Before the U.S. House of Representatives
Committee on Transportation and Infrastructure

Hearing on H.R. 2421
"The Clean Water Restoration Act of 2007"

Testimony of
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Submitted on behalf of municipal members of

Nation Water Resources Association (NWRA),

Western Urban Water Coalition (WUWC) and

Western Coalition of Arid States (WESTCAS)

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Mr. Chairman and Members of the Committee, my name is Mark Pifher and I am here today to provide the perspective of Western municipal water and wastewater utilities who share concerns over the current language contained in the "Clean Water Restoration Act of 2007." This group includes certain members of the Western Urban Water Coalition (WUWC)[1], the National Water Resources Association (NWRA), and the Western Coalition of Arid States (WESTCAS), such as Las Vegas, Tucson, Phoenix, Metropolitan Water District of Southern California, San Diego County Water Authority, Las Cruces, Colorado Springs, and Albuquerque. Over the years, I have been an active member of these organizations participating, in particular, on their Clean Water Act committees. I am also the immediate past director of the Colorado Water Quality Control Division, where I was responsible for the state implementation of all aspects of the Clean Water Act and the Safe Drinking Water Act. However, I do not appear today on behalf of the Division or the State of Colorado. I am currently the Deputy Director for Water Resources in Aurora, Colorado, the state's third largest municipality and the sponsor of an innovative $750 million dollar water reuse project, which is now under construction and which was recently favorably referenced in a New York Times article on Western water supply challenges.

## I. Introduction

Western municipalities, and in particular their water, wastewater and stormwater utilities, always have been, and will remain, strong supporters of the basic tenets of the federal Clean Water Act. After all, this statutory program assists in protecting and enhancing the source water upon which these cities rely to provide clean, safe drinking water to their citizens. It is these same municipalities who are partners with the state and EPA in implementing the pretreatment, stormwater and source water assessment programs; who construct wetlands as natural purification alternatives; who install, operate and maintain reuse and recycled water supply projects to maximize a scarce resource; who invest in the technology and plant improvements necessary to restore our impaired waterbodies under the total maximum daily load (TMDL) program; and who engage in pollutant trading efforts in order to assist under-funded nonpoint sources. Hence, I appear before you today not to undermine any efforts at strengthening water quality protection, but simply to express concerns over the potential impacts of the language found in H.R. 2421, with the hope that together we can address any legitimate concerns.

With the above as background, let me briefly identify some of the potential issues from the perspective of "on-the-ground" Western entities with water supply and wastewater/stormwater treatment responsibilities.

## II. Expansion of traditional federal jurisdiction and creation of uncertainty.

As proposed, the bill would redefine "waters of the United States" so as to include the full panoply of wet areas from mud flats to intermittent streams to prairie potholes and "all impoundments of the foregoing, to the fullest extent that these waters, <u>or activities affecting these waters</u>, are subject to the legislative power of Congress under the

[1] "WUWC members from San Francisco, Portland, Seattle, and East Bay Municipal Utility district do not join in this testimony."

Constitution." I will leave it to others, including our University professor panelists, to address the legal fine points of the Commerce Clause, the Supremacy Clause, the Necessary and Proper Clause and other constitutional provisions that may be brought to bear under this very expansive definition. For purposes of my testimony, I will simply note that in interpreting this language one would assume that the courts, which unfortunately will see many cases should the legislation be adopted, would look, in part, to the "Findings" section of the bill for guidance. There are a number of references, under this section which, depending upon how they are ultimately interpreted, may create the necessary federal nexus where such a connection did not previously exist. These references from Section 3 include the following:

- "Any part of an aquatic system" that may be interconnected with surfaces waters, potentially including "groundwater."
- Certain ephemeral and seasonal streams (depending on how they are ultimately defined).
- The "draining" of wetlands.
- Source water protection areas (as compared to the waterbodies therein).
- Bird watching, photography and general recreational activities.
- Bird and wildlife protection under treaties.
- The protection of federal "land".
- Flood control activities.

The above references, when combined with the fact that the new definition of "waters of the United States" would now encompass "activities affecting these waters" as compared to the waters themselves, may result in an expansion of jurisdiction under the Act that will unduly constrain state and local flexibility, while greatly increasing the time and costs associated with meeting water supply and wastewater treatment obligations. It may impinge upon local land use and water resource planning and undermine the timely completion of necessary projects, such as those authorized in the recent WRDA legislation.

