Testimony of

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On the Clean Water Restoration Act

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Mister Chair and members of the Subcommittee, I am Kristin Jacobs, a County Commissioner and past Mayor of Broward County, Florida, a member of the South Florida Water Management District's Water Resources Advisory Committee, and Broward County's Water Advisory Board. Within Broward County, I have also been a champion of our award-winning NatureScape program and the Water Matters program, promoting environmentally sustainable landscaping and water resource conservation. Thank you for the opportunity to discuss the Chairman's legislation, HR 2421, the Clean Water Restoration Act.

I have been a County Commissioner for ten years, representing the nation's fourteenth largest and the State of Florida's second largest county by population. There are approximately 1.8 million souls residing in Broward County, and you can be sure that water, clean water, is of great importance to us. In addition, our county is bordered on the east by the Atlantic Ocean, and on the west by the Everglades, extending, as I like to say, "from Seagrass to Sawgrass." These natural environments are connected by a network of canals that expand across Broward County. With precious natural resources on both sides of our very urban environment, and this extensive canal system, the stewardship of our water resources is an important responsibility.

Broward County's citizens and businesses have let me know that they need the assistance of their local, regional, state, and federal governments to ensure the quality of our natural resources and their protection from flooding and drought. Broward County has some 1,800 miles of canals, and without protection, careful monitoring, and regulation, pollutants in stormwater runoff could easily threaten nearshore and Everglades habitats as the water makes its way out the inlets to the ocean or back into the River of Grass. Broward County relies on groundwater for our drinking water, and our hydrogeology, shared with the other South Florida counties, allows a high level of interaction between our surface water and groundwater. The protection of surface waters is a crucial part of the protection of our drinking water resources. Broward County's environmental quality is also an integral part of our economic health, with approximately ten million visitors per year enjoying our natural resources and local businesses. I served in our emergency operations center during Hurricanes Katrina and Wilma and saw first hand how the protection of our environment supports the flood protection infrastructure to meet the needs our citizens to be safe in their homes and businesses.

As I began to speak to my colleagues from different parts of the country about HR 2421 and whether the legislation could be considered a possible expansion of federal authority to regulate water bodies, it became clear that there were widely varying views. After consultation and discussion with professional water managers and attorneys familiar with water law and the permitting process, I'm happy to provide my view today, and hope that you will give it your full consideration.

Support for the Clean Water Restoration Act

The Clean Water Restoration Act should be supported by this Committee and Congress because it clarifies Congress' intent as to the scope of federal agency jurisdiction, providing a plain meaning and more rational results in its application than exists today after the *Rapanos* decision of the United States Supreme Court. In *Rapanos*, the Court clearly struggled to determine whether the federal regulations promulgated under it were inconsistent with Congressional intent, resulting in a confusing plurality of opinions. The Clean Water Act defined the term "navigable waters" as "waters of the United States, including the territorial seas," and left to federal agencies the job of defining that standard. The Clean Water Restoration Act's replacement of "navigable waters" with "waters of the United States" and adoption of the proposed definition of "waters of the United States" clarifies Congressional intent in support of long-standing federal regulations that have been in effect for many years prior to *Rapanos*, restoring the scope of federal jurisdiction; no more and no less. This would assist future courts and the regulated community to avoid the litigation necessary to interpret the confusing plurality of opinions in *Rapanos* and to rely on the substantial jurisprudence developed in applying the federal agencies' prior definition, resulting in more rational and consistent decisions about the viability and legality of proposed projects and the scope of federal regulation. That this bill would restore the intent of Congress in passing the Clean Water Act is supported by prior decisions of many federal courts, which have held that Congress intended to give the terms "navigable waters" and "waters of the United States" the broadest permissible constitutional interpretation. See *U.S. v. Eidson*, C.A. 11 (Fla.) 1997, 108 F.3d 1336 (cert. denied), *U.S. v. Byrd*, C.A.7 (Ind.) 1979 609 F.2d 1204, and *U.S. v. Zanger*, N.D.Cal 1991, 767 F.Supp. 1030.

This bill should also be supported for its measured approach to clarifying Congress' intent. It does not expand federal jurisdiction, preempt the traditional roles of state and local governments in water quality protection or land use, or disturb the regulation of federal projects by state and local governments. Section 6 of the bill, the savings clause, preserves the existing exemptions from federal regulation in Subsection 404(f) of the Clean Water Act. Further, by adopting the standards in use just prior to the *Rapanos* decision, the bill would not change the federal regulation of public infrastructure and other projects of local governments, which are commonly developed under planning and financing horizons of 5, 10 or more years. Florida, for instance, requires that local governments adopt 10-year plans for the development of water supplies as a part of its comprehensive land use plans.

The bill also preserves the Clean Water Act's recognition of the role of state and local government constitutional powers by not amending Subsections 101(b) and 404(t). Subsection 101(b) affirms the primary responsibilities and rights of States to control pollution and to plan the development and use of land and water

resources. Subsection 404(t) clearly indicates that federal permitting requirements do not preclude or deny such state powers, including state authority to regulate the discharge of dredged or fill material and regulate the activities of the federal agencies' projects. States need to have the primary role in making decisions about the development of land and water, and this bill continues the federal government's commitment to that balance of powers, allowing state and local governments to continue providing adequate water supplies, flood protection, and land use planning and zoning.

