AMERICAN PROPERTY COALITION

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Congressional Hearing
on
"The Clean Water Restoration Act of 2007"

United States House of Representatives
Committee on Transportation and Infrastructure

Statement
by

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Mr. Chairman and members of the Committee: Thank you for this opportunity to present testimony today on the *Clean Water Restoration Act.* My name is Linda Runbeck, President of the American Property Coalition, a grass-roots organization that promotes local and regional alternatives to environmental policy. We believe the best way to achieve water quality and other environmental goals is through leadership at the local level, exactly the opposite approach suggested in the *Clean Water Restoration Act.*

CWA Shifts to National Land Use Control

Mr. Chairman, the goal of the *Clean Water Act* was to make the nation's rivers, lakes and streams both fishable and swimmable. Unfortunately, progress towards that goal has fallen short. While the CWA has succeeded in reducing industrial discharges, point source pollution from municipal waste plants has taken their place, swamping those gains. Billions have been spent, but the nation's water treatment infrastructure requires continued heavy lifting to finish the job of cleaning up point source pollution. In some small rural communities, nearly 100 in Minnesota, that can't afford a treatment plant,

straight pipe discharge of waste still goes directly right into lakes and rivers, according to a recent report in the StarTribune in Minnesota. Yet, today we're looking at HR 2421, a bill that amounts to national land use control that literally will re-shape the lives and livelihoods of Americans. HR 2421 has come in through the backdoor masquerading as a so-called simple clarification of the *Clean Water Act* when it is not. Rather, this bill has the potential to transform the *Clean Water Act* into a full-blown national land use control act. In it, federal agencies are given unlimited jurisdictional boundaries to intrude on every activity where Americans are involved with land and water. A more appropriate moniker would be the Nationalized Land and Water Control Act. As Reed Hopper of Pacific Legal Foundation observed in written testimony, *"...this bill pushes the limits of federal power to an extreme not matched by any other law, probably in the history of this country."*

CWA Expansion Would Regulate 'Activities Affecting Waters'

The bill would open the door to federal regulation of even insignificant, small depressions of mostly dry land, isolated wetlands, arroyos in the desert, sandflats, ditches and gutters, areas scarcely recognizable as 'waters of the U.S'. It doesn't end there: this bill would also, for the first time ever, authorize federal regulation of any 'activities affecting water'. And to be clear, 'activities' might have a direct impact or an indirect impact on waters. So, regulated 'activities' could be take place on a hilltop or a mountain-top 25 miles from a water, and the feds would still have the power to bring that activity to an immediate halt. For those not familiar with our work, we've conducted numerous workshops informing people of this pending bill, and in every city we've been, people stare in utter disbelief. They're going to do what? The federal government? On my private property? This bill is a wolf in sheep's clothing. The added language, "activities affecting these waters" has the potential to expand the federal government's regulatory authority far beyond the physical boundaries of water bodies or their buffers. No matter where an activity takes place, it may have the potential to affect "water" as broadly as it is defined. What activities? Measured in what way? Over what period of time? Under what conditions? All the questions regarding 'activities' regulation remain unanswered. The regulatory takings implicit in this bill, considering the millions of acres affected and the added costs of doing business or not doing business on one's land, are monumental. The ones who stand to lose will be the retirees, families, farmers, home builders, growers, sportsmen, ranchers, small business owners – those with their net worth tied up in homes, lots or land. This bill is about wresting control, from property owners, of the nation's lands and waters.

Vagueness Leaves More Confusion, More Issues Thrown into Courts

Far from simplifying, the *Clean Water Restoration Act* would achieve the opposite: broadening the scope of the *Act* far beyond its original intent and creating even more confusion over what is or is not to be regulated. The shame is that Congress, should it pass this bill, will have abdicated its role and transferred power from elected officials to the courts and appointed officials. The absence of clear and consistent standards will lead to abuse. Just as in Reed Hopper's example of a COE bureaucrat heard to say, "a

wetland is whatever we want it to be", now under HR 2421, bureaucrats with the same unbridled zeal will say "an '*activity*' is whatever we want it to be".

The bill also offers a convenient scapegoat for Congress to shifts the costs (and the blame) associated with water clean-up onto property owners and local governments. At the same time, Congress fails to provide them any meaningful measuring stick as the bill contains no national water quality standards. The same criticism has been made of the original *Clean Water Act.* Clemson University economist, Bruce Yandel wrote, "The *Clean Water Act* did not establish a system of national water quality standards as the *Clean Air Act* had established for air quality. Instead the CWA adopted a vague goal concerning fishable and swimmable water quality." Absent any measurable water quality standards or cost-benefit analyses or effective assessment mechanisms, this bill has the potential to exhaust the resources of individuals and local governments. Finally, after intruding on the freedoms and pocketbooks of millions of Americans, this bill can provide us no assurance that the nation's water quality will be improved.

