

THE CLEAN WATER ACT: 30 YEARS OF SUCCESS IN PERIL

**THE HONORABLE JAMES L. OBERSTAR
RANKING DEMOCRATIC MEMBER
COMMITTEE ON TRANSPORTATION
AND INFRASTRUCTURE**

*Prepared by the
Democratic Staff
of the
Committee on Transportation
and Infrastructure*

October 18, 2002

TABLE OF CONTENTS

EXECUTIVE SUMMARY	I
INTRODUCTION	1
HISTORY OF THE MODERN CLEAN WATER ACT	2
WHERE WE WERE – AND HOW FAR WE’VE COME	3
WHERE WE ARE TODAY – AND WHERE WE SHOULD BE	4
THE STATE OF THE NATION’S WATERS:	4
NEEDED WASTEWATER INFRASTRUCTURE IMPROVEMENTS:	5
LOSS OF THE NATION’S WETLANDS:	7
UNCONTROLLED NONPOINT SOURCE POLLUTION:	8
POLLUTERS ROUTINELY BREAK THE LAW:	10
BEACH WATER QUALITY:	11
WHAT IS THE BUSH ADMINISTRATION DOING TO IMPROVE WATER QUALITY?:	13
SUSPENSION OF THE TOTAL MAXIMUM DAILY LOAD (“TMDL”) RULE:	13
THE BUSH RECORD ON WETLANDS:	15
<i>The SWANCC decision:</i>	15
<i>Revisions to Nationwide Permits – Reversal of the “No Net Loss” Policy:</i>	17
FAILURE TO FUND NECESSARY WATER INFRASTRUCTURE:	19
DEVOLUTION OF ENFORCEMENT TO THE STATES:	19
CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFOs):	20
CONCLUSION:	23

EXECUTIVE SUMMARY

October 18th marks the 30th anniversary of the modern Clean Water Act. This landmark environmental statute established a national commitment to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. It is the main reason the Nation's waterways have shown dramatic improvement in water quality, even as the population has increased by nearly 40 percent. The Clean Water Act has been instrumental in improving the health of rivers, lakes, and coastal waters. It has stopped billions of pounds of pollution from fouling the water, and dramatically increased the number of waterways that are safe for swimming and fishing.

The successes and failures of the Clean Water Act can be succinctly stated. In 1972, only one-third of the Nation's waters met water quality goals. Today, two-thirds of those waters meet water quality goals. The Nation has doubled the waters that meet water quality goals, but there is still much work to be done: one-third of our Nation's waters fail to meet water quality goals first established 30 years ago. For example:

- In 1972, most estimates were that only 30 to 40 percent of the assessed waters in the United States met water quality goals; today, States report that 60 to 70 percent of assessed waters meet those goals – an increase of 100 percent;
- In 1968, sewage treatment facilities served approximately 140 million people in this country, many at only a primary treatment level (a level of treatment that screens and settles solid pollution); today, after Federal investments of more than \$80 billion in wastewater assistance since passage of the Clean Water Act, 189.7 million people, representing more than 73 percent of the total population, are serviced by more than 16,000 publicly owned treatment works providing secondary (a level of treatment that also incorporates bacteria to digest organic matter in wastewater) or more advanced treatment (additional measures typically intended to address nutrients);
- In 1972, the country lost an estimated 450,000 acres of wetlands each year; today, wetlands losses are estimated to be less than one-fourth that rate.

The Nation now stands at a crossroads in the restoration and protection of its waters and wetlands. One path improves upon the successes of the last 30 years and will finally achieve the goals of the Clean Water Act of fishable and swimmable waters. The other path leads to the very real possibility that progress could be lost. It is a simple question of priorities and commitment. Unfortunately for this and future generations, the Bush Administration is pursuing the latter path, in spite of clear warning signs that our progress in cleaning up the Nation's waters may be slipping.

The actions – and lack of action – of the Bush Administration on water quality are slowly and steadily undermining the successes of the Clean Water Act. For example, in the first two years of the Bush Administration:

- President Bush has suspended implementation of the Environmental Protection Agency's rule on Total Maximum Daily Loads ("TMDLs"), which would have given States an additional tool in addressing the more than 20,000 rivers, lakes, streams, and other waterbody segments that remain polluted to the point of endangering public health;

- President Bush has provided no leadership on additional efforts needed to control nonpoint source pollution – the greatest continuing source of impairment to the Nation’s waters;
- President Bush has remained silent in the wake of the Supreme Court’s decision in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, which eliminated Federal protection over millions of acres of prior-Federally regulated waters and wetlands;
- Representatives of the President have suggested the abandonment of decades-old interpretation on the scope of the Clean Water Act over the waters of the United States, and the likely proposal of changes which radically reduce the number of waters that would remain under Federal protection;
- President Bush significantly weakened the Corps’ Nationwide Permit program, overturning stricter environmental standards for the Nation’s waters, and allowing the continuation of activities that damage or destroy thousands of acres of wetlands and miles of streams every year; and
- President Bush has attempted repeatedly to undercut the Federal enforcement of laws, programs, and policies implemented by the Environmental Protection Agency.

Especially disturbing is the opposition of the Bush Administration to bipartisan Congressional efforts to increase Federal investment in the Nation’s wastewater and drinking water infrastructure. As our population grows, we must substantially increase our wastewater and drinking water infrastructure, to maintain and improve the quality of our water. Failure to make the necessary infrastructure investments will lead to a serious deterioration in water quality.

Taken as a whole, the 30-year history of the modern Clean Water Act has been a tremendous success. The past 30 years have also provided us with significant insight on where the Clean Water Act has failed – most notably in controlling various nonpoint sources of pollution. However, now, even when armed with the knowledge of how far the Nation has come, and how close it is to finally achieving the fishable and swimmable goals of the Act, the United States stands on the threshold of throwing all these successes away, and reverting back to the days of rivers that burn, lakes that are dead, and waterways that are sewers.

The actions of the Bush Administration clearly demonstrate how easy it is to turn the clock back on protecting our Nation’s waters. In two short years, President Bush has shown that the decisions, priorities, and policy choices made by his Administration can mean the difference between concerted efforts to restore and protect our most vital natural resource from pollution, and efforts to undermine these protections.

Clearly, the Nation has a choice – the final chapters on the Clean Water Act have yet to be written. The questions remain – which path will be followed; will the Administration and Congress finish the job of achieving the goals of the Clean Water Act?

INTRODUCTION

October 18th marks the 30th anniversary of the modern Clean Water Act. This landmark environmental statute established a national commitment to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. It is the main reason the Nation's waterways have shown dramatic improvement in water quality, even as the population has increased by nearly 40 percent. The Clean Water Act has been instrumental in improving the health of rivers, lakes, and coastal waters. It has stopped billions of pounds of pollution from fouling the water, and dramatically increased the number of waterways that are safe for swimming and fishing.

The successes and failures of the Clean Water Act can be succinctly stated. In 1972, only one-third of the Nation's waters met water quality goals. Today, two-thirds of those waters meet water quality goals. The Nation has doubled the waters that meet water quality goals, but there is still much work to be done: one-third of our Nation's waters fail to meet water quality goals first established 30 years ago.

The Nation now stands at a crossroads in the restoration and protection of its waters and wetlands. The Clean Water Act has been instrumental in addressing the more obvious sources of water pollution – the open discharge of chemicals and untreated sewage to our Nation's waters – and has achieved remarkable results over the last 30 years. One path improves upon the successes of the last 30 years and will finally achieve the goals of the Clean Water Act of fishable and swimmable waters. The other path leads to the very real possibility that progress could be lost. It is a simple question of priorities and commitment. Unfortunately for this and future generations, the Bush Administration is pursuing the latter path, in spite of clear warning signs that our progress in cleaning up the Nation's waters may be slipping.¹

The actions – and lack of action – of the Bush Administration on water quality are slowly and steadily undermining the successes of the Clean Water Act, allowing greater numbers of polluters to discharge at levels in excess of those necessary to protect the quality of the Nation's waters.

In addition, the Bush Administration has remained silent while developers expand their efforts to fill, drain, and conduct other activities that could destroy the remaining wetlands of the United States.

Finally, the Environmental Protection Agency (EPA) itself has reported that without additional efforts to upgrade pollution fighting efforts, within the next 20 years, U.S. waters could return to the polluted state that spurred the enactment of the original Clean Water Act in 1972 – back to the days when Lake Erie had been declared dead by *Life* magazine and the Cuyahoga River in Ohio caught fire. Yet the Bush Administration has shown little interest in making the necessary Federal investment to avoid this fallback.

The questions remain – which path will be followed; will the Administration and Congress finish the job of achieving the goals of the Clean Water Act?

