agency (EPA) Administrator Lisa Jackson will tell us today, one out of every four of the largest Clean Water Act dischargers had significant violations in 2008.

--Clearly this is something the EPA will need to address.

--As it does, however, I want to encourage the agency to act carefully, not just quickly.

--Clean water requires appropriate and consistent enforcement. But if we want to increase compliance, we need to look for ways to make the mechanics of compliance less burdensome.

--Too often, the permit process is confusing and time consuming. This is not only inconvenient, it's expensive – not just for regulated facilities, but for the EPA and ultimately the taxpayer.

--I am eager to hear from the EPA today about the possibility of a more streamlined, electronic reporting system, as well as the other challenges it faces on Clean Water Act issues in the weeks and months ahead.

--At this time, I yield back.

Congresswoman Laura Richardson

Statement at Committee on Transportation and Infrastructure

Hearing on "The Clean Water Act after 37 Years: Recommitting to Protection of the Nation's Waters."

2167 Rayburn House Office Building

Thursday, October 15, 2009

10:00A.M.

M. Chairman, I want to thank you for convening this hearing to review the Clean Water Act after 37 years. Access to clean water is a critical issue for California, and the 37th district is no exception. I am pleased that the Administration and this Committee are turning our attention to enforcing the Act after the neglect of the Bush Administration.

I have met with many constituents and organizations from my district regarding this issue. Conservation groups, individuals, schools, groundwater recycling groups, and others have all

expressed their desire to see this Act implemented and enforced.

As the Representative of a coastal district, I have extra incentive to make sure that this Act works as it is supposed to. The House has passed several bills over the years in an attempt to improve the effectiveness of the Clean Water Act, including the Beach Protection Act.

In 2007, beach closings and advisories nationwide hit their second highest level in the 18 years the Natural Resources Defense Council (NRDC) has been tracking them. In Los Angeles County, there were 1,696 beach closings and advisory days due to elevated bacteria levels, sewage spills, and stormwater runoff. It was clear that we had to act to address this problem.

That is why I supported the Beach Protection Act of 2008, which would have amended the Clean Water Act to establish

uniform criteria for testing and monitoring potential contaminants in those waters. My amendment to this Act would have ensured that the EPA published the results of this testing so that the American public has access to this beach quality information.

But the various amendments, clarifications, and additions to the Clean Water Act over the years do not detract from the fact that the Act has not been sufficiently effective because of a lack of enforcement. Families should not have to worry about bacteria levels, sewage spills, and stormwater runoff when enjoying a day at the beach. We could have the most environmentally stringent laws in the world; but they're completely meaningless if violators are not held accountable. If Congress is truly committed to protecting the environment, effective enforcement of clean water regulations needs to be a component of that effort.

In California, access to clean and drinkable water has been an issue for some time. I think we can all agree that Congress, the EPA, and the Administration need to address this problem before it becomes a full scale crisis. I look forward to hearing from our witnesses on this subject and to working with my colleagues on the Transportation and Infrastructure Committee in finding solutions.

I'd like to thank the witnesses for appearing before us today and I look forward to hearing their statements.

Thank you, Mr. Chairman

The Environmental Council of the States (ECOS) Testimony before the House Transportation and Infrastructure Committee
On The Clean Water Act: 37 Years of Environmental Protection

Presented by
R. Steven Brown, Executive Director
Environmental Council of the States
444 North Capitol St, NW, Suite 445
Washington, DC 20001
202-624-3667
October 15, 2009

Thank you, Mr. Chairman, for providing the Environmental Council of the States (ECOS), the opportunity to present testimony on the Clean Water Act (CWA). My name is Steve Brown, and I am Executive Director of our national association, ECOS. Today I am speaking on behalf of the environmental agencies in our 50 member States and territories.

Background
The Environmental Council of States is the national non-partisan, non-profit association of State and territorial environmental commissioners. Each State and territory has some agency, known by different names in different States that corresponds to the United States Environmental Protection Agency. Our members are the officials who manage and direct the environmental agencies in the States and territories. They are the State leaders responsible for making certain our nation's air, water and natural resources are clean, safe and protected.

States have the challenging job of front-line implementation of our nation's environmental pollution laws. States have increased their capacity and as environmental protection has become increasingly important to the general public, more and more responsibilities have been moved to the level of government best able to carry them out – State and local governments – which are best able because they are closest to the problems, closest to the people who must solve the problems, and closest to the communities which must live with the solutions. Today States are responsible for:

- Managing more than 96% of all Federally delegated environmental programs;
- Instituting 95% of all environmental enforcement actions;
- Collecting nearly 94% of environmental monitoring data; and
- Managing all State lands and resources, and many environmental matters in which the States have become national leaders.

The Committee is interested in how we can improve enforcement in the Clean Water Act. We share this desire and applaud the Committee's interest in it. This testimony will outline the challenges that States face, and solutions to meet them.

States are living in an era not of doing more with less, but of doing less with less. However, by working in full co-regulator partnership, managing resources, data, and the workload more efficiently, and clarifying jurisdiction and roles, the States and EPA can and will meet these challenges.

Opportunities for Improvements
The relationship between the States and EPA is of paramount importance. Consequently, improving that relationship to achieve a true partnership is a high priority. ECOS envisions a partnership with EPA that is collaborative and cooperative; that is based upon a clarity of roles and responsibilities; that recognizes and efficiently utilizes shared, finite resources; and that generates, disseminates and uses information effectively.

Worksharing, collaboration and cooperation. A relationship based upon collaboration and cooperation acknowledges the collective knowledge and experience of both the States and EPA. As full partners, the States and EPA would jointly develop programmatic goals and policies. The States would have meaningful involvement in all phases of the development of these programmatic goals and policies. The States and regional EPA offices would set performance goals jointly with headquarters EPA. To ensure a high level of accountability and transparency, the extent to which the States as well as the EPA regional offices and the EPA headquarters meet their respective performance measures would be assessed and reported in a consistent fashion. ECOS understands that EPA's CWA action plan contemplates regional and State staff worksharing to utilize resources efficiently. This recognition of the need for full partnership is a positive step.

Roles and responsibilities. The States' relationship with EPA can be enhanced by clarifying the roles and responsibilities of the States and EPA in the work that they share. In order to meet the parties' joint commitment to solving environmental problems, the States and EPA need to understand and support each others priorities. Clearly defined functions and duties would help States, headquarters EPA, and regional EPA offices to work more efficiently together to address tough problems. Clearly defined roles and responsibilities would eliminate unwarranted redundancies in effort and would also assist the States and EPA in effectively addressing environmental issues that cut across traditional program lines.

Role of States in Enforcement and Informal Enforcement Mechanisms
Under the CWA, States are authorized by EPA to take over substantial portions of the act, including permitting, enforcement, inspections, monitoring and standard setting. EPA runs the program in five States; all the rest are authorized to run the program under regular "oversight" from EPA. This arrangement is often referred to as the "co-regulator" system. Additionally, States have their own clean water laws that address issues beyond those in the CWA.

For most States, compliance is the goal - enforcement action is one tool among several that is available to achieve that goal (along with compliance assistance and compliance training for example). Traditional enforcement emphasizes the role of penalties and punitive actions as a deterrent to violations, and this is part of every State enforcement program. However, many States have realized the value of informal enforcement action as an effective means for achieving results and returning facilities to compliance quickly. Informal actions means more actions, quicker compliance, and allows us to focus formal methods for more serious cases.

To fully understand State enforcement results, we need to look beyond formal enforcement actions. By limiting reporting to only formal action EPA's databases may continue to list a facility as having "no action" taken even if that facility has returned to compliance through informal mechanisms. In its April, 2001 Report to Congress, ECOS found that many facilities return to compliance through swift and effective informal enforcement action, and that these initial steps can be very effective (success rates in returning facility into compliance shown below). States can choose from a wide array of formal and informal actions. These include:

Informal Actions

- Oral notification of violation – 76% success rate
- Field citation
- Letter to regulated entity (warning letter) – 81% success rate
- Voluntary compliance agreement - 83% success rate

Formal Actions

- Written notice of violation
- Complaint/proposed order
- Final order – 86% success rate (unilateral orders)
- Demand for stipulated penalties
- Judicial referral

While formal actions are a very important part of the "enforcement tool box," there is no guaranteed outcome for formal enforcement actions – a judge or hearing officer may side for the defendant. The process is lengthy and consumes significant resources for all parties. Even though informal actions are not punitive in nature, they offer States an effective mechanism to bring facilities into compliance and utilize scarce resources efficiently. As is true across any law enforcement activity, an incremental enforcement approach to achieve compliance is the most effective use of resources. Serious violations will receive a serious response to match, including penalties, with the primary goal a facility's return to compliance.

Funding Declines Coupled with an Expanded Workload Present Challenges

States' enforcement responsibilities have become even more challenging in the face of budget deficits affecting all but two States. During the period 2001 – 2009, inflation ran at about 24%, while the increase in categorical grants to States rose only 11 percent.

During this time EPA issued hundreds of new rules which the States are expected to implement. While increased State revenue covered much of this increased cost, with the recent downturn in State revenues this is no longer the case, and nearly all State environmental agencies are furloughing employees, not filling empty positions, and even discharging them. This budget situation has a direct impact on all work we do, including enforcement and will continue to have a negative effect until it is remedied by increased funding or reduced workload.

Starting in 2005, EPA began systematically cutting Federal support for State environmental programs. This continued until 2008 when the cuts were stopped, but not restored. Not until this year (fiscal 09) did States see increases in Federal budget help. From 2005-2008, Federal funding to States declined from $3.5 billion to $2.9 billion. The economic downturn in 2008 led to reductions in State environmental budgets from State sources, which had picked up some of the slack previously. The combination of loss of Federal funds and a decline in State support resulted in layoffs, cutbacks, furloughs, and shutdowns in many States. Some States are increasing furlough days to 2 or 3 per month.

Federal support for State environmental agencies increased to an all-time high in 2009 thanks to ARRA, and we should see many compliance improvements over the next few years at municipal sources because of it. However, this increase did not extend to the "categorical grants" (i.e., operational) section of funding, which are the funds that States use to help implement sections 106 (point sources) and 319 (non-point sources) of the Clean Water Act – and the enforcement work that goes with it.

Declining funding support is troublesome enough, but during this period States faced a rising workload as the number of regulated facilities requiring oversight rose significantly. For example, EPA's Office of Water has said the number of new sources – vessels, concentrated animal feeding operations – and a new emphasis on minor sources, means up to 1 million new sources with potential enforcement actions. This year at least 50,000 vessels were added to the list of regulated facilities, for example.

In addition, new or modified rules or policies from EPA mean new costs for States. From 2000 to 2011, EPA has asked, or is asking, States to implement approximately 600 new or modified rules with a "State or local impact." It is rare that States oppose these rules and in fact we are often eager to implement them. However, the recent funding patterns have made this more and more difficult.

States receive no Federal grants that are dedicated to enforcement. Instead, we manage the CWA section 106 and 319 grants to meet many demands. If the demands are increased - and they may need to be - then either more resources will be required, or some activities will be reduced. A typical State gets about 25% of its water funding from the Federal government. This is at, or near, an all-time low, and we hope it can be increased if we are to be successful in meeting the challenge of issues like non-point source runoff and stormwater impacts on water quality.

The 2010 Federal budget, as passed by the House, promises to turn this budget problem around, but that bill has not yet been signed into law. As ECOS developed its proposals for 2011, we were able to document a $1 billion additional need to simply put into place the rules currently promulgated.

State and EPA Data Exchange

Just as growing demands and shrinking resources call on States and EPA to collaborate for efficiency, environmental data management requires the same mutual effort. States and EPA are cooperatively implementing the National Environmental Information Exchange Network (Exchange Network) to improve the accuracy and transparency of environmental information. The Exchange Network enables States and EPA to use the internet to electronically share and publish their information, including data related to pollutant discharge and enforcement activities.

For example, EPA and State environmental agencies recently launched a new jointly-developed product called NetDMR that allows NPDES permittees to electronically sign and submit their discharge monitoring reports (DMRs). The Exchange Network allows EPA and State regulators to automatically share these electronic records. This helps ensure consistency among data sets and offers opportunities to improve access to information, streamline data management efforts, and create new efficiencies in the enforcement process.

However, there remain many obstacles that still need to be addressed. For example, State data and the compiled data in EPA's databases often do not match. This data needs to match so that States and EPA can agree of courses of action, and so that the public can be correctly informed. EPA has acknowledged that this reconciliation process is necessary and is underway through the work of the Exchange Network (www.exchangenetwork.net). Until that is complete, State databases are still the primary sources of data, especially for specific sites.

Data system improvements should be designed to allow EPA and States to evaluate the significance of noncompliance both for discharging facilities and water quality of receiving water bodies, and prioritize the most serious environmental problems.

The Exchange Network also holds the potential to help aggregate information from disparate State and EPA sources and make it available on the internet in a common format. More timely access to higher quality information will give both environmental managers and the public the power to make better decisions. Additionally, the States appreciate EPA's efforts to facilitate faster reconciliation of data discrepancies in the State Review Framework process.

Such discrepancies were at the heart of State dissatisfaction with EPA's data as provided to the New York Times (NYT) for its recent article. However, that is in the past and our

focus here today is on how to improve water enforcement. The Exchange Network is a key path forward, as is the State Review Framework.

State Review Framework

In 2004 ECOS proposed a system to US EPA in which State enforcement programs would be evaluated on a consistent series of measures. EPA accepted this proposal, and the system has come to be know as the "State Review Framework." The first iteration of that was completed in 2007 as a first effort. Many changes were made in it, and a second report is currently undergoing development.

ECOS continues to support the Framework, but we expressed dismay to EPA over its poor methodology in presenting the aggregated evaluation data following release of the NYT article. For example, EPA staff concluded that even one unresolved violation (among hundreds or even thousands) caused a State to be categorized as not having met timely data requirements. Such lumping is not accurate, is not based on sound methodological science, is not peer-reviewed, and may mislead the public. However, this issue is now behind us, and we look forward to working with the Agency more productively on this matter in the future.

Jurisdiction

Continuing uncertainty in the Clean Water Act due to several court cases has increased the difficulty in ascertaining jurisdictional authority over some polluters. ECOS has recommended steps to Congress to address this issue, and we continue to believe that legislative action is needed.

Written Statement of

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On behalf of the

American Nurses Association
and
the Washington State Nurses Association

"The Clean Water Act after 37 Years: Recommitting to the Protection of the Nation's Waters"

Before the
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC

October 15th, 2009

Chairman Oberstar, Subcommittee Chair Johnson, and other distinguished members of the Committee: It is a privilege to appear before you today on behalf of the American Nurses Association and the Washington State Nurses Association to discuss regulatory, transparency, and public trust issues relating to the Clean Water Act. Thank you for your interest in protecting our nation's families and your constituents by protecting our nation's water. Chairwoman Johnson, thank you for bringing your skills and wisdom as a nurse to work in Congress and in support of healthy families and healthy environments.

The ANA is the only full-service professional organization representing the interests of the nation's 2.9 million registered nurses through its constituent member nurses associations--including the Washington State Nurses Association. The ANA advances the nursing profession by fostering high standards of nursing practice, promoting the rights of nurses in the workplace, projecting a positive and realistic view of nursing, and by lobbying the Congress and regulatory agencies on health care issues affecting nurses and the public. The ANA clearly recognizes the fundamental tie between the quality of our environment and the health of the nation, and I am honored to have the opportunity to appear before you today to discuss that link.

As a public health nurse with expertise addressing household environmental health issues, I applaud the efforts of your Committee to protect our nation's most valuable resource; its children. The Clean Water Act addresses the protection of surface waters, coastal areas, streams, and wetlands. As we know surface waters can contaminate drinking water sources in a variety of ways, including agricultural run-off, contamination from domestic livestock, and discharge of mining and industrial waste. Industries emitting airborne pollutants can also

impact water quality through the dispersion of particulates and metals onto the land. In this context, I will discuss our research addressing potable water quality issues in the rural West.

For the past six years our research team has been visiting the homes of young families in rural Montana and Washington State. To date we have collected data characterizing levels of biologic, physical, and chemical contamination in the homes of 441 adults and 399 children under the age of eight. Of the homes we tested, 80% were on private wells; the remainder were on small rural water systems. Our research is funded by the National Institute of Nursing Research at NIH and families are referred to us by nurses working in county public health departments.

Most of our families live out in the country not by choice, but by necessity; they seek the least expensive housing available; a mobile home in a field, an outbuilding converted into a cabin, or a small home poorly equipped for Montana's frigid winters. Although we test homes for multiple contaminants, the most common reason that families sign up for our study is that we conduct a full screen for biologic and chemical contaminants in water. Mothers tell us they want to know whether the water they are giving their children is safe; they cannot afford such testing on their own and seem willing to put up with our research team in order to find out the answers they want. In the context of every type of household environmental health issue, from air quality to food safety, mothers uniformly tell us that their top priority is knowing about their water. Whether they are mixing formula powder with water to make bottles for their toddler, whether they are taking their children swimming at the local lake, or whether they are irrigating their garden using water from the ditch out front, they want to know if the water their children come in contact with is safe.

As you can imagine the testing we conduct yields different results for different families. A significant number of the families we study receive results indicating that their water contains no contaminants above threshold levels. One would logically expect such outcomes; some of the homes in our studies are located in areas considered to be among the most beautiful and remote in our nation. However, even in these areas, we see significant numbers of families, whose homes test positive for one or more water contaminants. Twenty-nine percent of our homes tested positive for at least on water risk. Seventeen percent of homes tested positive for coliforms, 3% tested positive for *E. coli*, 6% of homes exceeded the threshold for arsenic, and 3% exceeded the threshold for nitrates. On rare occasions, we find insecticides, herbicides, and volatile organic compounds in wells located in extremely remote areas. One family we worked with was found to have *E-coli* in their well. In such cases we typically walk the family through a process where they can disinfect their well by adding bleach to it, letting it sit for a day, and then clearing the bleach from the well and plumbing. After the well was disinfected, we retested the water; *E-coli* was detected again. We had the family repeat the process and the same results held. The bottom line was that no matter what water sanitation guidance we gave the family, their well remained contaminated. At this point the choices became more complicated; either install a UV light disinfection system or switch the entire family to bottled water for drinking and cooking. There were simply no other low-cost solutions we could offer to this family.

The tests we conduct don't differentiate between point and non-point source contamination. And for the mother it doesn't make much difference. Whether the upstream source of contamination is from mine waste, a local feedlot, agricultural run-off of fertilizers

and pesticides, or the deposition of sediments into a stream by a careless construction project, it makes little difference to a mother. She only knows that yesterday she thought that giving her child a glass of water from the tap was an act of health; today she is not sure what it means.

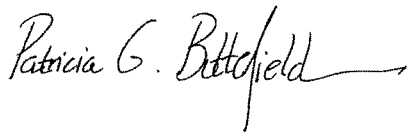
As a public health nurse, I understand the importance of trust between patients and their health providers. Trust is an essential part of any therapeutic relationship and key to the achievement of patients' health goals. We all know that once gained, trust must be maintained through honest and thoughtful communication. Once betrayed, it is almost impossible for trust to be reestablished. In our studies, we talk with parents quite a bit about the results of their water testing. We problem solve with them about the no cost and low cost options; these are generally families who cannot afford a reverse osmosis system or other point-of-use treatment system. One thing we have learned is that families want to know that government employees are looking out on their behalf. They want to know that contaminants that are dumped into their watershed, either intentionally or inadvertently, are being monitored. And they want to know that the persons who are dumping contaminants are being held accountable for their actions. Because when we fail to hold polluters responsible, we shift the costs of sustaining healthy water systems from the polluter to the citizen. When a well becomes contaminated and a family starts to purchase bottled water for their children, that family incurs a very real cost. And the families we study can ill afford such costs. The simple truth is that, despite our recommendations to the contrary, families who find out that their water may be contaminated almost always turn to bottled water. They see it as the only answer they can afford. Even when we recommend simple low-tech solutions to improve their drinking water quality, they rarely have the time, money, or expertise to install a point-of-use system in their home. They

don't understand the difference between a water softener and a water treatment unit. They don't know how to maintain a treatment unit or change the filters so that the unit remains operable. In our study, renters fare much poorer than home owners; regardless of local renters' rights policies, such families are often afraid to share their water test results with their landlord. They fear that they will be evicted for stirring up trouble. What we see is families turning to bottled water each time, increasing their own weekly expenses as well as the nation's cumulative burden of plastic bottles.

As a scientist, as a nurse, and as a citizen I want to know that the EPA and their state designates have the resources to enforce the Clean Water Act. I want to know that the more than 1 million U.S. citizens who are immuno-suppressed and at a real risk of dying if they drink contaminated water are protected. I want to know that the contractor on a highway construction project is taking precautionary action to assure that the stream adjacent to the highway is not poisoned by sediment and diesel. It is important to me to know that intentional polluters, who seek to profit by poisoning our nation's coastal areas, are caught and prosecuted to the full extent of the law. While I am only one person, I can speak for many of my nursing colleagues by stating that we support stronger connections between environmental health personnel and public health departments, so that enhanced enforcement efforts can be coupled with stronger public education efforts. Because in the end, we see too many parents who believe, that no matter how egregious or deliberate the action of polluters are, their voice will not be heard. I thank you for taking action that recommits our government to the goals of the Clean Water Act and provides our agencies with the resources they need to act aggressively and proactively on behalf of the health of our nation's children. Trust can be restored by

committing the requisite resources to ensure protection of our water and our health. Our citizens and your constituents deserve nothing less.

Respectfully submitted,



Patricia Butterfield

Testimony of
Lisa P. Jackson, Administrator
U.S. Environmental Protection Agency

Before the
Committee on Transportation and Infrastructure
United States House of Representatives

October 15, 2009

Mr. Chairman and Members of the Committee, I am delighted to be here today to discuss the state of our nation's waters. I would like to focus my remarks on our Nation's water quality and the challenges we face to improve it, the Agency's implementation of the Clean Water Act, and the steps that we are taking to improve Clean Water Act compliance and strengthen our enforcement program.

We can all agree that having clean and safe water in our communities is a right for all Americans. We also know that clean water is essential to our health, our environment and our economy. As we commemorate the 37th anniversary of the Clean Water Act today, we must reflect on the progress that has been made over the past 37 years and also focus on the enormous challenges ahead. Mr. Chairman, we have a long way to go.

The Clean Water Act was enacted to restore and maintain the chemical, physical, and biological integrity of the nation's waters and EPA is the agency that has primary responsibility to achieve these goals. As such, it is EPA's

mandate to use its resources effectively, including vigorously enforcing the rule of law, to achieve this result.

There are significant water quality problems facing too many communities. There are many diffuse pollution sources that are not regulated by the Clean Water Act. Inadequate information about some sources can limit the ability to identify serious problems quickly and take prompt actions to correct them. Adding to our challenges, recent Supreme Court decisions have increased the difficulty of determining which water bodies are covered by the Clean Water Act in many parts of the country.

The main tool that EPA has to achieve positive water quality results is the National Pollutant Discharge Elimination System or NPDES program. EPA established this program soon after the passage of the Clean Water Act, and its implementation by EPA and authorized states has resulted in significant water quality improvements throughout the country.

Under the Clean Water Act adopted in 1972, the universe to be covered by the NPDES permit program was estimated to be 100,000 point sources. Today, nearly 1 million point sources are covered by the NPDES program. This increase has significantly affected the ability of EPA and the states to administer and enforce the program. We are falling short of this Administration's expectations for the effectiveness of our clean water enforcement programs.

Simply put, Mr. Chairman, the time is long overdue for EPA to reexamine its approach to Clean Water Act NPDES enforcement to be better equipped to address the water pollution challenges of this century.

Data available to EPA shows that, in many parts of the country, the level of significant non-compliance with permitting requirements is unacceptably high and the level of enforcement activity is unacceptably low. For example, one out of every four of the largest Clean Water Act dischargers had significant violations in 2008. Many of these violations were serious effluent violations or failure to comply with enforcement orders.

The government's enforcement response to these violations is uneven across the country. For example, a violation in one state results in the assessment of mandatory minimum penalties, while in another state, no enforcement action is taken for the same violation. This situation creates a competitive disadvantage for states that are enforcing the law. We need to change this. Strong and fair compliance and enforcement across the country is vital to establishing a level playing field for industrial facilities, preventing some regions from attempting to achieve an economic advantage over others. And most importantly, having clean water is not a luxury. Rather, we need to make sure that all citizens, regardless of the state that they live in, should be able to drink safe water and swim and play in clean lakes, rivers and bays.

We need to address these key problems and that's why I am happy to announce EPA's new Clean Water Act enforcement plan.

EPA's Enforcement Office, led by Cynthia Giles, has recommended to me – and I have decided to act on – three crucial steps to strengthen federal and state Clean Water Act enforcement to better protect water quality.

First, we need to develop more innovative approaches to target enforcement to the most serious violations and the most significant sources. We need to ensure protective permits and appropriate civil and criminal enforcement for factories and large wastewater treatment plants that unlawfully discharge pollutants to waterways. We also need to reshape our enforcement program to be more effective in tackling violations from the many dispersed sources that continue to be serious threats to our waters and a major reason too many of our waters do not meet water quality standards. Some of the biggest threats are posed by concentrated animal feeding operations and by contaminated stormwater that flows from industrial facilities, construction sites, and urban streets into our waters.

Second, we need to strengthen our oversight of state permitting and enforcement programs. Many states have strong water quality protection programs and take enforcement to assure compliance. But we've seen great variability among the states in enforcement performance. EPA must clearly

articulate the acceptable "bar" for state clean water programs and consistently hold states accountable. In situations where states are not issuing protective permits or taking enforcement to achieve compliance, EPA needs to act to strengthen state programs and to pursue federal enforcement actions as necessary.

Third, we are and will continue to take immediate steps to improve transparency and accountability. We have a responsibility to "tell it like it is" to the American public.

We have already published the data and information that EPA has on Clean Water Act compliance and enforcement across the country on our website. We will continue this practice as new information becomes available. We also are working to accelerate the development of 21st century information technology tools to help us gather information more efficiently and to make it easier for the public to access and understand that information. For example, I am directing my staff to quickly develop a proposed rule requiring electronic reporting from regulated facilities, to replace the current paper based system. Electronic reporting could save regulated facilities, EPA and the states millions of dollars each year. At the same time, providing that information to the public shines a spotlight on facility performance.

We believe that making information on environmental discharges available to the public will increase the pressure on regulated facilities to self-police and reduce their pollution, as we have seen with the Toxics Release Inventory.

EPA plans to work closely with the states to implement these actions and make long-term improvements in our Clean Water Act enforcement and compliance program.

But I would also like to highlight actions we are taking right now to focus our enforcement efforts on violations that pose a serious threat to water quality. For example, we are strengthening our efforts to enforce existing rules limiting pollution from concentrated animal feeding operations. Where facilities or clusters of facilities with large numbers of animals are discharging without a permit or in violation of their permits, they can cause significant pollution problems of concern to communities. It is difficult to know where these facilities are when they do not apply for permits. However, we are working to develop innovative strategies that will identify the facilities that are violating our discharge requirements and present the most significant threats to water quality, and we will ensure that appropriate enforcement action is taken when we find these situations.

