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

Hearing on
Status of the Nation's Waters, including Wetlands, Under the Jurisdiction of the Federal Water Pollution Control Act

Testimony of
Norman M. Semanko
Executive Director & General Counsel
Idaho Water Users Association, Inc.
Boise, Idaho

Submitted on behalf of
The National Water Resources Association and
The Family Farm Alliance

July 19, 2007

Mr. Chairman and members of the Committee, my name is Norm Semanko and I am here on behalf of the National Water Resources Association (NWRA) and the Family Farm Alliance. I am the Immediate Past President of NWRA and a long-standing member of the Advisory Committee for the Family Farm Alliance. We appreciate the opportunity to provide this testimony. I would like to thank NWRA's Water Quality Task Force Chairmen, Scott Campbell of Idaho and Mark Pifher of Colorado, as well as Dan Keppen, Executive Director of the Family Farm Alliance and the Alliance's Advisory Committee Chair, Dick Moss, for their assistance.

The Family Farm Alliance advocates for family farmers, ranchers, irrigation districts and allied industries in 17 Western States to ensure the availability of reliable, affordable irrigation water supplies. The Alliance's members use a combination of surface and ground water, managed through a variety of local, state and federal arrangements. In addition to my testimony, the Alliance has prepared a letter for the hearing record which is attached to my written testimony.

The National Water Resources Association is a collection of state water associations and represents the collective interests of agricultural and municipal water providers in the Western States. NWRA has an active Water Quality Task Force and has long been involved in matters regarding the Clean Water Act in Congress, before the administration, and in the courts. NWRA has also provided briefings for Congressional staff on matters relating to the Clean Water Act.

I. LOOKING BACK: THE STATUS OF CLEAN WATER ACT JURISDICTION

A. A GENERAL OVERVIEW

Without question, interpretation and application of the Federal Water Pollution Control Act (33 U.S.C. §§ 1251 *et seq.*, hereinafter referred to as "CWA", "the Clean Water Act", or "the Act") has engendered much consternation and litigation over the past thirty-five years. The reach and scope of CWA jurisdiction, in particular, has kept courtrooms busy as the issue has made its way from the federal district and circuit courts, all the way to and through the United States Supreme Court on several occasions. The regulatory landscape has been, and remains, muddled at best. This is true despite the recent United States Supreme Court decisions in *SWANCC* and *Rapanos*, and despite recently released guidance jointly issued by the Environmental Protection Agency and the Army Corps of Engineers in June 2007. Thoughtful efforts to clarify the scope and application of the CWA would be most welcome. We appreciate the opportunity to provide the Committee with our thoughts on the status of CWA jurisdiction.

There have been suggestions that jurisdiction under the Clean Water Act has been reduced, most notably by the *SWANCC* and *Rapanos* decisions. However, the real question is what the jurisdiction, or reach, of the Act was upon its enactment in 1972 and subsequent to that. Jurisdiction has been a moving target for many years. The Corps of Engineers and EPA historically took a narrower view of jurisdiction under the Act. This has been expanded over the decades through citizen lawsuits and ever-broadening interpretations by the federal courts and, consequently, the federal agencies charged with its implementation. Only now are we seeing some of the courts, including the U.S. Supreme Court, conclude that the agencies have, in some limited instances, overreached, going beyond the bounds of the Clean Water Act. By and large, however, the jurisdiction that is asserted by the agencies remains extensive and goes well beyond what was intended with the passage of the Clean Water Act.

B. JURISDICTIONAL OVERREACHING: SOME REAL-WORLD EXAMPLES

It is important to note that the jurisdiction asserted by federal agencies before and after the *SWANCC* and *Rapanos* decisions has been and continues to be extensive. The practical realities for water providers -- agricultural and municipal – have real-world consequences in the form of increased costs for everyday consumers of water. These costs come without any real improvements in water quality. In fact, they threaten to divert resources away from some of the real water quality problems that exist.

Let me provide some practical examples in three areas under the Act.