¹ U.S. EPA. "National Water Quality Inventory: 2002 Report." September 2002. See also, U.S. EPA. "The Clean Water and Drinking Water Infrastructure Gap Analysis." September 2002.

HISTORY OF THE MODERN CLEAN WATER ACT

Since the latter half of the 20th century, national policy for water pollution control has been legislated primarily in the Federal Water Pollution Control Act (“FWPCA”). First passed in 1948, the FWPCA has been amended numerous times to gradually expand the involvement of the Federal government in regulating pollutant discharges from point sources to surface waters. Yet, until enactment of the 1972 Amendments to the FWPCA, more commonly known as the Clean Water Act, the primary responsibility for water pollution control was vested with the States.

Unfortunately for the health of the Nation’s waters, there was great diversity among the States in the terms of ability and willingness to pay the costs of building and upgrading publicly owned treatment works and to enforce water pollution control laws. Lack of consistent local water quality standards, monitoring data, and penalties for violators exacerbated the problems. Prior to the enactment of the Clean Water Act, national progress in improving water quality was hindered, in part, because unless a State formally requested intervention by the Federal government, Federal authority for regulating discharges was restricted to interstate and coastal waters.

Yet, all the while, little was being done to slow down the flow of pollution into the Nation’s waters, and things continued to get worse. For example:

- In July 1970, the Department of Health, Education and Welfare’s Bureau of Water Hygiene reported that 30 percent of drinking water samples had chemicals exceeding the recommended Public Health Service limits.
- The Food and Drug Administration reported in February 1971 that 87 percent of swordfish samples had mercury at levels that were unfit for human consumption.
- A national pesticide survey conducted in 1967-1968 by the U.S. Bureau of Sport Fisheries measured DDT in 584 of 590 samples, with levels up to nine times the FDA limit.
- In 1969, the Hudson River contained bacteria levels 170 times the safe limit.
- Record numbers of fish kills were reported in 1969 – over 41 million fish – more than in 1966 through 1968 combined, including the largest recorded fish kill ever – 26 million killed in Lake Thonotosassa, Florida, due to discharges from four food processing plants.
- A 1968 survey found that pollution in the Chesapeake Bay caused \$3 million annually in losses to the fishing industry.²

And, on a Sunday morning in June 1969, the residents of Cleveland, Ohio witnessed a sight that had become all too common in their community – a fire on the Cuyahoga River. Similar to the previous fires of 1936 and the 1950’s, a floating oil slick on the Cuyahoga river, just southeast of Cleveland, burst into flames, causing significant fire damage to two key railroad trestles. While the exact cause of the fire was never determined, investigations in the days following the blaze pointed

² Robert Adler, Jessica Landman, and Diane Cameron, “The Clean Water Act: 20 Years Later.” (Island Press 1993).

to a “discharge of highly volatile petroleum derivatives with a sufficiently low flash point to be ignited by a chance occurrence” – such as a spark from a passing train.³

Soon, national attention focused on the water pollution problems that existed throughout the Nation – from the article in *Life* that Lake Erie was “dead,” to the statements of President Lyndon Johnson that the Potomac River was a “national disgrace,” to numerous rivers so clogged with pollution that you could almost walk across them.

In hindsight, although the Cuyahoga River fire lasted a mere 20 minutes, it helped ignite a different type of fire throughout the Nation – one that would eventually lead to the passage of the Federal Water Pollution Control Act Amendments of 1972, the modern Clean Water Act.

WHERE WE WERE – AND HOW FAR WE’VE COME

The 1972 Clean Water Act (“the Act”) is commonly viewed as one of the most successful environmental laws in America. In many ways, the Act truly did turn the tide on water pollution. Measures of the Nation’s progress since its enactment include the following:

In 1972, most estimates were that only 30 to 40 percent of the assessed waters in the United States met water quality goals such as being safe for fishing, swimming, or as a drinking water source. Today, States report that between 60 to 70 percent of assessed waters meet state water quality goals – an increase of 100 percent.⁴

In 1968, sewage treatment facilities served approximately 140 million people in this country, many at a primary treatment level. Today, after Federal investments of more than \$80 billion in wastewater assistance since the passage of the Clean Water Act, 189.7 million people, representing more than 73 percent of the total population, are serviced by more than 16,000 publicly owned treatment works providing secondary or more advanced treatment.⁵

In 1968, about 39 percent (54.2 million) of the 140 million people served by publicly owned treatment works received less than secondary treatment (raw and primary). By 1996, the last year data is currently available, this percentage was reduced to about nine percent (17.2 million) of the 189.7 million people served by publicly owned treatment works.⁶ In addition, the U.S. population

³ Van Tassel. “The Encyclopedia of Cleveland History.” (Indiana U. P., 1987).

⁴ U.S. EPA. “National Water Quality Inventory: 2002 Report.” September 2002.

⁵ Primary treatment is the first stage of wastewater treatment. It removes settleable floating solids only. It generally removes 40 percent of the suspended solids and 30 to 40 percent of the BOD (biological or biochemical oxygen demand) in the wastewater. Secondary treatment is the second stage of wastewater treatment. It converts dissolved and suspended pollutants into a form that can be removed, producing a relatively highly treated effluent. Secondary treatment normally utilizes biological treatment processes (activated sludge, trickling filters, etc.), followed by settling tanks. It removes approximately 85 percent of the BOD and total suspended solids in wastewater. Secondary treatment is the minimum level of treatment required under the Clean Water Act. U.S. EPA. “Progress in Water Quality: An Evaluation of the National Investment in Municipal Wastewater Treatment.” June 2000.

⁶ This nine percent includes approximately 5.1 people currently served by treatment works with special waivers allowing the discharge of less than secondary treated effluent to deep, well-mixed ocean waters. See U.S. EPA. “Progress in Water Quality: An Evaluation of the National Investment in Municipal Wastewater Treatment.” June 2000

served by publicly owned treatment works with secondary or greater treatment almost doubled between 1968 and 1996 from 85.9 million people in 1968 to 164.8 million people in 1996.⁷

In 1972, the country lost an estimated 450,000 acres of wetlands each year. Today, wetland losses are estimated to be less than one-fourth that rate.⁸

WHERE WE ARE TODAY – AND WHERE WE SHOULD BE

Despite some important successes, there is still a long way to go in order to achieve the goals of the Clean Water Act.

The State of the Nation's Waters:

Today, approximately 40 percent of assessed rivers, lakes, and coastal waters do not meet water quality standards. States, territories, Tribes, and other jurisdictions report that poor water quality continues to affect aquatic life, fish consumption, swimming, and sources of drinking water in all types of waterbodies.

In 2000, States, Tribes, territories, and interstate commissions report that they only monitor 33 percent of the Nation's waters. Of those, about 40 percent of streams, 45 percent of lakes, and 50 percent of estuaries were not clean enough to support their designated uses, i.e., fishing and swimming.⁹

While these reports highlight the remaining need to improve the quality of the Nation's waters, these numbers also demonstrate how this country's record on improving water quality is slipping – demonstrating a slight, but significant reversal in our efforts to clean up the Nation's waters over the past 30 years.¹⁰

For example, in the 1996 National Water Quality Inventory report, States reported that of the 3.6 million miles of rivers and streams that were assessed, 64 percent were either fully supporting all designated uses or were threatened for one or more of those uses.¹¹ In the 1998 report, this number improved to 65 percent of assessed rivers and streams.¹² However, in the 2000 National Water Quality Inventory report, this number slipped to only 61 percent of assessed rivers and streams either meeting water quality standards or being threatened for one or more the waterbody's

⁷ U.S. EPA. "Progress in Water Quality: An Evaluation of the National Investment in Municipal Wastewater Treatment." June 2000.

⁸ U.S. EPA and USDA. "Clean Water Action Plan." February 1998.

⁹ U.S. EPA. "Water Quality Conditions in the United States: A Profile from the 2000 National Water Quality Inventory." September 2002.

¹⁰ While the EPA's National Water Quality Inventory report highlights only those waters of the United States that have been assessed, it the best information available on the health of the Nation's waters, representing the most timely and accurate information on the waters of the United States, as compiled by the States.

¹¹ A threatened waterbody is a waterbody for which current water quality data supports its meeting a certain designated use, however recent data trends show a diminishing level of water quality such that it is likely that in the next listing cycle the waterbody will no longer be meeting its designated use. U.S. EPA. "National Water Quality Inventory: 1996 Report to Congress." April 1998.