Mr. Chairman, enforcement is just one of the tools that we can use to address water quality problems. But long experience has shown that effective

enforcement is essential to the integrity of our Clean Water Act protections and makes a real difference in our ability to deliver the water quality that the American public expects.

Clean and safe water is the life blood of healthy communities, healthy ecosystems, and healthy economies. EPA is committed to building the nation's confidence that these resources will be protected and restored and that our recent lack of important progress is reversed.

We greatly appreciate the leadership of this Committee on the Clean Water Act and we look forward to coordinating with the Chairman and this Committee as we work to achieve these important goals.

Questions of
The Honorable Michael E. McMahon
Transportation and Infrastructure Committee
October 15, 2009
The Clean Water Act after 37 Years: Recommitting to the Protection of the Nation's Waters
2167 RHOB

QUESTIONS

1. For Administrator Jackson:
   How many EPA enforcement actions have been dropped, impaired, or not initiated because of jurisdictional uncertainties as a result of the *Rapanos* and *SWANCC* decisions?

2. How has the ability of counties and municipalities to provide safe drinking water been affected by the jurisdiction-based enforcement issues? Is there a public health threat or concern?

3. What is the economic threat posed as a result of this lack of enforcement from jurisdictional uncertainty?

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 11 2010

OFFICE OF CONGRESSIONAL AND
INTERGOVERNMENTAL RELATIONS

The Honorable Michael E. McMahon
Subcommittee on Water Resources and Environment
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman McMahon:

Thank you for your Questions for the Record following the October 15, 2009 hearing on "The Clean Water Act after 37 Years: Recommitting to the Protection of the Nation's Waters." Enclosed please find EPA's responses to your questions.

Again, thank you for your letter. If you have questions, please contact me or your staff may contact Carolyn Levine in EPA's Office of Congressional and Intergovernmental Relations at (202) 564-1859.

Sincerely,

Arvin R. Ganesan
Deputy Associate Administrator

Enclosure

cc: Chairman James L. Oberstar
Chairwoman Eddie Bernice Johnson
Ranking Member John Boozman

Questions of
The Honorable Michael E. McMahon
Transportation and Infrastructure Committee
October 15, 2009
The Clean Water Act after 37 Years: Recommitting to the Protection of the Nation's Waters
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QUESTIONS

1. For Administrator Jackson:
   How many EPA enforcement actions have been dropped, impaired, or not initiated because of jurisdictional uncertainties as a result of the *Rapanos* and *SWANCC* decisions?

   EPA Response:

   Since the *Rapanos* decision, the most significant impacts on the Clean Water Act (CWA) enforcement program have been due to the resource burdens necessary to develop evidence sufficient to support CWA jurisdiction. Stricter and unclear standards result in significant increases in the amount of field work, including modeling, data collection and analysis, required to show jurisdiction. This uncertainty causes delays and compromised settlements (lower penalties, fewer counts). Overall, numbers of Administrative Compliance and Penalty Orders dropped in 2006 and the years immediately following *Rapanos*. In the eight years since *SWANCC*, no isolated waters have been found jurisdictional, and thus no enforcement actions were initiated. In addition, the regional enforcement offices have shifted their enforcement efforts to areas in closer proximity to traditional navigable waters where jurisdiction may be proven more directly and where it is less resource intensive to demonstrate CWA jurisdiction.

   In March 2008, EPA responded to Representative Oberstar's December 10, 2007 request for information on "all enforcement cases, including any discharges in violation of a permit limit or in the absence of a permit, where a question about the jurisdictional status of the receiving water was a factor in EPA's decision to not pursue an enforcement

action, to lower the priority of the case, or where jurisdiction is being asserted, as an affirmative defense by the alleged discharger." Because EPA's CWA civil enforcement cases are primarily developed and initiated in the regional offices, OECA provided the regions with instructions for replying to this one-time request, and gathered the responsive data from the regions. The information provided concerns only the civil administrative enforcement program and the data summarized in the appended table on page 4 are reflective of each region's particular environmental and watershed characteristics and the region's enforcement priorities. Since this was a one-time request, we do not maintain and update this data on a regular basis.

In addition to EPA's civil enforcement data set forth above, there have been four criminal investigations that were closed due to questions about federal jurisdiction as a result of *Rapanos*.[1] There were also several additional criminal investigations that were closed prior to *Rapanos*, in response to concerns about jurisdiction that were created by an earlier Fifth Circuit decision, *In re: Needham* 354 F. 3rd 340 (5th Cir. 2003).

2. How has the ability of counties and municipalities to provide safe drinking water been affected by the jurisdiction-based enforcement issues? Is there a public health threat or concern?

EPA Response:

Two-thirds of Americans get their drinking water from surface water, so it is essential that EPA continue to protect the quality of our surface waters. Unfortunately, we cannot quantitatively assess the impacts of the jurisdiction-based enforcement issues on drinking water in counties and municipalities.

[1] There have also been 13 criminal investigations/cases in which the subjects/defendants have cited *Rapanos* to raise the defense of a supposed lack of CWA jurisdiction.

3. What is the economic threat posed as a result of this lack of enforcement from jurisdictional uncertainty?

EPA Response:

As stated in the May 20, 2009 Administration's views letter to Representative Oberstar regarding clarification of jurisdictional waters under the CWA, clean and safe water is critical to the economic well-being of the Nation. Our aquatic ecosystems provide significant economic benefits associated with activities ranging from recreation to urban revitalization. The increased burdens on the CWA enforcement program make it more difficult to take enforcement action against polluters who illegally discharge directly, or indirectly, into our Nation's waters. Because all water eventually flows downstream, lack of enforcement will inevitably result in the degradation of major waterways that are relied upon by businesses, agriculture and municipalities.

This degradation has the possibility of both requiring more expenditures to overcome the degradation, as well as the loss of economic returns when natural systems, such as wetlands, are impaired.

In particular, wetlands provide vital functions, including: protecting and improving water quality; providing habitat for fish and wildlife; storing floodwaters; and maintaining surface water flow during dry periods. Further, wetlands are sites for estuarine research and education, and can also generate revenue from the sale of fish or shellfish. Therefore, jurisdictional uncertainty and the overall drop in enforcement actions threaten the numerous economic benefits provided by wetlands, as now there is a greater potential for wetlands to become drained or filled.

Table 1. Effects of *Rapanos* on EPA's Civil Administrative Enforcement Program

Summary of Regional Responses

Covering Period of July 2006 through December 2007

Region	1. Instances where an enforcement action was considered to be appropriate based on existing violations, but where the Region chose not to pursue formal enforcement based on the uncertainty about EPA's jurisdiction over the receiving waters.	2. Cases where an enforcement action was considered to be appropriate based on existing violations, but where the Region chose to "lower the priority" of the case based on the uncertainty about EPA's jurisdiction over the receiving waters.	3. Any case where lack of CWA jurisdiction has been asserted by the alleged discharger as an affirmative defense to an enforcement action.
1	1 (404)*	1 (311); 1 (402)	1 (404)
2	0	1 (402)	0
3	4 (402/404)	4 (402)	3 (402/404)
4	13 (311); 8 (402)	18 (404); 6 (402)	10 (404)
5	3 (404)	12 (404); 14 (402)	2 (404); 1 (402)
6	86 (311); 52 (402/404)	4 (402/404)	3 (311); 2 (402/404)
7	3 (311); 10 (402); 3 (404)	3 (311); 2 (404); 19 (402)	1 (404); 3 (402)
8	106 (311); 3 (402/404)	7 (311); 4 (402/404)	2 (311); 1 (402/404)
9	11 (404)	4 (311); 4 (404); 7 (402); 1 (402/404)	3 (404); 1 (402/404)
10	1 (402)	1 (311); 4 (404); 9 (402)	5 (404); 5 (402)
TOTALS *	**304**	**136**	**49**

* Numbers in parentheses refer to applicable Clean Water Act Sections.

DO NOT DISTRIBUTE EMBARGOED UNTIL 11:00 AM, OCT. 15, 2009

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 14 2009

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Transmittal of Clean Water Act Enforcement Action Plan

FROM: Cynthia Giles

TO: The Administrator

I am pleased to transmit to you the Office of Enforcement and Compliance Assurance's Action Plan for revamping Clean Water Act compliance and enforcement, in fulfillment of the charge in your memorandum of July 2, 2009. To develop this plan OECA consulted closely with the Office of Water and all the EPA regional offices, with the assistance of Region 9 as Lead Region for Enforcement and Compliance Assurance. We conducted an extensive outreach program to solicit the views and suggestions of state environmental commissioners, state water program managers, Indian Tribes and tribal organizations, environmental advocacy groups, environmental justice community groups, industry representatives, and the academic community. We also solicited comments from the general public through an EPA website blog.

We found widespread consensus that despite significant progress reducing water pollution from the largest sources, the country faces serious regulatory and compliance challenges in attaining the water quality goals of the Clean Water Act. Increasingly, water pollution problems are caused by an exploding number of pollution sources that are widely dispersed and difficult to regulate effectively – such as contaminated runoff from urban streets, construction sites, sewer overflows, agricultural fields and concentrated animal feeding operations. Even well-regulated facilities are violating their discharge permits too often, and enforcement by states and EPA is uneven across the country. We received many thoughtful suggestions for addressing these problems, which we considered carefully in developing the Action Plan.

The Plan proposes three main actions to address the challenges before us: (1) revamp the water enforcement program to focus on the pollution sources that present the greatest threat to water quality; (2) strengthen oversight of state permitting and enforcement programs to improve results and provide greater consistency; and (3) improve transparency and invest in 21st century technology to provide more accurate and useful information to the public and increase pressure for better compliance performance.

I look forward to working with the Office of Water, States, Tribes and the many organizations and people who expressed to us their vital interest in improving the nation's water quality as we take action to implement this plan.

Attachment

cc: Scott Fulton
Robert Perciasepe
Robert Sussman
Peter Silva
Regional Administrators

Clean Water Act Enforcement Action Plan

EXECUTIVE SUMMARY

Despite progress reducing water pollution from the largest sources, our country still faces serious pollution challenges. Violations are still too widespread, and enforcement too uneven. We need to do better controlling pollution from large pipes, while we develop new strategies to address water quality threats from other sources. To follow through on the commitment of this Administration to clean and safe water, the Environmental Protection Agency (EPA) is revamping enforcement of clean water laws.

Target enforcement to the most important water pollution problems

Over the last 30 years, water enforcement focused mostly on pollution from the biggest individual sources, such as factories and sewage treatment plants. Now we face different challenges. The regulated universe has expanded from the roughly 100,000 traditional point sources to nearly one million far more dispersed sources such as animal feeding operations and storm water runoff. Many of the nation's waters are not meeting water quality standards, and the threat to drinking water sources is growing. To address these challenges, we must revamp federal and state enforcement to tackle sources posing the biggest threats to water quality while we intensify vigorous civil and criminal enforcement against traditional end-of-pipe pollution.

Strengthen oversight of the states

EPA is responsible for assuring that the protections of the Clean Water Act extend to all citizens. Many states have strong water quality protection and enforcement programs, but state compliance and enforcement vigor is uneven. Without consistent enforcement by EPA and states, there exists an unlevel playing field for businesses that do comply with the law, and also for our citizens who are not provided equal protection under our environmental legal framework. States labor under different political and resource constraints; nonetheless, EPA must ensure that states protect water quality and consistently apply the law by issuing protective permits and by pursuing vigorous enforcement. EPA must clearly articulate where the bar is for acceptable state programs, and consistently hold states – and EPA where it implements the law – accountable. Where states are not meeting these expectations, EPA needs to strengthen water quality protection by disapproving permits that are not protective and by pursuing federal enforcement against serious violators.

Improve transparency and accountability

The American public has a right to know what the threats are to water quality, where violations are occurring, and what we are doing about them. Moreover, the vastly increased and dispersed numbers of pollution sources require us to target enforcement to the biggest problems. We can work towards both goals by requiring reports to be submitted electronically. Using 21st century technologies will free up time to tackle pollution problems. At the same time, we can provide more complete, accurate and timely information to both regulators and the public, enlisting an informed public as a powerful ally to press for stronger performance and accountability from the regulated community.

Clean Water Act Enforcement Action Plan

October 15, 2009

Introduction

On July 2, 2009, EPA Administrator Jackson charged the Office of Enforcement and Compliance Assurance (OECA) with revamping the clean water enforcement program to ensure it is protecting and defending our nation's waters. She asked OECA to raise the bar of federal and state enforcement performance, to inform the public clearly and fully about serious Clean Water Act violations and actions to address them, and to use 21st Century technology to transform the collection, use, and availability of EPA data. This Action Plan describes the challenges we face as a nation in improving our enforcement efforts to improve water quality and describes the actions we will take to overcome them.

I. Clean Water Act Water Quality and Enforcement Challenges

Much has changed concerning the state of water quality and water pollution control in the United States since the passage of the Clean Water Act (CWA) 37 years ago. While EPA and states have made notable improvements to water quality, challenges remain as we strive to meet the CWA's goal of providing fishable and swimmable waters and protecting the sources of our nation's drinking water. There are significant water quality problems facing too many communities; there are expanding universes of diffuse pollution sources, many which are not effectively regulated by the CWA; and there are significant limitations that affect EPA's ability to identify serious problems quickly and take prompt action to correct them. Among these limitations are two Supreme Court decisions – its 2001 decision in *Solid Waste Agcy. of Northern Cook Cty. v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*") and its 2006 decision in *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*") – that added layers of confusion regarding which water bodies are covered by the CWA in many parts of the country.

Our portfolio of water pollution threats has evolved from the very visible pipes coming out of factories and sewage treatment plants into rivers and lakes to the hundreds of thousands of sources of industrial and municipal storm water runoff, agricultural runoff, mining wastes and sewage spills from aging sewer system infrastructure. Some of these sources of contaminated runoff are known as point sources and are regulated by the National Pollutant Discharge Elimination System (NPDES) permit program, including concentrated animal feeding operations (CAFOs), industrial sites (including construction sites) and municipal separate storm sewer systems (MS4s). Many others are known as non-point sources and are not regulated by the CWA. These sources, such as suburban storm water or agricultural farm runoff, require new and innovative approaches to reduce their impacts on water quality. The sheer magnitude of the expanding universe of the NPDES program itself, from roughly 100,000 traditional point sources to nearly a million sources – 95 percent of which are covered by general permits – presents challenges in how we regulate and enforce the laws of this country.

National information on significant segments of the NPDES regulated universe, their violations, their specific impacts to local water bodies, and states' compliance and enforcement efforts is seriously deficient. States conduct monitoring to identify which waters are passing or failing state water quality standards, and the causes and sources of impairments, and report this information biennially to EPA under Section 305(b) and 303(d) of the Clean Water Act. Only 16 percent of the nation's river and stream miles, 39 percent of its lake and reservoir acres, and 29 percent of its bay and estuarine square miles have been monitored, according to the most recent state-reported assessment findings from 2004. This means we don't know the quality of the vast majority of the nation's waters. Those limited assessments show that 44 percent, 64 percent, and 30 percent respectively were impaired, meaning they were not clean enough to support their designated uses, such as swimming or fishing. EPA and states are also encountering significant impacts to sources of drinking water in many parts of the country due to contamination from many of these same dischargers (such as CAFOs) to surface waters. This is significant, as approximately 66 percent of the U.S. gets its drinking water from surface water sources. Thus, pollution in rivers and streams can make it harder for drinking water suppliers to meet standards for safe drinking water.

EPA established the NPDES program after the enactment of the CWA in 1972 to control discharges by establishing permits with discharge limits protective of water quality standards, and enforcing against those permits. With only a few exceptions, EPA has authorized states to implement and enforce these programs across the country.[1] EPA retains independent enforcement authority in authorized states and has responsibility to ensure that state programs are nationally consistent in writing quality permits and enforcing them. To secure the public health and environmental benefits of our regulations, enforcement programs must consistently apply the law and pursue vigorous, effective and fair actions to address violations and to protect water quality. Effective enforcement programs create incentives for compliance by penalizing those who do not follow the law. They establish a level playing field between those members of the regulated community who comply and those who do not. Enforcement ensures fair treatment – companies that compete against each other should not face wide disparities in treatment across the country, such as mandatory minimum penalties for a violation in one state and no enforcement in another. Ultimately, enforcement is critical to ensure that the public receives the services and protections promised by our laws. Unfortunately, data shows us that we are not getting the compliance envisioned by our laws to protect clean water. While many states have strong NPDES programs, EPA needs to take prompt actions where a state is not acting to issue protective permits or taking effective enforcement. EPA's goal in taking these actions is to ensure equal protection, to strengthen those state programs, and hold states accountable for needed improvements.

EPA's oversight of state NPDES programs has focused primarily on how well states are addressing the largest direct discharge facilities that have continuing problems. EPA has fairly complete information about these biggest facilities, as the facilities are required to submit monthly reports of their compliance with their permit limits in submissions called Discharge Monitoring Reports (DMRs). These reports, along with other information about these facilities and the actions that states take to ensure their compliance, are required to be reported by states to

[1] A list of the status of state authorization for the NPDES program can be found at: http://cfpub2.epa.gov/npdes/statestats.cfm.

EPA data systems. Even with this focus, the rate of significant noncompliance at these facilities is approximately 24 percent, meaning that one out of every four had significant violations. Significant noncompliance (SNC) describes violations that are considered to be more serious and significant to water quality, although the term only applies to the largest facilities under EPA's current policy. So, while many serious violations by smaller facilities or other point sources are not included in the term, it does provide some insight into the serious nature of violations at the largest facilities.

Most SNC is related to illegal or unpermitted discharges to the environment. Of facilities designated in SNC in 2008, 46 percent were due to effluent violations – or exceedances for multiple months of their permit limits, which were set to be protective of water quality. Eleven per cent of the 2008 SNC were due to violations of a compliance order and thus related to exceedances of their permit limits as well. Forty-one per cent of the facilities were in SNC because EPA had not received the required discharge monitoring data. This means that EPA lacked critical information on whether these facilities were complying with their limits. Some of these facilities may have submitted their DMRs in a timely manner to the state, but the state did not provide these data to EPA as required. Reporting violations are important as they are the only indicator of the compliance level of a facility with its permit. If a facility isn't reporting, we don't know whether it is violating its permit limits.

Enforcement across states in responding to SNC violations is another important gauge of performance. Both the Permitting for Environmental Results and the State Review Framework found that enforcement levels across states varied considerably. Some states rarely take enforcement action against facilities in significant noncompliance, while other states do pursue timely and appropriate formal enforcement actions. Still, state and EPA data indicate that formal enforcement action was taken against only approximately 26 percent of the facilities in SNC in 2008.

For smaller facilities that submit DMRs, EPA has not required the same focus from states and has not required states to submit data about these facilities to EPA. EPA does not, therefore, have a national rate for significant noncompliance for these facilities. However, 28 states (and 4 territories and the District of Columbia) have entered some of these data into the national system, and these data show a rate of serious noncompliance at these facilities of around 45 percent; states report taking enforcement action against less than six percent of these facilities with a serious noncompliance problem. As with the larger facilities, there is significant variability across states, with some pursuing formal enforcement at a much greater rate than others.

State enforcement response to serious violations, whether at large or smaller facilities, is not what it should be. Without complete and accurate data, it is hard to know how critical the noncompliance at smaller facilities is to water quality. It is likely that these smaller but more numerous sources are of critical concern, especially where there are clusters of permitted facilities around impaired waters. EPA and states need consistent, national data to be able to formulate appropriate strategies for ensuring compliance from these facilities, and to target enforcement resources to the sources most affecting water quality.

Critical information concerning "wet weather" sources – or sources that discharge during storms or other wet weather events – is also missing. There is an incomplete inventory of CAFOs, industrial and municipal storm water entities, occurrences of significant sewer overflows and very limited information concerning actions states are taking to address violations at these sources. Obtaining data for these sources and for state actions is essential to ensure adequate oversight and transparency. This Plan is an opportunity to address concerns about high noncompliance, low enforcement rates, and absence of data across regulated NPDES sources and states.

EPA must bring together whatever existing data the Agency and states have on water quality, permitting and violations to help target our enforcement actions to those that will have the most impact. The Agency has created some important links to other EPA databases, such as Ask Waters, to improve our ability to show regulated sources with respect to the water bodies into which they are discharging and whether those bodies are impaired by pollutants discharged by those sources. These comparisons of water quality and compliance and enforcement information are important to make sure that an increased focus on enforcement does not create the incentive to make permit limits easier to comply with. Both protective permits and enforcement of permit limits should help to attain improved water quality. Linking information and making information more available and transparent can help engage the public in pressing businesses to improve compliance and be more accountable. However, much work remains to be done to create the integrated data set that holistically supports our scientific water quality work and legal work.

Surface waters that serve as drinking water sources can also be negatively affected by the permitted facilities, such as CAFOs, whose illegal or unpermitted discharges are impairing our water bodies. EPA and state tools under the Safe Drinking Water Act (SDWA) also may not be adequate to address these issues, requiring the need for new approaches. Solving many of these problems will require further Agency-wide collaborative efforts between OECA, the Office of Water, EPA regions, states and tribes to strengthen water quality assessment, monitoring, permitting, and enforcement, and to create an information network vital to all stakeholders. Solutions to these sources of pollution, whether point sources regulated under the NPDES program or non-point sources, are paramount to the protection of our waters and their critical uses.

EPA's challenges in protecting the nation's waters have been increased by recent court decisions in *SWANCC* and *Rapanos*. EPA supports legislative changes to remove the barriers these decisions have created in clean water enforcement. A May 20, 2009 letter from the EPA Administrator, along with other members of the Administration, to Senator Boxer, Chair of the Senate Committee on Environment and Public Works, stated that "enactment of legislation amending the Clean Water Act that will broadly protect the nation's waters, make the definition of covered waters predictable and manageable, promote consistency between Clean Water Act and agricultural wetlands programs, and recognize long-standing practices, would go a long way toward addressing the substantial confusion and uncertainty arising from those decisions." These decisions have negatively impacted EPA's ability to enforce by significantly increasing the amount of time and resources it takes to bring enforcement actions necessary to protect our waters.

II. Outreach for Ideas on How to Revamp the NPDES Enforcement Program

To garner a full range of ideas from different perspectives, OECA reached out to other EPA program offices, the Agency's regional offices, state environmental commissioners and state water program managers, Indian Tribes and tribal organizations, environmental and environmental justice community groups, industry representatives, and the academic community. EPA held face-to-face and telephonic listening sessions with each of these groups of interested stakeholders, and also received written comments from a number of the participants. EPA also solicited comments directly from the general public through an EPA blog site. Many of these ideas have been captured in the Action Plan.

There were common themes that emerged from this outreach. One theme was a common desire for greater transparency in EPA's enforcement and compliance program through an increase in the amount, detail and quality of data. Stakeholders expressed an interest in understanding a holistic picture of environmental conditions and actions that EPA and states are taking in order to determine how best to engage in helping to protect our water resources.

Suggestions for upgrading EPA's data systems included methods for presenting more understandable data, and making inspection reports and discharge monitoring reports publicly available. Environmental organizations and academics advocated posting information about the frequency of exceedances of CWA permit limits at individual facilities to allow better linkage of water quality data with compliance information. Industry and the National Association of Clean Water Agencies were particularly interested in EPA doing a better job of correcting data errors. States also agreed with the need for transparency, but expressed a desire to find ways to make sure that data is both accurate and presented in useful context.

Most commenters also endorsed strengthening state and federal enforcement programs, both in terms of particular changes in program focus and through improved state and federal program performance overall. Specific activities cited by the public and environmentalists for increased enforcement were curbing discharges from concentrated animal feeding operations and addressing construction and industrial storm water violations.

There was extensive and thoughtful input on improving overall program performance, from revision of EPA enforcement policies to reworking the structure of the state/federal enforcement relationship and establishing more accountability for underperforming programs. Ideas were submitted by academics, environmentalists, environmental justice community organizations, the Environmental Council of States, the Association of State and Interstate Water Pollution Control Administrators, and others with respect to stronger oversight, improved coordination, more frequent communication, more joint planning, and the ability to tap into more federal resources to produce better environmental results. Tribes advocated that EPA do more to increase tribal enforcement capacity-building while, at the same time, building a greater federal enforcement presence in Indian Country.

III. Improvements to the NPDES Compliance and Enforcement Program

New approaches in enforcement can and must play a pivotal role in ensuring that permitted dischargers comply with their permits, thus achieving the maximum benefits to water quality from our existing laws and regulations. But enforcement is not the only answer, as many of the sources contributing to water quality impairments are not covered by current regulations. Enforcement can play a key role now to better address the expanded NPDES universe and improve compliance of those sources with their permits, while EPA tackles the hard issues surrounding the currently unregulated pollution challenges. To begin to address the serious water quality problems we now face, EPA's enforcement program must work hand-in-hand with the Office of Water, EPA regions, states, and tribes.

In order to fulfill our responsibilities, we must find new, resource efficient ways of collecting, using, and making public information about where these sources are, what pollution they produce, their relationship to water quality, and where violations are most severe. These sources are vastly greater in number from our traditional focus on the 6,700 biggest industrial and municipal sources – for example, there are an estimated 19,000 concentrated animal feeding operations, 89,000 industrial storm water sources and over 200,000 construction storm water sites. These challenges call for EPA programs and states to work together to ensure that the limited civil and criminal enforcement resources available to regulatory agencies at all levels are used effectively to address the most serious water issues. EPA must do everything it can to support strong state programs and fulfill its oversight responsibilities by taking action where states underperform.

The input that EPA received from its outreach efforts was surprising in its coalescence around the following three major themes for action. This Action Plan describes these themes and identifies key actions to advance the protection of our nation's waters.

A. Target Enforcement to the Most Important Water Pollution Problems

State and Federal water enforcement programs must reshape their efforts to address significant new threats to water quality. New approaches are needed to revamp our enforcement program to tackle violations of existing law by the sources of pollution posing the biggest threats to water quality and public health, while we maintain and improve on the progress we have already made. The program's existing focus on the biggest facilities and the associated policies for designating and addressing violations do not consider the full range of the NPDES regulated universe and may not always allow for responses to be tailored to the type of violation and its impact. New approaches, policies and procedures to focus enforcement on the most serious violations adversely affecting water quality are long overdue.

Specific Actions:

To bring about long term change, EPA will develop and implement a new approach for ensuring appropriate responses to water quality problems and related violations of NPDES permits across the full universe of regulated facilities. The existing focus on the biggest (or "major") facilities with individual permits and on enforcement responses to significant

noncompliance are not easily applied to the expansion of the regulated universe and to the expanding use of general permits. When these policies were developed in the 1980s, the universe totaled around 100,000 facilities. Today, the universe has expanded roughly tenfold to nearly one million facilities, and 95 percent of dischargers are regulated through general permits. This growth demands new approaches and new tools to focus limited resources toward addressing these challenges to our water quality.

We will work with states to develop this new approach. We will establish an EPA/State Work Group to assess the regulated universe and determine appropriate responses. Analysis of sectors will determine whether problems related to water quality are due to regulatory issues, inadequate permits, or compliance related issues. Once problems are defined, responses can be tailored to the specifics of that sector and the specific water quality challenges. Responses might include enforcement actions, fixes to unclear or problematic regulations, or permit modification or reissuance to be more protective of water quality. Associated with this review, the effect of clusters of permitted facilities and their cumulative impact on water quality also needs to be reviewed.

