Written Testimony of
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Good morning Chairman Oberstar, Ranking Member Mica, and Members of the Full Committee on Transportation and Infrastructure. My name is James M. Tierney and I am the Assistant Commissioner for Water Resources of the New York State Department of Environmental Conservation in the administration of Governor David Paterson. Thank you for the opportunity to testify today about the importance of restoring the protections afforded by the Clean Water Act to America's lakes, streams, rivers and wetlands.

The Clean Water Act has been integral to the restoration and protection of our Nation's waters for more than 30 years. Unfortunately, rulings by the United States Supreme Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC) in 2001 and *Rapanos v. U.S.* (Rapanos) in 2006 jeopardize federal water pollution protections for the majority of the nation's streams, rivers, and wetlands.

New York, therefore, strongly supports HR. 2421, the "Clean Water Restoration Act of 2007." This legislation would truly be in the nature of a "restoration." For over three decades following the enactment of the Clean Water Act in 1972 it was understood that the Act regulated the discharge of pollutants, including fill, into "traditional" navigable waters, their non-navigable tributaries, and wetlands adjacent to these water bodies. This definition of what constitutes "waters of the United States" was contained in long-standing regulations promulgated by both the Environmental Protection Agency and the Army Corps of Engineers[1] – a legal definition that is fundamental to the scope and jurisdiction of the Clean Water Act.

While I only speak here on behalf of New York State, it is important to stress that the vast majority of the States recently expressed strong support for the long-standing definition of "waters of the United States" that was contained in these EPA and Army Corps regulations since

[1] 33 C.F.R. § 328.3(a)(1), (5), (7) (Corps definition); 40 C.F.R. § 230.3(s)(1), (5), (7) (EPA definition); 40 Fed. Reg. 31,320, 31,324-25 (July 25, 1975).

1975. Indeed, some 34 States and the District of Columbia joined an *amicus curiae* brief (http://rapanos.typepad.com/briefs/NewYork.pdf and http://www.eswr.com/1105/rapanos/rapamicstates.pdf) which supported this regulatory definition in proceedings before the U.S. Supreme Court during the controversial *Rapanos* matter. The position expressed in the states' *amicus* brief concerning the scope of the "waters of the United States" protected under the Clean Water Act is essentially identical to that presented in the Clean Water Restoration Act of 2007.

I would also like to express New York's strong technical and scientific concurrence with the legislative findings of the Clean Water Restoration Act of 2007. These findings are an excellent and scientifically valid summary of the environmental and economic connections between all waters, connections that extend from the largest bodies to small tributaries and headwater wetlands.

New York has lost an estimated 60% percent of its wetlands since early colonial times. Many other States have suffered even greater losses. Therefore, we as a Nation need to protect and enhance those wetlands that remain. The Clean Water Restoration Act of 2007 is critical to achieving that goal.

Importance of Clean Water to New York State

New York benefits from some of the most extraordinary water resources in the country, ranging from Long Island Sound to Lake Champlain and the Adirondack mountain lakes to Niagara Falls and the Great Lakes. New York is blessed with water resources that include over 52,000 miles of rivers and streams, nearly 7,900 lakes and ponds, 600 miles of Great Lakes coastline, 1,530 square miles of estuaries and 120 linear miles of Atlantic Ocean coastline.

New York's abundant water resources are integral to the State's economy and environmental quality. Industries have located in New York State because of our water supply. Tourism and recreation thrives along New York's waterways, and important events in the history of our Nation are intrinsically linked to New York's water resources – such as Henry Hudson's travels up the river now named after him; the Battle of Saratoga during the American Revolution that helped to change the course of our history; and the welcoming of millions of immigrants to our Nation at Ellis Island. Clean water – so greatly tied to New York's past, present and future – is essential for drinking water, economic development, tourism and recreational activities, fish and wildlife habitat, and many other activities in New York.

New York has developed a solid track record in the preservation of the quality of many streams, wetlands, lakes and groundwater resources, and the improvement of water bodies which were polluted in the past. Working with EPA, we have developed and implemented comprehensive plans for the Hudson River Estuary, Long Island Sound, Lake Erie, Lake Ontario and Lake Champlain. State officials continue to work with our local and federal colleagues and other interested parties to clean up Onondaga Lake, the New York-New Jersey Harbor, the Buffalo River and other waters.

Together with New York City, upstate communities, EPA and many other parties, in 1997 New York negotiated and implemented an agreement to ensure that a high quality, unfiltered drinking water supply is available for the daily use of the over eight million residents and visitors to the City, as well as at least one million users in Westchester, Orange, Ulster and Putnam Counties – about half of the population of New York. This "New York City Watershed" is the largest unfiltered drinking water supply in the country, providing approximately 1.3 billion gallons of drinking water every day.