¹² U.S. EPA. "National Water Quality Inventory: 1998 Report to Congress." June 2000.

designated uses – a significant reversal in the trend towards meeting the goals of the Clean Water Act.¹³

Similar reversals have been reported for the condition of the waters along the coastline, as well as in the Nation's estuaries.¹⁴ In addition, efforts to address the contamination and declining water quality in the country's 40 million acres of lakes has stagnated, effectively stopping the dramatic improvement in lake water quality achieved in the latter half of the last decade.¹⁵ In fact, the only category that has demonstrated consistent improvement has been in the Great Lakes – improving from 97 percent of assessed Great Lakes' shoreline waters being impaired in 1996, to 96 percent in 1998, to 78 percent in 2000.¹⁶ However, even in the Great Lakes, there has been significant reversal in water quality improvement, with 2 percent of assessed Great Lakes' shoreline waters fully meeting all water quality standards in 1996 and 1998, but no shoreline waters fully meeting water quality standards in 2000 – *absolutely none*.¹⁷

While it is true that EPA's National Water Quality Inventory reports do not provide information on the health of 100 percent of U.S. waters, they represent the best, if not the only, means of assessing trends in nationwide efforts to improve the waters of the United States. Given the fact that the true condition of all the Nation's waters could, in fact, be worse than the reports reveal – any reversal of improvement in water quality is troublesome, especially in light of the Bush Administration's repeated lack of commitment to achieving the goals of the Clean Water Act.

Needed Wastewater Infrastructure Improvements:

To a great extent, the successes of the 1972 Clean Water Act resulted from a significant Federal investment in wastewater infrastructure improvements throughout the country. Since 1972, the Federal government has provided more than \$80 billion in wastewater assistance, which has dramatically increased the number of Americans enjoying better water quality and improved the health of the environment.

Treating, and in many cases eliminating, the flow of direct discharges of untreated sewage into U.S. rivers, lakes, and streams has been one of the best investments the American people have ever made. First through the Federal construction grant program, and now the Clean Water State Revolving Loan Fund ("CWSRF") program, the Federal investment in water infrastructure has been integral to improving the quality of the Nation's waters. The gains in water quality realized through Federal, State, and local investment in wastewater infrastructure have been significant, helping to

¹³ U.S. EPA. "National Water Quality Inventory: 2000 Report." September 2002.

¹⁴ See U.S. EPA. "National Water Quality Inventory: 1996 Report to Congress." April 1998, U.S. EPA. "National Water Quality Inventory: 1998 Report to Congress." June 2000, and U.S. EPA. "National Water Quality Inventory: 2000 Report." September 2002.

¹⁵ See U.S. EPA. "National Water Quality Inventory: 1996 Report to Congress." April 1998, U.S. EPA. "National Water Quality Inventory: 1998 Report to Congress." June 2000, and U.S. EPA. "National Water Quality Inventory: 2000 Report." September 2002.

¹⁶ See U.S. EPA. "National Water Quality Inventory: 1996 Report to Congress." April 1998, U.S. EPA. "National Water Quality Inventory: 1998 Report to Congress." June 2000, and U.S. EPA. "National Water Quality Inventory: 2000 Report." September 2002.

¹⁷ See U.S. EPA. "National Water Quality Inventory: 1996 Report to Congress." April 1998, U.S. EPA. "National Water Quality Inventory: 1998 Report to Congress." June 2000, and U.S. EPA. "National Water Quality Inventory: 2000 Report." September 2002.

achieve a 50 percent increase in the number of fishable and swimmable waters throughout the Nation. In addition, as a result of dramatic improvements in wastewater infrastructure, effluent discharges have decreased by one-half since 1970, despite the fact that waste loads grew by more than one-third due to population growth and an expanded economy.

However, these environmental achievements are now at risk.

According to a recent EPA report, entitled *Progress in Water Quality*, “without continued improvements in wastewater treatment infrastructure, future population growth will erode away many of the Clean Water Act achievements in effluent loading reduction.”¹⁸ For example, EPA projects that with the expansion of the U.S. population forecast over the next 20 years,¹⁹ even with expected increases in wastewater treatment efficiencies, by 2016, wastewater treatment plants will be forced to discharge partially-treated effluent into U.S. waters at levels similar to those that existed in the mid-1970s – only a few years after the enactment of the Clean Water Act.²⁰ Even more troublesome, if these population forecasts are projected further to the year 2025, without significant investment in additional treatment capacity, the level of partially-treated effluent being discharged into the Nation’s waters would reach rates not seen since 1968 – four years before the enactment of the Act – when they had reached the maximum level ever recorded.²¹

Without increased investment in wastewater infrastructure, in less than a generation, the U.S. could lose much of the gains it made thus far in improving water quality, and wind up with dirtier water than existed prior to the enactment of the 1972 Clean Water Act.

Of additional concern is the growing awareness that much of the wastewater infrastructure in this country is rapidly approaching or has already exceeded its projected useful life. Many cities and communities throughout the United States are currently facing a critical juncture in the age and reliability of their water infrastructure. For example, pipes installed at the beginning of the 20th century that had an expected useful life of 100 years are deteriorating next to pipes installed in the 1940’s and 1960’s, that, unfortunately have an expected life of approximately 60 years and 40 years, respectively. In addition, many of the wastewater treatment facilities constructed soon after enactment of the Act are now reaching the end of their expected useful life, and are in need of repair or replacement.²²

¹⁸ U.S. EPA. “Progress in Water Quality: An Evaluation of the National Investment in Municipal Wastewater Treatment.” June 2000.

¹⁹ U.S. EPA. “Progress in Water Quality: An Evaluation of the National Investment in Municipal Wastewater Treatment.” June 2000. The Census Bureau has projected that in the next 20 years, the proportion of the U.S. population served by publicly owned treatment works will increase to an estimated 275 million people

²⁰ U.S. EPA. “Progress in Water Quality: An Evaluation of the National Investment in Municipal Wastewater Treatment.” June 2000. EPA has estimated that, by the year 2016, the expansion in population will likely result in a 45 percent increase in influent biochemical oxygen demand (BOD) loading to treatment works (68,030 metric tons per day) and a 20 percent increase in BOD discharges to surface waters (19,606 metric tons per day). BOD is a measure of the oxygen-consuming organic matter and ammonia-nitrogen in wastewater. The higher the BOD loading, the greater the depletion of oxygen in the waterway.

²¹ U.S. EPA. “Progress in Water Quality: An Evaluation of the National Investment in Municipal Wastewater Treatment.” June 2000. By the year 2025, EPA estimates that the amount of BOD loadings to the nation’s waters would reach 21,280 metric tons per day.

²² U.S. EPA. “The Clean Water and Drinking Water Infrastructure Gap Analysis.” September 2002.

As a result, many communities face the very likely prospect of replacing large portions of their wastewater infrastructure in the near future, or face the likelihood of increased failures in their wastewater treatment capacity – posing a significant threat to the country’s quality of life, economic prosperity, and the health and safety of both human populations and the environment.

The Clean Water Act requires EPA to report to Congress every two years with a detailed estimate of the costs of needed water infrastructure in each state. This report, which is compiled through a survey of the States, includes estimates of needed projects for improvement of U.S. waters, including publicly owned municipal wastewater collection and treatment facilities, facilities for the control of combined sewer overflows, activities to control stormwater runoff and nonpoint source pollution, and programs designed to protect the Nation’s estuaries.

EPA’s most recent assessment of wastewater infrastructure needs – the Clean Water and Drinking Water Infrastructure Gap Analysis – estimates that between \$300 billion and \$400 billion in capital investment is needed for restoration and replacement of the Nation’s aging wastewater infrastructure over the next 20 years.²³ Considering that the average annual investment by EPA over the past few years has hovered around \$1.35 billion, the level of investment to address needs requires a renewed Federal commitment.

More needs to be done – future generations deserve no less. Congress made a commitment 30 years ago to restore and protect the Nation’s water quality, and the Bush Administration should stand ready to uphold this commitment. The size of the expected costs for Clean Water infrastructure cannot be an excuse for turning back the clock on water quality.

Loss of the Nation’s Wetlands:

Wetlands are those areas where the flow of water, the cycling of nutrients, and the energy of the sun produce specially adapted communities of plants and animals. Wetlands contribute to the environment in ways that parallel rain forests in more tropical climates and perform many functions that are important to the Nation’s economy and quality of life.

As waters flow across watersheds through wetlands, chemicals that otherwise would contaminate surface waterways are removed through natural processes that assimilate pollution. When heavy rains fall and deep snowpacks melt, wetlands store and slow down the release of floodwaters, thereby reducing damage to downstream farms and communities. Wetlands can also recharge groundwater aquifers and sustain the yield of water for human use, as well as provide dry-season flows in rivers.

