



STATEMENT OF

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**ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES AND
THE NATIONAL ASSOCIATION OF COUNTY ENGINEERS**

THE CLEAN WATER RESTORATION ACT OF 2007

BEFORE THE SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE

APRIL 9, 2008

WASHINGTON, DC

Madame Chair, Ranking Member Inhofe, and distinguished members of the Environment and Public Works Committee, thank you for the opportunity to testify on behalf of the National Association of Counties (NACo) and the National Association of County Engineers (NACE). My name is David Brand and I am an elected county engineer from Madison County, Ohio. Yes, I said elected County Engineer. In Ohio the county engineer stands for county-wide election every 4 years. I will start my third term this January.

Madison County is a rural county in the Columbus, Ohio Metropolitan Area with a population of just under 50,000 people. It is a high producing agricultural county with a strong farmland preservation plan and relies on systematic drainage and county maintained ditches to protect this farming economy. I have two interstate highways crossing my county, and I have two State and National Scenic Rivers in my county, the Big Darby and the Little Darby. Roughly half of the 467 Square miles of Madison County drain directly into these two scenic rivers.

As County Engineer, I maintain 343 miles of county roads, 180 bridges and 200 miles of drainage improvements outside of the public road right-of-ways. As County Sanitary Engineer I am appointed by the County Commissioners to provide sanitary service to three sewer districts. I wear a few hats, have a few titles, hold a few professional registrations, and have a few employees (35). Something we pride ourselves on at the local level, doing more with less.

I want to thank you for allowing me to be apart of today's hearing on the Clean Water Restoration Act (CWRA). NACo has strong concerns with the CWRA because we fear that it would drastically expand federal clean water act jurisdiction. Additionally, we believe it would create significant bureaucratic obstacles and lead to increased costs to counties without enhancing environmental protections of waterways and wetlands.

Rather than cleaning up our nation's waters, we are concerned that CWRA moves far beyond this universally agreed on principle. The bill is essentially a one-size fits all approach, changing every area within the Clean Water Act. Removing the word "navigable" from the definition of the act will have expensive, far-reaching and unintended consequences for local as well as state governments.

One of the basic tenets of NACo philosophy centers on a state and local governments' responsibility to oversee state and local planning policies, processes and decisions. Counties are responsible for a wide range of activities designed to protect the health and well-being of their citizens. It is very likely that CWRA may preempt some of these ingrained local land use decisions.

That indeed was the major tenet of Supreme Court Justice Scalia's Plurality decision in the *Rapanos* case when he wrote, "In applying the definition [of waters of the United States] to

“ephemeral streams,” “wet meadows” storm sewers and culverts, “directional sheet flow during storm events,” drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term “waters of the United States” beyond parody. The plain language of the statute does not authorize this “Land is Waters” approach to federal jurisdiction” 126 S.Ct. at 2222 (2006). The CWSRA, as written, could be interpreted extremely broadly by both the Courts and the regulators, without regard for state and local responsibilities that the current act maintains.

While a broad interpretation would affect counties on many different levels, no more so than in the Army Corps of Engineers 404 permit program. There could be a limitless possibility of future federal permits required to do things such as construct a new driveway or simply cross a swale on an individual’s property. Counties are responsible for a number of manmade ditches, such as culverts, storm channels and road-side ditches. Currently, they face tremendous challenges getting permits approved in a timely manner.