This new approach will require the creation of new tools to integrate information and assist in targeting dischargers for compliance monitoring and enforcement, the establishment of clear and transparent expectations for state programs in implementing this new approach, and the design of regulatory changes necessary to implement this new approach.

A critical first and immediate step we will take to initiate this new approach is to link environmental information to compliance data to inform the targeting of our compliance and enforcement efforts. EPA will incorporate data about water quality standards, existing water quality status (including information developed in conjunction with establishing Total Maximum Daily Loads for impaired water bodies), permit limits and effluent violations to evaluate where violations contribute to water quality impairment. These data currently reside in different systems and have not been routinely used together to help target serious problems. This effort would also include analyzing newly available information on pollutant loadings and toxicity against compliance history and watershed impairment information to identify facilities that require additional compliance monitoring or civil or criminal enforcement attention. This analysis will identify where good compliance performance at the biggest facilities may allow a shift of enforcement attention on other sources that are causing more significant water quality impacts. Where there are significant information gaps concerning water quality, the locations of point source discharges, or compliance, EPA will work with states to fill these gaps in order to make informed decisions on how to deploy limited enforcement resources.

Once we have identified significant point source violations across the spectrum of regulated facilities that adversely affect water quality, we will work with state programs to commence appropriate federal and state civil and criminal enforcement actions.

During the process of developing its new approach, EPA commits to making timely, easily accessible and understandable information available to the public concerning violations/violators, actions EPA and states are taking to address them, and the effects of our actions on water quality.

B. Strengthen Oversight of Clean Water Enforcement Performance

EPA has a responsibility to assure that the protections of the CWA extend to everyone. Although EPA has authorized 46 states to run the NPDES program, including enforcement of its requirements, EPA retains the responsibility to ensure that states are protecting water quality and consistently applying the law through vigorous enforcement. In those states where EPA retains primary enforcement responsibility, the Agency will set the same expectations for its own compliance and enforcement programs as those for authorized states. EPA also has direct implementation responsibilities for territories and Indian Country and must ensure that its performance meets these same expectations. EPA recognizes that it must be sensitive to the need to tailor its compliance and enforcement programs for territories and Indian Country to address the unique challenges faced in these areas.

Many authorized states have strong water quality protection programs. As envisioned by Congress, states are the first line of environmental defense. States take the lion's share of inspection and enforcement actions in the programs they implement. States often act as laboratories where new ideas can be piloted and tested before national deployment. In the Chesapeake Bay, for example, states and EPA are working together to try new approaches to dealing with non-point sources that, if successful, might be implemented at the national level. We can work with and learn from states willing to take a leadership role. However, where states are not acting to issue protective permits or are not taking enforcement actions to achieve compliance and remove economic incentives to violate the law, EPA needs to act to strengthen those programs to protect public health and the environment.

EPA needs to address issues already identified in state performance. Reviews have been completed of state and regional permit and enforcement programs which have identified program weaknesses and prescribed steps to improve performance. EPA's Office of Water's Permitting for Environmental Results and Regional Permit Quality Reviews have evaluated performance in permit issuance and quality, and OECA's State Review Framework has been used to evaluate enforcement programs. While none of these reviews offer a definitive determination of the quality of a state or regional program, they have identified a lack of consistency in performance across states and highlighted common issues such as permit backlogs, failure to identify significant noncompliance, or to take timely and appropriate enforcement. EPA must consistently respond to these issues and press states and ourselves to make the appropriate improvements in order to achieve equitable protection to the public, a level playing field for competing businesses, and fairness across states in how our environmental laws are enforced.

Specific Actions:

Much of the regulatory framework, including policies and guidance, driving the CWA program was developed in the 1980s. Memoranda of Agreement were entered into between EPA and states when each of the 46 states and the 1 territorial agency received program approval. Thus, they were negotiated over a 30 year period, each reflecting what was viewed as most important to include in authorization agreements at the time. These agreements contain different provisions on a state-by-state and region-by-region basis. As new problems have emerged, as federal and state programs have matured and as program requirements have broadened, the

expectations for program implementation have become even more unclear. EPA needs to clearly articulate where the bar is set for acceptable state clean water programs, and hold states and ourselves accountable for achieving it. This requires clarity of expectations and more consistent and clear communications between EPA and states to make sure we are addressing the most important water quality problems and most serious violations. A formal and consistent planning and coordination process will help to accomplish this.

EPA needs to set clear expectations for what acceptable performance is and how performance will be measured. EPA will define and clarify expectations for water permitting and enforcement programs. Those expectations will be the basis for the development of performance metrics for permitting and enforcement, which will be made public to hold both EPA and states accountable. EPA will develop these expectations in dialogue with authorized states.

Once developed, EPA will use the standard set of expectations as a basis for negotiating consistent enforcement agreements with each state, remedying the outdated, inconsistent and sometimes problematic Memoranda of Agreement that were developed over time for state program authorizations. This consistent baseline will do much to assure that states understand expectations and have the appropriate tools to achieve them.

EPA will also incorporate these new expectations and metrics into a number of formal planning processes:

- EPA and state senior management will annually include water quality standards, permitting and enforcement in planning discussions about appropriate goals, performance expectations, permitting and enforcement program improvements identified in program reviews, inspection and enforcement targeting, roles and responsibilities, work sharing and the avoidance of duplication of effort.
- Progress will be reviewed periodically throughout the year in meetings between EPA and states to holistically discuss the attainment of annual water quality, permitting and enforcement goals and expectations.
- Water quality, permitting and enforcement expectations should be contributing to the achievement of the same environmental goals. Enforcement expectations should be a part of the Water National Program Managers Guidance, which already includes guidance for the use of CWA §106 grant funds for state water quality monitoring and permitting. Ensure that the inclusion of performance expectations for the enforcement program in the grant guidance results in commitments in annual (or biannual) grant work plans that will achieve both enforcement and water quality goals.

While new approaches and expectations are being designed, ongoing oversight can work to raise the bar of performance under our current system. Strong enforceable permits are the cornerstone for effective enforcement, and the two work together to protect the nation's waters. EPA will pull results together from permit quality and enforcement reviews to determine if states are meeting minimum expectations for NPDES program performance. In the short term, this will include the implementation of the State Review Framework and the permit quality reviews currently being conducted. In the longer term, these tools need to be assessed against the new

approaches that OECA and the Office of Water are contemplating to ensure alignment with new directions. Where a state is underperforming, EPA will disapprove permits that are not protective of water quality and initiate enforcement actions against dischargers to address serious violations and protect public health and the environment.

EPA will also explore the concerns of citizen groups that some state enforcement actions have not been effective in achieving compliance. In their input into this Action Plan, some citizen groups voiced concern that in some cases when they provided a state notice of intent to file suit, some states would move to block their suit by issuing an administrative order that did not bring about compliance. To examine this issue, EPA will look into places where this practice is alleged to be widespread and determine if federal action is necessary.

C. Improve Accountability and Transparency

EPA lacks nationally consistent and complete information on the facilities, permits, pollutant discharges and compliance status of most NPDES-regulated facilities. This affects the ability of EPA and states to identify violations, target their actions, connect violations to water quality impacts, and to share information with the public. Data problems between EPA and states include data quality, accuracy, and completeness. Responses to these problems are hindered by the reporting and data processing burden associated with the breadth and expanding scope of the NPDES regulated universe.

Analyses to identify additional data needs for EPA's permitting and enforcement program have estimated that, to obtain the level of facility-specific data needed to fully understand the impact of wet weather discharges and other universes of facilities subject to CWA requirements (such as biosolids or pretreatment) on our nation's waters, would cost over $100 million/year. Ninety per cent of the burden to enter the needed data is related to the DMRs, which are provided by permitees to states who then submit the information to EPA. While the burden can be whittled down considerably by phasing in sources and limiting reporting to when violations are found or enforcement actions are taken, it is still a considerable investment. In today's economic situation, where resources are scarce to conduct ongoing work, this state reporting burden is difficult to justify. EPA needs to explore new ways and new uses of technology to collect, analyze, use, and make information available to the public in a cost efficient and effective way.

Transparent information is a powerful self policing tool for reducing pollution and improving compliance. As we have seen with the advent and use of the Toxics Release Inventory, sharing information on environmental discharges with the public puts pressure on regulated facilities to increase compliance, limit environmental damage and be more accountable. Transparency is not a replacement for regulatory enforcement, but can be an effective driver for improved performance and accountability.

Specific Actions:

A consensus suggestion across co-regulators and stakeholder groups was to implement electronic reporting from facilities that are required to submit reports to a regulatory agency.

Electronic reporting utilizes 21st Century technologies to get information more quickly and efficiently, enables the real-time use of that information to target serious violations and sources of water pollution, improves data quality, and provides a more informative and complete picture to the public. The requirement for permitted facilities to report DMRs monthly results is a huge reporting burden – for facilities to submit paper DMRs, for states and EPA to manually enter DMR data into data systems, and for states to then transmit the data to EPA's national database. EPA and states are constantly dealing with data quality issues and struggling to meet data timeliness, completeness, and accuracy standards.

In order to ease the reporting burden, increase data accuracy, make real-time data available to regulators and the public, and allow the more efficient use of limited resources, EPA recently deployed a new electronic reporting tool called NetDMR (www.epa.gov/netdmr) that enables regulated facilities to submit their DMRs electronically to the national data system or to a state system. That information can then be shared immediately between state and federal systems through EPA's National Environmental Information Exchange Network. OECA can significantly increase the electronic submission of data by immediately encouraging the promotion and use of NetDMR or other electronic DMR reporting tools in direct implementation programs and authorized states. EPA will also initiate an aggressive marketing campaign to the regulated community to promote electronic reporting. This would include working with small business to develop capacity and incentives to ensure that they have the ability to electronically report.

To fully realize the transformation of reporting and data management into the 21st Century, OECA will develop a rule to require NPDES permittees to provide DMRs electronically to EPA or states, using either NetDMR or an equivalent state electronic DMR system, phasing out paper DMR forms. Pilot projects using electronic reporting tools show limited rates of success unless the tool is mandated. The full benefits of electronic DMR reporting can only be achieved when implementation is close to 100 percent. EPA estimates that conversion from hard copy to electronically-submitted DMRs may save EPA, states, and the regulated sources more than $50 million per year when fully implemented. Real-time information on discharges and compliance, and their connection to water quality, will increase accountability for results and enlist the public as allies in the push for better compliance.

EPA will explore other reporting from facilities and authorized states over the next year to determine if it is feasible and cost effective to implement electronic solutions. Some examples include: electronic Notices of Intent to Discharge for general permits, non-DMR compliance reports, inspection results, and electronic permits. Another idea to explore is whether electronic reporting may provide an opportunity to require a compliance certification by regulated facilities that currently do not have reporting requirements. This would fill a void by providing regular data about the discharges and compliance status of those facilities, and better inform regulators and the public of their status. This will provide a more complete picture of discharges to the environment and will help to link those discharges to water quality conditions.

Finally, EPA will move immediately toward making additional data that is not enforcement confidential available to the public, increasing the transparency of its enforcement program. We will consult users to help simplify EPA's Enforcement and Compliance History

On-Line (ECHO) public web tool, developing better ways to display data and trends that bring data to life – including interactive maps and new, simpler reports.

D. Short Term Actions

While we are working to revamp water enforcement to better protect water quality, there are actions we can take right now to address known compliance and water quality issues.

First, EPA will pursue new strategies to enforce existing rules limiting pollution from concentrated animal feeding operations (CAFOs), especially where they occur in areas close to imperiled waters. CAFOs have become larger and more densely located, placing more stress on waters in proximity to these locations. CAFOs result in a large pollution load to the environment[2] and have been cited as an environmental justice concern in some areas.[3] Where facilities with large numbers of animals are discharging without a permit or in violation of their permits, they can cause significant pollution problems of concern to communities. Many of the comments EPA received during its outreach for this Action Plan emphasized the need for EPA to move now to reduce pollution and address violations by these operations. EPA will review its existing enforcement tools to find ways to make progress in reducing violations and water pollution from these facilities, while additional solutions for reducing this pollution are being developed.

Second, EPA will revisit the division of work with states, many of which are facing near term serious resource problems. We will review with each state how best to target the resources we jointly have, so we make sure in the near term that we are addressing the most serious water pollution violations. As we revamp our enforcement program to more systematically address the new water pollution challenges, we will work with states now, utilizing the combination of existing data and targeting tools, to go after the violations we already know are serious problems for water quality.

Third, EPA will press aggressively for immediate electronic reporting. NetDMR is available now for facilities to use to electronically report their DMRs. We will urge facilities to shift to electronic reporting right away, to reduce data entry costs and increase the accuracy and timeliness of the information we make available to the public.

IV. Resource Issues

The NPDES permitting and enforcement program has expanded its regulated universe more than tenfold as water quality problems have shifted to smaller, less discrete sources. Problems have grown more complex, while at the same time court decisions have made our regulatory authorities less clear. During this expansion, program resources have generally remained static. Many states are experiencing large reductions in state resources which have seriously hampered compliance programs. In these tough economic times, it is especially important to protect responsible businesses that invest in complying with the law by taking

[2] An Urgent Call To Action: Report of the State-EPA Nutrient Innovations Task Group, August 2009

[3] Environmental Injustice in North Carolina's Hog Industry; Wing et. al.; Environmental Health Perspectives, Vol. 108, March 2000

enforcement against violators. We know that the existing level of resources at EPA and the states will not be enough to solve all of our water quality problems. In order to carry out this Action Plan, EPA and the states will need to engage in serious discussions on directing resources to the most important water quality problems and most serious violations. We need to ensure that we utilize the limited resources we do have on the most important sources of pollution and the most important violations that, if addressed, can result in improvements in water quality and in people's lives.

V. Conclusion

To help meet this country's expectation that the waters that sustain us are clean and safe, EPA must revamp its enforcement and compliance program to focus it on the most significant sources of water pollution and the most significant violations from those facilities. Our water pollution problems cannot be solved through enforcement alone, as we still do not have effective rules for many of the threats to clean water. But enforcement can make a significant difference in improving water quality and upholding our commitments to the rule of law and transparency in government. Through this Plan, enforcement will work hand-in-hand with water quality standards and permits to protect the environment and the American public. We will hold states, and ourselves, to a higher standard of performance. And we will make information about threats to clean water, violations, and enforcement actions available to the public. This information will serve as a powerful ally in encouraging businesses to do better, and giving the public the tools to demand greater compliance and accountability from the regulated community.

Testimony from Dennis Kavanaugh representing
Sandy Hook Waterman's Alliance, Keyport, New Jersey

To

Transportation and Infrastructure Committee

Regarding

"The Clean Water Act after 37 Years: Recommitting to the Protection of the Nation's Waters."

October 15, 2009

SANDY HOOK WATERMANS ALLIANCE

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The Sandy Hook Waterman's Alliance (SWA) was formed to promote and protect commercial fishing in Northern Monmouth County New Jersey. Currently the most successful fishery we have now are shell fish, mainly hard clams (mercenaria mercenaria), unfortunately, all of our available range is polluted. All of the Raritan Bay, Sandy Hook Bay, Navesink and Shrewsbury Rivers are under some form of harvest restriction. The current harvest program uses depuration, a process in which shell fish are submerged in radiated water for 48 hours, meat tested and sent to market. Annual harvest has been level for over ten years at approximately 40 million pieces of shell fish that supports an $8 million dollar payroll. This sounds good except the fishermen lose between 40% to 60% of their net income to processing cost and handling regulations.

Shell fish are a good indicator of water quality because a significant amount of the catch is consumed raw which leads to a number of health issues if not handled correctly. An indicator of water quality is "fecal count", measured in parts per million. To dip a child in marine water a fecal count of about 100 parts per million would be a target. Shell fish require about 15 parts per million to be consumed raw. Aiming for shell fish quality should insure healthy swimming for children.

Our enemies are runoff and poor sanitation management. These are the same problems that killed a billion dollar oyster industry indigenous to the area at the turn of the century. Without an aquaculture option, prohibited because of water quality, the industry has been down graded to working poor without a social network for support. Our organization has initiated litigation against three offenders of the Clean Water Act (CWA). Our first effort was returned to us from federal court because of the vagueness of "point source pollution". The failure of our case to attach accountability to the offenders allows the injury to continue.

Our first offender is Monmouth Race Track with a history of over 15 years of allowing horse waste to enter the Shrewsbury River. This summer a plan to contain the run off has been suggested by the track that was to have a completion date of 2012. The reason for the length of time is because construction was not to conflict with track operations. 2009's improvements were to put gutters on the horse sheds. Funding has yet to be approved. The Monmouth Race Track is owned and operated by the New Jersey Sports Authority, aka, the State of New Jersey. The worst polluter in Monmouth County is the State of New Jersey.

Our second offender is the Municipality of Colts Neck. This municipality single handedly defeated county efforts to fund the Navesink River Water Shed Project. In March, 2007, Colts Neck's response for not participating and killing funding was that their effort to control their ground water responsibility was above any efforts the county

could come up with. Only problem was a report in February, 2008, done by the state, reported finding human feces in a local stream in Colts Neck. What makes this find particularly upsetting is that the site was 25 yards from Monmouth County's water supply, Swimming River Reservoir. It seems that Colts Neck surrounds the reservoir and all of Colts Neck is served by septic waste systems.

Our last offender is the Borough of Red Bank. An extensive study was completed in February, 2008, by the State of New Jersey because of a downgrade in water quality. Red Bank's ground water system is a colander with human, animal, and multiple anti-antibiotic sources acknowledged. Sadly, the same report refers to its discoveries "non-point", which means no accountability. This discussion will be made easier because all the major documents have Lisa Jackson's name on them and is familiar with the conflicts.

Ground water pollution is based on economics. It is cheaper not to comply and externalize the responsibility and expense down stream. Over the past three generations, government has failed to slow the assault on New Jersey's coastal resources from political and developmental pressure onshore. We can defend our own interests given the right tools. The change will be expensive, dramatic, and correct. We have a program including budgets in partnership with Rutgers University for a system of perpetual monitoring but need a strong clear CWA for enforcement.

Presently the CWA and government oversight is a watchdog with no teeth. Simple actions could have great consequences. If human contamination is present in run off, then eliminate that local responsibility to expand, no new toilets. When do we lift the cloak of government immunity and introduce accountability? I need the CWA to be able to be specific how "point source" will apply to the statute. My industry cannot rely upon the state to control ground waters. The stake holder has to be able to efficiently defend its own interest in a federal arena.

I'd like to leave you with two thoughts. All of these offenses fall under the shadow of the EPA. Every summer the Garden State Parkway, which is a main artery in New Jersey, is locked solid with families going south to the Jersey Shore and clean water. What happens to the kids that can't afford the trip? Clean water is a civil right that begins with the permits issued by the EPA.

Secondly, a substantial amount of racketeering, fraud, and tax evasion is sucking the life out of my industry. My pleas to three governors, three attorney generals, one inspector general, one federal prosecutor and two congressmen have gone unanswered. Is there any chance one of the members could place a call for me for some federal assistance.

Thank you.
Dennis Kavanaugh

United States Government Accountability Office

GAO

Testimony
Before the Committee on Transportation and Infrastructure, U.S. House of Representatives

For Release on Delivery
Expected at 10:00 a.m. EDT
October 15, 2009

CLEAN WATER ACT

Longstanding Issues Impact EPA's and States' Enforcement Efforts

Statement of Anu K. Mittal, Director
Natural Resources and Environment Team

October 15, 2009

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Highlights

Highlights of GAO-10-165T, a testimony before the Committee on Transportation and Infrastructure, U.S. House of Representatives

CLEAN WATER ACT

Longstanding Issues Impact EPA's and States' Enforcement Efforts

Why GAO Did This Study

Congress enacted the Clean Water Act to help reduce water pollution and improve the health of the nation's waterways. The Environmental Protection Agency (EPA) administers its enforcement responsibilities under the act through its Office of Enforcement and Compliance Assurance (OECA), as well as its 10 regional offices and the states.

Over the last 9 years, GAO has undertaken a number of reviews of EPA's environmental enforcement activities, including for the Clean Water Act. For this testimony statement, GAO was asked to summarize the results of five prior reports on the effectiveness of EPA's enforcement program. Specifically, this statement includes information on the (1) factors that cause variations in enforcement activities and lead to inconsistencies across regions, (2) impact that inadequate resources and work force planning has had on enforcement, (3) efforts EPA has taken to improve priority planning, and (4) accuracy and transparency of measures of program effectiveness.

GAO's prior recommendations have included the need for EPA to collect more complete and reliable data, develop improved guidance, and better performance measures. Although EPA has generally agreed with these recommendations, its implementation has been uneven. GAO is not making new recommendations in this statement.

View GAO-10-165T or key components.. For more information, contact Anu Mittal, (202) 512-3841, mittala@gao.gov.

What GAO Found

In 2000, GAO found variations among EPA's regional offices in the actions they take to enforce environmental requirements. For example, the regions varied in the inspection coverage of facilities discharging pollutants, the number and type of enforcement actions taken, and the size of the penalties assessed and the criteria used in determining penalties. GAO also found that variations in the regions' strategies for overseeing state programs may have resulted in more in-depth reviews in some regional programs than in others. Several factors contributed to these variations including differences in the philosophical approaches among enforcement staff about how best to achieve compliance with environmental requirements, differences in state laws and enforcement authorities and how the regions respond to these differences, variations in resources available to state and regional offices, the flexibility afforded by EPA policies and guidance that allow latitude in state enforcement programs, and incomplete and inadequate enforcement data that hampered EPA's ability to accurately characterize the extent of variations. In 2007, GAO reported improvements in EPA's oversight of state enforcement activities with the implementation of a state review framework. However, while this framework helped identify several weaknesses in state programs, the agency had not developed a plan for how it would uniformly address these weaknesses or identify the root causes of these weaknesses.

In 2005, GAO reported that the scope of EPA's responsibilities under the Clean Water Act along with workload associated with implementing and enforcing the act's requirements had increased significantly. At the same time, EPA had authorized states to take on more responsibilities, shifting the agency's workload from direct implementation to oversight. In 2007, GAO reported that while overall funding for enforcement activities had increased from $288 million in fiscal year 1997 to $322 million in fiscal year 2006, resources had not kept pace with inflation or the increased responsibilities. Both EPA and state officials told GAO that they found it difficult to respond to new requirements while carrying out previous responsibilities and regional offices had reduced enforcement staff by about 5 percent. In 2005, GAO also reported that EPA's process for budgeting and allocating resources did not fully consider the agency's workload, either for specific statutory requirements such as those included in the Clean Water Act or the broader goals and objectives in the agency's strategic plan. Any efforts made by the agency to develop a more systematic process would be hampered by the lack of comprehensive and accurate workload data.

In 2007, GAO reported that EPA had made substantial progress in improving priority setting and enforcement planning with states through its system for setting national enforcement priorities and this had fostered a more cooperative relationship with the states. Finally, in 2008, GAO reported that EPA could improve the accuracy and transparency of some of the measures that it uses to assess and report on the effectiveness of its civil and criminal enforcement programs. GAO identified shortcomings in how EPA calculates and reports these data that may prevent the agency from providing Congress and the public with a fair assessment of the programs.

Mr. Chairman and Members of the Committee:

We are pleased to be here today to participate in your hearing on the 37th anniversary of the Clean Water Act. As you know, the Clean Water Act has played a critical role in reducing water pollution and improving the health of the nation's waterways. The Environmental Protection Agency (EPA) administers its environmental enforcement responsibilities under the Clean Water Act and other environmental statutes, through its headquarters Office of Enforcement and Compliance Assurance (OECA). OECA monitors the compliance of regulated facilities, identifies national enforcement concerns and sets priorities, and provides overall direction on enforcement policies. While OECA headquarters occasionally takes direct enforcement action, much of EPA's enforcement responsibilities are carried out by its 10 regional offices. These offices are responsible for carrying out core program activities under each of the major federal environmental statutes, as well as significant involvement in implementing EPA's national enforcement priorities and taking direct enforcement action. In addition, the Clean Water Act directs EPA to authorize qualified states to implement and enforce environmental programs consistent with federal requirements. EPA expects its 10 regional offices to take a systematic and generally consistent approach in overseeing the state enforcement programs and, in doing so, to follow EPA's regulations, policies, and guidance.

Over the last 9 years, GAO has reviewed various aspects of EPA's enforcement activities and has made several recommendations to enhance its enforcement program. Our testimony today is based on the findings and conclusions contained in five of these reports and will specifically focus on the following:[1]

[1]GAO, *Environmental Protection: More Consistency Needed Among EPA Regions in Approach to Enforcement*, GAO/RCED-00-108 (Washington, D.C.: June 2, 2000); GAO, *Clean Water Act: Improved Resource Planning Would Help EPA Better Respond to Changing Needs and Fiscal Constraints*, GAO-05-721 (Washington, D.C.: July 22, 2005); GAO, *Environmental Protection: EPA-State Enforcement Partnership Has Improved, but EPA's Oversight Needs Further Enhancement*, GAO-07-883 (Washington D.C.: July 31, 2007); GAO, *Environmental Enforcement: EPA Needs to Improve the Accuracy and Transparency of Measures Used to Report on Program Effectiveness*, GAO-08-1111R (Washington, D.C.: Sept.18, 2008); GAO, *EPA's Execution of Its Fiscal Year 2007 New Budget Authority for the Enforcement and Compliance Assurance Program in the Regional Offices*, GAO-08-1109R (Washington, D.C.: Sept. 26, 2008).

- Factors that cause variations in EPA's enforcement activities and lead to inconsistencies across its regional offices,
- The impact that inadequate resources and workforce planning has had on EPA's ability to meet changing enforcement needs,
- EPA's efforts to improve priority planning and enforcement planning as well as oversight of state programs, and
- Improvements that are needed to improve the accuracy and transparency of measures of program effectiveness.

For the reports used to support this testimony statement, we conducted our work in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient and appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for the findings and conclusions in these reports. We discussed the contents of this testimony with an EPA official.

Background

Since EPA was created in 1970, the agency has been responsible for enforcing the nation's environmental laws. This responsibility has traditionally involved monitoring compliance by those in the regulated community (such as factories or small businesses that release pollutants into the environment or use hazardous chemicals), ensuring that violations are properly identified and reported, and ensuring that timely and appropriate enforcement actions are taken against violators when necessary. Most major federal environmental statutes, including the Clean Water Act, permit EPA to allow states under certain circumstances to implement key programs and to enforce their requirements. EPA establishes by regulation the requirements for state enforcement authority, such as the authority to seek injunctive relief and civil and criminal penalties.

EPA also outlines by policy and guidance its views as to the elements of an acceptable state enforcement program, such as necessary legislative authorities and the type and timing of the action for various violations, and tracks how well states comply. Environmental statutes generally provide authority for EPA to take appropriate enforcement action against violators in states that have been delegated authority for these programs when states fail to initiate enforcement action. The statutes also provide that

EPA may withdraw approval of a state's program if the program is not administered or enforced adequately.