## III. Impacts on Western water supply activities.

Much of the West is rapidly growing, yet "water short." As noted below, the situation may only be exacerbated by forecasted climate change. The expansive language of the legislation could unduly complicate, delay, and increase in cost the installation of necessary water supply infrastructure or, in a worst case scenario, foreclose certain water supply options altogether. For example:

- As more waterbodies are determined to be jurisdictional, the construction of necessary water delivery infrastructure, e.g. wells, ditches, canals, pipelines, diversion structures, etc. will more often require Section 404 dredge and fill permits from the Corps.
- Even if Section 404 permits, be they "nationwide" or "individual" in nature, can be obtained for such infrastructure projects, there is a greater chance that the newly

created federal nexus will be pervasive enough to trigger NEPA review for activities occurring within the infrastructure corridor. This too will greatly increase project time and costs, as the entire NEPA process, from alternatives analysis to the final ROD, would need to be followed.

- Normal and necessary infrastructure maintenance, repair and replacement activities could now similarly trigger regulatory review, be they related to pipelines, ditches, canals, reservoirs, etc.
- Certain routine activities, such as the use of blow off valves along water supply pipelines, could require regulatory approval if located in close proximity to what would now be considered "jurisdictional waters."
- Should the EPA "water transfers rule" as previously proposed not be adopted and/or the courts determine that the mere transfer of water from one waterbody to another requires an NPDES permit, the reach of such regulated transfers could expand in proportion to the increased reach of jurisdiction over waterbodies.
- Given the enormous federal land footprint in the West, many Western storage and conveyance facilities are currently located on these lands. New "high elevation" storage options, and even many lower elevation alternatives, would be similarly located on Forest Service or BLM lands. There may be greater difficulty securing permit renewals or obtaining permits in the first instance for such facilities given the expansive language in the bill.
- On a related note, the West is the home to many American Indian tribes to which a trust responsibility is owed. This is reflected in the need to meet tribal water allocations, which often times requires the construction of water storage and conveyance facilities. This legislation may make meeting those obligations even more expensive and difficult, leaving long term municipal water supply options in doubt.
- Recovery programs and habitat conservation plans under the Endangered Species Act are often times dependent upon water management activities, including water infrastructure installation. Making completion of these activities more onerous and expensive is counter productive and simply adds to the burden of project sponsors such as Western municipal water suppliers.
- New energy development activities, such as coal bed methane production, can have associated water discharges which create both eco-systems and valuable water supplies for other beneficial uses, including municipal supply. Flexibility in the treatment of such water sources, which are often discharged to dry arroyos, may be lost.

## IV. Impacts on Western municipal wastewater discharge activities.

Western wastewater treatment facilities face a host of challenges, not the least of which is often-times the absence of any significant dilution flows at the point of discharge. "End-of-pipe" effluent limits are common. In many places, the wastewater discharge constitutes the majority of the flow (effluent dominated) or all of the flow (effluent dependent) in the stream. In addition, many treatment systems belong to financially

challenged small, rural municipalities who utilize lagoon technology, with periodic groundwater or surface water discharges. Any expansion of CWA jurisdiction may further complicate, or increase in cost, wastewater treatment efforts at a time when infrastructure monies are already in short supply. For example:

- The construction of necessary wastewater collection systems and associated lift stations may more often trigger Section 404 review, increasing costs and delays.
- With the reach of the Act now encompassing all ephemeral and intermittent streams, normally dry washes and isolated waterbodies, including isolated wetlands, previously exempt discharges for which no NPDES permit was required may now fall within the permitting scheme.
- Formerly, "zero discharge" activities, i.e., land application facilities and certain lagoon facilities, may now require permits due to potential groundwater impacts or surface water discharges to formerly non-jurisdictional waters.
- The use of "constructed wetlands" for treatment, if such are found to be jurisdictional, may be a less attractive treatment alternative. Regulatory constraints may limit their use, despite the cost effectiveness and environmental enhancements associated therewith.
- Recent efforts by EPA and stakeholders to develop policies governing water quality standards for effluent dependent and even effluent dominated waterbodies, including the advancement of a net environmental benefit concept designed to ensure the continuation of ecosystem supporting discharges, may prove more difficult.
- The bill may eliminate the exemption under current regulations for wastewater treatment systems.
- The bill may hinder the development and implementation of wastewater reclamation and reuse projects depending upon their design, e.g. groundwater recharge, and location, e,g, discharging to normally dry streambeds.
- Expanded jurisdictional issues might discourage innovative treatment technologies from being applied to produced water resulting from oil and gas production, or might discourage saline and brackish water treatment for augmenting sparse water supplies.