1. Section 303. Application of TMDLs to Artificial Water Conveyance Facilities

Under Section 303 of the Act, water quality limited segments – those rivers and streams that do not meet established water quality standards -- are identified. Thereafter, clean-up plans, or total maximum daily loads (TMDLs) are established with allocations made to the various users that impact the water quality of the rivers and streams. These TMDLs allow real water quality problems to be addressed in a focused way.

Unfortunately, the federal government has in some instances asserted jurisdiction over canals and drains and treated them as water quality limited segments. By labeling these artificial, manmade water conveyances -- many of which are concrete-lined, exhibit no fish habitat characteristics or other stream-like qualities whatsoever, and are completely dry during major portions of the year -- as "waters of the United States", the federal agencies have been successful only in diverting limited resources away from improving the quality of our rivers and streams.

Requiring TMDLs for lined water conveyance channels, rather than focusing on the rivers and streams that were intended to be protected under the Act, has had real-world consequences, not just for water providers, but for the everyday citizens that use the water, as well. No relief to this problem appears in sight.

2. Sections 401 and 402. Requiring NPDES Permits for Aquatic Herbicide Use

Under Sections 401 and 402 of the Act, discharges of point source pollutants into waters of the United States are prohibited without a National Pollutant Discharge Elimination System (NPDES) permit. Again, this program, like the TMDL program, has allowed real water quality problems to be addressed in a very focused way. However, over the 35 year history of the Act, litigious environmental groups have been successful is some cases in convincing federal courts that jurisdiction should be asserted over canals, ditches and drains as "waters of the United States". This has had the effect of dragging agricultural and municipal water providers into regulatory terrain that they never imagined could exist.

The use of aquatic herbicides, which are registered and fully regulated by EPA to protect the environment under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), has recently required NPDES permits to be obtained in several western states where their use is prevalent. This legal and regulatory exercise comes with little to no real gain for water quality. Again, resources are being drained, the focus is being pulled farther and farther away from the rivers and streams that were intended to be protected, and costs are escalating for end consumers.

We are encouraged that EPA has adopted a rule, clarifying that aquatic herbicides and other beneficial products, when used in accordance with FIFRA and the required label, are not pollutants and therefore their proper use in and around canals, ditches and drains does not constitute a point source discharge. However, this relief has come too late in some states that already required NPDES permits for these activities. In addition, the underlying jurisdictional question – whether the artificial, man-made water conveyance facilities are properly considered "waters of the United States" – was not resolved by EPA's rule.

3. Section 404. Asserting Jurisdiction over Work in Canals, Ditches and Drains

Finally, much of the jurisdictional focus has centered around Section 404, the so-called dredge-and-fill permit program. Again, this program was designed to protect the nation's rivers and streams, including adjacent wetlands. Unfortunately, aggressive regulators have expanded the reach of Section 404 by attempting to extend it to canals, ditches and drains.

Irrigation districts, canal companies and other water providers do routine maintenance work in their conveyance facilities every year. In addition, they are required to make more extensive improvements in the form of rehabilitation or replacement of some of the works from time to time. Water conservation activities such as lining or piping canals and drains are also commonplace activities, along with relocating portions of these water conveyance facilities for improved efficiencies. Without the ability to conduct these necessary activities, agricultural water delivery would come to a screeching halt. Additionally, many of these facilities provide a flood control function. In such cases, regular maintenance activities to maintain channel capacity are necessary to prevent serious flood damages.

The Corps of Engineers has, in certain cases, asserted that these activities are being conducted in "waters of the United States" and therefore require a 404 permit or reliance on one of these existing exemptions contained in the Act. As a result, we have spent the better part of the past two years working with the Corps, EPA and the Bureau of Reclamation to obtain a Regulatory Guidance Letter (RGL) helping to clarify the scope and breadth of the exemptions contained in the Act as they apply to these activities. We are certainly appreciative of these efforts by the federal agencies, which culminated with the release of the RGL earlier this month. However, the underlying question – whether these facilities are properly considered "waters of the United States" – was not addressed in the RGL. As a result, uncertainty continues to exist. In addition, the Corps already faces significant challenges with the timely processing of 404 permits. Requiring such permits for activities in water conveyance facilities would increase the already significant workload.