EPA administers its environmental enforcement responsibilities through its headquarters Office of Enforcement and Compliance Assurance (OECA). While OECA provides overall direction on enforcement policies, and sometimes takes direct enforcement action, it carries out much of its enforcement responsibilities through its 10 regional offices. These offices are responsible for taking direct enforcement action and for overseeing the enforcement programs of state agencies in those instances in which the state has been delegated such enforcement authority.

EPA has established principles for its enforcement and compliance program. State guidance, providing the framework for state/EPA enforcement agreements, has been in place since 1986. According to EPA, this state guidance, together with statute-specific guidance, is the blueprint for both EPA and state enforcement and compliance programs and serves as the basis for both authorizing and reviewing state programs.

OECA expects the regions to take a systematic approach to administering and overseeing the enforcement programs among delegated and nondelegated programs and, in doing so, to follow the policies and guidance issued for this purpose. While federal and state enforcement officials agree that core enforcement requirements should be generally implemented consistently, according to EPA some variation is to be expected—and, in some cases, encouraged. For example, EPA expects some variation in how regions target resources to the most significant compliance issues in different regions and states, the level of enforcement activity—which should vary with the severity of the problem, and the level of regional oversight of state enforcement programs—with the greater oversight provided for weaker programs.

Variations in Enforcement By EPA's Regions Have Resulted in Inconsistencies in Program Implementation

As we noted in our 2000 report on the consistency of EPA's regions in enforcing environmental requirements, some variation in environmental enforcement is necessary to take into account local conditions and local concerns.[2] At the same time, EPA enforcement officials readily acknowledged that core enforcement requirements must be consistently implemented, and to ensure fairness and equitable treatment, similar violations should be met with similar enforcement responses, regardless of geographic location. However, when we reviewed EPA's enforcement efforts we found that variations among EPA's regional offices had led to inconsistencies in the actions they take to enforce environmental requirements. For example, we found that

- inspection coverage by EPA and state enforcement staff varied for facilities discharging pollutants within each region,
- the number and type of enforcement actions taken by EPA's regions also varied,
- the size of the penalties assessed and the criteria used in determining penalties assessed varied by region, and
- the regions' overall strategies in overseeing the states within their jurisdiction varied, which may have resulted in more in-depth reviews in some regional programs than in others.

EPA headquarters officials responsible for the water program explained that such variation was fairly commonplace and has posed problems. The director of OECA's water enforcement division, for example, said that in reacting to similar violations, enforcement responses in certain regions were weaker than in others, and that such inconsistencies had increased.

We identified a number of factors that contributed to variations in EPA's enforcement that included the following:

- differences in the philosophical approaches among enforcement staff about how to best achieve compliance with environmental requirements,
- differences in state laws and enforcement authorities, and in the manner in which regions respond to these differences,

[2]GAO, *Environmental Protection: More Consistency Needed Among EPA Regions in Approach to Enforcement*, GAO/RCED-00-108 (Washington, D.C.: June 2, 2000).

- variations in resources available to both state and regional enforcement offices,
- the flexibility afforded by EPA policies and guidance that allow states a degree of latitude in their enforcement programs, and
- incomplete and inadequate enforcement data which, among other things, hamper EPA's ability to accurately characterize the extent of variations.

We also noted in our 2000 report that EPA headquarters enforcement officials were developing performance information that would allow for comparisons among both regions and states in their conduct of key enforcement responsibilities. Such assessments were expected to highlight any major program variations and would be communicated through the issuance of periodic status reports. A number of EPA regional offices were also developing and applying new audit protocols in their state reviews and encouraging more effective communication between and among regional and state enforcement staff. But we also concluded that a number of factors would continue to challenge EPA's ability to ensure reasonably consistent enforcement across its regions. Among the most important of these factors was the absence of reliable data on how both states and regions are performing their enforcement responsibilities.

In 2007, we again examined EPA's efforts to improve oversight of state enforcement activities. At that time, we reported that EPA had improved its oversight of state enforcement programs by implementing the State Review Framework (SRF). We noted that EPA's implementation of the SRF gave it the potential to provide for the first time a consistent approach for overseeing authorized states' compliance and enforcement programs. Nonetheless, we also reported that the SRF had identified several significant weaknesses in how states enforce their environmental laws in accordance with federal requirements. For example, reviews conducted under the framework found that the states were not properly documenting inspection findings or how they calculate or assess penalties, as provided by EPA's enforcement policy and guidance, that the states were not adequately entering significant violations noted in their inspection reports into EPA databases, and that the states lacked adequate or appropriate penalty authority or policies. While we recognized the value in EPA's identification and documentation of these findings, we also reported that EPA had not developed a plan for how it would uniformly address them in a timely manner, nor had the agency identified the root causes of the weaknesses, although some EPA and state officials attributed the weaknesses to causes such as increased workloads concomitant with

budgetary reductions. We concluded that, until EPA addressed enforcement weaknesses and their causes, it faced limitations in determining whether the states are performing timely and appropriate enforcement, and whether they are applying penalties to environmental violators in a fair and consistent manner within and among the states.

In 2000 and in 2007, GAO made several recommendations to EPA to address the concerns that we identified with the agency's enforcement programs. For example, in 2000, we recommended that EPA develop a comprehensive strategy to adequately address problems with the quality of the agency's enforcement data and issue guidance to the regions describing the required elements of audit protocols to be used in overseeing state enforcement programs. In 2007, we recommended that to enhance EPA's oversight of regional and state enforcement activities consistent with federal requirements that the agency should (1) identify lessons learned and develop an action plan to address significant issues, (2) address resource issues such as state staffing levels and resource requirements, (3) publish the results of the SRF reviews so that the public and others will know how well state enforcement programs are working, and (4) conduct a performance assessment of regional enforcement programs similar to the SRF. EPA generally agreed with most of the recommendations we made in 2007, but did not specifically comment on the recommendations we made in 2000. Although EPA has taken steps to address the recommendations in our 2000 report, it has not yet implemented the recommendations in our 2007 report.

Enforcement Resources Have Not Kept Pace with Increased Responsibilities and Better Resource Planning Would Enhance Enforcement Activities

In 2005, we reported that the scope of EPA's responsibilities under the Clean Water Act had increased significantly since 1972, along with the workload associated with implementing and enforcing the act's requirements.[3] For example, EPA's implementation of the 1987 amendments which expanded the scope of the act by regulating storm water runoff resulted in (1) increasing the number of regulated industrial and municipal facilities by an estimated 186,000 facilities and (2) adding hundreds of thousands of construction projects to states' and regions' workloads for the storm water program. At the same time, EPA had authorized states to take on more responsibilities, shifting the agency's workload from direct implementation to oversight.

In 2007, we reported that while overall funding for carrying out enforcement activities to regions and authorized states had increased from fiscal years 1997 through 2006, these increases had not kept pace with inflation and the growth in enforcement responsibilities.[4] Over the 10-year period we reviewed, EPA's enforcement funding to the regions increased from $288 million in fiscal year 1997 to $322 million in fiscal year 2006, but declined in real terms by 8 percent. Both EPA and state officials told us they found it difficult to respond to new requirements while carrying out their previous responsibilities.

In 2007, officials in OECA and EPA's Office of the Chief Financial Officer told us that in recent years OECA headquarters absorbed decreases in OECA's total enforcement funding to prevent further reductions to the regions. We determined that enforcement funding for OECA headquarters increased from $197 million in fiscal year 2002 to $200 million in fiscal year 2006—a 9 percent decline in real terms. During the same time, regional enforcement funding increased from $279 million to $322 million—a 4 percent increase in real terms. EPA also reduced the size of the regional enforcement workforce by about 5 percent over the 10 year period between fiscal years 1997 and 2006. During this 10-year period, the regional workforce was reduced from 2,568 full-time equivalent (FTE) staff in fiscal year 1997 to 2,434 FTEs in fiscal year 2006. In comparison, the OECA headquarters workforce declined 1 percent, and the EPA total

[3]GAO, *Clean Water Act. Improved Resource Planning Would Help EPA Better Respond to Changing Needs and Fiscal Constraints*, GAO-05-721 (Washington, D.C.: July 22, 2005).

[4]GAO, *Environmental Protection: EPA-State Enforcement Partnership has Improved, but EPA's Oversight Needs Further Enhancement*, GAO-07-883 (Washington, D.C.: July 31, 2007).

workforce increased 1 percent during the same period. However, the change in FTEs was not uniform across the 10 regions over the period. For example, two regions—Region 9 (San Francisco) and Region 10 (Seattle)—experienced increases in their workforce: Region 9 increased 5 percent, from 229 to 242 FTEs, and Region 10 increased 6 percent, from 161 to 170 FTEs. In contrast, two regions—Region 1 (Boston) and Region 2 (New York) experienced the largest declines: Region 1 experienced a 15 percent decline, from 195 to 166 FTEs, and Region 2 had a 13 percent decline, from 291 to 254 FTEs.

Although we recognized that resources had not kept pace with EPA's responsibilities under the Clean Water Act, we also found that EPA's process for budgeting and allocating resources did not fully consider the agency's current workload, either for specific statutory requirements, such as those included in the Clean Water Act, or for the broader goals and objectives in the agency's strategic plan. Instead, EPA made incremental adjustments and relied primarily on historical precedent when making resource allocations. In 2005, we concluded that changes at the margin may not be sufficient because both the nature and distribution of the Clean Water Act workload had changed, the scope of activities regulated under the act had increased, and EPA had taken on new responsibilities while shifting others to the state.

While we reported in 2005 that EPA had taken some actions to improve resource planning, we also found that it faced a number of challenges that hindered comprehensive reform in this area. Specifically, we identified several efforts that EPA had initiated to improve the agency's ability to strategically plan its workforce and other resources. While some of these efforts were not directly related to workforce planning, we found that they had the potential to give the agency some of the information it needed to support a systematic, data-driven method for budgeting and allocating resources. In addition, we identified two initiatives within the Office of Water that we believed had the potential to provide relevant and useful information for a data-driven approach to budgeting and allocating resources. First, beginning in December 1998, EPA and the states collaborated on a state resource analysis for water quality management to develop an estimate of the resources that states needed to fully implement the Clean Water Act. The primary focus of the project was identifying the gap between states' needs and available resources. To develop the estimates of the gap, EPA and the states created a detailed model of activities associated with implementing the Clean Water Act, the average time it took to complete such activities, and the costs of performing them. The National Academy of Public Administration subsequently reviewed

the model and determined that the underlying methodology was sound, and recommended that EPA and the states refine the model to support data-driven grant allocation decisions. However, as we reported, the agency did not implement the recommendation, citing resource constraints and reluctance on the part of some states. Second, in 2003, the Office of Water implemented an initiative called the Permitting for Environmental Results Strategy to respond to circumstances that were making it increasingly difficult for EPA and the states to meet their responsibilities under the Clean Water Act. According to EPA, in addition to the scope and complexity of the act expanding over time, the states were also facing an increasing number of lawsuits and petitions to withdraw their authorization to administer some Clean Water Act programs. As part of its effort to identify and resolve performance problems in individual states, EPA and the states were developing profiles containing detailed data on the responsibilities, resources, and workload demands of each state and region. We concluded that this information would be useful to any comprehensive and systematic resource planning method adopted by the agency.

Nonetheless, we also identified a number of larger challenges that EPA would face as it tried to adopt a more systematic process for budgeting and resource allocation. Specifically, we found that EPA would be challenged in obtaining complete and reliable data on key workload indicators, which we concluded would be the most significant obstacle to developing a systematic, data-driven approach to resource allocation. Without comprehensive and reliable data on workload, EPA cannot accurately identify where agency resources, such as staff with particular skills, are most needed. EPA officials told us that some of the key workload factors related to controlling point and nonpoint source pollution include the number of point source dischargers, the number of wet weather dischargers, and the quantity and quality of water in particular areas. However, we reported that for some of this information, the relevant databases may not have the comprehensive, accurate, and reliable information that is needed by the agency.

Even with better workload data, we found in 2005 that EPA would also find it difficult to implement a systematic, data-driven approach to resource allocation without staff support for such a process. Support might not be easily forthcoming because, according to EPA officials in several offices and regions, staff were reluctant to accept a data-driven approach after their experience in using workload models during the 1980s. At that time, each major program office used a model to allocate resources to the agency's regional offices. When the models were initially

developed, agency officials believed they were useful because EPA's programs were rapidly expanding as the Congress passed new environmental laws. Over time, however, the expansion of EPA's responsibilities leveled off, and its impact on the relative workload of regions was not as significant. The change in the rate of the workload expansion, combined with increasingly constrained federal resources during the late 1980s, meant that the workload models were only being used to allocate changes at the margins. The agency stopped using the models in the early 1990s because, according to officials, staff spent an unreasonable amount of time negotiating relatively minor changes in regional resources.

To address the concerns that we identified with EPA's resource allocation and planning processes for the enforcement programs, in 2005, we made several recommendations to the agency. Specifically, we recommended that EPA identify relevant workload indicators that drive resource needs, ensure that relevant data are complete and reliable, and use the results to inform budgeting and resource allocation decisions. In responding to our recommendations, EPA voiced concerns that a bottom-up workload assessment contrasts with its approach, which links budgeting and resource allocation to performance goals and results. However, we reiterated our belief that assessing workload and how it drives resources was fully compatible with EPA's approach. In 2008,[5] when we again reported on EPA's resource allocation process, we found that the process was essentially the same as we reported in 2005 and that the agency had not made progress on implementing our recommendations.

EPA Has Improved Its Process for Collaborating with States to Set Priorities

In 2007, we reported that, despite the interdependence between EPA and the states in carrying out enforcement responsibilities, effective working relationships have historically been difficult to establish and maintain, based on reports by GAO, EPA's Office of Inspector General, the National Academy of Public Administration, and others.[6] We identified the following three key issues that have affected EPA and state relationships in the past:

[5] GAO, *EPA's Execution of Its Fiscal Year 2007 New Budget Authority for the Enforcement and Compliance Assurance Program in Regional Offices*, GAO-08-1109R (Washington, D.C., Sept. 26, 2008).

[6] GAO, *Environmental Protection: EPA-State Enforcement Partnership has Improved, but EPA's Oversight Needs Further Enhancement*, GAO-07-883 (Washington, D.C.: July 31, 2007).

- EPA's funding allocations to the states did not fully reflect the differences among the states' enforcement workload and their relative ability to enforce state environmental programs consistent with federal requirements. In this regard, EPA lacked information on the capacity of both the states and EPA's regions to effectively carry out their enforcement programs, because the agency had done little to assess the overall enforcement workload of the states and regions and the number and skills of people needed to implement enforcement tasks, duties, and responsibilities. Furthermore, the states' capacity continued to evolve as they assumed a greater role in the day-to-day management of enforcement activities, workload changes occurred as a result of new environmental legislation, new technologies were introduced, and state populations shifted.

- Problems in EPA's enforcement planning and priority setting processes resulted in misunderstandings between OECA, regional offices, and the states regarding their respective enforcement roles, responsibilities, and priorities. States raised concerns that EPA sometimes "micromanaged" state programs without explaining its reasons for doing so and often did not adequately consult the states before making decisions affecting them.

- OECA had not established a consistent national strategy for overseeing states' enforcement of EPA programs. Consequently, the regional offices were not consistent in how they oversaw the states. Some regional offices conducted more in-depth state reviews than others, and states in these regions raised concerns that their regulated facilities were being held to differing standards of compliance than facilities in states located in other regions.

Our 2007 report acknowledged that EPA had made substantial progress in improving priority setting and enforcement planning with states through its system for setting national enforcement priorities and the National Environmental Performance Partnership System (NEPPS), which was designed to give states demonstrating strong environmental performance greater flexibility and autonomy in planning and operating their environmental programs. We concluded that the NEPPS had fostered a more cooperative relationship with the states and that EPA and the states had also made some progress in using NEPPS for joint planning and resource allocation. State participation in the partnership had grown from 6 pilot states in fiscal year 1996 to 41 states in fiscal year 2006.

Measures Used to Report on the Effectiveness of Enforcement Efforts Can Be Improved

In 2008, we reported that EPA relies on a variety of measures to assess and report on the effectiveness of its civil and criminal enforcement programs.[7] For example, EPA relies on assessed penalties that result from enforcement efforts among its long-standing measurable accomplishments. The agency uses its discretion to estimate the appropriate penalty amount based on individual case circumstances. EPA has developed penalty policies as guidance for determining appropriate penalties in civil administrative cases and referring civil judicial cases. The policies are based on environmental statutes and have an important goal of deterring potential polluters from violating environmental laws and regulations. The purpose of EPA's penalties is to eliminate the economic benefit a violator gained from noncompliance and to reflect the gravity of the alleged harm to the environment or public health. In addition to penalties, EPA has also established what it considers two major performance measures for its civil enforcement program. These are (1) the value of injunctive relief—the monetary value of future investments necessary for an alleged violator to come into compliance, and (2) pollution reduction—the pounds of pollution to be reduced, treated, or eliminated as a result of an enforcement action. EPA relies on these measures, among others, in pursuing its national enforcement priorities and overall strategy of fewer, but higher impact, cases. However, unless these measures are meaningful, the Congress and the public will not be able to determine the effectiveness of the enforcement program.

When we reviewed EPA's assessed penalties data we determined that from fiscal years 1998 to 2007 total inflation-adjusted penalties declined when excluding major default judgments.[8] When adjusted for inflation, total assessed penalties were approximately $240.6 million in fiscal year 1998 and $137.7 million in 2007. Moreover, we identified three shortcomings in how EPA calculates and reports penalty information to the Congress and the public that may result in an inaccurate assessment of the program. Specifically, we reported that EPA was

- Overstating the impact of its enforcement programs by reporting penalties assessed against violators rather than actual penalties received by the U.S. Treasury.

[7]GAO, *Environmental Enforcement: EPA Needs to Improve the Accuracy and Transparency of Measures Used to Report on Program Effectiveness*, GAO-08-1111R (Washington, D.C.: Sept. 18, 2008).

[8]A default judgment is a binding judgment in favor of the plaintiff when the defendant has not responded to a civil complaint.

- Reducing the precision of trend analyses by reporting nominal rather than inflation-adjusted penalties, thereby understating past accomplishments.
- Understating the influence of its enforcement programs by excluding the portion of penalties awarded to states in federal cases.

In contrast to penalties, we found that both the value of estimated injunctive relief and the amount of pollution reduction reported by EPA generally increased. The estimated value of injunctive relief increased from $4.4 billion in fiscal year 1999 to $10.9 billion in fiscal year 2007, in 2008 dollars. In addition, estimated pollution reduction commitments amounted to 714 million pounds in fiscal year 2000 and increased to 890 million pounds in fiscal year 2007. However, we identified several shortcomings in how EPA calculates and reports this information as well. We found that generally EPA's reports did not clearly disclose the following:

- Annual amounts of injunctive relief and pollution reduction have not yet been achieved. They are based on estimates of relief and reductions to be realized when violators come into compliance.
- Estimates of the value of injunctive relief are based on case-by-case analyses by EPA's technical experts, and in some cases the estimates include information provided by the alleged violator.
- Pollution reduction estimates are understated because the agency calculates pollution reduction for only 1 year at the anticipated time of full compliance, though reductions may occur for many years into the future.

In addition, we identified a number of factors that affected EPA's process for achieving annual results in terms of penalties, estimated value of injunctive relief, and amounts of pollution reduction. Some of these factors that could affect the outcomes included:

- The Department of Justice (DOJ), not EPA, is primarily responsible for prosecuting and settling civil judicial and criminal enforcement cases.
- Executive Order 12988 directs DOJ, whenever feasible, to seek settlements before pursuing civil judicial actions against alleged violators.
- Unclear legal standards, as illustrated by the 2006 Supreme Court decision, *Rapanos v. United States* have hindered EPA's enforcement efforts. This case generally made it more difficult for EPA to take enforcement actions because the legal standards for determining what is a "water of the United States" were not clear.

In our 2008 report, we recommended that EPA take a number of actions to improve the accuracy and transparency of the information that it reports to the Congress and the public regarding penalties assessed, value of injunctive relief, and estimates of pollution reduction. EPA generally agreed with most of our recommendations and stated that it would consider making these changes in the future.

In conclusion, our work over the past 9 years has shown that the Clean Water Act has significantly increased EPA's and the states' enforcement responsibilities, available resources have not kept pace with these increased needs, and actions are needed to further strengthen the enforcement program. To address these concerns, we have made several recommendations to EPA, however, EPA's implementation of our recommendations has been uneven and several of the issues that we have identified over the last decade remain unaddressed today. The agency still needs comprehensive, accurate, and reliable data that would allow it to better target limited resources to those regions and potential pollution problems of the greatest concern. The agency still needs better processes to plan and allocate resources to ensure that the greatest risks are being addressed. Finally, the agency needs accurate and transparent measures to report on whether the Clean Water Act is being consistently implemented across the country in all regions and that like violations are being addressed in the same manner.

Mr. Chairman, this concludes our prepared statement, we would be happy to respond to any questions that you or other committee Members might have.

Contact and Staff Acknowledgments

Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. For further information about this testimony, please contact Anu Mittal at (202) 512-3841 or mittala@gao.gov. Key contributors to this testimony were Steve Elstein, Diane Raynes, Ed Kratzer, Sherry McDonald, Antoinette Capaccio, and Alison O'Neill.

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U.S. ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF INSPECTOR GENERAL

Catalyst for Improving the Environment

Congressional Testimony

The Clean Water Act after 37 Years: Recommitting to the Protection of the Nation's Waters

Statement of Wade T. Najjum
Assistant Inspector General for Program Evaluation

Before the Committee on Transportation and Infrastructure
U.S. House of Representatives
October 15, 2009

Good morning Mr. Chairman and Members of the Committee. I am Wade Najjum, Assistant Inspector General for Program Evaluation at the U.S. Environmental Protection Agency (EPA) Office of Inspector General (OIG). I am pleased to be here today to discuss some of the challenges facing EPA that bears on its ability to effectively manage, oversee, and enforce environmental laws, including the Clean Water Act.

Over the years the OIG has issued numerous reports that pertain to aspects of the Clean Water Act ranging from EPA's oversight of major facilities in long-term significant noncompliance; efforts to clean up the Chesapeake Bay and the Great Lakes; and delays in establishing water quality standards for nutrients. Some of these reports are summarized at the end of my statement. We also have a significant body of work addressing enforcement and related issues in other EPA program areas. While this hearing is focused on clean water, I mention other program areas because the OIG believes that there are common roots to many of the problems we identified in other media that bear on clean water management and enforcement.

EPA and the Clean Water Act

Steps taken by EPA and others under the Clean Water Act have resulted in significant improvement in the nation's waters over what they would have been without this law. EPA has led a change in the nation's attitude toward protecting our rivers and streams. Billions of dollars are spent annually by companies and federal, State, and local governments to work toward the goals that Congress established 37 years ago. As a result, significant amounts of pollutants from factories and wastewater treatment plants are now removed before discharges reach rivers and streams; and many water bodies have been made safe for fishing and swimming.

Despite these accomplishments, the full potential of the Clean Water Act has not been realized. For example, when I spoke before the Subcommittee on Water Resources and Environment last year, I discussed gaps in clean water protections that inhibit attainment of clean water goals for the Chesapeake Bay. Also, we are currently evaluating EPA's wetlands program and are finding issues that impair its ability to effectively enforce the program.

Management Challenges that Impede Effective Management and Enforcement

Every year the OIG issues a listing of management challenges facing EPA based on OIG work performed and additional analysis of EPA operations. Management challenges are defined as a lack of capability derived from internal self-imposed constraints or, more likely, externally imposed constraints that prevent an organization from reacting effectively to a changing environment. In April 2009, the OIG identified 10 key management challenges for Fiscal Year 2009. Three of those challenges impact EPA's management and enforcement capability:

- EPA's organization and infrastructure;
- Oversight of delegations to States; and
- Performance measurement.

In the remainder of my testimony I will present our conclusions about how these challenges impact EPA's management and enforcement capability with reference to some of the reports that we have issued in recent years. It should be noted that EPA has addressed some of the specific findings as a result of adopting the recommendations contained in those reports. However, we believe that the underlying issues persist

EPA's Organization and Infrastructure

In July 1970, the first EPA Administrator formally organized EPA based upon existing environmental legislation that encompassed discrete media programs for water, air, pesticides, radiation, and solid waste, as well as 10 regional offices and a laboratory structure inherited from other federal agencies. However, President Nixon's Advisory Council on Executive Organization, also known as the Ash Council, recommended organizing EPA according to functional categories (e.g., monitoring, research, standard-setting, enforcement, assistance) rather than along media lines (e.g., air, water, land). This recommended organizational approach was intended to recognize the interrelated nature of pollution problems, acknowledge that pollutants cut across media lines, encourage balanced budget and priority decisions between component functions, and permit more effective evaluations of total program performance.

However, the realities of environmental legislation made this type of integration difficult and would require an incremental, three-phased approach. The first phase of EPA organization was dominated by its discrete medium orientation. The second phase followed a hybrid functional/media structure similar to EPA's current organization. Finally, the third phase would eliminate the media-oriented program offices in favor of the functional units recommended by the Ash Council. This was never realized. Studies we reviewed indicate that EPA's failure to move to this third phase may hinder EPA's ability to effectively enforce and oversee environmental laws.

OIG work has also shown that EPA's organization has impeded achievement of environmental goals and efficient use of resources. Recurring themes include: inadequate coordination between EPA headquarters offices; inconsistencies in enforcement among EPA's Regions; inadequate national (Agency) guidance, procedures, or priorities on programs; a lack of strategic plans that link program missions, goals, and performance measures; and decentralized management contributing to allocation and resource management problems. For example:

- In a review of EPA's Drinking Water Program, it was unclear whether the Office of Enforcement and Compliance Assurance (OECA) was adequately coordinating its efforts with the Office of Ground Water and Drinking Water (OGWDW). OECA reported that it has "substantive, regular, and consistent" coordination with OGWDW on both rule development and enforcement, while other sources indicated that OECA's enforcement priorities may be out of alignment with those of OGWDW.

- In a review that assessed EPA's oversight and assistance of tribal community water systems, we found that the five Regions we reviewed varied in the quality of oversight they provided to tribal community water systems. One Region failed

to monitor for certain contaminants, chose not to enter known monitoring violations into the Safe Drinking Water Information System, and did not conduct enforcement actions against the systems that committed these violations.

- EPA relies heavily on guidance to communicate Agency policy and regulations. OIG work has shown a culture in EPA that treats guidance as non-binding to parties, including EPA Regions, and accepting of guidance that is incomplete, draft, or interim. This could lead to inconsistent implementation and impede EPA's ability to effectively enforce necessary actions since private parties may perceive unfairness and the absence of boundaries on their activities.

- In a review of the Border 2012 Program, a joint U.S.-Mexico effort to improve the environment and protect the health of people living along the border, we found that success varied across the different media areas as well as by leadership despite a program structure aimed at reducing stove-piping. Program implementation varied depending on the Region. There was no systematic roadmap that defined the relationships between resources, activities, and intended outcomes; nor were there management controls to ensure that results were documented or that goals were being achieved.