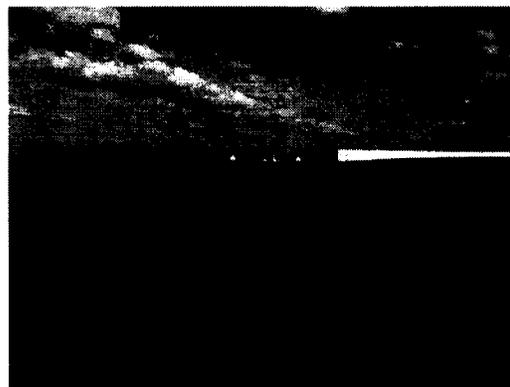
My experience is that most permits get denied the first time and the total length is closer to 12 months than it is to 3 months. This is very different than the timeframes being quoted by the bill’s sponsors. This is very problematic when debris clogs storm channels, which in turn floods homes. The county then deals with angry residents who don’t understand why the county has to wait for 404 permit approval before they can clean the channel out. Just over the weekend, the Associated Press highlighted one such project in Findley, Ohio that the Army Corp of Engineers stated will take five years for them to study, make permitting determinations, and provide any relief at an estimated cost of \$93 million (Akron (Ohio) Beacon Journal, Thursday Apr 03, 2008).

State and federal money is sometimes tied to county road projects. If a project is delayed due to delayed 404 permit approval, the county faces losing much needed money to complete a road project or at the very least yearly cost increases currently averaging 10% per year. Additionally, the dollars associated with getting these permits can be costly, especially for a rural county who does not have the manpower, expertise, or the resources.

As a county engineer, I take my responsibilities very seriously, as do the rest of our nation’s elected and appointed county officials. Counties fully support the CWA and play an important role in implementing the Clean Water Act as partners with their state as well as the federal government. Our counties work very hard in meeting the goals of the Clean Water Act while bearing a heavy responsibility to protect the health, welfare, and safety of its residents, while enhancing their quality of life.

Counties have risen to the challenge, by protecting the environment through a variety of environmentally-friendly and cost-effective programs. You have heard this through previous testimony on the House side from Benjamin H. Grumbles, Assistant Administrator for Water at the U.S. EPA. He stated that the United States Environmental Protection Agency (EPA) has leveraged \$25 billion through the Clean Water State Revolving Loan Fund into \$61 billion in wastewater infrastructure and water quality projects over the last 19 years as a result of partnerships with state and local government (Committee on Transportation and Infrastructure, United States House of Representatives, October 18, 2007).

As a county engineer, I see first-hand how these partnerships can provide real water quality improvements. In one example, I was able to bring the Ohio Department of Natural Resources, a local village, and the local soil and water department together on a development project to alter the locally required stormwater detention basin for the development into a water quality pond. This was done without federal involvement and without any investment from the local government. Below, on the left, is what the finished product looks like and what a similar adjacent development has constructed without partnerships, on the right.



Who are counties?

There are 3,066 functioning county governments nationwide. They range in size from 26 square miles to over 87, 000 square miles. Similarly, the population of counties varies tremendously from 67 residents to just under 10 million. But, it's important to remember that most of the counties in this nation, over 2,200 counties, are considered rural, because they have a population of less than 50,000 people.

Local governments, especially those in the under 50,000 category, provide many services on very limited budgets. Elected officials are often part time, with minimal support staff. Their average budgets are approximately \$18 million. And they stretch these budgets over a wide variety of mandatory expenses from education, public welfare, health care, highways, police, to fire. Local governments are the direct service providers for our citizens, the first line of defense, where the rubber meets the road.

County Responsibilities in CWA

Counties have a unique role in the protection of natural resources for they are both the regulator and the regulated under the Clean Water Act. In the role of regulator, counties administer a number of CWA programs that regulate water quality: storm water management and flooding, water quality management plans, Total Maximum Daily Load (TMDLs), etc. Additionally, many states require, as part of the state water acts, primary implementation at the local level. Coastal zone management acts in Alaska and California, fresh water acts in Massachusetts, Connecticut, Florida and Maryland, and in Virginia. An increase in the scope of CWA jurisdiction would increase the local scope in all these programs.

In the role of the regulated, counties are responsible for a number of public infrastructure projects, including roads and manmade ditches that would require wetland permits. We've heard

nightmarish stories from our counties who have had jurisdictional problems on projects. NACo has documented both commonplace and extreme stories. Some Washington and California state counties tell us they have mitigation requirements in the millions...just for one road project.