Many plants and animals depend upon wetlands, which are essential for maintaining biodiversity. Wetland species are the base of commercial and recreational enterprises that provide jobs and income important to thousands of communities around the country. Three quarters of the country’s commercial fish and shellfish, which provide approximately \$2 billion of revenue annually, are dependent upon coastal bays and their wetlands for some portion of their life-cycle.²⁴ Trees that

²³ U.S. EPA. “The Clean Water and Drinking Water Infrastructure Gap Analysis.” September 2002.

²⁴ U.S. EPA and USDA. “Clean Water Action Plan.” February 1998.

grow in southeast forested swamps are harvested for timber, and ducks, geese, and other migratory birds in all flyways use wetlands for feeding, nesting, and resting during migration.²⁵

Yet, because the importance of wetlands was poorly understood in the past, more than one-half of the wetlands in the contiguous States have been lost since the time of European settlement.²⁶ Ten states have lost 70 percent or more of their wetland acreage, and 22 States have lost more than 50 percent. Only three States – Alaska, New Hampshire, and Hawaii – have lost less than 20 percent of their original wetlands.²⁷ In some States and many watersheds, less than 10 percent of the original acreage of wetlands still exists.²⁸

In recognition of this enormous loss, as well as the importance of wetlands in achieving the goals of the Clean Water Act, in 1990, the Corps signed a Memorandum of Agreement with EPA outlining the position of the first Bush Administration to “achieve a goal of no overall net loss of [wetland] values and functions.” From that time, up until recently, both Republican and Democratic administrations have enthusiastically defended the goal of “no net loss” as an effective tool in implementing the broader goals of the Clean Water Act.

Unfortunately, the all too common practice of draining, filling, and eliminating wetlands continues today. Although the rate of loss has been dramatically reduced in recent years, the United States continues to sustain a net loss of between 58,000 to 100,000 acres of wetlands every year – in spite of the Federal government’s “no net loss” policy.²⁹

Uncontrolled Nonpoint Source Pollution:

Over the past 30 years, the modern Clean Water Act has made great advances in improving the quality of U.S. waters and controlling various sources of pollution, with one large exception – nonpoint sources – the unfinished agenda of the Clean Water Act.

Nonpoint source pollution refers to the polluting of water by diffuse sources rather than single identifiable “point” sources. These diffuse sources are usually associated with land use activities as opposed to end-of-pipe discharges. Examples of common nonpoint source pollution include: sediments, pesticides, and nutrients running off of farms and urban lawns; oil, grease, heavy metals, and other toxic materials carried on streets, highways, rooftops, and parking lots into storm sewers; farm animal wastes from barnyards and pet wastes from urban areas; and soil washed away from logging and construction areas.³⁰

²⁵ Stewart, Robert E. “United States Geological Survey Water Supply Paper 2425, Technical Aspects of Wetlands, Wetlands as Bird Habitat.” U.S. Geological Survey.

²⁶ Dahl, T.E. “Wetlands Losses in the United States 1780s to 1980’s.” U.S. Department of the Interior, Fish and Wildlife Service. 1990.

²⁷ Dahl, T.E. “Wetlands Losses in the United States 1780s to 1980’s.” U.S. Department of the Interior, Fish and Wildlife Service. 1990.

²⁸ U.S. EPA and USDA. “Clean Water Action Plan.” February 1998.

²⁹ U.S. EPA. “National Water Quality Inventory: 2000 Report.” September 2002. See also U.S. EPA and USDA. “Clean Water Action Plan.” February 1998.

³⁰ Coast Alliance, “Mission Possible: State Progress Controlling Runoff Under the Coastal Nonpoint Pollution Control Program.”

Today, after almost 30 years of Federal and State efforts under the Clean Water Act, the number one cause of pollution to the waters of the United States is from nonpoint sources. For example, in 2000, States identified more than 128,000 assessed river miles currently impaired from agricultural sources.³¹ An additional 28,000 assessed river miles are impaired from forestry sources, and 34,000 more miles are impaired through urban and stormwater sources. In addition, more than 3.1 million lake acres are impaired from agricultural sources, and an additional 1.3 million lake acres are impaired from urban and storm water sources. Finally, of the 58,618 miles of ocean shoreline assessed in the United States, the majority (more than 55 percent) can trace the source of their impairment back to urban or storm water runoff, and an additional 32 percent are contaminated by other nonpoint sources of pollution.³²

Clearly, the Clean Water Act has been unable to replicate its successes in controlling point sources of pollution to the problem of nonpoint. To a great extent, the reason for this is simple. Whereas the Clean Water Act has direct regulatory authority over the discharge of pollutants from point sources, there is no such authority to control or regulate nonpoint sources of pollution.

The lack of an effective national program to address nonpoint source pollution is a serious impediment to restoring and maintaining the health of U.S. waters.³³ Section 319 of the Clean Water Act requires States to prepare nonpoint source pollution programs, but does not require that such programs be implemented. In addition, unlike the mandatory technology-based controls imposed on point source discharges, the Act does not require the implementation or enforcement of any nonpoint source management plans, such as buffer strips or nutrient management plans, to fight polluted runoff. Finally, although nonpoint sources of pollution now cause more than 60 percent of water quality impairments, only three percent of Clean Water Act funds have been devoted to address this problem.

One approach that would have significantly improved the Nation's efforts to control nonpoint source pollution was H.R. 550, the Nonpoint Source Water Pollution Prevention Act of 1997, introduced in the 105th Congress. This legislation would have significantly increased Federal funding for the implementation of nonpoint source control programs. It would also have required States to create and implement plans to control nonpoint sources of pollution within their borders, but would have allowed for the Environmental Protection Agency to step in to implement these program where the States had failed to act. In addition, H.R. 550 would have renewed the emphasis of controlling nonpoint sources of pollution on a watershed basis, directing that States target those watersheds most greatly impaired by nonpoint sources first, to achieve the greatest overall improvement in water quality. Unfortunately, the Republican Leadership of the House refused to consider this legislation, and has failed to take any other action since to control the flow of nonpoint source pollution.

If this country ever expects to achieve the goals of fishable and swimmable waters, the Bush Administration and Congress must significantly increase efforts through both financial incentives

³¹ U.S. EPA. "National Water Quality Inventory: 2000 Report." September 2002.

³² U.S. EPA. "National Water Quality Inventory, 2000 Report." September 2002. See also, U.S. Commission on Ocean Policy. "Developing a National Ocean Policy, Mid-Term Report of the U.S. Ocean Commission on Ocean Policy." September 2002.

³³ Association of Metropolitan Sewerage Agencies: "Water... We've Got the Point. Now Let's Get to the Nonpoint..."

and enforceable mechanisms to control this massive, continuing source of impairment to U.S. waters. The controls and regulatory mechanisms necessary to reduce nonpoint source pollution are known – they have not changed significantly for decades. The problem is a lack of political will from the Bush Administration and Republicans in Congress to implement the necessary actions to reduce the largest continuing source of pollution to this country's waters.

Polluters Routinely Break the Law:

The primary objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. To that end, the Act established, as a goal, that the discharge of pollutants into navigable waters be eliminated by 1985, and makes it unlawful to discharge any pollutant into the Nation's waters without a permit.

Unfortunately, 1985 has come and gone, yet modern life necessitates that we continue the practice of granting permits for the discharge of pollutants, provided that these discharges have undergone significant review by EPA or the States on their potential threat to human health and the environment.

However, even with provisions in the Act allowing for limited permitted discharges, polluters routinely break the law. For example, a report issued in 2002 found that nearly 30 percent of major sewage treatment and industrial plants (1,798 facilities) in the U.S., Puerto Rico, and U.S. Virgin Islands were violating the law during a 15-month period.³⁴ This represents an increase of more than 15 percent from a similar report issued just one year earlier.³⁵

The 2002 report includes:

- 569 major industrial facilities, or 25 percent of the 2,276 major facilities currently operating in the U.S., Puerto Rico, and U.S. Virgin Islands.
- 1,190 major municipal facilities, or 31.3 percent of the 3,795 major municipal facilities currently operating in the U.S., Puerto Rico, and U.S. Virgin Islands.³⁶
- 39 major federal facilities, or 41.9 percent of the 93 major federal facilities currently operating in the U.S., Puerto Rico, and the U.S. Virgin Islands.

Another series of studies, conducted in 2000, show that even when large, industrial water polluters are caught, they are rarely fined. Worse still, in the few cases when fines are imposed on

³⁴ U.S. PIRG. "Permit to Pollute: How the Government's Lax Enforcement of the Clean Water Act is Poisoning Our Waters." August 2002.

³⁵ U.S. PIRG. "Polluters' Playground: How the Government Permits Pollution." May 2001.