- An OIG review found that EPA's decentralized management of the Superfund program contributes to allocation and resource management problems. EPA spreads its Superfund appropriation across a variety of offices and Regions. This has limited EPA's opportunities to effectively manage Superfund resources for cleanup.

Oversight of Delegations to the States

EPA's mission is to protect human health and the environment. To accomplish its mission, EPA develops regulations and establishes programs that implement environmental laws. These programs may be delegated to State, local, and tribal agencies that request to take primacy of the program. Delegation, however, does not relieve EPA of its statutory and trust responsibilities for protecting human health and the environment. EPA performs oversight of State, local, and tribal programs in an effort to provide reasonable assurance that delegated programs are achieving their goals. EPA does not have the resources to effectively administer all its responsibilities directly. EPA relies heavily on local, State, and tribal agencies for compliance and enforcement and to obtain performance data. In its *FY 2007 Performance and Accountability Report*, EPA states it delegated the responsibility for issuing permits and for monitoring and enforcing compliance to the States and tribes.

A critical management challenge to EPA is oversight of its delegations to States. Federal environmental statutes grant EPA a significant role in implementing the intent of the law, and also authorize a substantial role for States. However, quality data is often lacking to ensure that the intent of the law is met. Also, Federal requirements establish consistency for businesses and within industries nationwide. States' discretion adds flexibility to address specific circumstances and local issues. However, joint

implementation and enforcement leads to special challenges in interpretations, strategies, and priorities.

Our evaluations have shown that EPA's oversight of State programs requires improvement for several reasons. These include inconsistent enforcement guidance interpretation; States and Regions not meeting minimum reporting requirements; differing standards for State delegation agreements among the Regions; disagreements on enforcement priorities between OECA and the Regions; inaccurate data systems; and internal control deficiencies. For example:

- We found that EPA did not provide effective enforcement oversight of major facilities with National Pollutant Discharge Elimination System (NPDES) permits in long-term significant noncompliance. EPA inconsistently applied guidance defining timely formal enforcement actions. Also, EPA guidance did not provide meaningful direction on what constitutes "appropriate" actions. Timely and appropriate formal enforcement actions are important to minimize additional pollutants from being discharged into the nation's waters to ensure protection of human health and the environment. We estimated that up to 51 million pounds of excess pollutant loads were discharged during our review period by 44 facilities reviewed, representing loads that could have been minimized.

- EPA and States did not maintain complete and accurate records of NPDES compliance and enforcement activities. Many Region and State files were incomplete, and data in EPA's information systems were incomplete and inaccurate. Further, Regions and States did not report inspection-related violations in EPA's Permit Compliance System. An accurate history of the compliance and enforcement activities at a facility is important for oversight and making future enforcement decisions. The lack of accurate information inhibits EPA's ability to provide effective oversight to NPDES major facilities and thus protect human health and the environment from excess levels of toxic or harmful pollutants.

- We found Regions and States did not always oversee industrial users discharging into wastewater treatment plants without approved programs. EPA was working on developing guidance for overseeing categorical and significant industrial users discharging to plants without approved programs, but had put it off due to other priorities.

- In a review of EPA's oversight and assistance of tribal community water systems, we found internal control deficiencies existed in administering EPA's oversight in some of the Regions we reviewed. To varying degrees, tribal drinking water records were incomplete due to a failure to maintain oversight of system operations and/or poor records management. Internal controls are an important safeguard for ensuring that systems operate as intended. Deficiencies in these controls may indicate that the systems are vulnerable to failure, resulting in increased risk to public health.

Performance Measurement

EPA has been recognized for its efforts to align its budgeting, planning, and accounting systems to track and report on resource use. However, EPA continues to be challenged in measuring the human health and environmental results of its environmental programs. Despite the vast array of data reported and contained in EPA's information systems, the Government Accountability Office (GAO), the States, regulated entities, and EPA have pointed out that the Agency does not have much of the information it needs pertaining to environmental conditions and trends and the potential human health risks of various pollutants. This makes it difficult to evaluate and report on the benefits derived from environmental activities and make optimal decisions about how to invest EPA's resources to maximize environmental results.

Our reviews have shown EPA to have flawed performance measurements for several reasons. These include activity-based rather than performance-based metrics; inadequate performance measures; inaccurate reporting on performance results; and an inability to enforce performance reporting at the State level. For example:

- We evaluated the combined sewer overflow (CSO) enforcement priority area strategy in our 2008 review of OECA's strategic priorities. We found that EPA's primary focus was to ensure that communities representing significant population centers were making appropriate progress towards addressing CSO problems and violations. However, the CSO strategy did not contain long-term or annual outcome performance measures of success. Without outcome measures that contain targets and timeframes, EPA could not gauge whether the pace of progress was satisfactory. It also did not measure the resources EPA expends on this and the other priority areas. The lack of input measures prevents EPA from assessing the cost effectiveness of its programs.

- Our review of EPA's pretreatment program showed it did not have the information systems necessary to effectively measure, analyze, demonstrate, and improve pretreatment program performance. EPA's pretreatment measures have been activity-based to show compliance with program regulations or that compliance mechanisms are in place, rather than noting the impact of the program on the environment.

- Our review of EPA's backlog of NPDES permits found that the backlog measures did not provide an accurate view of the status of the permit program or an adequate measure of environmental results. These measures did not properly compare progress against baselines, and the measures focused on outputs (tasks performed) rather than outcomes (environmental results achieved). Therefore, they were not useful for making management decisions.

- We reported on the Total Maximum Daily Load (TMDL) program and found that TMDL and surface water quality performance measures did not provide clear and complete metrics of the program's accomplishments. Since the TMDL program did not have any outcome measures, we reviewed the two TMDL output measures along with two of EPA's annually reported surface water quality measures that

were broader than, but related to, the TMDL program. All of these measures were unclear, and some were inconsistently reported in EPA's publications.

- Our review of EPA's watershed approach found that EPA did not develop measures to evaluate key programs and activities, including implementation of some core water programs on a watershed basis. Further, while EPA's national outcome measures were relevant, they were not understandable, comparable, and reliable. Without these improvements, the ability of EPA's performance measurement system to convey useful information on EPA's strategy to improve water quality on a watershed basis will be hampered.

- We found that OECA's 2005 publicly-reported Government Performance and Results Act performance measures did not effectively characterize changes in compliance or other outcomes because OECA lacked compliance rates and other reliable outcome data. In the absence of compliance rates, OECA reports proxies for compliance to the public and does not know if compliance is actually going up or down. As a result, OECA did not have all of the data it needed to make management and program decisions.

- Our review of EPA's voluntary programs showed weaknesses in their current data collection and reporting systems – caused by limited, unverified, and anonymous data reporting. These systems are neither transparent nor verifiable, and are limited by anonymous reporting and use of third party industry data. As a result, the reported accomplishments of these voluntary programs may be based on unreliable data.

Conclusion

Mr. Chairman, EPA's ability to effectively manage, oversee, and enforce the environmental laws under its jurisdiction, including the Clean Water Act, has been impeded by several factors including its current organizational structure, how it oversees State delegated authorities, and limitations in performance measurements. On the 37th anniversary of the Clean Water Act, we believe that a recommitment to the protection of the nation's waters can be achieved by an EPA that is strategically aligned to uniformly enforce environmental statutes and provide consistent oversight of its Regions and State delegations. This will require a comprehensive review of EPA's current organization and a commitment to implement best practices. The OIG is ready to assist in this effort. We are continuing to monitor these issues. We are also currently in the midst of establishing a product line that will focus on reviewing EPA's organization and management practices and making recommendations that will help the Agency more effectively accomplish its mission.

Thank you for the opportunity to testify before you today. I would be pleased to answer any questions the Committee may have.

Attachment

Summaries of Selected EPA Office of Inspector General Reports on the Clean Water Act Since 2001

EPA Needs a Cohesive Plan to Clean Up the Great Lakes Areas of Concern	09-P-0231 September 14, 2009

Since 2004, EPA has completed five Legacy Act-funded contaminated sediment clean-ups and remediated approximately 800,000 cubic yards of contaminated sediment. However, EPA is challenged by the overall extent of the contaminated sediment problem in the Great Lakes areas of concern (AOCs). EPA is the designated lead Agency for the clean-ups; however, we found EPA does not have a regime for coordinating remediation activities across its program offices as well as with States, localities, and other stakeholders. While some results have been achieved in cleaning up individual sediment sites, EPA has not developed or implemented a coordinated approach to manage clean-ups.

EPA does not know the full extent of the contaminated sediment problem. Accurate sediment estimates for more than 30 percent of the remediation sites remain unknown. Potential Great Lakes Legacy Act clean-up sites have an estimated federal cost of $2.25 billion. Local partners will have to come up with a total of $1.21 billion in non-federal matching funds before Legacy Act assistance is provided. We estimate that at the current rate of progress, it may take more than 77 years to complete all of these clean-ups. Moreover, remediation will be conducted in the order that individual local governments and stakeholders can afford, rather than with regard to the risks posed to human health or the environment. Without improved management, coordination, and accountability, EPA will not succeed in achieving the results intended for the AOC program.

EPA Needs to Accelerate Adoption of Numeric Nutrient Water Quality Standards	09-P-0223 August 26, 2009

EPA's 1998 National Strategy and Plan to promote State adoption of nutrient water quality standards (which better protect aquatic life and human health) has been ineffective. In 1998, EPA stated that a critical need existed for improved water quality standards, given the number of waters that were impaired from nutrients. In the 11 years since EPA issued its strategy, half the States still had no numeric nutrient standards. States have not been motivated to create these standards because implementing them is costly and often unpopular with various constituencies. EPA has not held the States accountable to committed milestones. The current approach does not assure that States will develop standards that provide adequate protection for downstream waters. Until recently, EPA has not

used its Clean Water Act authority to promulgate water quality standards for States.

EPA cannot rely on the States alone to ensure that numeric nutrient standards are established. EPA should prioritize States/waters significantly impacted by excess nutrients and determine if it should set the standards. EPA also needs to establish effective monitoring and measures so that accurate program progress is reported. This will assist EPA management in program decision-making.

Congressionally Requested Report on Comments Related to Effects of Jurisdictional Uncertainty on Clean Water Act Implementation	09-N-0149 April 30, 2009

During our interviews, while conducting the wetlands enforcement evaluation, the U.S. Environmental Protection Agency (EPA), the U.S. Army Corps of Engineers, and State wetlands staff spoke about a variety of impacts to their programs caused by the Rapanos decision (Rapanos v. United States). This information was not verified or substantiated by Office of Inspector General (OIG). The OIG did not analyze its content or draw any conclusions from this information.

Overall, CWA enforcement activities [for Sections 311 (oil spills), 402 (National Pollutant Discharge Elimination System), and 404] have decreased since the Rapanos ruling. An estimated total of 489 enforcement cases (Sections 311, 402, and 404 combined) have been affected such that formal enforcement was not pursued as a result of jurisdictional uncertainty, case priority was lowered as a result of jurisdictional uncertainty, or lack of jurisdiction was asserted as an affirmative defense to an enforcement action.

EPA Has Initiated Strategic Planning for Priority Enforcement Areas, but Key Elements Still Needed	08-P-0278 September 25, 2008

OECA has instituted a process for strategic planning in its national enforcement priority areas. It has developed strategic planning guidance and a strategy template to facilitate continual review and improvement of the strategies. The Fiscal Years 2008-2010 strategic plans we reviewed, for air toxics, combined sewer overflows, and mineral processing, contain an overall goal, a problem statement, a description of the current status of the priority area, anticipated environmental benefits, the facilities to be addressed, the tools to be used, and OECA Headquarters and regional responsibilities.

However, each of the plans is missing key elements to monitor progress and accomplishments and efficiently utilize Agency resources. All three strategies lack a full range of measures to monitor progress and achievements. Two strategies lack detailed exit plans. Additionally, the combined sewer overflow strategy does not address the States' key roles in attaining the strategy's overall

goal. The absence of these elements hinders OECA from monitoring progress and achieving desired results in a timely and efficient manner.

EPA Needs to Better Report Chesapeake Bay Challenges: A Summary Report	08-P-0199 July 14, 2008

Despite many noteworthy accomplishments by the Chesapeake Bay partners, the Bay remains degraded. This has resulted in continuing threats to aquatic life and human health, and citizens being deprived of the Bay's full economic and recreational benefits. Through its reporting responsibilities, EPA could better advise Congress and the Chesapeake Bay community that (a) the Bay program is significantly short of its goals and (b) partners need to make major changes if goals are to be met. Current efforts will not enable partners to meet their goal of restoring the Bay by 2010. Further, new challenges are emerging. Bay partners need to address:

- uncontrolled land development
- limited implementation of agricultural conservation practices
- limited control over air emissions affecting Bay water quality

EPA does not have the resources, tools, or authorities to fully address all of these challenges. Farm policies, local land development decisions, and individual life styles have huge impacts on the amount of pollution being discharged to the Bay. EPA needs to further engage local governments and watershed organizations in efforts to clean up the Bay.

Despite Progress, EPA Needs to Improve Oversight of Wastewater Upgrades in the Chesapeake Bay Watershed	08-P-0049 January 8, 2008

Chesapeake Bay wastewater treatment facilities risk not meeting the 2010 deadline for nutrient reductions if key facilities are not upgraded in time. In the 7 years since signing the *Chesapeake 2000* agreement, EPA and its State partners have taken a number of steps to lay the foundation for achieving the 2010 wastewater nutrient reduction goals. Water quality standards have been set, nutrient loadings have been allocated, and nutrient limits are beginning to be incorporated into permits. However, States need to finish adding nutrient limits to the permits, and the facilities will need to make significant reductions by 2010. Crucially, these reductions will need to be maintained once achieved. Significant challenges include generating sufficient funding and addressing continuing population growth. EPA needs to better monitor progress to ensure needed upgrades occur on time and loading reductions are achieved and maintained. Otherwise, Bay waters will continue to be impaired.

Total Maximum Daily Load Program Needs Better Data and Measures to Demonstrate Environmental Results	2007-P-00036 September 19, 2007

EPA does not have comprehensive information on the outcomes of the Total Maximum Daily Load (TMDL) program nationwide, nor national data on TMDL implementation activities. Although EPA and States are responsible for implementing point source TMDLs, EPA cannot identify all of the permitted dischargers that should receive or have received wasteload allocations. Measuring nonpoint source TMDL implementation is difficult because it is highly dependent on State and local stakeholders, and EPA does not have statutory authority to regulate nonpoint sources. EPA's lack of information prevents the Agency from determining if TMDL implementation activities are occurring in a timely manner, and the extent to which TMDLs are restoring impaired waters.

EPA measures the pace at which TMDLs are developed and approved. For the last 2 years, EPA and States have exceeded goals for these measures. EPA has begun to take steps to measure program results and improve program data, has sponsored several studies of TMDL implementation, and is studying additional TMDL results measures. Developing meaningful measures of the environmental results of water quality programs is challenging. However, EPA needs to provide more management direction to improve its ability to assess how well this critical program is functioning.

The TMDL and surface water quality performance measures we reviewed do not provide clear and complete metrics of the program's accomplishments. Since the TMDL program did not have any outcome measures, we reviewed the two TMDL output measures along with two of EPA's annually reported surface water quality measures that are broader than, but related to, the TMDL program. All of these measures are unclear, and some are inconsistently reported in EPA's publications.

Development Growth Outpacing Progress in Watershed Efforts to Restore the Chesapeake Bay	2007-P-00031 September 10, 2007

EPA and its Chesapeake Bay watershed partners will not meet load reduction goals for developed lands by 2010 as established in the *Chesapeake 2000* agreement. In fact, new development is increasing nutrient and sediment loads at rates faster than restoration efforts are reducing them. Developed lands contribute less than one-third of the Bay loads but would require about two-thirds of the overall estimated restoration costs. Consequently, EPA and its Bay partners focused on more cost-effective approaches, such as upgrading wastewater facilities and implementing agricultural best practices. Additional challenges impeding progress include:

- Lack of community-level loading caps.
- Shortage of up-to-date information on development patterns.
- Ineffective use of regulatory programs to achieve reductions.

- Limited information and guidance on planning and applying environmentally sensitive development practices.
- Limited funding available for costly practices.

A cost-effective start to reversing the trend of increasing loads from developed land is for communities to concentrate on new development. Opportunities abound for EPA to show greater leadership in identifying practices that result in no-net increases in nutrient and sediment loads from new development and assisting communities in implementing these practices. If communities do not sufficiently address runoff from new development, loads from developed lands will continue to increase rather than diminish.

Federal Facilities in Chesapeake Bay Watershed Generally Comply with Major Clean Water Act Permits	2007-P-00032 September 5, 2007

Overall, EPA and the States are doing well managing how major federal facilities comply with their NPDES permits. In EPA's last reporting period (2004), major federal facilities in the Chesapeake Bay watershed had a lower rate of Significant Noncompliance than other federal and non-federal major-permit facilities nationwide. EPA and States have a variety of formal and informal tools available to enforce federal facility compliance with NPDES permits. These tools included: multimedia, voluntary agreement, and media press release approaches; Notices of Violation; an administrative order; and a Federal Facility Compliance Agreement. Also, EPA developed the Wastewater Integrated Strategy, which seeks to eliminate federal facility Significant Noncompliance with NPDES permit limits. EPA also worked with the Department of Defense to make NPDES permit compliance a higher priority at military installations (eight of the nine federal facilities with major NPDES permits are at military installations). We made no recommendations in this report.

Assessment of EPA's Projected Pollutant Reductions Resulting from Enforcement Actions and Settlements	2007-B-00002 July 24, 2007

The accuracy and reliability of EPA's projected pollutant reductions for Fiscal Years 2003-2006 were dependent on the specific program in which the enforcement action took place. For example, more reliable data were available to project reductions from oil spill and power plant cases than other Clean Water Act (CWA) and Clean Air Act (CAA) cases, respectively. EPA has improved its internal control process for ensuring more accurate pollutant reduction estimates from concluded enforcement cases. The accuracy of estimated reductions from CWA enforcement actions has likely improved as a result of these internal control changes. However, we noted some inconsistencies in the calculation of projected CAA emission reductions. For example, three of the six power plant cases we reviewed did not include estimates for particulate matter reductions, thereby underreporting reductions. Also, different methodologies were used to estimate post-compliance emissions from power plant cases. Further, three of the six

regions we surveyed did not independently review the basis for the projected reductions for some CAA cases as called for by OECA's guidance.

EPA's annual projected reductions were heavily influenced by a few large cases. Less than 1 percent of the CWA cases accounted for 52 percent of the projected pollutant reductions from concluded CWA enforcement actions. Similarly, a few large power plant cases resulted in a marked increase in total estimated CAA-related reductions for Fiscal Years 2004-2005. For example, two power plant cases accounted for over 600 million pounds in reductions, about 78 percent of the Fiscal Year 2004 total.

Facilities were on target to meet the projected reductions for the CAA cases we reviewed. However, it will take years to complete all corrective actions in these cases. Consequently, we could not determine whether they had achieved their total projected reductions. Projected reductions have already been achieved for at least one CWA case, and other CWA cases were making progress toward meeting their projected reductions. EPA's 2006 Annual Report used terms such as "achieved," "reduced," and "actual" to describe emission reductions for that year even though the reductions were often only projected amounts, since it can take years for reductions to occur. OECA agreed to use more precise wording in future reports.

Better Enforcement Oversight Needed for Major Facilities with Water Discharge Permits in Long-Term Significant Noncompliance	2007-P-00023 May 14, 2007

EPA did not provide effective enforcement oversight of major facilities with National Pollutant Discharge Elimination System permits in long-term significant noncompliance. While flexibility is required in a national program, EPA inconsistently applied guidance defining timely formal actions. Also, EPA guidance did not provide meaningful direction on what constitutes "appropriate" actions. Moreover, for 21 of 56 facilities reviewed, EPA and States did not take suitable formal enforcement actions to address all instances of significant noncompliance. At the remaining 35 facilities, none of the actions we could assess were timely based on criteria in EPA's Enforcement Management System.

EPA and States also did not maintain complete and accurate records of National Pollutant Discharge Elimination System compliance and enforcement activities. Many region and State files were incomplete, and data in EPA's information systems were incomplete and inaccurate. Further, regions and States did not report inspection-related violations in EPA's Permit Compliance System. We also noted that bacteria exceedances are not required to be reported as significant noncompliances.

Timely actions could help minimize the millions of pounds of excess pollutants released by these facilities. We estimate that up to 51 million pounds of excess pollutant loads were discharged from July 2002 through June 2005 by 44 facilities reviewed, representing loads that could be minimized.

EPA Relying on Clean Air Act Regulations to Reduce Atmospheric Deposition to the Chesapeake Bay and Its Watershed	2007-P-00009 February 28, 2007

CBPO is relying on anticipated nitrogen deposition reductions from Clean Air Act regulations already issued by EPA, combined with anticipated reductions from other non-air sources, to meet water quality goals for the Bay watershed. EPA believes these activities will provide sufficient nitrogen deposition reduction to enable the Bay to meet its overall nitrogen cap load, assuming non-air activities achieve planned reductions. EPA estimates that Clean Air Act regulations already issued will reduce nitrogen that falls directly into the Bay, as well as nitrogen deposited to the Bay watershed, by 19.6 million pounds annually by 2010. Even greater reductions should occur as States undertake additional measures in the next few years to meet the ozone and fine particulate matter standards. State and EPA strategies do not include additional air reduction activities specifically designed to clean up the Bay, although many State activities should have the co-benefit of reducing nitrogen deposition in the Bay.

If additional reductions in air emissions are needed to clean up the Bay, one potentially significant source of deposition not currently controlled is ammonia emissions from animal feeding operations. The magnitude of these emissions to nitrogen deposition in the Bay is uncertain. Ammonia emissions monitoring of animal feeding operations, expected to begin in the spring or early summer of 2008, should provide data to help EPA better determine the amount of such emissions from farming operations.

Saving the Chesapeake Bay Watershed Requires Better Coordination of Environmental and Agricultural Resources	2007-P-00004 November 20, 2006

State-level partners have committed the agricultural community to making nutrient reductions, but numerous practices abound and are generally performed on a voluntary basis. Few of the agricultural practices in the tributary strategies have been implemented because the agricultural community considers many of these practices as either being unprofitable or requiring significant changes in farming techniques. Although the State-level partners have provided substantial funding to implement these practices, one of the key State partners acknowledged substantial additional funding is still needed. At the federal level, applications for USDA's technical and financial assistance programs went unfunded, making it difficult to expand incentives for Bay area agricultural producers.

EPA must improve its coordination and collaboration with its Bay partners and the agricultural community to better reduce nutrients and sediment entering the Chesapeake Bay watershed. However, members of the agricultural community have been reluctant to participate with EPA because of EPA's regulatory enforcement role. USDA, a Bay partner at the federal level, could significantly

assist EPA in implementing the needed conservation practices within the agricultural community, given its many conservation programs, extensive field organization, and long experience working with the agricultural community. However, USDA has not coordinated a Department-wide strategy or policy to address its commitment as a Bay partner.

EPA Grants Supported Restoring the Chesapeake Bay	2006-P-00032 September 6, 2006

EPA awarded assistance agreements (grants) that contributed toward meeting the goals of the Clean Water Act and the *Chesapeake 2000* agreement. These grants funded activities designed primarily to: reduce the nutrients and sediment entering the Bay and its tributaries, monitor ongoing efforts to restore Bay water quality, and model (estimate) the results of Bay implementation strategies. In Fiscal Years 2003, 2004, and 2005, Congress appropriated $23 million each year for EPA's Chesapeake Bay Program. In each of those years, EPA awarded about $8 million for State implementation grants and $7 million for technical and other grants for specific projects. EPA used the remaining $8 million to fund EPA personnel and office management, interagency agreements, and congressional earmarks. The efforts contributed to EPA's overall Bay restoration program. This report did not contain recommendations.

Sustained Commitment Needed to Further Advance Watershed Approach	2005-P-00025 September 21, 2005

If EPA is committed to the watershed approach, it needs to make improvements in four key elements:

- Integrating watershed activities into its core water programs.
- Addressing stakeholder concerns to increase their participation.
- Refining and improving key aspects of its strategic planning process.
- Improving the watershed performance measurement system.

Although progress has been made in each of the four critical elements that we reviewed, further improvements are needed for each. EPA has made progress integrating watershed approach principles into some of its core water programs, but needs to address challenges to ensure further success. Stakeholders were enthusiastic about the watershed approach, but identified a number of obstacles when adopting the approach. EPA has made important strides incorporating the watershed approach into its strategic plans, but it must improve some key steps. Although EPA developed a performance measurement system for improving water quality on a watershed basis, EPA did not develop measures to evaluate key programs and activities, and its national outcome measures were not understandable, comparable, and reliable.

Efforts to Manage Backlog of Water Discharge Permits Need to Be Accompanied by Greater Program Integration	2005-P-00018 June 13, 2005

EPA and the States have had varying success in eliminating the backlog of NPDES permits requiring renewal, and more still needs to be done. The NPDES permit program is only one of many EPA programs to improve surface water quality. EPA needs to integrate its efforts to eliminate the NPDES backlog with the other programs to improve and maintain water quality based on Clean Water Act requirements.

To eliminate the NPDES permits backlog, EPA needs to address challenges involving resource constraints, increasing workload, complex permitting issues, external sources of permitting delays, and oversight limitations. EPA is now managing the NPDES permit program through the "Permitting for Environmental Results" Strategy that increases focus on environmental outcomes.

Congressionally Requested Review of EPA Region 3's Oversight of State National Pollutant Discharge Elimination System Permit Programs	2005-S-00002 October 29, 2004

The review answers five specific questions:

1. What are the statutory and regulatory requirements that EPA must follow for conducting oversight of State NPDES programs? The oversight requirements in the law are limited, but requirements are in the regulations.

2. How many major and minor NPDES permitted sources are in Region 3 States? Of the 7,499 traditional NPDES permitted sources in the Region, 750 are major sources and 6,749 are minor sources with individual permits.

3. How many inspections and enforcement actions were taken? According to the information in the Permit Compliance System, from October 1, 2002, to August 9, 2004, Region 3 and States inspected 3,729 permittees and took 205 enforcement actions. However, States do not report all of their actions in the system.

4. What are Region 3's procedures for ensuring that States comply with grant work plans? EPA Order 5700.6, entitled Policy on Compliance, Review and Monitoring, is the official policy that the Regions should follow to ensure grant recipients are complying with grant work plans. In Region 3, multiple people within the Water Division manage the grants. The project officers rely on technical staff in the Division to obtain some of the reports States should submit and inform them if they are having problems with a State. The Region also conducts joint evaluations with States regarding the grant work plan.

5. What are Region 3's procedures for ensuring that States are monitoring permits and taking timely enforcement actions? Region 3 uses various tools for overseeing States, including (a) reviewing information in the Permit Compliance System, (b) making quarterly calls with States, (c) carrying out Federal inspections and enforcement actions, and (d) reviewing State programs.

Congressional Request Regarding EPA Clean Water Enforcement Actions	2005-S-00001 October 18, 2004

According to respondents from the 10 EPA regions, wet weather enforcement cases require more resources to complete than traditional National Pollutant Discharge Elimination System (NPDES) enforcement actions. Further, 8 of the 10 regions said that conducting enforcement actions against combined sewer overflows/sanitary sewer overflows requires more resources than other types of wet weather actions.