Through the implementation of a comprehensive watershed protection program, EPA has granted New York City a waiver from the Safe Drinking Water Act's mandate to filter drinking water supplies. This waiver has, in turn, saved the City of New York a projected $8 to $10 billion that would otherwise be necessary to construct a water filtration plant, as well as approximately $1 million a day to maintain and operate this plant. Wetland and stream protection programs, including very small streams and headwater wetlands, have been critical components of this highly successful drinking water watershed protection effort.

States' Reliance on the Clean Water Act

None of the improvements that we have made in New York's water resources could have occurred without the active participation of the federal government. Congress has been at the forefront of these efforts, through past actions to create and reauthorize the Clean Water Act and the Safe Drinking Water Act, as well as through annual appropriations to fund the mandates of these laws. Recent attacks on the Clean Water Act's traditionally broad protections for all types of waters would leave only certain waters – such as those that are "navigable-in-fact" or permanently flowing – covered by the law with any degree of certainty or predictability. This is not consistent with scientific understanding of the connections between waters and fails to offer sufficient environmental protections.

States have relied on the federal Clean Water Act for the past 35 years to set criteria and establish programs to ensure that their waterways are clean and safe. For many reasons, states such as New York need a federal program that serves as a consistent and strong national "floor."

Simply put, water flows downhill. It is an important fact that affects each of the lower 48 States. All of these states have water bodies that are downstream of one or more of the other states. For example, New York, Pennsylvania, New Jersey and Delaware share the Delaware River. Therefore, the need to stop pollution at its source, in the headwaters, is important to every state. New York takes this responsibility seriously. For example, we are actively working with local stakeholders to implement a "Tributary Strategy" for the New York portion of the Chesapeake Bay watershed that identifies pollutant source reductions that can be achieved. This strategy identifies actions that can be taken to help restore a valuable national resource that is approximately 300 miles downstream of New York's border.

In addition, wetlands generally drain into adjacent tributaries or other waters, and the health of the lower reaches of watersheds relies on the health and vitality of tributaries and their adjacent wetlands. Federal agencies have properly applied the CWA to both non-navigable tributaries and to the wetlands adjacent to them for more than 30 years. To do otherwise would frustrate the Clean Water Act's purpose of restoring and maintaining the physical, chemical and biological integrity of the Nation's waters. For these reasons, New York strongly supports continued federal protection for these wetlands and other waters, including intermittent and headwater streams. New York protects all surface and ground waters of the State, including intermittent and headwater streams, through the State Pollutant Discharge Elimination System (SPDES), which has been approved by EPA to meet the requirements of the Clean Water Act.

It is essential to maintain a strong federal floor for water pollution programs throughout the country through the Clean Water Act. Otherwise, there could be a "race to the bottom" as financially hard-pressed States reduce environmental protections to obtain a perceived economic advantage. Our country's rivers, lakes, streams and wetlands depend on federal protections to guarantee that pollution does not poison or destroy these waters. It is not likely that alternative conservation programs or regulatory programs at the state or local level will provide adequate or appropriately broad surrogate protections should the jurisdiction of the Clean Water Act be reduced.

Over the past three decades, the states have relied on the Act's core provisions and have structured their own water pollution programs accordingly. While states play a vital role in administering parts of the Act, they would be heavily burdened, both administratively and financially, if forced to assume sole responsibility for regulating fill activities in wetlands adjacent to non-navigable tributaries and in smaller streams. The proposed clarification is needed to prevent a reduced role for citizens, who can file suits under the Act's citizen suit provisions. Limiting the definition of the term "waters of the United States" limits the rights of citizens. States themselves might lose significant authority to seek relief from pollution discharged into unprotected waters of up-stream states.

Further Legal Challenges to the Definition of Navigable Waters

EPA relied upon the Clean Water Act's broad authority in defining navigable waters in developing regulations to implement the federal oil spill prevention program (Section 311(j) of the CWA). The American Petroleum Institute and Marathon Oil challenged the definition of "waters of the Unites States" in EPA's spill prevention regulations - the same definition used elsewhere in its Clean Water Act regulations - seeking to limit the extent to which the federal program would apply to damaging oil spills for many of the nation's streams, creeks and wetlands (see *American Petroleum Institute v. Johnson* and *Marathon Oil Company v. Johnson*). New York State intervened in these cases. By restricting the scope of the term "waters of the United States," the state's waters would be afforded less protection under federal law and therefore more vulnerable to pollution.

Oil spills have caused extensive and expensive environmental damage in New York. Nationally, more than 9,000,000 gallons of gasoline escape into the environment annually during the course of transportation, storage, sale or use. Contaminated private and public drinking water wells in New York, as well as traditional navigable waters, have resulted from these spills. If the challenge by the oil companies is successful, fewer waters in New York would be afforded protection from oil spills and hazardous waste discharges under Section 311 of the Clean Water Act. New York would lose its ability, granted by the Oil Pollution Act of 1990, to file cost recovery claims with the federal government for oil spill clean ups undertaken in wetland areas. Such a decision would leave New York State with less money in its Oil Spill Fund to properly address the more than 20,000 active spills statewide. In just one New York watershed, the eastern shores of Lake Ontario, there are approximately 10,600 acres of wetlands, 65% of which are not adjacent to navigable waters. Therefore, if the oil companies prevail, pollution would be allowed into these waters with no remedy under the Clean Water Act.