## V. Impacts on Western stormwater control activities.

Much of EPA's focus over the last few years has been on controlling wet weather flows. Municipalities, along with the states, have been front line players in attempting to achieve stormwater related water quality protection goals. This includes both the utilization of local land use authority and the construction of municipal stormwater control facilities, including retention and detention basins. Once again, as noted below, climate change may only add to the difficulty and costs associated with these activities. Further CWA regulatory constraints may similarly increase the local burden. For example:

- The construction of new stormwater collection and retention/detention infrastructure may face the same additional Section 404 regulatory burdens faced by those constructing water and wastewater infrastructure.
- Similarly, the maintenance, repair and replacement of such stormwater infrastructure may become more difficult.
- The geographic areas where stormwater can be channeled without triggering regulatory consequences may be more closely circumscribed.
- As is the case with wastewater treatment options, the use of constructed wetlands may become a less attractive alternative.
- The cost of best management practice (BMP) implementation may significantly increase, as more areas would qualify as "waters of the United States" warranting protection.
- The proposed language changes may adversely impact stormwater management activities that are limited to water supply enhancement, such as: stormwater management projects that are being proposed on a watershed scale as a means to increase the availability of water supplies for western municipalities through large surface water harvesting projects; stormwater capture and infiltration through shallow basins to the subsurface for groundwater recharge; and green building projects that capture stormwater from rooftops and parking structures for reuse.

## VI. Impacts of climate change.

In the West, municipalities are closely following the science of climate change and proactively developing climate adaptation strategies. If current projections hold true, there may be earlier and potentially more rapid snow melt runoff (the source of much needed water storage); less precipitation in the form of snow and more in the form of rain; more intense, flashy summer storm events; an overall drop in basin-wide precipitation; and an increase in evaporation and evapotransporation, increasing overall water demands. In response to these predictions, western municipalities may find it necessary to:

- Increase reservoir storage so as to capture snowmelt and rain events when available and create additional "buffering" capacity for dry periods.
- Enhance stormwater management systems to handle extreme rainfall events, including flooding.
- Maximize hydropower generation to off-set infrastructure costs and reduce carbon footprints.
- Increase "underground" storage through recharge systems.
- Expand water collection systems, including pipelines, ditches, canals, etc.
- Take advantage of desalinization technologies for inland brackish and saline water resources and for water produced in association with oil and gas production.
- Capture and manage water from cloud seeding projects.

To the extent these types of responsible and forward looking adaptation measures require either infrastructure or the discharge of water, any expansion of the reach of "jurisdictional waters" will only complicate, delay, and increase in cost their implementation.

## VII. Conclusion

Western municipal interests face daunting challenges in the years ahead as they strive to meet both water supply and wastewater/stormwater treatment obligations. They are partners, along with EPA and the states, in the Clean Water Act regulatory regime and are dedicated to the protection of our most valuable resource – water. However, as we move forward, the language of the Act must be clear, so as to avoid costly litigation and regulatory delays, and flexible, so as to be able to adapt to changing conditions and new hydrologic scenarios, while proceeding with appropriate water resource planning at the state and local level.

In addition, the long recognized deference to state and local control over land use and water development activities, as embodied in Sections 101(b), 101(g) and 510 of the Act, must be honored. Though the goals of H.R. 2421 are laudable, the current language affords neither clarity nor flexibility, and constitutes a federal intrusion on traditional local perogatives. Western municipalities nevertheless stand prepared to work cooperatively with Congress and other stakeholders on solutions to clearly identified problems, so as to insure that the over-arching goals of the Act, as originally envisioned by Congress, are met.