Evidence suggests that EPA has shifted NPDES compliance and enforcement staff from traditional NPDES program activities to work on wet weather issues. All five of the EPA regions that provided information from Fiscal Year (FY) 1999 through 2003 delineating traditional and wet weather resources indicated that they have shifted resources to address wet weather violations of the Clean Water Act.

EPA Needs to Reinforce Its National Pretreatment Program	2004-P-00030 September 28, 2004

The reductions in industrial waste discharges to the nation's sewer systems that characterized the early years of the pretreatment program have not endured, according to EPA published data compiled from information provided by industrial facilities. Since the middle of the 1990s, there has been little change in the volume of a broad list of toxic pollutants transferred to POTWs or in the index of risk associated with these pollutants. As a result, the performance of EPA's pretreatment program, which is responsible for controlling these discharges, is threatened and progress toward achieving the Congress' Clean Water Act goal of eliminating toxic discharges that can harm water quality has stalled. The curtailing of the early gains may be explained in part by two factors: (1) dischargers that developed systems in response to EPA's initial program requirements have not enhanced their pretreatment systems in recent years, and (2) the rate at which EPA has been issuing effluent guidelines dramatically declined since 1990.

Without more visible leadership from Headquarters, improved programmatic information, and the adoption of results-based performance measures, EPA's pretreatment program is at risk of losing the gains it made in its early years. The leveling off of those early gains, coinciding with EPA's diminishing program emphasis, paints a picture of a program at risk. Headquarters has delayed finalizing guides and regulations intended to update the pretreatment program by not allocating sufficient resources or requesting budget increases for additional

pretreatment resources. Additionally, results-based performance measures on pretreatment program activities have not been developed partially due to the lack of adequate, accessible data. As a result, POTWs' pretreatment programs may not be as effective in protecting environmental quality or worker health and safety as they could be, and EPA cannot assess the effectiveness of its pretreatment program.

Effectiveness of Effluent Guidelines Program for Reducing Pollutant Discharges Uncertain	2004-P-00025 August 24, 2004

Regarding effectiveness, the impact of effluent guidelines remains uncertain. Although effluent guidelines were used in the National Pollutant Discharge Elimination System (NPDES) permits we analyzed, pollutant discharge data were not readily available to determine whether effluent guidelines reduced pollutant discharges. We found a lag in issuing NPDES permits that utilized the revised effluent guidelines. Once reissued, permit limits were derived from the revised guidelines to a very large extent. We also found that adequate information was widely absent, although revised guideline-derived permit limits had an impact on the limited number of facilities with adequate information. Due to a lack of pollutant discharge data, we could not determine the extent of environmental benefits brought about by EPA's investment in the effluent guidelines program.

Further, EPA does not measure the effectiveness of either the effluent guidelines program or individual effluent guidelines. Consequently, EPA does not have sufficient evidence to show that this program has actually produced reductions. Although our work showed significant reductions in a few facilities, EPA has not systematically collected data to evaluate this program as a whole. Therefore, EPA cannot support a statement made in its recent Annual Report that industrial discharges of pollutants have been reduced by billions of pounds as a result of effluent guidelines. The effluent guidelines program has a marked insufficiency of information to make managerial decisions because EPA has not developed a systematic way of collecting such information.

EPA Should Take Further Steps to Address Funding Shortfalls and Time Slippages in Permit Compliance System Modernization Effort	2003-M-00014 May 20, 2003

Without a modernized Permit Compliance System (PCS), EPA's Office of Water cannot effectively manage its Clean Water NPDES program. Having a modernized system is vital for EPA to effectively manage NPDES permitting and enforcement under current requirements. The current system is incomplete, obsolete, and difficult to use. The glaring weaknesses in the current PCS system have created a presumption in EPA that it will be modernized. We agree with EPA's view of the importance of this project, and believe delaying the project's rollout or reducing its functionality will hamper EPA's ability to achieve its goal of managing pollution sources on a watershed basis. The growth, variety, and

complexity of the regulated community have greatly outstripped the system's capabilities.

However, costs are dramatically escalating, and timeframes repeatedly pushed back, in part due to the failure to adequately plan, prepare, and manage the work. The critical role of the modernized PCS system does not make project management unimportant. On the contrary, management risks may be greater when a project is perceived as being vital. For this reason, it is imperative that EPA immediately conduct necessary analyses and develop realistic estimates of funding and schedules in order to place this project on a secure footing.

Wastewater Management: Controlling and Abating Combined Sewer Overflows	2002-P-00012 August 26, 2002

Combined Sewer Overflows (CSOs) are the total discharges into water bodies of untreated domestic, commercial, and industrial waste and wastewater, as well as storm water runoff, from a Combined Sewer System. Such a system collects and transports both sanitary sewage and storm water runoff in a single-pipe system to a wastewater treatment facility. Overflows can impair water quality and adversely affect the health of humans, animals, and aquatic organisms, as well as cause beach closings and fishing and recreational restrictions. The Environmental Protection Agency (EPA) issued a CSO Policy in 1994, and states and communities have implemented CSO programs with varying success. Since 1978, the number of CSO permittees has been reduced from approximately 1,300 to 859. Some states have given the CSO program a higher priority than others.

An estimated $44.7 billion is needed nationwide for CSO abatement efforts, and raising sufficient funding for often expensive projects is obviously a significant barrier for many communities. The Clean Water State Revolving Fund is a major funding mechanism, but even its vast resources cannot meet the demand. Another key barrier that we noted is finding suitable sites for needed facilities.

Despite the barriers noted, states and communities demonstrated numerous promising practices that could be employed in the CSO programs of others to improve operations, reduce costs, and eliminate some of the aforementioned barriers. These promising practices included a variety of technical approaches and innovations, state grant programs, government cooperative efforts, public education initiatives, and neighborhood improvements. However, there is a need for a central mechanism within EPA to disseminate this information.

Land Application of Biosolids	2002-S-000004 March 28, 2002

Sewage sludge is the solid, semi-solid, or liquid by-product generated during the treatment of wastewater at sewage treatment plants. According to the U.S. Environmental Protection Agency (EPA), over half the sludge produced each year is "used beneficially," primarily on agricultural land. The treated sewage sludge

used in land application is called "biosolids" by EPA and the industry. Land application of biosolids is a controversial issue. Concerns have been expressed about potentially adverse impacts of biosolids on human health and the environment as well as quality of life for nearby residents. However, EPA has taken the position that the biosolids program is low-risk and low-priority.

In March 2001, the National Whistleblower Center submitted a series of allegations to the EPA Office of the Inspector General (OIG) concerning EPA's conduct in regard to regulating biosolids. The allegations by the Center were based largely on issues raised by an EPA research scientist. In addition, a previous OIG audit on biosolids, issued in March 2000, found inadequacies in EPA's management and enforcement of the biosolids program. For these reasons, we are providing a status report on land application of biosolids.

The Clean Water Act gives EPA authority to delegate the biosolids program to States, but little progress has been made thus far. Only five States have received formal delegation from EPA for the biosolids program. Given EPA's lack of resources devoted to the Federal program, EPA cannot be certain that all citizens in non-delegated States are provided at least the same level of protection as in the Federal program.

Water Enforcement: State Enforcement of Clean Water Act Dischargers Can Be More Effective	2001-P-00013 August 14, 2001

We believe that state enforcement programs could be much more effective in deterring noncompliance with discharge permits and, ultimately, improving the quality of the nation's water. EPA and the states have been successful in reducing point source pollution since the Clean Water Act passed in 1972. However, despite tremendous progress, nearly 40 percent of the nation's assessed waters are not meeting the standards states have set for them.

The state enforcement strategies we evaluated needed to be modified to better address environmental risks, including contaminated runoff. Contaminated runoff, including agricultural and urban runoff, was widely accepted as causing the majority of the nation's remaining water quality problems. Although many sources of contaminated runoff were regulated, some were not.

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House Transportation and Infrastructure Committee

The Clean Water Act after 37 Years: Recommitting to the Protection of the Nation's Waters

Testimony of Tom Porta, ASIWPCA President
October 15, 2009

Good Morning Mr. Chairman and Members of the Committee.

My name is Tom Porta and I am the Deputy Administrator for the Nevada Division of Environmental Protection (NDEP) and current president of the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA). I have been working in State environmental quality programs for more than 25 years.

The members of the Association appreciate the opportunity to provide testimony before you today regarding States' administration of the Clean Water Act, particularly in the arenas of discharge permitting, compliance, and enforcement. As you heard from Mr. Brown, representing the Environmental Council of the States (ECOS), States and Interstates now do the lion's share of the work in protecting and improving the quality of our nation's waters.

Our message to you today is that States are doing a good job enforcing the provisions of the Clean Water Act and should be commended given the many constraints they work under.

Recent headlines and news stories have highlighted potential Clean Water Act violations that have gone unchecked or unreported. While these situations warrant further investigation, they represent a small part of the compliance picture. It's important to consider other factors including the total number of parameters permit holders are required to meet and report. In the short time we had to prepare for this hearing, we evaluated enforcement data from a sample of States in ASIWPCA leadership positions. Additionally, we looked at effluent limit violations versus reporting type violations. For example:

Over the last four years Utah found that of 116 permitted facilities, which include both major and minor permitees:

- 99.3% of the water quality requirements and 95.4% of the reporting requirements were achieved.
- These percentages were based on 236,976 potential points of effluent violation and 11,136 potential points of reporting violation.

In North Carolina for calendar year 2007 there were 1284 permitted facilities. Of the:

- 1,168,510 water quality requirements for limited parameters that applied, there were 4,414 limited effluent violations (a 0.4% non-compliance rate) -- 99.6% of the water quality requirements were met.
- 372,378 required monitoring results, 19,608 were in violation (5.3%) – 94.7% of monitoring results were in compliance.

In Delaware, for calendar year 2008:

- The 53 companies and communities with permits to discharge had approximately 90,000 opportunities to violate permit limits.
- There were 233 violations - that is a compliance rate of 99.74%.

In Illinois, on a quarterly basis, the percent of major dischargers without significant non-compliance violations is typically around 95%:

- In 1998, 2003, and 2008 there were 8484, 8772, and 11,752 NPDES permitted facilities, respectively, in Illinois.
- 95 percent of all violations were resolved by State enforcement protocols and without the need for further formal enforcement.

North Carolina has a total of 1296 municipal and industrial NPDES facilities (31 of which are under special orders by consent with schedules/stipulated penalties).

North Carolina Division of Water Quality Statistics	Total 2004-2007	Average/year
Compliance Assistance Inspections	194	48
# Notices of Violation – NOVs (did not rise to level of penalty)	2,217	554
# Facilities Assessed	2,340	585
Penalties Assessed	$3,075,401	$768,850
▪ # Penalties Associated with Flow	207	52
▪ # Penalties Associated with Paperwork	152	38
Moratoriums (no new sewer extensions allowed)	136	34
Operator Disciplinary Actions	33	8

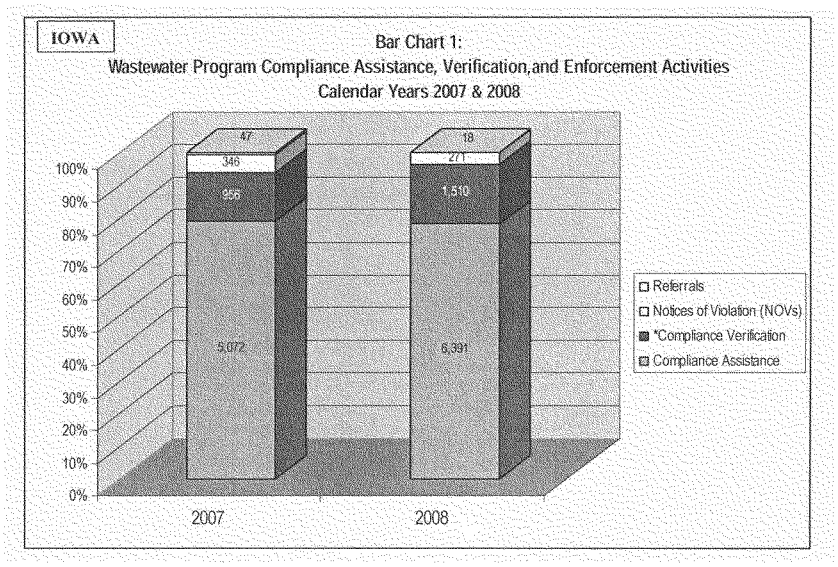
Over the 2004-2007 period, where penalties were assessed in North Carolina there were:

- NPDES facilities with only 1 month in violation: 70.5%
- NPDES facilities with 2-3 months in violation: 22.75%
- NPDES facilities with greater than 3 months in violation: 6.7%

Over the 2004-2007 period, where penalties were not assessed, but NOVs were sent there were:

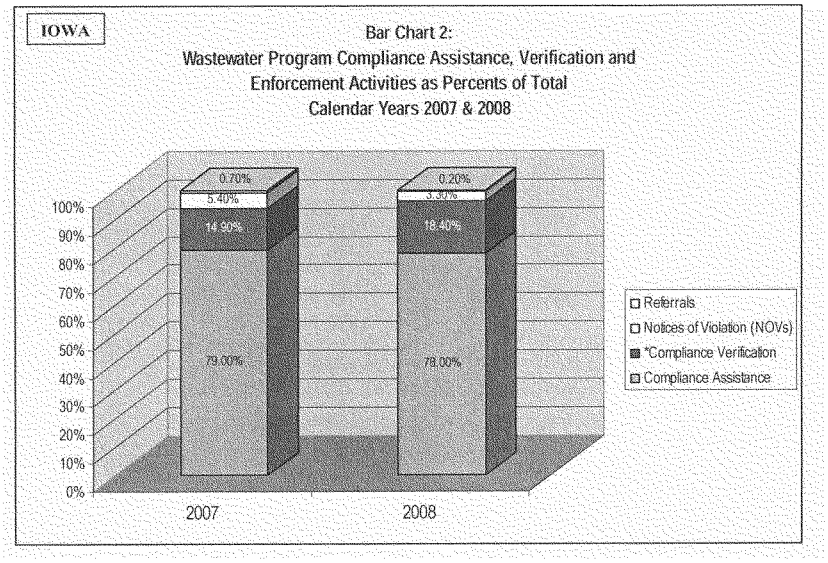
- NPDES facilities with only 1 month in violation: 85%
- NPDES facilities with 2-3 months in violation: 14%
- NPDES facilities with greater than 3 months in violation: 0.9%

For Iowa, the following information illustrates compliance and enforcement efforts in the wastewater program during calendar years 2007 and 2008.



Data Table, Bar Chart 1: Wastewater Program Compliance Assistance, Verification And Enforcement Activities, Calendar Years 2007 & 2008

	2007	2008
Compliance Assistance	5,072	6,391
***Compliance Verification** (e.g., inspections, visits, meetings and compliance reviews)	956	1,510
Notices of Violation (NOVs)	346	271
Referrals	47	18
Total	**6,421**	**8,190**



Data Table, Bar Chart 2: Wastewater Program Compliance Assistance, Verification and Enforcement Activities as Percents of Total, Calendar Years 2007 & 2008

	2007	2008
Compliance Assistance	79.0%	78.0%
***Compliance Verification** (e.g., inspections, visits, meetings and compliance reviews)	14.9%	18.4%
Notices of Violation (NOVs)	5.4%	3.3%
Referrals	0.7%	0.2%
Total	**100.0%**	**100.0%**

In my State of Nevada, the compliance rates for both effluent and reporting were over 99% for the recent 4 year period.

The information I just provided is only a sampling of a few States, but I believe it is representative of most State enforcement and compliance programs. That is not to say that all aspects of State compliance and enforcement programs are perfect. As with any environmental program, improvements can always be made.

Administrator Jackson has announced her intent to improve upon the Clean Water Act enforcement and compliance programs. ASIWPCA agrees that improvements should be made and we have offered to work closely with USEPA as co-regulators to make this initiative work, with the caveat that the results must be reasonable and add value to our enforcement and compliance programs. To provide some context for the challenges States and USEPA face:

- 53% of impaired waters are caused by nonpoint sources
- 5% of impaired waters are caused by point sources
- 42% of impaired waters are caused by a combination of point and nonpoint sources

So what should be done to enhance States' efforts and provide for effective State enforcement and compliance programs? We believe there are five elements to an effective enforcement/compliance program and they include the following:

First: Identify problems before they become violations through technical and compliance assistance.

USEPA must rethink the value placed on compliance assistance as the current oversight framework is primarily focused on enforcement. Enforcement is necessary and has its place but it is not the sole measure of success for the water programs. For example:

- In Iowa in 2007 and 2008 over 95% of violations were resolved by compliance assistance.
- In Maine over the last five years 92% of the violations at public facilities and 77% at industrial facilities were resolved by compliance and technical assistance.

Second: Focus on water quality violations, not paperwork or reporting glitches.

Paint an accurate picture of compliance and enforcement by redefining what truly is "significant noncompliance." The current definition is too broad and includes paperwork and reporting delays that do not impact water quality. Separating out these types of violations would show a true depiction of violations that impact water quality.

For example, the State of Utah has evaluated all of its data from the last 4 years that triggers the current definition of "significant noncompliance." Only 3.2% of the identified 2,200 violations were significant water quality violations.

Third: When appropriate, resolve violations quickly through non-formal enforcement actions.

A wide variety of administrative tools exist, from warning letters to consent decrees. These approaches often result in prompt compliance and more effectively use staff resources.

Fourth: Take formal enforcement actions when necessary and when compliance assistance and non-formal enforcement actions have failed.

The authority to issue formal actions and assess penalties is provided in Federal and State statutes and regulations; but discretion in using these powers is the true measure of governance. Formal enforcement action should be reserved for cases involving illicit discharges or recalcitrant behavior.

The attachment describes the menu of compliance and enforcement actions commonly used in the State NPDES programs.

Fifth: Track enforcement and compliance through reasonable data systems.

We can achieve greater levels of information accuracy and transparency with the use of electronic reporting and strategic data integration across the States. This would be a significant benefit to the

States and USEPA given the ever increasing number of new sources. However, disincentives prevent full participation by the regulated community. As an example, the requirements for authenticating signatures for an electronic filing are so onerous, that it is easier for permitees to submit their information by regular mail.

The public should be able to easily obtain this information through a simple, accurate, and accessible centralized location. Please note, enforcement information has always been available to the public through State records and databases, but the data has rarely been complete or accurate through Federal data systems.

I have provided you with a few examples of problem areas in the Clean Water Act enforcement program and concrete ideas for addressing these issues. In closing, ASIWPCA and its members look forward to working closely with Administrator Jackson, her staff, this Committee and Congress to develop reasonable and sustainable measures to improve upon the success of our compliance and enforcement programs.

Thank you, that concludes my testimony and I'd be happy to answer any questions you may have.

ATTACHMENT:

Summary of ASIWPCA Recommendations for National Compliance and Enforcement Program Enhancements

Data Systems and Reporting: Put into place adequate, cohesive and transparent data management systems that have accurate and complete information on activities in the States. It is imperative that States and USEPA work collaboratively to improve that reporting infrastructure. It should focus on the truly important information that is within available resources. Data entry and reporting should be simplified, with improved query functions to make data systems more useful and user friendly.

Roles and Responsibilities: Review and revisit traditional USEPA/State roles and responsibilities to ensure:

1. National expectations are clearly articulated and communicated.
2. More frequent and regular communication occurs between the State/USEPA program mangers.
3. Resource limitations are better understood and considered.
4. Formal enforcement activities are viewed as one of several tools designed to encourage compliance.
5. State and USEPA efforts are not duplicative or redundant.
6. State data system resource investments are leveraged to the benefit of water quality.
7. Performance measures are closely tied to environmental outcomes.
8. State Program oversight promotes a level playing field while being both fair and representative.

Collaboration: OECA should re-establish the State/USEPA Workgroup to discuss the appropriate data States should collect to manage their programs, along with identifying the minimum information needed by USEPA for oversight.

OECA Headquarters and Regions should continue to consult with each State to determine the extent to which national priorities coordinate with State environmental priorities. The national program guidance should provide enough flexibility that Regions and States can adjust accordingly. OECA should support timely State enforcement actions and compliance assistance.

Significant Non Compliance (SNC): We encourage USEPA to better define SNC such that it truly relates to "significant" violations that directly and materially impact water quality.

Water Policy: The USEPA should take a more proactive role regarding:

- Restructuring the stormwater program to better achieve environmental results.
- Discussing and collaborating on enforcement tools/options that address non-point source pollution, including participation in the joint State/USEPA strategy on nutrients.
- Filling the gaps in the CAFO strategy related to universe identification and adequate manure management, while providing compliance assistance
- Developing compliance assistance programs for other "new" universes of permitees

Air Deposition: USEPA should place a high priority on air emissions that result in impairments due to atmospheric deposition, initially focusing on mercury and nitrogen which are know to be significant sources to regional waters.

Priority Watersheds: USEPA should assist States with compliance and enforcement efforts in State and regionally designated priority watersheds. These watersheds may be impaired or simply require enforcement/compliance assistance efforts to maintain beneficial uses.

Funding: USEPA, States, Congress and other stakeholders should work together to enhance the funding for the core State Clean Water Programs related to standards setting, monitoring, assessment TMDL development and implementation, watershed protection, NPDES permitting, compliance and enforcement, data systems and infrastructure financing. Approximately 37% of annual State water quality program expenditures are for permitting, compliance and enforcement ($300 Million). Currently, the annual funding gap is over:

- $800 Million for core State Clean Water Programs
- $12 billion over the next 20 years for infrastructure.

State NPDES Compliance and Enforcement Program Attributes:

Compliance assistance, education and outreach – e.g. to small and mid size communities and businesses.

Compliance inspections (e.g. diagnostic or compliance)
- Major sources
- Minor sources
- POTW pretreatment programs
  - Indirect sources discharging to POTWs
- Combined sewer overflows and sanitary sewer overflows
- CAFOs
- Stormwater Dischargers
- Biosolids management
- Vessels
- Pesticide application

Surveillance and action regarding illegal non-permitted discharges

Wastewater system operator certification requirements
- Wastewater operator training programs including continuing requirements education every year
- Operator disciplinary actions

Whole effluent toxicity program (for all majors or those with toxic potential)

Review of and action on permitee discharge monitoring reports (DMRs)

Wastewater System performance audits

Required "modified" pretreatment programs for facilities with a significant industrial user

Issuance of notices of violation

Administrative penalties
- Including fast track penalties – assessed monthly, based on monthly DMRs

Sewer moratoriums, i.e., no new extensions allowed

- Hydraulic capacity management, with mandated planning/expansion if treatment capacity reaches critical flow limits

Laboratory certification required for all facilities monitoring effluent quality.
- Annual labs inspection

Complaint Investigation

Emergency response actions

Formal Violation Responses
- Initial
- Follow-up meetings, etc.
- Administrative orders and penalties

Formal referral by State Water Quality Program to appropriate entity for civil and criminal litigation
- Post-referral follow-up to implement court decisions or consent decree

Overview of the Current and Projected NPDES Universe

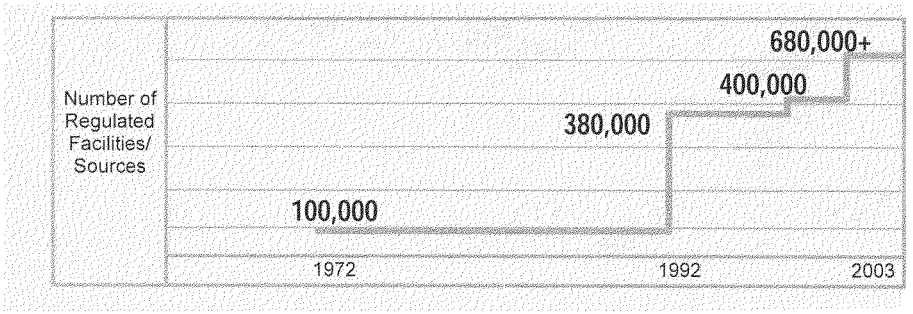
Estimates as of 5/17/2004

	Type of Facility	Approximate Number of Facilities
Major	• Individual Permits • POTWs • Non-municipals	6,700 (4,200) (2,500)
Minor	• Individual Permits • POTWs • Non-municipals	42,000 (12,000) (30,000)
Minor	• Covered by General Permits • Non-Storm Water • POTWs and Industrial Facilities	52,000

Type of Facility	Approximate Number of Facilities
Storm water: Phase I MS4s	270
Storm water: Phase II MS4s	5,000
Storm water: Phase I Industrial	90,000 est.
Storm water: Phase II Industrial	80,000 est.
Storm water: Phase I Construction	190,000 est. per year
Storm water: Phase II Construction	200,000 est. per year
Sludge-Only Facilities	6,000 est.

DATA Provided by USEPA

Growth of the NPDES Program
(Number of Facilities or Sources)



New Program Areas

- Storm Water Phase II Implementation
- CAFO Program Implementation
- CAAP Program Implementation
- Cooling Water Intake Structures - CWA §316(b)
- Pesticide Application
- Vessels

DATA Provided by USEPA

Committee on Transportation & Infrastructure
"The Clean Water Act after 37 Years: Recommitting to the Protection of the Nation's Waters"
October 15, 2009

Testimony of

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Good morning. My name is John Rumpler, and I am Senior Attorney for Environment America – a federation of state-based, citizen supported environmental advocacy organizations in 27 states. In that capacity, I coordinate the organization's extensive work to protect our nation's waters – from Puget Sound to the Great Lakes to the Chesapeake Bay.

This morning, I want to share with you the results of Environment America's research on clean water enforcement and offer some policy solutions.

But first, let's remember why we are here. We are here because, as Americans, we care deeply about clean water. Clean water is fundamental to our health and quality of life. Our rivers, lakes, streams, and bays are at the heart of America's natural heritage. These are the beaches where our children play, the places where ospreys and eagles make their homes, and the waters we draw upon to drink.

And that is why Congress passed the Clean Water Act in 1972 – to ensure that these waters would be "fishable and swimmable" for generations to come. In fact, the Act set a goal of ending all direct discharges of pollution.

Thirty-seven years later, direct discharges of pollution still pose significant threats to our waterways. In 2007, Environment America set out to determine the extent to which facilities were dumping pollution into the nation's waters in excess of their permit limits – limits that are supposed to ensure clean water.

After analyzing NPDES compliance data for 2005 obtained from U.S. EPA, we published our findings in a report called *Troubled Waters*.[1] We found that instances where pollution exceeded clean water standards were

- **Widespread**: Fifty-seven percent of all major U.S. industrial and municipal facilities discharged more pollution into U.S. waterways than allowed by law at least once.
- **Numerous:** These 3600 major facilities reported more than 24,400 instances of releasing pollution to our waters in excess of their permit limits.
- **Severe:** The average facility exceeding its pollution permit limit did so by 263 percent, discharging close to four times the legal limit.
- **Chronic:** Nationally, 628 major facilities exceeded their Clean Water Act permits for at least half of the monthly reporting periods between January 1, 2005 and December 31, 2005.