CWA Permit Process

When a project is deemed jurisdictional, that means the project requires a federal CWA permit. In my experience, these are cumbersome, expensive, and time-consuming to obtain.

Once jurisdictional, the project is then subjected to a multitude of regulatory requirements required under CWA. It triggers application of other federal laws like environmental impact statements, NEPA and impacts on ESA. These involve studies and public comment periods, all of which can cost both time and money. And often, as part of the approval process, the permit requires the applicant to "mitigate" the environmental impacts of the proposed project, sometimes at considerable expense.

Additionally, the Army Corps of Engineers who oversees the 404 permit program is already significantly behind in processing permits. All this bill would do is increase the number of projects that are deemed jurisdictional, while increasing the Corps' burden. This is folly.

One such example centers on the spraying of pesticides. Let's say that there has been an outbreak of West Nile Virus and the county has to quickly respond by spraying mosquito breeding grounds to kill the larva. Under this bill, technically, the spraying would be a point source affecting the waters. The county would have to wait for a permit before it could spray, leaving its citizens further at risk. Far-fetched? Not anymore. Due to the Ninth Circuit's *Talent* decision, municipalities and private landowners in Washington state are required to get permits for spraying activities that have the potential to flow into streams, wetlands, lakes, constructed drainage systems (including ditches), or other waters.

Intrastate Waters in the CWRA

We have concerns with several phrases within the bill, beyond the "navigability" issue. First, is the classification of "intrastate" waters as "waters of the U.S." with CWRA. This is problematic since historically, states have been responsible for setting water quality standards in intrastate waters.

We believe CWRA would impose significant new administrative requirements on state and local governments. This means that the states would be required to expand their current water quality designations to include all waters within the state, not just high priority waters. It would change reporting and attainment standards, including preparation of total maximum daily loads and allocations where necessary.

For example, many counties, in the role of regulator, have their own watershed/storm water management plans that would also have to be modified based on federal and state changes. Counties would then have to oversee all of the "waters" within its border. Changes at the state level would impact comprehensive land use plans, floodplain regulations, building and/or special codes, watershed and stormwater plans, etc.

Local governments, large and small, are also responsible for a number of public infrastructure projects that may be impacted by the proposed changes. These include: roads, gutters, and ditches; drainage channel maintenance; pesticide application, mosquito control, and fire retardant sprays; sewers and wastewater disposal, including settling ponds; water supply, transfers, and rights; solid waste disposal; county owned/operated airports; stormwater detention infrastructure; erosion control; maintenance/construction of county-owned schools, nursing homes, hospitals, any municipal buildings; marinas, dams, and reservoirs; parks, greenways, and forestlands; cleanup/ rebuild after natural disasters; and economic development.

To classify “intrastate” waters as “waters of the U.S.,” will eliminate the current separation between the state and federal government, bringing the federal government into local land use decisions. Federal preemption of state and local law presents a very serious challenge to our constitutional system of federalism. By preempting state and local laws, you reduce the ability of state and local governments to do their job effectively. If a local government has been preempted, then its ability to respond quickly is taken away.

Groundwater and the CWRA

Currently, most states specifically list groundwater in their definition for “waters of the State.” However, if intrastate waters are classified as “waters of the U.S.” the language as written, could be interpreted broadly to mean every wet area within a state, including groundwater. Additionally, the bill could be interpreted in future rulemaking, to include ditches, gutters and streets.

Tributaries, AKA Ditches in the CWRA

Ditches are pervasive in counties across the nation and, until recently, were never considered to be jurisdictional by the Corps, until after the 2001 *Solid Waste Agency of Northern Cook County* (SWANCC) Supreme Court decision. Since SWANCC, both the courts and the Army Corps of Engineers have classified ditches, including roadside ditches, as tributaries. CWRA classifies tributaries as “waters of the U.S.” This designation is key for counties, since many counties construct and maintain roads and ditches.