These few, but very concrete examples make it clear that jurisdiction under the Clean Water Act has been getting broader over the years, not narrower. *SWANCC* and *Rapanos* did not wipe the slate clean. Unfortunately, we have, and will continue to face, many jurisdictional problems under the Clean Water Act as it currently exists for years to come.

II. LOOKING FORWARD: POTENTIAL CHANGES TO THE ACT

Of course, there have been numerous discussions about a perceived need to "restore" jurisdiction under the Clean Water Act. As discussed above, jurisdiction has increased over the years. If anything needs to be "restored", it is a more reasonable interpretation of "waters of the United States" and what we perceive to be the intent of Congress when the CWA was enacted in 1972. While we appreciate the Chairman's efforts to focus the discussion and address this issue, the current legislation, H.R. 2421, "The Clean Water Restoration Act of 2007", would exacerbate the problem, rather than solving it. In addition, it would seriously erode the well-established and long-respected right of the states to manage their water resources and protect water quality.

A. THE LEGISLATION DOES NOT "RESTORE" CONGRESSIONAL INTENT; IT IGNORES IT

On May 22, 2007, the Chairman introduced H.R. 2421, "The Clean Water Restoration Act of 2007" ("CWRA"). It has been suggested that CWRA is necessary to reaffirm the original intent of the CWA, to end legal wrangling about what Congress meant when it passed the CWA in 1972, and to prevent the judicial branch from rewriting or redefining the scope and application of the CWA. However, the CWRA fails to accomplish any of these goals. Instead, it ignores the Congressional intent underlying the CWA and will give rise to more litigation, not less.

1. Congress Expressly And Repeatedly Used The Term "Navigable" in the Clean Water Act

Section 5 of the CWRA seeks to strike the terms "navigable waters of the United States" from the CWA in order to replace it with Section 4's all-encompassing definition of "waters of the Unites States." This proposed "restoration" of the CWA would read the touchstone term "navigable" out of the CWA in its entirety and replace it with a definition of "waters of the United States" that would include every conceivable "water" in the United States. This expansive interpretation has been rejected by the United States Supreme Court.

There can be no clearer indication of Congressional intent than that garnered from its express and repeated use of the term "navigable" when drafting and passing the CWA in 1972. Congress did not intend the CWA to touch all waters of the United States. Rather, the stated goal of the CWA is to eliminate the discharge of pollutants into the nation's "navigable waters." Likewise, the permissible discharge of pollutants to "navigable waters" requires a proper permit. Simply put, Congress' repeated use of the term "navigable" throughout the CWA was by design. If the term "navigable" is of no significant or independent import, the term would not have been inserted throughout the CWA. To read the term "navigable" out of the CWA, as the CWRA seeks to do, ignores express Congressional intent, rather than restoring it.

2. Congress Confirmed State Supremacy In The Planning, Development, And Use Of Land And Water Resources

Well-settled legislative and judicial authority has long recognized state and local government control over land and water use and development. For example, the Equal Footing Doctrine provides that new states enter the Union having the same sovereign powers and jurisdiction as the original thirteen states. Under this doctrine, among other things, a new state generally acquires title to the beds of inland navigable waters. This is as true of the Western States as it is

for all other states. In addition, the Submerged Lands Act of 1953 declares that states generally have title to all lands beneath inland navigable waters and beneath offshore marine waters within their "boundaries," which generally extend three miles from the coastline. Finally, Section 8 of the Reclamation Act of 1902 provides that nothing in the Reclamation Act may be construed as affecting or in any way interfering with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation. Moreover, Section 8 explicitly requires that the Secretary of the Interior proceed in conformity with state law in carrying out the Act. Collectively, these federal authorities and many others recognize the authority of each respective state to administer the waters of the state.