Finally the bill does not propose to change the current authority of states to manage permitting, grant and research programs and to prevent and eliminate pollution, even by adopting more proactive standards than those provided as minimums by federal programs. Because the bill will not disturb the role that Florida, Broward County, and many other state and local governments have chosen by adopting more protective standards than comparable federal programs or by obtaining delegations of those federal programs, it continues to support the existing role of state and local governments in the protection of our water resources. The continuation of this balanced approach helps our citizens obtain the benefit of having minimum and consistent standards across the nation, while allowing for the development of higher levels of protection when state and local governments need to respond to local needs. Even with such state and local programs in some areas of the nation, the continued partnership of the federal government to provide the minimum protections of the Clean Water Act provides the assurances needed by our citizens, businesses and governments of the nation's commitment to securing our future environmental and economic health. Continuing the roles of this partnership intact, rather than allowing a substantial confusion of the role of the federal government, is the best way to meet the objective of the Clean Water Act to restore and maintain the integrity and quality of the nation's waters.

Addressing Criticisms of the Clean Water Restoration Act

The Clean Water Restoration Act has been criticized as expanding federal jurisdiction to swales, ditches and gutters, and raised concerns about the effect of expanded jurisdiction and the potential for federal permitting delays on construction and maintenance projects of local governments. However, the role of the federal government in these areas is not changed by passage of the bill in any manner other than restoring the settled expectations of the regulated community and state and local governments that have been in place for over 20 years.

Swales are prevalent throughout Broward County. They are part of a water quality treatment system and, therefore not subject to the water quality requirements of the Clean Water Act. The stormwater/water quality treatment ponds to which they may discharge are similarly treated under the Clean Water Act. In order to meet the objectives of the Clean Water Act, however, current law

requires that water quality treatment is provided prior to discharge to canal or water bodies, which are already "waters of the United States." Water quality in Broward County's canals and the rivers, streams and lakes of other parts of our nation, are already protected by the Clean Water Act's NPDES and TMDL programs. This bill will not change the role of the federal government in relation to such swales, ponds, or canals or amend the NPDES or TMDL programs to reach new water bodies, waterways, their tributaries or headwaters.

A concern about this bill causing expanded regulation of ditches has also been raised. However, this bill does not change the way ditches are treated under the Clean Water Act. Ditches are already defined as a "point source" in Subsection 502(14) of the Act. The Clean Water Act allows discharges of pollutants from such point sources to waters of the United States when they comply with Section 402's NPDES program. The adoption of a definition of "waters of the United States" that is consistent with past federal agency rules will simply not expand or even disturb the current treatment of ditches under the Act.

Concerns about expanded regulation of public infrastructure and maintenance projects are similarly misplaced. *Rapanos* may have indicated to governmental entities considering such projects an opportunity to avoid the costs and time involved in obtaining federal permits for the class of projects only affecting isolated wetlands or very intermittently existing waters. However, the federal government's permit processing time frames can be reasonably accommodated when such projects require 5 or 10 year capital plans, land acquisition and use decisions, and competitive bidding processes that are commonly used through the nation. The existence of Clean Water Act nationwide and other efficient general authorizations address most projects that do not already require this level of time and planning, so it is a very narrow class of public projects that could have suddenly sprung up that would not be able to accommodate a return to the federal definition of "waters of the United States" that was in force up until December of 2006. Additionally, the plurality opinions in *Rapanos* have made it harder for public and private projects alike to anticipate what types of projects will qualify for a federal permit. The restoration of the prior federal definitions would lessen the confusion and uncertainty that public and private projects alike face after *Rapanos* when planning for major infrastructure or capital projects. The bill's adoption of the long-standing federal regulatory definition into statute would actually settle many of the questions raised in past court cases under the Act and provide a better basis for courts to construe the plain meaning of the Clean Water Act, lessening the risks of unpermittable projects and costly litigation.

Finally, concerns about preemption of state and local land use authority have been raised in connection with regulation of flow volumes from stormwater and run off from impervious surfaces. After thorough review by our attorneys and water managers, the basis for such concerns is unclear at best. The Act's relation to land use planning and zoning was neither changed by *Rapanos* nor would it be by the Clean Water Restoration Act. How such flows may affect

waters of the United States was the subject of nonpoint source pollution protections through certain types of NPDES permitting before and after *Rapanos*, under programs such as the Municipal Separate Storm Sewer System permitting program. Broward County is the lead permittee for such a "MS4" permit that includes almost all of the municipalities within the County, and its requirements to reduce nonpoint source pollution from runoff and land uses have neither supplanted the County or municipal roles to make land use decisions nor frustrated our responsibilities in meeting state requirements for comprehensive land use and water supply planning.

Mister Chair, I am pleased to note that among the 175 cosponsors of your bill are most of Broward County's Congressional Representatives. As for my opposing colleagues at NACo, particularly in the western states, I have no doubt that they are sincere in their concerns that this legislation would preempt their local government authority and make their permitting requirements even more onerous. I respectfully disagree.

In closing, let me assure the members of this committee that the Broward County Board of County Commissioners supports strong water quality protections and legislation that retains the original intent of the Clean Water Act. Restoring the Clean Water Act protections to all our water bodies has taken on even greater significance as counties across the nation are dealing with massive flooding, lack of drinking water, and new threats of unregulated industrial pollution to our streams and drinking water sources. Restoring Clean Water Act protections for small streams and isolated wetlands that the recent Supreme Court *SWANCC* and *Rapanos* decisions have put in doubt will protect our children's water resources for decades to come.

Mr. Chair and Members of the Committee, thank you so much for the privilege of offering my testimony today.