³⁶ According to the report, the majority of major municipal facilities in Significant Non-Compliance with their NPDES permit were often as a result of discharges from industrial users that discharge into sewer systems rather than surface waters. Because most publicly owned treatment works are not designed to treat many industrial chemicals, toxics discharged into sewers either pass through the treatment works untreated or contaminated the facility's sludge. See U.S. PIRG. "Permit to Pollute: How the Government's Lax Enforcement of the Clean Water Act is Poisoning Our Waters." August 2002.

polluters, the penalties are often too low to act as a deterrent to future pollution. According to this study, “[f]or many big polluters, breaking clean water laws has become standard business practice.”³⁷

These unfortunate facts were echoed in a 2001 report from the EPA’s Office of the Inspector General.³⁸ This report noted that although States generally took enforcement actions on significant violators, these actions were often delayed for a year or more after the violation occurred. Further, the penalties imposed were often insufficient to prevent further violations, and were not always collected. According to the Office of the Inspector General, these practices may be a contributing cause to the large number of recurring violations – with more than one-third of the States reporting that over one-half of their major facilities with significant violations in 1999 also had recurring significant violations in 2000.³⁹

Failure to take consistent and prompt enforcement action not only encourages polluters to continue to pollute, it actually increases the level of pollution entering the Nation’s waters as violations go unchecked. EPA and the States must take swift action not only to bring violators into compliance quickly, but also to establish a credible enforcement program to deter future polluters.

When polluters are caught, penalties must be imposed at sufficient levels to ensure that they do not realize any economic benefit from noncompliance. Otherwise, companies that pollute are rewarded and provided significant economic advantages over competitors by imposing minimal penalties.

For penalties to provide adequate deterrence against future non-compliance, they must be sufficient to eliminate any economic gain, and they must be collected. Without these actions, companies will consider Clean Water Act penalties as just another “cost of doing business,” and will continue to pollute the country’s rivers, lakes, and streams.

Beach Water Quality:

As a Nation, we are fortunate to have nearly 23,000 miles of ocean shoreline along the continental United States, more than 5,500 miles of Great Lakes shoreline, and 3.6 million miles of rivers and streams.⁴⁰ Beaches are an important part of the complex and dynamic coastal watershed, providing numerous recreational opportunities for millions of people including boating, fishing, swimming, walking, beachcombing, bird-watching, and sunbathing.

Lake, river, and ocean beaches are America’s favorite vacation destinations. At least one-third of all Americans visit coastal and Great Lakes counties and their beaches each year, generating tens of billions of dollars in goods and services, and supporting tens of millions of jobs.⁴¹ However,

³⁷ Environmental Working Group. “Pollution Pays: An Analysis of the Failure to Enforce Clean Water Laws in Three States.” January 2000.

³⁸ EPA OIG. “Water Enforcement: State Enforcement of Clean Water Act Dischargers Can Be More Effective.” August 2001.

³⁹ EPA OIG. “Water Enforcement: State Enforcement of Clean Water Act Dischargers Can Be More Effective.” August 2001.

⁴⁰ U.S. EPA. “National Water Quality Inventory, 2000 Report.” September 2002.

⁴¹ U.S. EPA. “Coastal Watersheds: The Beach and Your Coastal Watershed.” April 1998. See also, U.S. Commission on Ocean Policy. “Developing a National Ocean Policy, Mid-Term Report of the U.S. Ocean Commission on Ocean Policy.” September 2002.

as the national population is rapidly increasing and demographics are changing as more people move to coastal areas, increasing human demands and impacts on coastal and ocean resources have serious and deleterious effects on the health of estuaries, coastal waters, and oceans.⁴²

The good news is that America's waters are generally cleaner than they were 30 years ago, when rivers were burning and lakes were dying. The bad news is that far too many beaches are still unsafe for swimming due to pollution.

In 2001, at U.S. ocean, bay, freshwater and Great Lakes beaches, there were at least 13,410 days of closings and advisories, 46 extended closings and advisories (six to 12 weeks), and 73 permanent closings and advisories (more than 12 weeks). This number represents almost a 20 percent increase in closings and advisories from the previous year (11,300 in 2000). Eighty-seven percent of the major closings and advisories for 2001 were based on monitoring that detected bacteria levels that exceeded health standards for swimming.

Most beach closings and advisories are based on monitoring that detects elevated levels of bacteria, indicating the presence of microscopic disease-causing organisms from human and animal wastes. These wastes typically enter coastal waters from polluted runoff and stormwater – combined sewer overflows, discharges of untreated or partially treated wastes from sewage-treatment plants and sanitary sewers, septic system failures, and stormwater runoff from urban, suburban, and rural areas.⁴³

To a great degree, beach closings tend to occur following rainstorms, largely as a result of improperly designed or maintained sewer systems and drainage areas. For example, in many cities along the coast, when it rains – even as little as one-quarter of an inch – the volume in local combined sewers becomes too great for the treatment plants to handle. In these situations, the flow is diverted to nearby outfall points that discharge pollutants – including raw sewage, floatables such as garbage, syringes, and tampon applicators, toxic industrial wastes, and contaminated stormwater – into the nearest stream, bay, or coastal recreational area. These untreated discharges can often be as potent as direct sewer emissions.⁴⁴

Contact with polluted water can make you sick. Waters that are polluted with untreated sewage or stormwater runoff may contain several different disease-causing organisms, commonly called pathogens. Waterborne pathogens can carry or cause a number of infectious diseases, including gastroenteritis, typhoid fever, bacterial dysentery, and cholera, and can be passed along to unsuspecting swimmers through accidental ingestion of fecal-contaminated water. Waterborne viruses are also believed to be the major cause of swimming-associated diseases, including hepatitis, respiratory illness, and ear, nose, and throat problems, including swimmers-ear.

Much can be done to protect individuals and their families from these swimming-associated diseases, as well as keep the Nation's coastal areas from becoming little more than open sewers.

⁴² U.S. Commission on Ocean Policy. "Developing a National Ocean Policy, Mid-Term Report of the U.S. Ocean Commission on Ocean Policy." September 2002.

⁴³ Natural Resources Defense Council. "Testing the Waters 2002: A Guide to Water Quality at Vacation Beaches." July 2002.

⁴⁴ Natural Resources Defense Council. "Testing the Waters 2002: A Guide to Water Quality at Vacation Beaches." July 2002.

First, States and communities can conduct regular beach-water monitoring and public-notification programs to provide adequate protection to beachgoers. Fortunately, only two States remain that have no regular monitoring of coastal waters for swimmer safety.⁴⁵

However, equally as important are efforts to control sources of coastal water pollution from entering the Nation's coastal recreational areas. This, again, highlights the importance of improving the wastewater infrastructure and nonpoint source controls throughout the Nation, especially to prevent sewage overflows both from combined and sanitary systems, polluted runoff, and urban stormwater discharges.

WHAT IS THE BUSH ADMINISTRATION DOING TO IMPROVE WATER QUALITY?:

At best, very little...but what IS being done (or not done) is quickly undermining the successes of the Clean Water Act.

Suspension of the Total Maximum Daily Load (“TMDL”) Rule:

In the years immediately following the passage of the Clean Water Act, pollution problems were so prevalent that any reduction in pollutants immediately improved the health of waters. Today, however, some of the most obvious water pollution problems have been addressed; yet states continue to identify more than 20,000 rivers, lakes, streams, and other waterbody segments that remain polluted to the point of endangering public health. To restore the health of these waters, existing programs need a more focused effort to identify specific polluted waters, definition of specific measures needed to restore them to health, and implementation these measures.

The authors of the 1972 Clean Water Act envisioned a time when this more focused approach to restoring the remaining polluted waters would be needed and they created the TMDL program to meet this challenge. The TMDL program calls for States to identify those waters or segments of waters that are not meeting the State's water quality standards even after the implementation of the technology-based controls under the Act, to identify the pollutants that are causing the impairment, and to develop individualized plans to reduce the pollutants of concern so that water quality standards can be met. The Act also requires that both the list of polluted waters and the specific TMDLs must be sent to EPA for approval; if EPA disapproves a State list or TMDL, the Clean Water Act requires EPA to establish the list or the TMDL for the State.

The TMDL program can be thought of as the Clean Water Act having come full circle. Before 1972, water quality programs were ambient water quality based, which was time consuming, expensive, and ineffective, because all pollution control standards were to be individually developed. The 1972 Act changed the entire focus of water pollution programs from ambient water quality to technology-based standard. For industrial discharges, the basic standard is best available technology (BAT) that is economically achievable. For municipal discharges, the basic standard is secondary treatment. These technology standards are minimums that must be met, regardless of the quality of the receiving waters. Following implementation of technology-based controls, if a water body is still impaired, the TMDL program is applicable and ambient water quality based controls are applied. In effect, the TMDL program returns to the emphasis on water quality that existed before 1972, but in

⁴⁵ Natural Resources Defense Council. “Testing the Waters 2002: A Guide to Water Quality at Vacation Beaches.” July 2002.

a more effective manner, focusing only on waters known to be impaired, and with technology-based controls as a backstop.