In Ohio, the history of these ditches go back to the 1800’s and must be maintained in order to provide the drainage purpose they were constructed for. In Madison County this directly affects over half of the land, the majority of which drains directly to the two Darby National Scenic Rivers. We have managed this resource and ditches concurrently at the local level very well.

Numerous NACo members have voiced concern regarding officials at local Corps offices deciding to regulate man-made ditches as jurisdictional waters under the CWA. While some Corps offices regulate ditches, other offices have continued the existing policy of not regulating them. This expansive and inconsistent application of the law frustrates many counties’ ability to provide and conduct vital projects for the public.

For example, one Midwest county received Federal Highway Authority funding to replace two old county bridge structures. The Corps determined that because the project would impact 300 feet of a roadside ditch, the county would have to go through the individual permit process.

The county disagreed with the determination but decided to acquiesce to the Corps rather than risk further delay and the withdrawal of federal funding. The cost associated with going through the Corps process required the county to significantly scale back its intended project in order to stay on time and budget. Ultimately, the project's completion was still delayed by several months.

The delay that can result from regulating local drainage features is evidenced by another Midwestern county that wanted to conduct a storm water improvement project to address local flooding concerns. The project entailed adding a second structure to a concrete box culvert and replacing a corrugated metal culvert. These structures were deemed jurisdictional by the Corps because they had a "bank on each side" and had an "ordinary high water mark." Thus, the county was forced to go through the individual permit process.

The delay associated with going through the federal process nearly caused the county to miss deadlines that would have resulted in the forfeiture of its grant funds. Moreover, because the project was intended to address flooding concerns, the delay in its completion resulted in the flooding of several homes during heavy rains. The county was also required to pay \$10,000 in mitigation costs associated with the impacts to the concrete and metal structures.

Ultimately, no changes were recommended by the Corps to the project, and thus, no additional environmental protection was provided by going through the federal process.

"...Activities affecting these waters" in the CWRA

The bill goes on to include "activities affecting these waters." While the intent may be to limit nonpoint and point sources going into major water sources, it could be interpreted quite differently. This language could be interpreted broadly to allow the federal regulation of any and all activities that "affect" waters. The examples listed under intrastate waters are good examples because many are based on previous court cases and Army Corps of Engineers decisions. It is possible that a nonpoint source 10's to 100's of miles away could be regulated, even though there is no direct hydrological connection. This definition does not exist anywhere in current law or regulation.

As written, the bill leaves more questions than answers. This bill does nothing to bring about clean water; it only dooms us to more legal wrangling at the federal level and uncertainty at the local level. It will lead to more lawsuits over the interpretation of limits, not less. The sponsors of the bill state that its purpose is to restore historic protections for waters (prior to the 2001 SWANCC decision). That is a difficult to believe when the bill does nothing more than removes words from the original act. Restoring by rewriting is a new concept. However, the truth is, since the CWA passed in 1972, the determination of what is "navigable" or jurisdictional has changed through the years because of the lack of clear language and agency rulemaking.

NACo recognizes that the current system is not ideal. Our counties would like to have certainty in the jurisdictional process and overall in the Clean Water Act. However, we also recognize that a one-size-fits-all system will not work. Geographical features differ widely across this nation. Any federal plan needs to take into account these regional differences and plan

accordingly with flexibility. Unfortunately, this bill as written does not bring us any closer to the goal of clean water.

I want to assure you that counties are committed to keeping our waterways safe for generations to come. We do believe that the objective of clean water is attainable however we also believe that it will take a variety of methods to reach that goal. Primarily, we need strong partnerships among all levels of government, flexibility, and workable definitions that do not create an unnecessary burden on local governments, and incentives that bring all levels of government to the table, like the Clean Water Act did. We have some ideas and would love to share them with you.

We look forward to working with you and Chairman Oberstar to build an effective partnership among all levels of government for this purpose. I believe that we can achieve this vision together and I look forward to working with you. And I would be glad to entertain any questions from the committee.