Unfortunately, this possibility came one step closer to reality last week. On March 31st the US District Court for the District of Columbia ruled against EPA and interveners, including New York State. This ruling is further evidence of why Congress must act now to reaffirm and clarify the Clean Water Act.

Support for the Continuation of CWA Protections

Wetlands and adjacent tributaries are extremely important for downstream water quality. For example, an analysis of Lake Champlain by Vermont and New York concluded that of the estimated 647 metric tons of phosphorus (which tends to deplete dissolved oxygen and thereby create low oxygen conditions in which most aquatic life cannot survive) entering the lake from all sources each year, 573 tons — 89% — entered the Lake through its tributaries, most of which are non-navigable and intrastate waters.

In addition, headwater streams and isolated wetlands greatly enhance biodiversity or the variety and composition of biotic life. In New York alone, isolated wetlands provide habitat for hundreds of species of animals and plants, including more than 20 rare animals and 140 rare plants. Headwater streams are so critical for maintaining biodiversity that a panel of scientists, writing in the Journal of the American Water Resources Association, concluded: "Degradation and loss of headwaters and their connectivity to ecosystems downstream threaten the biological integrity of entire river networks."

Moreover, headwaters are vital in their own right. EPA has found that non-navigable tributaries in the mid-Atlantic region contain 558 separate sources of drinking water, serving a population of 5.2 million people. Headwater streams comprise about 53% of the total stream length in the lower 48 states.

Similarly, certain non-navigable bodies of water and wetlands in the New York City Watershed have been designated as Critical Resource Waters because of their importance in assuring the

purity of the City's water. New York City has successfully provided quality drinking water, in part, by protecting the wetlands and headwater streams north of the city that feed the reservoirs the City uses as sources of drinking water.

Clearly, states find all types of waters important to the health and safety of their citizens. Wetlands, their adjacent streams and tributaries as well as other small streams and tributaries are extremely important to protect our communities from flooding. These systems naturally absorb flood waters during heavy rain events and then release those waters after rain events. In 2007, New York experienced a significant flooding in some of our communities, including Westchester, Rockland, Ulster and Orange Counties. The damages, just to public properties in Westchester County, totaled $38 million from floods caused by a nor'easter'. If damages from this one storm to public and private properties in all the affect counties were combined, they would easily reach into the hundreds of millions of dollars. In New York, we are concerned that, if small wetlands and streams are removed from protection under the Clean Water Act, increased flooding would be likely, and the financial losses would be dramatic.

Without wetlands, fish and wildlife species lose much-needed habitat that, in turn, seriously impacts hunting, fishing and other recreational activities that are important to regional economies. Wetlands also reduce the natural filtering of water contaminants and sediments flowing from tributaries to the lakes, streams and rivers, and when they are lost we witness increased stagnation and noxious algae growths that foul beaches and shorelines. For that reason, New York is taking many steps to restore wetlands in areas such as Jamaica Bay in New York City and along the shores of Lake Ontario. We have undertaken successful wetlands restoration projects in the Upper Susquehanna region of New York's Southern Tier, and have restored wetlands as a successful technique to prevent flooding in some regions of the state.

Restoration efforts are costly, difficult and time-consuming. Our greatest fear is that, once wetlands and the biodiversity which they foster is lost, it may be difficult or impossible to re-establish. Preserving wetlands and small streams, through effective federal statutory and regulatory directives, is environmentally beneficial, economically effective, and provides reasonable certainty to the regulated community.

Conclusion

Clearly articulated Congressional guidance on the regulation of headwater wetlands and small streams is clearly needed to protect these wetlands, and to prevent the future need for costly restoration efforts. As New York argued in the amicus brief filed in the *Rapanos* case:

> "It is not enough for the Clean Water Act to be invoked only when there is proof that a specific discharge is connected to navigation or interstate movement. Even if the chances are small that any particular discharge will reach a downstream State or a traditional navigable waterway, collectively such discharges have an enormous effect – often the dominant effect – on water quality and quantity...

Comprehensive coverage under the Clean Water Act is necessary to maintain the balance between federal and State authority established by the Act."

This is the guidance that the states are seeking from Congress. I believe that HR. 2421, by reaffirming and articulating the original intent of the Clean Water Act, frames the federal role in wetland and small stream regulation effectively. By clearly defining this issue, the states will be able to once again work with the federal government to effectively regulate all connected wetlands and streams.

Thank you for providing me with the opportunity to testify.