However, despite the existence of the TMDL program, until the early 1990's, EPA and the States gave top priority to implementing general State clean water programs, and gave a lower priority to the more focused restoration authorities of the TMDL program. As a result, relatively few TMDLs were developed and many State lists were limited to a few impaired waters.

Then, several years ago, citizen organizations began bringing legal actions against EPA seeking to enforce the requirements of the Act on the listing of impaired waters and the development of TMDLs. To date, 22 of these cases have been resolved with agreement for State actions to identify impaired waters and establish TMDLs.⁴⁶ Where a State fails to act, EPA is required to step in to identify the polluted waters and to establish TMDLs for those waters.

In 1996, EPA determined that there was a need for a comprehensive evaluation of the TMDL program, and convened a committee under the Federal Advisory Committee Act ("FACA") to make recommendations for improving program implementation, including needed changes to the TMDL regulations and guidance.

On July 11, 2000, the Clinton Administration signed final regulations (the "TMDL rule") to revise and significantly strengthen the TMDL program based on the recommendations of the FACA committee, numerous stakeholders from a myriad of interests, including agriculture, and the general public. Although the new TMDL rule was built on the foundations of the existing TMDL regulations, the proposal was intended to be a great improvement in the program.

In essence, the TMDL rule retained the essential core of the program envisioned in 1972, namely: (1) States identify those waters where the State's water quality standards are not being met; (2) States identify the pollutants that are causing the water quality impairment; (3) States identify the sources of those pollutants; and (4) States assign responsibility for reducing those pollutants so that the waters can be used for the uses that the States have established. In addition, the EPA backstop was retained to ensure final accountability for the development and implementation of the program.

To further strengthen the program, the TMDL rule also would have required specific plans and schedules for implementation of TMDL actions to restore the health of polluted waterbodies, more diverse sharing of pollution control responsibilities among point and nonpoint sources, and expanded and strengthened public involvement in the development of TMDLs. In addition, EPA revised earlier drafts of the TMDL rule to make it clearer and more responsive to the concerns of the agricultural community, and withdrew in its entirety provisions related to forestry activities.⁴⁷

Unfortunately, as has been the case with many attempts to strengthen laws and regulations to protect our Nation's environment over the past decade, the Republican Leadership in Congress politicized the TMDL rule as too costly, too burdensome, and an overreach of Federal regulatory authorities tasked with protecting the Nation's waters. During consideration of an unrelated

⁴⁶ See EPA Website on TMDL Litigation Status. (last modified July 16th, 2002)
<<http://www.epa.gov/owow/tmdl/lawsuit1.html>>.

⁴⁷ See EPA Website on Background Information Regarding Rules Proposed in August 1999.
<<http://www.epa.gov/owow/tmdl/smithforestry.html>> and <<http://www.epa.gov/owow/tmdl/pdf/tmdl45.pdf>>.

appropriations bill, the Republican Leadership of the House and Senate included language to block any Federal funds from being used by EPA to “make a final determination on or implement any new rule” on the TMDL program during fiscal years 2000 and 2001.⁴⁸ The legislation was signed into law on July 13, 2000 – two days after the TMDL rule was made final – and effectively blocked any potential revision to or implementation of the TMDL rule, until October 1, 2001.

Then, on January 20, 2001 – the day of his inauguration – President Bush indefinitely blocked all regulations proposed by the Clinton Administration that had not been finalized and published in the Federal Register, including the TMDL rule. On October 18, 2001, the Bush Administration finalized an additional rule suspending the effective date of the TMDL rule until April 30, 2003, to give the Administration “time to re-consider [sic] some of the choices made in the July 2000 rule.”⁴⁹

Now, the Bush Administration is rumored to be planning to propose significant changes to the TMDL program, including changes that could undermine efforts now underway in States to develop TMDL programs, delay water quality improvements for years, and eliminate any EPA backstop for protection of the Nation’s waters, if not completely derail the program for good. Reopening key aspects of the TMDL program will lead to further confusion about the future of the TMDL program and will likely contribute to further delays in developing clean-up plans for our most polluted waters. After nearly 30 years delay in implementing the TMDL requirements of the Act, many States are just beginning to tackle cleanups that will result in cleaner, safer water for swimming, aquatic life, and other important uses of the Nation’s waters. The proposed delay threatens to further stall progress in these States because of uncertainty.

The TMDL process is the most fair and efficient way to finish cleaning up the Nation’s waters. The TMDL rule developed by the Clinton Administration was not perfect, with many criticizing the proposal, including some in the environmental community. However, the TMDL rule proposed an effective program that would have provided States with the tools needed to achieve water quality standards. Unfortunately, the Bush Administration either fails, or is unwilling, to understand the importance of implementing the TMDL rule in achieving the goals of the Clean Water Act.

The Nation’s citizens have already waited 30 years for the fishable and swimmable waters promised back in 1972 – apparently the Bush Administration’s response is, “What is one or two decades more?”

The Bush Record on Wetlands:

The SWANCC decision:

⁴⁸ Conference Report to Accompany H.R. 4425, Making Appropriations for Military Construction, Family Housing, and Base Realignment and Closure for the Department of Defense for the Fiscal Year Ending September 30, 2001 (House Report 106-710).

⁴⁹ See Effective Date of Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulations; and Revision of the Date for State Submission of the 2002 List of Impaired Waters; Final Rule, 66 Fed. Reg. 53,044 (2001).

In January 2001, the United States Supreme Court issued a 5-to-4 opinion – the *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*⁵⁰ – that denies Federal Clean Water Act protection for thousands of wetlands that serve as habitat for migratory birds.

Until *SWANCC*, Section 404 of the Clean Water Act served as the primary Federal protection for wetlands that serve important habitat, flood control, and water quality improvement functions. In the absence of section 404 protection, small, isolated waters, including wetlands, could be filled or drained without regard to the impact on the environment or human needs. Unfortunately, the Supreme Court adopted a myopic reading of Congressional intent and determined that protection of small water bodies is beyond the reach of the Act. As stated in the dissenting opinion of Justice Stevens, “the Court takes an unfortunate step that needlessly weakens our principal safeguard against toxic water.”⁵¹

The essence of the Court’s opinion is that when Congress used the term “navigable waters” in the Clean Water Act, Congress must have intended there to be some nexus to actual navigation and commerce. However, in fact, the legislative history and language of the Act make it abundantly clear that Congress intended the broadest possible constitutional interpretation for the provisions of this precedent-setting law. Congress was very deliberate and careful to define “navigable waters” as, “the waters of the United States, including the territorial seas.”

Since the *SWANCC* decision, the Section 404 regulatory program has been in turmoil, with the regulated community and concerned citizens watching as the situation grows increasingly more confusing and chaotic with each passing day. At the same time, many developers – including individuals who would otherwise prefer to see all Federal protections over U.S. waters and wetlands eliminated – have championed the broadest possible reading of *SWANCC*, advocating a bright-line test that would prohibit Federal protections over any non-traditionally-navigable water in the United States.

In the absence of any leadership from the Bush Administration, local district offices of the Corps and regional offices of EPA are left to decide for themselves the meaning of the *SWANCC* decision. However, as expected, this has not been successful.

Members of both the Association of State Wetland Managers and the Association of State Floodplain Managers – those responsible for State regulation of wetlands – have reported widely varying interpretations by field offices of the Corps and EPA regarding the jurisdictional scope of the 404 program, and in the absence of clear guidance, jurisdictional calls have become largely ad hoc and unpredictable.⁵² Depending upon how the scope of the *SWANCC* decision is interpreted, somewhere between 30 to 60 percent of the Nation’s wetlands could potentially be removed from the Federal protections of the Clean Water Act, and in the absence of a serious effort by the States to protect these waters, many of these waters may have no protection from pollutants or development at all.

⁵⁰ *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001).

⁵¹ See *SWANCC*, 531 U.S. 159 at 174.

⁵² Association of State Wetland Managers and the Association of State Flood Plain Managers. “Position Paper on Clean Water Act Jurisdiction Determinations Pursuant to the Supreme Court’s January 9, 2001 Decision, *Solid Waste of Northern Cook County v. United States Army Corps of Engineers* (SWANCC) Presented to Administrator Whitman, United States Environmental Protection Agency.” December 2001

There is also confusion regarding the status of 404 permits issued pre-SWANCC for activities in isolated wetlands, with some Corps districts taking the position that such permits are no longer valid and enforceable,⁵³ which is simply not the law.