Moreover, the pollutants involved in these unlawful discharges pose serious threats to our waters and our health. They include chemicals like chlorine, heavy metals such as copper, mercury, and lead that are toxic to people and wildlife, and yes, raw sewage.

With so many facilities dumping so much pollution, no one should be surprised that nearly half of our rivers and streams are unsafe for swimming and fishing.[2]

Unfortunately, these numbers are just the tip of the polluted iceberg. We did not count any "paper" or reporting violations, even though some of them could mask unlawful pollution. And we only looked at major facilities, not the tens of thousands of minor facilities that also pollute our waters.

Fortunately, there are concrete steps that Congress, U.S. EPA, and the states can take to move us from pervasive non-compliance and pollution to clean rivers, lakes, and streams.

First, we need tougher enforcement policies. Chronic and severe permit violations indicate a lack of credible deterrence. We need enforcement agencies to consistently issue penalties that remove the economic benefit of exceeding pollution discharge limits. We also must ensure that NPDES permits are sufficiently strong to ensure clean water: that means placing strict numeric limits on all pollutants, and regularly ratcheting those limits down as intended in the Clean Water Act. Finally, permit fees should be assessed to ensure that EPA and the states have adequate resources for enforcement and permitting.

Second, we need to dedicate the resources that clean water demands. Environment America commends Congress and the Obama administration in dedicating $4 billion to the Clean Water State Revolving Fund in the economic stimulus package. But with EPA estimating a $388 billion shortfall in water infrastructure, it will take a sustained public investment to end sewage overflows.

Third, we must ensure that the Clean Water Act once again applies to all of our waterways. While the challenge of clean water enforcement goes far beyond issues of jurisdiction, we cannot allow polluters on thousands of small streams to become exempt from the very limits we have been discussing today. And this is one clean water issue that this Committee can solve quickly. We hope that you will.

In closing, I can find no more eloquent words than yours, Chairman Oberstar, when we originally released these *Troubled Waters* findings two years ago: "We are at a turning point in history, and our responsibility to this generation and our legacy to future generations is to advance the cause of protecting the most precious of natural resources – clean water."

We couldn't agree more. And we urge Congress, EPA, and the states to seize this moment and vigorously enforce the Clean Water Act.

Thank you for your consideration.

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[1] Troubled Waters: An Analysis of 2005 Clean Water Act Compliance (October 2007). Available at http://www.environmentamerica.org/home/reports/report-archives/our-rivers-lakes-and-streams/our-rivers-lakes-and-streams/troubled-waters-an-analysis-of-2005-clean-water-act-compliance

[2] See U.S. Environmental Protection Agency, *Watershed Assessment, Tracking and Environmental Results: National Summary of State Information*, downloaded from iaspub.epa.gov/waters10/attains_nation_cy.control, 16 September 2009.

Testimony of Eric Schaeffer

Director, Environmental Integrity Project

Before the House Committee on Transportation and Infrastructure

October 15, 2009

Thank you, Madame Chairman and Members of the Subcommittee, for giving me the opportunity to testify at today's hearing on, "The Clean Water Act After Thirty Seven Years." My name is Eric Schaeffer, and I am director of the Environmental Integrity Project, a nonpartisan organization that advocates for improved enforcement of federal environmental laws. In my previous capacity, I served as Director of the USEPA's Office of Civil Enforcement from 1997 to 2002.

Recent articles in the New York Times charge that we have fallen short in enforcing the laws that are supposed to make our waters safe for fishing, drinking and swimming, and clean enough to support aquatic life. While I may quibble with some of the details, I believe the Times basically got the story right, and hope the attention will give us the momentum to fix problems that both EPA and states have been struggling with for decades. I offer the following thoughts for your consideration:

- State agencies bear most of the responsibility for writing and enforcing Clean Water Act permits under grants of authority from EPA. The Agency needs to step up oversight of state programs, to level the playing field and make sure all citizens have access to clean water, no matter where they live.

- But states cannot run complex federal programs without money. The Clean Air Act already requires that state air permit and enforcement programs be financed through permit fees; Congress should consider requiring a similar fee system to fund state Clean Water Act programs.
- Compliance data ought to be transparent and easy for the public to obtain and understand.
- Nearly forty years after becoming law, the Clean Water Act still has gaping loopholes that allow some of the biggest polluters to treat public waterways as though they were private sewers. Those loopholes need to be closed.
- Polluters need to pay penalties that are predictable and high enough to make violating the law more expensive than compliance.

Level the Playing Field: More Effective Oversight of States

The Clean Water Act, like most environmental statutes, strikes an uneasy balance between the federal government and states. In general, the USEPA sets minimum treatment standards for large "point sources" of water pollution, while states write permits and handle most day to day enforcement under grants of authority from EPA. But the Clean Water Act authorizes EPA to review state programs to make sure they meet federal requirements, to object to badly written permits, and to withdraw a state's authority where its performance falls too far short. In addition, EPA always reserves the power to enforce permit limits where states fail to do so.

While these checks and balances were supposed to level the playing field, the New York Times series reminds us that the reality can be quite different. Most state

agencies are chronically underfunded, some face political interference from well connected polluters, and others simply resent the federal government looking over their shoulders. EPA has been reluctant to step in, even when states fall far behind meeting their obligations, and this has been true under both Republican and Democratic Administrations. The emphasis on partnerships between federal and state agencies, while understandable and important, has clouded the bottom line and made accountability more elusive.

To address uneven performance, EPA will need to return to basics, through more consistent and careful oversight of states, and by showing greater willingness to veto poorly written permits and step up enforcement where it is lacking. That is hard and grinding work, and will meet with political resistance from industry, state bureaucrats, governors, and probably some Members of Congress. But there really are no shortcuts if we want to make sure that federal minimum standards are being met. If critical oversight of state agencies is too politically awkward for EPA's Office of Water, perhaps the task should be assigned to a beefed up Inspector General's office, which could be charged with holding both the federal and state agencies accountable for meeting Clean Water Act requirements. EPA could also take a step in the right direction by responding to the various petitions that community organizations have filed, alleging weak or nonexistent enforcement of the law.

State Clean Water Act programs should be self-financing

Clean water costs money, though these investments return a lot to the public, i.e,. by protecting fisheries and the tourism dollars they bring, reviving valuable city

waterfronts, and eliminating waterborne disease. Many of the most chronic violations occur at aging city or small town sewer systems – the stimulus package provides public money to upgrade those systems, which should be a big help.

But state budgets, which are historically underfunded, have been hit even harder by the recession, and that has shrunk funding for monitoring water quality, inspecting plants, and taking violators to court. States that administer federal clean air programs are required by Title V of the Clean Air Act to collect fees from the largest polluters. The actual fee for any one facility is pretty small, but these add up quickly and provide a stable base of funding for air programs.

We need the same self-financing mechanism for the Clean Water Act: a federally mandated fee, collected from the largest polluters every year, which gives states a way to cover basic program costs without having to rely on general revenues that frequently dry up during fiscal crises.

Compliance data should be easy for the public to obtain and understand

The Clean Water Act guarantees the public's right to know whether or not power plants, municipalities or other large sources are complying with discharge limits. That information is routinely reported by the largest facilities, and ought to be readily available online and in a format that is easy to understand. The USEPA has taken a big step in the right direction by making compliance records and discharge data available online through the "ECHO" database. Shining a light on violations is one of the best ways to shame polluters into compliance, and to prod government agencies to enforce the law.

Some states may raise concerns about the accuracy of that data, and no doubt it could be improved. But we have frequently compared discharge reports in state files to ECHO data, and found that they match. While occasional errors can be found in any large database, and should be corrected when they are identified, the more serious problem is that some states do not enter any information at all for so called "minor" sources. These can include coal mines, factory farms, and other operations with big environmental footprints. While reporting has improved in recent years, we need more complete data from minor sources to help us understand how well the Clean Water Act is working.

Close loopholes that protect some of the biggest polluters

Nearly forty years after the Clean Water Act became law, some of the nation's largest industries continue to operate without permits that limit their release of toxic metals or other pollutants. For example, the power industry is the second largest source of arsenic, selenium, and other toxic pollutants that are routinely dumped into rivers and lakes from coal ash ponds and scrubber sludge pits. EPA was supposed to have restricted discharges from these pollutants more than twenty years ago; EPA announced last month that it would propose standards, but not until 2012.

In the absence of national standards, the Clean Water Act requires states to establish technology based limits in individual permits, but we see little evidence that is happening. Just last month, the state of Tennessee proposed a Clean Water Act permit for the Kingston power plant, the site of a colossal spill of coal ash last December, that includes no limits on the toxins that will be discharged from ash and scrubber

wastewater. Many permits do not even require that these toxic metals be monitored on a routine basis.

The original Clean Water Act required large animal feeding operations to get Clean Water Act permits. More than thirty years later, you won't find a single Clean Water Act permit for enclosed animal feeding operations in the state of Iowa, one of the largest livestock producers in the U.S. These and other loopholes in the Clean Water Act ought to be closed. EPA has taken nearly fifteen years to "clarify" permit requirements for these factory farms, which are some of our largest sources of water pollution; by now, we ought to start seeing federal permits that prohibit or at least limit discharges from such facilities.

Polluters ought to pay

We will never be able to achieve the goals of the Clean Water Act by relying on enforcement alone. Government agencies will need to offer technical assistance, municipal wastewater treatment systems require public financing, and voluntary programs and incentives can play a role for sources that are not yet regulated under the Clean Water Act. But these strategies are, or ought to be, built on the bedrock of compliance with the clean water laws that Congress passed many years ago, and which still enjoy broad public support today.

I have attached sample data from EPA's ECHO database, which identifies power plants that have recently discharged pollutants at levels that are many times higher than

what their permits allow. If this data is correct, I hope that enforcement action by state agencies or EPA will show that violations this extreme will not be tolerated.

Are polluters paying as much as they should when they violate the Clean Water Act? I hope the Committee will take the time to examine some of the worst violations – which dump thousands of pounds of illegal pollutants into our waterways every day – and ask whether the penalties that EPA or state agencies assess are really enough to change behavior. If the answer is no, if it remains cheaper to ignore the law than to invest in compliance, the ambitious reach of the Clean Water Act will always exceed its grasp.

Percent Above Permitted Discharge Limit						
At Select Power Plants - 3QTR 2008 through 2QTR 2009						
State	Facility	Pollutant	3QTR 2008	4QTR 2008	1QTR 2009	2QTR2009
CA	Pittsburg Power Plant	Copper	73%	98%	165%	—
IA	Midamerican Energy - Council Bluffs	Iron	400%	121%	—	188%
IA	IP&L - Burlington Generating Station	Iron	10%	25%	94%	—
IL	City Water Light & Power - City of Springfield	Boron	45%	136%	30%	79%
IN	AEP - Lawrenceburg Plant	Mercury	—	61%	72%	—
MA	Northeast Utilities - Mt. Tom Station	Solids	—	10300%	57%	1920%
MA	Dominion Energy - Brayton Point Power Plant	Iron	—	—	94%	97%
MI	Wyandotte Electric Plant	Copper	—	57%	2300%	300%
MI	Michigan South Central Power - Endicott	Selenium	98%	220%	221%	107%
MO	Sikeston Power Station	Iron	220%	—	67700%	44800%
NE	Nebraska Public Power District - Sheldon Station	Iron	—	7550%	—	13200%
		Solids	1541%	1567%	199%	3234%
NY	Dunkirk Steam Generating Station	Selenium	—	560%	180%	960%
PA	Reliant Energy - Seward Power Plant	Iron	1571%	1500%	1886%	1900%
		Manganese	530%	515%	620%	615%
PA	Reliant Energy - Conemaugh Station	Iron	327%	243%	624%	1796%
		Manganese	1263%	850%	1494%	—
PA	EME Homer City Generating Station	Selenium	—	75%	375%	—
PR	PREPA - San Juan Steam Plant	Copper	177%	529%	403%	345%
WV	Allegheny Energy - Pleasants Power Station	Solids	56%	35%	380%	104%

Source: U.S. EPA, Enforcement & Compliance History Online, available at: http://www.epa-echo.gov/echo/index.html

TESTIMONY

Written Statement of
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The Performance of Clean Water Act Monitoring and Enforcement

Prepared for the hearing on
"The Clean Water Act after 37 Years: Recommitting to Protection of the Nation's Waters"
Committee on Transportation and Infrastructure
United States House of Representatives

October 15, 2009

Testimony

Mr. Chairman and distinguished members of the committee, thank you for the invitation to testify on the subject of the Clean Water Act after 37 years. My name is Jay Shimshack, and I have been conducting research on Clean Water Act (CWA) enforcement and compliance for more than a decade. I have also investigated broader issues of environmental monitoring and enforcement under contract for the US Environmental Protection Agency (EPA) over the past several years. I am currently Assistant Professor of Economics at Tulane University and Visiting Scholar at the Erb Institute at the University of Michigan. The views expressed today are my own.

Since my expertise lies primarily in regulatory oversight, I will focus today's discussion on understanding and strengthening the performance of CWA *monitoring and enforcement*. First, I will provide some context. Second, I will summarize the state of knowledge on the effectiveness of CWA enforcement. Third, I will review the consequences for improved water quality management.[1]

Status and Trends

To understand the issues, it is useful to provide some context. Broadly characterizing CWA performance is challenging. I recently compared several commonly used metrics for assessing CWA compliance (Shimshack 2009). I chose a single industry and a single time period to compare 'apples to apples.' A key conclusion was that different performance measures yielded significantly different results. For example, a comprehensive metric that included reporting, scheduling, and all possible effluent violations showed that nearly half of sample facilities were noncompliant. However, a pollutant-specific metric showed that only two percent of sample facilities were actually exceeding monthly limits for the industry's most common pollutant. Monthly average discharges of this pollutant were less than 40 percent of allowable levels. In other words, some reasonable metrics suggested good environmental performance while other reasonable metrics simultaneously suggested poor environmental performance.[2]

Regardless of how one defines noncompliance, however, the evidence suggests that enforcement actions under the CWA are infrequent relative to the number of violations. Many violations are not sanctioned. Formal enforcement actions with monetary fines are especially rare, and dollar amounts are modest relative to those allowable under the law. Maximum CWA administrative penalties are up to $50,000 per day. Between 2001 and 2008, the median amount of actually levied EPA CWA penalties was $3,000,[3] and these penalties often targeted multiple violations spanning many months.

Environmental monitoring and enforcement are, on average, falling over time. I am unable to find a consistently reliable and comprehensive time series of enforcement budget statistics

[1] This brief testimony draws extensively from my former work in the area, and more complete discussions of all points can be found in Shimshack 2007 and Gray and Shimshack 2009.

[2] Vastly different conclusions from different metrics may explain why some authors note high rates of CWA compliance while others note low rates of CWA compliance.

[3] This summary statistic is based on the author's calculations on data extracted from the EPA ECHO database.

specific to the CWA. However, overall EPA enforcement budgets declined by about a third in the late 1990s and still remain approximately 20 percent below peak levels in real terms. EPA civil and criminal referrals to the Department of Justice have trended downward over the past decade, and agency inspections and formal administrative actions have declined especially in recent years.

The Relationship between CWA Enforcement and Compliance

While CWA enforcement actions are infrequent and declining, an academic and policy literature shows that they are effective. Results from qualitative facility surveys indicate that enforced regulations have historically been, and remain, more important determinants of environmental behavior than any other factor. Government actions are frequently ranked as the single most important source of deterrence pressure (Khanna and Anton 2002, May 2005, Delmas and Toeffel 2008).

Further, a quantitative database analysis literature shows that CWA monitoring and enforcement activities generate substantial specific deterrence, meaning that inspections and sanctions consistently reduce future violations at the evaluated or sanctioned facility (Magat and Viscusi 1990, Earnhart 2004a, Earnhart 2004b, Glicksman and Earnhart 2007). CWA enforcement activities also generate substantial general deterrence, meaning that sanctions spillover to deter violations at facilities beyond the sanctioned entity (Shimshack and Ward 2005). The essential intuition is that sanctions enhance the regulator's reputation for toughness.[4]

Measured deterrence impacts are typically large. One specific CWA deterrence study found that a facility's odds of noncompliance were about twice as great if they had not been inspected in the previous quarter (Magat and Viscusi 1990). A CWA general deterrence study found that an additional fine induced about a two-thirds reduction in the state-industry water pollution violation rate for the year following the fine (Shimshack and Ward 2005). Evidence suggests that enforcement severity also matters; larger fines induce greater changes in compliance and fines deter more violations than non-monetary sanctions.

The quantitative evidence suggests that enforcement actions not only affect compliance decisions, but discharges as well. When inspections and fines reduce violations, pollution is of course reduced. However, fines and inspections also encourage *beyond compliance* behavior (Shimshack and Ward 2008). Studies indicate that plants with discharges typically below legally permitted levels reduce discharges further when regulators issue fines, even on other facilities. In addition, likely non-compliant plants often respond to increased regulatory threats by reducing discharges beyond reductions required to meet statutory requirements.[5] It follows that

[4] Other authors find similarly strong specific and general deterrence effects for enforcement actions levied under other domestic environmental statutes. See, for example, Gray and Deily 1996, Nadeau 1997, Stafford 2002, Gray and Shadbegian 2005, and Keohane et al. 2009.

[5] Beyond compliance behavior can be rationalized by economic theories involving discharge randomness and jointness in pollution production (Bandyopadhyay and Horowitz 2006, Shimshack and Ward 2008). Plants with partially random discharges may face some possibility of a sanction from accidental releases, so they may reduce discharges even further beyond compliance when the regulatory threat increases. When pollutants are jointly produced, a plant may reduce a pollutant with a binding limit when the regulatory threat increases and correspondingly push the jointly determined pollutant even further beyond compliance.

enforcement activities may generate significant effluent reductions even for sectors and contaminants where compliance is typically high.

While the literature convincingly demonstrates that CWA monitoring and enforcement actions enhance environmental performance, deterrence effects do not last indefinitely and deterrence effects do not reach across all regulated facilities. Regulated entities regularly update their beliefs about regulatory stringency, and enforcement deterrence effects decay rapidly (Magat and Viscusi 1990; Shimshack and Ward 2005). Also, the reach of the regulator reputation effect underlying general deterrence is limited by jurisdictional boundaries (Gray and Shadbegian 2007). Fines in Georgia may affect compliance behavior in that state but may have little impact on facilities in Florida. Consequently, regulators must maintain a constant monitoring and enforcement presence to induce consistent environmental performance over time and across space.

Implications

In my professional judgment, several implications follow from the state of knowledge summarized above:

- A substantial improvement in environmental performance may be achieved with a modest additional investment in traditional monitoring and enforcement activity.

  CWA enforcement actions significantly deter subsequent violations at the sanctioned facility, reduce violations at other facilities in the same jurisdiction, and encourage greater pollution reductions at plants that are already in compliance. In other words, fines and inspections have significant impacts on water pollution outcomes.

  The evidence on the strength and speed of the average pollution response to *modest* and *infrequent* sanctions also suggests that facilities' incremental CWA compliance costs are likely low, at least for well studied large industrial facilities. CWA penalties are infrequent and relatively small, yet minor changes in the likelihood and size of sanctions induce large and rapid behavioral changes. Fast pollution reductions imply that plants may invest more care towards maintenance, spill avoidance, operational efficiency, employee effort, and training in periods of high perceived regulatory stringency. These activities do not rely on large capital expenditures such as those required by new equipment installations. If current pollution limits are not overly stringent, enforcement induced pollution reductions may translate into large social welfare gains.

- A substantial improvement in environmental performance may be achieved with a modest additional invest in enforcement stringency.

  Fines provoke significant specific deterrence, general deterrence, and beyond compliance pollution reductions. Larger fines generate greater compliance and pollution effects. In contrast, the evidence for deterrence effects from common informal CWA enforcement actions like telephone calls and notices of violation is mixed. A reallocation of enforcement resources away from discretionary informal actions towards more frequent

and more severe formal enforcement actions may result in substantial improvements in environmental performance.

- Sweeping departures from our current regulatory system may not be warranted.

  Policy observers now advocate more frequently for voluntary, cooperative, informational, or alternative approaches to water pollution control. More research is needed, but the current state of knowledge does not support sweeping regulatory changes. The emerging literature exploring voluntary, informational, or cooperative programs finds mixed results (Khanna 2001, Lyon and Maxwell 2002). In contrast, the enforcement literature consistently finds that the deterrence effects from CWA inspections and sanctions are large. Enhancing environmental performance may simply entail greater and more nuanced use of current policy instruments.

- Environmental regulators should consider more vigorously publicizing their enforcement actions.

  While the evidence suggests that information provision should not replace traditional enforcement, new incremental transparency policies may leverage current enforcement efforts to achieve greater impacts. Spillover deterrence effects of sanctions require that facilities know about monitoring and enforcement actions at other regulated entities. Current state and EPA enforcement alerts are infrequent and highly aggregated, so facilities may not be sufficiently informed of monitoring and enforcement activity directed towards other regulated entities in the industry. Therefore, state and EPA authorities should consider pilot programs that publicize sector-specific enforcement details.[6]

- Congress, EPA, and the states should facilitate research on environmental enforcement and compliance through improved data access and enhanced research funding.

  The state of science on CWA enforcement and compliance has several key knowledge gaps. First, we don't fully understand the relative deterrence effects of different enforcement instruments in different contexts. For example, we don't often know the expected marginal benefits of an additional inspection versus an additional administrative fine versus an additional DOJ referral. Second, we don't completely understand how heterogeneous plant characteristics affect the strength of enforcement responses. We still have a lot to learn about what systematically drives deterrence at the facility-level. Third, we don't know if the common system of targeting predominantly 'bad apples' for enforcement achieves the greatest overall compliance bang for the buck. Finally, we don't know much about regulators' implementation costs for different monitoring and enforcement instruments. Consequently, understanding benefit-cost ratios for CWA interventions is difficult.

[6] It is possible, although not probable, that facilities currently overestimate their perceived risk of sanction. Thus, the effects of these pilot programs should be carefully monitored.

Minimizing the above uncertainties, and many others, could importantly contribute to the state of knowledge. The amount and quality of external research conducted on CWA compliance, deterrence, and environmental performance would increase significantly if the EPA and the states expanded the availability of *historical* compliance and discharges data. Only a few years of data is typically available, even for technical users, and this is often insufficient for careful quantitative research. The amount and quality of external CWA research would also increase significantly if the EPA and the states expanded the availability of *complete* compliance and discharges datasets. Technical user access to complete datasets has become increasingly secretive, bureaucratic, and cumbersome. Finally, the amount and quality of CWA research would improve if Congress, the EPA, and the states funded more water quality investigations. Research funding in the area is rare, even relative to other environmental topic areas.

Summary

Comprehensively characterizing monitoring activity, enforcement effort, and compliance status under the CWA is sensitive to measurement approach. However, three stylized facts consistently emerge. First, enforcement activity is relatively rare compared to the number of violations. Second, fines tend to be modest relative to fines allowable under the law. Third, enforcement activity is declining in recent years.

Despite the relative scarcity, however, a growing literature shows that state and federal enforcement actions importantly influence environmental performance. CWA inspections and fines significantly deter subsequent violations at the sanctioned facility, reduce violations at other facilities in the same jurisdiction, and encourage greater pollution reductions at plants that are already in compliance.

Policy implications follow. First, significant improvements in environmental quality may be achieved with modest additional investments in inspections, sanctions, and especially fines. Second, Congress, the states, and EPA can improve environmental performance without dramatically altering CWA provisions or management. More enforcement resources and oversight may translate into substantial improvements in environmental quality; the potential impacts of more radical changes are poorly understood.

Thank you for the opportunity to testify on this important topic.

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Biographical Sketch

Jay Shimshack is Assistant Professor of Economics at Tulane University and Visiting Scholar at the Erb Institute for sustainable enterprise at the University of Michigan. He holds a Ph.D. in agricultural and resource economics from the University of California, Berkeley (2002) and a B.S. in business marketing and management from Cornell University (1995). His major fields are environmental economics, applied microeconomics, and public policy. He teaches environmental economics and statistics.

Dr. Shimshack's specific research interests include the monitoring and enforcement of environmental laws, corporate environmental performance, transparency policies and information advisories, and environmental health. He has published several articles in academic journals and serves on the editorial council of his field's leading journal, the *Journal of Environmental Economics and Management*. His scholarship has been honored with multiple national awards. For the past several years, Shimshack has contracted with the US EPA to review the state of science related to environmental enforcement and to evaluate the effectiveness of Agency compliance assurance and enforcement activities.

My name is Judy Treml. I live in the Town of Luxemburg in Kewaunee County Wisconsin. My husband and I bought his great-grandfathers family farm homestead in 1997 and moved there with our children. We live in a rural part of Kewaunee County where our drinking water is obtained from a private drinking well. In July of 2003, our third daughter Samantha was born. Our other daughters, Kaitlyn age 8 and Emily age 6 also live in the home. In January, 2004 when Samantha was 6 months old, her pediatrition recommended that we test our well water for fluoride as she was now getting to the age of needing fluoride in her diet, for the health of her teeth. Since she was exclusively breastfed, she was not getting any fluoride and it was necessary, from his medical opinion to add fluoride to her diet. On February 4, 2004 we picked up a water testing kit from the Kewaunee County Health Department and tested our drinking water. We received the results in the mail from the State of Wisconsin that read that our drinking water was 'safe' to drink (meaning there was no bacteria contaminants in our water) and that the fluoride levels were virtually not present. This water result meant that we would have to supplement our daughters diet with either fluoride drops in our well water, or buy bottled water that had fluoride already in. Thankfully, I chose to purchase bottled water with fluoride in it, as a mere 26 days later we would learn that our perfectly safe drinking water would become grossly contaminated with cow manure and E Coli bacteria at twice the level of what it would take to close a public beach. It takes 1000 parts per milliliter of E Coli bacteria to close a public beach in Wisconsin, the water coming into my kitchen sink, into our bathtub...where we had just bathed our children was contaminated at 2,800 parts per milliliter of E Coli bacteria.

The events leading up to the contamination were an obvious contributing factor. Our well water was safe in a state run lab test on February 4, 2004 on March 2, 2004 four days after Stahl Farms, a local Concentrated Animal Feeding Operation dumped 80,000 thousand of gallons of liquid manure on 18 inches of snow in 40 degree temperatures. The snow was actively melting off the farm field directly across the road from our home and Glen Stahl was given permission to spread his manure by the Northeast Wisconsin Department of Natural Resources enforcement staff person, David Bougie. According to WDNR records, Glen Stahl had another incident of manure runoff 2 miles away from our home and because he lacked sufficient manure storage at his facility, his manure pit was full and needed to be drawn down to avoid overflowing. After the manure runoff from the first field in early February of 2004, Mr. Bougie from the WDNR gave Mr. Stahl permission to continue spreading under these conditions. We watched Glen Stahl enter the field of Tuesday February 23, 2004. My husband Scott, came home from work and watched the tractor enter the field and begin spreading the liquid waste on the ground. He also watched as the manure ran into the ditch line and down the incline of the field towards School Creek, that runs under our road and through our

property. Scott then approached Mr. Stahl on the tractor and asked him to stop spreading as the manure was running off the field and heading down the ditch line and over a neighboring properties front lawn. Scott request of Mr. Stahl was met with an expletive, and Mr. Stahl telling Scott that he had "permission to spread there". Mr. Stahl continued to spread manure into the evening and throughout Wednesday and Thursday. Scott made a call to David Bougie, the enforcement agent for Stahl Farms and reported the runoff. Mr. Bougie, according to WDNR records stated that he came out to the property and saw no evidence of runoff. After hearing Mr. Bougie's claim, Scott took our video camera out on to the road and began taping the manure laden water running off the field, into the ditch line, over the neighboring Karla Kahr property and continued following the ditch line until it entered School Creek.