The Clean Water Act is no different. Section 101(b) of the CWA specifically and expressly recognizes, preserves, and protects the "primary responsibilities and rights of States" to prevent, reduce, and eliminate pollution, as well as to plan and develop the use of land and water resources. Similarly, CWA Section 101(g) provides and confirms the Congressional policy that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by" the CWA. As the United States Supreme Court declared in the landmark case of *California v. United States* in 1978, "[t]he history and relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress."

To read the term "navigable" out of the CWA, and substitute it with the alarmingly broad definition of "waters of the United States", would eliminate long-recognized state sovereignty over their waters. This suggests that the existing use of the term "navigable" has no independent significance. As the U.S. Supreme Court noted in *SWANCC*, it is one thing to give a word limited effect, but it is quite another to give it no effect whatsoever. The CWA did not intend to federalize the nation's waters, yet that is exactly what the CWRA would do.

The language of the bill seeks to create a nexus between water quality protection and such activities as "bird watching and photography." It expands wetlands protection beyond traditional "dredge and fill" activities so as to encompass "draining," and it speaks in terms of "protecting federal land" in addition to the quality of waters. Each of these provisions represents an incremental, yet serious, expansion of federal jurisdiction under the CWA.

B. CONGRESS LACKS CONSTITUTIONAL AUTHORITY TO ENACT CWRA

1. The Commerce Clause, While Broad, Is Not Without Limits.

The term "navigable" as repeatedly used by Congress throughout the CWA amounts to a tacit recognition that the Commerce Clause is the basis of the Act's authority. This is because the federal government has long had the authority to protect navigation through the regulation of navigable waters. However, it is the states that have "virtually plenary" authority to regulate intrastate, non-navigable waters, as confirmed by the U.S. Supreme Court in 1935 in the case of. *California Oregon Power Co. v. Beaver Portland Cement Co.*

It is not unreasonable, nor surprising, that the U.S. Supreme Court has extended CWA jurisdiction to some non-navigable waters, as discussed in the *SWANCC* and *Rapanos* decisions.

This is because federal interests in navigation and interstate commerce could be affected by activities in non-navigable waters, provided that they are significantly connected to those navigable waters. However, such application of the Act has not been boundless. Instead, the Court has required that there be a "significant nexus" between the navigable and non-navigable waters before CWA jurisdiction can attach. This is because while broad, the Commerce Clause, and the authority it grants to Congress, is not limitless. The term "navigable" permeates the CWA in order to relegate federal regulation to its proper sphere of influence. Either the CWRA loses sight of the CWA's Commerce Clause limitations or the CWRA ignores them altogether.

2. The Other Constitutional Provisions Cited By CWRA Are Insufficient.

The authors of CWRA cite other Constitutional provisions as authority for the expansion of CWA jurisdiction to "all interstate and intrastate waters." More specifically, Sections 3(15) and 3(16) cite to the Treaty Clause, the Property Clause, and the Necessary and Proper Clause of the U.S. Constitution as the basis for CWRA. However, none of those clauses -- either individually or in combination -- provide Congress with the authority to regulate all intrastate waters.

The Necessary and Proper Clause is not an independent basis of authority. Rather, it gives Congress the authority to enact laws in furtherance of powers that have been specifically granted to the federal government elsewhere in the Constitution, such as the Treaty Clause and the Property Clause. By asserting that CWRA is a "necessary and proper means of implementing treaties to which the Unites States is a party," the authors of the bill are claiming that the United States cannot uphold its various treaty responsibilities unless the federal government obtains jurisdiction over all intrastate waters within the country. At best, this reasoning requires a giant leap of faith, which is not an appropriate basis for constitutional decision-making.

The assertion that the Property Clause provides authority to enact CWRA is even more tenuous. That provision simply provides Congress with the power to regulate property owned by the federal government. Why the federal government would need jurisdiction over all intrastate waters within the entire United States to protect its property interests is inexplicable.

Simply put, the Commerce Clause is the only arguable constitutional authority for enacting CWRA. As such, federal jurisdiction over intrastate waters must have some nexus to navigability, as explained above. CWRA's expansive definition of "waters of the United States" fails to adhere to this limitation and therefore cannot withstand constitutional scrutiny.