In the absence of 404 protections, many isolated waters and wetlands throughout the United States could be filled, drained, or polluted, without review, without objections, and without limit.

Not content with retrenchment ordered by the Supreme Court, the Bush Administration recently announced that it was contemplating the abandonment of decades-old interpretation on the scope of the Act, and is likely to propose changes that radically reduce the scope of waters that would remain under Federal protection.

On September 18, representatives from the Corps and EPA testified on the likelihood of an upcoming rulemaking to define the scope of the Act's jurisdiction over the waters of the United States.⁵⁴ According to Agency written testimony, this rulemaking will likely revisit whether the Act contemplated jurisdiction over any water or wetland that does not fall within the traditional definition of navigable waters – those waters that subject to the ebb and flow of the tide, or waters that are presently used, or have been used in the past, or may be susceptible for use, to transport interstate or foreign commerce. Such a narrow view would eliminate regulation of non-navigable tributaries of traditional navigable waters, certain wetlands adjacent to traditional navigable waters, and any other isolated, intrastate water where the basis for jurisdiction is not solely the Corps' migratory bird rule.

These proposed revisions to the long-standing jurisdiction of the Clean Water Act over the waters of the United States, if implemented, would significantly undermine the Nation's ability to restore and protect its waters and wetlands. By potentially limiting the scope of the Clean Water Act to traditionally "navigable" waters, the Bush Administration would remove Federal protections on over half of the Nation's waters and wetlands in the hopes that State programs might take additional efforts to protect these natural resources. This would set back efforts to protect water quality to the decades preceding the 1972 Act – a return to the disastrous scenario where 50 different States might have 50 differing approaches to protecting (or failing to protect) water quality. There would be no quicker way for the Bush Administration to undermine the successes of the past thirty years on water quality.

Revisions to Nationwide Permits – Reversal of the "No Net Loss" Policy:

In January 2002, the Bush Administration announced the implementation of revised guidelines and requirements of the nationwide permits ("NWP") program. These revisions, which went into effect in March 2002, significantly weakened the NWP program, overturning stricter environmental standards for the Nation's waters that were adopted in 2000, and allow the

⁵³ Association of State Wetland Managers and the Association of State Flood Plain Managers. "Position Paper on Clean Water Act Jurisdiction Determinations Pursuant to the Supreme Court's January 9, 2001 Decision, *Solid Waste of Northern Cook County v. United States Army Corps of Engineers* (SWANCC) Presented to Administrator Whitman, United States Environmental Protection Agency." December 2001.

⁵⁴ Testimony of Dominic Izzo, Principal Deputy Assistant Secretary of the Army for Civil Works, and Robert Fabricant, General Counsel, EPA before the Government Reform Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs. September 19, 2002.

continuation of activities that damage or destroy thousands of acres of wetlands and miles of streams every year.

The Clean Water Act authorizes the Corps to establish a program of nationwide permits for the expedited approval of certain activities involving the discharge of dredged or fill materials within the waters of the United States that are similar in nature and have a minimal cumulative impact on the environment. Activities performed under NWP do not require thorough public notice and comment, and they undergo a much less stringent review, if any, by the Corps than do projects performed under individual permits.

In spite of President Bush's proclaimed "Earth Day" support for wetland protections,⁵⁵ the recent changes to the NWP program will make it easier for developers, mining companies, and others to qualify for general permits, and will seriously undermine the "no-net loss" commitment that has been in place since 1990. For example, the January 2002 revisions eliminated the requirement for 1-to-1 mitigation for lost wetlands, by which developers were to create, restore, or buy one acre of wetland for every acre destroyed. Instead, each of the Corps' 38 district offices would only have to ensure that their district, as a whole, breaks even.

In addition, the Corps proposal eliminates a thorough Clean Water Act review of activities in intermittent streams, allowing the Corps to waive a 300-foot limit on stream destruction under the NWP program. As a result, developers would be able to expedite the elimination of potential safety buffer-zones in flood-prone areas that, although seemingly dry for a large portion of the year, provide a safe and environmentally sensitive means of controlling storm water runoff in heavy rains. As a result of the Corps changes, greater numbers of residents and business owners could potentially be subject to increased flooding and risk of harm.

Finally, the January revisions loosen the restrictions on filling wetlands in flood-prone areas, making it easier for developers to build in these areas, and placing at risk the lives and property of individuals in and downstream of these areas.

The January 2002 changes represent a significant internal shift in Corps of Engineers policy with regard to the importance and protection of the Nation's wetlands. Since 1990, both Republican and Democratic Presidents have understood the importance of these vital natural areas for the benefit they provide in cleansing and storing reservoirs of potable water, providing flood protection to coastal and downstream areas, and maintaining essential habitat for the Nation's native species.

However, in this one document, President Bush turns his back on former President Bush's established policy of "no net loss" of wetlands, and foreshadows potentially greater harm to these vital areas that can be expected in the remaining years of the Bush Administration. For diminished regulatory protections over U.S. waters and wetlands, when coupled with the likely reduction in the Act's scope to only traditionally navigable waters, will open hundreds of thousands of wetlands to destruction.

⁵⁵ Katherine Seelye and Douglas Jehl, "Bush Endorses Tougher Rule on Lead Reporting," N.Y. Times, April 18, 2001.

Failure to Fund Necessary Water Infrastructure:

As noted earlier, the Nation's water and wastewater infrastructure is getting old, and starting to fall into disrepair. Many of the wastewater treatment facilities constructed soon after enactment of the 1972 Act are now reaching the end of their expected useful life, and are in significant need of repair. Without renewing our attention to and investment in water infrastructure, this Nation risks losing many of the gains made over the past 30 years in improving water quality.

The Bush Administration fails to understand the need for increased Federal investment in water infrastructure. Since his election, President Bush has continuously proposed to slash funding for the primary Federal program responsible for funding wastewater infrastructure programs throughout the Nation – the Clean Water State Revolving Loan Fund.

In the fiscal year 2002 Budget Request, President Bush proposed to cut the CWSRF program by almost 40 percent – from \$1.35 billion in fiscal year 2001 to \$850 billion in fiscal year 2002. Fortunately, this effort failed.

However, in fiscal year 2003, the President again proposed to cut the CWSRF program, this time by 10 percent – from \$1.35 billion in fiscal year 2002 to \$1.212 billion in fiscal year 2003. In addition, despite the bipartisan efforts of Congress to pass legislation to substantially increase the authorized level of funding for water infrastructure, representatives of the Bush Administration testified that the President is opposed to any increase in Federal investment to improve, repair, and replace necessary water infrastructure.⁵⁶

Numerous sources, including EPA, have estimated significant needs for water infrastructure investment over the next 20 years, ranging from \$300 billion to \$400 billion. The current level of Federal spending is grossly inadequate to maintain and improve the quality of the Nation's waters and the health of the environment that is to be passed to future generations.

Devolution of Enforcement to the States:

As stated earlier, one of the key provisions of the Clean Water Act is the prohibition of pollutant discharges into the Nation's waters in the absence of permit. Without adequate enforcement of the criminal and civil penalties provided in the Act, these provisions provide little deterrent for polluters not to contaminate the waters of the United States.

Even with provisions in the Act allowing for limited permitted discharges into U.S. waters, polluters routinely break the law. Reports have documented increasing numbers of illegal discharges by major facilities over the past year, with State enforcement authorities taking little action to prevent these occurrences. In addition, the EPA's Inspector General's Office recently reported that State enforcement authorities have been lax in investigating and prosecuting illegal discharges – often delaying any action against polluters for a year or more. When State enforcement is finally taken, penalties imposed on polluters were often insufficient to prevent further violations, or infrequently collected.

⁵⁶ Testimony of Benjamin Grumbles, Deputy Assistant Administrator for EPA's Office of Water before the Subcommittee on Water Resources and Environment, March 13, 2002.

In spite of these facts, over the past two years, the Bush Administration has been trying desperately to undercut Federal enforcement at EPA, and transfer this responsibility to the States. This is exactly the wrong decision at the wrong time.

In both the fiscal year 2002 and 2003 budget, President Bush proposed significant cuts to the Federal enforcement offices of EPA – those offices charged with enforcing America’s most important and effective environmental laws, including the Clean Water Act. The enforcement efforts of EPA are essential in assuring that the agency can adequately protect the safety of our Nation’s air and water.