Criminal Penalties and Citizen Lawsuits Retained from Original CWA

The bill retains two punitive features from the original *Clean Water Act* – the criminal penalties and the opportunity for citizen lawsuit abuse. The expanded scope of the bill would put many more Americans at risk of the harsh criminal penalties of the original *Clean Water Act* - knowing violators face a maximum three-year prison sentence and fines of $50,000 per violation. The punishment simply doesn't fit the crime given the expanded jurisdiction to isolated wetlands, non-navigable waters and patches of almost dry land. Sadly, it will breed over-compliance in landowners, i.e., a tendency driven by fear to avoid out-of-line penalties -- similar to someone driving 30 mph in a 55 mph zone because they're afraid of the over-zealous cop.

The other punitive feature retained in this bill from the original *Act* is the citizen lawsuit. Unlike most laws where a person has standing in court only if they're personally injured, in environmental law, anyone anywhere can claim harm and bring a lawsuit. With this provision, both private landowners and public lands users have a bullseye on their back for harassment and exorbitant legal defense costs. Furthermore, this bill's inexplicably vague language allows special interest groups to forcibly broaden the statute's jurisdiction through court verdicts. Should this bill be enacted, instead of clarifying long-standing confusion in the original *Act*, it would erase 35 years of jurisprudence and turn the clock back on land and water regulation.

A Federal Wetlands Management Bureaucracy Will Be Required

Even the exemptions for agriculture and silvaculture stand to be compromised. Today, in Minnesota, federal exemptions for agriculture are being trumped by the state's *Wetlands Conservation Act.* A farmer's permit application approved under NRCS may be denied under Minnesota's WCA. In Minnesota, areas of almost dry land no bigger than 20 ft x 20 ft, the size of an average family room in a typical American home, are subject to regulation. Our wetlands bureaucracy grows in size and scope as it implements functions

such as wetlands delineation, replacement, monitoring, and enforcement as well as a wetland-banking and credits program, and a vegetation management program. With too much discretion in their hands, we see regulators getting carried away with outright nonsense in the name of environmental protection. A former colleague of mine was denied a permit to remove a large patch of poison ivy on the hillside in his backyard. According to the local government agent, the denial was because poison ivy is a natural substance.

One attorney in a large Minnesota law firm which handles hundreds of wetlands cases, said: "We have a bureaucratic nightmare for the landowner that made a mistake in good faith. Instead of the government having the burden and expense of proving the landowner was wrong, the burden is on the landowner to prove up the negative…There's a lot of nervousness out there."

Majority Opposes Federalization of all 'Waters'

There is little public support for greater federal control over lands and waters. Even when presented with arguments on both sides, respondents to a poll conducted in February by the National Center for Public Policy Research were opposed to this legislation by a margin of 54 – 46. More telling were the results when broken out by region. Opposition in the Mountain States was 62%; in the Farm Belt, 59% and in New England, 58%. A poll conducted in the Chairman's own district in northern MN in the late summer of 2006 asked respondents if they'd be more or less likely to support a candidate who "authored legislation to transfer control of all Minnesota lakes, streams and wetlands to the federal government." Seventy-eight percent said they would be "less likely."

Local Initiatives Ensure Accountability and Common-Sense

A grass-roots response is the optimal way to achieve cost-effective, common-sense solutions to most environmental problems. As Jonathan Adler wrote in the May 6, 1996 issue of *National Review*, "Most environmental problems are regional or local in nature, and they should be dealt with accordingly. Washington bureaucrats cannot hope to set rational priorities for every community in the nation, nor should they be allowed to try." Local initiatives are the only way to ensure accountability and broad-based public support. This has been demonstrated repeatedly throughout the country. For example, in 1998, a group of local citizens and county supervisors in California developed their own plan for managing two national forests and a portion of a third. That plan was written into law in 1998 led by U.S. Senator Dianne Feinstein. In Minnesota, prominent democrats and republicans joined forces in the '90's to produce local plans for nationally significant rivers. This was done through county joint powers agreements resulting in a very successful and popular alternative to proposed federal designations under the Wild and Scenic Rivers Act. This kind of approach needs to be given serious consideration with respect to the *Clean Water Act*.

In conclusion, given the local nature of ditches, gutters, isolated wetlands, small depressions in fields, and prairie potholes, the American people deserve something better than a centralized national land use bill imposed on an unsuspecting American public. Congress should take the time to get it right. The right way would be to: 1) establish goals; 2) authorize completion of a comprehensive assessment of the quality of the nation's waters; 3) establish priorities, costs, and a realistic timetable for achieving water quality goals; 4) complete the task of bringing the remaining point sources into compliance; and 5) allow local governments and local citizens the opportunity to develop local and regional alternatives that will ensure the broadest public support in order to achieve the desired results.

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