C. THE CASE FOR EXPANDING FEDERAL JURISDICTION HAS BEEN GREATLY EXAGGERATED

After reading the justifications provided by the bill's drafters, one not familiar with this nation's regime for regulation of the environment would understandably conclude that there is some giant gap in the regulatory scheme that is allowing unchecked pollution in waters that are not currently within the jurisdiction of the CWA. However, this is simply not the case.

Even though smaller intrastate waters and wetlands areas may not be within the jurisdiction of the federal government, they are within the jurisdiction of state and local governments. The necessary implication is that these governments are incapable of effectively protecting their water resources. Otherwise, there would be no need for the legislation.

In addition, it is important to keep in mind that the federal government does have jurisdiction over discharges of solid wastes, hazardous wastes, and hazardous substances to non-jurisdictional waters through the Resource Conservation and Recovery Act and the Comprehensive Environmental Response, Compensation, and Liability Act.

It is also worth noting that the CWA is widely recognized as an extremely successful statutory regime. All of this progress has been achieved under the current version of the CWA. And more than five years' worth of this progress has been achieved since the Supreme Court's *SWANCC* decision in 2001, which the drafters of CWRA allege was the beginning of the Court's attempts to limit federal jurisdiction. Simply put, the sponsors of the bill have only spoken of the need for an expansion of federal jurisdiction in the broadest, most vague terms possible, without establishing any real need.

D. CWRA DOES NOT ACCOMPLISH ITS GOALS AND WOULD HAVE UNINTENDED CONSEQUENCES

One of the stated purposes of CWRA is to "clearly define" the scope of CWA jurisdiction. This is certainly a desirable goal. Uncertainty and confusion has had real-world effects on the ground, resulting in delays and extra expenses for those with potentially regulated projects.

To accomplish this goal, however, the drafters are attempting to assert jurisdiction over "all interstate and intrastate waters". Regardless of one's view of what the extent of federal jurisdiction should be, this bill does not clearly define jurisdiction. Instead, it introduces new uncertainties and ambiguities that will ultimately need to be resolved through litigation.

One reason CWRA is so ambiguous is that the drafters have not provided any indication of what is meant by "all intrastate waters". Operating under the assumption that "all" means "all", this phrase would include swimming pools, rain puddles, water features, stock ponds; the list goes on and on. Presumably, the drafters would disclaim such a ridiculous extension of jurisdiction, but unfortunately no limitations appear in the text of the bill.

One of the bill's Congressional supporters stated that the Army Corps of Engineers "has around 20,000 jurisdictional determinations pending", the implication of which is that enacting CWRA would reduce or eliminate the need for such determinations, thereby saving agency resources and speeding up the permitting process. However, such administrative efficiencies would be unlikely to materialize due to the imprecise nature of the phrase "all intrastate waters." In addition, because CWRA expands the scope of the CWA, more permits and the associated recordkeeping, inspections, and renewals would be required, thereby further stretching agency resources.

E. THE PROPOSED BILL WILL HAVE SIGNIFICANT ADVERSSE IMPACTS ON AGRICULTURAL AND MUNICIPAL WATER SUPPLY ACTIVITIES

1. The Impacts on Irrigated Agriculture Would be Disastrous

Simply put, the CWRA's effect upon irrigated agriculture will be disastrous. The CWRA will extend jurisdiction to virtually all agricultural irrigation facilities. Such a jurisdictional extension will paralyze the ability of water users to efficiently operate and maintain these facilities.

First, extending CWA jurisdiction over agricultural irrigation facilities will subject them to water quality standards that these facilities were not designed and are not operated to support. Irrigation facilities are owned, operated, and maintained to supply irrigation water. In many instances, irrigation entities are both contractually and state law-bound to deliver this water. These facilities were not designed, and they are not operated, to serve as fish and wildlife habitat or as recreational attractions. These facilities are privately owned and paid for by the water users who benefit from the water that they deliver. Operation and maintenance of irrigation facilities includes the application of various aquatic herbicides and other chemicals both to the water and to the banks of these facilities. These chemical applications are necessary to promote efficient water flows, to prevent plant induced water losses, and to prevent plant and/or animal induced destabilization or destruction of these facilities. These chemical applications could have short term water quality effects that would violate newly imposed water quality standards.