In the fiscal year 2002 budget, the President unsuccessfully attempted to cut \$25 million from EPA’s enforcement budget, specifically targeting compliance, monitoring, civil and criminal enforcement, and Superfund enforcement. This effort would have resulted in the elimination of 270 positions from the Office of Compliance and Enforcement, and would have resulted in 2,000 fewer inspections, an 11 percent reduction in criminal actions, and a 20 percent reduction in civil actions.

The fiscal year 2002 budget also proposed to transfer \$25 million to the States for enforcement. While States could use additional help in ensuring compliance with environmental laws, that help should not come at the expense of Federal enforcement programs. Fortunately, this effort failed as well.

Undaunted by this failure, the President again proposed to cut Federal enforcement programs in his fiscal year 2003 budget – this time by \$10 million. The proposal would result in the elimination of 100 positions from the Office of Compliance and Enforcement, and again, would significantly undermine the ability of the Federal government to ensure compliance with environmental laws, including the Clean Water Act. As a result, if the President’s request is granted, there would be fewer inspections of regulated facilities, fewer prosecutions of individuals and companies who discharge unregulated pollutants into the waters of the United States, and weaker attempts to impose civil and criminal penalties against those convicted of violating the law.

Federal and State resources combined are not enough to fully enforce our Federal environmental laws as it is. Undermining and transferring scarce Federal resources to State programs when both are under-funded is like robbing Peter to pay Paul. The fact is, the air and water quality in one State impacts the air and water quality in another State. There are no borders when the goal is a clean environment. States do provide an important part of enforcing environmental laws, but they cannot replace the unique role of EPA in this area. That is why a clean environment should be a national priority.

Concentrated Animal Feeding Operations (CAFOs):

In the most recent water quality report to Congress, the States identified agriculture as the leading contributor to water quality impairment in rivers and streams by a wide margin.⁵⁷ Agriculture is also the leading source of impairment of lakes, ponds, and reservoirs.⁵⁸ Even in

⁵⁷ U.S. EPA. “National Water Quality Inventory: 2000 Report.”

⁵⁸ U.S. EPA. “National Water Quality Inventory: 2000 Report.”

estuarine areas, which are often highly urbanized, agriculture is the fifth leading cause of impairment.⁵⁹

Most activities associated with agriculture are not regulated or otherwise subject to requirements under Federal or State clean water programs. Yet, agriculture remains one of the most significant sources of pollutants causing water quality impairment.

Traditionally, the water quality issues associated with agriculture have focused on runoff from fields that contain insecticides and herbicides. While these issues remain a problem, increasing attention is being paid to nutrient pollution from animal feeding operations.

Today, consolidation of animal feeding practices have resulted in massive operations that generate a tremendous amount of waste material. This results in larger facilities and in facilities becoming more concentrated geographically.⁶⁰ For example, the Economic Research Service of the Department of Agriculture reports that there was a decline of more than 50 percent in the number of farms with confined animals in the 1982 to 1997 period – a drop from 435,000 to 213,000.⁶¹ At the same time, the number of animal units (AU) in production grew by more than 50 percent.⁶²

The net result of this concentration is that large amounts of nutrients are being imported into areas through feed, but the same nutrients are not being returned to their source. Instead, the more common and traditional method of disposing of nutrients in animal waste has been through land application of manure nearby the animal operation. The net result is an imbalance in what the land and crops can successfully use, resulting in excessive nutrients finding their way into adjacent rivers, streams and lakes.

These excessive nutrients carry a heavy price for the environment and for public health. Pollutants in animal manure have resulted in fish kills; eutrophication and algal blooms; contamination of shellfish, and subsequent toxin and pathogen transmission up the food chain; increased turbidity and negative impacts to benthic organisms; and reduced biodiversity when rivers and streams become uninhabitable by resident species.⁶³ Pollutants in animal manure can present a range of risks to human health when they contaminate drinking water or shellfish, and when they are present in recreational waters.

For example, *E. coli*, *Giardia*, and *Cryptosporidium* are all associated with animal manure, and all have serious health consequences including death. Recent examples include the Washington County Fair in New York State in 1999 (2 deaths, 71 hospitalized), Milwaukee, Wisconsin, in 1993 (100 deaths, 403,000 illnesses), and Walkerton, Ontario, Canada, in 2000 (7 deaths, 1,000 illnesses).⁶⁴

When nutrient laden runoff from agricultural and other nonpoint sources contaminate drinking water reserves, utilities are forced to add additional chlorine to kill any harmful

⁵⁹ U.S. EPA. “National Water Quality Inventory: 2000 Report.”

⁶⁰ U.S. GAO, “Animal Agriculture: Information on Waste Management and Water Quality Issues.” June 1995.

⁶¹ USDA, Economic Research Service, “Confined Animal Production and Manure Nutrients.” June 2001.

⁶² USDA, Economic Research Service, “Confined Animal Production and Manure Nutrients.” June 2001.

⁶³ U.S. EPA, “Proposed Regulations to Address Water Pollution from Concentrated Animal Feeding Operations.” December 2000.

⁶⁴ U.S. EPA, “Proposed Rule: National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations.” December 2001

microorganisms that may be present in the water. This combination of nutrient laden water and chlorine has been found to create “chlorine byproducts,” which have been linked to increased risks of cancer, and are further suspected to be a potential cause for increased risk of miscarriages and birth defects.⁶⁵

The pollution associated with animal feeding operations must be reduced, and current programs must be made more effective. Today’s programs are unchanged since the 1970s – well before current practices became the norm.

For example, on January 12, 2001, the Clinton Administration proposed to revise the regulations governing concentrated animal feeding operations (“CAFO”) in an attempt to bring the regulatory program up to date with current practice. The proposed rule on CAFOs would have modernized the CAFO program to reflect real world animal feeding practices, including lowering the threshold over which an animal feeding operation would come under the permitting requirements of the Clean Water Act.⁶⁶ In addition, this proposal attempted, for the first time, to more closely follow the land application and disposal of animal wastes to ensure that excessive nutrients were less likely to wind up in U.S. waters as nonpoint source pollution. Finally, the proposed CAFO rule would have required animal processors that exercise substantial control over contract growers to be more greatly involved in these operations, ensuring that large operations do not avoid the pollution controls by dividing up their operations to slip in under the permitting threshold.⁶⁷

Unfortunately, as noted in the earlier discussion on the TMDL rule, on the day of his inauguration, President Bush indefinitely blocked all pending regulations, including the CAFO proposed rule. Since that time, the Bush Administration has done little to suggest any further controls to slow the flow of animal wastes into the Nation’s waters.

In the absence of Federal leadership, some States have been much more active in their attempts to address the issue. For example, Oregon has recently put in place a program to reduce pollution from livestock operations. In addition, Michigan has implemented a program requiring certain large livestock farms to obtain permits under the state’s clean water law.

Unfortunately, other States lag behind, making little effort to control this problem, and further exacerbating the problem of concentration of animal feeding operations in less regulated states. However, the basic premise of the Clean Water Act is that there will be Federal minimum standards to achieve improvements in water quality. States have always had the right to do more, and to find creative ways to achieve water quality goals. When it comes to animal feeding operations, improved water quality remains the goal.

⁶⁵ Environmental Working Group and U.S. PIRG, “Consider the Source: Farm Runoff, Chlorination Byproducts, and Human Health.” October 2001.

⁶⁶ CAFOs are defined as point sources under the Clean Water Act, and as such, are subject to permit requirements and the implementation of effluent limitations to reduce or eliminate pollutant loadings into the waters of the United States.

⁶⁷ U.S. EPA, “Proposed Regulations to Address Water Pollution from Concentrated Animal Feeding Operations.” December 2000.

CONCLUSION:

For the most part, the 30-year history of the modern Clean Water Act has been a tremendous success. In this period, the Nation's waterways have shown dramatic improvement while there have been significant increases in population. In just over a generation, the number of assessed waters currently meeting water quality standards has doubled – but there is still much work to be done.

The past 30 years has also provided us with significant insight on where the Clean Water Act has failed – most notably in controlling various nonpoint sources of pollution. However, now, even when armed with the knowledge of how far the Nation has come, and how close it is to finally achieving the fishable and swimmable goals of the Act, the United States stands on the threshold of throwing all these successes away, and reverting back to the days of rivers that burn, lakes that are dead, and waterways that are sewers.

The actions of the Bush Administration clearly demonstrate how easy it would be to turn the clock back on protecting our Nation's waters. In two short years, President Bush has shown that the decisions, priorities, and policy choices made by his Administration can mean the difference between concerted efforts to restore and protect our most vital natural resource from pollution, and efforts to undermine these protections.

The Nation has a choice – the final chapters on the Clean Water Act have yet to be written. The questions remain – which path will be followed; will the Administration and Congress finish the job of achieving the goals of the Clean Water Act?