On Sunday morning, February 28, 2004, two days after Mr. Stahl finished spreading 80,000 recorded gallons of manure on the field, Karla Kahr knocked on our door with a bottle of the water that came from her kitchen fawcett. She filled a clear mason jar with her water and the water was completely brownish/black, with flecks of solid floating in it. She was extremely upset as she was 8 months pregnant with her first child and she was exposed to this water. Karla Kahr knew that Scott had talked to the WDNR about the manure running off the field and asked Scott if he would help her. Scott took the bottle of water and assured her he would go to Mr. Bougie's superior at the Northeast Regional DNR office and 'surely they have to do something now" is what he told her.

On Monday, March 1, 2004, Scott placed a call into Charles VerHoeven, Mr. Bougie's immediate supervisor at the Northeast Regional DNR office in Wisconsin. Scott told Mr. Verhoeven that he had reported runoff to Mr. Bougie early the week before from Stahl Farms and Mr. Bougie didn't stop the spreading that was running off the field, and now Karla Kahr's drinking water looked and smelled EXACTLY like the manure Glen Stahl had spread on the field adjacent to her home and ran over her front yard. After some discussion, and Scott offering to drive the bottle of water over to the Northeast Regional office for him to look at Mr. Verhoeven said to Scott, "I don't have time for this, I'm a very busy man, I'm understaffed....call someone else." When Scott asked Mr. Verhoeven who he should call, Mr. Verhoeven replied, "do you have a phonebook? Pick it up and find someone". Scott then called Mr. Verhoeven's immediate supervisor, Ronald Kaczmierzak , the Director of the Northeast Regional DNR office and tried to get help from him and after a short discussion which included Mr. Kaczmierzak, telling Scott "if you think that's bad, I've actually seen straw coming out of someones kitchen tap", Scott realized that we were not going to get any help from the Wisconsin Department of Natural Resources. Scott returned home from work that day, and stood in the kitchen with me as I was setting dinner on the table. We discussed the conversations that had taken place that day with the staff from the Wisconsin DNR and as I went to wash off some food, for us to eat for dinner I flipped on our kitchen tap and out poured brown, manure smelling water. I turned to the

dining room table took all the food off and said to Scott, 'you need to call the DNR and get them out here". His panicked expression spoke volumes to me as well as his words in which he said, "Judy, I TRIED, they don't care, they told me to call someone else", to which my reply was 'Give me that phonebook I"LL find someone who cares!" After making calls to every news outlet in our area and securing them to come video tape and publicize our problem, we set down to business of shutting off our water and trying to figure out where we were going to turn next.

As luck would have it, the Kewaunee County Land and Water Conservation Department was holding it monthly committee meeting the very next day in Kewaunee Wisconsin. Scott and I, as well as Karla Kahr went to that meeting with bottles of our manure contaminated water as well as the video tape of the runoff into School Creek and asked for their help. Andy Wallander, the Kewaunee County Conservationist, explained that Mr. Bougie was on his way to sit in on the meeting, but since he was not present, we needed to start the meeting. The Kewaunee County Land and Water Conservation Committee listened to our account of the spreading activities by Stahl Farms and watched the video tape of the runoff and while they were sympathetic to our issue, since Stahl Farms held a Wisconsin Pollution Discharge Elimination Permit (WPDES permit) and was considered a CAFO (Concentrated Animal Feeding Operation), enforcement action would have to come from the WDNR. Mr. Bougie walked into the meeting, roughly and hour late and offered up an apology for his tardiness, by saying 'I'm sorry that I'm late, I was being coached as to what I could and couldn't say at this meeting". When asked what the WDNR was going to do about the manure runoff by Stahl Farms, his reply was "Glen Stahl's spreading met the conditions of his permit". We told him of the video that clearly showed manure running off into the creek and Mr. Bougie showed no interest in it, other than to restate that 'Glen Stahl's manure spreading met the conditions of his permit". (This meeting as well as these quotes were documented by videotaping done with our video camera as well as the three television news stations that showed up at the meeting to record it for the evening news)

I distinctly remember leaving that meeting, feeling utterly helpless. We had had a perfectly safe drinking water well less than a month before the manure spreading and now it was grossly polluted with cow manure and no one was going to help us, not Kewaunee County, who didn't have the authority to help us or the Wisconsin Department of Natural Resources, who had the authority but was refusing to help. As I left the building, a young man working for the local government asked if he could speak with me. I walked into his office where he handed me a map of the field that was spread on, that CLEARLY showed that a good part of that field that Mr. Stahl spread on was NOT allowed to be spread on due to shallow fractured bedrock at the surface. In addition to this map, he also handed me the business card of an environmental attorney that worked for Midwest Environmental Advocates. He said, "call these people, they will help you, the DNR won't".

Upon leaving that office, I had to get home to meet up with a different DNR employee, Elizabeth Heinen. She came to our home to obtain a water sample to test at our insistence so the Wisconsin Department of Natural Resources would have their own sample of our water taken by one of their own employees, to prevent any dispute or claims that our sampling methods were faulty. After much persuasion, and as it turns out Ms Heinen directly defying an order not to come out to our home from her supervisor in Madison, Mr. Mark Putra she showed up at our home with Kelley OConnor, another DNR employee. They were both very pleasant and polite to talk to. As Ms. Heinen drew the water sample from our kitchen tap as well as from the pressure tank attached to our well I spoke with her and Ms OConnor. Ms. Heinen, aware I had an infant daughter as well as a 6 and 8 year old living in the house, set out giving me, what sounded like pre-written advice on what to do with our water. She told me that I could continue to bathe my children in it. She told me I could wash our dishes in it, "with a mild bleach rinse", however I shouldn't use it to cook until the test results came back from the health department. The water she was referring to, the water that she used rubber gloves to draw the test, she was telling me I could use to bath my children in! I could use it to wash their dishes in! I asked her "Liz, would you use this water to bathe your baby in?" and she said "that's not a fair question to ask me". I turned to Kelley OConnor and asked her, "would you bathe in this water looking and smelling like it does...knowing what it likely is after Stahl's manure runoff?". She looked at the floor and quietly said "No". Finally! An honest human answer from the agency in charge of protecting our water supply and our environment. A reply that would turn out to be what could save someone else, as I had long since given up hope that the WDNR cared about families in Northeast Wisconsin.

As Ms Heinen drew her last sample, I asked her if she would draw a sample for me to take to my daughter's pediatrition. She did, which I am grateful for as that water sample, after one look by my daughters doctor, prompted me to watch all of my children for symptoms of EColi poisoning. He said he didn't need a water sample back to know that this water was polluted and that I should shut it off and watch all the girls, especially 6 month old Samantha for diarrhea and vomiting, the first signs of EColi poisoning. He also talked to Ms Heinen to which he said to me "don't listen to any advice they give you for using your water, they are not medical doctors". He called the Wisconsin State Health and Human Services and the Wisconsin State Toxicologist office, looking for advice for treating my daughters in the event they became ill. Neither office had any knowledge on how to treat them. Our pediatrition called me, told me of his conversation with those offices and recommended that I call them with the questions I had regarding continued breastfeeding of Samantha. My question was 'can I still breast feed or if I am getting sick with EColi poisoning will it pass through my breast milk?". I was on a conference call with both the Wisconsin Health and Human Services and the Wisconsin State Toxicologist office and neither knew the answer.

My pediatrition, Dr. Wm Joseph Kellner, took matters into his own hands and did his own research through colleagues. He told me that Ecoli poisoning typically does not manifest itself for 4-10 days, and he recommended that we watch all of the family for symptoms. We were contacted by the Kewaunee Public Health Department on Thursday March 4, 2004 in which they informed us the results of the water sample Ms Heinen took. It was contaminated with Ecoli, 2,800 parts per milliliter and coliform bacteria at 9,800 parts per milliliter, (the safe limit on both is Zero)

On the morning of the 4th day, the very next day , we woke early to the sounds of Samantha playing in her crib. Scott went in to her room and as soon as he opened the door the stench was unbearable. Samantha had a bowel movement that covered everything. There was feces, everywhere, her crib, her body, her hair, her ears. There was vomit as well, breast milk in vomit down her front and in her crib. We brought her to the bathtub and began washing her off. The water that was coming into our house at this time was not from our drinking water well but from a semi tanker water truck parked in the driveway and piped into our home. After washing her off, we called Dr Kellner and he had us come in so he could begin testing Samantha's stool. She continued to vomit and expel anything we fed her liquid or otherwise. Her bowel movements were like water gushing and the vomiting was near constant those first days. We took Samantha home from the doctor's office with instruction to monitor her urine output as well as bowel movements and vomiting. All through that night and Saturday morning, we continued the best we could to push fluids. We could not feed her breast milk as we didn't know whether or not Ecoli bacteria passed through breast milk and we pushed as much of the non-milk formula we could. Every 6 hours our pediatrition called and by 9pm Saturday with no let up in the vomiting or bowel movements, we brought her into the local emergency room, to monitor her hydration. It was there the Emergency Room doctor told me what my daughter's doctor just didn't have the heart to tell me. When I asked the ER doctor, what she thought Samantha's illness was from she stated that in her medical opinion it was her exposure in her Sunday night bath that infected Samantha. I was devasted. I had unwittingly exposed my baby to Ecoli contaminated water, because I trusted our safe water sample and I didn't have any knowledge that the manure applied to the land could cross under a road and contaminate our drinking water well. I gave Samantha a bath Sunday night, 3 days after Glen Stahl applied animal waste to the field because of that safe sample and because our water LOOKED perfectly clear, no discoloration, no odor. It wasn't until weeks later through my own research that I learned that the groundwater just doesn't suddenly go bad. That Ecoli can be present even in clean looking and smelling water.

I tentatively asked this doctor what could happen to Samantha as a result of being poisoned by the manure contaminated water and her response stunned me. She told me that there were 4 outcomes for Samantha's illness. The first one being that she could be sick for a while and

recover. The second, she could be sick, suffer reversible kidney damage/failure and then get better. The third she could suffer from permanent kidney damage and require a transplant and the fourth, she could die. I had a perfectly healthy daughter one week and by week's end she is sick with an illness that could cause her death. I was mortified. Worse yet, I had perfectly safe water coming into my home and because of the irresponsible land use practices of a CAFO, and the dismissal by the State of Wisconsin to step in and enforce the rules of this CAFO's permit, my daughter could die? Where is the right in that? We had laws explicitly stating manure was not allowed to leave the site it was applied, and no one cared. The manure left the site by way of the ditch into the creek and by way of multiple fractures in the shallow bedrock into the groundwater polluting two private drinking wells and the agency responsible for enforcing those laws wouldn't.

As I sat with Samantha in the hospital, I started to feel sick and made my way to the bathroom where I began throwing up and having intense intestinal pain. The same ER doctor that was treating Samantha admitted me to the emergency room and ran the same tests on me, and concluded that I was suffering from the effects of the same contaminated water. By the next morning, the doctor concluded that there was nothing more they could treat in the hospital so we were released with orders from the doctor to return if Samantha became lethargic and non-responsive to liquid. I made my way home where I learned that while I was at the hospital my other two daughters ages 6 and 8 were also sick with exactly the same symptoms. Scott became ill a few days later. By this time, I was furious. My entire family was poisoned and it was unconscionable that this, we learned, was 100% preventable, with proper responsible land use practices. This CAFO was using manure spreading not as a fertilizer as intended but rather they were using the winter spreading as a waste disposal tool at the most high risk period of time of the year in Wisconsin.

We continued contact with the WDNR to see what if anything, they were planning to do, but their answer remained the same. As a result Scott and I had no other choice but to contact Midwest Environmental Advocates to help us enforce the clear violation of the Federal Clean Water Act that were obviously portrayed on our video of the spreading activities. After accepting our case, MEA drafted a Notice of Intent to Sue and delivered it to Stahl Farms. Once that became a part of public record.....just 30 days later the WDNR issued a Notice of Violation to Glen Stahl (Stahl Farms). This came even after they explicitly stated on record that the farm's 'spreading met the conditions of his permit". Our case made its way to the Federal court in Milwaukee where the judge deemed we had enough evidence to proceed with a federal lawsuit against Stahl Farms for violations of the Clean Water Act. Approximately 3 months later the Wisconsin Department of Justice then filed it's own intention to sue Stahl Farms for almost identical charges to ours, save for one. The one charge the State of Wisconsin would not pursue is the groundwater contamination claim. After questioning them on this the

WDNR stated that 'it had no authority over groundwater contamination, as it was impossible to prove a specific farms manure contaminated someone's well water'. This was incredulous to us! Of course it would be impossible to prove NOW, 6 months later, but it wouldn't have been hard had the WDNR done an adequate investigation at the time of the runoff incident rather than 6 months later. There was no manure left by the time they sent staff to inspect the site that many months later, it was all washed into School Creek and into the groundwater.

As a direct result of the Wisconsin Department of Justice's filing in State Court our attorney advised us that the State's case 'trumped' ours as they were truly the enforcing agency and since they decided to enforce themselves our federal case was in jeopardy. How could that be? How could the State of Wisconsin wait that many months, after knowing our intentions and file their own lawsuit at the 11th hour. Well, I took that question to then Attorney General Peggy Lautenschlager on Dec, 5 2005. She was speaking at the same medical conference Scott and I were speaking at so I took that opportunity to ask her. I introduced myself, refreshed her memory to our case, and asked "why did your office decide to file a Clean Water Act lawsuit against Stahl Farms after so many months and only after we had the case accepted in federal court?" Her response stunned me but I appreciated her candidness. She said "Well, we saw your case get seated in federal court we realized that there must have been significant damages that warranted us to take another look". So to speak in lay mans terms...the State of Wisconsin refused to pursue legal action against Stahl Farms for clear violations of the federal Clean Water Act until their hand was forced to by my family's pursuit of legal action.

In the end, we petitioned Kewaunee County Circuit Court judge Dennis Mleziva to grant my family intervener status in the State's case as we were less than confident and had every right to belief they would be less than adequate in pursuing adequate consequences on the States behalf. We were ultimately granted intervener status by Judge Mleziva and acted as intervenor in the states pursuit of violation of the Clean Water Act against Glen Stahl in Kewaunee County Circuit Court. The case was ultimately settled between the State of Wisconsin/Treml vs Stahl Farms. Our family settled with Stahl Farm's insurance company Rural Mutual for the expenses we incurred proceeding with our litigation, medical bills and related expenses for $80,000. $60,000 dollars being used to reimburse our family for those expenses and $20,000 for our inconvenience and health related issues. Broken down that equates to $4,000 per person in our family. However, the best result of private settlement was a civil agreement between us and Glen Stahl that he will not spread any waste from December 2st to April 1st of any given year, at this we learned, is the high risk period for groundwater contamination in Wisconsin.

Since our conversation with then Attorney General Lautenschlager, I realized that the state of Wisconsin was negligently remiss in their enforcement of agricultural runoff issues in

Wisconsin. As a result of the immense media coverage, in 2005 I received several calls from homeowners in the Towns of Lark and Whitelaw, also in NE Wisconsin that had their wells contaminated with little to no effort to remedy the problem by the Wisconsin Department of Natural Resources. In 2006, the Town of Morrison, had 100 wells contaminated by agricultural waste, with again little to no attempt at enforcing the law. Thankfully by this time the local county governments had recognized the impact the groundwater pollution was having on its residents and formed a task force to research the problem. The task force, known as the NE Wisconsin Karst Task Force was comprised of a researcher from a local university, groundwater specialists, a farmer etc. Its report was made public and still we have no action from the Wisconsin Department of Natural Resources. In 2007, the Town of Morrison was again hit with groundwater contamination. In 2008 a small town named Cooperstown, became the victim of agricultural/industrial waste groundwater contamination. While the WDNR did investigate this source of contamination and linked it to agriculture runoff, paving the way for homeowners to receive compensation from the State's Well Compensation Fund. This too was too little too late for 99% of the families in Cooperstown. In Cooperstown, when the first well became contaminated, the well of an elderly couple, Don and Virginia Dickerall, the WDNR did act. The WDNR saw to it that the Dickeralls had a new deeper safe drinking water well within a week. Sadly, that one elderly couple, was the only family to receive help in this way, the rest of the 56 families were left for months to their own devices with the only help from the State of Wisconsin coming in the form of complimentary state well tests, that simply showed that their water was contaminated. This testing continued for months, no result, no resolution and again in the winter/spring months of 2009 they were again the victims of another round of well contamination.

It leads me and many, many other families to ask the state employees the question, What is it going to take for the State of Wisconsin to finally see that families need their help? That soon it's no longer going to be a matter of how many children have gotten ill from exposure to manure contaminated water, but rather, which family is going to have the tragedy of burying a family member as a result of expose to manure contaminated water. With the elderly and infants being especially at risk for complication resulting from poisoning from their contaminated water supply, I hope for our state that a death or several deaths isn't what it's going to take. My hope is that we learn from the food industry and the effects of an E Coli contaminated food supply a few years back that result in over 200 deaths nationwide. Is that what the State of Wisconsin needs to happen? What is it going to take for the WDNR to enforce the Clean Water Act in these instances which they are entrusted and compensated to do with federal tax dollars?

Since our experience in 2004, I've remained active as a volunteer advocate for other families just like mine. I believe that its high time for the federal government to step up and put the

Written Testimony of Judy Treml, a Resident in Kewaunee County Wisconsin

For the Water Resources Committee Meeting on Thursday

October 15, 2009

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COMMITTEES
COMMITTEE ON WAYS AND MEANS
COMMITTEE ON HOUSE ADMINISTRATION

Congress of the United States
House of Representatives

October 14, 2009

The Honorable Lisa Jackson, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building, Mail Code: 1101A
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Jackson:

I write regarding the aftermath from a significant coal ash spill in December 2008, at the Tennessee Valley Authority's (TVA) Kingston Fossil Plant in eastern Tennessee. Approximately 3 million tons of coal ash from that spill has been transported for storage in Perry County, Alabama, a rural community located in my Congressional district.

As you know, there has been considerable public controversy regarding the transfer of the waste from what is believed to be the largest coal ash spill in American history. At least one state, Pennsylvania, refused to receive the shipment on the grounds that the ash did not meet the state's environmental standards for beneficial use. While Alabama's less rigorous environmental standards did not preclude the storage of the coal ash, persistent questions have been directed to my Congressional office and to local elected officials. These anxieties have been exacerbated by news reports about the uncertain impact such a massive distribution of coal ash will ultimately have on the health and drinking water sources of communities located near such storage sites. Other concerns involve the absence of clear and uniform federal standards as to whether coal ash itself constitutes a health hazard.

I have not viewed these questions as easy ones. My office has met with and communicated with local officials who approved the storage of the coal ash in Perry County, and with residents who are deeply worried and frustrated about the difference in safety standards between Alabama and other states. My office has communicated with federal environmental officials and has sought to maintain a dialogue with all parties who have a stake in this issue. Certainly, I am more than sympathetic that the storage of industrial waste is a job source in high unemployment counties like Perry and that the county will benefit from tax revenues generated by this storage. I am also mindful that the storage violates no current state or federal law, and that a reclassification of coal ash as hazardous could pose significant burdens on coal-reliant industries.

However, it is increasingly apparent that the federal government has to date not conclusively analyzed or addressed the potential hazards of large scale coal ash storage. I believe that residents and elected officials in Perry County deserve a clearer answer than they have received about the health and environmental risks posed by coal ash. The time has come for the Environmental Protection Agency (EPA) to establish consistent standards at the federal level that would fully address these legitimate concerns about the content of coal ash waste. If coal ash poses an unacceptable level of risk, inconsistent state standards should be immediately replaced with national guidelines that would put the safety of the people in one community on the same level as families living in another. I do not presume to know what the national standard should be, or how it would impact the storage of coal ash in Alabama, but both the coal-fired power industry and communities weighing whether to store coal ash should have the benefit of predictability and consistency.

Therefore, I join my colleague Congressman John Lewis, who in his own letter, calls for the EPA to promulgate consistent and enforceable standards for regulating coal ash. I hope that the EPA's action in this matter will be prompt.

Sincerely,

Artur Davis

Artur Davis
Member of Congress

NATIONAL ASSOCIATION OF REALTORS®

The Voice For Real Estate®

500 New Jersey Avenue, N.W.

Washington, DC 20001-2020

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October 14, 2009

The Honorable Jim Oberstar
Chairman
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, D.C. 20515

The Honorable John Mica
Ranking Member
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, D.C. 20515

Chairman Oberstar and Representative Mica:

I hereby request that the enclosed letter be submitted as written testimony for inclusion in the record for the hearing dated October 15, 2009 entitled "The Clean Water Act after 37 Years."

Thank you.

Sincerely,

Charles McMillan, CIPS, GRI
2009 President
National Association of REALTORS®

Enclosure (1)

NATIONAL ASSOCIATION OF REALTORS®

The Voice For Real Estate®

500 New Jersey Avenue, N.W.

Washington, DC 20001-2020

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October 14, 2009

The Honorable Jim Oberstar
Chairman, House Committee on Transportation and Infrastructure
United States House of Representatives
Washington, DC 20515

The Honorable John Mica
Ranking Member, House Committee on Transportation and Infrastructure
United States House of Representatives
Washington, DC 20515

Chairman Oberstar and Representative Mica:

On behalf of the 1.1 million members of the National Association of REALTORS® (NAR), thank you for holding a hearing on "The Clean Water Act after 37 years." We appreciate this opportunity to share the Realtor® community's view on the enforcement of clean water programs.

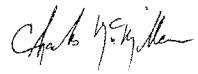
Enforcement is always a critical component of implementing federal laws. However, deleting "navigable" from the definition of U.S. waters will not help the Environmental Protection Agency (EPA)—or states to which the Agency has delegated authority—enforce the Act. NAR strongly believes this is the one term preventing federal agencies from asserting jurisdiction over all non-navigable waters, including isolated ponds, ditches and intermittent/ephemeral streams. Removing that term will simply expand jurisdiction, further complicating enforcement efforts. It will not help EPA or states prioritize clean up of waters, which from our perspective, has been the greatest obstacle to effective enforcement.

For the same reason, we have opposed S. 787, "Clean Water Restoration Act" (Feingold, D-WI) as reported by the Senate Environment and Public Works Committee. The bill would replace "navigable waters" with another phrase "waters of the United States" defined as "all… intrastate waters, including … all tributaries … and all impoundments of the forgoing." It does introduce findings (but only findings) and potentially conflicting rules of construction that the authors believe would clarify their intention to restore the scope of the Clean Water Act. However, codifying a regulatory definition without reference to the U.S. commerce clause or rewinding the clock to a time when federal agencies tried to regulate waters based on the presence of migratory birds or a connection via drainage ditch will not add clarity. Any legislation that begins by substituting one nebulous phrase with another is not a workable approach.

If the goal is to improve enforcement, the best way to do that would be to provide the EPA and states with the resources to fully carry out statutory programs. Due to the downturn in the economy and tax revenues, states have been struggling to do more with fewer resources. With focus shifting to non-point sources and the Clean Air Act, EPA has not been able to provide the timeliest guidance and assistance that state water programs could use in order to fully carry out all of the programs they have been delegated by EPA.

Let us not lose sight of the significant strides made by EPA, states, industry and other citizens working together in improving the quality of our nation's streams and lakes. As a result, more waters are closer -- today more than ever before -- to one day achieving statutory goals. While we agree there is always more to be done, deleting the term "navigable" and thereby expanding non-tidal permitting authority under the Act will not help with those efforts. Thank you again for having this important hearing.

Sincerely,



Charles McMillan, CIPS, GRI
2009 President
National Association of REALTORS®

cc: Members of the House Transportation and Infrastructure Committee

STEWARDS OF THE SEQUOIA

Division of CTUC non profit 501c3
PO Box 267
Lake Isabella, CA 93240

October 7, 2009

Honorable Kevin McCarthy & Chairman James Oberstar
House Transportation and Infrastructure Committee, US House of Representatives
2165 Rayburn House Office Building
Washington, DC 20515

Testimony For The Record : Clean Water Restoration Act (also Clean Water Act) and all issues related to enforcement of the Clean Water Act under the Supreme Court Decisions by the EPA and Corps.

Dear Congressman McCarthy, Chairman Oberstar and members of the House,

Please consider my testimony and include it in the official record regarding the Clean Water Act.

For the past five years Stewards of the Sequoia have been working with the Sequoia National Forest during their travel management plan. Over 50% of the existing roads and trails have been proposed for closure. One staff member has stated that concerns over compliance with the Clean Water Act as the reason for many of the proposed closures. Yet all the roads and trails represent less than 0.01% of the land in question. The area is extremely dry, yet where roads or trails cross dry creek beds we are told they cause unacceptable damage to the watershed.

Clearly there are considerable problems with the existing Clean Water Act when it can be used to close roads and trails that have no effect on the watershed or water. There is absolutely no reason to expand the Act. If anything the Act needs to be decreased in it's scope.

Recently there was a wildfire in the Piute area of the Sequoia Forest, which incinerated about 40,000 acres due to high fuel loads caused by lawsuits prohibiting active management. After spending over $23,000,000 fighting the fire it was ultimately extinguished by thunderstorms. This fire caused massive flooding, erosion and damage to the watershed. All of this damage could have been prevented or ameliorated by allowing the active management of the forest through the proposed forest thinning.

The lawsuits that stopped management in the Piutes were filed under the guise of protecting the resource and the watershed. Clearly they did neither, but instead actually damaged the resource and watershed as well as wasting over $23,000,000 to fight a fire that did not need to occur.

The groups who filed these lawsuits should be held liable under the Clean Water Act, but instead our roads and trails which have no impact on the watershed are going to be closed.

President Obama seeks to encourage volunteerism nationwide, however many of the roads and trails proposed for closure are maintained by volunteers, so these closure will discourage volunteerism contrary to the President's wishes.

These are problems that Congress needs to address and resolve by applying the Clean Water Act to hold anti management groups responsible for their actions and to limit the Clean Water Act so that it applies only to navigable waters.

Thank you for your time and consideration.

Sincerely,

Chris Horgan
Executive Director
Stewards of the Sequoia
Division of CTUC 501c3 non profit
chris@stewardsofthesequoia.org

"Since its founding in 2004, Stewards of the Sequoia is the largest on-the-ground organization of volunteers in the Sequoia National Forest. Our crews have maintained over 1,300 miles of trails and have planted hundreds of trees in reforestation projects. We represent in excess of 1,900 members whose activities include camping, hunting, fishing, hiking, mountain biking, motorized recreation, and horse riding"

Promoting Responsible Recreation & Environmental Stewardship

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