Second, irrigation facility operation and maintenance activities include physical and structural modification and upkeep. These maintenance activities include, but are not limited to, facility dredging, lining, piping, and relocation. The time, effort, and expense of securing permits for these activities would be astronomical. These added expenses would, by necessity, be borne by water users who in many instances would not be able to shoulder the additional financial burden. Traditionally, farmers are dirt rich, but money poor. In addition, many existing irrigation channels also provide a flood control or flood relief function. Thus, the need to maintain them is not just a necessity for continued irrigation deliveries, but also for flood control.

Third, the CWRA fails to account for the exigencies of operating and maintaining western irrigation systems. Many western states require that irrigation systems be operated not only to ensure the flow of water to water users, but that the operation of these systems be accomplished without harm to neighboring property owners. Emergency situations (such as facility failure) that cut off water supply, or that flood adjoining lands must be dealt with in a timely manner. Irrigation entities do not have the luxury of applying for a permit when time is of the essence. The CWRA could leave irrigation entities in an untenable position of having to choose between violating state law, by failing to timely address a problem that interferes with water supply or that causes flooding due to permit application and processing procedures, or violating the CWA, by acting immediately to rectify a problem that requires a permit prior to proceeding.

Some may argue that the aforementioned concerns are unfounded given the CWRA's "Savings Clause" in Section 6 of the bill. Theoretically, the Savings Clause would preserve current CWA exemptions enjoyed by the agricultural community such as the agricultural return flow exemption and the agricultural operations exemption. The problem, however, is that the CWRA's proposed definition of "waters of the United States" is so expansive that it threatens to render such exemptions meaningless. Put another way, the CWRA's proposed definition of "waters of the United States" unquestionably imposes CWA jurisdiction over irrigation facilities—a question or application of the CWA that is not currently absolute as many of the federal circuit courts have split on the issue. While various agricultural exemptions may be preserved on paper (via the CWRA's Savings Clause), it remains to be seen whether those exemptions will be preserved in practice. Once something is jurisdictional, overzealous enforcement and lawsuits initiated by environmental organizations can, and oftentimes do, follow. Basically, the Savings Clause exemptions are gutted by the jurisdictional aspect of the CWRA's newly proposed definition of "waters of the United States."

2. The Bill Would Result in Additional Complications and Costs for Municipalities

This unencumbered approach to the definition of "waters of the United States" would not only lead to additional unwarranted intrusion upon necessary agricultural practices as noted above, but would further complicate and substantially increase in cost municipal construction activities and "state" regulated municipal discharge practices.

For example, there would be additional instances of a "federal nexus" as municipalities construct necessary infrastructure, such as lengthy delivery pipelines and water storage facilities. Expensive and time consuming NEPA reviews would be triggered where none are currently implicated.

In addition, water "reuse" practices, such as non-potable irrigation applications on parks, golf courses and medians and zero discharge disposal options, each currently the subject of state regulatory requirements, could now be caught in the federal regulatory web.

CONCLUSION

In conclusion, NWRA and the Family Farm Alliance strongly urge the Committee to look closely at the history of jurisdiction under the Clean Water Act. Clearly, it has expanded significantly over the past thirty-five years, not narrowed. Significant problems are already being encountered by water providers with the existing Act and these challenges are expected to continue. Looking forward, we strongly oppose the CWRA because it is unconstitutional, unnecessarily and unjustifiably expands federal jurisdiction over intrastate waters, and would have significant adverse impacts upon agricultural and municipal water providers. We urge clarity, not expansion of the Clean Water Act.

Thank you again for the opportunity to provide this testimony. I would be pleased to answer any questions that you may have.